



JUDICIARY OF
ENGLAND AND WALES

Review of Efficiency in Criminal Proceedings

by The Rt Hon Sir Brian Leveson
President of the Queen's Bench Division

A black and white photograph of a grand, ornate Gothic hall, likely the interior of a court building. The hall features high ceilings, pointed arches, and a checkered floor. A large staircase is visible in the background.

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1 Introduction

1.1 Terms of reference

1. In February 2014, after discussion with the Lord Chancellor, the Lord Chief Justice asked me to conduct a review into the efficiency of criminal proceedings. It has been conducted against the background of the decreasing public funding that is available not only for Her Majesty's Courts and Tribunals Service ('HMCTS') but also for the police, the Crown Prosecution Service ('CPS'), the National Offender Management Service ('NOMS') and last, but by no means least, legal aid. The Review was intended to stand alongside that conducted by Sir Bill Jeffrey looking into how criminal defendants are given independent legal representation in the courts of England and Wales. Its purpose is to demonstrate ways in which, consistent with the interests of justice, it might be possible to streamline the disposal of criminal cases thereby reducing the cost of criminal proceedings for all public bodies. A further aim is to ensure that proposed reductions in criminal legal aid can be justified on the basis that the rate of remuneration will not be affected: less work will be required to be put into each case because considerable waste and inefficiency in the system (which takes up the time of criminal lawyers and thus costs money) has been eliminated.

2. The terms of reference of the Review were finalised on 4 April 2014 and are in these terms:

“While taking into account -

- a. current initiatives to improve the efficiency and speed of the criminal justice system (in particular recent changes relating to the early guilty plea scheme);
 - b. the need for robust case management;
 - c. recommendations made in previous reviews of the criminal justice system, including those not implemented at the time; and
 - d. Government reforms to the criminal justice system;
1. Review current practice and procedures from charge to conviction or acquittal, with a particular focus on pre-trial hearings and recommend ways in which such procedures could be:

- a. further reduced or streamlined;
 - b. improved with the use of technology both to minimise the number of such hearings or, alternatively, conducted (whether by telephone, or internet based video solutions) without requiring the attendance of advocates.
 2. Review the Criminal Procedure Rules to ensure that:
 - a. maximum efficiency is required from every participant within the system; and
 - b. any changes proposed are fully supported by the Rules.
 3. Report to the Lord Chief Justice within 9 months. The report will be published in due course.”
3. A further limitation placed on the Review concerned the mechanism whereby change could be effected. Although I am specifically tasked with reviewing the Criminal Procedure Rules and the practice of the courts, its purpose is not to investigate or recommend legislative change. In any event, that limitation is a necessary consequence of the time frame within which I have been required to operate: what I have done is not, and never could it take on the form or detailed exposition to be expected of, a Royal Commission; neither is it the type of Review that was conducted by Lord Justice Auld in 2001¹. Having said that, I have not ignored legislative possibilities. Chapter 10 identifies possible approaches that would require legislation: these have been raised and debated over the years and I do no more than suggest that they should be revisited. How far any is taken depends on policy decisions upon which, at least in part, it is not appropriate for a serving Judge who has not specifically been asked to review legislation to express a concluded view. A Royal Commission could be appointed to consider these issues but, inevitably, that would lead to considerable delay and, in any event, many of the issues have been debated over many years. Both that decision and the possible solutions are initially for the executive and then, if taken forward, for the legislature.
4. As a result, I have focussed on changes to procedure which can be achieved without requiring legislation but which make better use of the technological and other advances. All are designed to streamline the way in which the business of the criminal courts is conducted without losing sight of the interests of justice. Thus, rather than seeking to bolt procedures onto a system initially designed for the 19th century (as has been the practice for the last 50 years), I have tried to identify ways in which our current procedures can be adapted to make the best use of the skills, resources, IT and systems available.

1 *Review of the Criminal Courts of England and Wales* by The Rt. Hon Lord Justice Auld (HMSO, October 2001).

5. When I was the Senior Presiding Judge for England and Wales, I was involved in the promulgation of a programme to improve the efficiency of the Magistrates' Courts. Its aim was to reduce the number of hearings and to improve timeliness: it was known as CJSSS ('Criminal Justice: Simple, Speedy, Summary')². It was successful in improving performance³ although the effectiveness of some of those improvements has since diminished. The initiatives needed refreshing in a new programme promoted by the present Senior Presiding Judge, "Transforming Summary Justice"⁴. The most significant lesson learnt from these programmes has been that the criminal justice system is not, in reality, a single system: the police, the CPS, the defence community, HMCTS, the judiciary, the probation service and NOMS (to say nothing of the Ministry of Justice ("MoJ") and the Home Office) all have different priorities and different financial imperatives with performance indicators (where they exist) that are not aligned. The only way of improving the end to end operation is to bring the different participants in these systems together to debate and agree on initiatives to improve the whole.

1.2 Methodology

6. To that end, I sought to draw into this Review representatives of all those primarily involved in the delivery of criminal justice, inviting those representatives to include whomsoever they wished in the formulation of ideas that might improve the throughput of work, while at the same time reflecting the imperatives of all (and not just their own organisation). The names of those involved in the Review group (and their organisations) are set out in Appendix A; we met broadly on a monthly basis and I am grateful to all for the effort that they (and their respective organisations) put into the exercise. I have also been greatly assisted by two civil servants seconded full time from HMCTS and the MoJ respectively: Enzo Riglia has been involved in transformational change from the perspective of HMCTS for many years and David Robinson has considerable experience as a criminal practitioner who, more recently, has been Legal Advisor to the Criminal Cases Review Commission. Both have devoted considerable time and energy to the Review. In addition, members of the Judicial Office and researchers from the Law Commission have provided valuable input⁵.
7. In order to analyse the process from charge to disposal, three sub-groups were set up. Professor David Ormerod QC, a Law Commissioner, chaired a sub-group to deal with processes and procedure from charge to trial. Lord Justice Fulford chaired a sub-group on IT and listing and Mr Justice Openshaw chaired the final sub-group on the conduct of trials. Members of the Review group either served on the sub-groups or their organisations nominated others to do so: their names are also set out in Appendix A. In that way, I have sought to obtain the widest range of views.

² [Delivering Simple, Speedy, Summary Justice](#), Department of Constitutional Affairs, July 2006, DCA 37/06

³ E.g. Champness, A "Criminal Justice Simple Speedy Summary – six months on" (2008) 64(6) *Magistrate* 170-1.

⁴ [Transforming the CJS – A Strategy and Action Plan](#), MoJ, June 2013, Cm 8658; [Transforming the CJS – an Implementation Update](#), MoJ, July 2014, Cm 8868.

⁵ From the Judicial Office, this includes Amanda Jeffrey, Claire Fielder, Sophie Marlow, Sarah Carnegie and Ben Yallop; from the Law Commission, Vincent Scully, Amy Taylor and Sarah Taylor.

8. In addition, various other steps have been taken to obtain views. The Bar set up a Criminal Justice Review Group chaired by His Honour Geoffrey Rivlin Q.C. which has collated a response from the Bar. The Law Society conducted a series of regional events to seek views and hosted an evening when these were discussed. I have met others with a particular interest in the criminal justice system (such as the Victims' Commissioner). Finally, the website sought views from members of the public or other interested parties. A full list of those who contributed is set out at Appendix B.
9. It is important to underline the limitations of this Review. First, it is restricted by its terms of reference to focussing on changes which can be implemented without legislation. This restriction is significant: given the decades of continued interest in improving efficiency any non-legislative changes that could easily have been made would, by now, have occurred. Secondly, there has been no budget for this exercise, although the services of the two civil servants have been provided at the cost of HMCTS and the MoJ. For that reason and others, there has been no time or little opportunity for evidence gathering. With one exception, reliance has had to be placed on the very wide experience of all members of the Review group, the information available from the statistics maintained by the MoJ and the wide-ranging consultation (which has included such research as has been possible from other jurisdictions, including the Review presently being conducted in Scotland). The exception has been the invaluable and extensive assistance that I have received, *pro bono*, from Professor Cheryl Thomas, Professor of Judicial Studies in the Faculty of Laws at University College, London. Everyone (including Professor Thomas) has given their time and energy free of charge and I am extremely grateful to all.
10. There is a further very important limitation to this Review. There is no quantitative analysis of the effect of the changes which are proposed. Within the constraints of the Review, it has not been possible to calculate how much will be saved by any participant in the criminal justice system by any single change, or combination of changes, to the way in which criminal cases are conducted. Neither has it been possible to identify the extent to which, taken individually or together, any proposed change will serve to provide a better rate of remuneration for those conducting publicly funded criminal work although common sense demonstrates that if the work can be conducted with less waste and more effective use of time, rate of remuneration must be improved.
11. It is for the executive to determine how much funding will be available for the police, the CPS, those undertaking criminal defence on legal aid, HMCTS or NOMS and how the criminal justice system fares as a priority with other demands for public funds, such as health or education. Given that the origin of the Review has been a crisis over remuneration for legal professionals, however, it must be borne in mind that a criminal justice system that is professionally staffed and effective is critical to our democratic society. In that regard, I can do no better than repeat what I said in *R v Crawley* [2014] EWCA Crim 1028 at paragraph 57:

“The criminal justice system in this country requires the highest quality advocates both to prosecute and to defend those accused of crime: in addition,

they are the potential Judges of the future. The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing and the better the prospect of true verdicts according to the evidence. Poor quality advocates fail to take points of potential significance, or take them badly, leading to confusion and, in turn, appeals and, even more serious, leading to potential miscarriages of justice. We have no doubt that it is critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex.”

