FRAUD TRIALS COMMITTEE REPORT

Chairman: The Right Honorable

The Lord Roskill, P.C.

MEMBERS OF THE COMMITTEE

The Right Honourable The Lord Roskill, P.C., *(Chairman),*
A Lord of Appeal in Ordinary, since 1980.

The Lord Benson, G.B.E.,
Partner, Coopers & Lybrand, chartered accountants, 1934–1975;
Chairman, Royal Commission on Legal Services, 1976–1979.

Mr. David Butler,
Chairman, Butler Cox and Partners Ltd., information technology consultants, since 1977.

Sir James Crane, C.B.E.,
Her Majesty's Chief Inspector of Constabulary, 1979–1982.

His Honour Judge John Hazan, Q.C.,
A Circuit Judge, since 1982.

Sir Arthur Knight
Chairman, Courtaulds Ltd., 1975–1979;
Chairman, National Enterprise Board, 1979–1980.

Dr. Barbara Marsh, J.P.,
Vice-chairman, Shropshire County Council, 1981–1985.

Mr. Walter Merricks,
Solicitor; Secretary, Professional and Public Relations Committee, The Law Society, since September 1985.

Mr. M. N. Farmer *(Secretary)*

Mr. A. W. Barsby *(Assistant Secretary)*

"For one day in Thy courts is better than a thousand"
Psalm 84, verse 10.

"Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam."
(To no one will we sell, to no one will we deny or delay, right or justice.)
Magna Carta, Chapter 40.

REPORT OF THE FRAUD TRIALS COMMITTEE

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REPORT OF THE FRAUD TRIALS COMMITTEE

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain and the Right Honourable Douglas Hurd, C.B.E., M.P., Secretary of State for the Home Department.

SUMMARY

1. **The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right. In relation to such crimes, and to the skilful and determined criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage, during investigation, preparation, committal, pre-trial review and trial, the present arrangements offer an open invitation to blatant delay and abuse. While petty frauds, clumsily committed, are likely to be detected and punished, it is all too likely that the largest and most cleverly executed crimes escape unpunished. The Government has encouraged and continues to encourage ordinary families to invest their savings in the equity markets, particularly in the equities of formerly state-owned enterprises. If the Government cherishes the vision of an "equity-owning democracy", then it also faces an inescapable duty to ensure that financial markets are honestly managed, and that transgressors in these markets are swiftly and effectively discovered, convicted and punished. Self-regulatory mechanisms designed to encourage honest practices are now coming into force. Where those mechanisms are abused, the law must deliver retribution, swift and sure.**

2. **It follows that fundamental change is required in certain areas of the law. Where we believe radical change is necessary, we have not shrunk from recommending it. We hope the Government will not shrink from giving effect to it. For the defects of the present system to be remedied, changes in the law will not be enough. Changes in practice and in attitudes will also be necessary. These changes, as our report makes clear, will make demands upon the investigating authorities, the judiciary, the Bar and the administration of the courts. We distinguish in our recommendations between those that require legislation and those which require changes in attitudes and practice.**

3. **Much of this report, and the majority of the recommendations, are concerned with changes in the procedures to be adopted in the many different stages from the time that a fraud comes to the attention of the authorities until the verdict is given in court. We have sought to produce a coherent and integrated set of proposals aimed at streamlining the procedures for dealing with fraud cases. Although many of our proposed changes will depend upon the exercise of discretion at various**

different stages they interlock and reinforce each other. It follows that substantial alteration of any of our proposals may do damage to the structure of the whole. We believe that our proposals cover the main ground at each stage and that it would not have been possible to achieve more than this in the time at our disposal. We are conscious of the fact that before changes can be introduced much careful planning will be needed and modifications of detail may be necessary. In some instances a period of trial and error will be needed to ensure that the new procedures will work smoothly in practice. If our proposals are acceptable, we hope that a programme will be laid down in advance and that the impetus will not be lost during the relatively long period of introducing them.

4. **Our terms of reference relate to fraud in general, but the main emphasis of our findings is concerned with large scale or complex fraud cases. In many instances the reforms we propose could easily be argued to be of benefit to a wider range of criminal cases. We leave this question for those with wider concerns than ours.**

5. **Changes are required in the procedures for mobilising the necessary professional skills to analyse complex cases. Expanded investigatory resources will be required, and earlier intervention by leading counsel is also essential.**

6. **Pending the Government's decision on the abolition of committal proceedings, we recommend as an interim measure an alternative procedure designed to bring cases more quickly to the Crown Court. We propose the nomination of the trial judge at an early stage. The judge should be empowered to discharge the defendant at a preparatory hearing on the ground that *prima facie* the evidence does not support the charges in the indictment. Pre-trial reviews must be made effective. An obligation should be placed upon the defence to reveal the nature of the defence case once the prosecution case is disclosed. We also propose remuneration arrangements for counsel which reflect adequately the importance of preparatory work.**

7. **Substantial revision of the rules of evidence is required in order to deal with the international criminal and the deliberate obstructionist.**

8. **Despite all its shortcomings, we find trial by jury an acceptable procedure for the vast majority of fraud cases. For complex fraud cases falling within certain Guidelines, we believe, with one dissentient, that a different type of tribunal is required which we refer to as the "Fraud Trials Tribunal". We describe in our report how and when it should be used.**

9. **Once the case proper begins, we favour the increased use of written summaries being made available to the jury and visual aids.**

10. **We envisage a considerable change in the training requirements and working practices of all concerned with criminal fraud cases – police, lawyers, judges and court administrators alike.**

11. **We welcome the closer collaboration between the prosecuting authorities which the establishment of the permanent Fraud Investigation Group arrangements has initiated. However, we think that the need for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud should be examined forthwith.**

12. **An independent monitoring body (the "Fraud Commission") should be nominated which should be responsible for studying and advising from year to year on the efficiency with which fraud cases are conducted. It should make an annual report.**

13. **Our work would have been much facilitated by the availability of better statistics concerning the cost, duration and manpower devoted to certain classes of case. We think that such statistics should be collected in future by the Fraud Commission.**

14. **Suggestions have been made to us that some changes in the substantive law are necessary. We summarise them in the text so that the responsible authorities may consider them.**

15. **Some of our proposals may shock traditionalists. The same was probably true of the proposal to abolish the mediaeval practice of trial by combat. Some witnesses have suggested that fundamental changes might tip the scales of justice in favour of the prosecution and against the defence. We have carefully considered and, we hope, avoided this pitfall. The present arrangements may even encourage the defence to conduct its case like a prolonged and orderly retreat from the truth. This we find unacceptable. We intend that the true aggregate effect of our recommendations should be to tip the balance in favour of justice, economy and expedition and against injustice, waste and delay.**

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CHAPTER 1

THE APPROACH TO OUR WORK

A. Our terms of reference

1.1 Our terms of reference require us –

> "to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings."

B. Context

1.2 When the Lord Chancellor and the Home Secretary announced on 8 November 1983 their intention to establish an independent committee of inquiry with these terms of reference, they referred to the concern which had been expressed about the range of problems generated by allegations of serious commercial fraud.[1] Public concern at the effectiveness of the methods of combating serious commercial fraud had clearly been growing for some time. The two main areas of concern related to the process of investigation and trial. Investigations into allegations of serious commercial fraud commonly involved long delays. Delays at the investigation stage meant that either fraudsters were not being brought to trial when they should have been or cases were being prosecuted years after the events with which they were concerned, by which time witnesses' memories might have faded making successful prosecution more difficult. For the few fraudsters who found themselves convicted in spite of earlier delays in bringing them to trial, many could receive hopelessly inadequate sentences on the basis of pleas that they had had the matter hanging over them for so long. Criticisms of the judicial process in the present context have stemmed largely from the increasing length and complexity of trials of commercial fraud cases, leading many people to call into question the appropriateness of trial by jury for this type of case. There was also a general feeling at the time of our appointment that since much serious fraud appeared to escape detection or successful prosecution this served only to encourage its growth, with potentially harmful consequences not only for the unfortunate victims of fraud, but also for the reputation of the nation, and in particular the City of London, as one of the world's great financial centres.

C. Our approach

1.3 At the outset of our inquiry it was felt that the main part of our work would be concerned with the question of jury trials for fraud cases. It soon became evident, from the volume of evidence we received, that

[1] See *Hansard* (HC), 8 November 1983, vol. 48, Written Answers, cols. *83–84* and (HL) vol. 444, Written Answers, col. *790*.

although witnesses were concerned about the retention or otherwise of jury trials, their main criticisms and suggestions related to the administrative and legal procedures presently in force in fraud cases which were thought to be out of date and unrealistic.

1.4 It will be observed therefore that all the chapters in our report concentrate, in greater or lesser degree, on improvements of procedures beginning from the time that the fraud first comes to the notice of the authorities until the verdict is delivered in court.

1.5 We realise that if our recommendations are adopted in fraud cases it would be logical for some of them to apply in all criminal cases. Conversely, if our recommendations cannot be adopted in all criminal cases it may not, in certain instances, be possible to adopt them in fraud cases. These are not matters for decision by us. It will be for the Government of the day to decide which of our recommendations are acceptable and the extent to which they should be applied in fraud cases or more generally. We should stress, however, that with the exception of the different type of tribunal proposed for complex fraud cases which we mention in the next paragraph, we have been careful to ensure that we were not proposing changes in law and procedure which we would not be prepared to see applied to other types of criminal case.

1.6 Fraud varies widely in type, size and complexity.[2] The procedures we have suggested could be applied to all fraud cases to whatever extent is appropriate in each case, though many of them will be unnecessary in simple, straightforward cases. There is, however, one particular class of case which in the view of a majority of us needs special treatment: that is the fraud case of such complexity and difficulty that it cannot reasonably be expected to be understood by a jury selected at random. In these instances we believe, with one dissentient, that a tribunal of a special character should be appointed to hear the case. We have been able to identify the cases falling within this category by guidelines based on the experience of fraud cases in the past. These Guidelines are set out in Chapter 8. We have further recommended that this procedure should only be adopted if it is approved, in each case, by a High Court judge.

1.7 While our terms of reference clearly direct us towards an examination of what changes would be desirable in the procedures for trying fraud cases it was not self-evident that we should also be concerned with the substantive criminal law. A number of witnesses in the course of our work expressed concern about the state of the substantive criminal law of fraud and highlighted several areas where they thought that the law was in need of reform. We felt, however, that we should leave the question of the reform of the substantive criminal law for consideration by those with greater expertise in this field than ourselves. The Law Commission, for example, is currently reviewing the common law

[2] See further Appendix F.

offence of conspiracy to defraud as part of its general programme of work on the codification of the criminal law. In Chapter 3 we draw attention to the criticisms which we have received in order to give impetus to proper consideration of them by the Law Commission and others.

D. Other jurisdictions

1.8 Our terms of reference confine us to an examination of the changes in law and procedure which would be desirable for England and Wales. We have not therefore been concerned with reviewing the position in Scotland and Northern Ireland. We have, however, included both jurisdictions in the survey which we undertook of the ways in which other countries handle criminal fraud cases. The results of this comparative study are set out in Appendix E. It will be observed from this Appendix that other jurisdictions have problems similar to those experienced in England and Wales and that many of them have already tackled or are in the process of tackling them in ways similar to those recommended in this report.

E. Structure of the report

1.9 In order to carry out our task we include as the main content of our report chapters on

(i) the investigation process (Chapter 2)
(ii) the substantive law (Chapter 3)
(iii) committal proceedings (Chapter 4)
(iv) the rules of evidence (Chapter 5)
(v) preparatory hearings (Chapter 6)
(vi) the jury trial (Chapters 7, 8 and 9 (part))
(vii) a new form of tribunal to deal with those cases which, in the course of the preparatory hearings, appear to be so complex as to make them unfit for trial by jury (Chapter 8).

We also include, in Chapter 9, sections on the resources available for the trial and the training requirements of those concerned with criminal fraud cases. A further chapter addresses the cost implications of some of our principal recommendations (Chapter 10). We end each chapter with a summary of recommendations and for convenience these are comprehensively listed in the final chapter of the report (Chapter 11).

F. Terminology

1.10 Throughout our report we follow convention in using the masculine rather than the more cumbersome "he or she", "him or her", "his or her", but it should not be inferred that we have chosen to ignore half the population.

G. Secretariat

1.11 We take this opportunity of expressing our deep gratitude to Mr. Michael Farmer, our Secretary. Mr. Farmer, now a Senior Legal

Assistant in the Lord Chancellor's Department, was seconded to us from the Law Commission at the beginning of our work. It is his unceasing help which has enabled us to complete that work before the end of 1985. The greater part of the drafting and redrafting of the report has been done by him. His patient acceptance of this heavy burden and of the innumerable alterations and additions to his various drafts merits admiration as well as praise.

1.12 He has in turn been helped by our Assistant Secretary, Mr. Andrew Barsby. Mr. Barsby joined us in the course of our work in order to relieve Mr. Farmer of some of the pressure. He was seconded to us from the Criminal Appeal Office. Mr. Farmer has also been helped by Miss Alison Foulds, who was seconded from the Home Office and who has worked with us throughout. Finally, we would mention Miss Anne Hawthorn, whose skilled typing of the successive drafts of the report has commanded our particular admiration. To these four, whom we mention by name, as well as to others on the staff of the Law Commission who have looked after our well-being during our work we are greatly indebted.

CHAPTER 2

INVESTIGATION AND PROSECUTION

A. Introduction

2.1 In this chapter we examine the process of investigation and prosecution, dealing with the principal agencies concerned and the powers of investigation available to them. It will be seen from our description of the present arrangements that a number of separate bodies is concerned with the pursuit of fraud and that some of these may investigate and some prosecute, while others, such as the Revenue Departments, combine both functions within the same organisation. The picture has to some extent changed since the Fraud Investigation Group arrangements came into being within the Department of the Director of Public Prosecutions (DPP) which has led to improvements in co-operation, but traditional divisions are still part of the scene. The very diversity of responsibilities between these organisations and the fragmented nature of the powers of investigation, as we argue later,[1] act as a hindrance to the just, expeditious and economical disposal of criminal proceedings arising from fraud, in particular serious and complex fraud cases.

2.2 Some crimes, for example crimes of violence, are by their nature overt. Fraud, however, must be concealed from its victim if it is to succeed, and indeed may not be identified until long after the event. Even when the fraud is detected, it is to be expected that in serious cases the criminals will have taken steps to conceal the way in which the fraud was perpetrated, so as to make the process of investigation and prosecution more difficult. To this end, documents may be falsified or destroyed, and arrangements may be made for some transactions to take place in other jurisdictions, and for the proceeds of the offence to be removed there later perhaps to be followed by the fraudsters themselves. Thus, in large-scale or complex fraud cases, the task facing investigators is formidable. Apart from the problems already mentioned, there is the problem of scale: there may be thousands of documents to be located, put in order, and understood, and many enquiries to be made in different countries. Large numbers of witnesses may need to be interviewed. The investigation may take months to complete. All these difficulties must be overcome if a successful prosecution is to be launched. Any failure in the early stages to gather all the necessary evidence, and any wrong decisions about the course of the investigation will very likely prejudice the chances of successful prosecution. Our review of this area begins from the point when either a complaint of fraud is made or fraud is discovered.

B. The initial complaint and discovery of fraud

2.3 Before a fraud case can be pursued information has to reach the authorities responsible for investigating or prosecuting. It seems that

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[1] See para. 2.44 *et seq.*, below

most complaints of fraud or reports of suspected fraud, when made, go initially to the police. In the more serious type of case they will generally be made either by the victims, such as dissatisfied investors or those operating in the markets. Information may in some cases come to them from auditors[2] or from one of the self-regulatory organisations, such as The Stock Exchange, Lloyd's and others. The Department of Trade and Industry (DTI) may bring cases to the attention of the police as a result of complaints made to them or from its own statutory monitoring of companies and financial institutions. Complaints may be received by the DPP from dissatisfied creditors or shareholders or by members of Parliament on their behalf, from Official Receivers[3] or from voluntary liquidators of companies, from self-regulatory organisations or from foreign agencies. The DPP may then refer the matter either to the police or to the DTI for investigation.

2.4 Most of the frauds dealt with by the Revenue Departments are uncovered by their own staff. In the case of Customs and Excise a case may be referred for investigation following a visit to premises by a local VAT officer. A check on VAT returns may disclose some unusual feature and so lead to an investigation. Alternatively, the Department's intelligence and research function may provide a lead. In a minority of cases, an investigation stems from information provided by others, including other Government Departments and informants. Similarly in the Inland Revenue most investigations result from internal information, usually information from local tax offices, or from investigations into other matters. A minority of cases are investigated as a result of information from outside the Department.[4]

2.5 The failure to report fraud to the authorities is widely believed to occur, though its precise extent can obviously only be guessed at. There is no legal obligation upon victims to report fraud, unlike in the United States, where any fraud on a financial institution involving more than $5,000 must be reported, and failure to do so is itself an offence. While the private individual who has suffered a substantial loss through fraud may perhaps usually be relied upon to report it, large institutional losers may be reluctant to do so. There are many reasons for this. Large institutions may try to recoup their losses by bringing civil proceedings, or they may have made provision for, and be prepared to write off, such losses. In the latter case, a failure to declare to the shareholders of a company that a loss through fraud has occurred may itself be conduct bordering on the criminal. It is undoubtedly true that there are some powerful disincentives to the reporting of fraud. If a prosecution is launched the details of the fraud

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[2] An external auditor of a company is under no duty to report suspected fraud to the authorities. This issue has been recently reviewed by the Institute of Chartered Accountants in England and Wales: see further para. 2.51, below.

[3] In England and Wales the Official Receiver has a duty to investigate possible offences in every compulsory winding up and bankruptcy.

[4] See *Report of the Committee on Enforcement Powers of the Revenue Departments* (1983) Cmnd. 8822, vol. 1, sections 9.3 and 9.11.

will become public knowledge. The reputation of the institution may suffer, so that business is affected. Revealing how the fraud was carried out may encourage others to do the same. For some companies, the disincentive will be the time which will have to be spent in explaining matters to the police and perhaps eventually to the court: the potential disruption to the business of the company may not be worth the effort involved, particularly if there is felt to be little prospect of recovering the proceeds of the fraud. There may, finally, be a reluctance to report fraud in circumstances which would involve the disclosure of confidential details concerning clients.

2.6 The early discovery and reporting of fraud to the appropriate authorities is crucial to the chances of successful prosecution. However efficient the systems of investigation, prosecution and trial are, their effectiveness in practical terms depends upon the efficiency of the many and varied methods of discovering fraud and upon the willingness to report fraud where it is suspected to have occurred. Adequate systems of discovering fraud also act as a deterrent and help prevent fraud occurring in the first place. It remains to be seen whether the measures planned to be introduced to set up a statutory-backed system of self-regulation for the financial services industry will be adequate or whether full statutory regulation will be required for effective prevention of fraud in this area. In either event the need to take positive measures to protect the investor and safeguard the reputation of the City of London is vital, particularly at a time when the small investor is being actively encouraged.

C. The principal investigating and prosecuting agencies

1. THE POLICE

2.7 Most serious fraud offences are investigated by the police and are handled by groups of officers – fraud squads – within each of the 43 police forces in England and Wales. The first such group to be formed was the Metropolitan and City Police Company Fraud Department (MCPCFD). During the late 1920s and early 1930s a number of share pushing or stock manipulation scandals in the City of London gave rise to public concern. Just before the war there was discussion involving the DPP, Home Office and the Commissioners of the Metropolitan and City of London forces with a view to forming a dedicated police unit capable of investigating the more complex type of commercial fraud. The proposals were revived after the war and in 1946 the MCPCFD was formed. It was (and remains) staffed jointly by officers from the Metropolitan and City of London police forces and is commanded by a Metropolitan Commander, but the forces work separately on operations. Initially, 12 officers were employed. By 1971 there were 99, and by 1985, 209.[5] As Appendix G shows, most of the provincial fraud squads outside London are small, many having less

[5] In 1983, the police staff in the Metropolitan branch of the MCPCFD, as in other specialist squads, was reduced by 10 per cent in accordance with the Commissioner's policy of making more officers available to combat street crimes and burglaries.

than half a dozen officers each. Police forces whose areas embrace major commercial centres have correspondingly larger fraud squads, the largest outside London (West Midlands) having 34 officers in 1985. As with London the number of officers in provincial fraud squads has grown in total in recent years from 133, in 1971, to 379, in 1985. In England and Wales as a whole, the strength of the fraud squads represents approximately 0.5 per cent of total police manpower.

2.8 Provincial fraud squads are able to request assistance from the MCPCFD and do so on investigations where particular information is required, for example, about the technicalities of financial instruments. Requests for assistance by officers have diminished since the amalgamation of police forces in 1974, and officers from MCPCFD were last sent out to help in the provinces in about 1980. One reason for the reluctance to seek assistance is because the requesting force would be required to pay for the assistance given. We comment on this point later.[6] Another reason is that following amalgamation, the larger forces were better equipped with expertise and experience, and remain so today. MCPCFD also runs an intelligence service with national responsibility and provincial fraud squads use this service for information about fraudsters and their *modus operandi.*

2.9 Police officers in the Metropolitan Police are posted to the fraud squad usually for three years. In exceptional cases a posting may be extended for one or two years. Broadly the same is true in provincial fraud squads. In the City of London, however, officers join for longer periods of perhaps seven or eight years. Officers receive some training, though reliance is placed mainly on experience developed in the field. The lack of any proper career structure within fraud squads in general, the qualifications of those engaged on work in this area and the question of training are clearly relevant to the effective pursuit of fraud and are examined further below.[7]

2.10 We were told that the police working in this field are under constant pressure. No doubt the setting up of the fraud squads was a valuable innovation; but it has become plain in recent years that, particularly in relation to large-scale and complex frauds, investigation by the police in isolation of those concerned with the prosecution process can be time consuming and inefficient. The latest response to the growth in the specialised nature of certain frauds has been the formation of the Fraud Investigation Group which we describe in detail below.[8]

2. PROSECUTING SOLICITORS

2.11 The majority of police forces in England and Wales have prosecuting solicitors' departments, that is solicitors in the local authority service who act on behalf of the police in advising on prosecution decisions

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[6] See para. 2.71, below.

[7] See paras. 2.72–2.73, 2.75 and para. 9.25, below.

[8] See para. 2.23 *et seq.*, below.

and presenting cases in magistrates' courts on which the police have decided to proceed. They also instruct counsel, liaise with the defence solicitors, and deal with other legal aspects of the case. A minority of police forces lack prosecuting solicitors of their own and instead use private solicitors to advise and act for them. Prosecuting solicitors' departments handle the smaller and less serious fraud cases; more serious fraud cases are referred to the DPP or to both the DTI and DPP. As we mention later,[9] the introduction of the new Crown Prosecution Service will bring major changes to the organisation of prosecutions in England and Wales.

3. THE DIRECTOR OF PUBLIC PROSECUTIONS

2.12 The DPP is a public official, answerable to the Attorney General, who is required to "institute, undertake or carry on criminal proceedings in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention."[10] He is also required to give advice whether on application or on his own initiative to Government Departments, chief officers of police and others in such cases.[11] Chief officers of police are required to report certain listed offences to the DPP.[12] Few of the offences which have an element of fraud are included on the relevant lists because of the difficulty of classifying offences of fraud without catching the trivial as well as the serious cases. However, in October 1981, at the request of the Lord Chief Justice the Director re-emphasised the need for chief officers to seek his advice at an early stage of the police investigation of fraud where the subject of inquiry was likely to prove complex or "heavy" or both. The Director informed us that the co-operation he has received from chief officers has been "extremely good" and that in the majority of cases of substantial fraud there was early consultation between the investigating police officers and members of his Department.[13] Before the recent introduction of the permanent Fraud Investigation Group arrangements, the Fraud and Bankruptcy Division of his Department had a staff of about 24 (including support staff) handling some 150 cases per year.

2.13 The Prosecution of Offences Act 1985 provides for the establishment of a prosecuting service for England and Wales to be known as the "Crown Prosecution Service" in place of the existing mix of prosecuting solicitors' departments and private solicitors. The Service will consist of the DPP as its head, Chief Crown Prosecutors responsible to him for supervising the operation of the Service in each area and other prosecution staff. The Director will have the duty to

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[9] See para. 2.13, below.

[10] Under the Prosecution of Offences Regulations 1978, SI 1978, No. 1357, reg. 3.

[11] *Ibid.*, reg. 4.

[12] *Ibid.*, regs. 6(1), as amended by the Prosecution of Offences (Amendment) Regulations 1978, SI No. 1846, and 6(2).

[13] The MCPCFD estimated that, in 1982, the average time between the receipt by them of all allegations of fraud and the first report to the appropriate legal authority was 6.4 months and that, in 1983, this was reduced to 3.5 months. In 1984 and 1985 the average time for serious fraud cases was 4.5 months, within a range of 14 days to 12 months. Cases though to require a FIG investigation are now reported to the DPP within about one month: see para. 2.29, below.

take over the conduct of all criminal proceedings instituted by the police and to institute and have the conduct of criminal proceedings in any case of importance or difficulty. It is planned to bring the Service into operation in the present six Metropolitan counties and the Counties of Durham and Northumberland on 1 April 1986 and in the rest of England and Wales on 1 October 1986. Among its objectives[14] are: to be, and be seen to be, independent of the police; to achieve consistency of prosecution policy; to continue prosecutions while, and only while, they are in the public interest; to conduct cases vigorously and without delay; and to undertake prosecution work effectively, efficiently and economically.

2.14 We shall return to the role of the DPP in the prosecution of serious fraud cases in our discussion below of the establishment and operation of the Fraud Investigation Group arrangements.

4. THE DEPARTMENT OF TRADE AND INDUSTRY

2.15 The DTI has a wide range of functions, and is concerned with the control of fraud through its role as supervisor of the regulatory systems for trading companies, insurance companies, security dealers and others. The Department's investigatory powers are dealt with more fully below.[15] They include the power to report evidence of fraud to the DPP. However, it should be noted that such investigations do not have the narrow objective of discovering crime, but rather the wider one of finding out whether there has been misconduct or mismanagement in the affairs of the company when the public interest seems to require it. An investigation may be carried out in circumstances where there is no suggestion of fraud, but merely of incompetence.

2.16 The DTI has its own investigation staff which includes members with police, accounting and legal training. In the Companies Investigation Branch there are some 35 members of staff dealing with inquiries under section 447 of the Companies Act 1985.[16] Apart from the support staff of seven, all must have certain minimum accountancy qualifications and they would have had several years of experience of work in the fields of bankruptcy and insolvency. In the legal department, there are four lawyers, out of a total of 50 legally qualified staff, responsible for companies investigations who provide advice to the Companies Investigation Branch and deal with related prosecutions. A further 12 lawyers and 24 investigating officers (all former police officers) handle cases referred to them by the Insolvency Branch.

2.17 Inspections and investigations into the affairs of companies may give rise to prosecutions which are handled by the Department alone. This would be the case, for example, where there is evidence of the

[14] See *Setting a direction for the Crown Prosecution Service, Recommendations for Management*, a report by Arthur Andersen & Co. (1985), para. 2.3.

[15] See para. 2.38, below.

[16] Formerly Companies Act 1967, s. 109: see para. 2.41, below.

commission of regulatory offences arising from insolvency or breaches of the requirements of the Companies Acts. More serious cases would be likely to be referred to the DPP with or without a reference to the Fraud Investigation Group.[17]

5. THE INLAND REVENUE

2.18 The Inland Revenue may find that they are the prime victims of fraud, in that the main objective of the criminal is to evade his liability to tax, or incidental victims in that the intended victims are members of the public but the criminal nature of the enterprise leads the fraudster to evade his liability to tax.

2.19 The Inland Revenue have their own investigation staff exercising powers which are wider than those available to the police. Most investigative work is carried out by local inspectors, but cases of suspected serious fraud are referred to one of three specialist sections: Enquiry Branch, Special Investigations and the Investigation Office. The Enquiry Branch – handling cases of serious accounts frauds – is divided into 10 groups of 10 officers (consisting of a group leader, six inspectors and three accountants). The length of an investigation varies considerably but as a broad average the aim is to complete an investigation within 18 months to two years. The matter is then referred to the Solicitor's office who advise the Board whether to prosecute. Sometimes counsel is consulted before the Board make their decision.

2.20 The Revenue have the power to negotiate a settlement or seek civil penalty proceedings as an alternative to prosecution. In general the Revenue attend themselves to the conduct of prosecutions. The Department's approach towards selecting cases for prosecution is that they regard it as essential "to prosecute in some examples of all classes of tax fraud . . . because it is the possibility of prosecution which prevents the spread of tax fraud to unacceptable limits."[18] In certain types of case, the Revenue liaise with the police and the DPP, although the Revenue are not within the Fraud Investigation Group arrangements. There is no formal procedure and no fixed line of demarcation to settle the question who shall prosecute in any particular case. However, there is a standing arrangement whereby the Director is advised of any case in which the Board have decided to launch criminal proceedings falling into one of the following categories:[19]

(a) where the tax loss is alleged to be very large

(b) where a nationally important company is involved

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[17] See further para. 2.29, below.

[18] Evidence submitted by the Board of Inland Revenue to the Royal Commission on Criminal Procedure, para. 12.3, and quoted in the *Report of the Committee on Enforcement Powers of the Revenue Departments* (1983), Cmnd. 8822, vol. 1, para. 9.10.1.

[19] See *ibid.*, vol. 2, para. 17.6.2.

(c) where the question whether any person should be granted immunity from prosecution and called as a Crown witness falls to be considered

(d) where the case has a political aspect

(e) where it appears likely to give rise to great public interest

(f) where the case involves corruption in the public service.

If criminal activities are discovered during the Revenue's investigations, they have the statutory authority to exchange information with Customs and Excise,[20] but not with the police, the DPP or other Government Departments. In their evidence to us, the Revenue made it clear that, although fraud is the staple of their prosecution work, they are rarely involved in long fraud trials.[21] This is said to be due to the strain which long trials place on their limited resources. Although the policy is to aim in most cases for an appropriate monetary settlement, it was stressed that there were certain cases of fraud which were so serious that they had to be prosecuted in the public interest.

6. CUSTOMS AND EXCISE

2.21 HM Customs and Excise collects and accounts for the revenues of customs and excise and also carries out a number of functions not directly connected with the raising of revenue, such as controlling certain imports and exports. The revenues collected include value added tax (VAT), excise duties on oil, tobacco, drink and other items, car tax, betting and gaming duties, and European Community duties. The Department encounters fraud against itself and the public in the course of investigating non-payment or under-payment of revenue.

2.22 Locally based units consisting of specially selected and trained officers deal with the investigation of fraud. There is a specialist Investigation Division, with a staff of over 400, dealing not only with the more complex and wide-ranging fraud cases but also with other matters, such as the importation of dangerous drugs. In dealing with revenue matters, Customs and Excise staff have powers analogous with, but not precisely the same as, those exercised by the Inland Revenue. The Department is one of the major prosecuting authorities and once the Crown Prosecution Service is fully operative, it will be the largest authority outside it. The Department's legal work is handled by the Solicitor's office. Of the total of 77 lawyers, some 48, supported by non-professional staff, work exclusively on the prosecution of criminal cases within the magistrates' courts and in the preparation of more serious cases for trial in the Crown Court. In 1984 the professional staff handled some 1000 cases in the Crown Court and almost the same

[20] Finance Act 1972, s. 127.

[21] Between 1981 and 1984 the Inland Revenue were involved in only nine trials lasting more than two weeks.

number in the magistrates' courts.[22] The Commissioners' policy is to offer compounding wherever appropriate in revenue fraud cases, bearing in mind the gravity of the offence, the best interests of law enforcement and the best interests of the revenue. The Department estimated that but for the wide use of these powers of compounding, the number of prosecutions would be trebled. In practice the Department is obliged to conduct many large-scale fraud prosecutions involving lengthy investigations, a large number of defendants and massive documentation. A number of them in recent years have involved fraudsters cheating the Commissioners of Customs and Excise of huge sums of VAT arising from dealings in gold. Like the Inland Revenue, Customs and Excise does not come within the Fraud Investigation Group arrangements, although we were told of at least one investigation in 1985 which has involved Customs and Excise and FIG working together.

7 THE FRAUD INVESTIGATION GROUP ARRANGEMENTS

(a) Background

2.23 In recent years the need for a new and more effective body to combine the skills of those involved in the investigation and prosecution of major fraud cases has gradually come to be recognised by the authorities. This process began in 1978 when a Working Party was established by the Attorney General to review the arrangements for the investigation and prosecution of fraud, particularly company fraud, and examine the role and co-ordination between each of the authorities with responsibilities in this field.[23] The Working Party considered methods of investigation by the police and the Department of Trade, their statutory powers and identified the problems facing investigators and prosecutors in the investigation of major cases of commercial fraud. The Working Party was primarily concerned to see how investigations and prosecutions could be expedited, how co-operation between the various disciplines could be improved and whether any legislative changes were required. They made a number of specific recommendations for change some of which have been implemented. Their general conclusion was that, while the system was "good", it would be greatly improved with additional powers granted to the police and additional resources of manpower to both the police and prosecuting lawyers. Following upon the report of the Working Party in 1979 the Attorney General appointed a small working group to examine the Working Party's proposals on co-operation and consider what was needed to improve the speed and efficiency in detecting, investigating and prosecuting commercial fraud.

2.24 The Working Group examined some of the systems abroad and in particular the specialist investigation and prosecution units in West

[22] Many thousands of additional cases of lesser gravity are handled summarily in the magistrates' courts by local non-professional staff.

[23] The Working Party was chaired by the then Deputy Director of Public Prosecutions, Mr. M. J. Jardine, and comprised representatives from that Department as well as from the Home Office, Department of Trade, Law Officers' Department and the police.

Germany,[24] and their deliberations led to the setting up in 1981 of an informal pilot scheme involving the DPP, the Department of Trade and the Metropolitan Police. Initially two major fraud cases were selected for treatment by *ad hoc* fraud investigation groups. These groups consisted of representatives drawn from the two Departments mentioned as well as from the Metropolitan Police. The groups were reckoned a success by the authorities concerned in terms of reducing the time taken for investigations.[25] Following a review by the Government of the arrangements for the investigation and prosecution of serious commercial fraud cases, it was announced, in July 1984, that the *ad hoc* arrangements of fraud investigation groups for particular cases would be put on a permanent basis.[26] Accordingly, from the 2 January 1985 the permanent Fraud Investigation Group (FIG) arrangements came into being within the DPP's Department. Ground rules were agreed between the two Government Departments concerned. A Home Office circular to chief officers of police incorporates these ground rules and provides additional information on the structure and operation of the FIG arrangements. We reproduce this circular at Appendix H.

2.25 This summary of the background to the setting up of FIG will have indicated how slowly changes in the method of investigation have been brought about. The fact that even now only two Departments are directly involved in these arrangements, that the police retain their independence, and that the Inland Revenue and Customs and Excise remain outside the arrangements are all matters of concern.[27]

(b) Organisation

2.26 FIG is headed by a Controller who reports to the Director and through him to the Attorney General. It comprises three divisions: two concerned with FIG cases, one for cases arising in the Metropolitan and City of London police districts, the other for cases outside that area, and the third concerned with all other cases of fraud which are referred to the DPP. As before there are prosecuting lawyers (16) and support staff (19) from the DPP's Department. To these have been added three experienced accountants seconded from the DTI. The accountant's role is to concentrate on investigation, liaise with the police and provide accountancy advice to the police and DPP lawyers. Arrangements have also been made for accountants from the private sector to be made available to assist the permanent staff where either the volume of work or the need for particular expertise makes this necessary. We comment later[29] on the adequacy of the resources and expertise committed to FIG.

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[24] See Appendix E, para. 39.

[25] The MCPCFD estimated that the time saved was about one third of that expended on conventional inquiry methods.

[26] *Hansard* (H.C.), 3 July 1984, vol. 63, Written Answers, col. *89.*

[27] See further para. 2.44 *et seq.*, below.

[28] See also Appendix H, para. 6.

[29] See para. 2.71, below.

(c) Objectives

2.27 We were told that the objectives of FIG are –

(a) to harness in united action the various statutory powers available to the police, the Attorney General and the Secretary of State for Trade and Industry;

(b) to ensure that all the disciplines involved in the investigation and prosecution of fraud work closely together; and

(c) to ensure that investigations concentrate upon major issues and major offenders so that there can be speedy investigation of offences likely to result in successful prosecution (or an early termination of investigations where no prospects of successful prosecution are in sight).

(d) Identification of cases for FIG

2.28 The ground rules set out the types of fraud case which may require FIG treatment. These include frauds upon Government Departments or local authorities, frauds involving large-scale corruption, shipping and currency offences, and frauds discovered in the course of investigations by DTI inspectors appointed under the Companies Act. A number of other types of case should also be referred to the Controller for him to decide whether they should be investigated by FIG, including frauds by persons connected with Lloyd's, the Stock Exchange and other Commercial Exchanges and frauds with an international dimension.[30] It is emphasised that cases to be handled by FIG must meet the criteria of "substance, complexity *or* importance".[31]

(e) Reporting of cases to FIG

2.29 The ground rules stress that the Controller of FIG should be consulted as soon as the police, the DTI or the DPP have made a preliminary judgment that a particular case may be worthy of investigation by FIG. The MCPCFD told us that such cases are now being reported to the DPP within about one month of receipt of allegations. Early reporting to the prosecuting authority is, in our view, imperative if the delays associated with the investigation of fraud cases are to be reduced.[32] When a case is reported, a preliminary meeting involving representatives of the police, DTI and DPP will take place to decide whether a FIG investigation is appropriate. Where such an investigation is considered to be appropriate, a further meeting will be arranged as soon as possible to draw up a strategy for the investigation and to allocate responsibilities for investigation work. As the police investigators take witness statements and discover evidence, regular meetings will be held to consider progress and further decisions on the course of

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[30] See Appendix H, para. 10.

[31] *Ibid.*, para. 9.

[32] See further para. 2.49, below.

the investigation will be taken. If it appears that an inspection by the DTI under section 447 of the Companies Act 1985 is desirable,[33] the Controller will consult with the Inspector of Companies at the DTI and request an early and speedy inspection so that the police investigation is not long delayed.[34]

(f) Involvement of counsel and other specialists

2.30 The ground rules envisage that independent counsel will not normally be brought in to advise before committal for trial, but that there will be cases of such magnitude, complexity and importance that counsel will need to be consulted. This is another important matter which we discuss later in this chapter.[35]

2.31 Experts, for example, in the fields of information technology, underwriting or insurance may need to be consulted during the investigation. It is intended that a panel of such available expertise should be built up.[36]

D. Powers of investigation

2.32 An investigator naturally needs to be able to question witnesses, including suspects. Of even greater importance in fraud cases, an investigator needs access to the documents which were the vehicle of the fraudulent scheme and which will enable him to understand what has happened and piece together the case for the prosecution. The skilled fraudster is likely to do all he can to prevent the investigator from finding and using the documentation in the case; and a further problem for the investigator may be that some documents are in the hands of banks and other third parties, in this country or abroad. In the following paragraphs, we describe the principal powers available to the different agencies. In a later section[37] we deal with the criticisms of the scope of these powers and of the way in which they are exercised. Although one of the objectives of FIG is to harness the various statutory powers available to the police, the DPP and the DTI through formal channels of co-operation, most of the relevant powers remain the exclusive preserve of the individual agencies. Moreover, as we have seen, the Revenue Departments are not included in the FIG arrangements and they also have their own special powers for the investigation of revenue offences.

1. POLICE AND CRIMINAL EVIDENCE ACT 1984

2.33 The Police and Criminal Evidence Act 1984 (PACE) makes substan-

[33] For example, where the public requires protection from further loss and a company's assets need to be secured by the presentation of a winding up petition and an application to the court for the appointment of a provisional liquidator, or where access to records cannot be obtained by the police or F.I.G. accountants: see further para. 2.41, below.

[34] See Appendix H, para. 8.

[35] See para. 2.67, below.

[36] See Appendix H, para. 15.

[37] See paras. 2.52–2.64, below.

tial reforms of the law relating to police powers following the Report of the Royal Commission on Criminal Procedure.[38] The provisions of PACE discussed here come into force on 1 January 1986. The Act does not provide any special powers in relation to the investigation of fraud, but it nevertheless fills an important gap in this context in that it enables the police for the first time to obtain a warrant to search premises for evidence of fraud, and sieze material which they find. Under the previous law, courts could grant warrants to search for evidence of other offences, for example, drugs or stolen goods, but not for evidence of fraud. In a straightforward case, a magistrate will be able to issue a warrant if satisfied that there are reasonable grounds for believing that a serious arrestable offence[39] has been committed; that there is material of evidential value on the premises which, taken alone or in conjunction with other material, is likely to be of substantial value to the investigation of the offence; that it is not material coming within special classes;[40] and that one of a range of further limiting conditions applies the effect being that the issue of a warrant is necessary.[41] The warrant empowers a police officer to enter and search premises, and sieze and retain any material he finds for which the search was authorised.[42] The power is more limited than the powers of investigation under the Companies Act 1985[43] enjoyed by the DTI but it is likely to prove useful in the investigation of fraud.

2.34 PACE establishes three special classes of material for which more stringent and complicated procedures apply.[44] These classes are "items subject to legal privilege"; "excluded material"; and "special procedure material". Material in the first class cannot be the subject of a search warrant. "Excluded material" cannot be the subject of a warrant under PACE; but if there is power to issue a warrant for it in some other Act, an application may be made under PACE according to the special procedure laid down in Schedule 1, described later in this paragraph. Material in this class includes personal records which a person has acquired in the course of any trade, business, profession or other occupation and which are held in confidence. Since personal records must relate to a person's physical or mental health and similar matters it is unlikely that "excluded material" will include any financial records. The third class, "special procedure material", is wider and includes material acquired or created in the course of any trade, business, profession or other occupation (other than "excluded material" and "items subject to legal privilege") together with "journalistic material" (as defined) other than "excluded material".

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[38] (1981), Cmnd. 8092.

[39] As defined in s. 116 of PACE. Offences of fraud may constitute a serious arrestable offence if the commission of the offence has led, or is intended or is likely to lead, to substantial financial gain or loss to any person.

[40] See para. 2.34, below.

[41] Sect. 8.

[42] Sect. 8(2).

[43] See paras. 2.38–2.42, below.

[44] Sects. 9–14.

Application for an order in relation to this class of material must be made to a circuit judge under the special procedure set out in Schedule 1. The judge may make an order for production if there are reasonable grounds for believing that a serious arrestable offence has been committed, that the material is likely to have substantial value to the investigation (whether by itself or together with other material) and that it has likely evidential value and other methods of obtaining it have failed or are not worth trying because they are bound to fail and the public interest on balance requires production of the material. An application for an order must normally be made after notice has been given to the person holding the material, but a warrant may be issued by the judge where service of a notice could seriously prejudice the investigation.

2.38

2.35 Two more provisions of PACE may be mentioned. First, the Act specifically provides that a police officer acting in pursuance of these powers may require information stored on a computer to be produced in visible and legible form so that it can be taken away.[45] Second, there is a general power, after a suspect has been arrested, to search premises occupied or controlled by him.[46] It was doubtful whether this was possible under the pre-existing law.[47]

2.39

2.36 Although the provisions of PACE relating to search are convoluted and complicated, largely caused by the need for adequate safeguards for persons suspected of crime, it should be possible for the police to obtain more immediate access to and preserve a wide category of financial records and other documentation vital to the investigation and successful prosecution of those who committed serious fraud.

2. BANKERS' BOOKS EVIDENCE ACT 1879

2.37 Section 7 of the Bankers' Books Evidence Act 1879 allows any party to legal proceedings which have been started to apply to a magistrates' court or to the High Court[48] for a warrant to inspect and take copies of entries in a banker's book for any purposes in connection with such proceedings. The application may be made *ex parte*, but the courts have encouraged the giving of notice to the bank or other party to allow them the opportunity to oppose it and have discouraged "fishing expeditions. The definition of a banker's book was extended in 1979 to include records used in the ordinary business of the bank whether in written form or on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanisms.[49]

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45 Sect. 19(4).

46 Sect. 18.

47 See *McLorie v Oxford* [1982] 2 All ER 280.

48 The Divisional Court has said that where the magistrates are disturbed as to whether they should exercise their jurisdiction or not, they may refuse to make an order and state that application should be made to the High Court: see *R v Nottingham Justices, ex parte Lynn* (1984) 79 Cr. App. R. 238.

49 Banking Act 1979, sched. 6. The provision came into force on 19 February 1982.

3. COMPANIES ACT 1985

(a) Section 721[50]

2.38 Section 721 enables the DTI, the DPP and the police to make an application to a High Court judge for an order authorising inspection (but not the seizure) of the books and papers of a company where it can be shown that there is reasonable cause to believe that any person, while an officer of a company, has committed an offence in connection with the management of the company's affairs and that evidence is to be found in the company's books and papers. There is no power for officers of the company to be questioned. The provision is restrictive and the Jardine Working Party[51] recommended that it should be amended so that all employees and consultants of companies are included in the definition of "officer" and that it should apply to any criminal offence. These recommendations have not been implemented.[52]

(b) Sections 431 and 432[53]

2.39 These sections provide for the appointment of inspectors with wide powers to investigate the affairs of a company and to report on them. Under section 431, the DTI has the *power,* on the application of the company or of the company's members, if they have the prescribed minimum interests, to appoint inspectors to investigate the affairs of the company provided that good reason is shown for requiring the investigation. Under section 432 the DTI is *required* to appoint inspectors where ordered to do so by the court; the Department also has the power under the same section to appoint inspectors to investigate the affairs of a company if it appears that there are circumstances suggesting either (i) the use of the company as an instrument for fraudulent conduct; or (ii) the use by the management of its powers in a manner prejudicial to the company or its members; or (iii) the members have not been given all the information which they might reasonably expect. Inspectors may require officers and agents of the company to produce books and documents of or relating to the company, to attend before them and to give them all reasonable assistance in connection with the investigation. Such officers and agents may be examined on oath, and refusal to answer questions may be punished as contempt of court. Inspectors may also apply to the court for an order enabling them to examine on oath any person apart from such officers and agents who can assist them. Inspectors may, at any time and without the necessity of making an interim report, inform the Department of any matter discovered in the course of their investigation tending to show that an offence has been committed.[54] The functions of inspectors are thus to inquire, ascertain facts and report.

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50 Formerly Companies Act 1948, s. 441.

51 See para. 2.23, above.

52 See further para. 2.63, below.

53 Formerly Companies Act 1948, ss. 164 and 165.

54 Companies Act 1985, s. 433(2) (formerly Companies Act 1967, s. 41).

2.40 One of several results may follow from an inquiry under sections 431 or 432. First, criminal proceedings may be started. Second, the Department may publish the report which often gives rise to action by shareholders or creditors. Third, the Department may petition to wind up the company, and fourth the Department may commence civil proceedings in the name of the company.

(c) Section 447

2.41 Under section 447[55] the DTI may, if it thinks there is good reason to do so, require a company to produce its books or papers for examination by departmental officers. Inquiries under section 447 are not announced (unlike an investigation under section 431 or 432), since public knowledge of such inquiries could have serious consequences for the company concerned whereas an investigation may reveal that there are no grounds for legal proceedings. Section 447 also provides that present or past officers may be required to explain the entries in the books or papers of the company. Failure to comply with a requirement is a criminal offence. Explanations of entries in the books and papers are admissible in evidence against the person concerned. If there are reasonable grounds for suspecting that any requirement under section 447 has not been complied with, the Department may apply to a magistrate for a search warrant. The information obtained under section 447 is treated as confidential and may only be disclosed for purposes specified in section 449 of the Act, including the bringing of criminal proceedings. The DTI is empowered to make disclosure of information tending to show a criminal offence has been committed, inter alia, to the police and the DPP.

2.42 We were informed that from the beginning of 1980 until May 1984 there were 247 inquiries carried out by the DTI using their powers of investigation under section 447.[56]

4. POWERS OF THE REVENUE DEPARTMENTS

2.43 The Inland Revenue and Customs and Excise both have their own statutory powers of investigation. The Report of the Committee on Enforcement Powers of the Revenue Departments (the "Keith Committee") accepted that the nature of tax offences meant that they require more investigatory powers than do ordinary crimes, such as thefts, burglaries and robberies whose consequences as well as whose perpetrators are more readily observed.[57] Both Departments may require documents to be produced and information to be supplied. They also have a range of powers to enter premises and inspect

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[55] Formerly Companies Act 1967, s. 109.

[56] The results of these inquiries were as follows: in 59, no misconduct was alleged and no further action taken; in 98 inquiries no further action was taken, even though misconduct was alleged; in 9, prosecutions had been completed, 7 of which resulted in convictions for offences mainly involving dishonesty; 28 were under consideration with the DTI solicitor, 14 by others; 13 with the police; 16 with the DPP. In 24 cases petitions for winding up of companies had been presented.

[57] (1983), Cmnd. 8822, vol. 2, para. 8.1.5.

documents, some of these powers being framed in wide terms, some in narrow. In each case, there is a power to enter, search and seize material under a search warrant issued by a circuit judge in the case of the Inland Revenue in respect of direct taxes, or by a magistrates' court in the case of Customs and Excise in respect of VAT. The Keith Committee recommended reform of these powers. In particular they proposed that the powers to search for evidence of fraud under warrant should remain and should be assimilated so far as possible with enhanced safeguards for the citizen. They also proposed that VAT officers should have a power of arrest in respect of serious offences of VAT fraud.[58] Some of the Committee's recommendations have already been implemented in the Finance Act 1985.[59] We hope that the outstanding recommendations relating to the investigation and pursuit of fraud can likewise be given effect to as soon as possible.

E. Is further organisational reform required?

2.44 In this particular area of crime, fraudsters are skilful and well organised and the number of cases is increasing year by year. The operations of the modern fraudster extend over a wide range of illegal activities committed not only to the prejudice of individuals and business organisations but also offending against revenue and other tax laws. If these operations are to be curtailed it is self-evident that they must be matched by an efficient system of detection and trial which will deal with them quickly and act as a deterrent to others. This is impeded by the fact that the detection of fraud, the consequential inquiries, and the legal processes involved until a verdict is delivered, extend over a number of different organisations. As we have seen, these comprise the 43 independent police forces, the Department of Trade and Industry, the FIG operating under the DPP, the Inland Revenue and Customs and Excise. A serious fraud case may first be brought to light in any one of these organisations, but the resources available to each vary both as regards their powers under existing legislation and the quality and range of their staffs. We understand that where a number of Government Departments are involved in the same area of work, it is accepted that one of those Departments should have a co-ordinating or overseeing role. From the evidence we have collected, we do not believe that there is in fact fully effective co-ordination by one Department in this area.

2.45 We have described the background to the recent establishment of the FIG within the DPP's Department. The arrangement which has finally been achieved after prolonged debate establishes channels of co-operation involving two of the organisations concerned in this field, specifically the DTI and the DPP. The police are not formally part of FIG although the ground rules anticipate that they will give full co-operation when required. The Revenue Departments too are not

[58] *Ibid.*, vol. 1, paras. 1.7.5 to 1.7.7.

[59] In particular, for example, provisions increasing the maximum penalty for the evasion of V.A.T. to seven years (section 12) and provisions relating to civil penalties for the evasion of V.A.T. (sections 13–17).

included. At the date of our report FIG has been in operation for just under a year. Time will tell whether it is going to be effective in improving efficiency and reducing unreasonable delays in the investigation of fraud cases. After the first six months of its operation the Controller of FIG reported on the "excellent co-operation" which had been achieved among the organisations immediately concerned in the cases being handled by it.[60] At the same time, he noted that the interest generated by FIG had led to easier and increased co-operation and reporting of offences from elsewhere, including the self-regulatory organisations, accountants and voluntary liquidators. Insofar as FIG represents a move towards greater co-operation and co-ordination between separate organisations it is a step in the right direction.

2.46 However, in the light of the many changes which we recommend in this report to deal with fraud the question arises whether FIG should be taken a step further by the formation of a single, unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud. Such an organisation would need to be staffed by lawyers, accountants and investigation officers, in other words individuals trained in all the skills appropriate to the complexity of the work involved. Such an organisation with unified control and direction would have a number of distinct advantages. In particular, fewer serious frauds would be allowed to escape prosecution by slipping through the net of a series of independent organisations working in this field; overlapping of resources could be avoided; it would enable the investigation process to lead to more effective prosecution; there would be scope for greater efficiency and the reduction of delays; unhelpful restrictions on the disclosure of information from one organisation to another would be avoided,[61] and a unified organisation would have full powers of investigation. As we note elsewhere,[62] other countries have taken steps to concentrate skilled resources into a unified organisation, with strong powers dedicated to the control of commercial fraud, with apparent success. Legislation would, of course, be required to establish such an organisation and endow it with the necessary powers.

2.47 We recognise that bringing about changes of this kind would not be easy, because it would involve bringing together under one roof organisations who have for historical reasons worked apart. There is, we believe, a degree of institutional reluctance among the organisations concerned to work fully and effectively together. This and other problems would need to be overcome. It would need to be made clear where ultimate ministerial authority for the organisation should lie. Consideration would need to be given to the relationship of such an organisation with the existing Departments and organisations whose functions in related spheres would need to be retained. There is, for

[60] The number of cases being handled by F.I.G. in September 1985 was 38 (16 arising in London and 22 in the provinces).

[61] Compare the present position regarding the Revenue Departments: see para. 2.20, above.

[62] See Appendix E.

example, a strong case for including within the organisation the functions of the Revenue Departments relating to the investigation and prosecution of serious revenue frauds. It may be argued that an organisation which combined a police function with a prosecution function under one roof would be seen to conflict with the rationale of the independent Crown Prosecution Service. This, however, already is the position in relation to the Inland Revenue, Customs and Excise and, to a more limited extent, the DTI.

2.48 It may be considered beyond our remit to recommend a new unified organisation. In any event we have not been able to make a thorough enough study of the proposal in the time at our disposal. Nevertheless, we believe that the need for an organisation responsible for all the functions of detection, investigation and prosecution of serious fraud ought be looked at afresh, in the light of the above considerations and our other recommendations for dealing with fraud. We think that such an inquiry should be set in hand forthwith. The remainder of this chapter is largely concerned with proposals for a series of administrative changes which we believe could be put into effect immediately pending the outcome of such an inquiry. These are the need for an independent monitoring body,[63] proposals designed to improve the operation of FIG,[64] and the need for "Case Controllers".[65] In addition we examine the adequacy of the present powers of investigation.[66]

F. Proposals for an independent monitoring body (the "Fraud Commission")

2.49 In view of the fragmentation of the present system, it is essential, in our opinion, that there should come into being an independent monitoring body which has the responsibility for studying and advising from year to year on the efficiency (which includes issues of cost effectiveness) with which fraud cases are conducted. Its main objectives would be to watch the system in operation for the detection and pursuit of fraud cases until the final verdict, including the time which elapses at the various stages including the time between the discovery of fraud and its reporting to the prosecuting authority; to inquire into major variations or breakdowns in the system; above all to assess the possibility of improvements by changes of policy and procedure or the introduction of more efficient techniques. Apart from other advantages we believe that this would provide a degree of co-ordination of the numerous interests involved which is at present lacking. An additional function which the independent body should, we think, perform would be to observe the introduction of such of the recommendations in this report as prove acceptable to the Government and to assess their efficacy. We think that an annual report should be published.

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[63] See paras. 2.49–2.51.

[64] See paras. 2.67–2.74.

[65] See paras. 2.65–2.66.

[66] See paras. 2.52–2.64.

2.50 The choice of the independent body would be for consideration by the Government in the light of this report. We are reluctant to suggest the creation of an entirely new body. We would prefer to see the work we have in mind for it being carried out by a body within the existing machinery of Government, although an independent element, such as an independent Chairman, would be desirable. Such a body might suitably be called the "Fraud Commission".

2.51 The Institute of Chartered Accountants in England and Wales is considering the general issues arising in relation to the prosecution, detection and investigation of fraud. A Committee set up by the Institute has recommended that the existing guidance to its members in relation to reporting suspected fraud should be revised.[67] It recommends that if an auditor has qualified or intends to qualify his audit report on the grounds of suspected fraud (but not otherwise) he should, after first informing his client, forthwith send a copy of the accounts and his audit report to the Companies Division of the DTI. Developments of this character which we hope will lead to the early reporting of fraud will be invaluable in the early detection and combating the spread of fraud and it is to be hoped that similar initiatives may be adopted by other bodies which, in one way or another, are affected by this type of crime. We think that one of the tasks of the Fraud Commission should be to work in close touch with all bodies who now or in the future work on the same lines, including those bodies concerned with self-regulation.

G. Consideration of the powers of investigation

2.52 In an earlier section[68] we set out the principal powers of investigation available to the authorities for use in connection with the investigation of fraud. We turn now to consider the criticisms made by witnesses of their scope and the way in which they are exercised. Since at the time of our report the relevant provisions in the Police and Criminal Evidence Act 1984 are not yet in force we are not in a position to comment on their effectiveness in practice. Our brief outline of the new powers given to the police will have been sufficient to indicate their complexity. We have no doubt that skilled fraudsters will be alert to any deficiencies which may be found. As with any new legislation of this kind, it is likely that there will be a number of areas which will require clarification by the courts. Nor do we find it necessary to comment on the powers of the Revenue Departments which, as we noted,[69] were recently the subject of a thorough review by the Keith Committee.

1. BANKERS' BOOKS EVIDENCE ACT 1879

2.53 Several witnesses commented upon what they regarded as unsatisfactory and out-of-date limitations of the provisions contained in

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67 As reported in *The Financial Times*, 5 December 1985.

68 See paras. 2.32–2.43, above.

69 See para. 2.43, above.

section 7 of the Bankers' Books Evidence Act 1879.[70] We draw attention here to the main points of criticism. Thus it was pointed out –

(i) that no order for access to bank records can be made until after legal proceedings have been commenced, whereas powers are needed at the investigation stage;

(ii) that correspondence between a bank and its client does not fall within the definition of a bankers' book and therefore items which may be relevant to an investigation cannot be made the subject of an order;

(iii) that no provision is made to permit a general order of inspection covering more than one bank. The trail of investigation often leads from one bank to another, requiring a second and further application to the court; and

(iv) that no order can be made in respect of records kept by a bank not constituting a bank in our jurisdiction within the meaning of the Act.[71]

2.54 So far as points (i) and (ii) are concerned, we believe that the new provisions in PACE already described[72] should allow an application to be made for inspection of bank records prior to the commencement of legal proceedings. Bank accounts, other banking records and correspondence fall within the class of "special procedure material" and early access to them should in future be possible, subject to the safeguards of PACE.

2.55 In relation to (iii), we accept that during the course of an investigation it may be necessary to make further applications to the court for orders in relation to different bank accounts and that this may delay an investigation while the legal procedures are followed. The same will be true in relation to the powers of search contained in PACE which require specification of the premises to be searched and identification so far as is practicable of the articles to be sought. Having regard to the safeguards which Parliament has thought it proper to include in PACE, now may not be the appropriate time to recommend their removal in relation to bank records so as to permit a general order of inspection to be made, but the point should be kept open for future consideration.