1.3 The changing landscape

12. The criminal justice system is presently crowded with plans for future development. There are currently in the region of a dozen pilots, initiatives and schemes operating in England & Wales⁶. Each has been created and implemented in the desire to improve one or more aspects of the operation of the way in which criminal justice is delivered.
13. Compounding the above problem is that the landscape is subject to frequent change. Between 1989 and 2009, Parliament approved over 100 Criminal Justice Bills and more than 4,000 criminal offences were added to the statute book⁷. From an historical context, the figure is more startling: Halsbury’s Statutes of England & Wales has five volumes devoted to criminal laws that (however old they may be) are still currently in force. Volume One covers the law created in the 637 years between 1351 and 1988, and is 1,249 pages long. Volumes Two to Five cover the laws created in the 24 years between 1989 and 2013 and are no less than 4,921 pages long. The 2013 Supplement adds a further 200 pages. So, more than four times as many pages were needed in Halsbury’s Statutes to cover laws created in the 24 years between 1989 and 2013 than were needed to cover the laws created in the 637 years prior to that⁸.
14. It is hardly surprising then, given all the above, that the Review encountered what might best be described as ‘transformation exhaustion’.

1.4 The CJS Common Platform

15. The work of the criminal justice system currently relies on a combination of long-standing manual processes and aging computer systems that have evolved in a piecemeal fashion over many decades. There is no doubt that to increase the efficiency of the system, we need better, quicker and less costly ways of creating, filing and distributing documents; easier and more

⁶ Including, for example, the Early Guilty Plea (‘EGP’) Scheme, Transforming Summary Justice (‘TSJ’) and the CJS Efficiency Programme.

⁷ Law Commission Consultation Paper, 2010 paragraph 1.17.

⁸ See further the [Moj’s revised figures for new offence creation 2009-13](#), but note that their methodology is highly criticised by Leverick & Chalmers, who have their own data for two sample years of 1997-8 and 2010-11: “Tracking the Creation of Criminal Offences”, 2013, Crim LR 543.

flexible ways of enabling all those involved in the process to communicate effectively with one another. We need to reduce the number of hearings at which the participants have to attend in person. It is critical that we avoid duplication of work (such as “re-keying” the same information) and that we reduce administrative errors. Well-constructed IT has the potential to overcome most of these challenges.

16. One essential element of the developing landscape in this context is the “CJS Common Platform”. It has the potential to make such fundamental changes that it is worth explaining at this early stage. It will provide a comprehensive, online case-management system. At the very outset of criminal proceedings, following charge, the police will make all the relevant documentation available via a digital case file, to which the Crown Prosecution Service will be provided access. Any prosecution material in the proceedings will only need to be entered onto the system once (thereby avoiding any re-typing/re-keying). The case will be managed entirely online, with the various participants having access to the case-management system at the different stages in the process when they become engaged. The CPS will create the case file online. This will involve preparing the “papers” in a digital format that will reflect the bundles with which the courts are currently used to working, and additional material will “slot in” at the appropriate place in the file. The parties and the judiciary will be able to work on the electronic “papers”, privately highlighting, editing, and making comments.
17. Case progression will take place online, and all the decisions in the case will be made and communicated in this way. The CPS will give electronic access to the case papers (the used and disclosed materials) to all the parties and participants who have a legitimate business need. Paper processes will be effectively eliminated. It will be critical for this new system that case information is provided in a comprehensible format that facilitates electronic working in court and that the payment system, to the extent that it is based on a page count, takes into account this new way of working. These changes will profoundly affect the way that work is undertaken at each court centre, because the materials will be digitally managed. The parties and participants will file their documents electronically (statements, exhibits, lists of previous convictions, correspondence, pre-sentence and other reports, Plea and Case Management Forms (PCMH) forms, etc.), and applications and written submissions will be filed online.
18. At the relevant points in time, the Judge/list officer/case progression officer will each be automatically alerted when a new application or submission is received, and he or she will be able to decide how it is to be resolved: by way of an in-court hearing, a remote hearing or an electronic exchange of written submissions, with the Judge communicating his or her decision via a written message (including any reasons). The entirety of the documentation in the case will be filed in an electronic store that will be accessible to those involved in the case whose role entitles them to access the information. The parties will present their cases digitally in court, and it is proposed that the information will be made accessible to the jury (on tablets) in this format.
19. Whilst the development of the processes that are necessary for this radical change is a complicated

undertaking, the financial savings that will be brought about by eliminating paper and the increase in efficiency should be very considerable. Having said that, it must be recognised that there may be a consequential movement of some cost on to defence lawyers (if, for example, the defendant cannot access the statements in his case online and needs a hard copy). That possibility will have to be recognised in any negotiation as to remuneration.

20. Listing will be undertaken by way of a digital diary, and although the Resident Judge, assisted by the list officer, will retain complete control over this process, it will be possible for “standard” cases to be allocated automatically in the diary on a provisional basis, subject to approval or change by the list officer⁹. This will enable any Judge and the relevant court officials, at a glance, to assess when cases can be listed. This system should assist in enabling cases to be transferred between courts in order to ensure that best use is made of each court centre. This may lead to an enhanced or renewed role for regional list officers acting on the directions of the Presiding Judges.

⁹ A similar approach is envisaged for the Magistrates’ Court.

2 Overarching Principles of the Review

21. There have been many attempts over recent years to review the operation of the criminal justice system, not least by the Royal Commission on Criminal Justice¹⁰ and Review of the Criminal Courts of England and Wales (2001) conducted by Lord Justice Auld¹¹. The recommendations of these reviews (to the extent not already implemented) provide much material which is still relevant today (although a number of the recommendations would require legislation). This Review has, in some instances, developed some of those earlier recommendations to reflect the new landscape in which we operate: particularly with improved and more widely accessible IT, and in the face of financial challenges that have to be faced.
22. There must, of course, be an irreducible minimum of funding – for the police, the CPS, defence lawyers, the courts and NOMS – below which the criminal justice system cannot operate. It is, however, necessary to ensure that the scarce resources are not wasted or used inefficiently. Demands on public funds must be kept to a minimum while, at the same time, ensuring that the delivery of justice is effective and meets the highest standards that any democratic society is entitled to expect. In order to achieve this objective, remuneration for those engaged in the system must be commensurate with the skill and expertise which has to be deployed, otherwise the highest calibre individuals will not be prepared to work in the field and standards will inevitably drop.
23. Although reference is continually made to ‘the criminal justice system’, as I have said, there is no such single system: rather, there are a series of criminal justice participants each of whom has their own obligations and priorities, and operates within their own financial constraints. The almost inevitable consequence of these participants each having to address their own issues is that they have little, or significantly less, regard to the needs and obligations of other participants. As was demonstrated during the previous attempts to improve efficiency in the Magistrates’ Courts (CJSSS), only if all participants are conscious of the needs of others can a system be devised which has the potential to maximise efficiency.
24. The underlying approach to this Review has been to consider ways of encouraging better communication between the agencies involved in criminal justice, encouraging better communication between the parties to criminal litigation and maximising the opportunities to improve effectiveness and efficiency with the use of modern IT. From first to last, it also focuses on improving the prospects of a fair and just trial, including identification of the issues which will lead to the conviction of the guilty and the acquittal of the innocent¹². To that end, it will also be important to promote collection of data which is targeted at monitoring effectiveness and efficiency. This approach leads to a number of themes as to the way forward which I refer to as

10 [1993] Cm 2263.

11 *Review of the Criminal Courts of England and Wales* by The Rt. Hon Lord Justice Auld (HMSO, October 2001).

12 CrimPR, C1.1.

the overarching principles of this Review.