2.56 With regard to the point raised in (iv), the provisions of PACE are wider than the 1879 Act in that bank records held by a foreign bank or financial institution situated within the jurisdiction will be amenable to the new search powers. However, PACE, like the 1879 Act, will not

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[70] See para. 2.37, above.

[71] Under s. 9 of the Act, as amended, "bank" means, inter alia, a recognised bank, licensed institution or municipal bank.

[72] See para. 2.34, above.

allow the police access to bank records from a foreign bank operating within the jurisdiction where those records are kept outside the jurisdiction. Any extension of the powers of investigation in this respect will be possible only through mutual assistance treaties on a bilateral or international basis. Such developments have become increasingly necessary with the growing internationalisation of fraud. As we make clear in Chapter 5, we believe that the Government should take more positive steps to encourage the negotiation of such treaties.[73]

2. COMPANIES ACT INVESTIGATIONS

2.57 As we have seen, the DTI enjoys wider powers of inspection and investigation under the Companies Act 1985 than are available to the police. There is no doubt that the Department's powers are essential to the investigation of suspected fraud involving companies. We did not receive any evidence suggesting that these powers should be reduced in any way. However, several criticisms were made relating to the scope and exercise of these powers upon which we feel bound to comment, since they have a bearing on the pursuit of fraud.

2.58 A major point of criticism relates to the length of time taken by inspectors appointed under section 431 and 432. Reports prepared under these provisions often take several years to complete. In Chapter 10 we set out the statistics which we have obtained relating to the time and cost of such inquiries. They show an average time of 3 years and 8 months at an average cost of £463,000 for each inquiry carried out by external inspectors from appointment to completion of their report to the DTI. Although the length of time taken in recent inquiries is less than that in earlier inquiries, the time taken remains a matter of serious concern. One reason for the delay is that in cases of public interest and importance the inspectors appointed are invariably a Queen's counsel and a leading accountant and their involvement in the inquiry is on a part-time basis.[74] Delays are also brought about by the need for procedural requirements of fairness following certain decisions of the courts.[75]

2.59 A departmental review of the system of company investigations was carried out in 1980. As a result the policy was laid down that in future inspectors would only be appointed under section 432 where the investigatory powers under section 447 were likely to be inadequate for the purpose of obtaining the necessary information for decisions on such matters as prosecutions or petitions for winding up companies or where for other reasons it was likely to be in the public interest that the inspectors' eventual report should be made public. In announcing this

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[73] See further para. 5.44, below.

[74] Investigations into the affairs of smaller public companies and private companies (representing approximately half of the number of inquiries under sections 431 and 432) are usually carried out by departmental officials.

[75] See in particular *Re Pergamon Press Ltd.* [1970] 3 All ER 535 and *Maxwell* v *Department of Trade* [1974] 2 All ER 122, both decisions of the Court of Appeal.

policy,[76] the Secretary of State envisaged that 12 months would be sufficient timescale for each inquiry under sections 431 and 432. We note that, having regard to the average length of time taken quoted above, this target has not yet been achieved in practice. In our view, inquiries under sections 431 and 432, as distinct from those under section 447, should only to be undertaken as a last resort and greater efforts must be made to ensure that where such inquiries are undertaken they are brought to a speedy conclusion.

2.60 Although the time taken by inquiries often runs to several years, the DPP told us that in his experience inspectors under the above sections make every effort to draw suspected criminal offences to the attention of the DTI and to the DPP at the earliest reasonable time. On the other hand, the DTI told us that the willingness of inspectors to report offences at an early stage varied from inquiry to inquiry. The Department pointed out that inspectors sometimes felt that if the police were brought in to carry out their own parallel investigations, they might impede the inspector's own inquiry. However, it was said that the police were in general co-operative. In our view, inspectors must be prepared to report evidence of suspected fraud to the appropriate authorities, that is, the DTI, DPP and the police, as soon as it is discovered. Paramount consideration must be given to the early investigation of fraud when evidence of it is found and this must be impressed upon inspectors when they are appointed.

2.61 The principal advantage of the power available under section 447 is that it enables the DTI to make an investigation into a company both quickly and in a far easier manner than a full-scale investigation under section 432. We were told that the average length of time taken on investigations under section 447 was, in 1984, just short of two and a half months and that this represented a considerable shortening compared with the time taken in earlier years.[77] It is clearly desirable that investigations should take place under section 447 rather than under sections 431 and 432.

2.62 It was apparent to us that the investigatory powers under section 447 are jealously guarded by the DTI, because of a fear that the powers might then be limited if it were proposed that they should be conferred upon the police or any other authority. Although the discretion whether to use them ultimately rests with Secretary of State for Trade and Industry and no-one at present can direct him how or when to use these powers, we were told that, if it became clear to FIG that an investigation under section 447 was called for, the DTI would co-operate fully with FIG. The DTI pointed out that the powers were not only to be used when a suspected fraud is reported, but also for cases where the winding up of a company might be required or evidence of regulatory offences might be revealed. The MCPCFD indicated to us in oral evidence that they would like to be given similar

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[76] *Hansard* (HC), 19 May 1980, vol. 985, Written Answers, cols. *15–18.*

[77] In 1980, for example, the average time taken was 5.8 months for each inquiry.

powers of investigation to those contained in section 447 in addition to the new powers available to them under PACE. There is a paramount need for those charged with the investigation of fraud to be able to move swiftly from the first moment that there is a suspicion of fraud and it is time wasting and administratively unsatisfactory for one body to have to seek the assistance of another to set in hand inquiries which may be urgent. We see no reason why the powers under section 447 should be restricted to the DTI. In our view, the same or comparable powers should be conferred upon the police.

2.63 The only remaining provision in the Companies Act 1985 upon which we received submissions is section 721. One witness said that if section 721 was to remain and be effective, the procedure for obtaining an order should be streamlined. It was suggested that it should be possible for an application to be made *ex parte* to a judge in chambers without the necessity for a formal summons and for the evidence presented to the court to be by way of affidavit. We accept that these changes to the procedure would be helpful. We ourselves make no recommendation for change, but we suggest that section 721 be reviewed to take account of these points and also with a view to seeing how far in the light of PACE it is necessary to retain the provision. The views of those who have experience of the operation of this section in practice should be sought.

3. GENERALLY

2.64 For the sake of completeness, we should add that if the idea of giving one organisation overall responsibility for the investigation and prosecution of serious fraud cases were in due course to be accepted,[78] it would, of course, be essential to ensure that the organisation was vested with powers of investigation fully comparable with those at present available separately to the police, the DTI, and also the Revenue Departments, if the last mentioned were included.

H. The "Case Controller"

2.65 In addition to the proposed Fraud Commission, there is a further administrative change which we think ought to be made in advance of any new unified organisation responsible for the investigation and pursuit of serious fraud cases which may be set up in the future. We have already emphasised the importance of early reporting of fraud by the police to the prosecuting authority. As an extension of this, we are satisfied beyond doubt that a basic principle of administration should in future be adopted from the earliest moment that a serious fraud case is detected. That principle is that a named individual of adequate competence should be responsible for taking control of the case from the beginning and for all subsequent stages until the verdict. He should be drawn from one of the various organisations which are presently concerned with fraud and be designated by a suitable name such as the "Case Controller". He should be responsible for directing the initial

[78] See para. 2.46, above.

investigation process and employing suitable accountancy and legal services from the start; briefing prosecuting counsel early on,[79] and at all times ensuring that there is close co-operation between them; protecting documents against destruction or removal; sifting the evidence and detecting the gaps which need to be filled; arranging for witnesses' statements; sorting, filing and numbering the exhibits in an orderly way so that they are reduced to manageable proportions; preparing, in conjunction with counsel, simplified charts and schedules and for visual displays in court; always with a view to the ultimate presentation of the case in court and making it ready for trial quickly. Changes of a Case Controller in the middle of a case should not take place.

2.66 Jointly with the prosecuting counsel who is briefed in the case, the Case Controller would be answerable for any defects which arise in the preparation and presentation of the case and any unnecessary delays. Unless this procedure is adopted as a routine and the administration of the various organisations is adapted to meet it, we are satisfied that serious fraud cases will never be pursued with the speed and thoroughness which is necessary in order to bring fraudsters to justice.

I. Involvement of prosecuting counsel

2.67 As we have seen, it is envisaged that counsel will not be instructed by FIG prior to the committal stage "except in cases of magnitude, complexity or importance where counsel will need to be consulted earlier."[80] There were occasions, before the formation of FIG, when counsel were instructed in large-scale fraud and corruption cases at the investigation stage, but they were very exceptional and counsel's involvement at this stage varied from case to case. At one extreme, for example, in the investigations connected with the Poulson case in the early 1970s, two leading counsel and two junior counsel were employed full-time on the case during the investigation period and the prosecution.

2.68 We consider it essential that the team of specialists involved in any substantial fraud investigation, including investigations by the Inland Revenue or Customs and Excise, is given expert direction by one or two highly skilled lawyers. Unless advice of high quality is available from the outset of investigations of this type, the inquiries will be slowed up and valuable time may be wasted pursuing the wrong lines of inquiry. It is undesirable that the investigation should take one course and for that course to be found not to be the right one by counsel who is brought in to prosecute only at a much later stage, perhaps after the case has been committed. Counsel who are appointed during the investigation stage should be the counsel who are to conduct the case at any subsequent trial so that the same person who has given the inquiry direction will be involved in the presentation of

[79] See further para. 2.67, below.

[80] See para. 2.30, above.

the prosecution.[81] A considerable advantage of involving counsel from the beginning is that he will have had the opportunity of becoming familiar with the case and less of his time will be taken up at the stage when the case is being prepared for trial. It may be said that the police already receive adequate legal advice, when it is required, from the DPP. We do not believe, however, that there are sufficient members of the legal staff in the DPP's Department with the necessary ability to carry out the kind of directional work which is required in these cases. We are, of course, aware that counsel's time is more expensive than a departmental lawyer's time, but if, as has been shown to be the case in the past, the result of employing counsel at an early stage is a speedier and better targetted investigation, any additional expense would be money well spent. For these reasons, in appropriate cases of substance and complexity, we attach considerable importance to the appointment of competent counsel on the initiative of the Case Controller soon after the suspected fraud comes to light.[82] Since the police can only go to counsel through the DPP (or other prosecuting solicitor), it is all the more necessary that the police consult with the DPP as quickly as possible after the initial discovery of fraud, so that a decision whether or not to bring in counsel can be made quickly.

2.69 Practical problems have undoubtedly arisen where counsel have been involved in the early stages other than on a full-time basis as in the Poulson case mentioned earlier. The most able counsel are inevitably busy people with other heavy commitments and investigations have been slowed down as counsel takes time to read the papers. There is the further problem that unlike the departmental lawyer, counsel is not always available for instant advice. None of these problems is, in our view, insuperable, provided it is impressed upon counsel when appointed to the case that priority must be accorded to it over other work. Moreover, counsel should adapt to the task of being a member of, and, jointly with the Case Controller, leading a team of investigators and prosecutors: for example, consultations and examination of documentation need not be confined to his chambers if these can be held more conveniently elsewhere. Insofar as the rules of etiquette of the Bar discourage this, we believe that they are no longer appropriate and must be changed.

2.70 We regard it as essential that the independence of prosecuting counsel should be maintained. It is up to the Bar to ensure that the problems we have mentioned caused by the greater involvement of counsel in the early stages of investigations are overcome.

J. Resources

2.71 The evidence we have received has left us with the firm impression that the resources, both in terms of manpower and ability, are in many cases barely adequate, and in some cases totally inadequate, to cope with the volume of work generated by the increasing number of

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[81] See further para. 6.35 *et seq.*, below.

[82] We discuss the criteria for the choice of counsel in Chapter 9, at paras. 9.33–9.37, below.

reported cases of fraud. One example is the reluctance of individual police fraud squads to seek assistance from other fraud squads because the requesting force would be required to pay for the help given; this seems to us to be an example of false economy and confirmation that many fraud squads are inadequately funded and staffed. In general, proper and effective management of resources and training offer some scope for the more efficient handling of cases. We are not qualified to assess the adequacy of management controls or the actual size of the potential shortfall in individual areas. It is essential, however, that the overall shortge of resources which clearly exists must be remedied as a matter of priority.[83] The Government and others responsible for the provision of manpower must therefore ensure that adequate resources are provided to deal with this area of criminality. We understand that negotiations are in progress for adequate remuneration for the legal profession and more resources for this purpose will no doubt also be needed.

1. ACCOUNTANTS

2.72 One matter with which we are especially concerned is whether the police and the DPP have readily available to them adequate accounting advice. Appropriate expert accounting advice is as important in the investigation of serious fraud cases as the expert advice of counsel on legal matters. It is not a question of having an army of accounting staff, but rather one of having a few people well trained in investigation work who can control the work of other people. Police officers in fraud squads do not receive formal accountancy training. When giving oral evidence, the MCPCFD expressed themselves satisfied that the services of outside professional accountants were available when they were needed, but they believed that the occasions when such assistance was needed were limited. Since that time we have learnt that a 12 month pilot scheme began in October 1985 involving a panel of 20 volunteer accountants from private practice who have made themselves available to the MCPCFD in their investigations of fraud at fees far less than would be charged in commercial practices. It is hoped by those responsible for the scheme that, if successful, it will be extended to other parts of the country. It remains to be seen how far this initiative will prove to be successful and the services offered taken up.

2.73 We are convinced that in many cases police investigations need expert accountancy advice at an early stage. In our view, a small number of permanent qualified accounting staff skilled in investigation work should be attached to the police fraud squads, instead of relying wholly on the more expensive private sector and volunteer panels, together with the accounting advice obtainable from FIG and the DTI. In Chapter 10 we set out the estimated cost per year of employing one full-time accountant attached to a police force.[84]

[83] We note that the resources of FIG are admitted by the Government to be "seriously stretched" and are currently the subject of a review: see *Hansard* (HC), 2 December 1985, vol. 88, col. 12.

[84] See para. 10.5, serial 22.

2.74 The recent placing of three accountants in the DPP's Department on a permanent basis as part of the FIG arrangements has, in the Controller's view, already proved itself "invaluable". We were not at all surprised to hear that the most frequent comment in the Department is "How did we ever manage without them?" The adequacy of the accounting staff in post must be the subject of scrutiny by the Fraud Commission when it is in place.[85] Additional posts must be created if, as seems highly probable, their workload requires it. Again, we set out in Chapter 10 the cost per year of employing an additional FIG accountant.[86]

2. POLICE

2.75 Another question which concerns us is whether the policy of short term three year postings to the fraud squads is conducive to the efficient handling of investigations of serious fraud cases.[87] The only fraud squad which retains its officers for substantially longer periods is the City of London branch of the MCPCFD, where there is the opportunity for officers to gain experience and promotion within the squad. Elsewhere a long stay in the fraud squad is the exception and is often regarded as damaging to an officer's career prospects, but short stays give no opportunity for extensive training and acquisition of expertise. We were told that the Metropolitan branch of the MCPCFD had recommended to the Commissioner the following approach to the staffing of the fraud squad: one third permanent staff, one third of staff serving between four and five years and one third within the existing force policy of three years. As yet no moves towards this proposed approach have been accepted. We acknowledge that senior officers both in the Metropolitan Police and in other forces must have regard to the operational requirements of their force as a whole. However, we take the view that the provision of a career structure within fraud squads is essential, particularly having regard to the increasing levels of sophistication of fraud. We comment separately in Chapter 9 on the question of training.[88]

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85 See para. 2.49, above.

86 See para. 10.5, serial 22.

87 See para. 2.7, above.

88 See para. 9.52, below.

Recommendations

Serial		Paragraph
1.	**The need for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases should be examined forthwith.**	2.48
2.	**An independent monitoring body (the "Fraud Commission") should be responsible for studying the efficiency with which fraud cases are conducted and should make an annual report on the lines indicated in the text.**	2.49
3.	**Inspectors appointed under sections 431 and 432 of the Companies Act 1985 must report evidence of suspected fraud as soon as it is discovered.**	2.60
4.	**It is desirable that the Department of Trade and Industry should rely on investigations under section 447 of the Companies Act 1985 rather than inquiries under sections 431 and 432.**	2.61
5.	**Powers of investigation comparable to those available to the Department of Trade and Industry under section 447 of the Companies Act 1985 should be conferred on the police.**	2.62
6.	**Section 721 of the Companies Act 1985 should be reviewed to consider the need to retain the provision and, if so, whether the procedure for obtaining an order should be streamlined.**	2.63
7.	**A "Case Controller" should be responsible for the control of a serious fraud case from the time of discovery until the verdict.**	2.66
8.	**Prosecuting counsel should be appointed at an early stage in the investigation of serious fraud cases to advise as to the direction of the investigation; and should conduct the prosecution case at any subsequent trial.**	2.68
9.	**Counsel must be prepared to adapt to the task of being a member of and leading a team of investigators and prosecutors.**	2.69
10.	**The resources devoted to the pursuit of fraud must be expanded as a matter of priority.**	2.71

Recommendations

Serial		Paragraph
11.	**More expert accounting staff is likely to be needed in the DPP; permanent qualified accounting staff should be attached to the police fraud squads.**	2.73 2.74
12.	**Provision of a career structure for officers in the fraud squads is required.**	2.75

CHAPTER 3

THE SUBSTANTIVE LAW

A. Introduction

3.1 We explained in Chapter 1[1] that, although we make no recommendations as to the reform of the substantive law, we wish to record the main criticisms and proposals made by our witnesses in order to give impetus to proper consideration of these matters by the appropriate authorities. By "substantive law" we mean the law which, in defining offences, also defines conduct which is criminal and provides for its punishment.

3.2 "Fraud" is not a defined term: there has never been any general offence of criminal fraud in English law. There are in fact several hundred criminal offences on the statute book, together with a few common law offences, which may form the basis of a charge of fraud, in that one of the main ingredients of what is generally understood to be fraud may be present, such as dishonest practice, deception, false disclosure, concealment of assets or other activities of that nature.[2] The principal offences in the present armoury of the criminal law against fraud include obtaining property by deception, false accounting, fraudulent trading, theft and the common law offence of conspiracy to defraud.

3.3 The criticisms of the substantive law which we received took two forms. Some were that the law was obscure. Incomprehensible laws lead to confusion, injustice and delay. They place an added burden on the judge who has to interpret the law and upon the jury who have to apply it. Moreover, where the law is open to doubt, this may well give rise to appeals against conviction. Other criticisms were that the present law is ineffective to deal with fraudsters.[3] Prosecutors, it was argued, should have available to them offences which they can use which reflect the real gravity of the fraudulent conduct in question. We deal with the points raised under four separate headings, covering the element of "dishonesty" in offences, the common law offence of conspiracy to defraud, the question of the need for a new general offence of "fraud", and the question of territorial jurisdiction.

B. Dishonesty

3.4 In 1966, the Criminal Law Revision Committee recommended in its Eighth Report on Theft and Related Offences that the word "dishonestly" should replace the word "fraudulently", which had been

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[1] Para. 1.7, above.

[2] The Home Office confirmed this by providing us with the results of a trawl by computer (LEXIS) of the statutory references in response to the input of a dozen key words, including fraud, deceive, false, dishonest, cheat.

[3] See, for example, Hadden, "Fraud in the City: The Role of the Criminal Law" [1983] Crim. LR 500.

used in earlier legislation:[4]

> "'Dishonestly' seems to us a better word than 'fraudulently'. The question 'Was this dishonest?' is easier for a jury to answer than the question 'Was this fraudulent?'. 'Dishonesty' is something which laymen can easily recognise when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer."

The words "dishonestly" and "dishonest" were accordingly used in a number of important offences in the Theft Act 1968,[5] and in the Theft Act 1978. Dishonesty is also an essential ingredient of conspiracy to defraud at common law.[6] As has been pointed out,[7] the prosecution must, in order to obtain a conviction prove that the defendant acted dishonestly in the majority of proceedings in which indictable offences are charged. In general dishonesty distinguishes between those who, in running some scheme or business, have caused others to lose their money through incompetence or bad luck and those who have done so with criminal intent. For these reasons it is often the cardinal issue for the jury to consider. How far ordinary juries are capable of determining this issue in certain complex fraud cases is considered in Chapter 8.

3.5 Dishonesty is not defined by statute. For the purpose of offences involving theft, section 2 of the Theft Act 1968 lists three situations in which a person's appropriation of property is not to be regarded as dishonest. The section also provides that an appropriation of property may be dishonest notwithstanding a willingness to pay for it. The courts have left juries to determine this for themselves, on the basis that "dishonesty" is an ordinary English word. The courts have, however, considered how the jury should be told to approach the question of dishonesty in the offences in which it is an ingredient. The relevant appellate decisions have not always been consistent. The principal difficulty has been to formulate the relationship between objective and subjective definitions. An objective definition would leave some defendants at risk of conviction of serious offences when they were without moral blameworthiness; on this basis the jury must find the defendant to have been dishonest, if they consider his behaviour was dishonest according to the ordinary standards of decent people irrespective of his own mental state. On the other hand, a subjective definition would allow a defendant to set his own standards: the jury must find the defendant to have been dishonest, only if they are satisfied that he regarded his own conduct as dishonest.

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[4] Cmnd. 2977, para. 39.

[5] Including theft, false accounting, procuring the execution of a valuable security, obtaining property by deception.

[6] See *R v Landy* (1981) 72 Cr. App. R 237, 247 and *R v Ghosh* [1982] Q.B. 1053, 1059; see also para. 3.9, below.

[7] Griew, "Dishonesty: The Objections to Feely and Ghosh" [1985] Crim. LR 341. We are grateful to Professor Griew for sending us a copy of this article in advance of its publication.

3.6 The Court of Appeal, in *R. v. Ghosh*,[8] admitted that the law was in a "complicated state" and sought to clarify it. The Court ruled that the proper approach of the jury to the question of dishonesty should be as follows:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
>
> If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest."[9]

The decision has been welcomed by some as a helpful clarification of the law. But it has also been subjected to detailed academic criticisms. Since these are on record, it would serve no useful purpose to repeat them.[10]

3.7 A number of witnesses thought that the decision in *Ghosh* had complicated the jury's task. One experienced counsel, for example, told us that –

> "the decision is arguably wrong and capable of giving rise to the mystification of jurors and much delay by them in their deliberations and to unfortunate results."

He submitted that the logical and correct approach ought to be as follows:

(a) that the jury should find as a fact what was the state of mind of the defendant (for example, what did he know, what did he intend to do or intend should happen).

(b) The jury should then consider whether they think that in the circumstances of the case the defendant's state of mind was dishonest by their standards according to the ordinary man's understanding of the word.

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[8] [1982] QB 1053.

[9] *Ibid.*, at p. 1064.

[10] See, for example, Griew, *loc. cit.*, n. 7, above and Elliott, "Dishonesty in Theft: A Dispensable Concept" [1982] Crim. LR 395.

3.8 Another witness suggested that in relation to "commercial fraud" there might be a statutory reformulation of the tests in *Ghosh* along the following lines:

> Would reasonable and honest persons skilled in business matters have regarded the defendant's course of conduct as dishonest?
>
> If it was dishonest by those standards, did the defendant himself realise that what he was doing was by those standards dishonest?

As a corollary it was suggested that the prosecution might be allowed to lead evidence to show what reasonable and honest persons skilled in business matters would have regarded as honest or dishonest behaviour in the circumstances of the case. These suggestions raise a number of questions including whether any new definition of "dishonesty" should be limited to certain offences or groups of offences or whether it should apply to all offences involving dishonesty. It is not clear to us how such a new definition of dishonesty could be limited to "commercial fraud" cases unless it is envisaged that new offences might be created.

C. Conspiracy to defraud

3.9 The Criminal Law Act 1977 reformed the offence of conspiracy at common law by creating, in section 1(1), a statutory offence of conspiracy in place of the common law offence. The abolition of the common law offence was not complete however, because section 5(2) of the Act preserved common law conspiracy to defraud.[11] The preservation of conspiracy to defraud was intended as an interim measure pending a review of that offence by the Law Commission.[12]

3.10 The precise extent to which the 1977 Act preserved conspiracy to defraud was a matter of controversy and gave rise to conflicting judicial decisions. It is not necessary to relate the details of those decisions. It is sufficient to note that the controversy relating to the interpretation of the Act was resolved by the House of Lords which held, in *R. v. Ayres*, that common law conspiracy to defraud and statutory conspiracy, contrary to section 1(1), were mutually exclusive offences.[13] The House of Lords concluded that the reference to "conspiracy to defraud" in the 1977 Act "must be construed as limited to an agreement which, if carried into effect, would not necessarily involve the commission of any substantive criminal offence by any of the conspirators."[14] If a conspiracy involves the commission of *any* substantive offence, it can now properly be charged only under section

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[11] Sect. 5(3) preserved common law conspiracy to corrupt public morals or outrage public decency as a further exception.

[12] See para. 3.12, below.

[13] [1984] AC 447. The House of Lords affirmed an earlier decision of the Court of Appeal in *R v Duncalf* [1979] 2 All ER 1116. See also *R v Hollinshead* [1985] 3 WLR 159 (HL).

[14] *Ibid.*, p. 459 (*per* Lord Bridge).

1(1) of the 1977 Act as a statutory conspiracy to commit the offence, and not as a conspiracy to defraud.

3.11 While the decision of the House of Lords has clarified the law, there remains concern among prosecutors about the effect of the decision upon charging the substantive offences. This concern has been fuelled by a number of further judicial decisions, some unreported, which have highlighted the problems to which the construction put upon the relevant section of the 1977 Act has given rise.[15] In many fraud cases a charge of a substantive offence or of a statutory conspiracy to commit a substantive offence will be entirely appropriate and the maximum penalties adequate. In some cases, however, the only substantive offence available may be a relatively minor offence carrying a low penalty or a series of minor offences, or an offence or offences which are perhaps only incidental to the fraud. In these circumstances, the prosecution may find it impossible to prosecute for offences which reflect the totality and gravity of the allegedly fraudulent conduct in what would otherwise be called conspiracy to defraud. As one submission to us put it, there is a risk of "a build up [of] a case history of thwarted or inappropriate prosecutions for major frauds".

3.12 One way of overcoming this problem would be to amend the Criminal Law Act 1977 to enable charges of conspiracy to defraud to be brought in wider circumstances notwithstanding that a charge of a statutory conspiracy to commit an offence would also lie. This would effect the reversal of the decision in *Ayres*. Another approach would be to consider, as the Law Commission is currently doing as part of its general programme of work on the codification of the criminal law, "whether new offences in [the] area of [conspiracy to defraud] should take the form of a wide offence of fraud or of narrower, discrete offences designed to fill the particular gaps in the law which would become apparent if the common law offence were abolished."[16] As we mention below,[17] the possibility of creating an offence of "fraud" was also canvassed by some of our witnesses.

3.13 The witnesses also raised a separate point, namely that charges of conspiracy to defraud were sometimes too vague; they sometimes fail to make clear what allegations the defendant has to face and so lengthen and confuse trials. Others went further and suggested that conspiracy charges should be avoided as far as possible. The Court of Appeal has already said[18] that particulars should be given in the

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[15] See *R v Tonner* [1985] 1 WLR 344; *R v Cox and Mead, The Times* 6 December 1984; *R v Lloyd* [1985] 3 WLR 30, *R v Cooke* [1985] Crim. LR 215.

[16] *Nineteenth Annual Report 1983–1984* (1985) Law Com. No. 140, para. 2.13. The second option was canvassed in the Law Commission's Working Paper No. 56, (1974) *Conspiracy to Defraud*, and a number of possible gaps identified and discrete offences proposed, but, as its latest Annual Report also indicates, these proposals are likely to be superseded by the publication of a new working paper on this subject in due course.

[17] See para. 3.14.

[18] In *R v Landy* (1981) 72 Cr. App. R 237, 244.

indictment so as to make clear what exactly the prosecution allege when they charge conspiracy to defraud.[19]

D. A general offence of "fraud"

3.14 One proposal made to us was that a new, statutory offence of "fraud" should be created.[20] This might be a wide residual offence,[21] and might be available in place of conspiracy to defraud at common law,[22] or be used where appropriate in place of statutory offences and conspiracies to commit them. One suggestion was that the form of words given by the editors of *Archbold* might form the basis of a definition of such an offence:

> "(a) To 'defraud' or to act 'fraudulently' is dishonestly to prejudice or take the risk of prejudicing another's right, knowing that you have no right to do so.
>
> (b) It is not confined to a risk of possible injury resulting in economic loss, though most cases do involve this."[23]

3.15 While the availability of an offence which is not based upon the requirements that the conduct becomes criminal only when done in concert with others (as is the case now with conspiracy to defraud) would have advantages, it would also pose problems. If the offence is so defined that its ingredients are only (a) dishonesty and (b) conduct actually or potentially detrimental to another, some more narrowly defined offences (such as theft) might be made otiose.

3.16 A related suggestion is that the prosecution should be able to allege, in charging a single offence, a stated aggregate loss over a given period of time. This would be a convenient way of dealing with a succession of individual transactions. At present the practice is proper only where the prosecution are not able to be specific about the individual amounts which make up the total.[24] A further advantage would be that, where the case was contested, the judge would be able to sentence for the totality of the criminal conduct without a trial to determine guilt on each of a large number of individual transactions.[25]

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[19] We recommend in Chapter 6 that the prosecution in serious fraud cases be required to prepare a "case statement" for the court and the defence: see para. 6.57, below.

[20] Compare the position in Scotland which has a very wide offence of fraud at common law: see Appendix E, para. 7.

[21] For a recent discussion of this question, see Sullivan, "Fraud and the Efficacy of the Criminal Law: a Proposal for a Wide Residual Offence", [1985] Crim. LR 616.

[22] See para. 3.12, above.

[23] Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed., (1985), para. 17.26. The definition is an extended version of that put forward by Buckley J. in *Re London and Globe Finance Corporation* [1903] 1 Ch. 728, at 732, 733. See also *Scott v Commissioner of Police of the Metropolis* [1975] AC 819.

[24] See cases cited in Archbold, *op. cit.*, at para. 1–61.

[25] See Thomas, *Encyclopaedia of Sentencing Practice*, para. L. 2.1(d).

E. Territorial jurisdiction

3.17 A few of our witnesses referred to the jurisdictional problems which beset the prosecution of frauds committed without heed to national boundaries. At present there are no statutory provisions expressly covering the territorial jurisdiction of the criminal law of England and Wales. In principle, the criminal law is territorial, confined to acts performed in England and Wales. However, problems in determining where an offence has been committed may arise, in particular where the offence contains more than one main element, some elements taking place here and others abroad. The limitation on the jurisdiction of courts in England and Wales was considered by the Law Commission in a report in 1978.[26] The Commission did not feel able to recommend any general rules to the effect that, where any act or omission constituting an essential element of an offence occurs in England and Wales the offence should be deemed to have been committed there, even if other elements of the offence take place outside England and Wales. The Commission made it clear that it was its policy to examine these problems in the context of individual offences recommended as part of the process of codification of the criminal law.[27] We hope, as did some of our witnesses, that these matters will be considered in the course of any review of the substantive offences of fraud by the Law Commission or other appropriate body.

F. Conclusions

3.18 We have identified some of the issues relating to the substantive law of fraud which have concerned a number of our witnesses. Some of these matters are already being examined by the Law Commission. As a Committee we are not fitted to make recommendations in this area and we are not putting forward any proposals of our own. We believe that all the problems highlighted in this chapter should be examined by an appropriate body, such as the Law Commission or the Criminal Law Revision Committee, to see how far these criticisms of the present law are justified and to consider the need for legislation.

Recommendation

Serial		Paragraph
13	**An appropriate law reform agency should examine the issues, indicated in the text, relating to the substantive law of fraud.**	3.18

[26] *Report on the Territorial and Extra-territorial Extent of the Criminal Law* (1978) Law Com. No. 91.

[27] *Ibid.*, paras. 6 and 8.

CHAPTER 4

COMMITTAL PROCEEDINGS

A. Introduction

4.1 In this part of the report, we are concerned with the procedure for bringing fraud cases to trial in the Crown Court. The main issue examined is whether the existing procedure which allows for the possibility of protracted committal proceedings in magistrates' courts is satisfactory and should be retained or whether, as a number of our witnesses have suggested, there should be an alternative method of bringing these cases into the jurisdiction of the Crown Court.

B. The position before committal proceedings

4.2 Almost all criminal proceedings begin in a magistrates' court: a defendant is arrested and charged, and has thus to be brought before the court or (the general rule for less serious offences) he is summoned to appear before the court. The only significant exception is the "voluntary bill" procedure to which we refer later.[1] Once proceedings have been started in a magistrates' court, the court exercises a degree of control over them, for example, in the time it allows for the prosecution to prepare its case, or in granting or refusing bail to the defendant. Before the magistrates proceed to committal, a decision has to be taken as to whether a defendant will be tried in the Crown Court or in the magistrates' court.

4.3 Offences are classified as being summary only (triable in the magistrates' court), indictable only (triable before a jury in the Crown Court), or triable "either way". The last is a wide category and includes, for example, most offences under the Theft Acts[2] and many other serious offences involving fraud. The principal exceptions in the context of fraud are statutory conspiracy to commit a substantive offence[3] and the common law offence of conspiracy to defraud which are triable only on indictment. The procedure for determining the mode of trial of offences triable either way[4] is that the magistrates consider which court would, in their view, be appropriate. If they decide that the Crown Court should deal with the case, they start committal proceedings. If they decide that they themselves should hear the case but the defendant nevertheless insists, as he is entitled to do, on trial on indictment in the Crown Court, committal proceedings follow. If the prosecution is being conducted by the Attorney General, the Solicitor General or the Director of Public Prosecutions (DPP) and he applies for the offence to be tried on indictment in the Crown Court, the magistrates are bound by this and must set committal proceedings in train.

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[1] See para. 4.27, below.

[2] 1968 and 1978. The offences include theft, obtaining property by deception, false accounting, obtaining services by deception.

[3] Criminal Law Act 1977, s. 1(1), as substituted by the Criminal Attempts Act 1981, s. 5(1).

[4] Criminal Law Act 1977, ss. 19 to 23.

C. Committal proceedings

4.4 Before describing the present form of committal proceedings, it is worthwhile examining their origins.

1. HISTORICAL BACKGROUND

4.5 Before the establishment of regular police forces, it was the duty of magistrates to pursue and arrest offenders. As long ago as the 16th century they had the responsibility of examining witnesses in private for the purpose of taking statements. At that time the accused had no right to be present. In the early part of the 19th century the responsibility for inquiring into offences gradually passed to the police. The Administration of Justice (No. 1) Act 1848 provided that the accused was entitled, for the first time, to be present at the examination of the witnesses against him and seems to have marked the turning point at which the magistrates' examination took place in open court. In the period before and after 1848 when the police began to assume responsibility for investigating and prosecuting, the magistrates' inquiry became a judicial, instead of an investigative function and the criminal procedure envisaged a preliminary judicial hearing before a person could be put on trial as a result of a prosecution initiated by the police.

4.6 Following the judicial examination of the prosecution's case and the committal of the accused for trial, a bill of indictment was drawn up. Before 1933, a grand jury was responsible for deciding whether a bill of indictment preferred against an accused was a "true bill". If the grand jury did not find a true bill, it threw the bill out and the accused was discharged. By 1933, the finding of a true bill by a grand jury following committal by magistrates had become a formality, since by then committal proceedings had become the common form of producing a bill of indictment. The grand jury was abolished by the Administration of Justice (Miscellaneous Provisions) Act 1933.

4.7 It will be seen therefore that the original purpose of committal proceedings was to protect the defendant against charges initiated by the police which might be capricious or oppressive. These conditions no longer prevail and this is further emphasised by the setting up of the independent Crown Prosecution Service.[5]

2. PRESENT LAW

4.8 Committal proceedings take one of two forms:

(i) a hearing under section 6(1) of the Magistrates' Courts Act 1980 (commonly referred to as an "old-style" or "full" committal; we have used the latter term throughout this report) or

[5] See para. 2.13, above.

(ii) a committal for trial without consideration of the evidence by the magistrates under section 6(2) of the Magistrates' Courts Act 1980 (commonly referred to as a "paper" committal or a "section 1 committal" after section 1 of the Criminal Justice Act 1967 under which this procedure was first introduced).

Committal proceedings apply only to cases which are to be tried in the Crown Court; they do not apply to the cases referred to above[6] which are tried in the magistrates' court.

4.9 Since 1967 most committals are in the latter form. Section 6(2) of the 1980 Act provides that where all the evidence before the court (whether for the prosecution or the defence) consists of written statements,[7] tendered with or without exhibits, the magistrates may commit the defendant for trial at the Crown Court without consideration of the contents of those statements, unless:

(a) the defendant, or one of them, has no solicitor acting for him; or

(b) a lawyer acting for the defendant, or one of them, submits to the court that the statements disclose insufficient evidence to put him on trial at the Crown Court.

If either (a) or (b) applies the magistrates must proceed to hold full committal proceedings.

4.10 Full committal proceedings, under section 6(1), require the magistrates' court to consider the sufficiency of the evidence. Usually this occurs at the request of the defence but the prosecution may also elect to proceed in this way. The procedure is that the oral evidence of each witness is put into writing by the clerk of the court. It is then read to the witness, signed by him, and authenticated by the magistrate. Evidence recorded in this way is known as a deposition. This procedure may be modified by allowing a written statement of a witness to be admitted in evidence provided that the defendant (or each of them) does not object and the court does not require the witness to attend and give evidence. Thus, where the defence do not wish to cross-examine some or all of the witnesses at the committal proceedings, those witnesses need not be called to give evidence at that stage. A statement so admitted must either be read out in full, or if the court so directs, the contents of it may be summarised. The statement then forms part of the evidence upon which the court makes its decision. The prosecution do not have to call all their witnesses but merely enough to make out a *prima facie* case; witnesses who are called are subject to cross-examination by the defence. Defence witnesses may also be called and cross-examined by the prosecution. If the court is of the opinion that there is sufficient evidence to put the accused on trial or, in the words of the Divisional Court, that there is

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[6] Para. 4.3.

[7] These statements must satisfy the requirements of the Magistrates' Courts Act 1980, s. 102.

"such evidence that, if it be uncontradicted, a reasonably minded jury may convict upon it",[8] it must commit him for trial at the Crown Court. If it is not so satisfied it must discharge him. Such discharge does not amount to an acquittal and the prosecution may bring a fresh charge or apply to a judge for consent to prefer a voluntary bill of indictment.[9]

3. STATISTICS

(a) General – all cases

4.11 In 1984, 98,700 defendants were committed for trial in the Crown Court by magistrates.[10] There is, however, limited information as to the number of "full" committal proceedings as opposed to "paper" committals. The percentage of full committals appears to be small. Out of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975 and 1976, 4 had full committals and in 18 others some only of the evidence was given orally; in other words there was a paper committal in all but 1 per cent of cases.[11] A more recent study by the Home Office Research and Planning Unit[12] of all committal proceedings which took place in January 1981 shows that there was a full committal hearing in 7.6 per cent of the cases. It also reveals that, in 12 per cent of the cases where there was a full committal hearing, the accused was discharged. In this sample therefore the accused was discharged in less than 1 per cent (0.9 per cent) of all committal proceedings.

(b) Fraud cases

4.12 Separate figures for the proportion of full committal proceedings in fraud cases are also not kept as a matter of routine. Such information as we have been able to obtain from inquiry is patchy and it has therefore been impossible to provide a reliable estimate of the number of full committal proceedings in fraud cases each year. From information provided to us by the Home Office Research and Planning Unit the proportion in January 1981 was almost 11 per cent, which was higher than for criminal cases generally.[13] The total number of committals for trial in fraud cases in 1981 as a whole was 5,547. On the assumption that the proportion of full committals in January 1981 remained constant throughout that year, the total number of full committals in fraud cases in 1981 would have been around 600.

4.13 We were also able to obtain the following information from three prosecuting authorities and one combined fraud squad. The DPP told us that for the three years 1982–1984 full committal proceedings were

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[8] *R v Governor of Brixton Prison, ex parte Bidwell* [1937] 1 KB 374.

[9] See para. 4.27, below.

[10] *Criminal Statistics England and Wales Supplementary tables 1984*, vol. 1, Table S.1.1(A).

[11] McConville and Baldwin, *Courts, Prosecution and Conviction* (1981), p. 81.

[12] See Jones, Tarling and Vennard, "The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System" [1985] Crim. LR 355.

[13] See para. 4.11, above and Appendix I.

held respectively in 8, 6 and 11 cases prosecuted by the fraud division in his Department. The MCPCFD informed us that out of a total of 58 prosecutions in fraud cases investigated by them in 1982, 16 were full committals (26.6 per cent); in all these 16 cases full committal proceedings were requested by the defence and all cases were committed for trial. In cases prosecuted by Customs and Excise (and here the figures include both fraud and non-fraud cases), as at 1 February 1985, 339 (out of 685) cases had been committed and were awaiting trial in the Crown Court. Of these cases, 63 (18 per cent) were committed under section 6(1). In 8 of these cases, the principal prosecution witnesses were called and in a further 20 some of the prosecution witnesses were required for cross-examination. The Inland Revenue did not supply any statistics in this connection, but we were told that the use of full committal proceedings in prosecutions brought by them was rare.

4. FUNCTIONS OF COMMITTAL PROCEEDINGS

4.14 Committal proceedings in the magistrates' court fulfil three main functions. First, they are intended to act as a safeguard to a defendant so that he does not have to face trial on indictment unless a magistrates' court is satisfied that there is a *prima facie* case. Relatively few defendants however make use of this and, as pointed out above,[14] the original need for this safeguard has disappeared. Second, a range of ancillary matters is dealt with including legal aid for the trial, bail, witness orders, and venue. All these decisions are subject to review by the Crown Court. Third, committal proceedings provide the discipline of a date by which the prosecution and defence cases should have been prepared and the prosecution should have complied with the requirements for disclosure of information to the defence.[15]

D. The position in Scotland

4.15 In Scotland there is no procedure equivalent to full committal proceedings in England and Wales. However the system does contain safeguards. The procurator fiscal (an independent public prosecutor) decides who to prosecute and for what offence. He is subject to the directions of the Lord Advocate and his staff (the Crown Office), and if the procurator fiscal wishes to proceed on indictment he must first obtain the authority of Crown Counsel (senior barristers appointed to act as deputies of the Lord Advocate). Additionally, it is possible for the merits of the case to be considered by the sheriff (the judge before whom an accused is brought soon after arrest). Originally the sheriff was obliged to consider the evidence at an early hearing and satisfy himself that there was a *prima facie* case. This practice has died out. However, the accused does have the chance to state his position as regards the charges before the sheriff, and may now be questioned by the procurator fiscal, as a result of which the charges may be modified, reduced, or even dropped altogether.[16]

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[14] At para. 4.7.

[15] *Report of the Royal Commission on Criminal Procedure* (1981), Cmnd. 8092, para. 8.25.

[16] See also para. 6.79, n.51 and Appendix E, para. 8.

E. The Royal Commission on Criminal Procedure

4.16 In 1981 the Royal Commission on Criminal Procedure looked at committal proceedings in the context of their review of the process of prosecution and their recommendations for the statutory establishment of an independent prosecution service.[17] They took the view that committal proceedings were not operating as an adequate filter to prevent weak cases from reaching the Crown Court. They proposed the abolition of full committal proceedings and the institution of a new procedure (called "application for discharge") whereby the defence would be given the option of a hearing before the magistrates at which to make a submission of no case to answer after the prosecution case had been disclosed in writing. The possibility of applying for discharge would be available in respect of cases which are triable on indictment, or either way, but only where the delay before trial would exceed a specified period, which they suggested might be set at eight weeks.

4.17 The Royal Commission also proposed the abolition of paper committals. Sifting of weak cases would under these proposals be undertaken either by the Crown prosecutor or by the magistrates if there was an application for discharge. The Royal Commission saw no reason in principle why the Crown prosecutor should not send cases that are to be tried on indictment direct to the Crown Court, recognising, however, that provision would need to be made for other matters to be resolved by the magistrates including the questions of bail, and witness orders and, in certain cases, the mode of trial. The objection that such a procedure would remove a discipline on defence and prosecution to prepare for trial, and on the prosecution to comply with a requirement for disclosure would, in their view, be met by the imposition of a period on the supply of the papers to the defence and a time limit within which the request for an application for discharge hearing must be made.

4.18 Whether the hearing of the application for discharge should be by way of an examination of the case on paper, or by an oral hearing with witnesses being called to give evidence and cross-examined upon it, on balance a majority of the Royal Commission favoured the former course. The removal of the right of the defence to challenge, by cross-examination, the credibility of the prosecution's witnesses was justified, first, on the grounds that magistrates were only concerned with whether there was a case to answer and not whether they would convict or acquit and, second, because of the possible abuse of the existing full committal hearing by employing it as a rehearsal for trial or to wear down witnesses.

4.19 The Royal Commission's recommendations for an independent prosecution service have been accepted.[18] Although the Government has not yet reached a conclusion on the Royal Commission's proposals

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[17] *Op cit.* (n.15, above), see paras. 8.24–8.31.

[18] See para. 2.13, above.

to abolish committal proceedings and to replace them with the "application for discharge" procedure, the establishment of the national independent prosecution service may result in their implementation in due course.[19]

F. Criticisms of committal proceedings

4.20 Among our witnesses there was a substantial body of opinion which was critical of committal proceedings, particularly full committal proceedings. They urged that committal proceedings should either be abolished or altered in some way. The main objections were as follows.

1. LENGTH AND DELAY

4.21 There was a strong feeling that full committals often made for serious delays. Proceedings in individual cases have been known to last for several weeks, and sometimes for months. In a recent case a full committal hearing took just over a year to complete occupying a stipendiary magistrate for 150 working days. This may be an isolated example, but we are aware of other fraud cases where committal proceedings have taken six weeks or longer.[20] Further delay arises because magistrates' courts have heavy case loads and it is often difficult to fix a hearing or to find dates convenient to the legal advisers if the committal involves a hearing of witnesses. Fraudsters and sometimes their advisers are skilful in exploiting delaying tactics and throughout that time fraudsters are free to continue their operations to the detriment of the public.

2. ABUSE

4.22 The defence is not required to give reasons for demanding a full committal and this leaves the procedure vulnerable to defence manipulation. The defence sometimes use the proceedings to cross-examine prosecution witnesses at length in the hope that they may obtain material to formulate a defence. They delay matters hoping to gain some advantage by reason of witnesses dying or going abroad or as a result of witnesses' memories fading by the time the case comes to trial. A more specific example is that the defence sometimes subject prosecution witnesses from abroad to such hostile cross-examination that they are reluctant to return for the trial.

4.23 In the comparatively rare cases where the prosecution elects full committal proceedings, it appears that their motives are to use the proceedings as a dress rehersal for the trial in order to ensure that there will be sufficient evidence to justify a conviction and to find out whether a particular witness or witnesses will come up to proof in the witness box.

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[19] See further para. 4.33, below.

[20] For example, the committal proceedings in *R v Tritt and others* (the Miller Carnegie case) tried at the Central Criminal Court at the end of 1982 took 30 working days to complete. We have also learned of similar experiences abroad. Thus in Hong Kong committal proceedings in a highly complex commerical fraud case were recently completed having lasted just over six months: all the accused were committed for trial.

3. UNSATISFACTORY TRIBUNAL

4.24 Magistrates find some fraud cases, as one submission put it, "at best extremely difficult and at worst almost incomprehensible" unless they have the relevant commercial experience or a specialised training in accountancy. Consideration over many days of the type of complex issues which arise in some fraud cases is far removed from the usual work of magistrates' courts and imposes further strains on an already overstretched system.

4. COST

4.25 A full committal hearing is a costly exercise which falls upon public funds. The information obtained at our request demonstrates how expensive individual committal proceedings can be, but it was not sufficient to enable us to ascertain the annual cost of full committal proceedings in all fraud cases.[21]

5. DEFENDANTS RARELY DISCHARGED

4.26 Our understanding on all the available evidence is that it is rare for magistrates to discharge defendants in fraud cases on the ground that there is insufficient evidence to put the accused on trial in the Crown Court; almost invariably there is a committal on most or all of the charges laid by the prosecution. The argument that committal proceedings are ineffective as a screening procedure was one which persuaded the Royal Commission on Criminal Procedure of the need to abolish the procedure.[22]

G. Proceeding by a voluntary bill of indictment

4.27 Before we examine how the present committal procedure might be altered to meet some of these criticisms, it is necessary to mention the voluntary bill procedure to which we made reference earlier. We do so because it may be thought that, if the prosecution made more frequent use of this procedure in some fraud cases, many of the difficulties often caused by full committal proceedings could be circumvented.

4.28 The only significant exception to cases being brought to trial in the Crown Court following committal by magistrates (whether involving fraud or not) arises when a bill of indictment (customarily known as a "voluntary" bill) is preferred on the order of a High Court judge.[23] The procedure is not commonly used[24] and is generally confined to situtations where, for example, some defendants have already been committed and the prosecution desire to add a further defendant to an indictment without the delay which further committal proceedings would involve; or where they wish to join two separate indictments so

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[21] See para. 10.5, serials 1 to 5, below.

[22] Report, *op. cit.*, para. 8.26.

[23] Under the Administration of Justice (Miscellaneous Provisions) Act 1933, section 2(2)(b).

[24] National statistics are not kept. We have been told that the procedure is used at the Central Criminal Court in about 6 to 12 cases each year.

that defendants can be tried together; or where the examining magistrate refuses, without good reason, to commit; or where an indictment is quashed at trial in its entirety.

4.29 The voluntary bill procedure is as follows.[25] The application must be made in writing to a High Court judge. The reasons for the application must be stated and adequate evidence in support provided. Unless the judge otherwise directs, his decision is signified in writing without requiring the attendance of the applicant or any of the witnesses. If he thinks fit he may require their attendance, but not in open court. A defendant has no right to be represented or to appear by himself or to make any representation to the judge. However, the judge may have a discretion to agree to receive written representations from or on behalf of the defendant, but this will only be exercised in very unusual circumstances.[26] Where the consent of the judge is obtained the indictment is preferred in the ordinary way.

4.30 There are two main reasons why the voluntary bill procedure is not a satisfactory substitute for full committal proceedings. First, High Court judges have been reluctant to authorise the preferment of such bills in order to bypass committal proceedings once those proceedings have started. Second, only the Crown has the right to make representations on the application; the defence have no right to be represented or to object to the application or to argue that there is no case to answer. These are no doubt the reasons why the present voluntary bill procedure tends only to be used when some defendants have already been committed and it is desired to add others to the indictment without delay or where there has been clear evidence of abuse of committal proceedings. Whatever the merits or otherwise of the voluntary bill procedure, its use would not be a suitable substitute for full committal proceedings in fraud cases.

H. Conclusions

4.31 We have described above the reasons why full committal proceedings are an unsatisfactory method of bringing cases to trial in the Crown Court. There are serious deficiencies in a procedure which allows abuse by defendants largely to go unchecked; which is the cause of unacceptable delays and expense; which involves unnecessary duplication of effort; and which produces little by way of compensating advantages for the administration of justice. We have also said why we do not think that the voluntary bill procedure could be used to overcome these deficiencies. We conclude that if fraud cases are to be brought to trial quickly and efficiently, an alternative means of doing so must be devised which avoids the injustice, waste and delay of committal proceedings and which, at the same time, enables the defendant to be brought before the Crown Court knowing the charges which he has to face.

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[25] See the Indictments (Procedure) Rules 1971, SI 1971, No. 2084, rules 6–10.

[26] See *R v Raymond* (1982) 75 Cr. App. R 151 (CA).

4.32 We think the defendant should be given an opportunity to contend at an early stage that *prima facie* there is insufficient evidence to bring him to trial. A number of witnesses who favoured the abolition of full committal proceedings in fraud cases were keen to ensure that some machinery should be retained to enable a defendant to contend that there is insufficient *prima facie* evidence for the case to proceed to trial. The Royal Commission on Criminal Procedure clearly regarded it as important to make such provision at least in regard to cases where there was likely to be any significant delay before trial.[27] Although the safeguard afforded by the present committal procedure is largely theoretical, insofar as few defendants have their cases discharged at that stage,[28] we believe it is necessary to provide a safeguard, but subject to reservations which would avoid the time and cost of protracted proceedings.[29]

4.33 The Government has not yet reached a conclusion on the proposals of the Royal Commission on Criminal Procedure to abolish committal proceedings and to replace them with the "application for discharge" procedure. The establishment of the Crown Prosecution Service may result in their implementation in due course. Pending the Government's decision on this issue we put forward alternative proposals. We concur with the Royal Commission's proposals insofar as they would lead to the abolition of committal proceedings in all fraud cases, and its proposals coincide with our own analysis of the evidence which has been put before us. We do not think it desirable that reform of committal proceedings in serious fraud cases should be delayed for what may be a considerable time before a decision is taken on whether the Royal Commission's proposals are to be implemented fully in relation to all types of criminal case. We have therefore devised as an interim measure an alternative procedure which can be made available in fraud cases where it is appropriate so to proceed.[30]

I. The interim procedure

1. OUTLINE

4.34 We set out below the interim procedure which should, in our view, be available as an alternative to committal proceedings. We propose that:

(1) the prosecuting authorities designated should be permitted to dispense with the existing committal procedure in any fraud case where they are of the opinion that it is appropriate to do so.

(2) At any time before the start of committal proceedings, the prosecuting authority should be able to issue a certificate (a "transfer certificate") which would transfer the case from the jurisdiction of the magistrates' court to the Crown Court.

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[27] See para. 4.16, above.

[28] See para. 4.26, above.

[29] See para. 4.47, below.

[30] See para. 4.36, below.

(3) Thereafter the indictment, settled by counsel, would be preferred in the ordinary way.

(4) A judge with appropriate special experience should be nominated as the trial judge at an early stage and he would, except in special circumstances, deal with all matters arising on the case including the preparatory hearings.

(5) A defendant should be able to apply to the nominated judge for a preparatory hearing in open court at which he would have the right to make an application for discharge on the ground that the prosecution's evidence fails to disclose a *prima facie* case.

4.35 Should the transfer certificate procedure become redundant with the abolition of committal proceedings in all fraud cases, other ways would have to be found to trigger the improvements in procedure which flow from that certificate. The signature on it of prosecuting counsel[31] associates him not only with the assurance that the preliminary work has been properly completed, but also with the responsibility for playing a key role subsequently. The certificate also signals the need for a nominated judge with appropriate special experience.[32] Our proposal for a "Case Controller"[33] goes some way towards preparing for the changes which might be needed. As we say elsewhere,[34] our proposed changes interlock and reinforce each other.

2. CASES APPROPRIATE FOR THE NEW PROCEDURE

4.36 In our view, the new procedure should be available for use at the option of the prosecution alone as an alternative to committal proceedings in any fraud case where they are of the opinion that it is appropriate so to proceed. We do not think it is necessary or desirable to define the classes of fraud case to which it should apply nor to specify the criteria by which its suitability is to be determined in any particular case. Cases where the new procedure would be particularly appropriate are likely to be serious or complex fraud cases and especially those where delay is threatened by the prospect of protracted committal proceedings, but it need not be restricted to such cases. It should be available in respect of offences triable only on indictment and offences triable either way.

3. PROCEEDINGS BEFORE TRANSFER TO THE CROWN COURT

4.37 All fraud cases would begin in the magistrates' court in the ordinary way. Thus, our recommendations would not affect the way in which a defendant is initially arrested, charged and brought before a magistrates' court. At this stage the magistrates would assume jurisdiction.

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31 See para. 4.40, below.

32 See para. 4.46, below.

33 See para. 2.65, above.

34 See Summary, para. 3, above.

They would consider whether the defendant should be granted bail, with or without conditions, or whether he should be remanded in custody. They would consider any application for legal aid. They would also continue to exercise control over the proceedings and ensure that there was no undue delay by the prosecution until such time as a transfer certificate is issued.

4. TRANSFER CERTIFICATE

4.38 In our view, the prosecution should be able to elect to proceed by the new procedure at any time before or after the defence apply for full committal proceedings up to the moment when committal proceedings begin. However, once committal hearings have started we do not think it would be right to permit the prosecution to block those proceedings. If the prosecution so elect, they would lodge a "transfer certificate" with the appropriate Crown Court.[35] They would, at the same time, serve a copy on the defence. The transfer certificate would be equivalent to a certificate of committal issued by a magistrates' court and it would be served on the magistrates' court which was handling the case. At the time of its issue the jurisdiction of the magistrates' court over the particular case would cease and the Crown Court would then assume jurisdiction. All matters previously within the jurisdiction of the magistrates' court including questions of bail, legal aid and witness orders would from that moment on be dealt with by the Crown Court.

4.39 We considered whether the issue of the transfer certificate should be subject to some form of appeal or judicial review whereby a defendant could argue that the ordinary committal procedure should be followed. We are firmly of the view however that the prosecution's right to issue a transfer certificate should not be subject to challenge by the defence by way of an appeal or judicial review. Interlocutory appeals of this nature in criminal cases are not a feature of the present system. A right of appeal or review in these circumstances would provide an opportunity for delay in the proceedings and would undermine the purpose of the new procedure.

4.40 We made clear in Chapter 2 that, in our view, counsel appointed to prosecute should be involved at an early stage in the prosecution of certain types of fraud case. In all these cases he should have considered and advised on the preparation of the case before any decision is taken to issue a transfer certificate. The certificate should therefore bear his signature together with that of the officer in the prosecuting authority responsible for authorising the prosecution of the case.

[35] See para. 4.42, below. Accompanying the transfer certificate sent to the Crown Court should be a copy of the relevant papers, that is to say the information, the witness statements and accompanying documentary exhibits. The magistrates' court would be responsible for forwarding to the Crown Court any relevant documents held by them, in particular the recognisance of any surety, if bail has been granted. This should be done without delay. We were told that whereas the law requires the magistrates' court to provide the Crown Court with committal papers within 4 days of the committal date, the average time taken in cases committed to the Central Criminal Court is 14 days, with some cases taking up to 28 days.

5. PROSECUTING AUTHORITY

4.41 Most, but by no means all, fraud cases for which the new procedure would be appropriate would be prosecuted by the DPP and would be handled by the Fraud Investigation Group in his Department. Both Customs and Excise and the Inland Revenue also prosecute fraud cases and in general they do so without reference to the DPP. The question arises as to which prosecuting authorities should be permitted to issue a transfer certificate. If the new procedure were to be limited to prosecutions brought by the DPP the other prosecuting authorities mentioned would be at a disadvantage and the possibilities of protracted committal proceedings in cases prosecuted by them would remain. We propose therefore that the Commissioners of Customs and Excise and the Board of Inland Revenue should in all respects have the same powers as the DPP and be authorised to issue a transfer certificate in respect of fraud cases. It may become necessary at a later date to allow other prosecuting authorities to be brought within the scope of these provisions and we therefore propose that any legislation giving effect to our recommendations should give the Attorney General power to nominate other prosecuting authorities for this purpose.