2.1 Getting it Right First Time

25. Thus, the first overarching principle must be Getting it Right First Time. This is particularly important for the police and the CPS who are the gatekeepers of the entry into the criminal justice process. If they make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence, considerable delay can be eradicated¹³. On that basis, defence lawyers can take proper instructions and progress expeditiously: furthermore, it will be incumbent upon them to do so. If, on the other hand, a case is under-charged (or over-charged) or there is no proportionate disclosure of material, delay (and additional cost) will be inevitable. In my view, getting it right first time is the absolute priority of any improvement to efficiency and it must be recognised that this will impose additional burdens on the police and CPS: to ensure that they are prepared to accept those burdens, it is equally critical that all other participants do what they can to minimise unnecessary costs.

2.2 Case Ownership

26. Allied to 'Getting it Right First Time' is the second overarching principle **Case Ownership. For each case, in the police, the CPS and for the defence, to maximise the opportunities for case management, there must be one person who is (and is identified to be) responsible for the conduct of the case.** Attempts to name the advocate have previously foundered because the CPS and/or the defence have only decided to instruct independent counsel at the last moment (perhaps because a case that was an anticipated guilty plea becomes a trial), or because the advocate is not available for the PCMH or mention which is then conducted by someone without any knowledge or ownership of the case, or the issues involved in it. In civil cases, the same advocate or solicitor and counsel will be responsible for the advice, the pleadings and usually (but not invariably) any interlocutory hearing or trial: there is no reason why the same should not be so for criminal cases, acknowledging and taking account of the fact that criminal advocates spend many working days in court.
27. Case ownership ought to be helped in the future if the significance of geographical boundaries are reconsidered and much greater use of video technology promoted. Although there may still be various hands on the case, overarching case ownership and responsibility can be maintained by technology enabled updates and tasks, and by remote hearings. If the use of video links is to be expanded, a new operating model which is not confined to the current tiers of jurisdiction will ultimately be needed.
28. Tied to improved case ownership, Legal Aid must reward efficiency and avoid perverse incentives.

¹³ It is worth mentioning that this principle applies to decisions whether to proceed by arrest and charge or by voluntary attendance and postal requisition.

Thus, the current legal aid arrangements make it highly attractive for firms to retain a case until the PCMH. The role of the ‘instructed advocate’ under the advocates graduated fee scheme (‘AGFS’) can be of financial benefit to them.

29. Since 2007, the ‘instructed advocate’ receives all the fees under the AGFS and then pays the appropriate fees to all other advocates who appeared on the case. The net effect of the Legal Aid regulations¹⁴ is that the ‘Instructed advocate’ is the advocate who appears at the PCMH. Very often that is the in-house advocate who thus becomes the instructed advocate and many firms will not instruct counsel for the PCMH for this reason. It is clear why: the firm will receive the whole of the advocate’s fees for the case, even where counsel is instructed for every subsequent hearing including trial and sentence. At best, this means that the firm gets the benefit of the cash flow and at worst it can be a means of obtaining what is, in fact, a referral fee by the simple expedient of withholding a proportion of the fee intended for the advocate.
30. When this occurs, it means trial counsel is rarely instructed before the trial, so decisions are being made at the PCMH with which trial counsel may later disagree. Second, the instructed advocate thereafter has little to do with the conduct of the case; the conduct is always the responsibility of trial counsel. If the ‘instructed advocate’ notion was intended to confer case ownership, it does not in practice do so.
31. **In order for case ownership to work in practice, the Legal Aid Agency should change the definition of ‘instructed advocate’ to the advocate who conducts the main hearing** – usually the trial, but frequently the sentence. This would not represent a substantial change. In appeals, committals for sentence and breach proceedings, the Bar Council, Law Society and Solicitors’ Association of Higher Court Advocates have agreed that the instructed advocate should be deemed to be the person who attends the main hearing, with any other advocate being regarded as a substitute advocate.
32. Further to this Review process, I understand that the Legal Aid Agency is now currently giving consideration to amending the definition of Instructed Advocate in the Criminal Legal Aid (Remuneration) Regulations 2013¹⁵.

2.3 Duty of Direct Engagement

33. The third overarching principle will flow almost directly from case ownership: **the Criminal Procedure Rules should place a duty of direct engagement between identified representatives who have case ownership responsibilities**. In a civil case, it would be inconceivable that the lawyers for the parties would not voluntarily engage with each other in an effort to narrow issues and, potentially, settle the dispute. Neither would such discussions

14 *The Criminal Legal Aid (Remuneration) Regulations* (HMSO, 2013).

15 The proposal being that the instructed advocate is the one conducting the main hearing not simply the PCMH.

necessarily involve the court: judicial resolution of a problem would only arise in the event that agreement was not possible. Of course, if nobody “owns” the case – or if decisions as to who is to conduct it at trial have been deferred – this type of engagement will not be possible.

34. Case ownership, on the other hand, can lead to greater collaborative working between the parties involved. What matters is early effective engagement between the right people. That does not have to be face to face; e-mail and telephone conversations can resolve a great deal but they require a name and an e-mail address (or direct telephone number) along with a commitment to respond. On the other hand, agreements must be reduced into writing so as to avoid all confusion and there must be a secure e-mail system to facilitate more effective communication and to ensure that there is a record of the position of the parties. In that way, consideration can be given to all relevant matters at the earliest opportunity before the first hearing or in the Crown Court before the PCMH is listed: this can include an agenda for the trial which can be communicated to the court. **The Criminal Procedure Rules need to make clear that the parties are under a duty to engage at the first available opportunity** and certainly well before any first hearing. There should be an expectation that the identified case representatives will have communicated in advance of the first hearing. If they have not, they should have to explain to the court, at that hearing, why they have failed to do so.
35. When the CJS Common Platform has been established, it will provide a system similar to email communication between the parties that will ensure there is a readily available record of what occurred. As discussed elsewhere, Judges on occasion currently receive submissions and issue rulings in this way. Furthermore, once audio and video hearings are established, there will be a digital record similar to that provided by the DARTS system¹⁶.
36. I must mention one concern raised during the course of my Review, namely, whether the existing arrangement for the use of secure e-mail by defence practitioners is acceptable. A number of defence practitioners complained that the secure e-mail system ‘cjsm’ is not fit for purpose. They identified that it is difficult to sign up for, cumbersome and slow in operation and has a very small capacity. Others explained that this may be a technical issue of a failure by some to integrate Microsoft Exchange server with cjsm. I understand from practitioners that some simple steps to render the systems compatible alleviate these difficulties immediately. Suffice to say that until the CJS Common Platform is established, it should be a pre-condition that any practitioner wishing to conduct Crown Court litigation should have access to cjsm.
37. Building on the above there should be a presumption that interlocutory matters ought to be concluded without the need for a formal hearing in court. Rather than arrange a ‘mention’, by using IT the usual practice should become either to submit short submissions in writing for written resolution by the court or to arrange a hearing at a suitable time online or by

¹⁶ I understand that tests are taking place to use conference calls for interlocutory hearings and that it may be possible to use the DARTS system to ensure a comprehensive record is kept of these hearings. Also, the HMCTS Store may be used to retain records of remote or virtual hearings, especially ‘case management meetings’.

telephone. **The Criminal Procedure Rules (and Practice Directions, as appropriate) should make it clear that there is an obligation on any party to justify the need for an interlocutory hearing to take the form of a formal court hearing with all parties present.** With the CJS Common Platform this will be entirely straightforward, as discussed more fully in the next section.

2.4 Consistent judicial case management

38. The Fourth **principle is effective and consistent judicial case management.** Without creating a docket system (with every case allocated to a Judge), **the court must be prepared robustly to manage its work.** In the Crown Court, this might require a number of Judges taking on the responsibility of case management but this cannot be seen as a tick-box exercise: see, in particular, the very different approaches to case management evidenced by Professor Penny Darbyshire¹⁷. To that end, **all parties must be required to comply with the Criminal Procedure Rules and to work to identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency.** In the event that a suitable disposal of the case cannot be agreed, this includes ensuring that the necessary evidence is served, disclosure has been undertaken, defence statements are case specific and address the issues, appropriate admissions and summaries are prepared, special measures and evidential issues resolved and witnesses are required only if truly necessary with availability known to the court so as to avoid an ineffective hearing.
39. Looking at the broader picture, **to assist the courts in consistent decision-making statistical information should be more readily available, tailored to the needs of the court specifically to assist with allocation and sentencing decisions.** Although nothing must be done to impact adversely on the independence of the judiciary, ways must be found to ensure that all members of the judiciary are aware of the way in which their discretionary decisions (as between Magistrates and their local Judges and as between Magistrates and Judges and comparable courts) are exercised differently. I shall return to this issue in particular when discussing allocation although the importance of consistency in approach runs throughout decision making in the criminal courts.