6. PLACE OF TRIAL

4.42 At present the magistrates' court which commits the accused for trial is responsible for selecting the place of trial by the Crown Court. The court must have regard to the convenience of the defence, prosecution and witnesses, the expediting of the trial, and the location or locations of the Crown Court designated by a presiding judge as the location or locations to which cases should normally be committed from their petty sessions area.[36] The Crown Court has power itself to direct that the defendant be tried at a different place from the place selected by the magistrates' court or from a place previously directed by the Crown Court.[37] Moreover if the defence are dissatisfied with the place of trial selected by the magistrates' court or the Crown Court, they may apply in open court to a High Court judge for a direction varying the place of trial.[38]

4.43 For cases transferred to the Crown Court under the new procedure it will be necessary to make some alternative provision for selecting the appropriate place of trial. In our view, selection of the place of trial in these cases should be a matter for the prosecuting authority. They should be required to specify the court of trial on the transfer certificate. If the defence wish to object to, or the Crown Court itself wishes to alter, the place of trial, the existing provisions could, with appropriate modification, be made to apply.[39]

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[36] Magistrates' Courts Act 1980, s. 7 and Supreme Court Act 1981, s. 75(1).

[37] Supreme Court Act 1981, s. 76(1) and (2).

[38] *Ibid.* s. 76(3).

[39] *Ibid.*, s. 76. The question of the facilities required for the satisfactory trial of fraud cases is considered at para. 9.26, below.

7. THE INDICTMENT

4.44 When a case is brought within the jurisdiction of the Crown Court, one of the first steps undertaken by the appropriate officer of the Crown Court is for him to arrange for the indictment to be drawn up. In ordinary cases that officer will draw up the indictment himself; but in cases where more than ordinary care is required he may request that it should be drawn up by counsel. The prosecution are entitled to require that the terms of the indictment should be settled by counsel.[40] In fraud cases which would be subject to the transfer certificate procedure, counsel appointed to prosecute should normally be required to settle the indictment.

4.45 In committal proceedings the draft bill of indictment, settled by counsel, is "preferred" by delivery to the appropriate officer within 28 days of committal.[41] A similar time limit should apply following the issue of a transfer certificate.

8. THE JUDGE

4.46 In Chapter 9 we emphasise the importance which we attach to the need to ensure that fraud cases are handled by judges with the appropriate knowledge and experience. In all serious fraud cases brought to the Crown Court by way of a transfer certificate or committal, the trial judge should be nominated as soon as possible after the case has been transferred. Nomination of the trial judge at this time would enable the judge to get to grips with the case at an early stage before the trial. The task of nominating the judge who is to try the case should be performed by one of the presiding judges on the Circuit, but for cases to be tried at the Central Criminal Court this task should be performed by the Recorder of London. As from the date of his nomination the judge should, except in special circumstances, deal with all matters relating to that case including any application for discharge, other preparatory hearings and the trial.[42]

9. APPLICATION FOR DISCHARGE

4.47 In our view, a necessary concomitant to the new procedure for dispensing with committal proceedings is that the defendant should be given an opportunity to make an application for his discharge to the nominated judge at a preparatory hearing on the ground that *prima facie* the evidence in the witness statements does not support the charges laid in the indictment. Without this safeguard a defendant who wished to submit that the prosecution's evidence did not disclose sufficient evidence on which a jury could properly convict might not be able to do so until the close of the prosecution case at the trial. Moreover, a defendant who had a proper submission to make might be left with a charge hanging over his head for an unreasonable period of

[40] See Archbold, *Criminal Pleading, Evidence and Practice* (1985), 42nd ed., para. 1.47.

[41] Indictments (Procedure) Rules 1971, SI 1971, No. 2084, rules 4 and 5. A longer period may be allowed with the leave of a judge of the Crown Court.

[42] See further para. 6.30, below.

time. The right to make such application should not be in a form which would enable the defendant to embark on a prolonged hearing of issues which should properly be examined during the trial.

(a) Form of hearing

4.48 The application for discharge could be heard by the nominated judge either by way of an examination of the case on the papers following submissions by the prosecution and the defence or by way of an oral hearing with witnesses being called to give evidence and cross-examined on it. Adoption of the former course would remove from the defence the right which they have at present at committal proceedings to challenge by cross-examination the credibility of prosecution witnesses. On the other hand, if witnesses are called it could result in a protracted hearing particularly if the defence were to propose that some or all of the prosecution witnesses should be cross-examined. Such a hearing could take up a considerable amount of time in the Crown Court depending on the number of witnesses. There would thus be a risk that the principal advantage of the special procedure, which is to overcome the unacceptable delays caused by protracted committal proceedings, would be set aside.

4.49 Although the disadvantages of allowing the defence to call and cross-examine witnesses at the hearing of an application for discharge are considerable, there may nevertheless be a few cases where there would be an advantage in allowing a limited amount of cross-examination. We have in mind, for example, the case of a defendant, who is one of several defendants indicted together, who might not be able to show, otherwise than by cross-examination of perhaps one or two prosecution witnesses, that there is in fact insufficient evidence that he played any part at all in the alleged fraud. We therefore believe that, in a limited number of cases, cross-examination of witnesses at the hearing of the application for discharge may be justified.

4.50 How therefore can we preserve for a defendant the opportunity of an early challenge to key witnesses, while not offering unlimited scope for defendants to probe each and every witness at interminable length? We have already noted that this was a question on which the Royal Commission on Criminal Procedure found itself divided.[43] In our view the answer lies in requiring the defendant who wishes to cross-examine to state in advance his grounds for doing so, and if appropriate to support this by a sworn affidavit setting out the evidence which leads him to believe that the witness he wishes to cross-examine is either unreliable or untruthful. Thus the right of the defendant to have witnesses called and cross-examined on an application for discharge would not be absolute. He would have to apply in advance to the judge for leave. If it is clear to the judge that the defence are in effect pursuing a fishing expedition and are seeking a virtual dress rehearsal of the trial, the judge would refuse. In that event the defence would

[43] See para. 4.18, above.

still be entitled to a hearing of the application for discharge on the evidence disclosed in the prosecution papers. If the defence request for witnesses to be called appears to the judge to be reasonable and to be backed by cogent evidence, he would order accordingly. Such an order should only be made in special circumstances, or otherwise the benefits of the streamlined procedure would be lost.

(b) Open court

4.51 The hearing of the application for discharge should, in our view, take place in open court. To avoid the risk of prejudice to a defendant, we think that reporting restrictions similar to those which apply in relation to magistrates' court committal hearings should apply to the hearing of an application for discharge.

(c) Ruling on an application for discharge

4.52 We have considered what test the judge should apply in ruling on an application for discharge. In such cases we would expect the judge to apply the test which is applicable on a submission of "no case to answer" at the close of the prosecution case at the trial as laid down by the Court of Appeal in *R.* v. *Galbraith.*[44]

4.53 If the application for discharge were successful the defendant would be acquitted. Such a discharge would amount in law to an acquittal on indictment; in other words the defendant would be entitled to raise a plea of *autrefois acquit* to any subsequent charge on the same facts. The dismissal of a charge by magistrates at committal proceedings does not amount to an acquittal and the prosecution may bring a fresh charge or apply to a judge for consent to prefer a voluntary bill of indictment. To this extent, therefore, defendants would be in a better position under the new procedure than those who are subject to the ordinary committal procedure.

10. TIME LIMITS

4.54 While the proposed alternative procedure to committal proceedings for appropriate fraud cases should enable these cases to be brought to trial more quickly and economically than at present without causing injustice to defendants, it will not by itself remove the scope for delay unless the prosecution ensure that cases are prepared for prosecution and transferred to the Crown Court as soon as possible after arrest. The magistrates' court can in theory ensure that defendants do not suffer unconscionable delay prior to committal by refusing prosecution requests for further adjournments and fixing a date for committal. If the prosecution are not ready to proceed and no evidence is presented, it is open to the magistrates to order that the defendant be discharged. If under the new procedure the prosecution fail to issue a transfer certificate by then, the magistrates could likewise order the defendant's discharge.

[44] [1981] 1 WLR 1039, at p. 1042 (*per* Lord Lane C. J. giving the judgment of the Court).

4.55 The problem of delay in bringing cases to trial, although particularly worrying in relation to fraud cases, affects all classes of case tried in the Crown Court. The Prosecution of Offences Act 1985 contains provisions enabling the Home Secretary to set time limits in relation to the preliminary stages of criminal proceedings.[45] Field trials began at the end of 1985 with a view to determining the limits which should be set.[46] The Act provides that a defendant would be acquitted where an overall time limit expired before the completion of the stage of the proceedings to which the limit applied. If our recommendations for a new procedure to replace committal proceedings in appropriate fraud cases are implemented, the relevant time limits would relate to the time between the date when the defendant is initially brought before a magistrates' court and the date of the issue of the transfer certificate and from the latter date to the trial. It may be that the field trials will show that the pre-trial time limits in fraud cases will need to be longer than in other cases because of the particular difficulties of preparing for trials in these cases. Nevertheless, we would expect that the use of the new FIG arrangements together with our recommendations, if accepted, would lead to a substantial reduction in delays and we hope that the Secretary of State would have regard to this in setting or amending the appropriate time limits.

Recommendations

Serial		Paragraph
14.	**We do not recommend that the voluntary bill procedure should be used as a suitable substitute for committal proceedings in fraud cases.**	4.30
15.	**Full committal proceedings in fraud cases should be abolished, but as an interim measure pending the Government's decision on committal proceedings, designated prosecuting authorities should be permitted to dispense with full committal proceedings where appropriate and these cases would be transferred to the Crown Court by an alternative procedure.**	4.33 to 4.36
16.	**At any time before the start of committal proceedings, the prosecuting authority may issue a certificate transferring a case to the jurisdiction of the Crown Court.**	4.34 4.38 4.41
17.	**The issue of a "transfer certificate" should not be open to challenge by the defence by way of appeal or judicial review.**	4.39

[45] See s. 22.

[46] *Hansard* (HL), 25 November 1985, vol. 468, Written Answers, col. 783.

Serial		Paragraph
18.	**In any serious fraud case brought to the Crown Court by transfer certificate or committal a judge with appropriate special experience should be nominated as the trial judge at an early stage after transfer.**	4.46
19.	**The nominated judge should deal with all matters relating to the case including any application for discharge (recommendation 20, below) other preparatory hearings and the trial.**	4.46
20.	**In any case brought to the Crown Court by transfer certificate, a defendant may make application for discharge to the nominated judge, subject to the restrictions stated in the text.**	4.34 4.47 4.51
21.	**Appropriate time limits should be set under the Prosecution of Offences Act 1985.**	4.55

CHAPTER 5

RULES OF EVIDENCE

A. Introduction

5.1 We have thought it right to devote a separate chapter to the vexed question of the rules of evidence as they apply in criminal cases, because we have concluded that the rigidity and artificiality of the present rules are an obstruction to the just and expeditious disposal of fraud cases. Many of those who have made submissions to us pointed to the court time wasted in calling witnesses simply to testify to the genuineness of routine documents even where there was no dispute that the documents were not forged. Others were more concerned with cases where, owing to the strictness of the rules of evidence, prosecutions had not, indeed could not be brought.

5.2 There are few areas in which there is a greater divergence of opinion between lawyers and laymen. Lawyers will argue with enthusiasm that unless the prosecution case, in the absence of admissions which have themselves only been permissible since 1967,[1] satisfies every formal requirement of evidential proof an acquittal, however unmeritorious, should follow. The acquittal of the guilty albeit on an evidential technicality is part of the price which, it is said, has to be paid for the protection of the innocent against the possibility, however remote, of wrong conviction.

5.3 The layman regards this attitude as astonishing and has been known to condemn it as lawyers' nonsense. In his own everyday affairs the layman will take a decision, often of critical importance, on evidence which every criminal court would necessarily hold to be inadmissible, as not being the "best" evidence or as being hearsay evidence. The layman will act on what his subordinate has told him to be a fact even though that subordinate has no personal knowledge of that fact but has based his statement to his superior on what another subordinate has told him. The layman may well regard a contemporary document as being of far greater weight than the doubtful recollection of a witness.

B. Background

1. THE ORAL TRADITION

5.4 The reasons for this unsatisfactory state of affairs are historical. There is, in the first place, a strong oral tradition in English justice. The English criminal trial is based on the testimony of witnesses attending at the trial and giving evidence from their own first-hand personal knowledge of the offence. Oral testimony is the main, and in some cases, the only form of evidence which can be presented before a court. A witness who appears in person can be seen as he gives his evidence, and the credibility of the testimony given tested by

[1] Criminal Justice Act 1967, s. 10.

cross-examination. These aspects of trial procedure stem from the development of jury trial, where the assessment of the truth of the facts is made by a group of independent people who have not participated in the investigation and, until the trial starts, know nothing of the background to the affair. As a corollary, documents are treated by the law with suspicion, and their importance tends to be undervalued.

5.5 These rules were all clearly designed for an era when most of the population could be presumed to be illiterate. While their strict application has caused few difficulties in the general run of criminal cases, they seem increasingly inappropriate and burdensome in cases of fraud and dishonesty which themselves arise from business transactions which are the subject of written records.[2]

2. PROTECTING THE DEFENDANT

5.6 The story of the development of the modern rules of evidence begins with judicial decisions in the 17th and 18th centuries, though some can even be traced back to the middle ages. Punishments were extreme, and the defendant was in a most unfavourable position. It was not until 1898, to take one example, that a defendant was able to give evidence in his own defence. Rules of evidence which unduly favoured the defendant went some way towards redressing the balance. Defendants are no longer as disadvantaged as they were, but the rules of evidence remain biased in their favour. Judges in criminal cases are compelled to uphold objections to inadmissible evidence however unmeritorious, save in point of law, they may seem to be. If inadmissible evidence is wrongly admitted, any resulting conviction is likely to be quashed on appeal unless it is clearly shown that no harm was done as a result of the admission of that evidence.

3. CIVIL AND CRIMINAL CASES COMPARED

5.7 Much of the archaism in the rules of evidence in civil cases was swept away by the Civil Evidence Acts 1968 and 1972. As a result, though it is often said that the rules of evidence are the same in civil as in criminal cases, in reality the position today is quite different. As we argue later, we believe that the process of narrowing the gap between them should be taken a stage further.

5.8 In 1972 the Criminal Law Revision Committee in its Eleventh Report[3] made proposals which would have gone some way to assimilating the rules of evidence in criminal cases to those in civil cases. Controversy followed over certain aspects of the report (in particular its proposals relating to inferences to be drawn from the defendant's silence and evidence of the defendant's disposition to commit the type of offence with which he is charged) and, save for the recent legislation based

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[2] We return to this subject at para. 9.4, below, in considering the way in which the case can best be presented to the jury.

[3] *Evidence (General)* (1972), Cmnd. 4991.

upon some of the Committee's recommendations, most of its recommendations remain unimplemented. The new provisions in the Police and Criminal Evidence Act 1984 concerning the admissibility of documentary hearsay[4] are less radical in their approach than those envisaged by the Criminal Law Revision Committee or those adopted in the Civil Evidence Act 1968. While we propose an extension of the new provisions, we have no desire to revive the controversies surrounding the Eleventh Report.

C. Evidential problems in fraud cases

5.9 What then are the problems created by the rules of evidence? It would be true to say that in fraud cases the problems are mainly concerned with documents. We deal below with the three main areas: the hearsay rule as it applies to documents; the "best evidence" rule, prohibiting the use of copies; and finally, we consider problems caused by evidence from abroad.

1. HEARSAY AND DOCUMENTS

5.10 The evidence that a witness gives must be first-hand. If all he can recount is what another person has said, then that other person is the one who should be giving evidence and the secondhand version of the first is not acceptable. This rule, known as the hearsay rule, is applied with logical severity to documents. If a document is the record of a transaction (for example, a cheque recording an instruction to a bank to pay money to a third party), then the mere production of the cheque does not suffice to prove the transaction. The drawer of the cheque, the bankclerk, and the payee should come, for they alone can speak of the transaction. The cheque cannot speak for itself: it cannot "prove" itself.

5.11 Hence the position that documents are not normally evidence in themselves: they merely support the oral evidence of live witnesses. It is they who must both identify the document and tell of the truth or otherwise of its contents.

5.12 So harsh have the rules been found that they have been the subject of certain specific but limited relaxations by Parliament in the Criminal Evidence Act 1965 and in the Police and Criminal Evidence Act 1984 (PACE). These relaxations applied to classes of documents compiled as records by persons acting under a duty. The 1965 reform applied to records compiled by people in the course of a private business, and PACE simply extended the relaxation to records kept by anyone acting under a duty, whether in the private or public sector.[5] But the reforms are framed as exceptions to the general primacy of oral evidence, and are subject to a crucial set of conditions which stipulate in effect that oral testimony of the contents of the document must not be available. In essence, these conditions are: that the person who

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[4] Sects. 68–70; see further para. 5.12, below.

[5] Sect. 68 of PACE. Sect. 69 deals separately with documents produced by a computer.

supplied the information contained in the document is either dead, ill or cannot be traced; or is outside the United Kingdom and cannot practically be expected to come; or that having regard to the time that has elapsed and to all the circumstances, he cannot be expected to have any recollection of the subject matter.

5.13 These conditions, embodied in PACE, can be traced back to the 1965 Act, and before that to provisions in the Evidence Act 1938, which dealt only with evidence in civil cases.

5.14 It is clear that the exceptions to the general hearsay rule in PACE provide a helpful means to allow relevant documentary evidence to be given in fraud cases. Routine statements of account, ledger records, and entries in financial books made by subordinates who can no longer be expected to recall them can be produced in court as evidence of their contents without the need for the relevant individuals to give oral testimony. So too will it be possible for foreign business or government records to be produced as evidence of their contents without requiring the attendance in England or Wales of their authors.

5.15 There remain however, a number of areas where documentary evidence will not be admissible, and where personal attendance by witnesses may still be required.

5.16 First those documents which are not records compiled by a person acting under a duty. There are many letters, memoranda, reports, file entries, charts and other business documents which could not be said to fall into this class. There have already been a number of court decisions on the interpretation of the word "record" both under the 1965 Act and under the legislation relating to evidence in civil cases which employs the same formulation. Accordingly, the following have been held not to be records: an anonymously prepared schedule of legal proceedings undertaken in the United States; research reports, articles and letters in medical journals; a report on a company by Board of Trade inspectors; and a file of letters which had been continuously added to. The distinction between "records" and non-records seems to us to be artificial and of doubtful value. The proposals we make below[6] would largely supersede this provision, however, and so minimise the importance of the distinction.

5.17 Second, there are documents which are within the "record" classification, but where the supplier of the information is still alive within the country and might be expected to have some recollection of events. If personal attendance is possible it is obligatory, even though there may be very little the author can add to the contents of the document except to confirm that to the best of his recollection the document accurately recorded the transaction.

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[6] Para. 5.35.

2. COPIES OF DOCUMENTS

5.18 The common law rule is that copies of documents are not admissible in evidence: the original is required, because it is the "best" evidence on the point in question. The rule derives from the days before the invention of carbon paper or of the photocopier when copy documents had to be laboriously rewritten, and when the possibility of an error appearing in the copy which was not in the original was not at all remote.

5.19 The position has been ameliorated to some extent by PACE. Where a document is admissible in evidence under sections 68 or 69, it may be proved

(a) by the production of that document; or

(b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve."[7]

This provision does not apply to documents admitted in evidence otherwise than under PACE.

3. FOREIGN EVIDENCE

5.20 In large-scale fraud cases it is common for the prosecution to have to seek evidence from outside the jurisdiction. They may need documents or witnesses or both. If a copy of the document is available in this country, the prosecution may be able to rely on the provisions of PACE mentioned above. With this exception, the present law is unhelpful. Letters of request may be issued, through diplomatic channels, seeking the voluntary assistance of foreign authorities. But this is a slow, cumbersome and not always effective procedure. There is no power of which we are aware to compel someone out of the jurisdiction to come to this country to give oral evidence or to bring documents with him. Since the Evidence (Proceedings in Other Jurisdictions) Act 1975 evidence may be taken in this country for use in, inter alia, criminal proceedings in any country outside the United Kingdom. The reverse position unfortunately does not obtain:[8] evidence taken abroad is not at present admissible in criminal proceedings in this country. Indeed, even the limited powers under legislation first enacted in 1859 and 1885[9] which once theoretically permitted the taking of evidence abroad for use in criminal proceedings in England and Wales were abandoned when that legislation was repealed in 1975.

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[7] PACE, Sched. 3, para. 13.

[8] Our attention was drawn to the fact that the 1975 Act has been extended to Jersey by the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983, SI 1983 No. 1700. Where there is evidence in Jersey which it is desired to use in proceedings in England and Wales the Jersey Court can now be requested by a court in this country to grant assistance. The Director of Public Prosecutions provided us with a copy of an order made in a recent case at the Central Criminal Court under these provisions.

[9] Evidence by Commission Act 1859 and Evidence by Commission Act 1885, s. 3.

5.21 The Criminal Law Revision Committee in 1972 decided against recommending that provision should be made for obtaining oral evidence by commission in criminal trials.[10] They concluded that it would "open the door too wide to the danger that evidence might be introduced at a late stage which could not be adequately tested." The Committee considered a procedure by which a court could issue a request for the production of a document in the possession of a person within the jurisdiction of a foreign court. However, they concluded that such a procedure could cause delays if there were difficulties in obtaining the document and that the problem was not a sufficiently serious one for a change in the law. They added that "if serious difficulty occurs in future, no doubt the matter will be reconsidered."

5.22 Of course, even if a commission were to issue to take evidence abroad, there would be no compulsion on a witness to attend and give evidence before the commissioner or to produce documents, unless there were some sanction under the local law. Some countries, not all, might in the absence of a treaty or legislation comparable to our own Evidence (Proceedings in Other Jurisdictions) Act 1975 which enables evidence to be prepared for use abroad, object to the English and Welsh courts authorising even the voluntary taking of evidence in their territory. Nonetheless, it cannot be doubted that the present procedure (which in this country is one-way only) is extremely unsatisfactory in this respect.

D. The effect of evidential problems in fraud cases

5.23 Difficulties with evidence produce two main consequences in fraud cases. The first is that prosecutions sometimes cannot be brought owing to the strictness of the rules. Again and again one reads of questions being asked – why have there been no prosecutions in this case or that? In many cases the answer lies in the difficulties and sometimes in the actual impossibilities of strict proof. Evidence of some kind may be available in plenty to prosecuting authorities. Evidence of some kind may be available in plenty to the media or to others who press this question. But to say that evidence is available in plenty begs the question. The right question is not whether it is available in plenty but whether it is available and can be given in a form which is admissible in a criminal trial. Suppose the available evidence is in the form of a copy of a document. That copy may perhaps have been brought to light as a result of a seizure of documents or perhaps as a result of an inquiry under section 432 of the Companies Act 1985[11] or of some disciplinary tribunal where the strict rules of evidence do not apply. That copy document as it stands is not admissible evidence against any proposed defendant in a criminal court. Any prosecution based upon such a copy document is foredoomed to failure and in truth for that reason no prosecution would have been launched if that were the only evidence.

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[10] *Op. cit* (n.3, above), para. 277.

[11] Formerly Companies Act 1948, s. 165: see para. 2.39, above.

5.24 The "best" evidence is the original from which the copy has been taken. But suppose the original is abroad in the custody of a person unwilling to produce it? Suppose the maker of the document who alone can prove the truth of its contents is also abroad and unwilling to give evidence as to the truth of those contents? Suppose such a person having once given evidence at any committal proceedings and having disliked being cross-examined is unwilling to return to give evidence once again at the trial? The original cannot then be proved at the trial.

5.25 If society wishes to see the successful prosecution of those who are believed to have swindled large numbers of people, whether large investors or small investors, out of their assets, it must be prepared to stop the use of these ancient rules of evidence. They were devised as a protection for the innocent against the risk of wrongful conviction, not as a shield for those who, at least in the eyes of many, have been guilty of exceedingly serious and ingeniously devised frauds upon their victims, the concealment of which has often been as ingenious as the mode of their perpetration.

5.26 The second consequence of evidential difficulties is that they permit – indeed, they encourage – the skilled fraudster with no real defence to obstruct the administration of justice in the hope of gaining some advantage. Where the defendant has a substantive defence to put forward – for example, that although the transaction complained of occurred he was not acting dishonestly – the defendant clearly has no interest in prolonging the trial and possibly alienating the jury by requiring the attendance of witnesses whose evidence will be uncontested. But we have been informed of a sufficient number of instances where defendants have not been prepared to "agree" documents, where the only possible motive for their being unwilling to do so was a desire to prolong the trial, to confuse the jury and to take advantage of every conceivable opportunity to play the system. There have been cases where defendants have required every cheque, every bank statement, every account entry to be identified and explained by a series of hapless witnesses who have then been subjected to prolonged cross-examination about their history and methods of work in the hope that a weak point would emerge.

5.27 Although the instances of obstructive and unco-operative defendants are rare, we are convinced that changes in the law are required. It is unsatisfactory that outdated technical rules should prevent the bringing to justice of those the authorities believe to have committed offences. Nor can we be content with a situation where an expeditious court hearing can only be conducted with the co-operation of those on trial.

E. Objections to reform

5.28 Further reform beyond the modest reforms introduced in PACE must clearly address three issues which have haunted previous reformers.

5.29 First, justice requires that a defendant must have the chance to confront and question his accusers. He should not be deprived of the opportunity of testing by cross-examination the credibility of those who give evidence to be used against him. Indeed, the English system relies on him doing so in order to ascertain the truth. Thus it sometimes becomes apparent during the routine cross-examination of a witness whose testimony was expected to be uncontested, that the witness is in fact wholly unreliable and that little weight can be placed on what he says.

5.30 Second is the fear of fabricated evidence. The rules of evidence apply to both sides and if the prosecution is to have greater latitude to present its case either by means of oral testimony or by means of documents, so must the defence. It was this worry which led the Criminal Law Revision Committee to propose that exemptions to the hearsay rule in favour of documentary records should only apply to those made before the accused was charged. Of this proposal the learned editor of Cross On Evidence comments "this . . . provision reveals the absurd straits into which the cause of reform of the laws of evidence can be driven by the fear of manufacture. The reasoning appears to assume that there are some who are prepared to manufacture everything about a document except its date."[12]

5.31 Third is the concern that more widespread use of documentary evidence would undermine the "principle of orality" of the criminal trial. If the rules were too far relaxed, trials might simply consist of the examination of a mass of documents by rival counsel, with few live witnesses from whom the court could form any picture of the character and personalities involved.

F. Reform

1. SCOPE OF OUR RECOMMENDATIONS

5.32 We set out below our proposals for reforming the rules of evidence in criminal proceedings arising from fraud. If our proposals find acceptance, they will require legislation by Parliament to implement them. As we explained at the outset of our report, it will be for others to consider whether these proposals should be applied to all types of criminal proceedings. Whether or not they are so extended, we regard the proposals in this chapter as essential in order to secure the just and expeditious trial of fraud cases, particularly those cases which involve an international element. In Chapter 6, we deal separately with the procedural consequences of some of the proposed changes in the rules of evidence.

2. ADMISSIBILITY OF DOCUMENTS

5.33 We turn first to consider the problem of the use of documents[13] as evidence of the truth of their contents. We must first emphasise the

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[12] 6th ed. (1985), p. 56.

[13] In this section we use the term "document" to include a copy of the document. Our proposals on the use of copies follow at para. 5.40, below.

distinction between the admissibility of a document in evidence, and the truth of its contents. A bank statement might be admitted under the provisions of PACE to show that a sum of money was paid into an account on a certain date. That would be an example of the admissibility of a document as evidence of the truth of its contents. The statement would not be *conclusive* evidence of the payment of the money, but it would be some evidence of it. Whether the jury was ultimately satisfied that the money was paid in would depend upon its view of the reliability of the bank statement, and upon other evidence on the same point, from the prosecution or defence. As we have seen, the use of a document as evidence of the truth of its contents is only permitted at present where it is not possible to call oral evidence of the contents.

5.34 There was substantial support in the evidence which we received for a change in the rules of evidence so as to allow a wider class of documents to speak for themselves in this way. In effect, this is the position in civil proceedings, where provided that certain conditions are fulfilled,[14] documents are admissible as evidence of the truth of their contents. One possible approach which we considered would be to provide a general rule that documents should be admissible as evidence of the truth of their contents. The weight to be accorded to the document would entirely depend on the provenance of the document, the circumstances of its making and discovery, and the degree to which it is supported or contradicted by other available evidence. The parties would be left to decide whether a document should or should not be supported by oral evidence. They would not be forced to call witnesses they deemed unnecessary, nor denied the possibility of introducing what may be convincing items of evidence in documentary form just because no supporting witness is available.

5.35 We are not, however, persuaded that an absolute rule along the lines set out above would be satisfactory. Such an approach would withdraw the question of allowing documents to be given as evidence from judicial control and also from the process of preparation of the evidence before the trial. Unless some provision is made to determine in advance of the trial what documents are and are not to be used at the trial, time may be wasted at the trial with arguments in the absence of the jury whether a particular document shall or shall not be permitted to be given as evidence with the risk that the judge may play safe and refuse to admit the document on the ground that the risk of possible prejudice outweighs its evidentiary weight. We believe that the basic rule should be that in criminal proceedings arising from fraud documents should be allowed to speak for themselves and thus become admissible without formal proof. Whether or not a particular document which is currently inadmissible should be permitted to be

[14] In outline, a party seeking to use a statement must give notice to the other party specifying the reason for not calling the maker of the statement. The other party may object to its admissibility, by serving a counter notice, in which case the statement will not be admissible unless the maker is unavailable. The court has a discretion to admit a statement even though no notice was served and in spite of the absence of any of the (specified) reasons for not calling him.

given in evidence should be a matter for the judge to decide by the exercise of a discretion in advance of the trial. In other words, the judge should be given an "inclusionary" discretion.

5.36 Such an approach would operate in the following way. If one of the parties intends seriously to challenge the authenticity of a document and satisfies the trial judge at the preparatory hearings[15] that he has good reason for so doing, he must, of course, be allowed to make that challenge and the strict requirements of proof should not be relaxed. But where his challenge is without foundation the trial judge at the preparatory hearings should have the power to permit the document to be given in evidence without formal proof. A party must be entitled to put his own interpretation upon the contents of a particular document, but the question of the truth of the contents is a matter of weight, and not admissibility, and ultimately will be a matter for the jury. With this safeguard, a trial judge should, in our view, be empowered at the preparatory hearings to order that a document not only may be admitted in evidence but may be admitted as evidence of the truth of its contents. In exercising the discretionary power in the case of a document sought to be put in by the prosecution in this way the judge would need to be careful to ensure that there was no unfairness to the defence. It may be suggested that such a change in the law might encourage the fabrication of documents by defendants. Even if this be a risk, we consider the risk small. If documents are fabricated and the fabrication is exposed, the effect is likely to be traumatic upon the fate of those on whose behalf the fabrication has been perpetrated. We think that should be a sufficient deterrent to fabrication.

5.37 There is only one qualification that we would make to this rule, and that concerns documents which set out the evidence which a person could be expected to give as a witness and which have been prepared for the purpose of the proceedings. In respect of such documents, even though they may be records, PACE requires that they should not be given in evidence without the leave of the court which is to have regard to the circumstances in which leave is sought and to the contents of the statement, and to any likelihood that the accused would be prejudiced by its being given in evidence in the absence of the person who supplied the information on which it is based.[16] We think the principle contained in that formulation is right. Where a witness is available to give evidence, the presumption should be that he should be called. His testimony should not be incorporated in a document to be given in evidence before the other party has had a chance to object to this being done.[17]

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[15] We describe the form and nature of preparatory hearings in Chapter 6 at para. 6.25 *et seq*, below.

[16] Sched. 3, Part I, para. 2.

[17] But see paras. 5.42 and 5.47, below regarding the admissibility of depositions and experts' reports.

5.38 We believe that the party seeking to put in a document as evidence of the truth of its contents without formal proof should be required to provide some indication of the nature and source of the document. This information should be made available to the other side before the preparatory hearings. The judge, in exercising the discretionary powers proposed above, would be able to take into account any failure or refusal to disclose the source of the document in deciding whether or not to allow it to be given in evidence.

5.39 These proposals are not intended to supplant other existing rules of evidence. For example, evidence which is not relevant is not admissible, and this would continue to be the case. Again, the judge would retain his over-riding discretion to exclude evidence where its prejudicial effect outweighed its probative value. The discretion is often exercised to exclude some piece of admissible evidence which would add little to the prosecution case but which might unfairly damage the defence.

3. COPIES OF DOCUMENTS

5.40 To permit a more liberal use of copies of documents would be consistent with the proposals made above for the admission of documents in evidence though it would have a wider application than those proposals. In most cases we would expect the parties or their advisers to admit that the copy was a copy of the original and not to seek to require proof of the original. But we must remember that not everyone is reasonable and some may seek to insist on every point however technical and however unmeritorious being taken. We, therefore, propose that a judge should have power at the preparatory hearings to order that a copy document should be admissible to the same extent as if the original of that document had been produced and formally proved. We apprehend that this power will be of particular help in proving copies of foreign bank correspondence where formal proof of such correspondence may be fraught with difficulty and the provisions of the Bankers' Books Evidence Act 1879[18] may not, for various reasons, assist. Both prosecution and defence should be able to apply to the judge for such an order.

4. FOREIGN EVIDENCE

5.41 As we have already noted,[19] often the evidence from abroad cannot be obtained as witnesses may for a number of reasons refuse to come from abroad or having come to committal proceedings they may refuse to return for the trial. Under the present rules personal attendance of the witness who is abroad may be dispensed with if the other party (normally the defendant) agrees that a written statement containing the testimony of that witness may be given in evidence. And by section 68 of PACE an overseas witness whose evidence is contained in a

[18] See para. 2.53, above.

[19] See paras. 5.20–5.22, above.

documentary record need not be called if his attendance is not "reasonably practicable".[20] Our proposals above regarding documentary evidence would, if they were accepted, mean that there should be less need for oral evidence. But despite these means of avoiding the need to call witnesses from abroad, the problems remain and we therefore need to consider how they may be tackled.

5.42 Dealing first of all with the problem of the witness who attends and gives evidence at committal proceedings, but who thereafter is not available to give evidence at the trial, we propose that the trial judge should be empowered to order at the preparatory hearings that his deposition should be capable of being given as evidence of the truth of its contents. This would be subject to the comment that the evidence of the witness had not been tested by cross-examination at the trial, though if the witness had been cross-examined at the committal proceedings this would be contained in the deposition. We have proposed in Chapter 4 that the transfer certificate procedure should replace committal proceedings in appropriate fraud cases. If those recommendations are accepted, there will be no depositions available at all. Apart from witness statements, there may be available only the record of the evidence of those who are called to give evidence on an application for discharge but as we have made clear, oral evidence at that stage should be strictly limited. This makes all the more important the need to consider the problem of the reluctant witness who does not wish to come to this country at all.

5.43 The evidence we have been given leads us to believe that the conclusions of the Criminal Law Revision Committee regarding the taking of evidence on commission now need reconsidering.[21] We consider that the difficulties being experienced are such that legislation should now be sought to enable oral evidence to be taken on commission abroad for use in criminal cases in England and Wales. We recommend that such legislation should provide that the judge be given power to order at the preparatory hearings the examination and cross-examination of any witness (whether for the prosecution or the defence) who is unable or unwilling to attend the trial in this country. In civil proceedings it is possible to obtain the evidence of a witness resident abroad by sending a commissioner abroad to examine the witness and present his testimony to the court in writing. We see no reason why a jury should not form its own view of the value of such evidence from reading a transcript of the witness' evidence (or a translation by a sworn interpreter) just as a judge does in a civil trial. The results of the examination and cross-examination might be clearer, of course, if the examination abroad were recorded on a video tape to be played back at the trial so that the court and the jury could see how the witness reacted to questioning. A television screen and a video recorder could be installed in a court-room for this purpose as and when necessary without great difficulty or cost.

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[20] See para. 5.12, above.

[21] See para. 5.21, above.

5.44 As we indicated above,[22] even if there were to be fresh legislation here to enable evidence taken on commission abroad to be admissible in a court in England and Wales, it might be necessary for the foreign jurisdiction concerned to have legislation in force permitting evidence to be prepared for use abroad. Some countries already have such legislation in place.[23] Many do not, and further progress in this area should depend to a large extent on conventions, treaties and international agreements to provide for reciprocal arrangements regarding the taking and receipt of evidence.[24] Such treaties might provide powers to enable the legal authorities in one country to call upon the judicial authorities in another to invoke compulsory powers against witnesses in that other country. The United Kingdom is not at present a party to any international mutual assistance treaties, such as the European Convention on mutual assistance. Our inquiry has shown us the vital importance of close international co-operation if serious fraud offences are to be discovered and offenders properly brought to justice. We recognise that concluding such treaties is a long term matter. We believe however, that close attention must be given to the question of the level of mutual assistance which the United Kingdom is able to afford other countries, and to receive from them. The forthcoming consideration of an outline Commonwealth scheme by a meeting of experts in Marlborough House early in 1986 may provide a helpful impetus in this field.

5.45 It may well be that with the advances in modern technology, the law should now take account of the fact that with a live video link via satellite a witness in, say, New York or Sydney could "appear" on screen in the court-room and could be examined and cross-examined by counsel here without any loss of immediacy. No doubt it would be desirable for certain procedural formalities to be undertaken. If possible a judicial officer of the foreign country might be present in the studio to identify the witness, explain the nature of the proceedings, and the obligation to tell the truth. Alternatively, the examination of witnesses abroad could take place through a video link in advance of the trial and recordings of counsel here and the witness abroad made for use at the trial. Proceeding in either way might be expensive and difficult to arrange but the potential savings may outweigh the cost of bringing the witness over to give evidence in person. These possibilities ought at least to be available in cases where it can be arranged, in particular where the evidence of the witness may be crucial to the chance of a successful prosecution and the fact that the witness will have been cross-examined could enhance the value of his evidence. We do not regard it as a serious objection that a person in another jurisdiction might in practice be immune from proceedings for perjury in this country. So in effect is a witness resident abroad who flies into this country to give evidence and out again the next day.[25]

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[22] At para. 5.22.

[23] E.g., Hong Kong.

[24] See also para. 2.56, above.

[25] Subject to the possibility of extradition under the Extradition Act 1870, or return to this country under the Fugitive Offenders Act 1967.

5.46 We think that any legislation designed to give effect to the above recommendations, and any conventions or treaties to be concluded, should cover the procedures to which we referred in the last paragraph and to other procedures of this kind. Otherwise, when this method of taking evidence becomes practical, it will take many years before the necessary legislation can be obtained to make such evidence admissible.

5. EXPERTS' REPORTS

5.47 If the meat of a complex fraud case is in an accountant's report we can see no reason why a trial judge should not have power to order that that report should be admissible in evidence leaving it to the jury to decide how much, if any of it, they accept as correct. It must, of course, be open to challenge and since the accountant, unlike the foreign witness, is likely to be available to give evidence, it seems to us absurd that everything should be dragged out orally and the jury never see the report on which, in many cases, the prosecution is likely to have been founded.[26]

6. SCHEDULES AND CHARTS

5.48 Much of the documentary evidence in fraud cases is likely to be of such a nature that it lends itself to being summarised or put into the form of schedules. The relevant features of a series of transactions might be presented in this way, as might the structure of a group of companies. If the other party (normally the defence) are prepared to agree them, then there is no difficulty and they can be put before the court. If they are not agreed, they cannot be used at the trial unless their contents are formally proved. We think that the judge should have power at the preparatory hearings to permit such schedules to be admitted in evidence. This power ought to be capable of being exercised where there is no genuine challenge to the documents upon which the schedules are based.[27]

5.49 In Chapters 6[28] and 9[29] we discuss the need for use to be made by counsel and witnesses of a range of modern visual aids in the court-room so far as may be practicable. Demonstrations were given to us which showed how greatly the task of explaining complicated matters is eased by showing material on an overhead projector. This is particularly true of diagrams, charts and other material of this kind which have been specially prepared in order to explain matters clearly. In order to overcome any technical objections which may arise as to the admissibility of evidence presented with the help of improved methods of presentation of this kind (precisely what form will depend upon the nature of the case) we believe that a judge ought to have the necessary powers to ensure that evidence sought to be presented in this way by either party at the trial is admissible.

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[26] See further para. 9.14, below.

[27] See further para. 6.60, below.

[28] See para. 6.64, below.

[29] See para. 9.19, below.

Recommendations

Serial		Paragraph
22.	**The judge should have power to order that a document sought to be put in evidence by either the prosecution or the defence may be allowed in as evidence of the truth of its contents without formal proof.**	5.27 5.35 5.36
23.	**The party seeking to put in a document without calling its maker or other witness who can speak to it must give an indication of the nature and source of the document.**	5.38
24.	**The judge should have power to order that a copy document should be admissible to the same extent as if the original of that document had been produced and strictly proved.**	5.40
25.	**The judge should have a power to order that a deposition be admissible in evidence at the trial where the witness is unavailable, subject to the comment that it has not been tested by cross-examination.**	5.42
26.	**Legislation should be sought to enable evidence to be taken on commission abroad for use in criminal trials in England and Wales.**	5.43
27.	**Negotiations should be set in train with other countries to provide for reciprocal arrangements regarding the taking and receipt of evidence on commission.**	5.44
28.	**Treaties and legislation should allow for the possibility of using live satellite links to enable evidence to be taken from a witness in another country.**	5.45
29.	**A judge should have power to order that an expert's report should be admissible in evidence.**	5.47
30.	**The judge should have power to order that schedules and charts and other aids to presentation should be admissible in evidence.**	5.48 5.49

CHAPTER 6

PREPARING FOR TRIAL

A. Introduction

6.1 The focus of this chapter is on the preparation of fraud cases for trial in the Crown Court. In particular, we examine the pre-trial procedure known as the "pre-trial review", with a view to seeing how far the practice and procedure relating to this stage of the criminal process needs to be altered and strengthened so as to simplify, expedite and shorten the subsequent trial. In this connection, we include consideration of the obligations which should be placed upon the defence to disclose their case in advance of the trial.

B. Pre-trial reviews (or the "Summons for directions" procedure)

1. BACKGROUND

6.2 As a result of an initiative by the Criminal Bar Association, an experimental scheme was introduced at the Central Criminal Court in 1974 to hold pre-trial reveiws in selected criminal cases. It was initially confined in its application to complicated cases expected to involve lengthy trials, in particular complicated fraud cases. Cases could be set down for "practice directions" in advance of the trial for the purpose of identifying the essential points in issue, and settling various preliminary matters affecting the conduct of the trial. The principal aim of the scheme was to shorten the length of the subsequent trial. The original scheme was revised in 1977 to deal with problems which had arisen and to give greater flexibility with reference to the number and type of cases which might be listed for directions. Nevertheless, the semi-formal nature of the scheme was maintained insofar as no sanctions were provided to ensure the parties' compliance with any orders and directions made by the judge. Pre-trial reviews at the Central Criminal Court are now governed by practice rules dated 21 November 1977. Separate rules in similar, but not identical terms, have been issued by the presiding judges of the Circuits.

2. THE CENTRAL CRIMINAL COURT PRACTICE RULES

6.3 The Central Criminal Court practice rules provide that any case may be listed for practice directions upon an application in writing to the court by solicitors acting for any party, or by any unrepresented party, provided that the court is satisfied that the case is fit for such practice directions. If no party makes an application the court may take the initiative in listing the case for a hearing. Under the rules 14 days notice of hearing is required unless the parties agree to shorter notice. In relation to long fraud cases, it is the practice to hold a meeting at the List Office about eight to ten weeks after committal at which representatives of all the parties attend. At this meeting a date is fixed for the trial and the pre-trial review. In practice the pre-trial review is arranged to be held about four to six weeks before the trial. Not every case will be suitable for a pre-trial review. Generally speaking they are

held in cases where some or all of the following features are present: the trial is likely to last at least five days; there are several defendants and several counts on the indictment; the issues are likely to be complex; the documentation is likely to be large; the evidence is likely to be substantial and issues of admissibility are likely to arise over it.

6.4 Rule 4(e) provides that hearings "shall be attended by counsel briefed to conduct the case on trial or in special circumstances counsel specifically instructed to deal with matters arising under rules 5 and 6." Rule 5 provides that "counsel will be expected to inform the court",

(a) of the pleas to be tendered on trial;

(b) of the prosecution witnesses required at trial as shown on the committal documents and any notices of further evidence then delivered;

(c) of any additional witnesses who may be called by the prosecution and the evidence that they are expected to give;

(d) of facts which can be and are admitted in accordance with section 10(2)(b) of the Criminal Justice Act 1967, within such time as may be agreed at the hearing and of the witnesses whose attendance will not be required at trial;

(e) of the probable length of the trial;

(f) of exhibits and schedules which are and can be admitted;

(g) of issues, if any, then envisaged as to the mental or medical condition of any defendant or witness;

(h) of any point of law which may arise on trial, any question as to the admissibility of evidence which then appears on the face of the papers;

(i) of the names and addresses of witnesses from whom statements have been taken by the prosecution but who will not be called;

(j) of any alibi not then disclosed under the Criminal Justice Act 1967;

(k) of the order and pagination of the papers to be used by the prosecution at the trial and of the order in which witnesses for the prosecution will be called;

(l) of any other significant matter which might affect the proper and convenient trial of the case.

A hearing for directions under rule 5 may be dealt with in chambers before any judge of the court, not necessarily the judge who is allocated to try the case.

6.5 Provision is also made in rule 6 for the judge to hear and rule upon any application by any party to sever any count or defendant and to amend or provide further and better particulars of any count in the indictment. Rule 7 provides that the judge may "make such order or orders as lie within his powers as appear to him to be necessary to secure the proper and efficient trial of the case". Hearings for directions and orders under rule 6 and the making of orders under rule 7 "shall be held and made in open court by the judge allocated to try the case."

3. THE WORKING PARTY ON THE CRIMINAL TRIAL

6.6 A Working Party under the chairmanship of Lord Justice Watkins was set up in 1981 to "discuss and recommend improvements in the preparation of cases for trial in the Crown Court with a view to reducing the time and cost of proceedings". The proposals in the Working Party's report, issued in 1982, were aimed primarily at ordinary Crown Court cases rather than the more complicated type of case. The Working Party identified two undesirable consequences of the present system which focusses procedure in the Crown Court on the trial: first, that there is in most cases neither the occasion nor the incentive after committal to do any preparatory work for a trial until shortly before the hearing is due; second, the parties are not required at present to communicate with each other about the case and preparation often takes place without the benefit of knowing what in fact is in issue.

6.7 The Working Party proposed a scheme to try to remedy both of these faults, involving a system of forms and oral pre-trial reviews. On the first of their suggested forms a defendant would be required to notify everyone concerned shortly after committal whether the case would be contested or not. Thereafter a judge would be able to instruct counsel to fill in a further form which would require full preparation of the case by him before it could be completed satisfactorily. This would enable all the parties and the judge to see from the completed form what was likely to be in issue at trial and whether some or all of the issues could be resolved beforehand. The Working Party regarded oral pre-trial reviews as a last resort because of the expense of holding them and problems of listing, and only to be used if matters could not be resolved or issues sufficiently defined on paper. They pointed out that one of the defects of the pre-trial review as it operated at present was that it lacked "teeth". For this reason they thought that the new scheme should have the force of law and proposed that a Crown Court Rule be made in order to implement it. To ensure that the rule was observed and that the proposed scheme was effective, they recommended that its implementation be co-ordinated with reform of the costs and legal aid system. The Working Party looked forward to a payments system which took into account the fact that the time at which work was done was important, which gave reasonable incentives to do work properly and which enabled judges and taxing officers to penalise lawyers who did not play their part, especially if loss was caused to other parties.

6.8 In accordance with another of the Working Party's recommendations, a pilot project was established in 1983 for a limited period at six Crown Court centres (including the Central Criminal Court) to test the workability of the scheme. We understand that an analysis of the results of the pilot project by the Lord Chancellor's Department is approaching its conclusion.

C. Are pre-trial reviews working satisfactorily?

6.9 The short answer to the question posed is, "not always". In appropriate cases (whether of fraud or not) a well-prepared and properly conducted pre-trial review can be effective and can result in considerable savings of court time at the trial stage. This result can be brought about in a number of ways. For example, separate, shorter trials may be ordered either in respect of particular defendants or in respect of particular counts on the indictment. Although not at present obliged to, the defence may be prepared to indicate the general nature of their case and thus identify the essential issues. The evidence, both oral and documentary, may be reduced in this way or through admissions of fact by the defence. Summaries and schedules of documentary evidence prepared in advance and agreed by the defence can also contribute to the saving of trial time.

6.10 The saving of trial time through an effective pre-trial review produces a number of worthwhile benefits for everyone concerned in the trial process. Apart from lower costs (to the benefit of whoever is ordered to pay them), shorter trials mean that other cases awaiting trial with defendants both on bail and in custody can be brought on much sooner. And in principle, shorter trials with the issues more clearly defined will be easier for juries to follow and understand because they will not be burdened with cross-examination on irrelevant issues. There has been no quantitative or qualitative research into the effects of pre-trial reviews in the Crown Court.[1] There are obvious, though not necessarily insuperable, difficulties in conducting research, for example, to assess the level of savings which have been achieved. However, it is the view of many judges and practitioners that in some contested cases savings of one third or more of the estimated length of trials have been achieved as a result of effective pre-trial reviews.[2]

6.11 Our evidence suggests that pre-trial reviews operate sensibly and efficiently in a large number of the cases in which they are held at the Central Criminal Court and elsewhere. This is a considerable achievement. Nevertheless, we have had ample evidence that in a small but appreciable number of fraud cases pre-trial reviews are not assisting in the just, expeditious and economical disposal of proceedings in the way that they might. In these cases, it seems, the additional expense of holding a pre-trial review has not been justified by any significant savings in trial time nor has it resulted in any other obvious

[1] See Ashworth, *The English Criminal Process: A Review of Empirical Research* (1984), p. 68.

[2] At paragraph 10.11, we set out an estimate of the cost savings which can result from the reduction in the length of a typical long fraud trial at the Central Criminal Court.

benefits. There are several factors which either individually or in combination spoil or reduce the effectiveness of some pre-trial reviews, which we now examine.

D. Factors leading to ineffective pre-trial reviews

1. THE JUDGE

6.12 The judge conducting the pre-trial review is not always the judge allocated to try the case. As we noted earlier,[3] the Central Criminal Court practice rules provide that a hearing for directions may be dealt with by any judge of the court. We understand that it is now the usual practice for pre-trial reviews held there to be conducted by the judge allocated for the trial. This practice, however, is not so well established at other Crown Court centres.[4]

6.13 Even where the trial judge has been allocated and takes the pre-trial review, that judge does not always have the special knowledge or experience necessary to try fraud cases. We consider and make recommendations on this matter in Chapter 9.[5]

6.14 The judge is not always given an adequate opportunity to read the papers in advance of the pre-trial review. This point was raised by the Court of Appeal in a recent complicated commercial fraud case:[6]

> "Before the trial started there was a pre-trial review before [the trial judge]. A full scale review was certainly needed. However it was only a day or two before the review that the judge was provided with the papers, which were massive, and a copy of the opening speech of leading counsel before the committing justices. The review produced no worthwhile result. This was not the fault of the judge. He could not be expected to master this complicated case in the time available to him. Had he been able to do so we have no doubt that he would have done some extensive pruning. That would be an important object of a pre-trial review in cases of this kind. Prosecuting counsel who have been immersed in the details of a case for months sometimes do not appreciate the difficulty which a judge and a jury may have in assimilating the evidence. At the pre-trial review the judge (and he should normally be the one who is going to try the case) should be ready and willing to take the initiative to ensure that all unnecessary detail is omitted. This he cannot do unless he is given the papers well before the review hearing and has time to read and analyse them. If he is not he may think it right to postpone the review. We are sure that a robust pre-trial

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[3] See para. 6.4, above.

[4] Nonetheless, the desirability of this practice being followed has been expressed in, for example, a Direction by the presiding judges of the Midland and Oxford Circuit dated 21 January 1983.

[5] See para. 9.29, below.

[6] *R v Landy* (1981) 72 Cr. App. R 237, 243 *per* Lawton L. J. (the Israel British Bank case).

review in this case would have resulted in a shorter and more satisfactory trial."

6.15 Another factor is that in general the judges do not at present appear to have adequate secretarial facilities to enable them to prepare themselves properly for fraud cases of this kind.

2. COUNSEL

6.16 A frequent complaint from witnesses was the lack of proper preparation for pre-trial reviews on the part of prosecuting counsel and on the part of defence counsel. It was felt that too often basic preparatory work was either not being done at all or was being left to be carried out immediately before or even during the first few days of the trial with the result that it was too late to have any effect in expediting or reducing the length of the trial. To give but one illustration of the many instances of poor preparation cited to us, we were told of a case where 19 notices of additional evidence had been served by the prosecution, only three of which preceded the start of the trial. The defendants could not be arraigned and put in charge of the jury until the fourth day of the trial as the prosecution were not ready even at that stage for the case to be opened to the jury.

6.17 One reason put forward for inadequate preparation was that counsel are not always instructed or fully instructed in sufficient time to allow them to prepare properly. Sometimes the blame for this was put onto the prosecution for not making advance disclosure of all their evidence in good time. On other occasions, it was attributed to defendants who changed their solicitors shorty before the pre-trial review or the trial. In some cases this is clearly done as a deliberate tactic to cause maximum difficulty and delay, rather than for good cause, such as professional mishandling of the defence case. Another reason for inadequate preparation was that counsel on either side were not always of the right calibre or did not have the necessary experience required for handling fraud cases. Many witnesses (not only members of the Bar) urged upon us that poor preparation was a direct result of poor payment for preparatory work. The current levels of remuneration allowed out of public funds for this class of work, it was said, provided little incentive for counsel to devote their time to preparing properly for a pre-trial review.

6.18 Another common complaint in the evidence was that counsel instructed to appear at the pre-trial review were not always the counsel who were to be briefed for the trial. All too often, it seems, junior counsel (or even in some cases his pupil) attend but without leading counsel. In these circumstances, counsel for the defence, for example, might well feel unable to give away anything useful for fear of compromising his leader's conduct of the trial. He was merely there to "hold the fort" with instructions from defence solicitors to reserve the position of their clients on every point.

6.19 There are several reasons why counsel briefed for the trial do not always attend pre-trial reviews. First, on a purely practical level, counsel may be engaged in a trial elsewhere and because of the distances involved it may be difficult or impossible for him to break off from the trial at one court and attend a pre-trial review in another on the same day. Even where the distance involved presents no obstacle, judges are very often unwilling to release counsel to enable them to attend a "mere pre-trial review", even for half a day. This attitude is indicative of a second reason why trial counsel do not attend these hearings, namely, that despite many effective pre-trial reviews they have a poor reputation and are not treated seriously by some members of the judiciary and the legal profession. As one submission put it: "a general sense of the uselessness of the occasion frequently prevails". The view is all too often taken that matters which might sensibly be dealt with at a pre-trial review are better left to be considered on the first day of the trial when all the principal participants are necessarily present. A third reason for the non-attendance of trial counsel at pre-trial reviews is again the level of remuneration and the fact that there is little incentive for all counsel to attend when they might be doing other more lucrative work.

3. TIMING OF THE PRE-TRIAL REVIEW

6.20 The timing of the pre-trial review is another significant factor affecting the outcome and the effectiveness of the pre-trial review. If the review is held too far in advance of the trial, neither side may have done all the necessary preparatory work. If it is held only a short while before the trial, there will be little or no time in which to give effect to any directions by the judge or agreements by the parties.

4. SANCTIONS

6.21 A substantial body of evidence submitted to us emphasised that a major defect of the pre-trial review system as it operates at present is that it lacks "teeth". The same point was made by the Working Party on the Criminal Trial,[7] and some account was taken of it in their recommendation that a new scheme be implemented by a Crown Court Rule. Neither the Central Criminal Court practice rules nor those applying on the Circuits have the force of law. They wholly lack statutory backing and depend for their success entirely upon the commonsense of all counsel representing the parties and of the judge and of the former's willingness to co-operate with the suggestions made by the judge. They do not and could not be used to compel the parties to be co-operative. However much the judge may lean on counsel to be co-operative there are, at present, no sanctions behind the orders. There is little or nothing to prevent counsel who give specific undertakings at the pre-trial review from subsequently ignoring them. The prosecution are under no obligation to prepare their case in the best and simplest way. Nor is there anything to prevent a defendant, and in particular an experienced defendant,

[7] See para. 6.7, above.

playing the system however much his advisers may tell him that such action is unwise and may later have adverse consequences for him, by for example reducing the scope for a successful plea in mitigation if convicted. Without any sanction to point to, the defendant's advisers can be put into a difficult position. They can in effect be forced to submit to their client's decision not to co-operate in any way. Ultimately, of course, if a defendant believes he is going to be convicted he has little incentive to be helpful; a guilty defendant may think that his best and possibly only chance of acquittal is by playing the system. Suitable sanctions could, as we argue later, lead to greater co-operation from all parties.

6.22 The lack of teeth is plainly due to the fact that the pre-trial review is an informal procedure taking place outside the trial. Another consequence of this informality is that it is wrong for anything said or done in the course of the pre-trial review to be used for evidential purposes in the course of the trial unless the party affected consents to it being admissible.[8]

E. Improving the pre-trial review: our conclusions

6.23 The introduction of a system of oral pre-trial reviews has, in our view, been a valuable innovation in criminal procedure in recent years, which have seen its extension from the Central Criminal Court to most other Crown Courts in England and Wales.[9] We have no doubt that in many fraud cases the issues have been identified and subsequent trials have been shortened as a result of the part played by the judge and counsel on either side at pre-trial reviews. In this kind of case where the documentation is often vast and where the reduction of the evidence and the clarification of the issues assumes such importance, detailed and thorough preparation for the trial is essential to the whole course of the case. We believe that pre-trial reviews should provide a helpful stimulus for this work and greatly assist in reducing injustice, waste and delay.

6.24 We have highlighted a number of factors which either individually or collectively have led to the effectiveness of pre-trial reviews being reduced or nullified in many cases where they are held. It is essential that as much as possible should be done to eliminate the causes of these failures in order to overcome the poor reputation which pre-trial reviews have acquired in some quarters. In this area, we believe we have the strongest possible backing from the evidence of our witnesses, who on many points were in widespread agreement. We therefore make a number of recommendations which we believe will lead to a significant improvement of the system. It will be seen that what we propose is a basic change to the nature of the pre-trial review. It should cease to be an informal procedure taking place outside the trial where no sanctions are available against a refusal to co-operate.

[8] See *R v Hutchinson, The Times* 6 July 1985 (CA).

[9] The Central Criminal Court Practice Rules have also been used as a model for other jurisdictions outside England and Wales, for example, in Hong Kong: see Appendix E, para. 18.

Instead it should become a formal procedure, treated as though it was part of the trial and appropriate sanctions should be available accordingly.

1. PREPARATORY HEARINGS AS PART OF THE TRIAL

6.25 Historically "the trial" has always been regarded as the focal point in the criminal process. Technically, a trial in the Crown Court does not begin until "the jury has been sworn and takes the accused into their charge, to try the issues and having heard the evidence, to say whether he is guilty or not of the charge against him."[10] It seemed to us that one of the reasons for the present negative attitude towards pre-trial reviews in some quarters is that they are not seen as forming part of the trial, but are considered as being preliminary to it. We believe that the pre-trial review should be regarded as being a *preparatory part of* (not preparatory to) *the trial.* The trial should in effect be in continuous session, subject to necessary adjournments, from the start of the pre-trial review onwards. The practical importance of this is that it would help to reinforce the need to have the trial judge and counsel attending throughout and for the relevant essential work of preparation to be completed in advance of the pre-trial review.[11] It may well be that a change of nomenclature would be appropriate to signify our proposal that the pre-trial review should be considered as part of the trial. To this end, we propose that the pre-trial review should be referred to as "preparatory hearings". We have therefore adopted this title throughout our report.