17 [2014] Crim LR 30.

3 The role of IT

3.1 Video and Audio Hearings: the default position

40. Until recently, in order to conduct a “hearing” of any sort, all those involved in the process needed to gather in the same place – almost invariably a courtroom – in order for submissions to be advanced by the advocates or evidence to be given by witnesses, thereby enabling the Magistrates, Judge or the jury to make a decision. Based on long familiarity, Judges, advocates and the public are entirely used to this process and it is understandable that it may be difficult for many people to envisage a new process that involves the Judge conducting remote hearings. I appreciate that there are competing arguments around the most effective way to undertake remote hearings¹⁸. However, in relation to pre-trial and case management hearings, this process is inefficient and expensive. Such hearings are often essentially administrative in nature and it is unnecessary to gather the participants together in one room to deal with the matters that require resolution, save exceptionally when the interests of justice require it.
41. With appropriate investment in equipment and infrastructure, new technologies are now available which will provide a reliable and high-quality means of dealing with many, but clearly not all, aspects of criminal cases without requiring the parties to travel to court. In various combinations, advocates, police officers, defendants (and sometimes victims and witnesses) are required to attend at court (Magistrates’ Courts and Crown Court centres), sometimes making extensive and time-consuming journeys, for hearings that often only last a very short period of time.
42. Judges in the county court frequently conduct telephone hearings – entire lists are often dealt with in this manner – and the criminal courts are now lagging significantly behind modern practices. Indeed, there has been a marked failure on the part of the criminal justice system to utilise new and far more efficient ways of working.
43. Increasingly, business people and other professionals who are involved in complicated and essential activities meet and work using audio and video links (e.g. business meetings are conducted in this way and surgical operations are carried out remotely) and members of the public, to a significant degree, are now used to communicating via computers or on their mobile telephones. It is acknowledged for the purposes of this Review that trials and sentencing hearings – certainly as regards the latter when imprisonment is a possibility – will continue to

¹⁸ Surinder Kahai, ‘Is Video Conferencing a Good Substitute for Face-to-face Meetings?’ (2010); Carlos Ferran and Stephanie Watts, ‘Video conferencing in the field: A Heuristic Processing Model’ (2008) 54(9) Management Science, p. 1565-1578.

take place conventionally in a courtroom with all the participants gathered together¹⁹. There are of course already established statutory exceptions where vulnerable witnesses give evidence via a video link or by a 'section 28' recording²⁰.

44. Remote hearings enable the Judge, provided he or she has access to the relevant materials, to sit at any court centre or any venue with suitable IT facilities (thereby providing greater flexibility in listing), and they will ease the pressure on courtrooms because the proceedings can be conducted from the Judge's chambers. The advocates will either appear from their chambers or offices, or from a court where they are appearing in other cases. Defendants, victims and witnesses will be able to participate via an audio or video link, and observers (members of the public) could be able to observe the proceedings in a similar way.
45. For a considerable period of time, a significant number of Judges have dealt with administrative issues in cases by communicating with the parties by e-mail, receiving submissions in this way; thereafter, the court has been able to issue an e-mail ruling. This has proved to have considerable utility and it has not led to any significant difficulties or complaints. It is a means of conducting hearings without the need to bring all those involved to court, and it leads to an unassailable record of what occurred. However, to date, this has only happened on an ad hoc basis, and, as elaborated at 1.4 above, the CJS Common Platform will place this particular means of communication on a more organised basis.
46. I understand that a number of Magistrates' Courts²¹ are now able to move to a position of 'digital by default'. A national roll-out is likely to require a new operating model of case allocation and listing, and all the relevant agencies will need to become familiar with different ways of working. The implementation of these proposals was explored at a CJS Common Platform video workshop in November 2014, and this work will be developed.
47. It needs to be stressed that as a minimum, there are eight essential prerequisites for remote hearings:

- i. **High quality equipment**

The equipment must be reliable and the audio and visual quality should be of a high standard: the voices and the faces of those involved need to be clear so that the remote hearing in this critical sense replicates what can presently be seen and heard in court.

19 It may be that other types of hearings also require physical presence in one place: such situations will have to be worked out on a case by case basis.

20 [Section 28 of the Youth Justice and Criminal Evidence Act 1999](#)

21 In Kent, Sussex and Surrey.

ii. Digital recording and access

The proceedings must be digitally recorded, with easy access provided to the audio and visual archive. In appropriate cases (which might be all save those in which the court is dealing with purely administrative arrangements and where no specific public interest is engaged), consideration should be given to making the record generally available, at least for a limited period. This will address the need for open justice, given remote hearings will otherwise take place in the absence of the public. Technology is available which supports multiple participants at meetings or hearings and in most cases they provide an “in-built” recording facility. Suitable arrangements will need to be made for hearings involving public interest immunity material.

iii. Cases to be “queued”

There needs to be a sophisticated listing system for audio and video hearings, so that cases are “queued” with the participants waiting online to be called on, in the same way that occurs with cases in court.

iv. Involvement of advocates instructed for the substantive hearing

For Judges conducting remote hearings, sensible arrangements need to be made to ensure that, to the greatest possible extent, the advocates who are instructed in the case are available to assist the Judge. This will probably require some adjustment to current judicial sitting patterns and a requirement to provide facilities so as to ensure that advocates who are involved in trials are able to participate in these remote hearings without disrupting the trials (i.e. at outside conventional court sitting hours). This will of course be made far more realistic by the provision of such equipment at each court centre.

v. Video facilities in prisons

The system will be dependent, to a marked extent, on the ability of the prison establishment to provide sufficient video booths so that defendants can be “present” during the hearing without having to travel to court. Similarly, and quite separately from allowing defendants to witness what happens in court, there must be adequate capacity within the prison estate to ensure that counsel and solicitors are able to conduct remote conferences and consultations in private with adequate security to prevent abuse. Savings which permit conferences such as this will help the prison service (which will not have to devote as much time and attention to providing sufficient time and resource for legal visits) but will also allow defence lawyers to take

instructions without travelling to the establishment at which the defendant is held and without the time constraints that usually operate on such visits.

vi. Showing exhibits

The system(s) that are used must enable documents and other exhibits to be shown via the video link. Various systems that are currently available provide this facility (essentially this is done by allowing one of the participants to show/share the screen of his laptop on the screens used by the other participants).

vii. Training

The Judges and court staff must be properly trained in the use of these new technologies. All parties with regular access to it (e.g. advocates, solicitors, the police) must be trained similarly. While it would be impractical to have resident experts dealing with technical failures, there must be provision for courts to access technical assistance more readily than is currently the case.

viii. Retention of the gravitas of proceedings

We must ensure that the presentation of the proceedings if undertaken in virtual form does not detract from the solemnity and gravitas of the court. Careful consideration must be given to the development of the virtual environment. **I suggest a committee should be constituted of representatives from the participants in the criminal justice system²² to determine best practice in the conduct of such hearings which should then be included in Criminal Practice Rules or Directions.**

48. Remote hearings are presently being tested in a number of courts (*e.g.* Reading), with a marked degree of success although it is accepted that, on occasion, it will be necessary to organise conventional hearings when, for instance, one of the parties has failed to fulfil its obligations, and remote hearings, backed up by orders or reminders, have failed to bring about a satisfactory response. This should meet the suggestion, frequently made in this context, that the Judge must have the opportunity of seeing the “whites of the eyes” of the party who has failed to meet his/her obligations. It is hoped that this would only need to be used in a small number of cases, but it will be for the Judge to decide when this step is necessary, given that listing is a judicial function.

²² This should include the Judicial College, HMCTS, the Bar, the Law Society, the CPS, the Probation Service and NOMS.

49. It is proposed that **the utilisation of audio and video hearings, with a view to countrywide implementation, should be made a priority within the work of the CJS Efficiency Programme.**
50. Although the discussion above deals with remote court hearings, the use of modern IT can and should go much further. At present, for a lawyer to confer with a client held in custody requires a visit to be pre-arranged, with limited time availability and cost both for the lawyer (in travel, negotiating security and general waiting) and prison services (in dealing with the lawyer as a visitor, monitoring movement and supervising the visit). **Appropriately locked-down computers linking lawyers and in-custody clients via internet-based video conferencing would allow instructions to be obtained far more efficiently and with considerable saving of time and public money. Similar facilities would also be of value in police stations,** particularly given the potential for increased use of live links to courts.