6.26 One further consequence of such a change should be mentioned. The steps taken at the preparatory hearings, being formal, could if necessary be referred to at the trial. If, for example, a defendant tried to retract admissions made at the preparatory hearings, this could be put to him in cross-examination. Were it not so, a defendant might pretend to co-operate, so as to avoid the use of sanctions, but then withdraw all his admissions.

2. OPEN COURT

6.27 We think it would be desirable from the point of view of justice being seen to be done that preparatory hearings, as with the trial, should generally be held in open court in the presence of the defendant rather than in chambers. To avoid the risk of prejudice to a defendant, reporting restrictions similar to those which apply in relation to magistrates' court committal hearings should apply to preparatory hearings.[12]

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[10] See *R v Tonner; R v Evans* [1985] 1 WLR 344, 357 (CA). Before the jury is sworn, the defendant must be arraigned in open court, that is to say (1) he is called by name to the bar of the court, (2) the indictment is read to him and (3) in relation to each count on the indictment he is asked whether he pleads guilty or not guilty. Occasionally the arraignment takes place at the pre-trial review, but usually this is left until the first day of the trial.

[11] See further paras. 6.32, 6.39, and 6.41, below.

[12] We made a similar recommendation in respect of the hearing of an application for discharge: see para. 4.51, above.

3. CASES APPROPRIATE FOR PREPARATORY HEARINGS

6.28 Not all fraud cases sent for trial in the Crown Court will require preparatory hearings. We do not think it would be practicable to define the classes of fraud case for which they would be appropriate. Nor is it, in our view, necessary to try to do so. It should be open to the parties themselves to apply for a preparatory hearing, and for the court to determine in the light of the particular circumstances of the case whether such a hearing is warranted. If neither party requests a hearing, it should always be open to the court to take the initiative and order one. We would expect the parties to request, or the court to order, a preparatory hearing in all substantial or complex fraud cases.

6.29 We recommended that, in fraud cases brought to the Crown Court by way of a transfer certificate, defendants should have the right to make an application for discharge.[13] We would certainly not expect every defendant to make such an application, but in cases where a hearing is held for this purpose, it may constitute one of several preparatory hearings.[14]

4. THE JUDGE

(a) Same judge throughout

6.30 There are many advantages in having as the judge who conducts the preparatory hearings the judge who is going to conduct the trial. First, it means that at the start of the trial the judge will already have had the opportunity afforded by the preparatory hearings of familiarising himself with the case. It is inefficient for a judge to be brought into a trial (particularly one involving complicated issues) if he has not had ample opportunity to get to grips with the case at an early stage. Second, it is inefficient for one judge to have the burden of familiarising himself with the papers for the preparatory hearings if another judge who is to be the trial judge also has to familiarise himself with the same set of papers. Third, the judge will not be called upon at the trial to review decisions on admissibililty of evidence and on the conduct of the case made by an earlier judge. It is doubtful in any event whether one judge can make procedural rulings which will bind the trial judge in advance of the trial. Fourth, a judge who knows he is going to try a difficult case will from the outset begin to form his own ideas as to the shape and content of the trial, and, if he feels that boldness is required, can act boldly. A judge who conducts a review of "someone else's" trial may be more circumspect, for fear of handing on the case in a form which embarrasses the trial judge. This too is of no benefit to the proper administration of justice.

6.31 Almost all the witnesses who discussed this agreed in their evidence that in principle the same judge should conduct the preparatory hearings and the trial itself. However, one or two witnesses thought it would be unwise to follow this policy. They felt that, particularly if the

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[13] See para. 4.47, above.

[14] See para. 6.51, below.

powers available to the judge at preparatory hearings were to be strengthened, a defendant who was unhappy with a decision of a judge at a preparatory hearing might, rightly or wrongly, feel a sense of grievance if the same judge were subsequently to try the case. This consideration had, it was said, even greater force if the defendant were to be tried, not by the judge sitting with a jury, but by the judge sitting alone or by the judge sitting with two lay assessors.

6.32 In Chapter 5, we recommended that the judge should have power at the preparatory hearings to make orders concerning such matters as the admissibility of documentary evidence. Some defendants may be resentful of decisions taken and orders made. Nevertheless, we believe that the need for a fair, expeditious and economical trial, is sufficient justification. In Chapter 8 we recommend that for a small number of complex fraud cases a different tribunal is required consisting of a judge and two lay members. Again, defendants may feel indignant at being tried in this way; but, for this very reason, we have been careful to recommend that the decision to order trial by the alternative tribunal is taken by a (High Court) judge[15] other than the judge conducting the preparatory hearings and the trial. None of these recommendations cause us to depart from our view that it is essential, for the reasons set out in paragraph 6.30, that the judge presiding at the preparatory hearings must be the judge who, barring unforeseen problems, is going to conduct the trial. We do not underestimate the administrative headaches that this may sometimes cause those responsible for the allocation of judges and the listing of cases. Nevertheless, we believe that the benefits which would follow far outweigh the costs of dealing with these problems.

(b) Time to read the papers

6.33 We believe it is essential that judges are given adequate time to familiarise themselves with cases before the preparatory hearings. Their task will be made considerably easier if our recommendation that the prosecution should prepare a summary of their case is adopted.[16] In our view, it will be necessary for judges sometimes to be relieved from their court duties for a continuous period so that they can spend time on the necessary preparatory work in their room during the day rather than in broken periods out of court hours. Although the ever increasing volume of business in the Crown Court circumscribes the scope for court administrators to allow for "reading days", the demands brought about by some fraud cases are so exceptional that the judges concerned must be given adequate time to prepare for them. We are satisfied that any additional cost would be more than made up by savings in trial time at a later stage.[17]

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[15] Or judges of the Court of Appeal (Criminal Division) if the matter is decided on appeal.

[16] See para. 6.57, below.

[17] At para. 10.5, Serial 14, we set out an estimate of the daily cost of a circuit judge reading papers in his room.

(c) Secretarial facilities

6.34 It is important, in our view, for the judge who is studying a voluminous set of papers in a fraud case out of court to be able to dictate the crucial points in the case so that they can be set out in typewritten form for his later benefit. We understand that the secretarial facilities (typists, audio equipment) available to judges at the Central Criminal Court and elsewhere are seriously inadequate and make little or no allowance for this kind of work to be done. This is a matter of concern. We therefore recommend that the necessary steps be taken to ensure that the judges trying these cases are given adequate secretarial facilities.

5 COUNSEL

(a) Same counsel throughout

6.35 Commonsense and a regard to the proper administration of justice dictate that for the efficient running of a case counsel attending the preparatory hearings for both the prosecution and the defence should be counsel who are briefed to conduct the case at trial. If leading as well as junior counsel are to be briefed for the trial by either side (as in most serious fraud cases they would be) they too must attend these hearings. The evidence on the need for continuity of counsel throughout was unanimous. We have already highlighted some of the consequences where this does not happen.[18] Failure by all counsel to attend throughout the preparatory hearings and the trial will result in the loss of many of the benefits to be expected from the improved system of preparatory hearings which we recommend. We examine below possible solutions to the problem of how to ensure that the principle is adhered to.

6.36 One approach would be to adopt the suggestion made to us in evidence that counsel briefed to conduct the case at trial should be professionally obliged to attend all preparatory hearings connected with the case, unless there are compelling reasons which prevent him from doing so. Making it a matter of professional obligation to attend throughout would be a serious step to take. We would not propose it unless we were satisfied that it would be both fair and practicable to do so. Would it be fair, for example, to expect counsel to refuse other work in order to make themselves available for a short preparatory hearing? What should amount to a compelling reason for non-appearance at the preparatory hearings or the trial? If the escape clause were to be too broad, so that, for example, being "part heard" in another case was a sufficient excuse, the provision would be worthless. If it were cast in too narrow a form, it could lead to unfairness. The problem arises because the dates for preparatory hearings are often difficult to arrange to suit all counsel concerned, especially where a case involves several defendants and therefore a larger number of counsel. Would a professional obligation to attend throughout mean that finding a date which suited all counsel leads to further serious delays?

[18] See para. 6.18, above.

6.37 We have no doubt that one way of enabling counsel to attend preparatory hearings would be for judges to be more willing to release counsel involved in a trial to attend a preparatory hearing in another case. An adjournment of the trial would usually be necessary (otherwise counsel might be in breach of the existing obligations on him to be present throughout the trial[19]), but it would rarely, if ever, need to be for more than one day at a time. It is understandable why there should be some reluctance on the part of judges to grant adjournments for this purpose, particularly if the court's time cannot be filled with other business. In our view, a balance has to be struck in these circumstances. From the point of view of the administration of justice we would regard it as likely to be more beneficial that a trial be adjourned for a day than that a preparatory hearing in another case take place in the absence of one of the leading counsel. Courts ought to be prepared to be more flexible than the evidence suggests they are being at present. If counsel required for a preparatory hearing is already involved in a long trial, it ought to be possible to give the trial judge sufficient notice of the intended date for the preparatory hearing to enable everyone concerned with the trial (including the judge, jury, other lawyers, witnesses and listing officers) to plan accordingly. As we mention later,[20] the problem might to some extent be eased if all preparatory hearings were to be held on Fridays, so that at least trial courts would be able to sit, if necessary, on four consecutive days. If a judge is unwilling to grant an adjournment to enable counsel to attend a preparatory hearing in another case, the presiding judge should be informed so that he can use his authority to take whatever steps are necessary to resolve the problem. We would hope that his intervention would rarely be required once the practical importance of enabling counsel to attend preparatory hearings in fraud cases becomes known and accepted.

6.38 The problem of ensuring that counsel are able to attend preparatory hearings requires the co-operation not only of the courts but also of counsel and the clerk who organises his workload. Overbooking of counsel by some barristers' clerks sometimes causes problems, though it is not easy to see how such conduct can be deterred.[21] We would hope that our recommendation for proper remuneration for preparatory work in these cases might have some effect in limiting the need to overbook counsel.[22]

6.39 In our opinion, the changes in attitude which are required on the part of judges and the profession would not be sufficient in themselves to ensure that counsel attend both preparatory hearings and the trial. We believe that this must be reinforced by a provision written into the

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[19] *Code of Conduct for the Bar of England and Wales* 3rd ed., (1985), rule 151 (defence counsel), rule 161 (prosecuting counsel).

[20] See para. 6.52, below.

[21] The Royal Commission on Legal Services accepted that overbooking occurs "because of the many uncertainties and varying factors which apply in all litigation". *Report* (1979), Cmnd. 7648, para. 34.34.

[22] See para. 6.46, below.

Bar's Code of Conduct to the effect that counsel briefed for a trial should be obliged to attend all preparatory hearings unless there are compelling reasons wich prevent him from doing so. A "compelling" reason would include, for example, absence on a professional engagement either abroad or in another part of the country in circumstances in which it would not be practicable to attend the preparatory hearing on a date or at a place otherwise suitable to the other counsel involved. In our view, breach of the obligation without good cause should lead either to a reduction of the publicly-funded fees payable to counsel for the work done, or in some cases to disciplinary action by the Bar Council.

(b) Specially trained and experienced counsel

6.40 In Chapter 9 we emphasise the importance which we attach to the need to ensure that counsel selected to prosecute in fraud cases have the necessary experience, training and aptitude to handle such cases.[23] Our recommendations in this regard have a bearing on virtually every stage in the prosecution of fraud cases. If they are implemented, we would expect them to lead to significant improvements in the preparation of these cases for trial, which is a matter we consider next.

(c) Preparation

6.41 It is clear to us that one of the keys to the expeditious and efficient disposal of the trial is early, detailed and thorough preparation of the case by everyone concerned. Inadequate or late preparation by the prosecution has led to disastrous consequences in terms of days of wasted time in court and, more seriously, unmeritorious acquittals. The evidence of witnesses and some shocking examples of what has happened in practice[24] have convinced us that there is scope for significant improvements in the preparation of fraud cases for trial.

(i) By the prosecution

6.42 We have already stressed in Chapter 2 the need for the involvement of prosecuting counsel in the early stages of the investigation of fraud cases. By the time the indictment is drawn up following committal or, as we propose, transfer of the case to the Crown Court by certificate issued by the prosecuting authority, counsel should already have done much to shape the case insofar as he should have ensured that the case is kept to manageable proportions and that the indictment is not overloaded by the inclusion of too many counts or too many defendants. .

6.43 Following the drafting of the indictment and before the first preparatory hearing a large amount of work will usually remain to be done. The onus will be on the prosecution to ensure that the following matters are dealt with without delay at the earliest possible stage.

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[23] See para. 9.33 *et seq*, below.

[24] See para. 6.16, above.

(Some of these matters are considered in more detail later in the chapter).

(1) The defence should be sent copies of any witness statements and documentary exhibits intended to be used at the trial, not already served on them.[25]

(2) A summary, cross-referenced to the witness statements and documentary exhibits, should be prepared by prosecuting counsel and served on the court and the defence outlining the prosecution's case against each defendant and in respect of each count on the indictment.[26]

(3) A list of witnesses in the approximate order in which they are to be called (or their statements read) should be prepared.

(4) Schedules and summaries of the relevant contents of documentary evidence should be prepared and agreed with the defence.[27]

(5) Requests for the defence to admit facts and documents should be prepared and served on the defence.[28]

(6) Chronologies of relevant events and a glossary of terms should be drawn up.[29]

(7) Consideration should be given as to how best the evidence should be presented at the trial in a way which will make it capable of being more easily understood; in particular, what visual aids need to be prepared for use.[30]

6.44 In our view counsel appointed to prosecute, both leading and junior, should have the primary role in taking responsibility for the preparation for the preparatory hearings and the trial. We regard it as essential that members of the independent Bar should be involved in this way and that their involvement should be preserved even when the Crown Prosecution Service is fully operative. The Bar should bring the same degree of independence as is required of the prosecution service. While counsel should have this primary role, it is vital of course that they must work very closely with the prosecuting authority at all stages.

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[25] In accordance with the guidelines issued by the Attorney General (in December 1981) on the disclosure of certain categories of information to the defence in cases to be tried on indictment: see [1982] 1 All ER 734; (1982) 74 Cr. App. R 302.

[26] See paras. 6.55–6.59, below.

[27] See paras. 6.60–6.61, below.

[28] See paras. 6.88–6.96, below.

[29] See paras. 6.62–6.63, below.

[30] See paras. 6.64–6.66, below.

(ii) By the defence

6.45 Many of the recommendations we make later in this chapter, particularly in relation to defence disclosure, will require defence counsel, like prosecuting counsel, to put greater efforts into the preparation of the case in advance of the trial. Defence counsel too will have to be ready to deal with the preparation of a case at an earlier stage. Before this can happen, defence counsel must receive full instructions from solicitors at an early stage. Instructing solicitors in turn rely upon the prosecution not serving notices of additional evidence late in the day. If the defence do not know the full strength of the prosecution case early enough, they cannot be blamed for late preparation. Our proposals regarding the prompt disclosure of witness statements, documentary evidence and the summary of the prosecution case are intended to ensure that this excuse should not be available to the defence.

(d) Remuneration

6.46 By requiring counsel to take the lead in preparing fraud cases more thoroughly and at an earlier stage before the preparatory hearings, and to respond promptly to the orders and directions of the judge at those hearings, the overall effect of our recommendations will be to place greater burdens and responsibilities upon both prosecution and defence counsel. We do not concern ourselves with what the appropriate level of remuneration for this work by counsel should be because this would take us outside our terms of reference. Nevertheless, in our view, it is crucial that counsel should be adequately rewarded for this work, in recognition of the additional burdens and responsibilities which are to be placed upon them, to provide proper incentives for the work to be done well and at the appropriate early stage, and to ensure that counsel of the necessary calibre and experience are attracted to and remain available for this type of work. Moreover, where counsel's efforts in preparation contribute to the shortening of the trial, the extra work and expertise involved must be reflected in the level of fees paid.

6.47 The present arrangements for the remuneration of prosecution and defence counsel out of public funds broadly distinguish between, on the one hand, work in preparing for the trial and, on the other hand, attendance at the trial. This distinction apart, attendance at pre-trial reviews is treated for this purpose as a separate item and seemingly as deserving of lower recompense than for attendance at the trial. We cannot emphasise too strongly the importance we attach to preparatory hearings in fraud cases. Our conclusion that for all practical purposes they should be regarded as forming part of the trial should be reflected in the arrangements for remuneration. Counsel should be paid on the basis that the main work of preparation is done in advance of the first preparatory hearing rather than as at present at a later stage. Thereafter attendance at the preparatory hearings and the trial should be paid at the same rate.

6.48 While we have been concerned to stress the importance of paying counsel properly for preparatory work, there may be circumstances in which counsel's fees should be reduced to take account of time wasted by slipshod work.[31]

6. FIXING PREPARATORY HEARINGS

(a) Listing

6.49 If our proposals later in this chapter for putting teeth into preparatory hearings are accepted (for example, the judge giving directions as to the admissibility of documentary evidence, the defence outlining their case and making admissions of fact), it will be imperative that the holding of preparatory hearings is not delayed. As we saw earlier,[32] in long fraud trials at the Central Criminal Court, pre-trial reviews do not take place until it is possible for a trial date to be fixed. The pre-trial review is not usually held until some four to six weeks before the trial. Until the various decisions needed at the preparatory hearing stage have been taken, no-one can begin to estimate many matters relevant to fixing the date for the trial including the length of the trial.[33] In our view the first preparatory hearing should take place as soon as possible after committal or the issue of a transfer certificate. We consider that it should be the duty of both the prosecution and the court, in practice, the listing officer, to ensure that not later than a specified period (perhaps 28 days)[34] after committal or transfer certificate, or such longer period as the court may allow, a date for the first preparatory hearing is fixed. We have already recommended that in the appropriate cases a judge should be nominated as soon as possible after the case comes within the jurisdiction of the Crown Court.[35] The process of nominating a judge will need to be co-ordinated with the fixing of the date for the first preparatory hearing. Once the nominated judge has seisin over the case, he should keep the pressure on the parties and exercise his authority to ensure that no delay is allowed before the second preparatory hearing, if required, except for very strong reasons. The listing officer should have the responsibility of monitoring the progress of the case once it comes to the Crown Court and ensuring that delays at any stage which will be likely to affect the progress of the case are reported to the nominated judge for him to decide whether any action is required.

6.50 In Chapter 2 we recommended that there should be an independent monitoring body (the Fraud Commission) whose main responsibility would be to study and advise on the efficiency and cost effectiveness of fraud cases from year to year. One of the Fraud Commission's functions should, in our view, be to observe the progress of fraud cases through the courts and to examine and advise on the time taken

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[31] See para. 6.39, above and paras. 6.61, 6.81 and 6.98.

[32] See para. 6.3, above.

[33] See para. 6.101, below.

[34] See para. 6.100, below in relation to time periods generally.

[35] See para. 4.46, above.

between the different stages and the causes of delays. For this purpose the listing officer should be required to respond to any inquiry initiated by the authority.

(b) Number

6.51 Some fraud cases will require more than one preparatory hearing, because it may well be impossible to resolve all outstanding matters in one day. There should, in our view, be such number of preparatory hearings as each case requires. Extra time and effort at this stage of the proceedings should be more than offset by the benefits which should be achieved by having shorter, clearer and more efficient trials.

(c) Timing

6.52 The precise dates and timing of preparatory hearings will depend upon the availability of the nominated judge, the convenience of counsel on either side, and the needs of the individual case. It has been suggested by one or two witnesses that it might assist those responsible for listing if some preparatory hearings were to be heard outside normal court hours, for example, beginning at 4.30 pm. We do not favour this idea for several reasons. Generally, we believe it is desirable that a whole day should be set aside for a hearing so that its effectiveness is so far as possible unhindered by the constraints of time. There is also the problem of providing the necessary court staff and security to enable the court to remain open in the early evening. There may, however, be advantages for the courts to adopt as standard the practice of setting aside one day of the week for preparatory hearings. At the Central Criminal Court most pre-trial reviews are held on Fridays. Clearly it would not be necessary for every court to keep every Friday free, but if the practice were universally adopted of holding preparatory hearings as and when they are required only on Fridays we think that this might facilitate finding a date which is convenient to the trial judge and all counsel.

(d) Place

6.53 So far as the place of the preparatory hearings is concerned, we think there is scope for flexibility. We see no reason why they should always be held in the location of the Crown Court where the trial is due to be heard. Given the overriding importance of having the trial judge and all counsel briefed for the trial present, it may be sensible and more economic in some cases for the preparatory hearings to be heard at a different location to suit the convenience of the judge and counsel.

F. Preparing the prosecution's case

6.54 In paragraph 6.43 we set out a list of the principal matters which the prosecution would need to prepare before the first preparatory hearing. We now return to some of the matters listed there for more detailed consideration.

1. SUMMARY OF THE PROSECUTION'S CASE

(a) Present practice

6.55 The practice has grown up in recent years in large and complicated fraud cases, as in other comparable cases, for the prosecution to provide a summary of their case for the court and the defence, usually drafted by junior prosecuting counsel. We understand that this procedure was first introduced in cases prosecuted by the Director of Public Prosecutions and has been extended to certain cases prosecuted by other authorities. There appears as yet to be no uniform practice as to the time when these summaries are prepared and circulated, nor as to the form which they should take. In a properly prepared case, the prosecution seek to let both the judge and the defence have a copy of the summary in a reasonable time before the date fixed for the pre-trial review, but the evidence suggests that this practice is not always followed. Often the summary takes the form of a note of the prosecution's opening speech. Provision of a summary can be regarded as part of the process of disclosure of the evidence which the prosecution propose to call. The obligation on the prosecution at present to make disclosure in cases to be tried on indictment begins at or before committal proceedings when the prosecution are required to supply copies of witness statements and would also arise, as we have recommended, upon the issue of a transfer certificate.[36]

(b) Consultation

6.56 The importance of having a summary of the prosecution's case in fraud cases, was emphasised by many witnesses. The point was made that when the judge comes to a case for the first time having been supplied with a copy of the indictment, together with a formidable bundle of witness statements and documentary exhibits, he will have no quick means of forming a view as to the way the prosecution intends to put their case unless he also has a copy of the prosecution's summary. Likewise, without a summary each defendant, or his representatives, may not be able to see from the indictment and the statements how the evidence will be pieced together, and precisely the case which he will have to meet.

(c) Case statement

6.57 We agree with our witnesses that in many fraud cases a properly prepared summary of the prosecution's case setting out the nub of the case against each defendant within the compass of a few pages is essential. To distinguish clearly between this and other types of summary, we refer to this document as a "case statement". The prosecution's case statement must, in our view, be drafted by prosecuting counsel and must be made available to the nominated judge and the defence at an early stage, which should be as soon as possible after the preferment of the indictment. In any event, it should be made available not later than a specified period before the first

[36] See para. 4.38, above.

preparatory hearing.[37] The judge should be given the power to order that a case statement be prepared, which he should exercise in cases where the prosecution have failed to prepare one by that time.

6.58 In Chapter 9, we examine the question of what written material should be placed before the court, and in particular the jury. We recommend that the jury should be supplied with, among other material, copies of the prosecution's case statement. The case statement should not, in our view, simply be a note of the opening speech. Rather, we see it as a document in its own right, amounting to an expanded version of the indictment and one which in effect perfects the prosecution's obligation of disclosure of the evidence. The case statement should include a statement as to:

(i) the primary facts;

(ii) the sources of those primary facts, that is to say the witnesses who will speak to them or the relevant exhibits, or both;

(iii) the propositions of law relied upon; and

(iv) the consequences of the above in relation to each count in the indictment, with appropriate references and cross-references.

The disciplines which should be observed in the preparation of this document would be similar to those used in the preparation of other documents, and they are considered more fully in Chapter 9.[38]

6.59 Bearing in mind our later recommendation that the prosecution case statement should be supplied to the jury, it would be necessary to allow the defence an opportunity to object to its contents (for example, on a matter relating to the admissibility of evidence) at the preparatory hearing stage. Since the case statement should have been made available before the first preparatory hearing, the defence would have the opportunity to make any submissions on it to the judge at that stage. After considering the matter with counsel on both sides the judge should be able to rule on the submissions and order any necessary amendment accordingly.

2. SCHEDULES AND SUMMARIES OF EVIDENCE

6.60 As we said in Chapter 5, much of the documentary evidence in fraud cases is likely to lend itself to being summarised or put into the form of schedules or charts. We were concerned there to ensure that the judge has power to order that they may be admitted in evidence.[39] The onus should always be on the prosecution to see that documentary evidence is reduced as far as possible. Appropriate schedules and summaries of the relevant contents of these documents should be prepared and

[37] See para. 6.100, below.

[38] See para. 9.10, below.

[39] See para. 5.48, above.

served on the defence with a request that they be agreed, with or without modification, before the first preparatory hearing. The prosecution should also draw up and serve on the defence a notice to admit facts and documents. We have found it more convenient to deal with this matter separately when considering the obligations of the defence generally.[40]

6.61 In the event that the prosecution have not prepared appropriate schedules or summaries of evidence on time, the judge should, in our view, be empowered to order at a preparatory hearing that the prosecution prepare and serve them on the defence within a specified period.[41] The judge should also be able to give directions, where necessary, as to the scope and form of such schedules and summaries. In support of these powers, the prosecution's failure without reasonable excuse to comply with the judges's orders and directions should be met with an appropriate sanction, which in this case should, in our view, be a reference to the appropriate authority for this matter to be considered in the assessment of prosecuting counsel's fees.

3. GLOSSARIES

6.62 In the course of a fraud trial jurors may encounter many technical, legal and financial terms with which most of them are likely to be unfamiliar. It is to be hoped, of course, that the language used in explaining matters to the jury will be kept as simple and clear as possible so that everyone has a reasonable prospect of being able to understand what is being said. However, technical terms cannot always be avoided and where they are used their meaning should always be given. It has been suggested that it would help jurors to understand if they were supplied with a glossary explaining in every day language the terms likely to be encountered during the trial. This view is supported by the research which we commissioned.[42] Members of the jury could be given the glossary at the start of their involvement in the trial with time for quiet study, and have it for reference throughout the trial. They might also be encouraged to take it away with them at the beginning of the trial to read at home in their own time. A glossary could be produced quickly and relatively cheaply on a micro-computer with a word processing package. In due course a comprehensive glossary could be prepared and stored on computer, from which glossaries tailored to individual trials could be produced on demand.

6.63 We believe that glossaries would make a useful contribution to better juror understanding in fraud trials and we therefore recommend that they be used. The responsibility for preparing the glossary should lie with the prosecution, who should serve a copy on the court and the

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[40] See para. 6.85, below.

[41] See para. 6.100, below.

[42] See Black, "The effect of glossaries on jurors' comprehension in fraud trials", in *Improving the Presentation of Information to Juries in Fraud Trials* (1986), pp. 1 to 15 (published by HMSO separately with this Report.) See further Appendix A, para. 8.

defence before the preparatory hearings. The judge should be empowered to order that glossaries be prepared and used where the prosecution fail to take the initiative.

4. PRESENTATION OF EVIDENCE

6.64 A large body of witnesses stressed the importance of clear and efficient presentation of evidence at the trial. Many of them urged that greater use should be made of modern effective techniques of presenting complex information to a lay audience, such as visual display and projection systems, as a further way of assisting in improving the jury's understanding of the evidence. In Chapter 9, we consider various kinds of visual aid which might be employed in the court-room and specifically recommend that the authorities should encourage the use of overhead projectors as an aid to juror comprehension.[43] Clearly, wherever the use of such visual aids is appropriate, consideration must be given at an early stage how the relevant information can best be presented. When the prosecution have settled this, where appropriate in consultation with witnesses, such as accountants, who are to give expert evidence, the necessary work of preparation must be put in hand. It is essential that the prosecution team give effect to this in advance of the preparatory hearings.

6.65 In many fraud trials evidence will consist of numerical information, in the form of accounts, balance sheets and the like. Here in particular the ability of everyone concerned, including the jury, to follow and understand this kind of information can be affected by the way in which it is presented to them. Part of the research which we commissioned has shown various simple measures which can be taken in order to improve the presentation of numerical information.[44] We do not need to enter into detail here, but we think that those concerned with the preparation and presentation of this type of information in court should have regard to the findings of this research.

6.66 It is clear to us that counsel must be ready to adopt new techniques of presentation as and when they are developed. Having regard to a manifest failure on the part of counsel in the past to move forward with the times in this respect, there is no room for complacency. The prosecution must do everything possible to make the presentation of evidence more effective. If the prosecution do not do this, then the court should ensure that they do so. In Chapter 5, we dealt with the admissibility of such evidence.[45] The trial judge should also be empowered to make orders and give directions for the preparation and use of visual aids at the trial. These powers should, whenever necessary, be exercised at the preparatory hearings.

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[43] See para. 9.25, below.

[44] See Wright, Lickorish, Hull, "Presenting Numerical Information to Fraud Trial Juries" in *Improving the Presentation of Information to Juries in Fraud Trials* (1986), pp. 17 to 39 (HMSO).

[45] See para. 5.49, above.

G. Disclosure by the defence

1. INTRODUCTION

6.67 In this section we discuss the extent to which the defence should be obliged to outline the nature of their case in advance of the trial. We also examine how far the defence ought to be required at or before the preparatory hearings to make admissions of facts and documents, to disclose the names of likely witnesses and to bring up points of law which it is intended to raise at the trial. A number of our witnesses argued that the absence of any general requirement of advance disclosure by the defence operated so as to make fraud trials longer, less efficient, more obscure and ultimately less just.

6.68 To some extent we shall be going over ground already examined by the Royal Commission on Criminal Procedure in their 1981 report.[46] The Royal Commission proposed only a limited extension of the present requirements of defence disclosure (relating to expert evidence) arguing on the basis that any general requirement for the defendant to give advance information regarding his defence would be objectionable in principle and unlikely to save much time and expense during the trial. Their consideration of this issue, however, took place in the context of criminal trials generally. We are concerned to see what changes in law and procedure are required to deal with the problems arising from fraud cases, in relation to which other considerations and arguments must, in our view, be taken into account in this context.

2. PRESENT LAW

6.69 Subject to the few limited exceptions mentioned below, there is no general obligation upon the defendant to give information to the prosecution in advance of the trial. The prosecution may attend for trial knowing next to nothing about the defendant's case, except perhaps what his plea will be. The defendant need not give anything away to the police when being questioned. Once he has been charged he need not tell the police or the prosecuting authority what his defence will be, the names of his probable witnesses or the evidence which they are to give. Even at the stage of the trial the defendant may remain silent throughout since he is not obliged to go into the witness box or call any evidence on his behalf. He has the right to do and say nothing at that stage. He can insist that the prosecution discharge their burden of proving their case against him beyond reasonable doubt and the court may never hear his version of the events other than his plea of not guilty. If the defendant chooses to put forward a defence to the charge his opportunity to do so comes at the latest in cross-examination of the prosecution witnesses and at the end of the prosecution case when he may give evidence himself and call his own witnesses. The fundamental principles at play here are the burden of proof, the right of silence, the protection against self-incrimination and

[46] *Report of the Royal Commission on Criminal Procedure* (1981), Cmnd. 8092, paras. 8.20–8.23.

the free choice of giving or tendering evidence on behalf of the defence.

6.70 The absence of any general obligation of defence disclosure is, as we have indicated, subject to a number of exceptions.[47] Thus a defendant who intends to rely upon the defence of alibi in a trial on indictment may not, without the leave of the court, adduce evidence in support unless he has given notice of that evidence within seven days of the conclusion of committal proceedings.[48] This defence will hardly ever arise in fraud cases. Second, whether or not a defendant intends to call evidence on his own behalf, he is required through his counsel to put his case to the witnesses for the prosecution during the prosecution case. Failure to do so may result in hostile comment from the trial judge. Third, provisions due to come into force during 1986 will require parties to criminal proceedings in the Crown Court to give advance notice of the substance of any expert evidence which they propose to adduce.[49] The defendant's right of silence during the trial is affected to the extent that the judge, but not the prosecution, is entitled to comment on the defendant's failure to give evidence on his own behalf by telling the jury that the uncontroverted evidence of the prosecution tending to show the defendant's guilt may be more easily accepted by them, although he must stress that silence cannot amount to evidence of guilt.

3. SHOULD THERE BE A REQUIREMENT OF ADVANCE DISCLOSURE OF THE DEFENCE?

6.71 We are not concerned here in any way with the defendant's right of silence while under police interrogation. It was not a matter upon which we sought evidence and very few of our witnesses commented on it. However, a number of witnesses urged that a defendant in a fraud case should be required to disclose the nature of his defence at an early stage before the trial. Some went further and suggested that a system of pleadings should be introduced along the lines of the procedures which are a feature of civil proceedings whereby during the early stages of litigation the parties define the matters which are at issue between them.

(a) The arguments in favour

6.72 The arguments put forward for a change in the law to require advance disclosure of the defence in fraud cases are as follows. First, it is said that many fraud trials take longer than is necessary because so much time is taken up with evidence about which there is ultimately going to be no real dispute between the parties. If the defence case were

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[47] We note that under the now dormant Exchange Control Act 1947, a person suspected of an offence against the Act could be directed to furnish information in his possession or control and to produce books, accounts and other documents. Failure to comply with such directions was itself an offence and fresh directions to comply could be given following conviction. A suspect thus had no right of silence.

[48] Criminal Justice Act 1967, s. 11.

[49] Police and Criminal Evidence Act 1984, s. 81, and rules of court to be made thereunder.

disclosed in advance trials would be *shorter* and more *efficient*. Second, it is argued that the jury's understanding of the case is often impaired because it may not be until many days or weeks into the trial that the members of the jury have any chance of discovering what the real issues are which they are being asked to try. However clearly the prosecution case is explained, the jury may be listening to the evidence for a long period wondering what the line of defence will be. By the time the defence eventually begin to open their case, the jury may lose sight of the important details of the prosecution's case. Trials would be *clearer* for the jury if at the outset they were told in outline what part of the prosecution's case the defence intended to challenge. A further argument is that there would be less scope for fabricated defences. The prosecution would be able to investigate in advance any relevant defence claims which require investigation.

6.73 The arguments which have been advanced in support of the requirement of advance disclosure of the defence seem to us to provide a case for change. We have not been able to test through research the extent to which trial time is wasted because of the defence failure to outline their case in advance. Nor have we been able to test empirically the truth of the assertion that the jury's understanding of cases is impaired where it has not been clear at the outset of the case what the real issues are. Nevertheless, commonsense and the weight of the evidence submitted to us on this issue lead us to conclude that the lack of any obligation to disclose the defence case in outline in advance of the trial is a hindrance to the efficient handling of many fraud cases.

(b) Objections to the proposal

6.74 So far we have not examined the objections to the proposal. The main objection, as some have argued, is that it is an infringement of fundamental principles of our criminal law in regard to the burden of proof, the right of silence and the protection against self-incrimination. Further objection to the proposal is taken on the grounds that it is impossible to devise an effective sanction against a defendant who fails to comply with the requirement. Some sanction would be required or otherwise defendants who intended to play the system would have no reason to co-operate. The two objections are to our minds linked insofar as the extent to which the fundamental principles to which we have referred are or may be affected depends upon the sanctions which are available in the event of a failure by the defendant to make advance disclosure of his defence.

6.75 Before we consider the question of possible sanctions, we should make it plain that we would not intend any proposal we made in this context in any way to involve a weakening of the principle that the prosecution bear the burden of proving their case beyond reasonable doubt. As we have made clear in this chapter, the prosecution will be required to prepare their case thoroughly in advance of the preparatory hearings, and this will include making early disclosure of their evidence, including witness statements and documentary exhibits, together with

the case statement. If the prosecution have done their work properly the defence should be clear as to the basis of the prosecution case. The defendant and his lawyers should have sufficient time to consider the case before and at the preparatory hearing stage. We recognise that the burden of proof would be affected if the prosecution were allowed to alter the nature of their case once the defence had been disclosed. To avoid this possibility, any proposal would therefore have to involve the prosecution's case being "fixed" before the defence could be required to show their hand. If the prosecution sought to change their ground during the trial in order to overwhelm the case put forward by the defence, the judge might well be justified in intervening to stop the case altogether or, if it were not too late, to ensure that the prosecution adhered to their original case as set out in the case statement. In this way, we believe that the principle of the burden of proof resting on the prosecution would remain intact.

(c) Sanctions

6.76 Several possible sanctions were suggested for a defendant's failure or refusal to disclose the general nature of the defence case in advance of the trial. The main suggestions were as follows:

(a) A defendant should be refused any right to give evidence himself at the trial or to call any factual evidence other than perhaps expert evidence.

(b) The sanction of costs should be used where it is clear that the failure to make prior disclosure of the line of defence relied on has unnecessarily prolonged the trial.

(c) After comment from the prosecution and the judge, the jury should be entitled to take account of, and draw any appropriate inferences from, the defendant's failure to disclose a particular line of defence on which he relies at his trial.

6.77 In regard to the suggestion at (a), the few witnesses who supported this pointed to the ineffectiveness of the provisions for giving advance notice of alibi. If the defendant does not notify his intention to raise this defence in advance, he cannot adduce evidence in support without the leave of the trial judge. Judges inevitably find themselves bound to give leave for fear either of a miscarriage of justice or that the defendant would otherwise be able to tell the jury that he could say where he was at the time in question but that the judge would not let him do so. In practice, therefore, the failure to give notice of alibi has become no more than a matter which can be commented upon adversely to a defendant. This inadequacy, it is said, would be removed if the defence were to be prevented from giving any evidence at all where they had made no pre-trial disclosure. Most of the witnesses to whom we put this suggestion thought that such a sanction would be too draconian and unworkable, and we agree with them. The risk of an innocent defendant being wrongly convicted, perhaps as a

result of his own lawyer's inadequate preparation, appears to us to be unacceptably high.

6.78 With reference to the suggestion in subparagraph (b), a number of witnesses thought that it would be appropriate for the court to make an order in costs against a defendant, where it was satisfied that the failure to disclose his defence in advance had caused the prosecution needlessly to waste time in proving matters which the defence did not intend ultimately to dispute. We bear in mind that an enabling provision has recently been approved by Parliament which would allow the trial judge to make such an order where he is satisfied that one party has incurred costs as a result of "an unnecessary or improper act or omission by, or on behalf of, another party" to the case.[50] In general, those who were in favour of a costs sanction were against any other form of sanction because they did not think any other form of sanction would be in the interests of justice. In our view, however, a costs sanction would only rarely be effective for this purpose. A wealthy defendant could afford to ignore it, while a defendant on legal aid would be unlikely to attach much weight to it when balanced against the possibility of securing an acquittal by delaying the disclosure of his defence, if he has one, until the last possible moment. While we do not reject the sanction outright, we doubt whether it would be effective in many cases.

6.79 Finally, we turn to subparagraph (c) and the suggestion that the judge and the prosecution should be entitled to comment on the failure to disclose the defence in advance. We believe that any failure by the defence to make such disclosure at the preparatory hearing stage may be a matter which is relevant to the credibility of the defence advanced at the trial. We can see no reason why both the prosecution and the judge should not be entitled to comment appropriately at the trial if the defence lead evidence in support of their case which might have been mentioned at that earlier stage.[51] The extent of the comment might range from a failure on the part of the lawyer's representing a defendant to the merits of the defence case itself. The court or jury should only be allowed to draw such inferences as appear to them proper having regard to all the evidence before them. The stronger the prosecution's case the more significant would be the defendant's failure to disclose the general line of his defence.

6.80 As we have already anticipated, it will be suggested here that allowing the prosecution and the judge to comment on the failure of the defendant to disclose his defence in advance of the trial infringes the defendant's right to remain silent, to decline to incriminate himself. We believe that the defendant's right of silence should be maintained.

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[50] Prosecution of Offences Act 1985, s. 19.

[51] We have noted that in Scotland a similar sanction has recently been adopted in support of the procedure (known as judicial examination) for obtaining an indication of the defendant's general line of defence in advance of trials on indictment. See the *Second Report on Criminal Procedure in Scotland* (1975), Cmnd. 6218, paras. 8.23–8.24 and the Criminal Procedure (Scotland) Act 1975, s. 20A(5) as inserted by the Criminal Justice (Scotland) Act 1980, s. 6(2).

He need not go into the witness box if he does not wish to do so. But we do not think that the defence's position can be weakened or damaged by stating in advance what line of defence he will rely upon once the whole of the prosecution's case has been fully put out in front of him before or at the preparatory hearing stage. We do not regard this obligation as an infringement of the defendant's right of silence.

6.81 For the sake of completeness we should add that failure to disclose the defence may not be the fault of the defendant. He may be willing to co-operate, but his lawyers may fail to carry out the necessary work. Such a failure would require a sanction directed at the lawyers. A judge has the power to make observations on the lawyer's conduct of a case with a view to the reduction of fees payable under legal aid, and in a case of lawyers' apparent neglect leading to failure to disclose the defence in advance we consider that the judge should make such observations.[52]

(d) Conclusion

6.82 We conclude that the law should be altered so that the defence are required to outline in writing the nature of their case in general terms at the preparatory hearing stage. Any failure to disclose the defence outline at that stage should be capable of attracting comment from the prosecution and the judge at the trial. The jury should be entitled to take account of, and draw any appropriate inferences from, the defendant's failure to disclose a particular line of defence on which he relies at his trial. The judge should also be able to make an order against the defendant for payment of part of the prosecution's costs in these circumstances. Where the fault appears to be with the defence lawyers the judge should draw to the attention of the appropriate authority that the fees payable from the legal aid fund may have to be reduced. We would expect the judge at a preparatory hearing to warn the defence of the possible consequences of their failure or refusal to make any, or any adequate, disclosure. However, we believe that if it is provided that the defence should declare the nature of their case in advance, this will eventually become accepted as a matter of routine. In our estimation, it will rarely be challenged and in consequence the number of occasions when the "teeth" would have to bite should be relatively small.[53]

4. NAMES OF DEFENCE WITNESSES

6.83 Should the defendant be required to disclose at a preparatory hearing the names and addresses of the witnesses, if any, who are likely to be called on his behalf? The first point we would make is that we do not think that the defendant should be obliged to state whether or not he

[52] The judge's observations are made for the attention of the appropriate authority (in practice a "determining officer" of the Crown Court): it is for the appropriate authority (from whose decision there is a right of appeal to a Taxing Master), not the judge, to decide whether to disallow fees: see Practice Direction (1977) 64 Cr. App. R 112.

[53] Mr. Walter Merricks does not fully concur with these proposals: his note of dissent appears immediately following Chapter 11.

himself is going to give evidence at the trial. The defendant is not obliged to give evidence and, so long as that remains the position in law,[54] we do not think it appropriate to force the defendant to make up his mind before the close of the prosecution case whether or not he is going into the witness box.

6.84 Separate considerations arguably apply to the witnesses to be called on his behalf. The principal advantage to the prosecution of knowing the names and addresses of defence witnesses in advance is that it enables the police to conduct interviews and make enquiries before trial about the witnesses' backgrounds. These enquiries may enable the prosecution to put matters to witnesses in cross-examination which will damage their credit. Such a requirement already exists in relation to the alibi defence, but we think that this can properly be regarded as a special case, where it may be considered particularly important that the prosecution is given adequate time to check the defendant's claim that he was elsewhere at the time the prosecution allege that the offence was committed. In many cases the defence may not decide whether to call a particular witness until they have seen how prosecution witnesses stand up to cross-examination and we think that this is a legitimate position for the defence to take. Disclosure of witnesses' names might lead to allegations at the trial that the police have in some way acted improperly in interviewing a witness for the defence. We believe that on balance the case for requiring advance disclosure of the names and addresses of witnesses likely to be called by the defence cannot be supported.

5. ADMISSION OF FACTS

(a) Introduction

6.85 The disclosure of the defendant's line of defence in advance of the trial should lead the way to the agreement of facts and documents by the defence. We consider now the procedure which should be adopted for seeking defence agreement on facts and whether there should be any sanctions against a defendant who does not co-operate with this process. We deal separately later with similar questions in relation to the admission of documents because different considerations apply.

(b) Present practice

6.86 Under provisions enacted for the first time in the Criminal Justice Act 1967 (section 10) the need to call undisputed evidence at the trial is removed by the process of making formal admissions whereby the prosecution or the defendant may admit any fact of which oral evidence may be given. Such an admission is conclusive evidence of the facts admitted, but it may be withdrawn at any stage with the leave

[54] The Criminal Law Revision Committee recommended that the prosecution, like the judge, should be entitled to comment on the defendant's refusal to give evidence and that the refusal may be treated as, or as capable of amounting to, corroboration of any evidence given against the defendant; but these recommendations have not been implemented: see *Eleventh Report: Evidence (General)* (1972), Cmnd. 4991, paras. 110, *et seq.* and Annex 1, draft Criminal Evidence Bill, cl. 5.

of the court. The admission may be made before or at the proceedings but if it is not made in court it must be made in writing. The more facts a defendant is prepared to admit the less time will be taken up at the trial in hearing evidence to prove those facts. In the case of admissions made before trial, either a schedule of facts can be prepared, agreed and given to the jury, or witness statements can be read with an indication by one party that the facts asserted by the witness are not challenged by the other.

6.87 The procedure is facilitated if one party serves on the other in advance of the trial a schedule of facts to be admitted. This practice is adopted in some cases but we have heard evidence that in too many cases it is not and that the best that occurs is a hurried negotiation between counsel on both sides just before (or even during) the trial which may or may not produce some admissions. Even where the prosecution have supplied the defence in advance of the trial with a request for admission of specified facts, the defence may refuse to admit anything. Some defendants resort to this tactic in the hope of prolonging the proceedings and putting the prosecution to as much trouble as possible.

(c) Our proposals

6.88 It is vital that the prosecution should give the defence every opportunity to make admissions at the earliest possible stage. If the defendant discloses his defence as we have proposed, it should become clear which facts he can be asked to admit. But whether or not he discloses his defence, the onus must be on the prosecution to notify the defence in specific terms of the admissions which, in the absence of an indication of an intention to plead guilty, it is thought might reasonably be made. If the prosecution fail to take this essential step at the outset it will almost invariably have an impact on the efficient handling of the case at later stages. We conclude therefore that the prosecution should be required to serve on the defence a notice to admit facts in advance of the first preparatory hearing. The judge should be empowered to direct the prosecution to draw up such a notice within a specified time if they fail to do so. The defence should be given a specified period within which they should serve a counter-notice on the prosecution stating which facts are admitted and which are not, giving their grounds for any refusal to admit.

6.89 We would hope that the co-operation of the defence would be forthcoming. But one is inevitably faced with the problem of how to deal with the defendant who either refuses to admit facts which any reasonable innocent person would have been ready to do, or who fails or refuses to give any adequate reasons for not admitting them.

6.90 Various forms of sanction have been suggested in this context. Apart from the sanctions referred to in paragraph 6.76 (b) and (c) relating to the failure to disclose the defence case, we should also mention one other, namely, that the judge might be given the power to order that

certain facts should be deemed to be admitted. The judge would decide whether a refusal to admit those facts was unreasonable, or whether the stated grounds for disputing them were adequate. Any ruling made by the judge as to facts which should be deemed to be admitted because of an unreasonable refusal by the defendant to admit them would have to be capable of being reversed at the trial where good cause was shown for doing so.

6.91 This procedure would have the effect of placing what is sometimes termed an "evidential" burden on the defence insofar as they would be required to put forward adequate reasons for requiring strict proof by the prosecution of particular facts. In relation to the proof of certain ingredients of criminal offences this is unobjectionable, particularly where the matter relates to something which is peculiarly within the knowledge of the defendant. Since this power would operate in relation to facts in general, we believe that it would be necessary to devise some criteria to limit the circumstances in which the judge could exercise his discretion. We concluded that it would be impossible to draw up satisfactory criteria which distinguished between the proof of "formal" facts and the proof of facts going to the heart of the prosecution's case. We would be reluctant to leave the matter to the unfettered discretion of the judge. For this reason we conclude that there should be no power given to the judge to order the admission of facts in this way.

6.92 In our view, the most appropriate sanction would again be that of comment by the judge and the prosecution at the trial in the event of a failure or refusal by the defendant to make admissions of facts which a jury might after hearing all the evidence think that any reasonable innocent person would have been ready to make. To ensure that this sanction operates fairly, the judge should be required to put the defendant on notice at the preparatory hearings of those facts which in his judgment the defendant ought reasonably to admit, or deny with reason. If the defendant insisted on that evidence being produced by the prosecution and he did not subsequently challenge it, either in cross-examination or by producing evidence of his own to counter it, the judge and the prosecution should, in our view, be justified in making comment as appropriate depending upon the circumstances of the case. The sanction of costs should also be available in appropriate cases at the discretion of the judge.

6. ADMISSION OF DOCUMENTS

6.93 In Chapter 5 we recommended a relaxation of the present rigid and artificial rules which require most documents, unless they are "agreed" by the defence, to be strictly proved before they can be allowed in as evidence. Our proposals would involve the trial judge being empowered to exercise a discretion to permit certain documents to be admitted as evidence of the truth of their contents if he was satisfied that there was no good reason to doubt the authenticity of the documents and he thought it was reasonable so to order.[55] The

[55] See para. 5.35, above.

question of the truth of the contents would usually be a matter of weight for the jury. But before any question of the judge ordering in documents arises, it is essential that the defence are given a proper opportunity to admit or deny the documents which are to form part of the prosecution's case in advance of the trial. It would be consistent with our earlier proposals regarding the disclosure of the defence and the admission of facts, if the defence were to be required to indicate in advance of the trial which documents they admit and which they intend to challenge and to give in outline their grounds for doing so.

6.94 The procedure which we propose for seeking admission of documents is as follows:

(1) The prosecution should serve on the defence a notice with a list of all the documents which they intend to put in evidence. In relation to each document, the prosecution should indicate whether it is an original document or a copy, the provenance of the document and whether or not the author of the document or copy as the case may be is expected to be available to give evidence.

(2) The notice would request the defence within a specified period[56] to state in a counter-notice in respect of each document

(a) whether they admit or deny the authenticity of the document,

(b) whether they intend to challenge the admissibility of the document as evidence of the facts stated, and

(c) whether they intend to challenge the admissibility of the document on any other grounds, for example, relevance.

(3) Where the defence wish to deny the authenticity of a document or challenge its admissibility the defence should be required to state their reasons in outline in the counter-notice, but without being required to state the names of witnesses whom they may wish to call.[57]

6.95 If this notice procedure is followed the judge will be in a position at a preparatory hearing to decide in relation to documents which are not "agreed" by the defence whether or not he should exercise his discretionary power to order in documents as evidence of the truth of their contents. The judge would be able to take into account the extent to which any advance disclosure by the defence of their case effectively renders strict proof of the documents unnecessary.

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[56] See para. 6.100, below.

[57] See para. 6.83, above.

6.96 We considered whether the judge should have the additional power to refuse to allow the defence to challenge at the trial the authenticity or truth of the contents of the document ordered to be admitted in evidence where no grounds for challenging them had been made at the preparatory hearing stage. This would no doubt be effective in ensuring compliance with the procedure. It would not, in our view, be fair to deny a defendant the opportunity of challenging documents at the trial, although by that stage he would not be able to prevent the jury from seeing the document and assessing what weight they wish to attach to it. However, where a challenge is made to the truth of the contents of a document at the trial, no notice of the intention to challenge having been given before or at the preparatory hearings, the judge and the prosecution should, in our view, be entitled to comment on the failure to mention the challenge at the earlier stage.

7. POINTS OF LAW

6.97 Some trials are the subject of frequent interruptions when counsel for one or other of the parties wishes to raise a point of law with the judge. If this happens after the jury have been empanelled, the jury will be sent out of the court-room while the lawyers for the prosecution and the defence make their submissions. Some points of law are taken by counsel at the beginning of the trial (for example, a submission that the offence charged is not one known to the law); some are taken while the evidence is being given (for example, that the evidence which a witness is about to give is inadmissible); some are raised as part of a defence submission of no case at the end of the prosecution's evidence; and some are raised at the end of the whole of the evidence before the judge sums up. Frequently expensive trial time is wasted and everyone kept waiting because points of law which might have been taken at an earlier stage are not raised until the trial.

6.98 It will not always be possible for counsel to anticipate in advance of the trial every point of law which may need to be raised in a case. In any event the judge would be unable to give a ruling at a preparatory hearing on points of law which depend on the way in which the evidence comes out at the trial. Nevertheless, it would be consistent with our emphasis on the need for more thorough pre-trial preparation, if counsel for the defence were to be required to raise with the judge at a preparatory hearing points of law which go to the root of the case or any point of law relating to the admissibility of the evidence as disclosed on the papers. The Central Criminal Court practice rules state that counsel would be expected to do this, but, as we have seen, there are no sanctions. We believe that, in the event that court time is wasted because defence counsel failed to raise a point of law at a preparatory hearing which could have been raised at that stage had the case been properly prepared, the judge should be able to draw this to the attention of the appropriate authority[58] so that the matter can be considered on the assessment of the legal aid fees payable out of public funds.

[58] See note 52, above.

8. CASE STATEMENT BY THE DEFENCE

6.99 We discussed earlier[59] the need for the prosecution to prepare a case statement in advance of the preparatory hearings and we said that we recommend in Chapter 9 that this document should be handed to the jury at the outset of the case. We think that in the interests of a clear and efficient trial the defence should also be allowed to prepare a written case statement of their own based on the outline of the defence disclosed at a preparatory hearing and any admissions of facts and documents which they have made. This document would amount to a statement by the defence indicating the essential matters on which they join issue with the prosecution as disclosed in the written evidence and their case statement.[60]

H. Time limits

6.100 At various places in this chapter we have recommended that certain procedural steps should be taken by the prosecution or the defence within specified periods. We think it is important that there should be the discipline of time limits applying to both sides to help to ensure that prepartory work does not suffer undue delay. However, we do not regard ourselves as qualified to suggest what the actual time limits should be, and we leave this to others to decide. In most instances we would expect the time limit to be measured in days or at most a few weeks rather than any longer period.

I. Fixing the trial date

6.101 At the end of Chapter 4 we referred to new provisions enabling the Home Secretary to set time limits in relation to the preliminary stages of criminal proceedings.[61] We drew attention to the likelihood that pre-trial time limits for certain fraud cases will need to be longer than in other cases because of the particular difficulties of preparing for trials in these cases but that some of our other proposals should enable shorter time limits to be set than would otherwise be the case. We were disturbed to find that at the Central Criminal Court some fraud trials do not begin until a year to 18 months and sometimes longer following committal. One of the reasons for this is the priority given to the trial of murders and rapes, and another is the fact that cases involving defendants awaiting trial in custody also receive preference. There are also the problems of ensuring that a judge will be available for the whole length of the trial, the desirability of avoiding a case being interrupted by public holidays such as Christmas or Easter, and the need to pay regard to counsel's availability.

6.102 We regard delays of 18 months and more between committal and trial as quite unacceptable. We do not believe that justice can be done if this length of time is allowed to elapse between committal and trial. We recognise that serious custody cases must be given priority.

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[59] See para. 6.57, above.

[60] See further para. 9.17, below.

[61] See paras. 4.54–4.55, above.

However, a balance must be maintained and serious fraud cases should be regarded as of almost equal importance with serious custody cases. When the preparatory hearings have been completed, or possibly by the end of the first preparatory hearing, it should be known when the case will be ready for trial and how long it will be likely to last. At that stage a firm trial date should be fixed. Every step should be taken to keep the nominated trial judge free. Adherence to that trial date should be insisted upon in the absence of some compelling reason.

6.103 We have evidence that a factor in these long delays is a shortage of suitable judges. We do not consider ourselves competent to make recommendations on this subject but we must point out that, once the backlog has been dealt with, any increase in the availability of judges capable of conducting serious fraud trials need not be permanent. Indeed if our recommendations are accepted, they can be expected to result in a reduction in the judicial manpower required to handle the present number of serious fraud trials. We have sought in Chapter 10 to examine the cost implications of our proposals and the magnitude of the potential savings in the context of which any increase in costs (whether permanent or temporary) should be considered.

J. Summary of procedural steps

6.104 Before we set out the recommendations flowing from this chapter we think it may be helpful to list the procedural stages which we envisage being followed as appropriate after the transfer or committal of the case to the Crown Court.

Before the first preparatory hearing

(1) Prosecuting counsel to draft the indictment.

(2) Trial judge to be nominated at an early stage.

(3) Date of first preparatory hearing to be fixed.

(4) Service by prosecution of any remaining witness statements and documentary exhibits on the court and the defence.

(5) Prosecution to prepare and serve on the court and the defence:

  (a) a case statement,

  (b) schedules and summaries of contents of documentary evidence as appropriate.

(6) Prosecution to prepare charts and glossary of terms.

(7) Prosecution to serve a schedule of facts which the defence should be asked to admit.

(8) Prosecution to serve a schedule of documents and defence to be asked to admit or deny authenticity and whether they intend to

challenge the admissibility of the documents on any ground and, if so, to state them.

(9) If the case has been brought to the Crown Court by way of a transfer certificate, the defendant would have a right to apply for discharge at an early stage (see Chapter 4).

(10) Defence to agree appropriate schedules and summaries of documentary evidence served on them by prosecution.

(11) Defence to disclose a written outline of their case following receipt of prosecution's case statement.

(12) Defence to serve on prosecution a counter-notice to (7) stating which facts are admitted and which not, with reasons.

(13) Defence to serve on prosecution a counter-notice to (8) and to admit or deny authenticity of documents and to state, where relevant, grounds for challenging admissibility of documents.

(14) Defence to prepare a case statement, if desired.

At the first preparatory hearing

(15) Judge to ensure that all the above steps have been carried out, where appropriate, and, in any case where they have not, to give the necessary orders and directions to the parties.

(16) Points of law going to the root of the case or relating to the admissibility of evidence intended to be raised at the trial should be dealt with.

(17) Judge to consider the need for further hearings.

(18) Date of the trial to be fixed at this stage, if possible, or at a further preparatory hearing.

At further preparatory hearings (as required)

(19) All outstanding matters to be dealt with.