3.2 CJS Common Platform

3.2.1 Digital Presentation of Evidence

51. Evidence is increasingly created, stored and presented in a digital format. A range of different devices and platforms are being used, both wired and wireless, when introducing this material in court. Similarly, digital evidence is starting to be made available on mobile devices for jurors²³. At present, a variety of different systems are available in the criminal courts and the number of reports of delay consequent upon incompatible, broken or defective equipment exemplify the considerable time lost (and costs caused) by inadequate and out-of-date equipment. **Part of the work of the CJS Efficiency Programme and the enhancement of IT within the courts must be to ensure that digital evidence (in whatever form) can be presented easily and without the delay or complications associated with present attempts to do so.**
52. Given that the technological landscape is changing fast, the extent of the court system's responsibility should be to establish broad technical compatibility guidance with which the parties and participants will be expected to comply.
53. By way of example, the courts have recently started to receive evidence recorded on body video cameras worn by police officers ("BWVs"), as discussed below. These new opportunities will have a potentially huge impact on the trial process. It is important to have reliable information about the effect of this evidence on Judges and fact finders, and it is of note that studies are

²³ Research currently being conducted at UCL Jury Project is examining the impact on fairness of presentation of evidence in this manner. Findings are expected in Spring 2015 including a controlled testing of various presentation and evidence handling tools in jury trials.

currently being carried out in other jurisdictions on this issue²⁴.

3.2.2 Encouraging digital evidence gathering

54. The availability of reliable and effective mechanisms for admitting and displaying digital evidence will have an undoubted impact on the way evidence is gathered. Showing footage from BWVs during hearings is to a significant extent dependent on compatible and high quality equipment in court that enables it to be viewed clearly and without delay. At the time of writing, it is reported that over 30 police forces are using BWVs for a wide range of policing activities, including domestic violence incidents and stop and search procedures. The courts must be in a position to consider this material.
55. The public appears strongly to support initiatives of this kind. For instance, independent researchers from the Institute of Criminal Justice Studies at the University of Portsmouth are presently evaluating the impact of body worn cameras on the Isle of Wight. A high percentage of those surveyed believe this initiative will help the police to be more efficient. At least 90 per cent considered that cameras would assist the process of gathering evidence and identifying criminals, as well as increasing the likelihood of convictions. There will need to be extensive academic evaluation of the consequences of initiatives of this kind²⁵.
56. In seeking to establish the evidence base for body worn video across policing, the College of Policing is contributing to two randomised controlled trials. The first, a collaboration with Essex Police in response to domestic violence incidents, concluded in October 2014. The trial showed that issuing officers with BWV could be effective at increasing the proportion of detections that resulted in a criminal charge²⁶. This finding was consistent across all incidents regardless of initial assessment of risk by the control room.
57. A further trial with the Metropolitan Police is ongoing²⁷. Body worn cameras are an example of the significant scope that exists for transforming the way in which trials are conducted because of the rapidly emerging technological opportunities. In due course they may involve some legislative change²⁸ (for example to the Police and Criminal Evidence Act 1984) but this should not act as a barrier to progress in this area. **Further testing and pilots involving the**

24 For example, currently, at the University of Queensland, Australia, deploying software and applications designed by the University of Montreal for the presentation of information to jurors by electronic means.

25 See, for example, the [comments of Dr Paul Quinton](#), Principal Research Officer at the College of Policing.

26 It also found that there were no differences in incidents being recorded as crimes, or rates of arrest, and too few cases to identify impact on guilty pleas and sentencing. Officers with BWV frequently mentioned the evidence gathering benefits of the cameras – particularly for capturing context, comments and emotion accurately. The [full report](#) is available from the College.

27 The live trial in conjunction with MOPAC (the Mayor's Office for Policing and Crime) involves around 500 cameras, with results anticipated around quarter 3, 2015-16. It is exploring stop and search, complaints, criminal justice outcomes as well as changes in officer and public attitudes.

28 See Chapter 10 for comments regarding legislative change.

use of body worn video should be encouraged and mechanisms developed to ensure that this evidence can be deployed in court without disruption to the business of the court²⁹.

²⁹ Police Forces increasingly are being encouraged to ensure that materials (most notably CCTV and BWV) are provided in a digital format that can be accessed and used by the wider CJS. Testing the streaming of BWV evidence into court is taking place in Croydon and Bromley Magistrates' Courts. I understand that a prototype 'digital repository' for such material will be generated within the next year.

4 Appropriate Allocation: the right cases for the Crown Court

58. A clear theme emerged in the course of the Review that too many cases are being sent unnecessarily to the Crown Court in that, for whatever reasons, Magistrates decline jurisdiction (or commit for sentence) in a significant number of cases where the Crown Court eventually passes a sentence that is within their sentencing powers: see, in particular, paragraphs 65–77, *infra*.

4.1 Charging Decisions

59. One reason for this state of affairs is inappropriate charging decisions based, at least sometimes, upon an inadequate appreciation of the true gravity of the incident being investigated. This can result in under-charging but, to a greater extent, (perhaps because of the appreciation that there will be less of a challenge to the reduction in gravity of the charge pursued) to over-charging.

60. Anecdotally, there are accounts of jurors (who have had to organise their lives to attend court and whose allowances do not always match the loss of earnings) questioning the value of trying cases at the lowest end of seriousness. Getting the charge right – ‘Getting it right first time’ – is the first pre-requisite of a more efficient system and this problem cannot remain unaddressed.

61. Any failure to charge appropriately has a considerable impact throughout the life of that case. This applies whether or not the error is to over-charge or under-charge³⁰. For example, in the first quarter of 2014, 15% of all ‘cracked’³¹ trials in the Crown Court were due to guilty pleas entered to alternative new charges offered by the prosecution for the first time on the day fixed for trial. A further 4% of cracked trials were primarily due to late guilty pleas being entered to new charges, previously being rejected by the prosecution³². This represents a substantial waste not only of court resources but also the resources of the CPS and the legal aid fund, to say nothing of the cost both financial and emotional to victims and witnesses. In such cases, although there will have been room for different decisions to be made prior to the date of trial, the seed for potential waste has been sown from the outset and could have been avoided had the initial charging decision been appropriate.

62. Some of the responsibility for this may be due to insufficient training for those responsible for

30 From detailed analysis of CREST published in Cheryl Thomas, ‘*Are Juries Fair?*’ (2010) Series 1/10 Ministry of Justice Research.

31 Trials in which the defendant has previously entered a plea of not guilty and a trial date has been listed, but the defendant subsequently enters a plea of guilty. In the first Quarter of 2014, the proportion of total trials listed which ‘cracked’ was 34%. This compares with 43% in Quarter 1 of 2010 (MoJ Court Statistics Quarterly 2013).

32 Figures from MoJ Court Statistics Quarterly.

making decisions in ‘either-way’ cases, so that they lack understanding of what is required to prove a particular charge in court. Presently, in many either-way cases, and in particular to the offences of affray and assault occasioning actual bodily harm³³, that responsibility falls to the CPS. Any solution to ensuring appropriate charging decisions must involve a commitment to a review of staff training.

63. In the circumstances, I recommend that **those who make charging decisions must be appropriately trained in the law (including the evidential requirements of specific offences) and the CPS standards and practice relating to appropriate levels of charge depending on the specific facts. There must also be a mechanism for review of inappropriate charges and a proper line of accountability to the Director of Public Prosecutions.**

4.2 Allocation Decisions

64. Entry into the criminal justice system is controlled by the police and in many cases the CPS: it is they who make the charging decisions which govern not only how many cases enter the system but also along which track any particular case is dispatched. Although the very earliest communication between defence solicitors and the police might impact on whether the trial is ultimately in the Crown Court, the court service has no control over volume or the representations as to the perceived gravity of cases entering the system. While the decision making of the police and CPS is central to achieving efficiency, proper assessment by the court and case management from the first hearing is also critical to a determination of the resources – both judicial and financial – which any particular case will require.
65. Absolutely central and pivotal to that management is the allocation decision in respect of charges that are triable either way. In which cases should Magistrates decline summary jurisdiction (leading inevitably to the case being sent to the Crown Court for trial by jury) and in which should they be prepared to accept summary jurisdiction, which then passes the decision to the defendant to decide whether to elect trial by jury? Does the allocation process, as exists, provide the most appropriate approach as to venue?
66. A number of pointers suggest that the answer to the second question is in the negative. Firstly, analysis of sentencing trends in the Crown Court points to a conclusion that a not insignificant number of cases (between 26% to 34%³⁴) in which summary jurisdiction has been declined led to sentences that were within the sentencing powers of the Magistrates’ Court. There are a number of factors which may lead to such outcomes.

33 The two offences to which many judicial contributors have referred as typifying cases which should not have been dealt with in the Crown Court.

34 Source: MoJ Quarterly Statistics, 2009–2013.

67. In some cases there will have been a re-appraisal of the gravity of the case after the allocation decision but before its conclusion, and that will explain the outcome in terms of sentence given. That only serves to emphasise the need for the police and the CPS to have sufficient information available to get the charging decision right first time.
68. Secondly, it may well be that some cases are unnecessarily sent to the Crown Court because of a misunderstanding about the test. Different courts have different views about the nature and meaning of the test in relation to allocation, leading to inconsistency of approach. This is evidenced by a disparity in regional performance as to the proportion of cases sent for trial³⁵.
69. Thirdly, it is not clear that courts have altered their approach (whatever it may have been) following the change to the allocation test brought about by the guideline issued on 11 June 2012 by the Sentencing Council of England and Wales. Because of its significance, it is worth setting out the guideline in full (the emphasis being in the guideline itself):

“Statutory framework

In accordance with section 19 of the Magistrates’ Courts Act 1980, where a defendant pleads not guilty or has not indicated an intention to plead guilty to an offence triable either way, a Magistrates’ Court must decide whether the offence should be sent to the Crown Court for trial. When deciding whether an either way offence is more suitable for summary trial or trial on indictment, section 19 of the Magistrates’ Courts Act 1980 provides that the court shall give the prosecutor and the accused the opportunity to make representations as to which court is more suitable for the conduct of the trial.

The court must also have regard to:

- a. the nature of the case;
- b. whether the circumstances make the offence one of a serious character;
- c. whether the punishment which a Magistrates’ Court would have the power to inflict for the offence would be adequate; and
- d. any other circumstances which appear to the court to make the offence more suitable for it to be tried in one way rather than the other.

³⁵ This variation, expressed as a percentage of either-way receipts, ranges (across 11 courts in England & Wales), from 11% to 24%. Source: Justices’ Clerks’ Society submission to the Review, October 2014, reflecting figures collected to August 2014.

Guidance

It is important to ensure that all cases are tried at the appropriate level. **In general, either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient.** Its powers will generally be insufficient if the outcome is likely to result in a sentence in excess of six months' imprisonment for a single offence.

The court should assess the likely sentence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence.

The court should refer to definitive guidelines to assess the likely sentence for the offence.

Committal for sentence

There is ordinarily no statutory restriction on committing an either way case for sentence following conviction. The general power of the Magistrates' Court to commit to the Crown Court for sentence after a finding that a case is suitable for summary trial and/or conviction continues to be available where the court is of the opinion that the offence (and any associated offences) is so serious that greater punishment should be inflicted than the court has power to impose. Where the court decides that the case is suitable to be dealt with in the Magistrates' Court, it should remind the defendant that all sentencing options remain open, including committal to the Crown Court for sentence at the time it informs the defendant of this decision. However, where the court proceeds to the summary trial of certain offences relating to criminal damage, upon conviction there is no power to commit to Crown Court for sentence.

Linked cases

Where a youth and an adult are jointly charged, the youth must be tried summarily unless the court considers it to be in the interests of justice for both the youth and the adult to be committed to the Crown Court for trial. Examples of factors that should be considered when deciding whether to separate the youth and adult defendants include:

- whether separate trials can take place without causing undue inconvenience to witnesses or injustice to the case as a whole;
- the young age of the defendant, particularly where the age gap between the

adult and youth offender is substantial;

- the immaturity of the youth;
- the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor; and
- the lack of previous convictions on the part of the youth.”

70. Section 125(1) of the Coroners and Justice Act 2009 provides that every court must follow any guideline unless satisfied that it would be contrary to the interests of justice to do so.

71. Prior to the new guideline, the approach was set out in the National Mode of Trial Guidelines 1999. The elements to which the court had to have regard were identical but the guidance (in the form of observations) included the instruction that the court “should assume for the purpose of deciding mode of trial that the prosecution version of the facts is correct”: that means (as has been made clear by a number of respondents to this Review) that the prosecution case has to be taken ‘at its highest’. There was no suggestion that aspects of the case advanced by the defence would be considered.

72. As a result, it might be thought that the new guideline would have reduced the number of cases in which the Magistrates decline summary jurisdiction but I have been informed by HMCTS³⁶ that in fact the number of cases in which summary jurisdiction has been declined has been increasing since the introduction of the new guideline.

73. It must be noted that the legal framework has not been consistent in the two years that have followed the new guideline. In late 2012, amendments to s.19 of the Magistrates’ Courts Act 1980 were introduced by Schedule 3 of the Criminal Justice Act 2003 (which brought committals to an end so that either way cases in which jurisdiction has been declined or the defendant has elected trial are now sent to the Crown Court in the same way as indictable only cases). This has meant that there is now no second opportunity to review a charging decision (when the committal papers have been assembled).

74. There are a number of possible reasons why allocation decisions have not been affected as a result of the new guideline. First, although it might be thought that a defendant would seek to minimise the gravity of an allegation, discussion with various groups reveal that defence teams frequently do not engage in the allocation decision and could well agree with prosecution representations that summary jurisdiction should be declined. That is because of a perception that at the lower end of gravity, Judges in the Crown Court are more lenient than Magistrates. Secondly, if a bail case is to be contested in the Crown Court, even if eventually a guilty

36 Source: Internal Management Information Statistics.

plea is tendered, almost invariably, the waiting time will be appreciably longer than in the Magistrates' Court: this can generate mitigation borne out of delay. Thirdly, the Magistrates' Court Sentencing Guidelines point to Crown Court sentences which, if deployed without appropriate analysis at the allocation stage, may lead to unnecessary committals for trial (as opposed to occasional committals for sentence); a number of decisions of the Divisional Court, which are intended to be fact specific, might also encourage undue caution. Finally, at a pragmatic level, a lower fee is paid if a guilty plea follows election for trial than if a guilty plea follows a decision to decline jurisdiction: this will hardly encourage engagement intended to minimise gravity at the allocation stage.

75. Furthermore, there is a risk that the earlier that the decision as to allocation is made, the greater the risk that the prosecution will only be able to depend on initial reports as to gravity of the offending which might not reflect the more nuanced position which flows following more detailed investigation. The abolition of committals for trial (which, by definition, were after the allocation decision), has also deprived the prosecution of a 'second look' at the charging decision which could itself impact on the allocation decision.
76. There is no doubt that the decision on allocation is critical and has far reaching consequences. Cases unnecessarily sent to the Crown Court add substantially to the overall cost incurred³⁷, waiting times are substantially longer for those cases that are not prioritised and there is an impact on those cases that are correctly allocated to the Crown Court because timescales are extended as the existing backlog increases³⁸.

4.3 Recommendations

77. **The allocation procedure could be conducted more quickly if the defence was invited to indicate at the outset if the accused intends to elect Crown Court trial. If so, there would be little to be gained from hearing sometimes lengthy representations about whether the case is suitable for summary trial. A Criminal Practice Direction allowing for this change in approach should suffice.**
78. **Magistrates' Courts must be encouraged to be far more robust in their application of the allocation guideline which mandates that either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient. The word 'likely' does not mean 'possible' and permits the court to take account of potential mitigation and guilty plea, so can encompass cases where the discount for a guilty plea is the feature that brings the case into the Magistrates' jurisdiction. It is**

³⁷ Estimates vary considerably, but the Review has established that on average Crown Court trials appear to cost at least four times as much as Magistrates' Court trials. Given the significance of this issue, there ought to be more accurate statistics available.

³⁸ There were 101,723 sitting days in Crown Courts in 2013/14 compared to 103,180 in 2012/13 and the number of either way cases in Crown courts increased throughout 2013/14 (Source: MoJ Quarterly Statistics).

important to underline that, provided the option to commit for sentence is publicly identified, the decision to retain jurisdiction does not fetter discretion to commit for sentence even after requesting a pre-sentence report.

79. Local Resident and other Circuit Judges should be encouraged to engage with Magistrates' training to assist in the approach to allocation decisions and to highlight the extent to which sentences imposed in the local Crown Court are within the sentencing powers of Magistrates. This training can supplement training of legal advisors and Magistrates which should incorporate analysis of some of the common errors which impact on the current allocation process. The Judicial Business Group responsible for the management of the Magistrates' Court must monitor allocation decisions with the benefit of feedback from the Crown Court and be accountable for training in this area³⁹.
80. The Sentencing Council should reconsider the Allocation Guideline and the Magistrates' Courts Sentencing Guidelines in the light of the amendments brought about by the implementation of Schedule 3 of the Criminal Justice Act 2003 (bringing committals to an end) and further to encourage the retention of jurisdiction in cases where a combination of lack of complexity and gravity point to the conclusion that summary trial is justified and does not satisfy the test that it is likely that the court's sentencing powers will be insufficient even if, after full examination of the circumstances, it then becomes appropriate to commit for sentence.
81. The Sentencing Guideline on Allocation should be construed such that, in cases where Magistrates are uncertain about the adequacy of their powers (short of it being likely that they are not), they can retain the case and commit for sentence if they later take the view that the case falls outside their sentencing powers. This possibility needs to be made clear to the accused.
82. The judiciary should investigate the reasons for differences in allocation in different parts of the country for which purpose HMCTS should collect and provide the appropriate statistics; feedback should be available for local Magistrates' Courts on the comparative information. Part of the training and refresher training for Magistrates should revolve around the significance and impact of allocation decisions.