Recommendations

Serial		Paragraph
31.	**"Preparatory hearings" (a term we use in preference to pre-trial review) should be treated as a formal preparatory part of the trial.**	6.25
32.	**Preparatory hearings in the presence of the defendant should generally be held in open court, but subject to reporting restrictions.**	6.27

33. **Preparatory hearings should be held in fraud cases where appropriate and should be initiated at the request of either party or the court.** 6.28

34. **The judge presiding at the preparatory hearings must be the judge who, save in exceptional circumstances, is to conduct the trial.** 6.32

35. **The judge must be given adequate time to familiarise himself with the case before the preparatory hearings.** 6.33

36. **Adequate secretarial facilities must be provided for judges trying fraud cases.** 6.34

37. **Counsel, including leading counsel, briefed for the trial should be under a professional obligation to attend all preparatory hearings, and should attend unless there are compelling reasons which prevent him for complying with his duty. Breach of this obligation should lead either to a reduction in counsel's fees or in extreme cases to disciplinary action by the Bar Council.** 6.35 6.39

38. **Judges should be more willing to adjourn cases to enable counsel to attend preparatory hearings.** 6.37

39. **The prosecution, in particular prosecuting counsel, must bear the responsibility of ensuring that their case is thoroughly prepared before the first preparatory hearing.** 6.43

40. **Defence lawyers will have to be ready to prepare their case for trial at an earlier stage than at present.** 6.45

41. **Counsel should be adequately remunerated for early and thorough preparatory work.** 6.46

42. **Counsel should be paid on the basis that the main work of preparation is done in advance of the first preparatory hearing and not later.** 6.47

43. **Attendance at a preparatory hearing should be paid at the same rate as attendance at the trial.** 6.47

44. **Both the prosecution and the court should be under a duty to ensure that within a specified period of committal or transfer certificate a date for the first preparatory hearing is fixed.** 6.49

45. **The listing officer should be responsible for monitoring the progress of cases and to report any likely delays to the nominated judge.** 6.49

46.	**The Fraud Commission (Recommendation 2) should observe the progress of fraud cases through the courts and examine and advise on the time taken and the causes of delays.**	6.50
47.	**There should be such number of preparatory hearings as the case requires.**	6.51
48.	**A full day should normally be set aside for each preparatory hearing. Consideration should be given to adopting as standard the practice of holding preparatory hearings on one day of the week, Friday probably being the most suitable for this purpose.**	6.52
49.	**Preparatory hearings should not always be held at the place of trial, if another location is more convenient to the trial judge and all counsel.**	6.53
50.	**Prosecuting counsel should prepare a "case statement" summarising the essence of their case against each defendant and in respect of each count on the indictment in advance of the first preparatory hearing.**	**6.57**
51.	**The judge should be empowered to order the prosecution to prepare a case statement.**	6.57
52.	**The defence should be allowed to object to the contents of the prosecution's case statement at a preparatory hearing. The judge should be entitled to order any necessary amendment.**	6.59
53.	**The prosecution should prepare schedules and summaries of the relevant contents of documentary evidence. The judge should have the power to order the prosecution to do so and to give directions as to the scope and form of such schedules and summaries.**	6.60 6.61
54.	**Glossaries of technical terms should be prepared by the prosecution for the use of the jury. The judge should have power to order preparation of them.**	6.63
55.	**The prosecution must give consideration to the most appropriate method of presenting complex information and make full use of modern techniques.**	6.64
56.	**Prosecuting counsel and expert witnesses concerned with the presentation of numerical information should have regard to the various ways of improving such presentation.**	6.65

57 **The judge should be empowered to direct the preparation and use of visual aids for the trial.** 6.66

58. **The law should be altered so that the defence are required to outline in writing the nature of their case at the preparatory hearing stage.** 6.82

59. **If a defendant fails to disclose his defence in advance of the trial the following sanctions should be available:**

(i) **The prosecution and the judge should be entitled to comment at the trial, and the jury should be entitled to take account of and draw any appropriate inference from the defendant's failure to disclose a particular line of defence on which he relies at the trial.**

(ii) **Where the failure to make prior disclosure of the defence has unnecessarily prolonged the trial, the sanction of costs should be available.** 6.82

60. **The judge should warn the defendant of the possible consequences of a failure to disclose the line of his defence in advance of the trial.** 6.82

61. **Where the failure to disclose the defence is the fault of the defendant's representatives, they might be penalised by having their fees from the legal aid fund reduced.** 6.82

62. **The defendant need not be required to indicate whether he intends to go into the witness box until the close of the prosecution case.** 6.83

63. **The defendant should not be required to inform the prosecution in advance of the names and addresses of any witnesses who are likely to be called at the trial on his behalf.** 6.84

64. **The prosecution should be required to serve a notice on the defence requesting admissions of facts. The defence should be required to serve a counter-notice stating which facts are admitted and which are not giving their reasons.** 6.88

65. **Failure to make admissions of fact which are not the subject of challenge at the trial and which a jury might after hearing all the evidence think any reasonable innocent person would have been ready to make should be capable of attracting comment by the judge and the prosecution.** 6.92

66. **The sanction of costs should also be available in appropriate cases.** 6.92

67. **The prosecution should be required to serve a notice on the defence requesting admissions of documents. The defence should be required to serve a counter-notice stating whether they admit or deny the authenticity of the document.** 6.94

68. **The prosecution and the judge should be entitled to comment on any failure to challenge the truth of the contents of a document in advance of the trial.** 6.96

69. **The defence should be required to raise points of law at the preparatory hearing stage, other than those which depend on the way in which the evidence comes out at the trial.** 6.98

70. **Failure of defence counsel to raise a point of law at the preparatory hearing which could have been raised then had the case been properly prepared which results in court time being wasted should lead to the possibility of a reduction in counsel's legal aid fees.** 6.98

71. **The defence should be entitled to put in a written case statement of their own in reply to the prosecution's case statement.** 6.99

72 **Appropriate time periods should be laid down within which certain procedural steps should be taken.** 6.100

73. **The trial date should be fixed when the preparatory hearings have been completed, or after the first preparatory hearing. Trial dates once fixed should not be altered except for a compelling reason.** 6.102

CHAPTER 7

COMPOSITION OF THE JURY

A. Introduction

7.1 In this chapter we consider the rules which affect the composition of the jury in criminal cases. We focus on the present rights of jury challenge and in particular examine the validity of claims that the composition of the jury can be influenced by the tactical exercise of the defence right of peremptory challenge, the problem to which this gives rise, and possible remedies. We begin, however, with an examination of some suggestions put to us for altering the qualifications for jury service so as to improve the quality and effectiveness of juries in fraud cases and to enhance public confidence in the jury system. We deal separately in Chapter 8 with the more fundamental question whether trial by judge and jury should be retained for complex fraud cases or whether some form of alternative tribunal would be more appropriate. Consideration is also given here to the need for stand-by jurors in fraud cases.

B. Composition of the jury: the present rules in outline

7.2 Any person aged between 18 and 65 is qualified to serve as a juror in the Crown Court if he is registered as a parliamentary or local government elector and has been resident in the United Kingdom for any period of at least five years since reaching the age of 13, but not if he is ineligible or disqualified as defined in the Juries Act 1974.[1] The Lord Chancellor is responsible for the summoning of jurors. The electoral registration officer sends a copy of the register to the appropriate jury summoning officer in the Lord Chancellor's Department who issues summonses to people on the register in the area of the Crown Court in question. That officer prepares "panels" of the people summoned to be available at a particular court on a particular date.

7.3 The Juries Act 1974, as amended, provides that various classes of person either must not or need not serve on a jury. Some people, including the judiciary, others concerned with the administration of justice and the clergy are ineligible and must not serve because of the undue weight which might be given to their opinions and in the case of the clergy because their calling may incline them too readily towards compassion. Those suffering from some form of mental disorder for which they are being treated are also ineligible. Some people are disqualified because they have a serious criminal conviction and they too must not serve.[2] Some people, including members of Parliament, peers, members of the armed services and practising members of the medical and other similar professions may be excused as of right because their absence from work is incompatible with the public interest. There are others who may be excused as a matter of

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[1] See s. 1 and Sched. 1, as later amended.

[2] See further para. 7.12, below.

discretion by the appropriate officer of the Crown Court or the court where good reason is shown. The needs of mothers to look after children, of persons of both sexes to look after small businesses, of long arranged family holidays, of employers, are the main examples of such cases. In addition a person who appears to be incapable of acting effectively as a juror on account of physical disability or insufficient understanding of English[3] may have his summons discharged by a judge.

7.4 We now turn to examine particular aspects of these rules, namely summoning individuals from the electoral roll, the age limits, the literacy requirement, and the disqualification rules.

C. The electoral roll

7.5 Leaving aside the question whether certain types of fraud case should be tried by a specially qualified jury,[4] some concern was expressed that the process of summoning jurors from the area of the Crown Court in question can, partly for this reason, lead to juries being composed of individuals who are unrepresentative of the adult population at large. It was said that to draw jurors from inner-city residential areas, in particular around the Central Criminal Court in the City of London was likely to lead to less well-qualified juries hearing fraud cases. One specific suggestion was that jury service for the Central Criminal Court, where many of the more substantial and complex fraud cases are tried, might be extended to those who work in London as well as those who live there as a means of raising the quality and qualifications of jurors without going as far as creating a special jury system.

7.6 There appears to have been some misunderstanding about the catchment area for those summoned for jury service for the Central Criminal Court which in fact covers the whole of the Greater London area and is not restricted to the area immediately surrounding the City of London. Even if it were so restricted, we do not think it would be practical to summon individuals on the basis of where they work rather than where they live. The task of compiling such a list would be enormous and it would require constant and expensive updating. Nor do we think that it would of itself necessarily lead to any marked difference in the quality of juries. The electoral roll for the catchment area around the relevant Crown Court is likely to remain the only practical and acceptable basis upon which jurors should be summoned for jury service.

D. Age limits

7.7 A few witnesses suggested that both the lower and upper age limits were too low and should be raised to 21 (or perhaps 25) and 70. In favour of raising the lower limit it was argued that few 18 year olds can be expected to have sufficient maturity and experience of life to make

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[3] See further para. 7.9, below.

[4] As to which see paras. 8.42–8.44, below.

a proper judgment on the issues which they are required to determine. To the extent that the jury is also setting a standard (for example, in relation to honesty and dishonesty) in reaching its verdict, this lack of experience may increase the chances of the jury reaching an improper verdict. The argument in favour of raising the upper age limit is that many people between the ages of 65 and 70 would make good jurors and their involvement would serve to increase the sum total of experience of the jury.

7.8 While recognising that there is some force in these arguments, we are not persuaded that it is either necessary or desirable to alter the age limits for jurors in fraud cases. The principal argument in favour of the status quo is that 18 is the age of majority and that, since a person assumes many other responsibilities at that age, he should also qualify for jury service. There is also the point that individuals in lower age groups may have better computing knowledge than others, which may be of benefit in some fraud trials. In any event, where a particular jury is a true random selection of people within the present age limits the proportion of persons under 21 on that jury is statistically likely to be relatively small. The exercise of the defence right of peremptory challenge may sometimes have the effect of increasing the proportion of young people on the jury, but this is an aspect of a different problem with which we deal separately below.[5] So far as the upper age limit is concerned this was raised from 60 to 65 in 1972. The Departmental Committee on Jury Service (the Morris Committee) which recommended this change in 1965 rejected a higher age limit largely on the basis that elderly people are likely to suffer greater hardships by having to travel to courts which may be a considerable distance from their homes and by having to concentrate during the trial for long periods at a stretch.[6] They also pointed to the greater incidence of problems with eyesight and hearing among the elderly. In the context of fraud cases, which are often lengthy and require close attention to documentary evidence, we think that there is no case for raising the upper age limit. Accordingly, we do not recommend any change in either the upper or the lower age limits for jury service in fraud cases.

E. Literacy requirement

7.9 The Morris Committee considered whether their recommendation that inclusion on the electoral register should be the basic qualification for jury service (in place of the householder qualification) ought to be coupled with a recommendation that some sort of educational, intelligence or literacy test should be introduced.[7] The Committee rejected various proposals along these lines as being either inappropriate or unacceptable. However, they concluded by saying that

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[5] See para. 7.17 *et seq*, below.

[6] *Report of the Departmental Committee on Jury Service* (1965), Cmnd. 2627, para. 68.

[7] *Ibid.*, paras. 76–80.

> "It is ... self-evident that a juror will not be able to understand what is going on in court unless he has a good command of the English language. He may have to study documents, and perhaps to take notes. *We therefore recommend that no one should be qualified to serve on a jury who cannot read, write, speak and understand English without difficulty.*"[8] (emphasis added).

7.10 Section 10 of the Juries Act 1974 now provides that "where it appears to the appropriate officer ... that on account of ... insufficient understanding of English there is doubt as to his capacity to act effectively as a juror, the person may be brought before [any] judge who shall determine whether or not he should act as a juror and, if not, shall discharge the summons ...". We understand that, at the Central Criminal Court at least, any application for excusal on the grounds that a juror had an insufficient understanding of English would normally be granted. On the other hand, an application on the grounds that a juror had difficulty in reading and writing would not. It was explained to us that the names of these jurors would go into the ballot in the usual way, and it would be possible for them to be selected for any trial, including a fraud trial. In cases involving documentary evidence, some judges may tactfully ask jurors, before they are sworn, whether they are likely to have difficulty in understanding such evidence and will release jurors who say that they will. The names of these jurors will then be returned to the pool of names and would be allocated to other courts. It is likely, but not certain, that they would then be involved in trying shorter and less complex cases.

7.11 It seems to us that in any fraud trial, whether it is an ordinary case or a complex case, it is imperative as a matter of principle that the members of the jury should be able to read and write English without difficulty.[9] The reason is that in fraud cases so much depends upon documents and tables or figures and jurors will not be able to understand them adequately and make notes unless they have a basic grounding in the English language. If this principle is accepted we think we must leave to those responsible for the administration of the courts how they will in future ensure that, in fraud cases, only jurors are appointed with an understanding of English sufficient to enable them to read and write. The provisions of section 10 of the Juries Act 1974 do not, in our view, appear to be operating properly. However, if the correct view of section 10 is that the phrase "understanding of English" does not relate to a person's ability to read or write the language, further legislation may be required.

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[8] Para. 80.

[9] We are not concerned here with trials which require to be heard in Welsh.

F. Disqualifications

7.12 The present rules regarding disqualifications from jury service on account of previous convictions for criminal offences are set out in the Juries Act 1974, as recently amended.[10] The following persons are now disqualified:

(i) anyone who has at any time been sentenced to imprisonment for life or for five years or more, or who has been detained during Her Majesty's pleasure;

(ii) anyone who at any time in the last 10 years has served any part of a sentence of imprisonment, youth custody or detention; or been detained in a Borstal institution; or had passed on him or made in respect of him a suspended sentence of imprisonment or order for detention; or had made in respect of him a community service order;

(ii) anyone who has at any time in the last five years been placed on probation.

7.13 In spite of the very recent changes which have had the effect of ensuring that a wider range of convicted offenders do not sit on juries, a few of our witnesses felt that these changes did not go far enough. Several suggestions were made to us for further extending the classes of persons disqualified. One was that those disqualified should include persons convicted and given substantial fines. In support of this it was pointed out that heavy fines are sometimes imposed upon persons convicted of quite serious fraud offences who manage to avoid a sentence of imprisonment.[11] Another suggestion was that the rules should take account not only of those who are convicted of quasi-administrative offences under statutes such as the Companies Acts, and the Bankruptcy Acts, but also those who have been censured in Department of Trade inspectors' reports or by any approved self-regulatory body such as the Institute of Chartered Accountants in England and Wales, The Law Society, Lloyd's, and The Stock Exchange. A third suggestion was that disqualification should extend to the spouses and children of persons convicted of offences. A fourth was that anyone who had been charged with and was awaiting trial for a particular type of offence should be disqualified from trying a case involving the same kind of offence as that on which he is awaiting trial.

7.14 As the Morris Committee pointed out,[12] there are basically two reasons for excluding from juries persons with criminal records. The first is that a person convicted would probably find it difficult to regard

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[10] By the Juries Disqualification Act 1984.

[11] For example, in one case, a few years ago, a City stockbroker and his company involved in a £2 million currency fraud were ordered to pay more than £220,000 in fines and costs; see *R v Altman and others, The Times*, 22 April 1978 and para. 8.49, below.

[12] *Op. cit.*, (n. 6, above), para. 134.

the police dispassionately and might be inclined to discount prosecution evidence even if he does not deliberately set out to frustrate a rightful conviction. The second is that if a person with a criminal record is allowed to serve on a jury, confidence in the administration of justice would be likely to suffer. A defendant of hitherto good character is entitled to feel that those who are trying him are persons with a good reputation. Most people would regard it as wrong to rely on those whose own understanding of the line that divides right from wrong may be defective.

7.15 It must be borne in mind that, as one commentator has said,[13] general disqualifications are "crude instruments" for the selection of impartial juries. For example, it cannot be supposed that persistent petty offenders will naturally be well disposed towards commercial fraudsters; conversely, of course, the absence of convictions cannot be taken as an indication of moral or legal probity. There will clearly always be room for argument as to where the line should be drawn between those deemed to be fit and those deemed to be unfit to serve as jurors. The rules for disqualification must, of course, be clear and readily understandable to prospective jurors, not least because it is an offence for a person to sit on a jury while disqualified.

7.16 It is unlikely that a challenge of prospective jurors for cause would be upheld simply on the basis that a person has a non-disqualifying previous conviction, or had been censured by Department of Trade inspectors.[14] From the point of view of public confidence in the jury system we are concerned that the present rules for disqualification appear to be insufficiently effective to achieve their aim. We stop short of making any specific recommendations as to how those rules should be extended because we believe that this is a matter which ought to be examined in relation to the jury system as a whole notwithstanding that the rules have only recently been altered by Parliament.

G. Jury Challenge

1. PRESENT LAW AND BACKGROUND

7.17 The exercise by defendants, or as happens more often today, by counsel for defendants of a defendant's statutory right to challenge jurors without assigning any reason for the challenge, has often been the subject of controversy. That controversy has been especially acute recently.[15] Under the Juries Act 1974[16] the right of each defendant to challenge jurors without cause was restricted to seven. That number was further reduced to three by the Criminal Law Act 1977.[17] It has since remained at three.

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[13] M. Levi, "Commercial Frauds: Problems and Remedies in the Judicial Process" (1982), p. 74.

[14] See para. 7.30 et seq, below.

[15] It was announced shortly before the completion of our report that the Attorney General is to arrange for the Crown Prosecution Service, when it is in place, to conduct a survey of the use of the peremptory challenge in order to obtain a basis of fact upon which the Government can decide whether action is needed: see *Hansard* (HC), 7 November 1985, vol. 86, col. 130.

[16] Sect. 12(1)(a).

[17] Sect. 43.

7.18 We do not find it necessary to relate in detail the history of the right of challenge.[18] Like much else in our legal history it is rooted in the distant past when defendants were left undefended by counsel and, later, when even though they were able to be defended by counsel, they could not give evidence on their own behalf, when most offences were capital, when the packing or alleged packing of juries on behalf of the Crown was not unknown, and when some judges were perhaps less concerned to protect the interests of the possibly innocent than to uphold what they no doubt sincerely believed to be the interests of the state. If a man were in danger of being hanged, let him at least have some say in the choice of those who might send him to his death.

7.19 Historically, the right of challenge took, and today still takes, two forms, "challenge to the array" and "challenge to the polls." "Challenge to the array" is a challenge to the whole panel on the ground that the person responsible for summoning the jurors in question is biased or has acted improperly. That right was expressly preserved by the Juries Act 1974.[19] It is a right but rarely exercised. We do not regard this right as relevant to our work and mention it only for the sake of completeness.

7.20 The right of challenge with which we are concerned is "challenge to the polls" to give it its formal name. This is a defendant's right of peremptory challenge now reduced to three for each defendant. The same section of the Juries Act 1974, as later amended, by reducing the number to three, also expressly safeguarded a defendant's right to challenge for cause.[20]

2. CRITICISMS AND ABUSE OF THE PEREMPTORY CHALLENGE

7.21 The efficacy of the jury system depends upon acceptance of the principle of random selection. As we have already explained,[21] that principle is necessarily eroded by exclusions and releases. When, therefore, a panel of potential jurors from whom the names of an intended jury are to be selected in open court is ultimately brought into court, that panel may well be less representative of society as a whole than it would have been had those factors mentioned earlier not already come into play.

7.22 It must therefore follow that the effect of the exercise of the right of peremptory challenge of those selected by ballot, especially if done as appears too often to be the case by reference only to superficial appearance – for example, dress, manner, age, and the carrying of particular newspapers – must be further to erode the principle of random selection because certain types of persons are deliberately excluded from possible jury service.

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[18] At common law each defendant charged with a felony could make up to 35 challenges; over the years it declined from 20 in 1509, to seven in 1948 when the right of challenge was extended to misdemeanours.

[19] Sect. 12(6).

[20] See para. 7.30, below.

[21] See para. 7.3, above.

7.23 It also follows that the greater the number of defendants facing trial, the greater the number of peremptory challenges available and the greater possible distortion of the principle of random selection, though it is of course possible at least in theory that a replacement following a peremptory challenge may to some incalculable extent redress that distortion. If there is a panel of 100 potential jurors and eight defendants, 24 peremptory challenges are possible and permissible. The choice will, therefore, have to be made from a possible 76 persons, and not a possible 100.

7.24 We have mentioned that the exercise of the right of peremptory challenge often appears to be based almost entirely on superficial appearance. Either side does in fact have available to it not only the names of potential jurors but also their addresses.[22] It is possible, therefore, for the defence to make use of this knowledge, coupled with appearance, as a basis for deciding whether a prospective juror is likely to be antagonistic to the defence case. It may be thought, for example, that persons living in certain areas may be more, or less, sympathetic to the particular type of fraud which is to be tried. There is evidence that this information has been used in this way in recent, albeit non-fraud cases, and it is not unrealistic to foresee that determined defence teams in a serious fraud case involving several defendants might employ inquiry agents to check on the addresses listed on the jury panel with a view to pooling their challenges and challenging off those jurors whose area of residence might suggest either that they are likely to have a moral outlook favourable to the prosecution of fraudsters or that they are better qualified to understand the complexities of the case.

7.25 These considerations lead us to the conclusion that the existence of the peremptory right of challenge must necessarily, when coupled with the other factors discussed, tend further to erode the principle of random selection and may even enable defendants to ensure that a sufficiently large part of a jury is rigged in their favour.

7.26 A further criticism which has been levelled against the peremptory challenge is that prospective jurors have felt aggrieved and even deeply insulted at their exclusion from jury service. They regard being the subject of such a challenge and of a requirement forthwith to leave the jury box after having been publicly identified by name, as a scarcely veiled reflection upon their integrity and capacity for impartiality.

3. CONSULTATION

7.27 Not surprisingly in the evidence we received, there was a difference of opinion as to the propriety of the exercise of this right of peremptory challenge. Those, including a number of judges, who had observed the reactions of those successfully challenged, were strongly opposed to its

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[22] Juries Act 1974, s. 5.

continuance. They, too, regarded it as inimical to the principle of random selection. Experienced counsel were divided. One told us that he would never personally challenge a potential juror unless he thought there were good reasons for the challenge other than superficial appearance and that he, himself, had always made a practice of informing those he defended that he personally would not challenge jurors and that if his client wished to exercise his right, of which counsel made sure that he was aware, he must do it himself from the dock. But others were of a different opinion. Some regarded it not merely as a right but also as a duty which might be exercised if by its exercise counsel thought that he might thereby enhance the prospects of his client's acquittal whatever might be its real justification or lack of real justification. Interestingly enough, one member of the Bar told us that if he were defending in a fraud case and he thought his client had good prospects of a successful defence if only he were sure that some members of the jury at least would understand the nature of that defence, he would exercise the right of challenge in order to ensure, so far as possible, that some members of the jury did understand its nature.

4. STAND BY FOR THE CROWN

7.28 So far we have only discussed the exercise of the right of peremptory challenge by or on behalf of defendants. It is convenient next to consider the rights of the prosecution in this field. The prosecution's right is commonly known as a requirement to "stand by for the Crown."[23] In *Halsbury's Laws of England*[24] the position is stated as follows:

> "The Crown may challenge for cause only but may also direct any person whose name is called to stand by until the panel has been called over and exhausted and will not be put to assign cause until it appears that there will not be a full jury without recourse to that person."

Thus the prosecution's right to challenge without cause depends upon the number of people on the jury panel. In theory this could be large or small. In any event, the right is open to the same criticism that it erodes the principle of random selection as does the right of peremptory challenge by the defence.

5. PRELIMINARY CONCLUSION

7.29 We have considerable sympathy with the exercise of the right of peremptory challenge in pursuit of an aim of securing a better racial or sexual balance on a jury. But we have no sympathy with its exercise where that exercise is, as the evidence suggests is too often the case, largely tactical. The aim of a jury trial is to secure a verdict which is

[23] See Archbold, *Criminal Pleading, Evidence and Practice* 42nd ed., (1985), para. 4.153. See also *R v Mason* (1980) 71 Cr. App. R 157.

[24] 4th ed., (1979), vol. 26, para. 626.

just to prosecution and defence alike after a proper appraisal of the evidence. That aim ought not to be hampered by the use of the right of peremptory challenge in the hope of replacing a juror whose appearance and address may suggest a capacity to understand the real issues or a bias in favour of the prosecution by one whom it is hoped may be less able to understand or may be more likely to be biased in favour of the defence.

6. THE CHALLENGE FOR CAUSE: A SUFFICIENT SAFEGUARD?

7.30 It is against this background that we turn to consider how the essential interests of defendants can be adequately safeguarded in some other way. It is for this purpose that we consider the use of the challenge for cause. At present this is only required to be exercised by the defence after peremptory challenges have been exhausted and by the prosecution in the circumstances mentioned in paragraph 7.28.

7.31 Historically, challenges for cause have long been regarded as falling under four heads. It is perhaps a measure of the antiquity of the process that both *Archbold* and *Halsbury* identify those four heads under their respective Latin descriptions. At the risk of possible inaccuracy we shall use the vernacular. One, privilege of peerage, is hardly relevant today. Lack of necessary qualification, suspicion of bias and disqualification on the ground of past criminal convictions, are the most relevant, in particular, of course, the last two. The Juries Act 1974 enjoins that any challenge for cause must be tried by the judge before whom the defendant is to be tried.[25]

7.32 We do not think it necessary to refer to recent cases where questions of challenge for cause have arisen. Undoubtedly, judges have, from time to time, intervened in order to satisfy a particular defendant that every possible reasonable attempt has been made to meet a particular request, as, for example, to ensure that a jury contains at least one person of a particular racial background. But a desire to assist in this way cannot and must not be allowed to develop into giving a defendant a right virtually to select at least part of a jury who will try him.

7.33 A limitation of the defendant's right of challenge to a right to challenge for cause raises at least three specific questions which in our view require to be considered. The first is whether it would, as some of our witnesses feared it might, lead to the kind of protracted proceedings which sometimes take place in the United States in connection with the selection of a jury.[26] There, it is common practice in the so-called *voir dire* for prospective jurors to be examined on their personal, medical and psychiatric history, their political and religious beliefs and their social attitudes so that defence lawyers can decide whether to make a challenge. Indeed, largely because of the openness of jury delibera-

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[25] Sect. 12(1)(b).

[26] Cornish (*The Jury* (1968) p. 46) cites, by way of example, the trial of Jack Ruby for the murder of Lee Harvey Oswald where 162 prospective jurors were examined over 15 days before a complete jury was sworn.

tions to researchers in the United States there has grown up a large body of evidence, not always consistent, on the relationship between juror characteristics and verdicts. We have no reason to believe that this practice would ever be entertained by the judiciary in this country, if the right of challenge were to be limited as proposed. We would expect judges to continue to be firm and adhere to well-established principles in carrying out their statutory duty of determining the propriety of a challenge for cause and of following the well-established practice of not permitting such a challenge and the cross-examination of a prospective juror unless first a defendant or his counsel can show a clear *prima facie* case for the suggested challenge. It is not at present a ground for a challenge that cross-examination of a prospective juror may throw up some hitherto unknown justification for the challenge. There must be a foundation of fact in support of the challenge for cause before any right to cross-examination arises.

7.34 The second question arising from a possible limitation of the right to challenge is whether the limited information which is presently available to the defence concerning those included on the jury panel would need to be supplemented. Otherwise, it may be said that the defence would have little upon which to base any possible challenge for cause. One possibility which we have considered would be a return to the position which existed until 12 years ago when the names, addresses and *occupations* of prospective jurors were listed. In 1973 the Lord Chancellor directed that information contained in jury panels should no longer include the particulars of prospective jurors' occupations because of evidence that the defence were sometimes using this knowledge to decide whether to make a peremptory challenge. If jurors' occupations were to be disclosed once more, the risks of abuse would be far less than they were because the defence would need to justify the challenge to the satisfaction of the judge within the existing principles of challenge for cause. We believe that in these circumstances there would be no real disadvantage in requiring the inclusion of jurors' occupations on the jury panel. Beyond this we do not think that any further disclosure of information about prospective jurors need be made available to the defence as of right.

7.35 The third question which arises is whether the abolition of the defendant's right of peremptory challenge would have to be accompanied by the abolition of the prosecution's right " to stand by for the Crown". Unquestionably, in our view, it would be necessary for both sides to be treated in the same way, so that each side should be able to challenge but only for cause. If the prosecution had a reason for challenging a juror which might cause particular embarrassment to the person concerned if disclosed in open court (for example, relating to a previous conviction) the matter could always be raised with the judge in chambers for him to decide whether and how he should proceed to hear and determine the challenge.

7.36 In respect of the peremptory challenge, we encountered a familiar difficulty. The problems we have hitherto discussed, like much else of our work, are of wider relevance to the administration of justice than relevant to the trial of fraud cases. Many of those difficulties created in fraud trials by the present rights of peremptory challenge might just as easily arise in non-fraud trials. Whenever this difficulty has arisen, we have asked ourselves a simple question. What problems are specially likely to arise in fraud trials, and what remedies can be developed specific to those problems? The problems are undoubtedly aggravated in the trial of some fraud cases. As we have sought to show elsewhere in our report, complex fraud cases present characteristics which are not common to other types of crime. Their very complexity and the nature of often specialised transactions which a jury is to be asked to consider are matters often distant from the everyday experience of the ordinary citizen. It seems to us indefensible in such cases that a tactical exercise in jury challenge should be permitted in the hope of replacing those who on superficial appearance may be thought (rightly or wrongly) to show a greater possibility of understanding complex business transactions by those less well advantaged. Any step which may make and may well have been designed to make the correct understanding of such transactions less likely is inimical to the interests of justice. If the interests of defendants can be properly protected in some other way we see no justification for allowing this tactical exercise to continue. Nevertheless, we cannot truthfully separate this aspect of the problem from the problem as a whole and say that it is unique to fraud trials or to a particular class of fraud trials.

7.37 For reasons which in modern society are perfectly understandable, but nevertheless regrettable, the principle of random selection which is central to the very nature of the jury has been progressively eroded by exclusions and releases. The current practice of peremptory challenge further weakens the same principle, to a potentially critical extent. Our evidence shows that the public, the press and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases towards a desired result. The current situation bids fair to bring the whole system of jury trial into public disrepute. We conclude that in respect of fraud trials such manipulation is wholly unacceptable and must be stopped. Whether it is acceptable in robbery, drugs or murder trials is for others to conclude.[27]

7.38 We accordingly recommend, with one dissentient,[28] the abolition of the right of peremptory challenge, and of the prosecution's right to "stand by for the Crown" in any fraud case. Both the prosecution and the defence should only be allowed to challenge jurors for cause according to existing principles. If the judge thinks fit, the determina-

[27] As to the proposed survey by the Crown Prosecution Service of the use of the peremptory challenge, see para. 7.17, n. 15, above.

[28] Mr. Walter Merricks; his note of dissent appears after Chapter 11.

tion of the validity of the challenge for cause may take place in chambers. To assist the making of valid challenges for cause, jurors' occupations should be disclosed on the jury panel as they were before 1973.

H. Stand-by jurors

7.39 In some cases it is necessary for the trial to continue with fewer than 12 jurors because a juror has died or fallen ill or is discharged for some other reason. The Juries Act 1974 provides that the number of jurors during a trial must not be reduced below nine.[29] In that event the whole jury must be discharged and a complete retrial of the defendant may be ordered before a fresh jury. We are aware of only a small number of fraud trials in recent years which have had to be aborted for this reason. With these cases no doubt in mind some witnesses have suggested that in trials likely to be of any appreciable length, three or four jurors should be chosen at the start of the trial in addition to the 12 jurors sworn. Any subsequent need to replace one or more members of the jury which does not require the whole jury to be discharged could be met from the stand-by jurors without a fresh trial being required. The stand-by jurors would, of course, have to hear all the evidence and see all the documents. They would not necessarily have to sit with the jury until required, although they would probably have to be seated near them. Stand-by jurors who were not required would play no part in the jury's verdict.

7.40 A number of possible problems with this proposal were raised. One is that there would be a risk that the stand-by jurors would not apply themselves to the evidence as would be the case if they were members of the original jury. Another is that the costs of jury trials would be increased because of the necessity to recompense 15 or 16 jurors instead of 12 and to provide extra copies of documents. There would, of course, be a saving in those cases in which the need for a fresh trial was avoided, but we have no means of estimating whether the costs overall would be decreased or increased. Stand-by jurors would also need to be given separate accommodation.

7.41 The disadvantages mentioned are not necessarily overwhelming. Two states in Australia (Queensland and Western Australia) have adopted systems of reserve jurors to cope with the problems of long trials. And in the United States the judge has a discretion whether to empanel extra jurors up to maximum of three. They are, however, not identified, but the jury sits as a larger jury until the time comes for deliberation, when a further ballot is held to choose the 12 who will form the final jury. While we would not be opposed to the principle of using stand-by jurors in either of these two forms, we are not satisfied that the problem of jurors dying of falling ill during long fraud trials is sufficiently serious to warrant such measures being taken to deal with it.

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[29] A jury of nine must be unanimous: see Juries Act 1974, s. 16.

Recommendations

Serial		Paragraph
74.	**The procedure for summoning jurors should continue to be based upon the electoral roll for the catchment area of the Crown Court in question.**	7.6
75.	**The upper and lower age limits for jury service (18 and 65) should remain unchanged.**	7.8
76.	**No-one should sit on a jury in a fraud case who cannot read, write, speak and understand English without difficulty.**	7.11
77.	**The rules relating to the disqualification of persons from jury service should be reviewed in relation to the jury system as a whole with a view to seeing whether and how far the disqualifications should be extended in scope.**	7.16
78.	**The defendant's right of peremptory challenge of jurors and the prosecution's right to "stand by for the Crown" in any fraud case should be abolished.**	7.38
79.	**The prosecution and the defence should only be allowed to challenge jurors for cause in accordance with existing principles.**	7.38
80.	**The determination of the validity of a challenge for cause should, if the judge so orders, be heard in chambers.**	7.38
81.	**The problem of jurors dying or falling ill during long fraud trials is not sufficiently serious to warrant provision being made to enable a small number of stand-by jurors to be empanelled.**	7.41

CHAPTER 8

JURY TRIAL AND THE ALTERNATIVES

A. Introduction

8.1 In this chapter we consider whether it is appropriate for persons accused of fraud to be tried by a jury of 12 persons selected at random, or whether some other form of tribunal would be more suitable. For the reasons explained below we have come to the conclusion, with one dissentient,[1] that certain types of fraud case are of such complexity that a different type of tribunal is needed which we refer to as the Fraud Trials Tribunal (FTT).

8.2 It is not possible to give a precise definition of a "complex fraud case" and such cases cannot be identified by reference to a list of offences. The Commissioner of Police for the City of London provided us with a quasi-definition of a "complex City fraud". With some modification and additions we have adopted this for the purpose of "Guidelines" which indicate the essential characteristics of a complex fraud case as we use the term in the rest of this chapter. These Guidelines are set out as an annex to this chapter immediately preceding the list of recommendations.

8.3 So long as jury trial remains the principle method of trying criminal cases in the Crown Court, we think that jury trial (reformed in the ways we have proposed) should be continued for fraud cases which do not fall within the Guidelines.

The structure of this chapter

8.4 We begin by outlining the history of the jury system. We then refer to the controversy which surrounds the subject and the main reasons which are advanced for retaining the present system. We describe the characteristics of a complex fraud case. We then examine the defects of the jury system and conclude that a different form of tribunal is necessary for complex cases if fraudsters are to be brought to book. We analyse the different forms of tribunal which have been suggested by witnesses and outline the one which appears to be most appropriate.

B. Origins of the jury

8.5 The precise origins of the jury system are uncertain though it began as something quite different from the system as we know it today. According to some scholars it was brought over to England by the Normans, and according to others it pre-dated them. The Normans certainly used an early form of jury for administrative purposes. The Domesday Book, for example, was compiled from the verdicts of jurors whose expert knowledge of their localities made it possible to

[1] Mr. Walter Merricks; his note of dissent appears after Chapter 11.

compile a statement of the extent, value and tenure of the greater part of England. Jurors were oath-swearers, the solemnity of the oath being held to guarantee the proper discharge of various duties. Henry II extended the jury system into the sphere of the civil law, using the jury to decide disputes relating to the ownership of land. He too was responsible for introducing the jury into criminal justice by establishing, in 1166, the jury of presentment who were required to report on offences committed in their neighbourhoods. After the prohibition of trial by ordeal in 1215, the judges turned to juries as an alternative way of proving guilt. As with their earlier use for administrative purposes, jurors at this time were informants basing their verdicts on their local knowledge of the facts. By the mid-14th century the "petty" or trial jury had become established in this form.

8.6 Since that time the role of jurors has been gradually transformed from that of informants into their present role as impartial judges of fact who come to a case without previous knowledge of the facts. In part this transformation was caused by the difficulties of finding sufficient jurors who were personally well informed as to the point at issue. In the later Middle Ages witnesses who were not jurors gave evidence upon which the jury acted. It was not until the 18th century that the principle became established that a juror should not have prior knowledge of the facts of a case. In the meantime during the 17th and 18th centuries, the jury acquired, after a struggle, its independence from the judge in reaching its verdict.

8.7 Until the middle of the 19th century, the common law courts used trial by jury as the sole method for disposing of civil actions. From 1854, when the alternative of trial by a single judge became possible in these courts, the use of the jury in civil cases began a gradual decline. Over the same period of time the proportion of criminal cases tried by judge and jury has also been steadily diminishing without detriment to the cause of justice.

C. The jury system

8.8 The jury system has been both venerated and castigated over the years. As the joint authors of a recent study of jury trials state: "One would in fact be hard put to it to locate within the immense literature on juries a truly moderate expression of opinion on the subject. Opponents and defenders seem to have been locked in a bitter struggle in which everyone takes sides."[2] Traces of this were noticeable in the submissions of evidence to us. Some of our witnesses regard trial by "twelve men and women good and true" as a fundamental and irreplaceable bastion of personal freedom. Others regard it as an anachronism, an ancient relic and a candidate for outright abolition. Our task has been to look at this emotive topic dispassionately in the light of the evidence presented to us.

[2] Baldwin and McConville, *Jury Trials* (1979), p. 1.

8.9 Four arguments were put to us in evidence, all of them tending to support the status quo. The first is that jury trial has the unique advantage of delivering verdicts in which the public at large has confidence, because members of the public, as distinct from persons in authority, are involved in delivering them. The second is that the public regards the jury as the citizen's ultimate protection against unjust or oppressive laws. The third argument is that to provide an alternative to jury trial for complex fraud cases would create an undesirable precedent for such other crimes as murder, robbery or rape – the "thin end of the wedge" argument. The fourth was that, in fraud cases, the main question is that of honesty and that a random jury do not have difficulty in reaching a verdict on this issue.

1. PUBLIC CONFIDENCE

8.10 The proposition that the public has confidence in the jury trial process, though frequently advanced as a self-evident truth, is difficult to test. Ideally one would investigate systematically the way that juries undertake their task and interview them during and after the trial. The views of the judge, counsel and solicitors engaged in the case would be sought. The attitude of the accused, whether convicted or acquitted, would be ascertained. The transcripts of the case would be studied in detail and compared with the various opinions expressed by those taking part. Such research is not possible and would constitute a contempt of court.[3]

8.11 Research of an indirect, and therefore less than ideal, nature undertaken by Baldwin and McConville tried to evaluate the performance of the jury in a series of criminal trials in 1975 and 1976 in Birmingham and London by comparing the verdict of the jury with the verdict of other key participants in the case. They found that in almost six cases out of seven there was no serious compaint about the jury's verdict from most of the participants contacted. None of the questionable acquittals in their sample of cases involved complex frauds and very few were the result of lengthy or involved trials. Their general conclusion, however, was that trial by jury is an "arbitrary and unpredictable business". Their confidence in the system had been shaken by the evidence obtained.[4]

8.12 We have not been able to obtain accurate evidence whether there have been many doubtful acquittals or convictions in fraud cases or whether many retrials have been caused by a failure to secure jury agreement. Nor have we been able to obtain satisfactory evidence of the number of cases which have been prosecuted because of the possible lack of jury understanding. We think that, in general, the public believes that juries provide a satisfactory method of trial and this view is held by many of our witnesses. We do not know whether the public

[3] The Contempt of Court Act 1981 prevents the research into the deliberations of juries. See also Appendix A, paras. 6–8.

[4] *Jury Trials* (1979), *passim.*

appreciates the complexity of some fraud trials or the extent to which confidence would be impaired if, as we point out in this report, it were generally realised that

(a) trial by a jury selected at random is sometimes a major contributory cause in preventing fraud cases from being brought to trial;[5]

(b) the difficulty of presenting a complex case often results in a decision to opt for less serious charges than the facts warrant;[6]

(c) there is no requirement that jurors selected at random should be able to read or write the English language;[7]

(d) the principle of random selection is eroded by the exclusions which take place in practice, including the exercise of the right of peremptory challenge.[8]

8.13 Other witnesses hold the contrary opinion and many of them express, in particular, disquiet about the jury system for certain types of fraud case. Their view is that a few fraud cases each year, mostly arising in London, are so complex and tangled as to defeat the powers of comprehension of an ordinary jury, and so can be fairly and effectively tried only before some different tribunal. Some informal evidence has also reached us which suggests that a considerable number of those who experience the jury trial at first hand, either as jurors, court administrators or lawyers, are by no means confident about either the efficacy or the equity of the system.

2. UNJUST LAWS

8.14 It is argued that the jury functions as an essential safeguard against the operation of unjust and oppressive laws. Undoubtedly, there have been some occasions when the jury's verdict of acquittal can only satisfactorily be explained by the jury having decided that the offence with which the accused had been charged was oppressive. In these cases the jury shows its collective rejection of a law which offends against the jury's sense of what is fair and just for an ordinary citizen. Acquittals against all the evidence which can be explained on this basis are extremely rare and at risk of being capricious. In any event, we do not think that this question arises in fraud cases because the nature of the offences is such that they do not open themselves to suggestions of oppression or unjust laws.

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[5] Paras. 8.36 and 8.37, below.

[6] Para. 8.36, below.

[7] Paras. 7.9–7.11, above.

[8] Paras. 8.18 and 8.19, below and paras. 7.17 *et seq*, above.

3. THE THIN END OF THE WEDGE

8.15 The "thin end of the wedge" argument appears to us to rest upon a faulty premise. We point out later[9] that the vast majority of cases in England and Wales today are already tried before a specialist, as opposed to a random, tribunal. If the random and unqualified tribunal is a bastion of freedom, then the damage has already been done. We conclude that there is nothing sacrosanct about the random tribunal. Trial by jury is an institution which, like any other, is suitable in certain circumstances and unsuitable in others. Where jury trial is appropriate, it should be retained. There is no case for change for its own sake. But when it is inappropriate, its replacement is as necessary and permissible as any other reform.

4. HONESTY

8.16 The fourth argument in support of jury trials relates specifically to fraud cases. It is said that the central issue in many of them concerns the honesty of the defendant. It is claimed that a random jury of 12 persons is well fitted to arrive at the right conclusion and that in the majority of cases they do in fact do so. We are not convinced by this argument. Chapter 3 indicates that the judiciary have not yet established a satisfactory definition of honesty and we have little doubt that juries also have difficulty particularly when faced with complex transactions and market dealings of which they have had no previous experience. It is difficult to see how there can be a proper understanding of the question of dishonesty unless there has been a proper understanding of the evidence on which the charge of dishonesty is based.

5. TRIAL BY PEERS

8.17 Some witnesses referred to the right of an accused person to be tried by his peers but we came to the conclusion that, like other catch phrases, this was interpreted to mean whatever the user happened to find convenient to support his point of view. At one extreme it is held to mean that any citizen has a right to be tried by other adult persons chosen at random. At the other extreme, that a citizen should be tried only by those who have a business, educational, or other background and experience similar to his own.

6. SELECTION OF THE RANDOM JURY

8.18 Some members of the public are ineligible for jury service, such as lawyers, police officers and the clergy, others, such as recently convicted criminals are disqualified from jury service. Eligible jurors may be excused from serving as of right, such as members of the armed services and of the medical profession, or as a matter of discretion for a variety of reasons, personal or business. In practice self employed persons who are unable to delegate their work and others who have to meet urgent and pressing responsibilities are excused although they

[9] See paras. 8.21–8.24, below.

otherwise have the qualities which would make them eminently fit for jury service. There are various provisions for discharging jurors who, for reasons of physical disability or because they show an insufficient understanding of English, may be unsuited to serve. Potential jurors may be challenged off the jury for cause, such as a connection with the case or the defendant. They may be challenged off the case peremptorily, for no cause. Similarly, they may be stood by for the Crown for no reason or challenged off for cause. Some of these procedures are discussed in greater detail in Chapter 7 where we make some proposals for improving the quality and effectiveness of juries.

8.19 The cumulative effect of these procedures is progressively to depart from the principle of random selection which, together with impartiality, is fundamental to the nature of the jury. The extent to which this departure undermines the rationale of the jury system, is a matter both for speculation and debate. It has been said that the process of selection and self-selection inevitably leaves a jury of "housewives and unemployed men", with the implied judgment that such a jury is less likely to understand complex evidence from the business world than a jury more truly representative of the population at large. Whether or not one subscribes to this view is not material. What is clear is that the principle of random selection is, in practice, seriously eroded and the persons who finally fill the jury box may be far from being a true cross section of the general public.

8.20 It is difficult satisfactorily to assess the performance of a given jury against the yardstick of the stated occupations of its members.[10] We obtained lists of the occupations of the jurors who sat on a number (21) of long fraud trials in recent years at the Central Criminal Court. Some of the occupations were stated by jurors in generic terms (for example, civil servant) and jurors who were unemployed at the time of their jury service might have stated their occupations when in work. We did not attempt to match the stated occupations with the occupations of the adult population as a whole or in the Greater London area alone, but upon the limited information available there was no evidence of obvious occupational bias in any direction.

7. THE ANOMALY

8.21 We draw attention to an astonishing development in the administration of the law. In the vast majority of legal cases in England and Wales today the persons selected to hear them are skilled people with particular knowledge and attributes, as opposed to a random selection drawn from the public at large which is the principle on which jury trials are at present founded. By 1984 magistrates' courts were handling about 2.2 million criminal cases a year. In the same year there

[10] In the study by Baldwin and McConville (*op. cit.*, para. 8.11, above), it was found that juries in the sample of 500 cases tried in Birmingham Crown Court in 1975 and 1976 were broadly representative of the community in terms of age and social class, but unrepresentative in terms of sex and race. From an examination of the relationships between the characteristics of juries and the verdicts returned, the researchers found that no single social factor, nor any group of factors operating in combination, produced any significant variation in the verdicts returned generally.

were over 22,000 trials in the County Courts and about 2,200 trials of civil actions in the Queen's Bench Division of the High Court, and only a handful of cases was tried with a jury.[11] Tribunals, typically composed of a legal Chairman sitting with two lay members, also deal with disputes in immigration, rates, social benefits, industrial problems and many other fields. There are now over 60 specialist tribunals dealing with hundreds of thousands of cases a year. Out of all the citizens (possibly some 3 million) who, in the course of any year, find themselves in difficulty with the law, only a small proportion (32,300 in 1984) will be tried by a jury.

8.22 The underlying logic of this situation, we find puzzling in the extreme. If society believes that trial by jury is the fairest form of trial, is it too costly and troublesome to be universally applied? If so, the millions of people convicted of summary offences before magistrates' courts in recent years, some of them facing imprisonment as a result, have a legitimate grievance, since they have been denied, on grounds of expediency, what is deemed to be the fairest form of trial. But if jury trial is not inherently more fair, given its extra cost and trouble, what are the merits which justify its retention? Society appears to have an attachment to jury trial which is emotional or sentimental rather than logical.

8.23 The most important conclusion to draw from these considerations, however, is that in almost every area of the law, society has accepted that just verdicts are best delivered by persons qualified by training, knowledge, experience, integrity or by a combination of these four qualifications. Only in a minority of cases is the delivery of a verdict left in the hands of jurors deliberately selected at random without any regard for their qualifications. Thus, those who advocate that complex fraud trials should be conducted before a select, as opposed to a random, tribunal are arguing not that such cases should be treated in any special or unique fashion, but that they should be treated in a manner more akin to the way the vast majority of all other legal cases are treated today.

8.24 In our opinion the absence from the jury box in a complex fraud case, except by chance, of persons with the qualities described in the preceding paragraph seriously impairs the prospect of a fair trial. We draw attention to other impediments to justice in succeeding paragraphs.

D. Trial by jury in complex fraud cases

1. THE NATURE OF COMPLEX FRAUD CASES

8.25 We doubt whether the public at large appreciates the characteristics of a complex fraud case or the difficulties which face an average juror. World financial markets are becoming more complex, more integrated

[11] The latest available figure for jury trials in County Courts is 38 in 1982, and for jury trials in High Court civil actions in London is 21 in 1984.

and interdependent, more competitive and more automated. The development of computerised transmission services facilitates the high-speed movement of money in ways which obscure their origins. Transactions initiated in London can have instantaneous repercussions in New York, Hong Kong or Tokyo with minimal human intervention. In addition, the creation and development of new financial instruments add to the complexities of financial practice. We see now a few cases of fraud where the evidence is so complex and the alleged dishonesty so deeply buried, that even a trained business mind cannot easily encompass the case and all its ramifications.

8.26 Fraudsters are often highly intelligent individuals. They exercise great skill in conducting their operations, and may use companies or bank accounts overseas through which funds are channelled. These skills are used to conceal the substance of dishonest transactions by shrouding them in a form which makes them appear convincing to a layman. There is often a network of companies in which the identities of the beneficial owners are impossible to discover. There may be an elaborate structure of agencies, contracts and accounts which make it difficult to discover whether it is a legal and honest framework designed to cope with complex trading and fiscal circumstances or a labyrinth designed to conceal deceit. Fraudsters know when to conceal the effect of the transactions by destroying or deliberately refraining from keeping essential records, so that the chain of events is broken and becomes difficult to follow through. They know every trick of the trade in the particular field of activity in which they engage and every loophole in the law. They do not hesitate to manufacture documents which justify transactions, but in fact are often false or at any rate a shaded version of the truth. Usually they operate with one or two skilled accomplices, some situated abroad, which makes it difficult to decide where the critical decisions were made or by whom. We draw attention to Appendix F which indicates the wide scope of fraudulent operations which are being carried on at the present time.

8.27 When the case eventually comes to trial the juror is faced with many difficulties. He is initially likely to be unfamiliar with the procedure. There may be many defendants, and multiple charges against each. He may have difficulty in remembering who's who and who is accused of what. The background against which the frauds are alleged to have been committed – the sophisticated world of high finance and international trading – is probably a mystery to most or all of the jurors, its customs and practices a closed book. Even the language in which the allegedly fraudulent transactions have been conducted will be unfamiliar. A knowledge of accountancy or book-keeping may be essential to an understanding of the case. If any juror has such knowledge, it is by chance.

8.28 The evidence before the jury may run to hundreds, or even thousands, of documents. Sometimes these are presented in huge, ill ordered bundles. Little attempt may have been made to summarise or simplify the evidence. In the largest cases the photocopying bill alone can run

to thousands of pounds. Sometimes the tactics of the lawyers will seem designed to obscure rather than to evince the truth. Although the taking of notes by jurors and questions to the judge are both permitted, a juror serving for the first time may not know whether either practice is welcome or useful: a brief, explanatory leaflet which is provided for everyone summoned for jury service falls short of encouraging note-taking, and positively urges restraint in the asking of questions. First-time jurors can find the whole court-room environment alien and intimidating. Against this baffling background, the jurors are told that they alone are the judges of whether the defendants are guilty of dishonesty, and even of what constitutes dishonesty in the particular case which is being tried.

8.29 Many of our witnesses have asserted that many jurors are almost certainly out of their depth in complex fraud cases. In such circumstances the minority of jurors who comprehend the evidence – or act convincingly as if they did – may exercise a dominant or perhaps excessive influence over the rest so that justice is in truth meted out by a jury within the jury. Alternatively, the verdict may rest not upon a firm grip on the evidence as presented, but upon an *overall impression* of guilt or innocence in the minds of jurors.

8.30 The difficulties described above are not the only problems which face jurors who are selected to hear complex fraud cases.

2. LENGTH OF TRIALS

8.31 Fraud trials often involve exceedingly lengthy hearings of weeks and months, and they form a substantial proportion of the longest trials. A survey carried out for the Committee showed that in the five years from 1979 to 1983 there was a yearly average of 26 fraud trials each lasting for longer than 20 working days.[12] More than one third of these trials (on average 10 each year) were heard at the Central Criminal Court, representing slightly less than half the total number of trials at that court lasting more than 20 working days. The longest single fraud trial lasted 137 working days, which was the retrial of a case of similar length. One reason why these trials take so long is that it is necessary to explain complex matters over and over again to the jury to ensure that they have some chance of understanding what it is they are being asked to decide. A lengthy trial is a major disruption to the lives of most jurors and the question has often been raised whether it is fair, and ultimately in the interests of justice, to impose such burdens upon the ordinary citizen.

8.32 The disruption to the life of a juror as a result of a lengthy trial is serious but is not however the major issue. The problem of maintaining an adequate degree of concentration for long periods, and consequently of understanding the issues is profound. We do not believe that in a serious fraud trial of say 20 working days, the average

[12] See Appendix J for an analysis of the number and length of "long" fraud trials in these years.

juror can retain in his memory all the essential facts and figures upon which his verdict should ultimately depend. This view is supported by much of the evidence we have received and it is confirmed by some limited research which we were able to set in hand.

3. THE LIMITS OF COMPREHENSION

8.33 Because direct research on jurors' comprehension of actual fraud cases would amount to a contempt of court, we commissioned a research project of a more indirect nature from the MRC Applied Psychology Unit at Cambridge.[13] The research was conducted with individual volunteers, not with actual members of a jury. Sometimes these volunteers were classified so as to resemble members of a jury. The detailed research findings of this project are published separately.[14] Only a broad conclusion needs to be quoted here.

8.34 The research posed the question, when complex information is communicated to individuals in a manner designed to resemble court-room procedure, how much of it is retained? And the answer is, very little indeed. By definition, the research cannot be conclusive, since it cannot be conducted on actual jurors. Nevertheless, the research findings strongly support the view of experienced observers and the promptings of commonsense, that the most complex of fraud cases will exceed the limits of comprehension of members of a jury. We have no doubt that most ordinary jurors experience grave difficulties in following the arguments and retaining in their minds all the essential points at issue, particularly in a long hearing of a complex character. This creates the serious risk either that the jury will acquit a defendant because they have not understood the evidence or will convict him because they mistakenly *think* they have understood it when they have in fact done little more than applied the maxim "there's no smoke without fire".

4. CONCLUSIONS ON COMPLEX FRAUD TRIALS

8.35 There is no accurate evidence which we have been able to obtain to suggest that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally.[15] Nevertheless, we do not find trial by a random jury a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth. The breadth of experience of these cases of many of our witnesses leads us to accept their evidence.

8.36 There is another factor to which we attach great importance. We made enquiries whether prosecuting authorities refrained from prosecuting in some cases because of the difficulty of presenting them to juries

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[13] See Appendix A paras. 6–8.

[14] *Improving the presentation of information to juries in fraud cases* (1986) HMSO.

[15] See para. 8.12, above.

selected at random in a way which the juries would be able to comprehend. We were told that this was rarely the sole reason, but that it was sometimes a major contributory factor in deciding not to proceed with a prosecution. We also had evidence that the difficulty of presenting a complex case often resulted in a decision to opt for less serious charges than the facts warranted.

8.37 We regard this as a serious situation. All the available evidence indicates that, in the United Kingdom, fraud is a growth industry and attention is directed to the statistics furnished in Appendix K. Unless all fraud cases are vigorously pursued the number will increase. For example, at the end of 1984, in London alone, there were 636 cases under investigation by the Metropolitan and City Police Company Fraud Department and £776 millions at risk. The prizes for success in such criminal ventures are so large that a growing number of people are being attracted into fraudulent dealings. We have observed moreover that there is public disquiet when company failures occur under conditions which suggest fraud or wrongdoing and no prosecution follows. We hope that the gravity of this situation will not be underestimated. Fraud is posing a threat to London as a financial centre and to the considerable volume of invisible exports which represents a major factor in the economy of the country.

8.38 Elsewhere in this report we recommend improvements in the investigation and preparation of cases;[16] changes in the remuneration structure for the Bar designed to favour proper case preparation;[17] an alternative procedure designed to bring cases more quickly to the Crown Court pending the Government's decision on the abolition of committal proceedings;[18] further development of the pre-trial review designed to simplify cases and isolate the real grounds of difference;[19] the abolition of the right of peremptory challenge;[20] substantial changes in the rules of evidence;[21] a higher standard of presentation at the hearing;[22] the use of visual aids;[23] and the selection of judges with special experience.[24] In sum, these proposals represent a fundamental overhaul of the court-room process, which most of our witnesses regard as long overdue.

8.39 These changes would be a great assistance to juries and we would expect them to result in increased comprehensibility by them. But in the light of the foregoing analysis of the nature of a complex fraud case and the uncertain quality of a jury of 12 persons selected at random,

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16 Chapter 2.

17 Paras. 6.44–6.45, above.

18 Paras. 4.33 *et seq.*, above.

19 Chapter 6.

20 Paras. 7.36–7.38, above.

21 Chapter 5.

22 Paras. 9.4–9.18, below.

23 Paras. 9.19–9.25, below.

24 Paras. 9.29–9.32, below.

we are satisfied that a different form of tribunal is necessary to try cases which fall within the Guidelines. Any such tribunal should we think have two basic characteristics in order to ensure that it would arrive at a fair and just verdict. First, it should be comprised of persons who are able to comprehend without difficulty the kind of complex transactions which are under enquiry. Second, the persons should be chosen, like all other persons who are appointed to judicial or quasi-judicial positions in the United Kingdom in criminal, civil, and other tribunals, because they are believed to uphold a high standard of integrity and to have a general competence which fits them to discharge their responsibilities.

8.40 The numerous changes we propose are long overdue and we think they are necessary in any event, for the proper administration of justice and the conduct of the different tribunal. It is impossible to ascertain how many cases would arise each year which fall within the Guidelines. It seems inevitable that there will be an increase of complex fraud cases and in any case we have not been able to assess the increased number of cases which will come to trial as a result of the improvements we have proposed. The figures in paragraph 8.30 show that there has been an average of 26 fraud trials each year lasting more than 20 working days. The magnitude of the load will become clearer when experience has been gained with improved jury trials in cases in which they will still adjudicate. But we have no doubt about the immediate need for a different tribunal for complex fraud cases.

E. The alternative tribunal

8.41 We have considered the alternative tribunals proposed by various of those who gave evidence. These are trial by judge and a special jury, trial by judge alone, trial by a panel of judges, and trial by judge and assessors (lay members).

1. SPECIAL JURIES

8.42 A special jury would be selected from a panel of people with an above average standard of education, training and experience. The qualification might be academic only, for example, a certain number of GCE 'O' level passes or their equivalent. Alternatively those who are already lay magistrates might be invited to serve as special jurors. Or a panel of people versed in trade or finance might be maintained, with assistance from professional bodies and trade associations. Some of our witnesses suggested that it would suffice to have seven or eight special jurors in place of the 12 members of an ordinary jury.

8.43 The introduction of special juries to try complex fraud cases would have the effect of putting the clock back. Special juries were once an established part of the legal machinery and in one form or another can be traced back to the 14th century.[25] The qualifications for service as a

[25] Special jurors in the sense of men specially qualified to hear, understand and weigh evidence may have appeared first as jurors with a knowledge of a particular trade. An early example is a case recorded in 1394 of London jurors of cooks and fishmongers being summoned to try one who was accused of selling bad food: Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 94.

special juror were more exacting than those for service as a common juror: a special juror had to be either an "esquire" or person of a higher degree, a "banker" or "merchant" or an occupier of a house with a rateable value higher than the level at which a person qualified for service as a common juror.[26] Special juries were abolished by the Juries Act 1949, except in cases in the commercial list at the Royal Courts of Justice in the Queen's Bench Division which could be tried by a special jury from the City of London. It was thought that there might from time to time be a case in which the expert knowledge of such a jury would be of great assistance to the judge in charge of the commercial list.[27] The City of London special jury sat only three times after 1949[28] and was abolished in 1971.[29] It is believed that the last major criminal fraud case tried by special jury was in the 1920's.[30]

8.44 In our view, the proposal for special juries is ruled out by the following considerations. We have already indicated the complexity of the issues which arise in the type of case under consideration. We do not believe that special jurors would have the degree of special knowledge or expertise which would be required in order properly to grasp the points of concern in a complex case. Even if the special jury were composed of only seven or eight members instead of 12 as has been suggested, we doubt whether it would be practicable to empanel this number of persons with the level of qualifications necessary for the length of time that they would be needed in each case. For these reasons, therefore, we have also rejected the proposal of special juries.

2. TRIAL BY JUDGE ALONE

8.45 A judge sitting without a jury might be asked to determine guilt on the facts in a complex case. He might sit as a judge of the Crown Court, or of the Commercial Court (a subdivision of the High Court) if that court were given criminal jurisdiction. There is no lack of precedent for this proposal. Stipendiary magistrates deal with summary cases in this way. Trial by judge alone is the general rule in civil cases in England and Wales. It is also the mode of trial applied in the so-called Diplock courts in Northern Ireland for offences associated with terrorism.[31]

8.46 An experienced judge sitting alone would be the most economic way of trying a complex case. It would, however, place a considerable burden on the judge to be the sole decision-maker, and he would not have available to him the assistance of those who are skilled in the subject matters of the case to help him to interpret them and to arrive at a balanced conclusion. Although we have no doubt that experienced

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26 See the Juries Acts 1825 and 1870.

27 *Hansard* (HL), 8 March 1949, vol. 161, col. 182 (Lord Chorley).

28 One of these was *Young v Rank* [1950] 2 KB 510.

29 Courts Act 1971, ss. 40(1) and 56 and Sched. 11, Pt. 1.

30 The defendant was Horatio Bottomley, M.P.: see Levi, "Blaming the Jury: Frauds on Trial" (1983) 10 Jo. Law & Soc. 257, 258.

31 Under the Northern Ireland (Emergency Provisions) Act 1978.

judges would be willing to accept these burdens as they do in almost every civil case, including commercial cases of great complexity (albeit that the civil standard of proof is lower), we think it would be desirable to avoid placing a judge in this position if, as we believe, there is a more suitable alternative. We should add that very few of those who submitted evidence to us supported the proposal that a judge alone should try complex fraud cases.

3. TRIAL BY A PANEL OF JUDGES

8.47 This proposal is for a panel of judges, perhaps three, to hear complex fraud cases. They would discharge all the present functions of the judge and jury. This also failed to win widespread support among our witnesses. The strain on judicial manpower was a frequently quoted disadvantage of this proposal. More significant, in our view, is the fact that a panel of judges would simply provide more judicial expertise, whereas what is required for complex fraud cases is supplementary knowledge and experience of the business world.

4. TRIAL BY JUDGE AND LAY MEMBERS

8.48 The final proposal is that a judge and a small number of lay members should hear complex fraud cases. The lay members would play an equal part with the judge in deciding questions of fact but the judge alone would deal with questions of law and procedure. Those who advocate this proposal often described the lay participants either as "assessors" or "adjudicators". We find this terminology confusing. The term "assessor" is usually used to describe an expert whose role is only to advise the judge on technical matters, such as navigation in a marine case.[32] The term "adjudicator" also has other connotations from the world of arbitration. The majority of those witnesses who favour a mixed judicial and lay tribunal for complex cases also strongly believe that the lay members must play a full and equal part in the determination of fact. To make clear this distinction, we employ the term "lay member" to describe the fuller role.

8.49 Our attention was drawn to the fact that before 1978 the Director of Public Prosecutions could elect for summary trial in prosecutions under the Exchange Control Act 1947.[33] These cases were usually heard in the City of London and went to summary trial in order to save costs and to secure a speedier result than trial by jury would allow. Magistrates in the City were considered to have a better understanding of the complexities involved. Two cases in particular were described to us as "large revolving fund exchange control cases involving the defendants' ingenious and very complicated use of abstract and esoteric exchange control concepts." In one of these cases[34] the Chairman of the bench was an experienced lawyer, while the other two

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[32] See Supreme Court Act 1981, s. 70.

[33] Sched. 5, Part II, paras. 2(3) and 3(1). The Criminal Law Act 1977 (in force 17 July 1978) removed the power of the D.P.P. to elect for summary trial.

[34] *R v Altman and others, The Times*, 1 November 1977 and 22 April 1978.

magistrates were a retired bank official who had worked on exchange control and a businessman with experience of the stock market. The case took about 30 days to hear, but the lawyers estimated that it would have taken up to three or four times that length had there been trial by jury. This was mentioned to us as a practical example of the workings of a tribunal in effect consisting of a judge and two specially qualified lay members.

8.50 A judge sitting with lay members is the proposal most widely supported by those who gave evidence. Provided the lay members are well chosen, comprehension of the evidence would be at a high level. Knowledge of the background to the case, the terminology, customs and practices of the business in which the alleged fraud had been perpetrated, would be available. Provided the lay members were given an equal vote on the matter of the verdict (though not on questions of law or sentence), they could demonstrate their independence of the judge, if necessary by outvoting him. If the tribunal consists of the judge and only two lay members, the problem of assembling and maintaining a list of suitable candidates to serve would not, we think, present much difficulty.[35]

5. CONCLUSION

8.51 In the light of the evidence put before us we think that a judge and two lay members would be the most appropriate tribunal to try complex fraud cases. We suggest that such a tribunal should be known as the "Fraud Trials Tribunal". We are satisfied that the FTT would considerably reduce the length and cost of trials while at the same time increasing the prospects of a sound verdict being reached. The savings of judges and court time and the greatly improved comprehension of the matters under enquiry would allow more, if not all, complex fraud cases to be brought to trial and provide a further deterrent to those who seek to engage in fraudulent operations.

F. The Fraud Trials Tribunal

1. CONSTITUTION

8.52 The trial judge would be the judge who is nominated shortly after the case is brought into the jurisdiction of the Crown Court in accordance with our earlier recommendation.[36] He would be either a High Court or a circuit judge. We do not accept the suggestion advanced by some of our witnesses that this form of tribunal should in every case be presided over by a High Court judge.[37]

8.53 The lay members should be selected from a panel of persons who have skill and expertise in business generally and experience of complex business transactions. We describe more fully below the kind of person who would be suitable for inclusion on such a panel.[38]

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35 Para. 8.62.

36 See para. 4.46, above.

37 See further paras. 9.29–9.32, below.

38 See para. 8.61, below.

8.54 There was limited support among our witnesses for the idea that the prosecution should be entitled to elect trial by judge and lay members without any requirement of obtaining the leave of a judge. A number of witnesses thought that trial by jury should only be dispensed with in favour of an alternative tribunal with the consent of the defence. Neither of these proposals would, in our view, be acceptable, because we think that the decision as to the proper mode of trial should lie with the court and not with one or other of the parties. If there were to be a requirement that the defence must give their consent to trial by judge and lay members, we are not satisfied that many defendants would choose to be tried in this way. Recent experience in other jurisdictions, such as New South Wales and New Zealand, which have allowed defendants to elect non-jury trial, confirms our doubts, because very few defendants have so elected.[39]

8.55 In our view, the right approach to this question is that either the prosecution or the defence should be entitled to apply to a judge with a request that the case be tried by the Fraud Trials Tribunal because it falls within the Guidelines (see Annex). An application should be made to a High Court judge. If the nominated trial judge is a High Court judge, the application should be made to another High Court judge. Both prosecuting and defence counsel should have the right to be heard. The party requesting trial by the FTT would have to make out the case to the satisfaction of the High Court judge. Even where both defence and prosecution agree that trial by the FTT is desirable, we believe that the judge should examine the arguments and decide accordingly.

8.56 We think that the application either by the defence or the prosecution for trial by the FTT should be made as soon as either of the parties is satisfied that the case falls within the Guidelines. The "Case Controller" referred to in Chapter 2[40] might come to this conclusion at an early stage and soon after transfer of the case to the Crown Court. In the majority of cases we think that an application, if appropriate, would be made just prior to or immediately after the first preparatory hearing.

8.57 If the prosecution and the defence are agreed that the case is suitable for jury trial, we do not think that a court should be able to order that the case be tried by the FTT.

8.58 The mechanism for referring a case to the FTT should be an order issued by the authorising judge and delivered to the court administrator at the court where the case is to be tried. Copies of the order should also be sent to the defence, the prosecution, the judge nominated to take the case, the Court of Appeal (Criminal Division) and the Lord Chancellor.

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[39] See Appendix E, paras. 26 and 29–30.

[40] See para. 2.65, above.

8.59 When a High Court judge has authorised trial by the FTT at the request of the prosecution or the defence but against the wishes of the other party, then that other party should, in our opinion, have a right of appeal. Such a right would be a necessary exception to the general rule that the criminal law does not allow interlocutory appeals. The appeal should be made to the Court of Appeal (Criminal Division) within 14 days of the order being made by the High Court judge. It should be accompanied by the prosecution's case statement and the defence case statement, if any. No doubt in the light of experience the Court of Appeal (Criminal Division) would wish periodically to review the Guidelines to apply in determining what cases should be tried by the FTT.

8.60 Once an order has been duly issued the *mode* of trial should be specifically excluded from grounds of appeal against the verdict in the actual case. In other words, no one could appeal against conviction on the grounds that the wrong tribunal was used.

3. LAY MEMBERS

8.61 We think that the persons who would be suitable to be lay members should have the following qualities:

(a) Persons should be handpicked after a careful process of enquiry and vetting.

(b) They should not have any known extreme views in any direction, which might affect their ability to form a balanced view.

(c) Their integrity should not be open to doubt.

(d) They must have experience of business dealings and the capacity to enable them to understand the kind of complex issues which will arise in this class of case.

(e) They should be able to devote adequate time to the job.

(f) They should be of different age groups and should not be restricted to those in retirement.

8.62 The Lord Chancellor should, in our view, be responsible for assembling and maintaining a list of available lay members. The size of the panel would depend upon the number of cases which require to be heard by the FTT. Established professional and other bodies should be asked to assist in the selection and monitoring of suitable candidates. We have made enquiries of the accounting bodies, representatives of the Bank of England, the clearing banks and others and we believe that an adequate number of people with the characteristics set out in paragraph 8.61 could and would be found. We think that a list of 150–200 names should satisfy any need which may arise in the

immediate future. This would allow for exclusions on the ground of conflict of interest,[41] non-availability and other engagements.

8.63 It is important, in our view, that no lay member should remain on the Lord Chancellor's list for more than three years without being subject to a review.

8.64 Lay members should be remunerated on a basis of time occupied in preparation and in sittings in court and should receive an allowance for any necessary expenses incurred. We do not suggest what the level of remuneration should be, but in Chapter 10 we calculated the average daily cost of trial by judge and two lay members on the basis that the lay members would be paid at the same rate as a circuit judge's daily rate.[42] We recognise that some lay members would see this service as a public duty and would be prepared to sit for the cost of their out of pocket expenses alone.

8.65 The Lord Chancellor should select the lay members to take part in a particular trial in consultation with the nominated judge for that trial, and should inform the defence and the prosecution of his selection. Both the prosecution and the defence should be allowed the opportunity to make written representations to the Lord Chancellor if they have reason to believe that the participation of any lay member would involve a conflict of interest. In accordance with normal practice a lay member would himself make an appropriate declaration if he had reason to believe that there was a conflict of interest or that he was otherwise unfitted for the particular case.

4. PROCEDURE AT THE TRIAL

8.66 During the trial, the lay members would sit alongside the judge. The judge alone would be responsible for dealing with questions of law and for the exercise of judicial discretion, for example, relating to the admissibility of evidence. Many of these matters would be dealt with at the preparatory hearing stage. In all other respects, the lay members would be full members of the court and would be entitled to ask questions and put points to witnesses or counsel.

8.67 We think that in the majority of cases the lay members would not attend the preparatory hearings. It would be important for them not to be present when the presiding judge was considering matters such as the admissibility of evidence because they might be influenced by hearing evidence which the judge ultimately holds to be inadmissible. In some cases however the attendance of the lay members might be important. We have in mind, for example, the manner in which some complex issues should be explained by charts, diagrams, or visual aids which would facilitate an understanding of the issues involved in the trial.

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[41] See para. 8.65, below.

[42] See para. 10.5, Serial 18, below.

8.68 At the end of the trial the judge and lay members would retire to consider their verdicts. We considered whether the judge should be required to sum up on the law to the lay members before they retire. We concluded that there would be no advantage in the judge doing so at that stage instead of, as we prefer, leaving it until the verdict is announced. Thus, when the verdict is delivered, the judge should in every case deliver in open court either orally or in writing a statement of the law applied together with the court's decisions on the facts. We think that the court should be required to record the reasons for its decisions whether the finding is one of guilty or not guilty.

8.69 Some of our witnesses who considered the issue thought that the tribunal should be required to reach a unanimous decision. We do not think that unanimity, although obviously desirable, should be necessary for a verdict. The verdict of the court should be arrived at by a simple majority and we do not see any objection to the two lay members outvoting the judge. However, in our view, there should be only one judgment given, and, if there is a dissenting opinion, it should not be disclosed or referred to.

8.70 If a lay member is obliged for reasons of health or otherwise to withdraw before the case begins, a replacement should be appointed. If a lay member is obliged to withdraw during a case or dies, then the case should be retried.

5. SENTENCING

8.71 We have come to the conclusion, with some hesitation, that the judge alone should be responsible for sentencing a defendant who is convicted by the FTT. The reasons for our hesitation are twofold. First we have no doubt that, when discussing the verdict with the judge, the lay members will be likely to express a view on the appropriate sentence to be imposed. Second, we note that when an appeal to the Crown Court from the magistrates' court is heard by a judge and two lay magistrates, the latter take part in deciding the appropriate sentence. However, we think that the balance of advantages lies in conferring the decision on sentence to the judge by reason of his experience and training in that field.

6. APPEALS

8.72 We think that in principle the right of, and the grounds for, appeal against a decision by the FTT should be the same as those now prevailing in jury trials. It has been suggested that the workload of the Court of Appeal would increase, because every defendant convicted by the FTT would be certain to appeal against conviction. We see no reason why this should be so. The existence of a reasoned judgment would, in our view, be likely to discourage rather than encourage hopeless or near-hopeless appeals. Even if we are wrong on this, the number of cases to be tried by the FTT is likely to be small, and therefore the number of possible appeals (assuming that all defendants were convicted) would in any case be limited.

7. SEPARATE TRIALS

8.73 The trial judge may order at the preparatory hearing stage that there should be separate trials in relation to different parts of an indictment. In our view, it is desirable in these circumstances for the same nominated judge to preside over the separate trials whether or not the cases are heard with a jury or with lay members. Likewise, if trials are severed in this way and an order is made for both to be tried by the FTT it would, we think, be desirable for the same lay members to sit with the judge on both trials.

8. OTHER MATTERS

8.74 The law relating to the conduct and protection of jurors, including the Contempt of Court Act 1981, would need to be extended to cover lay members.

ANNEX

GUIDELINES

A complex fraud case is not necessarily one in which enormous sums of money are involved, or one in which the documentation is copious, or the list of witnesses long, although it would be normal if some – if not all – of these ingredients were present.

It is a fraud in which the dishonesty is buried in a series of inter-related transactions, most frequently in a market offering highly-specialised services, or in areas of high-finance involving (for example) manipulation of the ownership of companies.

The complexity lies in the fact that the markets, or areas of business, operate according to concepts which bear no obvious similarity to anything in the general experience of most members of the public, and are governed by rules, and conducted in a language, learned only after prolonged study by those involved. A factor which often adds much complication and difficulty is the use of a network of companies and bank accounts overseas which conduct business in currencies other than sterling.

The frauds are usually committed by people who are acknowledged experts in their field, and it is often their very expertise which enables them to identify and exploit a flaw in the system, and to add further complications so as to avoid detection or hinder investigation.

The concept of the market must be understood before the fundamental dishonesty of the fraudulent transaction can be recognised. To explain or to understand such market concepts in "classroom" conditions represents a very considerable intellectual challenge, to which only the exceptional could rise.

The sub-group of crimes is most likely to be found in frauds upon or involving the Stock Exchange, Lloyd's of London, and the commodities and financial futures markets. Geographically, such institutions are located within the boundaries of the City of London, but because of the convenience of modern communications it can, and does, happen that frauds in which these institutions are used take place in venues throughout the country and overseas. Some frauds on the Revenue and Customs and Excise may also include some of the features described above.

Serial		Paragraph
82.	**For complex fraud cases falling within certain Guidelines, trial by a judge and two lay members should replace trial by judge and jury. We refer to the new tribunal as the "Fraud Trials Tribunal" (FTT).**	8.51
83.	**Either the prosecution or the defence should be entitled to apply to a High Court judge (other than the nominated trial judge) if the case falls within the Guidelines.**	8.55
84.	**Either the prosecution or the defence should have the right of appeal to the Court of Appeal (Criminal Division) against an order for trial by the FTT.**	8.59
85.	**The defence should not be able to appeal against any subsequent conviction on the ground that the wrong tribunal was used.**	8.60
86.	**The lay members should be selected from a panel of persons who have the qualifications stated in the text.**	8.61
87.	**The Lord Chancellor should be responsible for compiling and maintaining a list of available lay members.**	8.62
88.	**No lay member should remain on the list maintained by the Lord Chancellor for more than three years without being subject to a review.**	8.63
89.	**Lay members should be remunerated on a basis of time occupied together with an allowance for any necessary expenses incurred.**	8.64
90.	**The lay members taking part in a particular trial should be selected by the Lord Chancellor in consultation with the nominated judge for that trial.**	8.65
91.	**A lay member would not take part in a case if there were any conflict of interest.**	8.65
92.	**At the trial the judge alone would be responsible for dealing with any questions of law arising and for the exercise of judicial discretion.**	8.66
93.	**The lay members would normally play no part in any preparatory hearing.**	8.67

Recommendations

Serial		Paragraph
94.	**At the end of the trial, the judge and lay members should retire to consider their verdict. In every case, the judge should deliver either orally or in writing a statement of the law applied and the court's decisions on the facts.**	8.68
95.	**The verdict of the tribunal should be by a simple majority. Only one judgment should be given and a dissenting opinion should not be disclosed.**	8.69
96.	**If a lay member is obliged for reasons of health or otherwise to withdraw before the case begins, a replacement should be appointed. If a lay member is obliged to withdraw during a case or dies, the case should be retried.**	8.70
97.	**The judge alone should be responsible for sentencing and for any ancillary orders that require to be made.**	8.71
98.	**The right of, and grounds for, appeal should in principle be the same as those prevailing in jury trials.**	8.72
99.	**The law relating to the conduct and protection of jurors, including the Contempt of Court Act 1981, should be extended to cover lay members.**	8.74

CHAPTER 9

THE CONDUCT OF, AND RESOURCES AVAILABLE FOR, THE TRIAL

A. Introduction

9.1 In this chapter we deal with the conduct of the trial and various other matters which have a direct and indirect bearing on the trial. We are principally concerned with the question of the presentation of the case in court. We have found it convenient also to consider the competence and training requirements of those who take part in the trial.[1] It is not, we think, necessary to consider the trial step by step.

9.2 If our recommendations in Chapter 8 are accepted there will be two separate modes of trial for fraud cases tried in the Crown Court, trial by judge and jury and, for complex fraud cases falling within certain Guidelines, trial by the Fraud Trials Tribunal, consisting of a judge and two lay members. We do not propose that there should be wide differences in procedure for the two modes of trial: our recommendations in this respect are confined to what we said in Chapter 8[2] about a modified way of reaching and announcing the court's decision. Our proposals in this chapter are not intended to be limited to any particular class of fraud case. They would, in our view, be of particular benefit in the larger and more complex case, but they could be applied to all fraud cases to whatever extent is appropriate in each case.

9.3 One far-reaching proposal has been put before us, namely that in fraud cases the court should be "inquisitorial" rather than "accusatorial" in nature. In other words, it is suggested that the court should conduct the investigation into the facts itself, rather than merely being the forum before which the parties do so. Inquisitorial procedures are common in Europe and elsewhere, but in this country the only court which adopts such an approach is the coroner's court. It seemed to us to be beyond our terms of reference to examine the case for such a fundamental change in our legal system and we do not pursue the proposal further.

B. Oral and written presentation: a new approach

9.4 Witnesses, wrote Bentham in 1823, are the eyes and ears of justice.[3] For many years it has been a tradition that criminal trials in England and Wales should be conducted orally. This no doubt stems from the time when most of the population was illiterate and many jurors would not have been able to read or write.

9.5 In days gone by, jury trials were short. Fraud trials now often last for days or weeks and this places a burden on the memories of those taking part which many are understandably unable to carry.

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[1] For this purpose we also include the training needs of the police, although they relate to the conduct of the investigation rather than the trial: see para. 9.52, below.

[2] Para. 8.68, above.

[3] *Traite des preuves judicaires* (ed. Dumont), chapter 1, s. vii.

9.6 In consequence of this tradition, the opening and closing submissions by the parties and the summing up by the judge are all oral. They are often made at great length and with unnecessary prolixity. Most witnesses are examined orally and at times in great detail. Much of this could often be shortened by the appropriate use of written material. The oral tradition has a further disadvantage. The amount of speech which any person can absorb is limited, so that important points are often misunderstood or forgotton by juries and, at times, not even understood.

9.7 These out-of-date procedures have another consequence. Counsel realise that because jurors' powers of absorption are limited, juries may not have grasped points which counsel regard as important, with the result that they are repeated over and over again, at tedious length and with much waste of time.

9.8 It is worth recording that in the Crown Court a shorthand note is kept of virtually the entire proceedings.[4] Very brief extracts from the note may be transcribed for the use of the judge and counsel during the trial itself; otherwise transcripts only become available when there is an appeal against conviction or sentence. The jury thus never have in front of them transcripts of important parts of proceedings which would help them to understand the issues in the case without having to draw upon unreliable and inaccurate memories.

9.9 We are satisfied that these unsatisfactory procedures should be brought to an end in fraud cases. We think that the principle which should be observed in the future is that cases should be presented, orally or in writing, in whichever way the court and counsel consider most likely to enable the jury to understand the issues. This is of special importance in fraud cases, which are often based on a mass of figures and written documents, and where it is vital for the issues to be presented clearly to the jury.

9.10 We set out below the disciplines which we think should be observed, and if necessary imposed by the judge in the event of the parties being either dilatory or reluctant in reducing arguments and submissions into writing.

(a) Every document prepared for the use of the jury should have a headnote stating its purpose.

(b) Documents should be typed, with numbered paragraphs. Headings and sub-headings may be necessary.

(c) The wording should be concise and clear.

(d) Documents should be confined to the facts and issues: emotive language should be excluded.

[4] Counsel's speeches are omitted from the note unless a special arrangement is made for them to be included.

(e) Documents should be clearly photocopied, and the pagination should be the same on all copies.

9.11 The consequences of this new approach would, we think, be profound. The presentation of the case to the jury would be much improved. Further, putting important points in writing is a valuable discipline in itself. It clears the author's mind and demands that the wording be simple, short and understandable. The need to express a point in writing identifies the essentials, and exposes weaknesses and inconsistencies which are often glossed over in oral presentation.

9.12 Counsel would need to be trained to reduce complicated issues and a mass of figures to a simple written statement which the jury can understand. The practice, which occurs all too frequently by accident or design, of confusing the jury with prolixity or with unimportant and irrelevant issues would be reduced. Advocacy would remain, but it would have to be directed to the issues which matter.

9.13 The written material which should be available for the jury would vary in each case. In a case of any substance or complexity we would expect the following material to be made available at the appropriate time with a copy for each juror.

(a) The prosecution's case statement.[5]

(b) A case statement by the defence in reply.[6]

(c) One or more simple charts prepared by the prosecution, for each of the charges, summarising essential figures in an intelligible form and explaining how the alleged fraud was carried out.

(d) Such charts as the defence wish to submit.

(e) The written statements of expert witnesses.[7]

(f) The prosecution and the defence should be able, if they so wish, to set down in writing a short statement of what each regards as the principle issues in the case, to be handed to the jury at the conclusion of all the evidence.

9.14 As regards (e) above, the evidence of experts in fraud cases is often crucial. At present the evidence, sometimes detailed and complex, may have to be brought out point by point in a lengthy examination in chief and the jury may fail to see the wood for the trees. We have already recommended that the judge should have the power to order that an accountant's report, for example, should be admitted in evidence.[8] In our opinion, the jury should be given time to read the

[5] See para. 6.57.

[6] See para. 6.99.

[7] See para. 5.47, above.

[8] *Ibid.*

expert's statement before the expert gives evidence. The statement given to the jury should be confined to the facts and the expert's opinion based on those facts, and should conclude with a summary of findings. Nothing should be included which could be read as a judgment on the issues before the court.

9.15 As regards (f) above, we do not suggest that the parties should be *obliged* to put into writing at the close of the evidence a summary of what each party sees as the principle issues which require to be considered by the jury. Each party may take the view that their case statement is adequate for this purpose. However, it might assist the jury if, before they retire, they were to be given a written summary of the issues which the parties consider to have emerged from the evidence presented in court. The summary of issues by each party would cover some of the ground in counsels' closing speeches, but the important point is that the jury would have a short summary available to them in writing which they could consider when arriving at their verdict.

9.16 It remains for us to consider the objections which may be raised to the use of written material. Some might object on the grounds that it would be an unnecessary breach with tradition. We do not think there is any substance in that criticism. The arguments for a change set out above are compelling. It may be urged by some that it would destroy the power of advocacy. We do not share this view. Argument, persuasion and advocacy would be open to counsel, but our proposals would confine them to the issues which the jury have before them, set out in writing by the parties.

9.17 It might be argued that the prosecution's case statement may fix the mind of the jury on its contents; and it might be impossible to dislodge from the jury's mind the impact of that statement, so that the defence would be prejudiced. We do not think this argument is well-founded. At present the prosecution's oral opening statement is specifically designed to impress on the jury what the prosecution regard as the main issues. The oral opening often lasts for many hours. There could therefore, in our view, be no objection to these same issues being put before the jury in writing in a short and simple statement so that they did not have to rely on their imperfect and probably conflicting memories. We think that usually the defence would wish to put their own case statement before the jury at the start of the defence case. However, there would be no objection to the defence giving the jury their statement at the same time as the prosecution.

9.18 There is, however, a more important consideration. If the defence could demolish a point which had been made in the prosecution's case statement, the defendant's position would be likely to be greatly improved. It would be a more effective way of discrediting the prosecution's case than seeking to demolish a point of which there was no clear record and which was put to the jury orally some time previously and possibly in a confused way. The prosecution would be

in a similar favourable position if it were able to demolish a point which is in the defence case statement.

C. Visual aids

9.19 For many years the worlds of business and education have made extensive use of visual aids to present complex material to managers and students. In recent years visual aids have also begun to be used in courts. One advantage claimed for visual aids is that they at least ensure that all the jurors are looking at the correct document. When each juror is asked to select a page from a sizeable bundle, this may not be the case.

9.20 We considered three kinds of visual aid. From the simplest and cheapest to the most complex and expensive, they are the overhead projector, the 35 mm slide projector and the computer terminal. Each is described below.

1. OVERHEAD PROJECTOR

9.21 The overhead projector is a glass-topped box about the size of a large briefcase. Transparent acetate foils (7.5″ × 11″ in size) are laid flat on the glass top. A light source inside the box projects the image on the foil onto a lens mounted on an adjustable arm, which in turn projects an enlarged image onto a screen or a plain wall. A clear image four or five feet across can easily be obtained. The acetate foils can be prepared by hand with marker pens. An existing document can be made into a foil using a simple and cheap machine by a heat transfer process. Modern techniques also enable foils to be made by copying documents in an ordinary photocopier onto special film which can be used in place of the normal copying paper.

9.22 When presenting the material, the presenter has the text in front of him on the glass top. He does not need to crane his neck or turn away from the audience to see what they see, though he can, if he chooses, use a "flying arrow" torch to point to items of special significance. A sheet of paper or card can also be used to mask parts of the text. Thus the audience's attention can be directed (for example) to one set of annual figures, and the next year's figures can be unmasked for comparison. One foil can also be placed over another in successive overlays. Overhead projection is cheap, reliable, in widespread use, and extremely flexible. New transparencies can be produced in seconds. The disadvantage in the past has been its limited ability to use colour because the heat transfer process yields only black and white foils, all colour in the original fading to grey. However, a recent development has been the introduction of a film which can be used to produce overhead colour foils (3¼″ × 4¼″ in size). The film can also be used to reproduce computer graphics and translate pictures already shot on 35 mm film into colour foils.

2. 35 MM SLIDE PROJECTOR

9.23 Projectors using 35 mm colour slides are widely used by amateur photographers and in glossy commercial presentations. The slides, mounted in plastic frames, are inserted in a carousel and shown one by one. But the slides must be prepared in a film laboratory and are consequently expensive and time-consuming to produce. Whereas an overhead projector can be used to project an image onto a plain wall, a screen is usually necessary for 35 mm slides. 35 mm colour slides can also be so dazzling that they distract attention from the presenter. Considerable training is necessary to become a skilled 35 mm presenter. Another disadvantage of 35 mm slides is that on most projectors they can only be shown in the sequence in which they are inserted in the carousel. To work back and remind a jury of an earlier slide would be time-consuming and distracting. Finally the overhead projector can be used in normal ambient light, while 35 mm slides require a partially darkened room

3. COMPUTER TERMINAL

9.24 A computer terminal can be used to provide access to documents stored magnetically on a disc file. One display terminal serves two or three people in the audience. The presenter has a keyboard and inserts the page reference of a document, which appears instantly on all the screens. A cursor, or flying spot, under the control of the presenter, can be used to highlight items on the screen. Some computer systems have powerful search facilities. A key word or phrase can be typed in and the system will rapidly retrieve and display all documents where that word or phrase occurs. Despite the continuing decline in the price of computer hardware, computer terminals are still the most expensive form of visual aid we have considered. A complete system would cost several thousand pounds per terminal to install, and an annual maintenance contract would also have to be paid for. A system able to store graphic images (drawings, diagrams or handwritten documents) would be even more costly. Any failure in the system would also bring proceedings to an abrupt halt.

4. CONCLUSIONS

9.25 We were given a useful demonstration of an overhead projector displaying complex financial information. We felt that the system contributed substantially to a deeper understanding of the subject matter. In our opinion, the low cost, flexibility, and ease of use of overhead projection make it the most useful court-room aid.[9] We recommend that the judge at the preparatory hearings should have power to direct the use of an overhead projector at the trial. The colour capability of 35 mm slides is being challenged by developments in the field of overhead projection, and the extra cost and inconvenience of 35 mm slide preparation make this a less attractive option. Computer terminals may find their place in the court-room before

[9] We deal below (para. 9.27) with the question of how many court-rooms need to be so equipped.

long, and although the present cost is considerable, we think it would be desirable for an experiment to be conducted in one court-room at the Central Criminal Court to test the potential benefits of using computer terminals at the trial for the display of relevant information. In making these recommendations we do not, of course, exclude the possibility that in a particular case the parties will wish to use some other sort of visual aid, nor do we suggest that future technological developments should be ignored.

D. Facilities at court

9.26 The Departmental Committee on Jury Service, reporting in 1965,[10] expressed concern about physical conditions for jurors, noting that older court-rooms were frequently cramped and uncomfortable for all those taking part in a trial; but it added that there were reasons to believe that new court buildings would offer better facilities. Twenty years later, with many new court buildings having been opened during this period and many more planned, the situation has improved considerably, but some of our witnesses have indicated that facilities at some courts are not always satisfactory for the trial of long fraud cases.

9.27 Aside from questions of physical comfort, which speak for themselves, we are concerned with two points. First, the court-room and any associated accommodation must have sufficient space for bulky documentation to be used and stored. Second, the court-room itself must have available a screen or a plain wall, so that an overhead projector can be used. Not all court-rooms necessarily meet these conditions. We therefore recommend that the presiding judges in consultation with circuit administrators should designate the courts which meet these conditions for the purpose of ensuring that fraud cases requiring additional facilities are only committed or transferred, as the case may be, to those courts.

E. Competence

9.28 In order to meet the difficult challenges often posed by fraud cases and to deal with these cases most effectively, those who take part must have a high level of competence in this particular field. In relation to the judiciary and counsel, we believe that the problem is essentially one of proper selection, although provision of training, as we mention later, will also be important. For the new Crown Prosecution Service and the police, the onus lies with the management of these organisations to ensure that individuals resonsible for the investigation and prosecution of fraud cases have a high level of competence appropriate for the job.

1. SELECTION OF JUDGES

9.29 In Chapter 4 we recommended that the presiding judge of the circuit or the Recorder of London for cases to be tried at the Central Criminal Court should be given the responsibility for nominating judges to try

[10] Cmnd. 2627, paras. 299–307.

fraud cases which are transferred to the Crown Court by the certificate of a prosecuting authority.[11] We believe that among the present judiciary there is a sufficient number of judges with the necessary experience and ability to try serious or complex fraud cases. Nevertheless, it is apparent to us, as it has been to many of our witnesses, that in selecting judges to try this type of case, which may reasonably be regarded as among the most difficult criminal cases to try, those responsible for the process have not always ensured that the most competent judge is chosen or made available to be chosen. One point of particular concern to several of our witnesses was the question whether a greater number of these cases should be tried by High Court judges rather than circuit judges.

9.30 At present the overwhelming majority of fraud cases tried in the Crown Court are tried by circuit judges; exceedingly few are tried by High Court judges. A survey which we commissioned revealed that between 1979 and 1983 out of 129 fraud trials each lasting for more than 20 working days only three were tried by a High Court judge.[12] There are two main reasons for this. First, offences tried on indictment are divided into four classes which are distinguished by the composition of the court trying them.[13] Class 1 includes murder and a small number of other very serious offences, and these cases can only be tried by a High Court judge. Class 2 includes manslaughter, rape, and other serious offences, and may be tried by a High Court judge unless the case is released by the presiding judge to be tried by a circuit judge or recorder. Classes 3 and 4 include the remaining offences and may be tried by any judge. All fraud offences fall into these last two classes. Thus the presumption implied by this classification is that the gravest offences (such as murder and manslaughter), rather than the most difficult cases, are tried by High Court judges. The second reason is that High Court judges generally spend only a few weeks at a time while out on circuit, and, unless special arrangements are made, they are not usually in a position to take lengthy cases.

9.31 It is clear to us that the existing burden of work placed upon High Court judges, both in civil and criminal fields, would make it impracticable for more than a minority of fraud cases to be tried by High Court judges. Nevertheless, we consider that there should be room for a greater number of fraud cases to be tried by High Court judges than have been in the past, particularly cases of importance and great complexity. If the presiding judge or the Recorder of London, as appropriate, takes the view that a particular case ought to be tried by a High Court judge, we have no doubt that the Lord Chief Justice, who bears the responsibility for the deployment of High Court judges in the Queen's Bench Division, would endeavour to ensure that a High Court judge with suitable experience was available. Some alteration of

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[11] See para. 4.46, above.

[12] See Appendix J.

[13] In accordance with directions issued by the Lord Chief Justice made under the Supreme Court Act 1981, s. 75.

the classification of offences may be desirable for this purpose, but we do not have available sufficient information to enable us to suggest precisely how this may best be done.

9.32 In the majority of fraud cases the presiding judge or the Recorder will nominate a judge from the circuit bench. The judges of the Crown Court include recorders and assistant recorders, but we think that their lack of experience as judges and the fact that they are part-time and generally only sit for short periods mean that they should not be nominated to deal with fraud cases of any length or complexity. There was some support, among our witnesses, for a two tier system of circuit judges so that circuit judges in the first tier would be formally recognised as those who should try the more difficult fraud cases. The present system of circuit judges is not entirely uniform since a small number of them are given extra responsibilities and in consequence have a slightly higher status and level of remuneration than other circuit judges.[14] Nevertheless, circuit judges who have the experience and ability to try the more difficult fraud cases should not, we think, be singled out in the way suggested. In practice, the presiding judge or the Recorder of London, in consultation with the circuit administrator, would no doubt find it helpful to identify informally those judges who are suitable to be nominated for trying the more difficult fraud cases.

2. SELECTION OF PROSECUTING COUNSEL

9.33 We believe it to be of vital importance that counsel selected to prosecute in fraud cases should be chosen from among those who have the necessary experience and aptitude to handle such cases. It follows that the procedure for nominating prosecuting counsel, including the question of the responsibility for nomination, must be organised in such a way that counsel who are not fitted to prosecute in fraud cases, however able they may be in other types of criminal prosecution work, are excluded from the field of choice.

9.34 The present system for the nomination of counsel varies between different prosecuting authorities. The DPP, in common with other Government Departments including the Revenue and Customs and Excise, instructs counsel nominated by the Attorney General on an individual case basis; for this purpose the Attorney General makes a list of suitable counsel for each Circuit. Different arrangements operate at the Central Criminal Court where the Director has a permanent requirement for the services of counsel of high calibre. A standing team of Treasury Counsel handle most of the Director's cases together with counsel on a supplementary list. There is also an additional list of some 24 suitably experienced Queen's Counsel to whom the Director allocates a substantial proportion of criminal cases

[14] As at 1 November 1985, there were 373 circuit judges. Those receiving higher remuneration were: the six judges taking "Official Referees' business", three Resident Judges at larger London court centres, The Recorder of London and the Common Serjeant of London, the honorary Recorders of Manchester, Liverpool and Birmingham, the senior circuit judges at the Leeds court complex, and the Vice-Chancellor of the County Palatinate of Lancaster.

requiring the services of leading counsel. The Director told us that he proposed to use them extensively in fraud prosecutions to relieve some of the heavy burden falling on Treasury Counsel. Nominations for work at the Central Criminal Court are made normally by the Deputy Director. The Attorney General requires an equitable distribution of such work. So far as County Prosecuting Solicitors are concerned, they select counsel themselves with a varying degree of influence by the police.

9.35 We were shown a copy of a consultation paper prepared by the Law Officers' Department and circulated for comment from interested bodies in July 1985. It outlined the selection procedure envisaged for counsel instructed by the Crown Prosecution Service, together with the principles which would govern its operation. Subject to the results of consultation, it is proposed that, in future, selection of counsel by the new Service should, subject to limited exceptions, be undertaken locally, but on the basis of lists drawn up in accordance with a procedure laid down by Headquarters. The lists would serve either a Circuit or, less likely, individual Areas which are the responsibility of Chief Crown Prosecutors. If the first option is adopted a separate list would be maintained for prosecutions in London. It is suggested that each Circuit might have a Committee comprising a number of Chief Crown Prosecutors who would be responsible for the compilation of individual lists, guided by information supplied by all Chief Crown Prosecutors on the Circuit. Its recommendations would ultimately require the approval of the Attorney General. The lists would formally be categorised according to counsel's suitability for different standards of work. Four categories of case are proposed ranging from magistrates' court work at the bottom to heavy Crown Court cases at the top, including cases of particular public importance. Specifically it is proposed that the last category would also show the names of counsel "willing and considered able to undertake lengthy or complex fraud cases" and that "a separate list would be maintained for silks." Once on a list counsel would be able to progress from one list to the next following periodic reviews by the Circuit Committee guided by a policy as to normal progress and by information supplied as to the performance of counsel during the relevant period. Safeguards in the form of a review procedure would be built in to protect the proper interests of individual barristers. The lists would not be published, but individuals would know their position on the lists.

9.36 Two options have been put forward for the selection of counsel for cases conducted by the Headquarter's staff of the Crown Prosecution Service which are likely to entail a substantial public interest. One would be a continuation of the present arrangements for DPP cases whereby the Attorney General would maintain his own special list of counsel for each Circuit selected from the top section. He would nominate counsel in cases conducted by Headquarter's staff and such other cases as may be referred to Headquarters where the Director considers that "hand picked counsel" is required. An alternative arrangement would be for the Attorney General to select and provide

special lists of counsel chosen from the top category and for the choice of counsel to be made by the Director, and, in cases of exceptional importance, by him after consultation with the Attorney General. Treasury Counsel, appointed by the Attorney General, would continue to be available at the Central Criminal Court for difficult and complex work.

9.37 It is plain to us that not all counsel in the top category of case will be suitable for conducting the prosecution of difficult or complex fraud cases. We have been told, in confidence, of a number of cases where important prosecutions in fraud cases have been conducted by counsel who do not have the experience and ability which confidence in the prosecution service demands and which judges and others concerned with trials are entitled to expect. Whoever is responsible for nominating counsel must ensure, in future, that counsel are competent to conduct this particular type of case, irrespective of their competence to prosecute in other serious crimes such as murders, rapes or armed robberies. In our view, competence is the only relevant criterion for the choice of prosecuting counsel. An equitable distribution of work is of secondary importance only. If one person (A) is the right choice and another (B) only the second choice on competence grounds, the brief should not be given to B merely because A has recently prosecuted in another heavy fraud case.

9.38 While we welcome the proposal to have a special sub-category of individual counsel who are "willing *and able* to undertake lengthy or complex fraud cases" (our emphasis), we wish to add two riders to the proposals. First, in compiling this list and keeping it under review, we believe that the views of judges experienced in trying this type of case should be sought. Second, young, able counsel need to be trained so that in due course they can assume responsibility for these prosecutions. Experience, as has often been said, cannot be taught. Senior prosecuting counsel should whenever possible be given an able young junior either as the only junior or as a second junior. In the long run it will, in our view, be more economical to train junior counsel in this way, though, as we go on to consider in the next section, supplementary training will be required.

3. PROLIXITY

9.39 The complaint is often made that trials are longer than they used to be, a major reason being that there has been a tendency towards greater prolixity.[15] This complaint was, not surprisingly, voiced by many of our witnesses. Regrettably the complaints appear to be true. They relate to counsel's examination and cross-examination and opening and closing speeches as well as to the judge's summing up. The problem is not confined to fraud cases, but fraud cases are particularly

[15] In this context, we draw attention to one recent fraudulent trading case which lasted for 82 days. The Court of Appeal (Lawton L. J.) observed that "thirty years ago this trial would have taken no longer than about twenty working days to try . . . In the last thirty years there has been a change from conciseness to prolixity. There must be a change back and quickly.": see *R v Cox and Mead, The Times*, 6 December 1984 (CA Transcript No. 5131/B/83 and 5141/B/83).

vulnerable to it, since the issues are often complex and diffuse. Although complaints about prolixity have been made for very many years little has been done to respond to them.

9.40 One or two witnesses raised the question of imposing time limits on opening and closing speeches by counsel. While this could have a significant effect in shortening trials, we are not satisfied that it would be feasible to lay down time limits for speeches. Fixed limits would not take account of the different circumstances of each case, and they might make it more difficult for the jury to understand, rather than easier.

9.41 Some of the proposals we have made in this report, for example, the greater use of written material, case statements and visual aids, should go some of the way towards reducing prolixity and thus achieving what has not been achieved so far. We hope that these proposals will enable essential points to be brought out at the trial concisely and not at inordinate length. So far as fraud cases are concerned, the solution to prolixity lies, above all, in ensuring that cases are tried and conducted by competent judges and counsel. Our proposals regarding the need for nominated trial judges, the careful selection of prosecuting counsel and changes in the structure for remunerating counsel should thus all be seen in the context of leading to a reduction in time and therefore in cost.

F. Training

1. THE NEED FOR TRAINING

9.42 We are of the opinion that appropriate training is essential if fraud cases are to be handled with the necessary degree of competence. Professions, such as the medical and accountancy professions, make extensive use of post-qualification training. Very recently, The Law Society has introduced such a scheme. There is, however, no formal provision for post-qualification training at the Bar, and training for judges after their appointment is on a relatively modest scale. We believe that the judiciary, the legal professions, as well as the police and other investigators should all have the advantage of adequate training to enable them to function effectively when dealing with fraud cases, and to keep up to date with developments in technology, and changes in the techniques used in commercial and financial spheres. We regard money spent on training as money well spent. There will, of course, be scope for courses and facilities to be shared by the different professions. It should, in our view, be one of the functions of the Fraud Commission to encourage post-qualification training in this area.[16]

2. THE JUDICIARY

9.43 In some jurisdictions, judges receive comprehensive training before they sit. In this country there has in the past been very little formal

[16] See para. 2.49, above.

judicial training. However, in 1979, the Judicial Studies Board was set up, under the chairmanship of a judge, its functions being

> "to determine the principles upon which judicial studies should be planned, to approve the proposed forms of study programmes, to observe them in operation and to report on them periodically to the Lord Chancellor, Lord Chief Justice, and Home Secretary".

Initially the Board was concerned only with organising judicial seminars relating to the work of the Crown Court but, since October 1985, its role has been expanded to include responsibility for judicial seminars dealing with the civil and family jurisdictions, and the training of magistrates. In 1984, there were three three-and-a-half day seminars for experienced Crown Court judges and recorders, and three three-day seminars for more than 100 new assistant recorders. All assistant recorders attend a seminar before sitting as judges.

9.44 In May and October 1985 a number of High Court and circuit judges[17] attended courses on information technology and accounting organised by the Institute of Chartered Accountants in England and Wales. We understand that all those who took part in them found the experience valuable. We welcome this initiative since we believe it is important that organised training in accounting and information technology should be available to those High Court and circuit judges who are to try fraud cases. In our view, there is a need for such courses to be organised on a periodic basis either by the Institute of Chartered Accountants, if they were willing to do so, or by the Judicial Studies Board with the assistance of the relevant professional organisations. In Chapter 10, we set out the average cost of providing a two week training course for a circuit judge, inclusive and exclusive of his salary cost.[18]

3. THE BAR

9.45 We have already indicated that the best form of training for a barrister to learn how to handle fraud cases is experience, and for a junior barrister to be led by a competent Queen's Counsel or senior junior in such cases provides an invaluable opportunity. However valuable, this is not a complete form of training. Hitherto, specialised training for barristers has been minimal, though they are of course expected to keep themselves up to date, and it is open to them to attend courses organised by others. We consider that action is required in three areas, professional examinations, pupillage and post-qualification training.

(a) Professional examinations and pupillage

9.46 The examinations for students training for the Bar are regulated by the Council of Legal Education. The syllabus includes some compulsory

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[17] Including a member of the Fraud Trials Committee.

[18] See para. 10.5, serials 19 and 20.

and some optional subjects. Unlike the examination requirements of The Law Society, the syllabus for the Bar does not require a knowledge of accountancy. The Royal Commission on Legal Services recommended that company law should be a compulsory subject.[19] This has now been put into effect, insofar as questions in other papers may demand an understanding of the principles of company law. In addition, students must attend a course of 10 lectures *either* on forensic science and medicine *or* on company accounts. The aim is "an introduction at an elementary level".[20]

9.47 Several witnesses pointed out to us that few practitioners can read a balance sheet with confidence, and that this is an obvious handicap to those who are briefed in fraud cases. This subject would not only be of benefit to barristers involved in fraud cases, but would also be valuable to barristers dealing with businesses large and small, companies, taxation, and other kinds of work. We believe that those intending to qualify as barristers should receive some compulsory training in accountancy. Ideally, this subject should be included in the syllabus for the Bar examinations but we recognise that, given the demands of other subjects, this may not be practicable at this stage of a barrister's training. In that event, we think that barristers ought to receive training in accountancy during pupillage. Not everyone who is called to the Bar undertakes pupillage; but it is a pre-condition of permission to commence practice at the Bar. At either stage there would only be scope to teach the rudiments, but it would nevertheless provide a useful basis of knowledge which could be developed, at a later stage.

(b) Post-qualification training

9.48 The Royal Commission on Legal Services, dealing with both the Bar and the solicitors' profession, recommended that "a programme of continuing education should be developed and the introduction of an obligatory system kept under review."[21] Solicitors admitted since August 1985 must, in order to take out a practice certificate, attend a certain number of courses on legal topics. However, the Bar has yet to introduce such a scheme.

9.49 Barristers are free, it they wish, to attend some of the many courses and seminars which are presently available, often arranged on a commercial basis. However, there is little incentive for them to do so, since it would mean taking time away from fee-earning work, and the course would have to be paid for. One possibility is that post-qualification training in accountancy, as well as in information technology, should become compulsory for practising barristers. It might well find its place as part of a wider scheme of continuing education set up by the Bar. It would constitute a means of developing the initial training, given before qualification or immediately after it, which we recommend above. As with judicial training, the assistance

[19] Report (1979), Cmnd. 7648, Recommendation R 39.5.

[20] Council of Legal Education, Calendar for the year 1985–6, p. 70.

[21] *Ibid.*, Recommendation R 39.17.

of outside bodies should be sought to provide the relevant expertise, but the initiative should lie with the profession itself to develop a programme of training of this kind.

9.50 Whether post-qualification training would affect a barrister's entitlement to practise, as it does a solicitor's, would be a matter for consideration. However, we think that prosecuting authorities should give weight to attendance at relevant post-qualification courses when selecting counsel to prosecute in fraud cases.[22]

4. PROSECUTION STAFF

9.51 Once the Crown Prosecution Service is in operation,[23] all public prosecutions in England and Wales will be carried out by civil servants, whether as members of that Service or members of other Government Departments who undertake prosecution work. Training already available to civil servants under the existing programme of courses includes training in accountancy. These courses are designed to cater for the needs of civil servants generally rather than prosecutors in particular. Nonetheless, basic training for prosecutors along these lines would in our view be valuable. We understand that steps are being taken in the DPP's Department to put training on a firmer basis and this includes arrangements through the Institute of Chartered Accountants in England and Wales for courses on accountancy which are tailor-made for lawyers working in the Fraud Investigation Group.

5. THE POLICE

9.52 Police officers in fraud squads are not required to have legal or accountancy qualifications and, as we have recommended, it is necessary that expert legal and accountancy assistance should be made available to police at the earliest opportunity.[24] Training for officers seconded to fraud squads is provided by the Metropolitan Police Detective Training School and some training is carried out within the Greater Manchester and West Midlands Police areas. From the beginning of 1986 there will be a single four week fraud investigation course held four times a year at the Detective Training School, replacing two three week courses (an introductory and an advanced course). Additionally some "in house" instruction is given within fraud squads to reinforce experience gained from case investigations. We have already said that experience in this field is not a complete form of training[25] and that officers should serve longer with fraud squads in order to gain necessary expertise.[26] We have not undertaken a comprehensive review of the proper training requirements of police officers working in this area, but we are firmly of the view that a longer period of training, with provision for further shorter courses in

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22 See generally paras. 9.33–9.38, above.

23 See para. 2.13, above.

24 See paras. 2.68 and 2.73, above.

25 See para. 9.45, above.

26 See para. 2.75, above.

specialised subjects, will be required if officers working in fraud squads are to be able to investigate fraud cases effectively.

Recommendations

Serial		Paragraph
100.	**Fraud cases should be presented to the jury by means of a carefully chosen mixture of written and oral material. The jury should be given a set of essential documents which should conform to clear guidelines.**	9.9 – 9.15
101.	**The judge should have power, at a preparatory hearing, to direct that visual aids should be used at the trial.**	9.25
102.	**An experiment should be conducted in one court-room at the Central Criminal Court to test the usefulness of computer terminals in presenting information in fraud cases.**	9.25
103.	**Court-rooms used for fraud cases should have adequate space for using and storing documents, and facilities for the use of overhead projectors. Presiding judges, in consultation with circuit administrators, should designate the courts which meet these conditions.**	9.27
104.	**Those responsible for nominating trial judges for fraud cases (see Recommendation 18) should ensure that those selected, whether High Court or circuit judges, are competent to take the particular case.**	9.31 9.32
105.	**Those responsible for nominating prosecution counsel for fraud cases should apply the sole criterion of competence to conduct the case effectively.**	9.37
106.	**In compiling a list of counsel competent to prosecute in fraud cases, the views of judges experienced in trying fraud cases should be sought.**	9.38
107.	**Appropriate training for all those involved in fraud cases should be provided.**	9.42 –9.52
108.	**Accountancy should be a compulsory subject in training for the Bar, either at the Bar examinations stage or during pupillage.**	9.47
109.	**Post-qualification training in accountancy and information technology should be available for practising barristers, and appropriate incentives for attendance should be devised.**	9.49 9.50
110.	**Better training for police officers in fraud squads is required, together with courses in specialised subjects.**	9.52

CHAPTER 10

TIME AND COST

10.1 We endeavoured to obtain information concerning the time, costs, and other statistics in fraud cases. For this purpose we asked Coopers & Lybrand, chartered accountants, to collect the relevant figures on our behalf.

10.2 This task proved difficult and it was spread over a long period. The sources from which the information was sought were initially as follows, but the number increased as various supplementary sources of information had to be contacted.

(a) The Director of Public Prosecutions
(b) Home Office
(c) Lord Chancellor's Department
(d) Department of Trade and Industry
(e) South-Eastern Circuit Administrator
(f) Court Administrator, Central Criminal Court
(g) Police – Metropolitan
(h) – City of London
(i) – Lancashire Constabulary
(j) – West Mercia Constabulary
(k) – Sussex Constabulary

10.3 We have already drawn attention in Chapter 2 to the large number of different organisations which are concerned with the detection and pursuit of fraud. Apart from the four Government Departments set out in (a) to (d) above, it will be appreciated that the Inland Revenue and the Customs and Excise.Departments are independently organised as prosecuting authorities which act, in relation to their own Departments, in a similar way to the Director of Public Prosecutions. The above table refers to five police forces who were contacted in order to obtain information but the number of police forces who are, or may be, concerned in fraud cases is 43 and each of them acts in an independent capacity.

10.4 The information requested was often not readily available. It was also found that the different sources compiled the information using different bases. For example, some costs quoted were historical and others were restated on a current basis and salaries were quoted both inclusive and exclusive of overheads. In the result it was possible to collate some key figures but Coopers & Lybrand have pointed out to us that they have only been able to check the arithmetical accuracy of the costings given to them and that they have not audited them in the

sense of agreeing the data with the primary records. Many of the figures quoted were based on small samples only which may not be representative, and this in turn would affect the average figures shown. We regret that it has not been possible to obtain more comprehensive information or to make comparisons over a number of years so that the trends can be examined and effective comparisons made.

10.5 We tabulate below such of the key figures as could be obtained.

Serial		Money figures are at current cost
	Full Committal Proceedings	
1.	Average cost per case for each working day (court time including prosecution and defence costs[1])	£3,000
2.	Average length of each case (based on six cases held in 1983)	5 days
3.	Average cost of a five day full committal proceeding	£15,000
4.	It is difficult to ascertain the number, or the annual cost, of full committal proceedings in all fraud cases. The figures provided for the year 1983 related to six cases which is too small a sample from which to draw reliable conclusions. Rough estimates indicate that the number of full committals in all fraud cases each year might now be in the order of 500–700. The information we have is not adequate to give the total annual cost.	
5.	The time taken in 321 fraud cases which were the subject of committal proceedings, both full and paper, in January 1981 has been analysed as follows:	

	Median time taken in weeks	
	Full	**Paper**
First court appearance to committal	24	9
From committal to disposal	31	11
From first court appearance to disposal	61	25

As a result of the analysis it was noticed that (based on average figures, in weeks) the time taken in fraud cases at all stages is 30 to 40 per cent longer than that found in all cases taken as a whole.

[1] I.e. the legal aid costs of both solicitors and counsel reflecting the number of defendants and the number of their representatives in the cases studied. (In one case there were three defendants, in another, two, and in the remaining cases, one defendant per case). It should be borne in mind here and elsewhere that the defence costs per case for each day will vary according to the number of defendants and the number of their representatives.

Serial		Money figures are at current cost
	Section 431 and 432 reports under the Companies Act 1985 (formerly sections 164 and 165 of the Companies Act 1948)	
6.	Total number completed in the five years 1979 to 1983	27
7.	Of these, number carried out by external inspectors	14
8.	Range of time taken by external inspectors	1 year and 4 months to 4 years and 5 months
9.	Average time taken by external inspectors	3 years and 8 months
10.	Average cost for report made by external inspectors	£463,000
	Central Criminal Court costs	
11.	Average cost per case for each working day (court time only)	£1,700
12.	Average cost per case for each working day (court time including daily prosecution and defence costs[2])	£3,000
13.	Average cost per case for each working day for a pre-trial review (excludes prosecution and defence costs)	£1,200
14.	Average cost of a circuit judge reading papers in his room per day	£300
	Commercial fraud cases	
15.	Average cost of a commercial fraud case from the beginning of the police investigation to verdict, based on a sample of 10 cases lasting more than 20 days, on which verdicts were reached in 1981 – 1984 (Note: This expenditure is exclusive of any expenditure in respect of reports under sections 431 and 432)	£500,000

[2] See note 1, above.

16.	Range of court time taken in the above 10 cases, in working days	26 days to 110 days
17.	Average number of working days	46 days

Trial by judge and two lay members

18.	Estimated cost per case for each working day (court time only), based on the assumption that the fees of two lay members will be at the same rate as a circuit judge's daily rate	£1,800

Training courses for judges

19.	Average cost per each participant of a training course of 14 days, exclusive of circuit judge's salary costs	£300
20.	Average cost inclusive of circuit judge's salary costs	£2,000

Employment costs

21.	Cost per annum of employing an additional accountant as a Higher Executive Officer on a permanent basis in the DPP Fraud Investigation Group	£26,000
22.	Cost per annum of employing an accountant as a Senior Executive Officer on a permanent basis in the Metropolitan and City Police Company Fraud Department	£32,000

10.6 An essential requirement of justice is that it be administered with reasonable dispatch. The evidence we have received in fraud cases is that this is often not achieved. In this context it will be noticed from Serial 5 that the average time in fraud cases at all stages is 30 to 40 per cent longer than that found in all cases taken as a whole. As we have pointed out in other chapters in this report, cases are delayed or extended for long periods; they become stale through delay and are sometimes abandoned altogether for that reason. Essential witnesses die and, in any event, memories fade so that a fair hearing is impaired. Many of the procedures are time wasting and they are sometimes used deliberately by one or other of the parties to cause delay. Trials are burdened by undue prolixity. All these factors are damaging to the cause of justice and to the persons under inquiry whether they are ultimately proved guilty or are acquitted. Time expended is reflected in cost. The table in paragraph 10.5 emphasises some of the long delays which take place and the heavy expenditure which is consequently incurred.