³⁹ The Judicial Oversight Group ('JOG') consisting of; the Senior Presiding Judge, a High Court Judge, the Chief Magistrate and the Chairman of the National Bench Chairman's Forum, has national oversight of the work of the Judicial Business Groups.

5 The Magistrates' Court

5.1 Transforming Summary Justice ('TSJ')

83. The recent research and engagement undertaken by the MoJ in its development of the CJS Strategy and Action Plan⁴⁰ identified numerous aspects of the summary justice process which are working inefficiently. These include:

- failures in the way a case file is constructed ("file build quality");
- the need to improve Magistrates' expertise on disclosure issues;
- the identification, preparation and prioritisation of guilty plea cases;
- the rates of effective first hearings in not guilty cases.

84. In order to identify effective solutions to these inefficiencies, a body was created with expertise from across the criminal justice system including the defence community. Its aim was to develop proposals for improving the efficiency and management of the court system generally, and the way in which it serves victims and witnesses⁴¹.

85. This collaborative approach, drawing on a broad range of practical expertise from across the process provides real strength to the conclusions reached in the TSJ work. It is an approach that reflects other successful cross-CJS transformation programmes such as Criminal Justice – Simple, Speedy, Summary ('CJSSS'), and it has been central to the approach I adopted in this Review.

5.1.1 Supporting the TSJ principles

86. **I fully support and endorse the principles behind the concept of TSJ** which is scheduled for implementation in 2015. **The ten key characteristics⁴² which TSJ identifies are the essential building blocks for a simple summary process** and echo earlier drives for similar efficiencies. These characteristics fall under three broad themes:

40 [Transforming the CJS – A Strategy and Action Plan to Reform the Criminal Justice System](#) (Ministry of Justice, June 2013).

41 [Transforming the CJS – Strategy and Action Plan – Implementation Update](#), (Ministry of Justice, July 2014).

42 (1) quality assured police files; (2) anticipated plea hearings; (3) brigading of cases; (4) optimum bailing patterns; (5) early receipt of IDPC; (6) the right personnel at the hearing; (7) streamlined disclosure; (8) the clear expectation of effectiveness; (9) police support for anticipated not guilty hearings; (10) wi-fi connectivity for each agency at court.

- simplifying cases and streamlining the system;
- identifying cases for early guilty pleas and securing pleas early on; and,
- ensuring smoother case progression.

87. The evidence presented to this Review, and which has formed a constant theme in workings of my sub-groups, has been identified as a key priority for the Criminal Justice Board in 2014–15⁴³. It also supports the underlying message of TSJ: that is the need to get things right first time. In keeping with this theme, the Board identified its main priority for action in 2014–15 as developing the way that the CJS considers the needs of victims and witnesses and moving toward digitisation.

88. The task required of the CJS agencies to prepare and then implement the TSJ process should not be underestimated. It requires strong leadership from the CPS and police to bring excellence and consistency to their practice across England and Wales. **The scheme will require substantial commitment from all agencies and those working in the Magistrates' Courts whose cooperation, engagement and collaboration will be vital if TSJ is to have the success that is necessary to improve summary justice,**

89. With that in mind, it would be wrong to add to this burden by making recommendations which would risk distracting those currently occupied in preparing the way for TSJ. The following comments are designed to enhance the process that is TSJ once it is in place.

5.1.2 Court process begins at point of charge

90. Within TSJ there is an expectation that the period of bail between charge and first hearing will be 14 or 28 days. This creates an opportunity for the early engagement between the identified representatives of the prosecution and defence that the Review underlines is essential in all cases⁴⁴. Further, this engagement must be prior to and not solely at court hearings. It is part of a broader principle of changing the professional culture towards one of voluntary engagement between the parties throughout, that is, I believe, a cultural shift that needs to be promoted within all agencies that operate within the criminal justice system.

91. The opportunity created by the scheme allows the parties to begin discussion about the issues, possible plea, missing key evidence or other material which could assist in reaching an early resolution. The manner in which this early discussion can take place is an issue for each CPS area, though I am firmly of the view the engagement needs to happen as early as possible.

43 [Transforming the CJS – Strategy and Action Plan –Implementation Update](#), (Ministry of Justice, July 2014).

44 See Chapter 2 'Overarching Principles'

92. **Given the nature of the TSJ process at the pre first hearing stage (bail cases having a 14 or 28 day lead in time), I strongly encourage the parties to take advantage of this period and enter into early discussion in order that the first hearing is as effective as possible.**

5.1.3 Fast track cases

93. Certain types of commonly occurring offence could in my view form a category of 'fast tracked' case: examples include prosecutions pursuant to sections 4 and 5 of the Road Traffic Act 1988 dealing with 'drink driving'. Offences classified as such would then involve very short timescales between arrest, charge and first hearing.
94. The types of offence which should be classified as suitable for 'fast track' procedures will depend on numerous factors⁴⁵. One important issue will be whether the evidence necessary to build a case will be limited in extent, be easily acquired, and sufficient to produce convictions without any additional material. Using the example of a 'drink-drive' offence, the evidence against the accused is primarily the printout from the 'intoximeter' device, usually available at point of charge. **In such offence types characterised by high guilty plea rate and simple file build, I would urge those implementing TSJ to examine ways in which a fast track approach to first hearing for some offences could be achieved.**

5.2 Exploiting the new online Legal Aid Agency grant process

95. The LAA are moving to an online process which leads to the grant of a representation order⁴⁶. This process will capture details such as the identity of the lawyer/advocate who will be representing the defendant and should also contain email contact details. This is critical information which will assist in the efficient disposal of the case. Thus, on the basis that the identity of the defence representative is then known, the LAA should develop a mechanism whereby these details are passed to an identified representative of the CPS. In that way, the prosecution will be able to serve initial details of the prosecution case ('IDPC') by email as soon as it is available and in good time to provide the opportunity for early engagement of the representatives as I recommend in Chapter 1.
96. By linking the identified defence lawyer to the relevant CPS prosecutor, the LAA will perform an important service in the more efficient despatch of the work. **I would therefore recommend that the LAA work with the CPS and the defence community in order to introduce a process by which details of the named lawyers for prosecution and defence in any particular case can be matched and exchanged thereby facilitating the early disclosure of IDPC.** How that should be devised is a matter for parties: it will require personal responsibility to be assumed by a prosecutor and defence lawyer but it is only

45 For example, conviction rate, simplicity of file build, public protection concerns.

46 [Legal aid: crime eForm](#)

in that way that the other advantages of early engagement can be obtained.

97. Furthermore when this process is in place, **I recommend that the Criminal Procedure Rules Committee should consider rule amendments, first to create a firm responsibility on the prosecution to provide the IDPC to the identified defence representative at the earliest opportunity and secondly for the identified defence representative and CPS advocate to engage in discussions about the case at the earliest opportunity.**
98. There is no doubt that for early progress to be made in cases, very speedy decisions must be made on the granting of representation orders. Without the orders being in place, it is entirely understandable that defence solicitors will not be prepared to carry out work at the risk of not being paid for it. Figures provided to the Review in November 2014 indicate 95% of correctly completed applications are considered within 48 hours of receipt⁴⁷. I would anticipate this improving as and when the online grant process is rolled out nationally. For the remaining 5% (which will involve applications by the self employed where financial details will be harder to come by), consideration should be given to a streamlined mechanism which reflects the issues that require resolution but prevents avoidable delay: without more about how this might be achieved, it is impossible to go further.
99. I have acknowledged the ever decreasing sums available to the various participants operating within the criminal justice system and, in particular, the impact this has had on remuneration rates for defence lawyers. Part of the solution to improving the efficiency of the whole system is to acknowledge the critical role that the defence can play whether in relation to advising clients as to discount and the benefits of entering an early guilty plea or obtaining instructions to identify the true issues in dispute (so that preparation and trials can be focused in a more limited way than otherwise would be the case). I appreciate that, in the absence of an increased budget for the LAA, an increase in remuneration rates for this would require drawing funds from other parts of the fee structure, but in the long run this may provide a more cost effective and efficient system. **I would therefore recommend that the LAA look into this redistribution of the money available to them for fees, to support the efforts required for early engagement with clients so as to resolve the case or identify the true issues.**

5.3 Case management and progression

5.3.1 Case progression before first hearing

100. Statistical data has for some time shown that charged cases are on average disposed of in two hearings in the Magistrates' Court⁴⁸. This represents a notable reduction from a historic high of three hearings per case in 2007 (prior to the commencement of CJSSS). Progress has clearly been made and any attempt to improve yet further the way cases are managed within the summary

⁴⁷ Management information obtained from the Legal Aid Authority for the purposes of the Review.