10.7 Serial 4 gives some information about the number of full committal proceedings in fraud cases in a year. Chapter 4 shows that some at least of the expenditure involved could be avoided without detriment to the cause of justice.

10.8 Serial 8 shows that the time range for inquiries carried out by external inspectors under sections 431 and 432 of the Companies Act 1985 (formerly sections 164 and 165 of the Companies Act 1948) was between 1 year and 4 months and 4 years and 5 months. They show an average time for each report of 3 years and 8 months. The average cost of investigations dealt with by external inspectors was £463,000 per report. It should be realised that the time and costs shown exclude those of the police inquiry which took place if it emerged that criminal charges had to be preferred against some of the persons whose conduct had been under inquiry; they also exclude the time and the cost of the trial itself. These additional costs are referred to below.

10.9 We have obtained some figures of the overall cost of 10 commercial fraud cases and in these cases the average was £500,000 (Serial 15). These costs include the costs of the police inquiry and all the subsequent costs until the verdict of the court. They are exclusive of the cost of any report under sections 431 and 432 of the Companies Act 1985.

10.10 As regards trials at the Central Criminal Court, it will be seen from Serial 16 that in the 10 cases examined, where the trial period exceeded 20 days, the time range extended from 26 days to 110 days. The average time of the hearing in court was 46 working days. As we made clear in Chapter 8 these long hearings place an unreasonable burden on all those taking part and we question whether it is possible for the majority of those involved to maintain an adequate degree of concentration, or to retain in their memories all the essential facts, if justice is to be properly and fairly administered.

10.11 In Serial 18 we have estimated a possible average daily cost of trial by a judge sitting with two lay members, the method of trial which we have recommended in Chapter 8 for complex fraud cases. For this purpose we have assumed that the lay members would be paid at the same rate as a circuit judge's daily rate. It will be seen from a comparison with the average daily cost of a case at the Central Criminal Court tried by a judge and jury of 12 (Serial 11) that the difference in cost is marginal.

10.12 Throughout our inquiry we have been conscious of the need to eliminate unnecessary or time wasting procedures. Many of these have existed, unchanged, for a long period of years. We have little doubt that if our recommendations are adopted they will result in material savings of time and, in consequence, money. We do not have any reliable basis for accurately assessing the savings in time and cost which might be expected. However, in one case tried at the Central Criminal Court we were given an authoritative estimate that an effective (and not costly) pre-trial review had probably made it

possible to reduce the length of the full trial from six weeks to three. On the basis of the costs quoted in Serial 12, a reduction of 50 per cent of the time spent at that trial might have produced a saving of £45,000 (15 days at £3,000 per day). If similar savings of trial time had been achieved in the 10 commercial fraud cases in Serial 15, this might have produced a total saving in relation to court-related expenditure of £690,000 (10 x 23 days x £3,000) or an average of £69,000 per case. Even if a reduction by as much as a half were not possible in all fraud cases of this kind tried by judge and jury, we would certainly expect that, in those complex fraud cases to be tried by judge and two lay members, savings of time and cost of at least this order would be achieved. A proportion – it is difficult to say how great – of the costs saved in this and other ways would need to be spent in other areas where we have recommended improvements, such as in the investigation and preparation of cases.

10.13 It should be borne in mind that the overwhelming proportion of the costs of all criminal proceedings falls not upon the individual but upon the State, either as direct expenditure or in the form of legal aid; there is thus little direct incentive on any of the persons engaged to save time or cost and there is no pressure to initiate changes. We have no doubt that in each of the different places in which costs are incurred, control is exercised in accordance with the established procedures of approved annual budgets and by other means, but we do not think that this goes far enough. In Chapter 2 we recommended that there should be an independent monitoring body (the "Fraud Commission") which has the responsibility of studying and advising on the efficiency and cost effectiveness of fraud cases from year to year. One of its functions would be to assess the possibility of improvements by changes of policy and procedure or the introduction of more efficient techniques. In order to assist it to discharge this function, it would be necessary for the monitoring body to collect the key figures of time, cost and other relevant material on a consistent basis. Apart from other advantages we believe that the monitoring body would provide a degree of co-ordination of the numerous interests involved which is at present lacking.

10.14 We also believe that it should be impressed constantly on all those engaged in the criminal legal process that they have a continuing duty not only to eliminate delays, bad professional work, and wasteful procedures, in order to ensure the proper administration of justice but also to reduce the mounting burden of expenditure. Appropriate disciplinary procedures and sanctions should be applied if these requirements are disregarded.

Recommendations

Serial		Paragraph
111.	**One of the functions of the Fraud Commission (Recommendation 2) should be to collect the key figures of time, cost and other relevant material concerning the investigation, prosecution and trial of fraud cases.**	10.13
112.	**Appropriate disciplinary procedures and sanctions should be imposed when needless and wasteful delays take place in the investigation and trial of fraud cases.**	10.14

CHAPTER 11

SUMMARY OF RECOMMENDATIONS

11.1 The following is a comprehensive summary of our recommendations. If they are accepted, some will require legislation by Parliament to give effect to them or to enable statutory rules or regulations to do so. Others will not require legislative intervention, but can be implemented by changes in working practices and attitudes. We distinguish these categories by marking an asterisk against recommendations which we believe will require legislation.

Recommendations

Serial		Paragraph
1.	**The need for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases should be examined forthwith.**	2.48
2.	**An independent monitoring body (the "Fraud Commission") should be responsible for studying the efficiency with which fraud cases are conducted and should make an annual report on the lines indicated in the text.**	2.49
3.	**Inspectors appointed under sections 431 and 432 of the Companies Act 1985 must report evidence of suspected fraud as soon as it is discovered.**	2.60
4.	**It is desirable that the Department of Trade and Industry should rely on investigations under section 447 of the Companies Act 1985 rather than inquiries under sections 431 and 432.**	2.61
*5.	**Powers of investigation comparable to those available to the Department of Trade and Industry under section 447 of the Companies Act 1985 should be conferred on the police.**	2.62
6.	**Section 721 of the Companies Act 1985 should be reviewed to consider the need to retain the provision and, if so, whether the procedure for obtaining an order should be streamlined.**	2.63
7.	**A "Case Controller" should be responsible for the control of a serious fraud case from the time of discovery until the verdict.**	2.66
8.	**Prosecuting counsel should be appointed at an early stage in the investigation of serious fraud cases to advise as to**	

Serial		Paragraph
	the direction of the investigation; and should conduct the prosecution case at any subsequent trial.	2.68
9.	**Counsel must be prepared to adapt to the task of being a member of and leading a team of investigators and prosecutors.**	2.69
10.	**The resources devoted to the pursuit of fraud must be expanded as a matter of priority.**	2.71
11.	**More expert accounting staff is likely to be needed in the DPP; permanent qualified accounting staff should be attached to the police fraud squads.**	2.72 2.74
12.	**Provision of a career structure for officers in the fraud squads is required.**	2.75
13.	**An appropriate law reform agency should examine the issues, indicated in the text, relating to the substantive law of fraud.**	3.18
14.	**We do not recommend that the voluntary bill procedure should be used as a suitable substitute for committal proceedings in fraud cases.**	4.30
*15.	**Full committal proceedings in fraud cases should be abolished, but as an interim measure pending the Government's decision on committal proceedings, designated prosecuting authorities should be permitted to dispense with full committal proceedings where appropriate and these cases would be transferred to the Crown Court by an alternative procedure.**	4.33 to 4.36
*16.	**At any time before the start of committal proceedings, the prosecuting authority may issue a certificate transferring a case to the jurisdiction of the Crown Court.**	4.34 4.38 4.41
*17.	**The issue of a "transfer certificate" should not be open to challenge by the defence by way of appeal or judicial review.**	4.39
18.	**In any serious fraud case brought to the Crown Court by transfer certificate or committal a judge with appropriate special experience should be nominated as the trial judge at an early stage after transfer.**	4.46
19.	**The nominated judge should deal with all matters relating to the case including any application for discharge**	

Serial		Paragraph
	(recommendation 20, below) other preparatory hearings and the trial.	4.46
*20.	**In any case brought to the Crown Court by transfer certificate, a defendant may make application for discharge to the nominated judge, subject to the restrictions stated in the text.**	4.34 4.47 4.51
21.	**Appropriate time limits should be set under the Prosecution of Offences Act 1985.**	4.55
*22.	**The judge should have power to order that a document sought to be put in evidence by either the prosecution or the defence may be allowed in as evidence of the truth of its contents without formal proof.**	5.27 5.35 5.36
*23.	**The party seeking to put in a document without calling its maker or other witness who can speak to it must give an indication of the nature and source of the document.**	5.38
*24.	**The judge should have power to order that a copy document should be admissible to the same extent as if the original of that document had been produced and strictly proved.**	5.40
*25.	**The judge should have a power to order that a deposition be admissible in evidence at the trial where the witness is unavailable, subject to the comment that it has not been tested by cross-examination.**	5.42
*26.	**Legislation should be sought to enable evidence to be taken on commission abroad for use in criminal trials in England and Wales.**	5.43
27.	**Negotiations should be set in train with other countries to provide for reciprocal arrangements regarding the taking and receipt of evidence on commission.**	5.44
*28.	**Treaties and legislation should allow for the possibility of using live satellite links to enable evidence to be taken from a witness in another country.**	5.45
*29.	**A judge should have power to order that an expert's report should be admissible in evidence.**	5.47
*30.	**The judge should have power to order that schedules and charts and other aids to presentation should be admissible in evidence.**	5.48 5.49

Recommendations

Serial		Paragraph
*31.	**"Preparatory hearings" (a term we use in preference to pre-trial review) should be treated as a formal preparatory part of the trial.**	6.25
*32.	**Preparatory hearings in the presence of the defendant should generally be held in open court, but subject to reporting restrictions.**	6.27
33.	**Preparatory hearings should be held in fraud cases where appropriate and should be initiated at the request of either party or the court.**	6.28
34.	**The judge presiding at the preparatory hearings must be the judge who, save in exceptional circumstances, is to conduct the trial.**	6.32
35.	**The judge must be given adequate time to familiarise himself with the case before the preparatory hearings.**	6.33
36.	**Adequate secretarial facilities must be provided for judges trying fraud cases.**	6.34
37.	**Counsel, including leading counsel, briefed for the trial should be under a professional obligation to attend all preparatory hearings, and should attend unless there are compelling reasons which prevent him from complying with his duty. Breach of this obligation should lead either to a reduction in counsel's fees or in extreme cases to disciplinary action by the Bar Council.**	6.35 6.39
38.	**Judges should be more willing to adjourn cases to enable counsel to attend preparatory hearings.**	6.37
39.	**The prosecution, in particular prosecuting counsel, must bear the responsibility of ensuring that their case is thoroughly prepared before the first preparatory hearing.**	6.43
40.	**Defence lawyers will have to be ready to prepare their case for trial at an earlier stage than at present.**	6.45
41.	**Counsel should be adequately remunerated for early and thorough preparatory work.**	6.46
42.	**Counsel should be paid on the basis that the main work of preparation is done in advance of the first preparatory hearing and not later.**	6.47

Recommendations

Serial		Paragraph
43.	**Attendance at a preparatory hearing should be paid at the same rate as attendance at the trial.**	6.47
44.	**Both the prosecution and the court should be under a duty to ensure that within a specified period of committal or transfer certificate a date for the first preparatory hearing is fixed.**	6.49
45.	**The listing officer should be responsible for monitoring the progress of cases and to report any likely delays to the nominated judge.**	6.49
46.	**The Fraud Commission (Recommendation 2) should observe the progress of fraud cases through the courts and examine and advise on the time taken and the causes of delays.**	6.50
47.	**There should be such number of preparatory hearings as the case requires.**	6.51
48.	**A full day should normally be set aside for each preparatory hearing. Consideration should be given to adopting as standard the practice of holding preparatory hearings on one day of the week, Friday probably being the most suitable for this purpose.**	6.52
49.	**Preparatory hearings should not always be held at the place of trial, if another location is more convenient to the trial judge and all counsel.**	6.53
50.	**Prosecuting counsel should prepare a "case statement" summarising the essence of their case against each defendant and in respect of each count on the indictment in advance of the first preparatory hearing.**	6.57
*51.	**The judge should be empowered to order the prosecution to prepare a case statement.**	6.57
*52.	**The defence should be allowed to object to the contents of the prosecution's case statement at a preparatory hearing. The judge should be entitled to order any necessary amendment.**	6.59
*53.	**The prosecution should prepare schedules and summaries of the relevant contents of documentary evidence. The judge should have the power to order the prosecution to do so and to give directions as to the scope and form of such schedules and summaries.**	6.60 6.61

Serial		Paragraph
*54.	**Glossaries of technical terms should be prepared by the prosecution for the use of the jury. The judge should have power to order preparation of them.**	6.63
55.	**The prosecution must give consideration to the most appropriate method of presenting complex information and make full use of modern techniques.**	6.64
56.	**Prosecuting counsel and expert witnesses concerned with the presentation of numerical information should have regard to the various ways of improving such presentation.**	6.65
*57.	**The judge should be empowered to direct the preparation and use of visual aids for the trial.**	6.66
*58.	**The law should be altered so that the defence are required to outline in writing the nature of their case at the preparatory hearing stage.**	6.82
*59.	**If a defendant fails to disclose his defence in advance of the trial the following sanctions should be available:**	
	(i) The prosecution and the judge should be entitled to comment at the trial, and the jury should be entitled to take account of and draw any appropriate inference from the defendant's failure to disclose a particular line of defence on which he relies at the trial.	
	(ii) Where the failure to make prior disclosure of the defence has unnecessarily prolonged the trial, the sanction of costs should be available.	6.82
*60.	**The judge should warn the defendant of the possible consequences of a failure to disclose the line of his defence in advance of the trial.**	6.82
*61.	**Where the failure to disclose the defence is the fault of the defendant's representatives, they might be penalised by having their fees from the legal aid fund reduced.**	6.82
62.	**The defendant need not be required to indicate whether he intends to go into the witness box until the close of the prosecution case.**	6.83
63.	**The defendant should not be required to inform the prosecution in advance of the names and addresses of any witnesses who are likely to be called at the trial on his behalf.**	6.84

Serial		Paragraph
*64.	**The prosecution should be required to serve a notice on the defence requesting admissions of facts. The defence should be required to serve a counter-notice stating which facts are admitted and which are not giving their reasons.**	6.88
*65.	**Failure to make admissions of facts which are not the subject of challenge at the trial and which a jury might after hearing all the evidence think any reasonable innocent person would have been ready to make should be capable of attracting comment by the judge and the prosecution.**	6.92
*66.	**The sanction of costs should also be available in appropriate cases.**	6.92
*67.	**The prosecution should be required to serve a notice on the defence requesting admissions of documents. The defence should be required to serve a counter-notice stating whether they admit or deny the authenticity of the document.**	6.94
*68.	**The prosecution and the judge should be entitled to comment on any failure to challenge the truth of the contents of a document in advance of the trial.**	6.96
*69.	**The defence should be required to raise points of law at the preparatory hearing stage, other than those which depend on the way in which the evidence comes out at the trial.**	6.98
*70.	**Failure of defence counsel to raise a point of law at the preparatory hearing which could have been raised then had the case been properly prepared which results in court time being wasted should lead to the possibility of a reduction in counsel's legal aid fees.**	6.98
*71.	**The defence should be entitled to put in a written case statement of their own in reply to the prosecution's case statement.**	6.99
*72.	**Appropriate time periods should be laid down within which certain procedural steps should be taken.**	6.100
73.	**The trial date should be fixed when the preparatory hearings have been completed, or after the first preparatory hearing. Trial dates once fixed should not be altered except for a compelling reason.**	6.102

Recommendations

Serial		Paragraph
74.	**The procedure for summoning jurors should continue to be based upon the electoral roll for the catchment area of the Crown Court in question.**	7.6
75.	**The upper and lower age limits for jury service (18 and 65) should remain unchanged.**	7.8
76.	**No one should sit on a jury in a fraud case who cannot read, write, speak and understand English without difficulty.**	7.11
77.	**The rules relating to the disqualification of persons from jury service should be reviewed in relation to the jury system as a whole with a view to seeing whether and how far the disqualifications should be extended in scope.**	7.16
*78.	**The defendant's right of peremptory challenge of jurors and the prosecution's right to "stand by for the Crown" in any fraud case should be abolished.**	7.38
79.	**The prosecution and the defence should only be allowed to challenge jurors for cause in accordance with existing principles.**	7.38
*80.	**The determination of the validity of a challenge for cause should, if the judge so orders, be heard in chambers.**	7.38
81.	**The problem of jurors dying or falling ill during long fraud trials is not sufficiently serious to warrant provision being made to enable a small number of stand-by jurors to be empanelled.**	7.41
*82.	**For complex fraud cases falling within certain Guidelines, trial by a judge and two lay members should replace trial by judge and jury. We refer to the new tribunal as the "Fraud Trials Tribunal" (FTT).**	8.51
*83.	**Either the prosecution or the defence should be entitled to apply to a High Court judge (other than the nominated trial judge) if the case falls within the Guidelines.**	8.55
*84.	**Either the prosecution or the defence should have the right of appeal to the Court of Appeal (Criminal Division) against an order for trial by the FTT.**	8.59
*85.	**The defence should not be able to appeal against any subsequent conviction on the ground that the wrong tribunal was used.**	8.60

Serial		Paragraph
*86.	**The lay members should be selected from a panel of persons who have the qualifications stated in the text.**	8.61
*87.	**The Lord Chancellor should be responsible for compiling and maintaining a list of available lay members.**	8.62
*88.	**No lay member should remain on the list maintained by the Lord Chancellor for more than three years without being subject to a review.**	8.63
*89.	**Lay members should be remunerated on a basis of time occupied together with an allowance for any necessary expenses incurred.**	8.64
*90.	**The lay members taking part in a particular trial should be selected by the Lord Chancellor in consultation with the nominated judge for that trial.**	8.65
*91.	**A lay member would not take part in a case if there were any conflict of interest.**	8.65
*92.	**At the trial the judge alone would be responsible for dealing with any questions of law arising and for the exercise of judicial discretion.**	8.66
*93.	**The lay members would normally play no part in any preparatory hearing.**	8.67
*94.	**At the end of the trial, the judge and lay members should retire to consider their verdict. In every case, the judge should deliver either orally or in writing a statement of the law applied and the court's decisions on the facts.**	8.68
*95.	**The verdict of the tribunal should be by a simple majority. Only one judgment should be given and a dissenting opinion should not be disclosed.**	8.69
*96.	**If a lay member is obliged for reasons of health or otherwise to withdraw before the case begins, a replacement should be appointed. If a lay member is obliged to withdraw during a case or dies, the case should be retried.**	8.70
*97.	**The judge alone should be responsible for sentencing and for any ancillary orders that require to be made.**	8.71
*98.	**The right of, and grounds for, appeal should in principle be the same as those prevailing in jury trials.**	8.72

Serial		Paragraph
*99.	**The law relating to the conduct and protection of jurors, including the Contempt of Court Act 1981, should be extended to cover lay members.**	8.74
*100.	**Fraud cases should be presented to the jury by means of a carefully chosen mixture of written and oral material. The jury should be given a set of essential documents which should conform to clear guidelines.**	9.9 to 9.15
*101.	**The judge should have power, at a preparatory hearing, to direct that visual aids should be used at the trial.**	9.25
102.	**An experiment should be conducted in one court-room at the Central Criminal Court to test the usefulness of computer terminals in presenting information in fraud cases.**	9.25
103.	**Court-rooms used for fraud cases should have adequate space for using and storing documents, and facilities for the use of overhead projectors. Presiding judges, in consultation with circuit administrators, should designate the courts which meet these conditions.**	9.27
104.	**Those responsible for nominating trial judges for fraud cases (see Recommendation 18) should ensure that those selected, whether High Court or circuit judges, are competent to take the particular case.**	9.31 9.32
105.	**Those responsible for nominating prosecuting counsel for fraud cases should apply the sole criterion of competence to conduct the case effectively.**	9.37
106.	**In compiling a list of counsel competent to prosecute in fraud cases, the views of judges experienced in trying fraud cases should be sought.**	9.38
107.	**Appropriate training for all those involved in fraud cases should be provided.**	9.42-9.52
108.	**Accountancy should be a compulsory subject in training for the Bar, either at the Bar examinations stage or during pupillage.**	9.47
109.	**Post-qualification training in accountancy and information technology should be available for practising barristers, and appropriate incentives for attendance should be devised.**	9.49 9.50

Recommendations

Serial		Paragraph
110.	**Better training for police officers in fraud squads is required, together with courses in specialised subjects.**	9.52
111.	**One of the functions of the Fraud Commission (Recommendation 2) should be to collect the key figures of time, cost and other relevant material concerning the investigation, prosecution and trial of fraud cases.**	10.13
112.	**Appropriate disciplinary procedures and sanctions should be imposed when needless and wasteful delays take place in the investigation and trial of fraud cases.**	10.14

(Signed) ROSKILL (*Chairman*)
HENRY BENSON
DAVID BUTLER
JAMES CRANE
JOHN HAZAN
ARTHUR KNIGHT
BARBARA E. MARSH
WALTER MERRICKS*

M. N. FARMER, *Secretary*
A. W. BARSBY, *Assistant Secretary*
9th *December* 1985.

* A signed Note of Dissent is set out in the following part of the report.

NOTE OF DISSENT BY MR. MERRICKS

DISCLOSURE BY THE DEFENCE

A1. I do not believe that the recommendation made by the Committee at paragraph 6.82 should stand without considerable qualification. In particular I think that the use to which the defence disclosure document could be put should be limited by the requirement that no reference should be made to it during the course of the trial except with leave of the judge.

A2. I agree that once the prosecution has laid all its cards on the table, has produced a case statement which cannot in its essence be altered, and has thus made a final declaration of the allegations it is making, the defendant can be required to disclose the outline of what his defence will be. Many defence lawyers already do this although there is no obligation to do so, and all the parties (the court administration, the prosecution, the judge and the jury) no doubt benefit.

A3. Frequently the disclosure is made on a "counsel to counsel" basis: that is, the information is given by defence counsel to prosecution counsel for his use only. Sometimes defence counsel is prepared to give a more formal indication of the broad lines of the defence in open court. But at present this happens if at all on a voluntary basis. The Committee's proposal is that the disclosure should now be a matter of obligation.

A4. Armed with the outline of the defence, prosecution counsel will be able to arrange the presentation of his case appropriately. Witnesses whose evidence is not to be challenged need not be called. Those whose evidence is crucial can be invited to concentrate their testimony on the matters in issue.

A5. My objection, however, is to a possible abuse of the process by prosecution counsel. There would be a natural temptation for prosecution counsel in the examination-in-chief of his witnesses simply to put the defence to each of them and ask them for their comments. This would run the risk that their evidence would be directed solely towards discrediting the defence.

A6. Defence counsel might be put at a further disadvantage when it comes to the cross-examination of prosecution witnesses. At present defence counsel rightly test the reliability of prosecution witnesses from a number of different angles. Sometimes it becomes apparent that a witness, whose written statement to the police seemed damning on paper, is actually not a reliable character. A single hesitant or ambiguous answer, if vigorously pursued, may reveal the witness to have defects of memory, or of character which render his evidence entirely suspect. The adversarial system requires counsel to engage in this kind of probing to test the veracity and credibility of witnesses. But with the defence revealed, the judge might well rule irrelevant any line of questioning which was not germane to the defence outline as revealed.

A7. The nature and character of the adversarial trial process would be fundamentally altered. The aim of the prosecution would become, not the establishment beyond reasonable doubt of their own case, but the destruction of the defence case. The task of the judge in ruling on whether, at the close of the prosecution case, a prima facie case has been made out would become particularly difficult, and the vital safeguard which those rulings embody could become imperilled.

A8. Accordingly I believe that the disclosure of the defence should be confined to the prosecution and the judge. It should not be referred to without the consent of the defence or the leave of the judge during the prosecution's presentation of its case at the trial. I agree that if the defence, without reasonable justification, does in a deliberate way depart in the presentation of its case from the outline it has given, or it fails to offer an outline and then produces a defence by surprise, the judge should then tell the jury and allow them to draw such conclusions as are appropriate.

JURY CHALLENGES

B1. I am unable to associate myself with the recommendation in Chapter 7 for the abolition of the right of peremptory challenge in fraud cases.

B2. The Government has announced its intention of having the Crown Prosecution Service conduct a general survey to establish the extent of the practice. It would be unwise, impracticable and unrealistic to legislate in advance for fraud cases before a more general consideration of the issues could be made.

B3. Moreover my colleagues, while declaring that they have sympathy with the exercise of challenges for the purpose of achieving a more appropriate sexual or racial mix on a jury, would in practice put an end to that possibility by their proposal. The existing permissible grounds on which a challenge "for cause" can be made are certainly not wide enough to permit such a practice. It seems to me that if the peremptory challenge is to be reduced or abolished, the grounds on which challenges for cause can be made would have to be extended. That would, however, inevitably draw the judge into the process of jury selection by requiring him to adjudicate on whether particular challenges are allowable. This would be a dangerous arena for the judge to become involved in. The process could delay the start of trials and lead to practical difficulties in the empanelment of jurors.

B4. A wider consideration of the issue might lead to the conclusion that the peremptory challenge should be allowed to remain. While difficult to defend in strict logic, it is but one feature of a complex and not wholly logical system in which the checks and balances have evolved over a long period, and which should be disturbed only after a wide-ranging examination of the consequences.

MODE OF TRIAL

C1. I am unable to agree with my colleagues that the evidence we have received justifies us in recommending to the Government the establishment of an alternative mode of trial for complex fraud cases.

The Evidence

C2. For all the concern expressed about the subject of long fraud trials, there are remarkably few of them. A survey carried out for the Committee showed that over the five years from 1979 to 1983 there was a yearly average of 26 fraud trials throughout the country which lasted for longer than four weeks. The trials which lasted longest are to be found at the Old Bailey (Central Criminal Court) where there was a yearly average over the period of 10 such trials.

C3. From the survey it appears that a fair proportion of the 10 or so long cases tried each year at the Old Bailey, were "carbon paper frauds", "Spanish villa frauds", "airline ticket frauds", "false label whiskey frauds", "double glazing frauds", and so on, and would have been unlikely to fall within the definition my colleagues have devised of "complex" cases.

C4. Even allowing for improved detection and prosecution rates resulting from the procedural and evidential improvements we have suggested, the number of cases destined for the proposed Fraud Trials Tribunal seems to me very small indeed.

C5. The submissions made to us by those who are closest to the existing system were overwhelmingly in favour of retaining the jury. The vast majority of the police, the solicitors' profession (from both the defence and prosecution perspectives), the magistrates, and Bar opposed the removal of jury trial. Whilst views among the judiciary were divided, it is clear that many judges had grave reservations about removing the right to jury trial.

C6. These views cut across the political spectrum: both the Society of Conservative Lawyers and the Society of Labour Lawyers were emphatic in insisting on the retention of jury trial.

C7. The submissions from the Bar – and barristers might be thought to have the closest instincts on the matter – were almost unanimous. Even those in the legal profession who called for a change often indicated that the matter was not self-evident, that procedural changes might well suffice to cure the major mischiefs, and that only a tiny number of cases should be affected by any change. The Director of Public Prosecutions for example stressed to us that though he favoured an alternative mode of trial, he did not regard this as the most fundamental of his proposals for improvement.

C8. The submissions which did favour an alternative mode of trial came largely from the financial and accountancy world. When pressed in oral evidence it became clear that most of them based their views on generalised impressions. Amongst the judges and lawyers who gave evidence, none suggested that they had regularly come across cases in which the verdicts returned by juries in fraud cases indicated that they had not understood the evidence. On the contrary many spoke of the dedication and application jurors brought to their unfamiliar task, and how their verdicts often reflected an apparently sophisticated evaluation of the charges and the evidence combined in a common sense result.

C9. As far as lack of prosecution is concerned, the DPP supplied us with an analysis of cases referred to his fraud division for the year 1983. Of the 179 referred for prosecution (as opposed to criminal bankruptcy cases and others), in 31 cases the decision was to prosecute, 77 were still pending at the time, and in 71 the decision was not to prosecute. Of these, the largest category revealed insufficient evidence to justify proceedings (32), in some there was no evidence of an offence (12), 9 were referred to the Department of Trade and Industry, in 10 cases there were difficulties over extradition. The remainder either revealed other offences but no fraud (9), were not prosecuted by reason of staleness (6), or the small amount of the deficiency (5). One case was not prosecuted due to complexity: the case involved the theft of intellectual property. Civil proceedings were pending, and independent counsel had advised that the cost of a prosecution would be enormous and that the chances of success did not warrant it.

C10. These figures give no cause for complacency. The high number of cases still pending indicates the pressing need for additional resources within the DPP's Department if it is to function effectively. But they do not suggest that there is a lack of will to prosecute when the evidence is available, or that cases are regularly dropped for fear that a jury will not understand the issues.

The Constitutional Question

C11. I accept the constitutional argument put to us, amongst others, by Lord Devlin that the right to jury trial has become so much of an institution that it has become more or less a convention of the constitution that citizens should not be liable to more than a limited term of imprisonment otherwise than on a jury verdict. (Magistrates' courts of course, do have the power to imprison but not for more than an aggregate of six months for summary offences and twelve months for either way offences.) This convention Lord Devlin traces back to 1688 and beyond. While our unwritten constitution is of course flexible, I agree that before Parliament should be asked to abrogate the constitutional right, it could and should require it to be demonstrated not only that jury trial has broken down in serious fraud cases, but also that all possible procedural improvements have been considered and found inadequate. A mere hunch, unsupported by

tested evidence, that the system might at some time in the future prove inadequate should not be enough. Nor should our legislators allow themselves to be panicked by publicity given to recent scandals in the fields of banking and insurance into jettisoning entrenched constitutional safeguards.

C12. The burden is on those who wish to alter the system of jury trial, not simply because that is the present system, but because the right of the citizen not to be liable to incarceration for a lengthy period (the maximum sentence for conspiracy to defraud is life imprisonment) other than on a jury verdict has become a civic right which should only be dislodged for good cause. The constitutional importance and sovereignty of the jury has been recently re-emphasised in public perceptions as a result of the two Official Secrets Acts prosecutions, the Ponting case and the Cyprus secrets trial.

C13. In their comments at paragraphs 8.21 – 8.23, my colleagues seem to find trial by jury an anomaly. In criminal cases it is most certainly not an anomaly. It is the basic mode of trial for all serious offences, and the right to elect a trial by jury, in any allegation of dishonesty is still regarded as one of the citizen's most important rights.

C14. The fact that only a minority of criminal cases do jury trials take place in no way diminishes its central importance. That fact merely reflects the division between summary trial and trial on indictment, and the relatively high rate of guilty pleas. It is specious logic to conclude from these figures, as my colleagues do at paragraph 8.23, that society has therefore "accepted that just verdicts are best delivered" other than by juries. Nor is it proper to argue that those who advocate the withdrawal of the right of jury trial for complex frauds are merely arguing for the normal mode of trial (that is non-jury) to apply.

C15. Allegations of fraud constitute serious offences, the charges carry heavy penalties. The correct comparison is therefore between those charged with fraud and those charged with other serious offences. It is not right to compare the mode of trial for fraud with that for summary offences where the penalties are statutorily limited.

Juror Comprehension

C16. My colleagues identify as the principal problem which moves them to their conclusion that of juror comprehension. In the really complex financial market fraud case, where thousands of interdependent dealings may be involved, it is said that jurors who are not familiar with that financial market may not be able to understand the background let alone the dishonest elements alleged by the prosecution and denied by the defence.

C17. As Appendix A sets out the Committee found itself unable to conduct any research which would directly assist on this issue, largely as a result of the legal prohibition, contained in the Contempt of Court Act, on

asking jurors about their deliberations. We explored whether it might have been possible to ask individual jurors who had served on fraud trials how far they had understood the evidence (while stressing that they should not reveal the contents of their collective deliberations). Even that, however, was considered to breach the spirit if not the letter of the law. But even had we been able to proceed with such a survey, it would only have revealed the extent of juror comprehension in a small class of cases. In order to put these findings in context we would have had to have asked questions of a further sample of jurors in other cases, in particular in other long cases with multiple defendants. Only then would we have been able to answer the question as to whether jurors in fraud cases understood more or less than jurors in other types of cases. We might, however, have discovered that juror comprehension as a whole was patchy, and doubt might have been cast on the value of juries in the criminal justice system. I had to accept that, apart from the legal considerations, such an exercise would have taken far longer than we had at our disposal, but the result has been that we have only anecdotal and second hand evidence on the central question at issue. Even that evidence, however, did not point unambiguously towards the conclusion that jurors cannot and do not understand fraud cases. Most judges and lawyers who made submissions to us thought that juries mostly reached the right result, or at least an understandable result.

C18. I should emphasize, lest it be thought otherwise, that I do not regard any attempt to reform the criminal trial process as out of the question. On the contrary it has become clear that many of our trial procedures are in need of reform. But if fundamental features such as jury trial are to be reviewed, the review should be a comprehensive one not confined to a narrow band of cases of an indefinable class. Such a review should be preceded by or carried out in conjunction with a research programme which would focus on the roles of lawyers, judge and jury. Such a fact finding operation would in my view be an essential preparation for and precondition of any initiative to modernise and reform more fundamental aspects of the trial process.

The Jury's Role

C19. It has always been the function of the lawyer to outline and present to the lay jury the evidence of the offences explaining such background as may be necessary. Complex and unfamiliar medical or forensic evidence may have to be given in a rape or wounding case; in murder cases psychological evidence may be crucial in distinguishing between murder and manslaughter; technical and scientific evidence identifying tissues and fibres may be relevant in any criminal case. An understanding of the background, say to a company's procedures, may be necessary in a case of embezzlement. In all these cases it is the task of prosecuting counsel to convey to the jury sufficient background information to enable them to follow the case.

C20. This public explanation of the charges performs a further vital function – that of ensuring that members of the public and the press are also informed of the nature of the case. The jury not only represents the public at the trial its presence ensures a publicly comprehensible exposition of the case. There is the danger in trial by experts that the public dimension will be lost. The assumption appears to be that some cases are so complex that only experts are capable of understanding the allegations, and that consequently there could be no public explanation comprehensible to the layman. The trial might then be reduced to exchanges between the lawyers and the tribunal, conducted in impenetrable jargon. The tribunal would pronounce to the public that as a result of its proceedings, which neither the public nor the press were expected to be able to follow, it had concluded on the guilt or innocence of the accused. I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.

C21. The fundamental issue in most fraud cases is that of dishonesty. To entrust this judgement to experts I find dangerous. There is the problem that currently, as a matter of law, the standards to be applied in assessing honesty are those of ordinary people. Experts are by definition not ordinary people and they may find it difficult, not to say impossible, to envisage that the standards by which they must judge the accused are not those they would normally apply to themselves or their colleagues.

C22. Even if this provision of law on the standard of dishonesty were to be altered, trial by experts might still be a dangerous expedient in cases where dishonesty has to be decided. The court must judge whether the transactions in which the accused engaged reveal merely incompetence and desperation, or deliberation and deception. With a lay jury it would be normal for expert witnesses to give evidence of their opinions of current practice in the relevant field. In a trial where expert assessors form part of the tribunal, it is not clear whether such evidence would be given at all. Is it to be omitted altogether on the ground that the tribunal will be familiar with the practice? If on the other hand experts do give evidence there will be the unhappy spectacle of experts pronouncing judgement on the opinions of their colleagues. Those hired to give evidence in the case are likely to be at the top of their careers. Those on the tribunal will by the nature of things look second class by comparison. In judging between the evidence of experts the intuition of the lay person on the jury may be more reliable and appropriate than the intellect of the professional.

The Problem of Definition

C23. My colleagues have recognised that it is not possible to define in terms suitable for statutory enactment the class of cases to which the new Fraud Trials Tribunal would be appropriate. The problem of definition

has not troubled us greatly in the other aspects of our report, since we have proposed improvements to the procedure which could be adopted generally in appropriate cases. However, the mode of trial has always hitherto been considered a sufficiently important matter for any distinctions to be accurately defined. The divisions between those triable summarily only and those triable either way are defined on the basis of a list of specific offences. The citizen thus knows those cases in which he will have a right to elect trial by jury. There may be controversy over exactly where the borderline should be drawn, but at least its current location is not uncertain. I regard it as unacceptable that the distinction between the class of cases which will be tried by the Fraud Trials Tribunal and those which will be tried by the ordinary courts should rest upon the unfettered discretion of a single judge, who is supposed simply to recognise the appropriate case when he sees it.

C24. Nor do I regard any of the factors which my colleagues regard as pointing in the direction of a Fraud Trials Tribunal case as being of themselves necessarily relevant. Cases can involve a mass of complex evidence without necessarily involving large amounts of money. The bank clerk who is able to defraud the bank by a series of intricate manoeuvres within his branch may succeed in depriving the bank of only £5,000. The evidence, however, may be complex and the procedures difficult to follow. The background to the internal workings of a bank would certainly not be familiar to most people. Would this be a case for the Fraud Trials Tribunal?

C25. The use of networks of bank accounts, overseas currency accounts, and interelated company systems is said to be a factor. It is, however, becoming more common for criminals to attempt to launder the proceeds of crime (be they bank notes seized in a wages snatch or the profits of the drug trade) in this way. It has not been suggested, nor do I suppose that it would be acceptable, that bank robbers or drug traffickers should be tried other than by juries, even where the evidence includes details of the financial accounts where the proceeds of crime were lodged. Moreover, many legitimate businesses which involve interests abroad must maintain foreign currency accounts. Is the clerk who steals from a holiday tour company by manipulating its foreign accounts to be tried by the Fraud Trials Tribunal when his counterpart who manipulates only English accounts is not?

C26. I conclude that the loose nature of the guidelines and the wide element of discretion which will arise in their application will give rise to manifest inequity as between those who are directed for trial by the FTT, and those whose crimes are alleged to have differed only in style, planning or execution and are tried by jury. There is an essential unfairness in distinguishing between murderers, drug traffickers, burglars, rapists on the one hand and financial fraudsters on the other. Why should the man who steals £1 million from a bank by the use of a shotgun be allowed the right of trial by jury, while the man who uses a computer is denied the same right?

Deficiencies of the Fraud Trials Tribunal

C27. The practical difficulties my colleagues have had in constructing a Fraud Trials Tribunal within the existing criminal justice system speak for themselves. It is, for obvious reasons, conceded that there would have to be a right of appeal from the judge's decision on mode of trial. It must be extremely likely that every defendant who has objected to being tried at the FTT would in fact exercise his right of appeal. Since also a reasoned verdict is to be delivered by the FTT, the scope for mounting an appeal against conviction will be greatly widened. Few lawyers would be unable to find sufficient flaws of reasoning to ground an appeal. The result would be both that the decision to order a trial by the FTT would in practice always be made by the Court of Appeal, and that every conviction by the FTT would also have to be reviewed by that court. Apart from adding to the delays in that overburdened court, the shift in decision making to the appellate level reveals an unfortunate weakness in the structure proposed.

C28. A reasoned acquittal verdict will also strike many as an odd feature, placing even defendants cleared by the FTT in a disadvantageous position compared to those acquitted by verdict of a jury. The latter can leave the court comforting themselves with the traditional cliche that no stain on their characters has been left. In the FTT it would be exceedingly difficult to draft a reasoned judgement of acquittal which did not include comments on the honesty or competence of those on trial. Moreover, embarrasingly direct conclusions on the reliability of the evidence given by the witnesses for the prosecution might have to be drawn.

C29. Convicted defendants will inevitably claim that they are being tried unfairly and that the FTT had been deliberately created in order to produce convictions. Nor would they be entirely mistaken about the in-built bias towards conviction which the FTT would, in my view, develop. For if the first few cases before the Tribunal were to result in acquittals, the public reaction might well be one of disbelieving exasperation. If financial fraudsters cannot be convicted in the new specially designed Tribunal, it would be asked, was the exercise in setting it up not a waste of time? Even worse, accusations would be made that the financial and commercial members of the FTT had connived at a whitewash to protect their brethren. The track-records of individual judges and lay members (as well as that of the FTT as a whole) would be subjected to close inspection and comment. It would be doubly difficult for the Tribunal members, conscious of this kind of public pressure, both to remain impartial, and more importantly to be perceived as being so.

Conclusion

C30. I have concurred with my colleagues in proposing major improvements to the prosecution, bringing to trial and presentation of fraud cases. I think that for the most part these will remedy the problems revealed by our enquiry. I do not think the case has been made out for abandoning

jury trial in complex frauds, or for the creation of a special tribunal with the power to try defendants on indictment.

C31. What then should be done?

C32. The legislative policy should be to create and develop summary "trip-wire" offences: failure to comply with regulations, to obtain authorisation, to compile proper accounts, etc. The investigative process should allow for regular spot checks and random inspections. Prosecution policy should be to institute proceedings using summary charges as often as is appropriate, and sentencing policy should be to encourage the imposition of short custodial terms where it is shown that large sums of money may have been at risk, even if none has actually been proved to have been appropriated. This policy should be considered even where more serious offences are known to have been committed if the prospects of bringing these to trial are limited. The sight of unscrupulous operators receiving even brief tastes of prison would do much to deter fraud, and would reassure the public that double standards are not being applied.

C33. In this context I would not oppose the creation of a specialised court of summary jurisdiction to try offences arising from city, corporate and commercial matters. Such a court would consist of persons with appropriate experience and background, both legal and commercial, who would be appointed as magistrates. There are good precedents for giving magistrates very substantial powers to make financial orders (some statutes authorise unlimited fines) and to impose disqualifications (e.g. on company directorship). A court of this kind could be given additional resources to ensure that it did not suffer from the delays endemic in the rest of the system, and with a specialised caseload excluding the ordinary run of crime it could develop considerable expertise. Such a court could be established without any need for legislation. It would simply require the injection of additional resources, the appointment of specialised magistrates, and administrative arrangements to direct the trial of appropriate cases to it.

C34. A more ambitious proposal, but one which would require legislation, would be to confer on such a court enhanced but still limited powers of punishment. A limit of say an aggregate of eighteen months imprisonment would allow the court to deal with a substantial range of offenders. After all, most of those convicted of fraud are sentenced to non-custodial penalties, and those that do receive imprisonment are rarely sentenced to long terms. (Some of course deserve long sentences and should continue in my view to be committed for trial at the Crown Court by a jury.) The prospect of a genuine limit on imprisonment might encourage defendants to opt for summary trial before the court even when charged with more serious offences.

C35. Since my colleagues have not concurred with these proposals I have not thought it right to develop them at greater length in this note of dissent.

(Signed) WALTER MERRICKS

APPENDIX A

THE WORK OF THE COMMITTEE

Meetings

1. The membership of the Committee was announced in Written Answers in both Houses of Parliament on 12 April 1984 and the Committee met for the first time on 4 May. Altogether we have held 29 full meetings 10 of which were wholly or partly devoted to taking oral evidence. We also set up a Sub-Committee to act as a steering committee for the study which we commissioned from Coopers & Lybrand in an endeavour to obtain information relating to the time, costs and other statistics in fraud cases.[1] This Sub-Committee met twice.

The written evidence

2. Our first task was to invite written evidence from those who had expressed an interest in the work of the Committee and also from other persons and bodies who were willing to assist. For this purpose we prepared a short invitation outlining the nature of our inquiry and identifying the principal issues which we saw as falling within our terms of reference. The invitation received widespread publicity in several of the national newspapers as well as in legal, business and accounting journals. We reproduce our invitation at Appendix B.

3. We received 140 or so submissions of written evidence from individuals, organisations and Government Departments. Those who responded to our invitation are listed at Appendix C. We are pleased to record here our gratitude to everyone involved in the preparation of written evidence, which was of great assistance to us in our work.

Oral evidence

4. We selected from among those who had submitted written evidence 24 bodies and individuals and invited each of them to give oral evidence.[2] Inevitably the invitations were limited, but we chose a group of witnesses who appeared to us to be broadly representative of those who are closely involved in the prosecution and trial of fraud cases. The names of those who gave oral evidence are included in Appendix C. Nearly all the sessions were held during December 1984 and February 1985. The purpose of taking oral evidence was to enable us to test the views of witnesses on what we regarded as the main issues and the options for reform which had emerged from the written evidence. In order to focus our witnesses' minds on these issues we sent them in advance of the sessions a list of the questions which they would be asked to address. The general list of questions is reproduced at Appendix D. The oral evidence proved to be a valuable part of our work and we wish to express our appreciation again to everyone concerned who gave up their time to come and talk with us.

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[1] See Chapter 10.

[2] One other witness gave oral evidence without any prior written submission.

Court visits

5. During the early stages of our inquiry, we took the opportunity of seeing for ourselves a pre-trial review being conducted in a serious fraud case at the Central Criminal Court. In addition several of us visited the same court to sit in on parts of lengthy fraud trials. We found these visits useful. On each occasion those of us who attended were met by the judges, counsel and staff concerned and we are grateful to them all for their help.

Research

(i) Juries

6. We considered at the outset of our work the need for research evidence to supplement the written and oral evidence on two issues central to our remit. The first is whether an ordinary jury is capable under the existing system of understanding and following the evidence in a complex fraud trial and returning a just verdict. The second issue is whether there are any ways in which, by improving pre-trial procedures or by improving the presentation of cases at the trial, or by giving jurors aids both to understanding and remembering critical information, their ability to understand such a case can be improved. To help us to determine whether there was any available research information which addressed itself directly to these issues, what the options for any further research were and what were likely to be the best and most practicable methods of carrying out such research, we invited a number of distinguished academics and researchers, in the fields of law and psychology, to a Seminar to discuss these matters with us. Several of the participants had themselves previously been involved with jury research.[3]

7. The Seminar highlighted the problems of conducting worthwhile research in this area. Despite the immense body of literature on the subject of the jury there is very little sophisticated information regarding the ability of juries to understand fraud cases involving complex issues and highly technical documentary evidence. The ideal method of attempting to address the first issue would be to question jurors on actual cases. However, research of this kind is effectively ruled out by the Contempt of Court Act 1981.[4] Even though the restrictions in that Act designed to preserve the confidentiality of jury's deliberations are arguably not so all-embracing as to rule out all

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[3] We are grateful to the following for their participation and helpful advice given at the Seminar: Dr. Andrew Ashworth (University of Oxford), Dr. John Baldwin (University of Birmingham), Dr. Debra Bekerian (MRC Applied Psychology Unit, Cambridge), Prof. Leonard Leigh (London School of Economics and Political Science), Dr. Michael Levi (University College, Cardiff), Ms. Doreen McBarnet (University of Oxford), Dr. Philip Sealy (LSE), Mr. Paul Softley (Home Office Research and Planning Unit), Ms. Julie Vennard (Lord Chancellor's Department), Dr. Patricia Wright (MRC Applied Psychology Unit, Cambridge), Mr. Douglas Wood (Social and Community Planning Research), Prof. Michael Zander (LSE).

[4] Section 8 of which provides that it is a "contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings."

communications with jurors on certain aspects of their task, the Committee did not wish to countenance any research in this field which would be against the spirit of the law. It was necessary therefore to consider other, less than ideal, options. One was to use a "shadow" jury sitting through a "live" trial alongside a real jury.[5] To conduct such research with only one long and complex fraud trial might have been feasible but to yield any credible results a larger sample of cases would be required which would be both expensive and time-consuming. Another possibility was to experiment with other forms of "simulated" or "mock" juries. As Baldwin and McConville record[6] there have been over fifty separate experiments in as many years, in general consisting of researchers presenting to a mock jury a reconstruction of a real trial.

8. Our discussions revealed that there were many different avenues of research varying widely in approach and scale. Some of those mooted would have delayed our report well into the next decade. Bearing in mind the constraints of our own timetable, any extensive experimental research, however valuable the results might be, would have been impracticable. However, we took the view that there might be some benefit in conducting some small-scale research into methods of improving individual jurors' comprehension in complex trials. Accordingly, we commissioned a team of psychologists from the Medical Research Council's Applied Psychology Unit at Cambridge to carry out four research projects on different aspects of this problem. We refer to the results of the research at various points in our report.[7] One of our members[8] spent a day with the Unit while part of the research was being carried out and we are grateful for the cooperation she received during her visit. We would like to thank all the members of the Unit who undertook the research projects and who managed to submit their reports on them within our tight deadline. We would also like to acknowledge with gratitude the fact that the Medical Research Council was willing to donate the time of the research staff involved at no cost to the Committee. The report of the research projects is being published in a separate volume at the same time as this report.

(ii) Crown Court survey of "long" fraud trials

9. Although the official statistics (the *Criminal Statistics England and Wales* and the *Judicial Statistics*, both published annually) give certain information relating to cases tried in the Crown Court in general and fraud cases in particular which was useful to us, we discovered that there was no published information available about the trial of long and complex fraud cases. We therefore endeavoured to find out whether any unpublished information was available and what further

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[5] *Cf.*, for example, Purves and McCabe, *The Shadow Jury at Work* (1974) which describes the experiments with shadow juries carried out by a team from the Oxford University Penal Research Unit. All of the cases involved in this project lasted no more than a day or so.

[6] *Jury Trials* (1979), p. 12.

[7] See paras. 6.62, 6.65 and 8.33.

[8] Dr. Barbara Marsh.

information could readily be obtained regarding the trial of these cases in recent years. The particular matters upon which we sought information covering the five years from 1979 to 1983 related to the number of fraud cases tried in the Crown Court where the trial lasted more than 20 working days, the length of time spent on each case, the principal offences charged, the results of each case, the status of the trial judge, the number of cases required a retrial and the reasons for such, the occupations of the jurors, and whether or not a pre-trial review was held. The results of this survey have been noted at various points in our report.[9] We are grateful to the six Circuit Administrators in England and Wales and the members of their staff concerned for all the assistance they gave us with this survey.

(iii) Comparative procedure

10. In July 1984 we contacted the Ministers of Justice and Attorneys General in several foreign and commonwealth jurisdictions (in some cases at both federal and state level) as well as the Scottish Home and Health Department and the Northern Ireland Office and requested their assistance as to the way in which fraud cases are prosecuted and tried in their respective jurisdictions. For this purpose we drew up a questionnaire setting out the main points on which we were seeking information. Replies were received from virtually all those to whom we had written. We have not been able to include in this report an analysis of all the information obtained from this survey,[10] but Appendix E summarises the present position in the relevant jurisdictions regarding the prosecution process and the methods of trial of fraud cases. We are grateful to all those who took the time and trouble to respond to our questionnaire.

[9] See in particular paras. 8.31, 9.30 and Appendix J.

[10] Copies of all the replies are to be deposited in the Public Record Office.

APPENDIX B

FRAUD TRIALS COMMITTEE

Invitation to submit Written Evidence

1. This Committee has been appointed by the Lord Chancellor and the Home Secretary with the following terms of reference:–

> "To consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved, and to consider what changes in existing law and procedure would be desirable to secure the just, expeditious and economical disposal of such proceedings."

2. The Committee's membership is as follows:–

The Right Honourable The Lord Roskill (Chairman)
The Lord Benson, GBE, FCA
Mr. David Butler
Sir James Crane, CBE
His Honour Judge John Hazan, QC
Sir Arthur Knight
Mrs. B. E. Marsh, JP, PhD
Mr. Walter Merricks

3. The Committee is anxious to receive written evidence as soon as possible not only from those who have already expressed interest in its work but also from others who are willing to help. This paper therefore invites written evidence from both sources.

4. The prevalent disquiet, whether justified or not, with the present system of jury trials for what have come to be called "serious fraud cases" is well known and has led to the setting up of the Committee. The Committee, therefore, sees as its principal task the review of that system in the light of the evidence which it expects to receive. The complaints include the lengths of some recent fraud trials and the unfair burden which the system is said to cast upon those selected for jury service in these cases as well as the difficulties which some juries are said to have encoutered in assimilating a mass of often highly technical and complex evidence. Suggestions have been made for different modes of trial in these cases as for example trial by a single judge sitting either with assessors or with a jury, whether of the same or a smaller number as at present, selected for its special qualifications, or trial by three judges, with perhaps one with special qualifications, sitting without a jury, to mention but a few of the possibilities which have already been publicly canvassed.

5. Such a review would be likely also to necessitate consideration of related matters, for example

(i) to what class or classes of case of "serious fraud" should any new system of trial be applied?

(ii) by what criteria should it be decided whether any individual case falls within that class or those classes?

(iii) by whom should any question arising under (i) or (ii) be decided and should any appeal be allowed against that decision? For example, should the defendant be given a right to elect an alternative mode of trial? Or should the choice be for either the prosecution or the defendant, or for the court?

(iv) to what extent should pre-trial procedures, for example committal proceedings in magistrates' courts, be changed whether or not there are any changes in the formal system of trial?

(v) what scope is there in the trial of these cases for improvements in the preparation and presentation of evidence and in the conduct of the trial?

(vi) are there any changes in the rules of evidence which would assist?

The Committee does not suggest that this list is in any way exhaustive or that other matters may not also arise for consideration. But it hopes that these suggestions may assist in the formulation of written evidence. Nor does the Committee suggest that written evidence should be limited to the matters outlined above. On the contrary it would welcome any help on matters whether of principle or of practice which are thought to be relevant to its work.

7. It will be seen that in the first instance the Committee is asking only for written evidence. This will enable the Committee to form a preliminary view to what extent some issues at least can be regarded as common ground and others will prove controversial. In due course the Committee will consider whether and if so to what extent oral evidence will also help. The Committee would be grateful if those preparing written evidence could indicate clearly which, if any, parts of their evidence they wish to be treated as confidential and therefore not subsequently available for publication.

8. Evidence should be sent to the Secretary of the Fraud Trials Committee, who is Mr. Michael Farmer, at the address given below by 30 September 1984. If further time is required the Committee would be grateful if the Secretary could be informed as soon as possible of the date by which the evidence may be expected.

9. The Secretary of the Committee would be pleased to clarify any of the points arising out of this paper. The telephone number is 01-242 0861 extension 226.

Fraud Trials Committee,
Conquest House,
37/38 John Street,
Theobalds Road,
London, WC1N 2BQ.

May 1984

APPENDIX C

LIST OF INDIVIDUALS AND ORGANISATIONS WHO GAVE WRITTEN AND/OR ORAL EVIDENCE TO THE COMMITTEE

Note: Most witnesses agreed that their evidence should be made public and it has been deposited in the Public Record Office. The following system of symbols denotes whether the witness gave written and/or oral evidence as well as the public availability of the evidence:

No symbol	written evidence only, publicly available
*	written evidence only, not publicly available
**	written and oral evidence, both publicly available
***	written and oral evidence, not publicly available
****	written evidence publicly available, oral evidence not publicly available
*****	oral evidence only, not publicly available.

This list reflects the positions and titles of witnesses at the time their evidence was submitted or taken, as the case may be.

* The Right Honourable Lord Justice Ackner
Mr. Roy Amlot
The Association of Authorised Public Accountants
The Association of British Chambers of Commerce
Association of Certified Accountants
Association of County Councils
The Attorney General and the
**** Director of Public Prosecutions
Sir Thomas Hetherington, KCB, CBE, TD, QC
Mr. John Wood
* Mr. Patrick Back, QC
** Mr. David Baldwin
*** Bank of England
Mr. D. A. Dawkins
Mr. A. W. Nicolle
Mr. B. Quinn
Bank of Scotland (Unit Trust Department)
His Honour Judge Beaumont, MBE
* Mr. Patrick Bennett, QC
Mr. E. J. Bevan
Mr. Louis Blom-Cooper, QC
Mr. J. G. Boal
Mr. F. J. H. Brackett
*** British Bankers' Association
Mr. R. Adams
Mr. M. Karmel
Mr. D. Wheatley, QC
* British Insurance Association

British Legal Association
Mr. Donald Campbell
Mr. S. Cartledge
* The Honourable Mr. Justice Caulfield
His Honour Judge Brian Clapham
** The Commissioner of Police of the Metropolis
Commander William Hucklesby
Det. Supt. McStravick
Det. Ch. Supt. Squires (City of London Fraud Squad)
Mr. Michael Coombe
Sir Kenneth Cork, GBE
*** The Council of Her Majesty's Circuit Judges
His Honour Judge M. Anwyl-Davies, QC
His Honour Judge B. Griffiths, QC
His Honour Judge J. P. Harris, DSC, QC
His Honour Judge T. R. Heald
His Honour Judge D. West-Russell
** Council for the Securities Industry
Sir Patrick Neill, QC
Mr. A. Peck
Mr. G. Williams
** Criminal Bar Association
Mr. W. N. Denison, QC
Mr. P. E. Crosse
**** HM Customs and Excise
Mr. J. B. Bendall
Mr. M. Blythe
Mr. P. Ellis
Mr. W. S. Hill
Mr. A. Hughes
Mr. W. E. Knaggs
Mr. K. Teller
Mr. D. M. Davidson
* Mr. J. W. Dean
Deloitte Haskins & Sells
The Right Honourable The Lord Denning
**** Department of Trade and Industry
Mr. G. Clark
Mr. B. J. G. Hilton
Mr. D. J. Jupp
Mr. J. B. K. Rickford
Mrs. F. A. Scarborough
Mr. E. A. Thompson
The Right Honourable The Lord Devlin
* The Right Honourable Sir John Donaldson, MR
His Honour Judge Brian Duckworth
Mr. A. H. M. Evans, QC
Finance Houses Association
** D. J. Freeman & Co., Solicitors
Mr. D. J. Freeman

* Mr. Paul Freeman
Major F. D. Goode
Mr. J. P. Gorman, QC
* Mr. L. C. B. Gower
** Mr. Allan Green
Mr. D. P. Grimmer
Mr. R. J. Gwilliam
Dr. T. Hadden
Haldane Society of Socialist Lawyers
Mr. Michael Hill, QC
Hilliard & Ward, Solicitors
Holborn Law Society
Home Office
* The Lord Hooson, QC
Mr. R. W. and Mrs. J. C. Houghton
Mr. I. A. Hunter, QC
Mr. J. M. H. Hunter and others
* The Lord Hutchinson, QC
**** Inland Revenue
Mr. R. S. Boyd, CB
Mr. B. Pollard
** The Institute of Chartered Accountants in England and Wales
Mr. B. Currie
Mr. A. Hardcastle
Mr. J. Norton
Mr. P. Rutteman
The Institute of Chartered Accountants of Scotland
Institute of Credit Management Ltd.
The Institute of Legal Executives
Miss Susan Jackson and Mr. R. E. Rhodes
Judges of the Family Division of the High Court
JUSTICE
Justices' Clerks' Society
Mr. Alistair Kelman
* Mr. James Lamb
Mr. C. N. Lambert
*** The Right Honourable The Lord Lane, AFC (Lord Chief Justice of England)
** The Law Society
Mr. J. Clitheroe
Mr. E. Taylor
The Law Society of Scotland
The Right Honourable Lord Justice Lawton
Professor L. H. Leigh
The Honourable Mr. Justice Leonard
* His Honour Judge Lewisohn
Dr. M. Levi
Messrs. Linklaters & Paines, Solicitors
* Mr. Mark Littman, QC
Mr. D. E. J. Llambias

Lloyd's
** The London Criminal Courts Solicitors' Association
Mr. A. Edwards
Mr. P. M. Raphael
Mr. B. Simons
London Solicitors' Litigation Association
***** The Right Honourable The Lord Lowry (Lord Chief Justice of Northern Ireland)
The Magistrates' Association
McKenna & Co., Solicitors
** Metropolitan Stipendiary Magistrates
Mr. D. A. Hopkin (Chief Metropolitan Magistrate)
Mr. R. Lownie
** Midland and Oxford Circuit
Mr. M. Elsom
Mr. D. Fennell, QC
Mr. H. Mayor
Mr. J. Roberts, QC
* Mr. P. J. Millett, QC
Mrs. Barbara Mills
* Mr. J. P. Murphy
The Honourable Mr. Justice Mustill
His Honour Judge Arthur Myerson, QC
The National Association of Security Dealers and Investment Managers
** National Council for Civil Liberties
Ms. M. Staunton
Mr. P. Thornton
Mr. A. White
North-Eastern Circuit
Northern Circuit
The Right Honourable Lord Justice O'Connor
* Mr. M. Ogden, QC
** Mr. Harry H. Ognall, QC
The Honourable Mr. Justice Peter Pain
**** His Honour Judge Pigot, QC[1]
Pinsent & Co., Solicitors
Police Federation of England and Wales
The Police Superintendents' Association of England and Wales
The Prosecuting Solicitors' Society of England and Wales
*** The Recorder of London and the Common Serjeant of London
His Honour Judge Sir James Miskin, QC
His Honour Judge Tudor Price[2]
The Registrar of Criminal Appeals and Mrs. M. Pigott
The Right Honourable The Lord Renton, QC
Mr. Kenneth Richardson
Mr. Alec Samuels

[1] Appointed Common Serjeant of London, before giving oral evidence.

[2] Appointed a Justice of the High Court, Queen's Bench Division, before giving oral evidence.

Save & Prosper Group Ltd.
* Mr. John Selwyn
The Senate of the Inns of Court and the Bar
Mr. J. Smith
Mr. R. S. Smith
Society of Conservative Lawyers
Society of Labour Lawyers
South-Eastern Circuit
Mr. Derek Spencer, QC, MP
Mr. G. W. Staple
*** Mr. J. Steyn, QC
The Stock Exchange
Mr. J. R. Tarling
Tennyson and Company
Touche Ross and Co.
Mr. Andrew Trollope
* Miss N. M. Turl
* Mr. A. C. B. Urwin
Wales and Chester Circuit
Western Circuit
The Lord Wigoder, QC
Professor Glanville Williams, QC
* Mr. J. Wilmers, QC
* Mr. A. J. Wilson
Mr. M. D. L. Worsley
Professor G. J. Zellick

APPENDIX D

FRAUD TRIALS COMMITTEE
QUESTIONS FOR WITNESSES AT ORAL HEARINGS

Q.1. How far is the decision not to prosecute influenced by –

(a) fear of the jury not understanding and perverse acquittals;

(b) fear of inordinate length or cost;

(c) vital witnesses and/or defendants being abroad;

(d) delays between commission of offences and starting proceedings, including delays necessitated by Department of Trade inquiries? – Why are proceedings not begun in advance of those inquiries at least where the evidence then available shows a prima facie case?

What percentage of DPP cases in which serious fraud was alleged were not proceeded with during the years 1979–1983 (inclusive)?

Q.2. What changes in present procedures for the investigation and trial of fraud cases would facilitate speed and ability to prosecute?

(a) Use of Mareva injunctions, Anton Piller Orders; ability to use evidence from banks in advance of beginning of proceedings.

(b) Bypassing committal proceedings at least of the old-fashioned kind in heavy fraud cases and substituting a new voluntary bill procedure and early pre-trial review before the judge allocated to see the case through with power to the judge to throw the case out if satisfied it would never have got past the committal stage.

(c) Getting counsel involved at an early stage and pruning the papers to manageable proportions. Is the cost of doing this and of securing the right counsel at pre-trial reviews a relevant factor?

(d) Requiring the Crown to produce a written summary of their case in advance and the defence, after time for considering, to produce a written statement indicating what evidence of the Crown it is desired to challenge and the general nature of the defence; and giving the judge power to order that admissions shall be deemed to be made unless just cause if shown for a refusal.

(e) In the case of witnesses abroad who cannot or will not come here, making statements admissible as evidence of their contents.

(f) Making accountants' and similar reports into the subject matter of the case admissible evidence of the facts therein contained and allowing the jury to have copies subject to the accountant responsible for its preparation being called, if desired.

(g) Making statements contained in all other documents admissible evidence of any fact stated therein of which direct oral evidence would be admissible, where witnesses in this country are dead or cannot conveniently be called, etc.

(h) The use of visual aids and computer records to demonstrate the facts relied on either side.
Note – this might require juries to be entitled to the operator of these devices being available in the jury room.

Q.3. In the years 1979–1983 (inclusive) how many serious fraud cases were thrown out by the magistrates after the holding of old-style committal proceedings?

Q.4. What is the up-to-date position of the Fraud Investigation Group? When is it expected to have any impact on the investigation of fraud cases? What steps are being taken to develop a science of "forensic accountancy" and to employ specially trained accountants in the FIG? Are there presently sufficient resources in manpower and money to make FIG effective? Could the DPP please let us have (in diagramatic form) an indication of the proposed structure of FIG including details of the numbers, grade and qualifications of personnel involved? To what extent, if at all, will Customs and Excise and the Inland Revenue be brought into FIG? At what point of time during the investigation of fraud cases will cases be referred to FIG?

Q.5. What criteria are there to justify a distinction between a long and complex fraud case and a long and complex drug case or "East-end gang warfare" case?

Q.6. If the jury goes, and judge and two or more assessors or a small special jury are put in its place, how are assessors or a special jury going to be selected? Education? Occupation? Age? How do you prevent the special jury being largely retired people, say over 60 or 65? If the tribunal is judge and assessors, should the assessors be able to override the judge on fact? Or should the assessors be given only an advisory role? Should any special tribunal be required to give reasoned judgments? Should there be a right of appeal on fact or law or both? At what stage and by whom is the trial before a special tribunal to be ordered, and on whose application? Should the judge have the power of his own motion to order trial before a special tribunal even if neither side seeks it?

Q.7. Can we know of specific cases since the beginning of 1979 where it is thought that acquittals have followed through lack of understanding of the case either by judge or jury and in particular where there has been

a directed acquittal by a judge who either has not understood the case or has shown himself unable or unwilling to sum it up properly.

Q.8. If it were shown that prosecutions were not brought when they should be because of their complexity and fear of a jury's lack of understanding, would that affect your views as to the need to retain the present system?

Q.9. Right to challenge jurors: how far are stories of deliberate challenging off juries of allegedly obviously educated people true? Should the right of challenge without cause be abolished?

Q.10. To what extent do commitments of prospective jurors lead them to be excused from jury service in long fraud cases?

Q.11 Have there been cases since the beginning of 1979 where trials have been held up or abandoned because jurors have been ill or otherwise forced to stand down during trial? Is there any case for having stand-by jurors?

Q.12. Should the jury be given a written summary of counsel's opening and closing speeches? There has been criticism of their length and prolixity and this may be one way of dealing with the problem.

Q.13. If the system of jury trial is to be maintained, should there be a special panel of judges (whether High Court or circuit judges) with the requisite criminal and commercial experience for the purpose of trying complex fraud cases or is it better that the choice be left to be made informally by the Lord Chief Justice or the presiding judges of the Circuits or the Recorder of London as the case may be? (We are told that it is at present virtually impossible for a High Court judge to try a complex fraud case lasting more than about six weeks, since he is then required to move elsewhere or to return to London.)

Q.14. Why are more leading counsel of suitable experience not employed and adequately rewarded to prosecute in these cases, and thus relieve the burden on Treasury Counsel at the Central Criminal Court? Is the question one of finance? It is difficult to believe that were the case tried out of London, leading counsel would not be employed. Why not in London?

Q.15. How early in the preparation for prosecution should the prosecution consult experienced chartered accountants?

Q.16. Would there be sufficient numbers of solicitors with the relevant commercial experience and expertise prepared to work for the prosecution service on short term contracts?

Q.17. Can any analogy be drawn from the powers of the Revenue and the Customs to accept a pecuniary settlement without a prosecution? It is a matter of complaint that a prosecution does nothing to compensate the

victims and that understandably victims are more concerned to effect recovery of loss than to ensure punishment of the offender. Is this feasible either before or following a prosecution and in the latter case, accompanied by a plea of guilty, is it an insuperable objection buying off the punishment? Is there any way of combining criminal and civil proceedings?

Q.18. Is not the suggestion of creating a new offence of fraud on top of all the existing offences involving dishonesty too drastic an amendment of the criminal law to be adopted as a solution of our problems, and would it not create uncertainty whether the new offence should be charged or one or more of the former offences, and thus tend to increase the size and complication of indictments?

APPENDIX E

COMPARATIVE PROCEDURE

Introduction

1. In this Appendix we give brief descriptions of the machinery by which frauds are investigated and prosecuted in various different jurisdictions, and of the trial process. We draw attention to features of particular interest. Where States or Provinces within countries have different procedures, we do not seek to deal fully with these differences.

2. While it is of course difficult to make direct comparisons between methods of investigation, prosecution and trial in different jurisdictions, it has been instructive to us to see how a number of other jurisdictions, both common law and civil law, have tackled or are proposing to tackle problems relating to fraud in ways similar to those recommended in this report.

3. Much of the information was obtained in the early stages of our inquiry, and caution is therefore needed in using this material since it may not take account of recent changes in the law or procedure in the relevant jurisdictions.

4. The jurisdictions covered in this Appendix are as follows:

Scotland
Northern Ireland
Hong Kong
Australia
New Zealand
Canada
France
West Germany
Denmark
United States of America

Scotland

(a) Investigation and prosecution

5. Some Scottish police forces have their own fraud squads, and Scottish forces have their own training facilities, including training in fraud. They are able to use the information service provided by the Metropolitan and City Police Company Fraud Department.[1]

[1] See para. 2.7, above.

6. Conduct of prosecutions is almost entirely in the hands of public prosecutors, consisting of the Lord Advocate and his staff (the Crown Office) and the local procurators fiscal, who are answerable to the Lord Advocate. The Crown Prosecution Service for England and Wales will be similar to the Scottish system, but Scottish prosecutors exercise much greater control over criminal proceedings. Besides selecting charges they may generally choose the court of trial, and may engage in "plea bargaining" independently of the judge.

(b) Trial

7. In Scotland, fraud is an exceptionally wide offence at common law. It has been described as "the bringing about of some definite practical result by false pretences".[2] Criminal proceedings in Scotland take two forms, summary procedure and "solemn" procedure – that is, trial on indictment. The District Court, where magistrates sit, has summary jurisdiction only. The Sheriff Court has both summary and solemn jurisdiction. The High Court of Justiciary has solemn jurisdiction only. Trial on indictment is broadly comparable with the system in England and Wales, but there are significant differences. The indictment sets out more fully what the prosecution aim to prove. Opening speeches are dispensed with, and the summing up (the "charge to the jury") tends to be shorter. The jury of 15 decides by a simple majority, and can return verdicts of guilty, not guilty, and not proven.

8. One important feature of criminal procedure is "judicial examination", whereby an accused is brought before the Sheriff as soon as possible after arrest. This was historically a part of Scots procedure, but had become, by the beginning of the present century, almost a formality. (The accused occasionally made use of his right to make a declaration.) However, the old practice of examining the accused was revived, in modified form, from the beginning of 1982. Whether or not he makes a declaration, the accused may now also be questioned by the procurator fiscal. In the latter event, the procurator fiscal may ask only questions designed to elicit any denial, explanation, justification or comment on the charge, or any confession to the police, or any declaration. The accused is not under oath, and is not under an obligation to answer, but his answers or failure to answer may be commented upon at the trial.

Northern Ireland

(a) Investigation and prosecution

9. The police (The Royal Ulster Constabulary) have their own fraud squad. Serious offences of all descriptions are prosecuted by the Director of Public Prosecutions for Northern Ireland, and the discretion whether to prosecute, and if so for what offences, lies with him rather than the police. There is no equivalent of the Fraud Investigation Group.

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[2] See Gordon *The Criminal Law of Scotland*, 2nd ed., (1978), para. 18–01.

(b) Trial

10. The system of summary trial and trial on indictment is broadly similar to that applying in England and Wales. However, for a group of "terrorist" offences, defined by statute, trial on indictment takes place before a judge sitting alone in so-called "Diplock courts". In jury cases, each accused is allowed 12 peremptory challenges. Fear of intimidation was the principal reason for the introduction of trial by judge alone; but abuse of the peremptory challenge may also have helped to undermine the jury system.[3] The procedure for trial by judge alone has been kept as close to ordinary procedure as possible.

Hong Kong

(a) Investigation and prosecution

11. The Royal Hong Kong Police Force has a Commercial Crimes Bureau. The total number of police officers working for the Bureau in 1985 was 230, with 54 support staff, of whom 9 were accountants. There has been a large increase since 1980 (97 officers with 34 support staff) reflecting a sharp increase in frauds under investigation.

12. Prosecutions are conducted by Crown prosecutors who are members of the Attorney-General's legal staff. There is a subdivision, known as the Commercial Crimes Unit, employing a total of 19 legal staff.

13. There is also a Standing Liaison Committee for Commercial Crime, which has representatives from the police, the Independent Commission Against Corruption (ICAC) (concerned with frauds in which there is an element of bribery or corruption), the Attorney-General's chambers, the Official Receiver's Office, the Securities Commission, the Banking Commission, and the Monetary Affairs Office. Complaints of major fraud are considered by the Committee, which decides upon the appropriate line of investigation. The investigation will be carried out, as appropriate, by the police or by the ICAC. In the process of investigation, the Crown prosecutor will be involved at an early stage, and the practice is to employ an accountant from the private sector to analyse documents seized. Case conferences are held during the investigation, and word processors may be used to store documents.

(b) Trial

14. The more serious offences (including those which come under the heading of fraud) may be tried either in the District Court, where a judge sitting alone has power to impose up to seven years' imprisonment, or in the High Court where the judge sits with a jury of seven. Save for a few exceptional offences, which must be tried in the High Court, the Attorney-General is free to choose the court of trial.

[3] *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* (1984), Cmnd. 9222, paras. 100–101.

15. Jurors are summoned at random. Each accused has five peremptory challenges, and jurors may also be challenged for cause or asked to stand by. In addition, special juries may be summoned. This seems to have happened only very rarely, but a list is still maintained, jurors being chosen from the ordinary jury list for their profession or position in a company.

16. In recent years there has been concern about the suitability of trial by jury for complicated commercial fraud cases, and concern has also been expressed about the lack of the necessary experience and background among District Court judges. A Trial of Commercial Crimes Bill was introduced proposing a system of trial by judge and commercial adjudicators in the more difficult fraud cases "so that trials may be conducted more efficiently, more quickly and with a better assurance that the right decision will be reached."[4] The Bill would enable the Chief Justice to order trial by judge and three commercial adjudicators on the application of the defendant or the Attorney-General, where he was satisfied that

> "(a) the trial will involve an offence commonly called a commercial crime;
>
> (b) the evidence to be heard in the trial is likely to be difficult to understand or appreciate because of its technicality or quantity; and
>
> (c) the justice of the matter would be best served by the accused person being tried by a judge and commercial adjudicators."[5]

17. The term "commercial crime" was not further defined in the Bill. There was to be no appeal from the decision of the Chief Justice to make an order. Trial would take place in the High Court or District Court as appropriate. It would be for the judge to decide all matters of law and procedure. The commercial adjudicators would be full members of the court and equal with the judge in deciding questions of fact. Before retiring, the judge would direct the adjudicators in open court on the law and sum up the evidence. The verdict of the court would be the verdict of a majority and would be announced in open court by the judge without any reasons being given.

18. The Bill was welcomed in some quarters, but it ran into substantial criticism both from within the legal profession and the wider public. On 1 May 1985, the Legislative Council deferred the Second Reading of the Bill and appointed a Select Committee to consider and report upon the problem of complex commercial crime generally. The report of the Select Committee, dated 7 August 1985, noted the difficulty of defining complex commercial crime, and pointed out that some of the problems found in this area were not exclusive to it, but were

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[4] Explanatory Memorandum to the Bill, gazetted on 1 March 1985.

[5] Cl. 5(1).

particularly severe. Lack of time prevented any final conclusions being reached. We understand that further consideration of the issues is being given by a newly appointed Select Committee in the 1985/86 session of the Legislative Council.

19. In the District Court there is no formal pre-trial procedure, though at the joint request of counsel most District Court judges will agree to a pre-trial hearing. In the High Court, a Practice Direction effective from 1 January 1985 provides for a pre-trial hearing and related matters. The prosecution may serve a notice to admit facts, or a notice that they intend to rely on a written statement and not to call a witness. The defence are expected to reply. At the pre-trial hearing before the judge (who must if practicable be the judge who will try the case) counsel will be expected to deal with a range of matters relevant to the trial, such as the likely pleas, and whether the admissibility of evidence will be challenged, or whether points of law will arise. The judge "will give such directions as appear to him necessary to secure the proper and efficient trial of the case".

20. Recent legislation has made provision for the admission of documents as evidence of their contents, including foreign documents, bankers' records and other records, and documents received in response to the issue of letters of request by the High Court.

Australia

(a) Investigation and prosecution

21. The administration of justice is organised on a State basis; though a National Crime Authority has been set up to deal with organised crime. Different States have different arrangements. Two examples may be mentioned.

22. In Queensland, the police force has a fraud squad which employs accountants and makes use of early contact with prosecuting lawyers. In New South Wales, a Corporate Affairs Commission was set up in 1970, to deal with all aspects of corporate activity. The Commission is responsible for the registration of companies and business names. It regulates the licensing and operation of the securities industry (including banks and stock exchanges), and has a wide variety of discretionary powers in relation to corporate affairs and company accounts. It deals with complaints about corporate fraud, usually coming from liquidators or creditors. Its Investigation Division includes accountants. When an investigation is concluded, the matter is passed to the Prosecutions Branch of the Legal Division, which handles the prosecution.

(b) Trial

23. In most States (Tasmania is the exception) there is a three-tier system of courts. Magistrates' courts deal with summary offences, while trials on indictment may take place before the District Court (where the maximum sentence is limited) or before the State's Supreme Court.

24. The rules for challenging jurors differ from State to State. Several States permit additional jurors to be sworn, at the start of a long trial, in case replacements are needed. In Tasmania there is provision for a special jury. Admission to the special jury list depends on a juror's character, education, and intelligence. Special juries are rarely used, but there has been one recent case in which a special jury was empanelled at the request of the defence.

25. Not all States make provision for pre-trial proceedings. However, in South Australia the Rules of the Supreme Court have recently been amended, and the judge now has wide powers to give directions about the preparation of the case for trial. In Victoria, the Rules of the Supreme Court make provision for pre-trial hearings.

26. One State, New South Wales, introduced in 1979 a provision for trial by judge alone, at the option of the defendant. This is applicable to a range of "white collar" offences (defined by a list) before the Supreme Court in its summary jurisdiction. We were informed that this form of trial had been used on only one occasion.[6]

27. In 1985, the Law Reform Commission of Queensland published a Working Paper (WP No. 28) entitled *Legislation to Review the Role of Juries in Criminal Trials*. The paper considers, as a separate subject, the trial of commercial crimes and conspiracies relating to them. It suggests the adoption of the system of summary trial applying in the Supreme Court in New South Wales, but with one fundamental difference, namely, that the consent of the defence would not be required to invoke the jurisdiction. The Commission also suggests that both the Supreme Court and the District Court should be invested with summary jurisdiction for certain specified offences of a commercial nature.

New Zealand

(a) Investigation and prosecution

28. A decision has recently been taken to create a specialised investigation unit, under the Registrar of Companies, involving both police officers and staff from the Commercial Affairs Division of the Department of Justice.

(b) Trial

29. There is a two-tier system of courts. Magistrates (mostly stipendiaries) have a more extensive jurisdiction than their English counterparts, and can impose up to three years' imprisonment. More serious offences are

[6] A discussion paper, *The Jury Trial in Criminal Cases*, issued in September 1985 by the New South Wales Law Reform Commission, undertakes a comprehensive review of trial by jury. Its tentative proposals include the retention of jury trial for long and complex cases (without prejudice to the summary jurisdiction of the Supreme Court for "white collar" offences) and a range of measures to help juries cope with such cases. The Commission also proposes the reduction of the peremptory challenge from eight to either three or four for each defendant, with the same number for the prosecution.

dealt with in the Supreme Court. Here all offences may be tried before a judge and jury (in which case the verdict must be unanimous). But unless the offence is punishable with 14 years' imprisonment or more, the defendant may apply for trial by judge alone. The judge may then order trial in this way if satisfied that it is in the interests of justice.

30. The procedure for trial by judge alone (which was introduced in 1979) is not restricted to fraud cases, but it has been little used. In 1981 (the first year in which figures were kept) there were no such cases. In 1982 there were three. In 1983 there were none. Of the 1982 cases, two concerned allegations of theft by a person in a position of trust and one of attempting to defeat the course of justice.

31. We were told that there is no pre-trial review procedure; but that the Criminal Law Reform Committee was considering the question of pre-trial discovery.

Canada

(a) Investigation and prosecution

32. The Federal police force (the Royal Canadian Mounted Police) has a Commercial Crimes Section which employs officers trained in accountancy and financial matters. In the investigation of frauds, there is some overlap between the RCMP and Provincial forces; but large cases are likely to be dealt with by the former.

(b) Trial

33. The right to trial by jury is governed by the Canadian Criminal Code and now also by the Canadian Charter of Rights and Freedoms. For a smaller number of the most serious offences, trial must take place before a judge and jury in the Supreme Court. But for a wide range of offences, including fraud offences, a defendant can choose between summary trial and trial with or without a jury. The system of courts varies from province to province, but broadly speaking, a trial on indictment will take place either before the Superior or Supreme Court of the Province, or before a County or District Court. However, the Attorney-General can override the defendant's choice of court if the offence is punishable with more than five years' imprisonment, so as to require trial before a judge and jury. This is often done, especially where the allegation is one of large-scale dishonesty. Alberta constitutes an exception: here all offences may be tried by a judge alone.

34. Most Provinces make use of visual aids in presenting fraud cases. Most have some kind of informal pre-trial procedure to clarify the issues for the trial.[7] This might take place on the initiative of the judge or of the counsel themselves. In some Provinces the hearing takes place before the judge who will try the case, in others before a different judge.

[7] In June 1984, in its Report on Disclosure by the Prosecution, the Law Reform Commission of Canada recommended a system of formal pre-trial disclosure by the prosecution.

France

(a) Investigation and prosecution

35. "Economic" offences are investigated by specialised sections of the police working under the supervision of the prosecutor, and the examining magistrate – the *juge d'instruction*. The latter plays a very important role in fraud cases: the police have few powers which they can exercise on their own initiative, but the *juge d'instruction*, on the application of the prosecutor has wide powers to order the examination and seizure of documents, the examination of witnesses under oath, surveillance (including telephone-tapping), and also the preparation of reports by an accountant or other expert. The *juge d'instruction* is thus able to control and direct the investigation. When the investigation is concluded, the *juge d'instruction* may commit the case to a higher court for trial.

(b) Trial

36. Offences are classified either as *crimes*, or as (less serious) *délits*. The latter are tried by the *Tribunal correctionel*, the court being made up of a President and two other judges. *Crimes* are dealt with in the *Cour d'assisses*, where there is a president, two other judges, and a jury of nine. Conviction is by a vote of at least eight members of the court, (in other words at least five jurors). The French code of criminal procedure makes provision for specialised courts to deal with economic and financial offences; but this provision is applicable only to *délits*.

37. There is no pre-trial procedure as such in the court of trial. At the trial, the procedure is inquisitorial: the court takes the initiative in questioning witnesses, though counsel are allowed to put or suggest supplementary questions.

West Germany

(a) Investigation and prosecution

38. The administration of justice in West Germany is based on the provinces, or *Länder*, all of which, however, apply a common criminal code. The code distinguishes between "ordinary" fraud and "economic crime", the latter category embracing serious fraud and other offences such as breach of trust and bribery, and tax and company law offences.

39. Economic crime is handled by specialised prosecution units working with the police, and including prosecutors, accountants, and the *wirtschaftsreferent.* The last-mentioned is a key figure, perhaps best described as a business administration expert, under whom the accountants work. The emphasis throughout is on team work. The prosecutor has wide powers to search and seize documents, examine witnesses and can enlist the help of the tax authorities and other bodies where necessary.

40. As part of the investigation, the *wirtschaftsreferent* prepares a report for the prosecutor dealing with the alleged fraud and explaining the accounting and business aspects of it. He, like the rest of the prosecution unit, is expected to be impartial. Where there is sufficient evidence, the prosecutor must generally charge all those concerned, and has no discretion to limit the charges. This is an underlying principle of German law (the *legalitätsprinzip*). If satisfied that there is sufficient evidence, the prosecutor prepares an indictment, which is a formal document and must include the report of the *wirtschaftsreferent.*

(b) Trial

41. At the bottom of the hierarchy of courts is the local judge's court. The judge sits alone, and deals with minor offences. Above him is the lay court (*schöffengericht*) which sits with a judge and two lay members, and can impose up to three years' imprisonment. This court may deal with ordinary frauds. Serious fraud comes within the jurisdiction of the court dealing with economic crime, the criminal chamber for economic matters (*wirtschaftsstrafkammer*). Here there are three professional judges and two lay members. The professional judges receive specialised training, and are likely to be allocated to economic crime for a substantial period. The lay members of the court are put forward by local town councils. They hold office for four years, and are chosen by ballot for each case.

42. The court is inquisitorial, examining the witnesses itself. The *wirtschaftsreferent* acts like a court expert. There is no pre-trial procedure as such: it is for the prosecutor to clarify the issues, so as to be able to decide whether there is sufficient suspicion of an offence. The court of trial must also consider whether to admit the charges, having regard to the state of the evidence. The decision is taken on the papers, before the start of the trial.

Denmark

(a) Investigation and prosecution

43. In 1973 a special unit was set up to deal with complicated commercial fraud cases. The State attorney's staff work with the police and hired auditors in the conduct of investigations. There is a central intelligence-gathering unit which assists district police and prosecutors.

(b) Trial

44. Most criminal cases come before the District Court, where a judge sits with two lay members for trials, or on his own to deal with pleas of guilty. Where an offence is punishable with more than four years' imprisonment, the trial will generally take place before the High Court, where three judges sit with a jury of 12; however fraud and forgery are exempted from this provision.

45. There is also a Maritime and Commercial Court, with criminal as well as civil jurisdiction over the area of Greater Copenhagen (and other areas as well, if the parties agree). The court consists of the Chief Justice and Deputy Chief Justice, sitting with assessors.

46. In fraud cases, use is made of written material to supplement matters dealt with orally.

United States of America

(a) Investigation and prosecution

47. Many frauds are punishable under Federal law and may thus be dealt with by the Federal authorities: the Federal Bureau of Investigation will deal with the investigation, and the prosecution will be conducted by the US Department of Justice, the Criminal Division of which has a section responsible for fraud. Federal agencies enjoy a number of advantages, including the ability to operate across State boundaries.

48. Most States have their own specialised agencies to deal with fraud. In California, for example, the Attorney-General's office has a Major Fraud Unit, and the larger counties in the State also have fraud prosecution units. In New York, the investigators employed at the Attorney-General's office are specially trained in fraud, many having an accountancy background. The office works where appropriate in harmony with other agencies, such as the tax authorities.

(b) Trial

49. The constitution protects the right of the individual to trial by jury for all the more serious offences. Generally, the defendant may waive this right, with the agreement of the prosecution, in which case the trial takes place before a judge alone. (There is no procedure for trial by judge and assessors.) Though there are no firm statistics, we understand this occurs in about 10 per cent of all cases. There are held to be advantages in trial by judge alone, including the swifter comprehension of the judge and the fact that the court can sit outside the conventional court hours. But there may also be disadvantages; the judge may be more generous in admitting evidence, for example, and this may tend to lengthen proceedings.

50. The indictment must contain a minimum of information, but in practice the prosecution usually prepare a much fuller document, to explain what they allege against the defendant. They may include an explanation of how a transaction would have worked if the defendant had been acting honestly. The use of visual aids is well-established, and in a complicated case the prosecution will devote careful attention to them, so that the details are presented to the jury as clearly as possible. In jury cases, judges give directions on the law, but do not sum up on the facts.

51. The Federal rules of evidence have recently been amended, and now include provisions whereby:

(a) Foreign business records may be admitted if accompanied by a certificate authenticating them.

(b) "Summary" evidence is admissible – for example, an accountant may give evidence of the result of his investigation; without dealing with every separate transaction.

(c) Hearsay evidence may be admitted if it seems reliable and if fairness seems to require its admission.

APPENDIX F

TYPES OF FRAUD

1. In this Appendix we describe some common types of fraud. Not all frauds coming under these headings would be complex frauds as we have used the term in Chapter 8: for example, many cheque frauds are relatively unsophisticated. It is also true that the headings are not mutually exclusive, and that new variations on old themes are constantly being developed by the criminal community. Indeed, some of the most serious frauds are "one-off' offences: the fraudsters locate and exploit some weakness in the system until the fraud is discovered and measures are taken to prevent a repetition.

Advance fee frauds

2. The fraudsters pose as finance brokers, and purport to negotiate a large loan for a foreign company or government. The deception may be elaborate, for example, involving forged documentation, meetings in hotels. In return for the loan, a percentage fee is payable in advance; and if the loan is large, the fee will itself be substantial. Once the fee has been paid, the fraudsters disappear. Sometimes the fraudsters may succeed in obtaining collateral security for the loan, in which case they can liquidate this as additional profit in the fraud. Closely related are frauds where advance fees are obtained for arranging mortgages.

Banking frauds

3. A bank may be used as a vehicle for fraud: the fraudsters gain control, then obtain money from investors. The money goes directly or indirectly into the pockets of the fraudsters. In other cases, a reputable bank may be the victim of fraud. Borrowings mount up, perhaps over a lengthy period, amidst skilful deceptions, before the fraudsters disappear with the money.

Bankruptcy frauds

4. Here a dishonest business may be started, or an honest one put to dishonest use. In either case the fraudsters continue to trade although they have no prospect of paying their debts, obtaining money or goods from others. The victim may be one of the Revenue Departments, as where a company goes into liquidation owing large amounts of VAT, but the business is quickly reconstituted under another name – the "phoenix syndrome".

Charity frauds

5. The fraudsters obtain money from the public, ostensibly for a charitable purpose. The organisation involved may be considerable, with innocent members of the public acting as collectors. The

fraudsters pocket a large proportion of the money thus collected by often awarding themselves generous salaries and expenses.

Cheque and credit card frauds

6. Fraudsters buy stolen cheques and credit cards and use them to obtain cash and goods. Careful planning may be involved, so the stolen cheques and cards are transported quickly to another part of the country, and people – often young women of previous good character – are engaged to cash the cheques.

Commodity frauds

7. The term "commodity" embraces so-called "soft" commodities, such as sugar and cocoa, as well as metals. The markets deal in "futures", that is contracts to buy or sell at a future date, and also in options to do so. Swings in prices may be sizeable and rapid, and the operation of the market is complex. In the absence of a system of protection for private investors, there has in the past been much scope for the dishonest to take advantage of the unwary.[1]

Common Market frauds

8. The Common Agricultural Policy regulates prices within the EEC by means of levies and subsidies. These are paid in European Currency Units. The currencies of the member States must thus be fixed periodically against the ECU, this rate being known as the "green" rate. To make sure that differences between the green rates of currencies and their market rates do not disrupt trade between member States, a device known as the Monetary Compensation Amount is used, which may be positive or negative. These mechanisms provide opportunity for a range of frauds, for example evading payments of levies or MCA's by smuggling goods, or fraudulently obtaining subsidies by misdescribing goods.

Computer fraud

9. Typically, the fraudster gains access to a computer which controls the movement of money, and gives an instruction for money to be transferred to his credit at an account which may be out of the country. Computers may also be used as tools in the commission of fraud.

"Cube-cutting"

10. Here a fraudulent shipping agent, in dealing with customers, overestimates the size of the cargo or classifies it as being of a type subject to a higher tariff than it actually is. Then in dealing with the shipping line, the agent underestimates the bulk of the cargo, or describes it so that it is subject to a lower tariff. The agent is thus left with a fraudulent profit.

[1] It is proposed that the new system of investor protection will entail the authorisation of all dealers, and will give a degree of protection for the private investor. See the Government's White Paper, *Financial Services in the United Kingdom* (1985), Cmnd. 9432.

Cheque "cross-firing"

11. Fraudsters may deceive banks into providing free credit, by "cross-firing" cheques. A draws a cheque in favour of B for a certain sum, and B draws one for the same sum in favour of A. A's cheque is paid into B's account. A few days later, the cheque is presented for payment at A's bank – but by then A has paid B's cheque into his account, and this takes several days more to be cleared. The period can be extended by increasing the number of participants. However, this fraud depends on the bank's willingness to pay out against uncleared cheques.

Discounting or factoring frauds

12. The fraudsters, purporting to operate a business, approach a merchant bank or other source of finance. The bank agrees to lend cash on the strength of orders received. False documentation is presented to the bank, or evidence of orders received, to obtain money which the fraudsters then pocket.

Franchise frauds

13. Here the fraudsters induce investors to buy franchises, perhaps with associated equipment or plant, in (say) the fast food business, holding out the prospect of large returns on the investment. But once the payment has been made, the franchise proves worthless and the equipment is not forthcoming.

Government subsidy frauds

14. Fraud is perpetrated by submitting a false claim to a government department. A good deal of planning and skill may be used by the fraudsters to give credibility to the deception.

Insurance fraud

15. Fraudsters may victimise an insurance company by submitting false claims. It is equally possible for a fraudulent insurance broker to swindle clients or insurance companies, by (for example) overcharging or falsifying applications for insurance.

Investment frauds generally

16. Apart from the specific instances given elsewhere in this Appendix, there is wide scope for frauds on investors. Generous returns on money invested are often promised by the fraudsters. The first investors may be paid "dividends" out of the money received from later investors, thus promoting the fraud and prolonging its life.

Long-firm fraud[2]

17. The fraudsters set up in business as wholesalers. They place initial orders with suppliers, and pay promptly to establish their creditworthiness. Then large orders are placed. When the goods are received they are quickly sold for what they will fetch and the fraudsters disappear.

[2] For a detailed study of the organisation and control of long-firm fraud, see Levi, *The Phantom Capitalists* (1981).

Marine fraud

18. It is a well-established fraud to scuttle a ship and to make an inflated insurance claim for the ship and the cargo. There is also scope for the fraudster in swindling banks by the presentation of forged bills of lading, and in acting as a fraudulent shipping agent, appropriating the goods entrusted to him for forwarding and also the money paid to him.

Overseas land frauds

19. This is a type of investment fraud. The fraudsters attract investors in a scheme to develop land abroad, it may be for holiday or retirement homes. To facilitate the deception the fraudsters may acquire a small amount of land or may make arrangements so that they are able to show plots to prospective investors.

Public sector corruption

20. Bribes and other favours are used by the fraudsters to corrupt public servants. The benefits received in return may take various forms, for example the acceptance of an uncompetitive tender, or shoddy work overlooked.

Revenue and Customs and Excise frauds

21. Here the object is to cheat the Revenue Departments of tax due to them, either as the main purpose of a fraudulent scheme or as an incidental purpose. From among many variations, we may give two examples: (1) *"The Lump"*. Employees in the construction industry would be disguised, by means of false documentation, as independent contractors. They would thus be paid without deduction of tax, rather than under the PAYE system. (2) *VAT frauds on gold.* The purpose of these frauds is to profit from cheating the Commissioners of Customs and Excise of value added tax. The fraudsters collect large sums of output tax on sales of gold, frequently smuggled, to main bullion dealers within the United Kingdom. VAT is charged at 15 per cent of the value of the gold. The fraudsters aim is to keep as much of the output tax as possible by reducing the net amount payable to the Commissioners or by disappearing before payment is due. Elaborate documentation involving fictitious invoices would be created to show a minimal liability to Commissioners for VAT. Countermeasures have now been taken against both frauds.

Social Security fraud

22. This form of fraud consists simply of obtaining State benefits by means of false claims. Such frauds may often be unsophisticated; but there are examples on record of well-organised claims being made for large numbers of imaginary dependents.

Stationery frauds

23. Here the fraudster makes contact with the stationery buyer of a large organisation, and obtains orders. Initially, deliveries are made by the

fraudster as requested. But then increasing amounts of stationery are sent which have not been ordered, and the buyer is pressed for payment. Success depends upon lax procedures within the company and upon intimidating the buyer. By skilfully exerting pressure the fraudster may induce the buyer to accept and pay for vastly excessive amounts of stationery.

Stock Exchange frauds

24. Fraudsters operating in this area may pursue one of several different kinds of fraud. They may induce investors to buy securities; they may manipulate the market, to influence the price of shares to their advantage; or they may indulge in "insider dealing", that is, buying or selling upon the basis of inside knowledge not available to others, about matters likely to influence the price of securities.[3]

[3] Insider dealing is itself an offence under the Company Securities (Insider Dealing) Act 1985 (formerly Part V of the Companies Act 1980).

[Paragraph 2.7]

APPENDIX G

FRAUD SQUAD OFFICERS IN ENGLAND AND WALES: 1985

The following table, based upon information provided to us by the Metropolitan and City Police Company Fraud Department, shows the strength of fraud squads in England and Wales in 1985. The total of 588 compares with a total of 232, in 1971, 427, in 1976, and 583 in 1982.

All the officers in fraud squads are concerned solely with fraud, subject to operational requirements.

FORCE	NUMBER OF OFFICERS IN 1985
Avon and Somerset	10
Bedfordshire	6
Cambridgeshire	5
Cheshire	4
Cleveland	9
Cumbria	4
Derbyshire	8
Devon and Cornwall	10
Dorset	5
Durham	8
Dyfed-Powys	2
Essex	11
Gloucestershire	5
Greater Manchester	19
Gwent	4
Hampshire	21
Hertfordshire	7
Humberside	12
Kent	12
Lancashire	11
Leicestershire	7
Lincolnshire	6
Merseyside	16
Norfolk	6
Northamptonshire	3
Northumbria	12
North Wales	4
North Yorkshire	4
Nottinghamshire	11
South Wales	13
South Yorkshire	9
Staffordshire	7
Suffolk	6
Surrey	2

FORCE	NUMBER OF OFFICERS IN 1985
Sussex	10
Thames Valley	11
Warwickshire	7
West Mercia	8
West Midlands	34
West Yorkshire	26
Wiltshire	4
City of London	62
Metropolitan Police	147
TOTAL	588

APPENDIX H

TEXT OF HOME OFFICE CIRCULAR NO. 16/1985 TO CHIEF OFFICERS OF POLICE CONCERNING THE INVESTIGATION OF FRAUD, DATED 15 FEBRUARY 1985

In Answer to a Written Question on 3 July 1984 the Chancellor of the Exchequer announced that following a Government review of the arrangements for the investigation and prosecution of fraud cases, the present provision whereby in London fraud investigation groups may be considered on an *ad hoc* basis was to be put on a permanent basis and extended to cover the whole of England and Wales. This Circular provides Chief Officers with information about the setting up of the permanent Fraud Investigation Groups (FIG), the type of case which they will expect to handle and the arrangements for police participation. It is not envisaged that FIG will be affected by the establishment of the Crown Prosecution Service.

Background

2. The Prosecution of Offences Regulations 1978 set out those cases which are reportable by Chief Officers to the Director of Public Prosecutions. Few of the offences which have an element of fraud are reportable *per se*. Certain offences under the Forgery and Counterfeiting Act 1981 do however come within this category, together with those offences where the consent of the Attorney General or the Director of Public Prosecutions is a statutory pre-requisite of prosecution. In practice, however, the police often report cases of commercial fraud involving substantial sums of money or involving public figures or where there has been extensive press publicity. Furthermore, as fraud has in the last few years become much more international and offenders are often overseas, the Director of Public Prosecutions is consulted with a view to extradition.

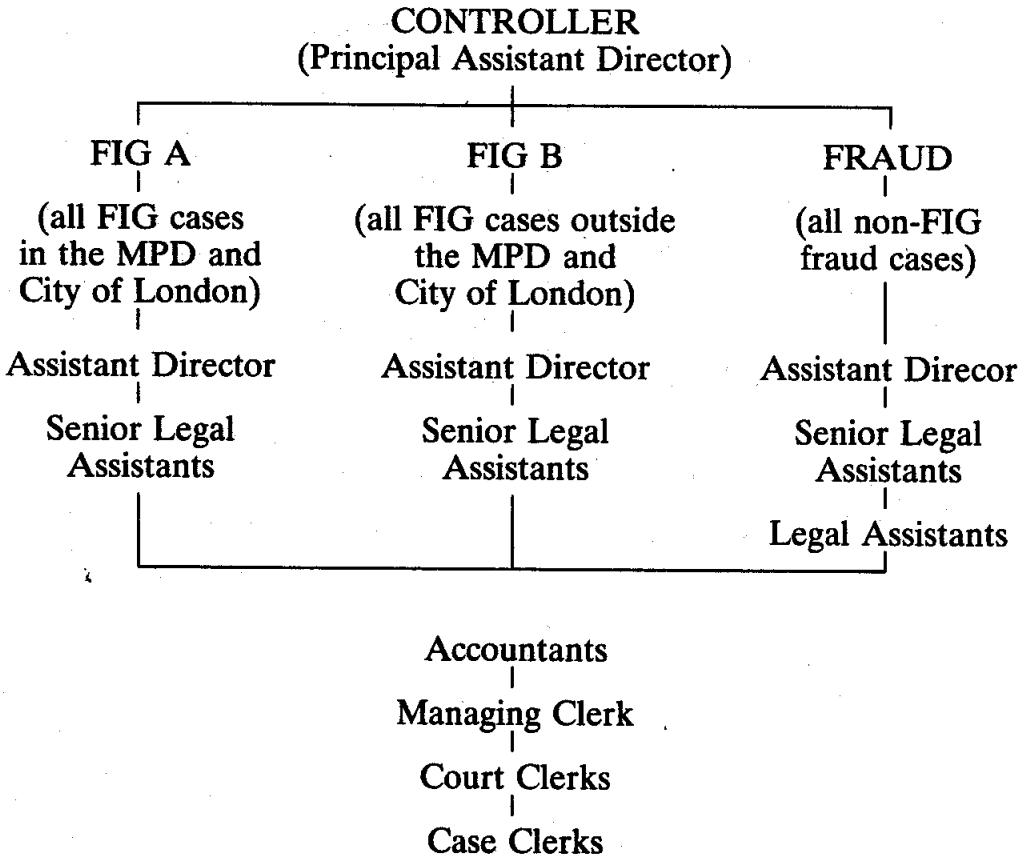
3. With the increase in fraud and some particularly serious cases of dishonourable trading in City institutions the burden upon the police, the Director of Public Prosecutions and the Companies Investigation Branch of the Department of Trade and Industry (DTI) has increased significantly. In the more serious and complex cases an investigation can involve both police, often in consultation with the DPP and DTI and an overlap of interest and activity can occur. It was to minimise such overlap and to ensure that all the disciplines involved in the investigation and prosecution of fraud worked closely together in order to concentrate investigation upon the major issues and the major offenders and to complete it without delay that arrangements were made in London for a system of *ad hoc* FIG. Each *ad hoc* FIG has generally comprised legal staff of the DPP, investigators from DTI and police officers from the Metropolitan and City Police Company Fraud Branch (MCCFB), together with any other appropriate experts, under the chairmanship of the DPP.

4. The Government has now decided to extend the above *ad hoc* arrangement and to put it on a permanent basis. This step is one of a threefold package of measures aimed at combating commercial fraud and its damaging effect on the reputation of the City. The other two associated initiatives are the Committee which has been set up under the chairmanship of Lord Roskill to consider the conduct of criminal proceedings in England and Wales arising from fraud and consideration by DTI of improved measures for self-regulation.

5. The provisions of this Circular do not remove the need, expressed in the DPP's letter of October 1981, for Chief Officers, where appropriate, to seek legal advice early in the course of the investigation of a suspected fraud where full FIG handling is not considered appropriate. A separate division in the DPP's office (see paragraph 6 below) will remain dedicated to such cases. Separate arrangements are being made in Scotland and Northern Ireland.

Structure of the Permanent Fraud Investigation Group arrangement

6. The permanent arrangement came into operation on 2 January 1985. It is headed by a Controller and comprises three divisions: two concerned with FIG cases and the third with all other cases of fraud which are referred to the DPP. Its structure is as follows:



All divisions will be located in Dacre House, Dacre Street, London SW1. The Controller will issue in due course direct to police forces a list of personnel and telephone numbers.

7. The Controller will have three accountants available to give assistance to the police. To maximise flexibility they will not be attached to a specific division but will be allocated to an investigation on a rota basis. The Controller has made arrangements for outside accountants to be made available to assist those on the permanent staff where either the volume of work or the need for particular expertise make this necessary.

Purpose of FIG

8. The two major objectives of FIG will be first, to ensure speedy investigation and institution of proceedings in those cases where that course is justified and second, early identification of those cases where an investigation is unlikely to result in criminal proceedings so that the investigation may be discontinued and valuable manpower and other resources deployed to other investigations. It will be an essential function of FIG, and a matter over which the Controller will exercise close supervision, to avoid wastage of time on minor offences, minor offenders, blind alleys and peripheral matters.

Identification of a FIG case

9. The initial complaint may be made to DTI, less commonly to the DPP and, probably in the majority of cases, to the police. Not all cases of fraud will require FIG handling but the following paragraphs describe the type of case encountered by the police where FIG is likely to be the appropriate means of taking the investigation forward. This list is by no means intended to be exclusive but rather to serve as a guide to the sort of fraud complaint where FIG should be considered from the outset. Where there is any doubt about the need for FIG handling the fraud complaint should be referred without delay to the head of the force Fraud Squad or to the ACC (Crime) as appropriate. If there is doubt, error in favour of a FIG should be made, at least at the outset but, of course, this list is concerned only with cases meeting criteria of substance, complexity *and* importance. The following types of fraud may be suitable for FIG treatment:

(i) upon Government Departments and local authorities, for example VAT-related fraud;

(ii) which include large scale corruption; and

(iii) involving large shipping and currency offences.

Frauds discovered by Inspectors appointed pursuant to section 109 of the Companies Act 1967 or section 165 of the Companies Act 1948, and reported by them to DTI in the latter case, will also be referred by that Department to the Controller of FIG.

10. The following types of fraud case should also be reported to the Controller of FIG so that he may exercise his discretion whether they should be investigated by FIG:

(i) upon Governments of other countries;

(ii) with an international dimension;

(iii) involving nationalised industries and public limited companies (eg British Leyland, Rolls Royce);

(iv) by persons connected with Lloyds of London, the Stock Exchange and other Commercial Exchanges; and

(v) involving well-known public figures (eg Members of Parliament, captains of industry).

Reporting of FIG cases

11. As soon as the police, DTI or DPP have made a preliminary judgement that the case is worthy of FIG investigation the Controller should be consulted. If there is any paperwork in existence this should be sent to him but it is not essential. The Controller will convene a meeting at the earliest convenient time inviting representatives of the police and DTI and arranging for a DPP lawyer and FIG accountant to attend. Generally such a meeting will take place at Dacre House but there may well be occasions when it is more convenient to hold it elsewhere, especially where heavy documentation is concerned. At this meeting the decision will be taken whether FIG is the appropriate manner of investigation. It is the experience of the Director of Public Prosecutions that such decisions are easily reached without disagreement. Where FIG is considered appropriate, the next stage is described in paragraph 12 below; where FIG is ruled out at this stage, the Chief Officer should nonetheless consult the DPP as described in paragraph 5 above wherever necessary. Should further investigation suggest that FIG investigation is necessary, the case should be referred back to the Controller. In cases reported to the DPP pursuant to section 41 of the Companies Act 1967, the Controller will immediately liaise with the Inspectors through the Inspector of Companies with a view to deciding lines of enquiry.

Investigation by FIG

12. As soon as possible after the decision to investigate by way of FIG has been made and once all parties have had an opportunity to consider what paperwork there may be, a further meeting will be held to determine the future direction of the investigation. In urgent cases, where immediate police investigation is required, this meeting may be dispensed with.

13. At this meeting lines of investigation will be drawn up and the police invited to proceed accordingly, liaising with the DTI and the FIG's accountant as necessary. Ideally, in the early stages, the police should submit once a month copies of the statements they have taken and a monthly meeting arranged to discuss the progress of the enquiry. The investigating police officer will not be expected to provide a written

report until the completion of the enquiry. Of course, it may be necessary to hold intermediate meetings, for example to discuss whether to use a peripheral offender as a witness. As the enquiry progresses the meetings are likely to become more frequent. It may be found early in the police investigation that a request to DTI for an inspection under section 109 of the 1967 Act is desirable. Should this be so, the Controller will consult directly with the Inspector of Companies at DTI and ask for an early and speedy inspection so that the police investigation is not delayed.

14. When the enquiry has been completed a decision will be made whether or not to prosecute. As the DPP's lawyers will have extensive knowledge of the case and as it will have become clear in many instances before completion of the police investigation that proceedings will be taken, it is hoped that the papers will be in a form enabling them to be served upon the defendants soon after proceedings have been instituted. It is likely that as the investigation proceeds there will have been discussions as to the appropriate charges to be preferred against the defendants.

Consultation with Counsel and other specialist advisers

15. The DPP will not normally consult Counsel before committal for trial but inevitably there will be cases of such magnitude, complexity and importance that Counsel will need to be consulted. Every effort will be made to ensure that Counsel's advice is obtained speedily and the Attorney General will nominate Counsel who are not only experienced in this field but who are known to be available to deal with the particular case expeditiously. Experts in the programming of computers and in other specialist fields will be instructed as required: it is expected to build up a panel of such available expertise.

Police participation in FIG

16. Police officers will not be attached permanently as an integral part of FIG but, as before, will operate under the operational supervision of their Chief Officer in full co-operation with the new Unit. This arrangement has been agreed in recognition of each Chief Officer's individual responsibility to investigate crime within his area and the need for police officers involved in a fraud enquiry to retain their powers as constable: a constable holds office under the Crown and in law cannot be subject to direction as to the exercise of those powers.

17. Where referral of a fraud complaint in his force area has given rise to a FIG investigation, the Chief Officer will make appropriate arrangements to provide sufficient officers to take forward the enquiry on the lines and at the speed agreed with the Controller at the meeting described in paragraph 13 above. In selecting officers for such a task, Chief Officers will wish to bear in mind the particular skills required for such investigations and the need to develop a body of expertise within their force. A balance is required: it would clearly not be conducive to the concept of FIG for officers totally unfamiliar with the

investigation of fraud to be deployed on such cases but equally Chief Officers may wish to include on a case some officers relatively inexperienced in the investigation of fraud who could benefit from such experience and use it to the longer-term advantage of the force.

18. As the FIG office will be based in London, no problems are anticipated in communications with the Metropolitan and City Police Company Fraud Branch. Geographical distance is however a consideration for cases occurring outside London. Clearly police investigation will be carried out locally in the force area where the fraud is alleged to have occurred. It is however vital for close co-operation to be maintained and in order to effect this in cases outside London the DPP will expect his lawyers to visit from time to time the police station where the enquiry is based. It is also expected in the majority of cases that the FIG accountant will base his investigation of financial records at the local police station. The DTI will similarly arrange for their officers to visit the police station as and when necessary. Police travel outside the force area is therefore likely to be confined to that necessitated by their enquiries and to meetings in London with the Controller to discuss progress on the case where these cannot be held locally.

[Paragraph 4.12]

APPENDIX I

FULL AND PAPER COMMITTALS IN FRAUD CASES

1. Statistics about committal proceedings in fraud cases are not maintained as a routine but the following information was provided to us by the Home Office Research and Planning Unit.[1]

2. The sample available is small and relates to 1981; the figures might therefore vary if a larger and more up-to-date sample was available. The figures set out below should not be quoted without making reference to this point.

Number of Committals

3. In the month of January 1981, 5,553 persons were subject to committal proceedings at the magistrates' courts of which 321 or 5.8 per cent were fraud cases. The type of offence in the 321 cases was classified as follows:

Home Office Statistical Category	*Type of Offence*		
51	Fraud by company directors etc. . . .	2	0.6
52	False accounting	15	4.7
53	Other frauds	228	71.0
60	Forgery etc. of prescription	3	0.9
61	Other forgery	73	22.7
	Total	321	100

4. Out of the above total of 321 the number of full committals was 35 or 10.9 per cent. This percentage is slightly larger than that found for all cases which was 7.6 per cent.

5. Information on who requested the full committal is limited. In 21 out of the 35 cases, 14 were at the request of the defence, 5 at the request of the prosecution and 2 as a result of the defendant not being represented.

1 We are grateful to Mr. P R. Jones of the Home Office Research and Planning Unit for supplying us with the statistics detailed in this Appendix which were derived from the Unit's research study on committal proceedings: see Jones, Tarling and Vennard, "The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System" [1985] Crim. LR 355.

The Time Taken

6. The time taken in the 321 fraud cases has been analysed as follows:

	Median time taken in weeks	
	Full	*Paper*
First court appearance to committal	24	9
From committal to disposal	31	11
From first court appearance to disposal	61	25

As would be expected, the time taken on full committals is materially longer than in paper committals.

7. The Research and Planning Unit has also pointed out that (based on average figures, in weeks) the time taken in fraud cases at all stages is 30 to 40 per cent longer than that found in all cases taken as a whole.

[Paragraph 8.31]

APPENDIX J

FRAUD TRIALS LASTING FOUR WEEKS (20 DAYS) OR MORE IN ENGLAND AND WALES: 1979–1983

The tables below show the numbers of fraud trials including re-trials and further trials, which lasted four working weeks or more in England and Wales from 1979–1983. The information was obtained as part of a survey of fraud trials carried out for the Committee with the help of the Lord Chancellor's Department. Table A gives the numbers for the Central Criminal Court and Table B gives the total numbers for all other Crown Courts.

Table A: Fraud trials lasting four working weeks or more at the Central Criminal Court: 1979–1983.

LENGTH OF TRIAL	1979	1980	1981	1982	1983
4 weeks		4	2	1	1
5 weeks	3	2	2		1
6 weeks				2	2
7 weeks	2	2	2	1	2
8 weeks	2		2		1
9 weeks			1		1
10 weeks	1		1		
11 weeks		1	1	1	
12 weeks		1			
Over 12 weeks	3 (13 weeks, 17 weeks, 19 weeks)		2 (27 weeks, 27 weeks)	2 (21 weeks, 17 weeks)	1 (20 weeks)
TOTAL NO. OF TRIALS	11	10	13	7	9

Table B: Fraud trials lasting four working weeks or more in all crown courts excluding the central criminal court: 1979–1983.

LENGTH OF TRIAL	1979	1980	1981	1982	1983
4 weeks	1	2	3	1	10
5 weeks	1	2	5	4	6
6 weeks		2	3	3	6
7 weeks	4	1	3	3	1
8 weeks	1		1	2	1
9 weeks			1		2
10 weeks			2	1	1
11 weeks					1
12 weeks		1			
Over 12 weeks			1 (14 weeks)	2 (13 weeks, 23 weeks)	1 (16 weeks)
TOTAL NO. OF TRIALS	7	8	19	16	29

[Paragraph 8.37]

APPENDIX K

CRIMINAL AND OTHER STATISTICS RELATING TO FRAUD

Criminal Statistics

1. The criminal statistics give some indication of the growth of reported fraud in recent years, but they do not distinguish between the ordinary straightforward fraud case and the kind of serious and complex fraud cases with which this report is largely concerned. Statistics of offences recorded by the police, of offenders found guilty of offences of fraud and of disposals are published annually in the *Criminal Statistics England and Wales.*

2. The number of defendants convicted of offences of fraud at the Crown Court in 1984 was 4,626, which was 2,744 more than in 1974, representing a rise over the decade of 145.8 per cent. In the magistrates' courts, 17,830 defendants were convicted of such offences compared with 11,947 in 1974. Table A overleaf sets out the number of offenders found guilty of offences of fraud in magistrates' courts and in the Crown Court from 1974 to 1984.

3. In 1984, 5,455 defendants were brought before the Crown Court for offences of fraud. Of that total, 722 (or 13.2 per cent) were acquitted. Of those brought before the Crown Court for all offences in 1984, nearly 15 per cent were acquitted.

Table A: Offenders found guilty for offences of fraud (1974–1984)

YEAR	MAGISTRATES COURTS	CROWN COURT	TOTAL
1974	11,947	1,882	13,829
1975	13,090	2,197	15,287
1976	14,250	2,433	16,683
1977	14,004	2,434	16,438
1978	13,477	2,279	15,756
1977[1]	13,856	2,806	16,662
1978[1]	13,323	2,648	15,971
1979	14,953	2,240	17,193
1980	17,215	3,059	20,274
1981	17,539	3,413	20,952
1982	18,602	3,852	22,454
1983	18,205	4,529	22,734
1984	17,830	4,626	22,456

[1] Based on indictable and summary offences as redefined by the Criminal Law Act 1977 and on a new counting procedure.

Other statistics

4. By contrast with crimes such as burglaries, thefts and robberies, there are no reliable national statistics available to indicate the total value of money and property lost or at risk of being lost through fraud each year. Published figures are available relating to fraud cases under investigation by the Metropolitan and City Police Company Fraud Department (MCPCFD) which show the "money at risk" in these cases, but this of course understates the position in the country as a whole because the figures for all other police forces are not included.[1] ("Money at risk" is calculated in relation to each reported fraud on the basis of the sum of money actually stolen or which was at any time seriously in danger of being stolen.) The following table (Table B) shows these figures (on a historical basis), together with the number of persons arrested or summonsed and the number of cases under investigation. Figures are given separately for the two component forces of the MCPCFD.

[1] Just as we complete our report we note that a survey of companies trading in the United Kingdom commissioned by Ernst & Whinney estimate that "company fraud is costing British business nearly £3 billion a year:" see *The Times*, 9 December 1985.

Table B: Cases Investigated by the Metropolitan and City Police Company Fraud Department (1980–1984)

I. Metropolitan Branch

	1980	1981	1982	1983	1984
Arrests and major crime summonses	393	217	257	262	350
New investigations	651	389	376	*	1963
Cases under active consideration at end of year	508	376	393	443	594
"Money at risk"	£439m	£279m	£294m	£264m	£617m

*Not available

(Source: Annual Reports of the Commissioner of Police of the Metropolis).

II. City of London Branch

	1980	1981	1982	1983	1984
Arrests	40	35	40	65	77
New investigations	413	536	591	510	621
Cases under active consideration at end of year	*	90	96	103	117
"Money at risk"	£54m	*	£100m	£115m	£159m[1]

*Not available.

(Source: Annual Reports of the Commissioner of Police for the City of London).

[1] In addition the following totals of foreign currency were at risk in frauds under investigation: $125.8m U.S., D. marks 65m and Swiss Francs 6.25m.

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