⁴⁸ Figures from HMCTS.

courts must not have a detrimental impact on the current position. Thus, improvements to case management and progression need to be focussed on activities and processes occurring outside the courtroom.

5.3.2 Case progression at the first hearing

101. The first hearing at the Magistrates' Court has developed into the critical hearing for those cases where a not guilty plea is entered. The agenda is then set for every such case. This situation has been achieved through the endeavours of the Criminal Procedure Rules Committee and numerous initiatives focusing on case management. Magistrates, District Judges and their legal advisers have played a significant part in changing the culture in their courts. It is from this encouraging position that we need to build by using the forthcoming TSJ initiative and in due course the promised IT changes. The aspiration must be for a system where it is exceptional for a case to be brought back into court to overcome some case progression issue.
102. I draw a significant distinction between what I consider to be the role of Magistrates and District Judges in case management, and the separate role, in respect of case progression, of the Justices' Clerk/legal adviser and administrative staff. By the time of entering a not guilty plea, I would expect the parties to have already been in discussions and for each to have a clear understanding of the issues which require determination at the trial. The continued momentum of the case needs to be maintained at this critical stage of the first hearing. That requires strong judicial intervention. The trial issues need to be narrowed to those that are in dispute and of relevance. Moreover, consideration must be given to which witnesses are required to give live evidence⁴⁹ and, through judicial direction, a timetable needs to be set, in every case. The other crucial aspect of the first hearing is, of course, agreeing the trial date. I believe that the setting of this date must have a greater significance than it appears currently to have⁵⁰. It should be seen as an immovable date, giving certainty to those required to attend court.
103. I repeat that setting the agenda for a case is the work of the judiciary. Compliance with judicial directions, the meeting of statutory obligations on the service of documents, etc is for the parties to manage⁵¹. As a last resort it should be for the legal and/or administrative teams within HMCTS to step in and intervene when non compliance is putting at risk the effective trial date, with the option of course of returning the matter to the Bench if their endeavours fail to elicit the desired compliance.
104. I appreciate that this level of maturity is not yet demonstrated consistently across the country. Some courts have put in place systems to tackle local issues around ineffective trial rates but there is considerable variation in the way this is undertaken.

49 See Rule 3.2 of the Criminal Procedure Rules, as at October 2014.

50 [MoJ national statistics](#) indicate that in the first quarter of 2014, 20% of listed trials are vacated.

51 See Rule 3.3 of the Criminal Procedure Rules

5.3.3 Case progression officers

105. This takes me to the use of case progression officers ('CPOs') – the people with responsibility for moving a case forward. At present there are (or, at least, have been) CPOs within each agency involved in the case⁵². The person performing the role within the relevant agency has done so either as a dedicated role or as part of a wider range of responsibilities. Over the years practices have changed and are not consistent across the country. This means that scarce resources are being diverted to fill gaps that are created by inefficiencies elsewhere in the process. This is, I believe, a clear example of tackling the symptom and not the cause.
106. What is also clear is that the use of CPOs has diminished over time as a consequence of organisational change and a general perception amongst practitioners that the role lacks the necessary powers and authority to tackle non compliance. As the use of the role has diminished one would expect a noticeable worsening of the figures for effective and ineffective trials in the Magistrates' Court. There is however no such drop in performance. Figures provided to the Review show a relatively flat position for both measures since 2009⁵³.
107. Another way of reading the figures is to conclude that whatever is being done has not had the desired impact and reveals that the current system of cross-agency CPOs has had little impact on the overall effectiveness of case progression. What is required is a strengthened approach to case management, achieved through ongoing engagement between representatives, and a commitment from all parties to efficient case progression. I therefore recommend a new approach to case progression. Instead of returning to the old principles of a single CPO within each agency, **HMCTS should establish a single Case Progression Officer and develop processes which move case progression into the hands of appropriate legal or other teams within HMCTS, using currently available technology where it is appropriate and of value.** That person would oversee the progress of a case, without answering to or having a 'loyalty' to a single agency but rather having a responsibility to the court, reporting performance to the Resident and Presiding Judges to whom, in this area, the CPO is accountable. This seems in my view to have greatest merit in the more complex cases. I comment further when dealing with the Crown Court, pre-trial (see Chapter 7) but the creation of a single CPO role filled by a single individual should also offer benefits in the summary courts. I envisage the role as being primarily concerned with facilitating compliance with orders and directions. Accordingly there should be absolute clarity around the individual responsibilities that the individual CPO holds and which responsibilities lie with those with case management responsibilities in the CPS and the defence. It is important in that respect there is no duplication of effort; otherwise the benefits of the role will be substantially diluted.
108. While the single CPO is responsible to the judiciary, they must be able to hold to account any of the agencies – including HMCTS – for non-compliance with obligations under the rules.

52 See Rule 3.4 of the Criminal Procedure Rules

53 MoJ Quarterly Statistics (October to December 2013).

109. At this point, it is important to recognise the ongoing work of the CJS Common Platform⁵⁴. Within its design are case management functions which will create a more sophisticated automated approach to document handling and distribution, as well as court order compliance. But until that platform is in place and is functioning, it is necessary to make changes to the systems we currently have to enable as much case progression work as possible to be undertaken outside of the courtroom with minimum need for judicial intervention, thereby maximising the resources available.
110. Under TSJ the CPS and police are to make changes designed to improve compliance with relevant orders and statutory obligations. The aim of such changes is to reduce the number of judicial interventions required. In this regard, TSJ and the IT changes mentioned above should provide an opportunity for HMCTS to look at ways to move case progression activities out of court and into the hands of the Justices' Legal Adviser.

5.3.4 The role of the JLA

111. Another mechanism for improving the efficiency of case progression is through an extension of the powers available to Justices' legal advisers ("JLA"). This would enable administrative tasks and minor decision-making to be dealt with out of court, ensuring more effective use of valuable court time: one example might be determining special measures applications.
112. It is worth noting that this is not the first time such a scheme has been suggested. In his 1997 Report, Martin Narey identified⁵⁵ firstly, the importance of good case management in the Magistrates' Court and secondly the most efficient and effective means of doing so. He suggested that there is:

“a powerful argument for reinforcing the role of the lay magistracy by giving to Justice's Clerks (and other senior staff to whom they may delegate their powers) the responsibility for managing cases. Some will argue that this would amount to redefining the essentially judicial role of the lay magistracy and the administrative role of court clerks and would diminish the role and status of Magistrates. I am quite certain that this would not be so. On the contrary, removing administrative case management from Magistrates' remit... would do much to increase the quality and attractiveness of the work of the magistracy and increase its efficiency.”

⁵⁴ The CJS Common Platform (CJSCP) will enable case information to be shared between CPS, HMCTS, defence and others, depending on their role, and allow Directions to be monitored and applications to be made, on line. The CJSCP will provide a dashboard to highlight compliance with Directions, flag when Directions have not been complied with, send reminder notices and ensure all parties are copied into relevant communications.

⁵⁵ *Review of Delay in the Criminal Justice System: A Report* (Home Office, February 1997) p.26.

113. Current powers under the Justices' Clerks Rules 2005⁵⁶, in relation to case management, include:
- Setting/varying directions for the future conduct of the case, including the continuity of parties' representatives, where appropriate;
 - Fixing or setting aside the date, time and place for a trial of an information;
 - Giving directions for the conduct of the trial;
 - Varying directions;
 - Granting special measures⁵⁷;
 - The further adjournment of proceedings⁵⁸;
 - The giving/varying or revoking orders for separate or joint trials⁵⁹.
114. Comments from Magistrates and District Judges to the Review indicate that many of the applications referred to above are still currently listed before a court. This, in my view, is wasting time and court resources and steps should be taken by HMCTS to ensure consistency of approach when dealing with applications which could be more efficiently dealt with outside the court by the JLA⁶⁰. However when applications are made out of time (as permitted by the Criminal Procedure Rules)⁶¹ the JLA cannot extend the time limit and authorise the application to proceed without referring the matter to the court. In my view, **a Justices' Legal Advisor should have power to extend time pursuant to the Criminal Procedure Rules subject only to the trial date remaining unaffected.**
115. A number of powers have been identified that are not currently held by JLAs but which, if available to them, could usefully increase the scope for effective case progression away from the courtroom. These include:
- the power to extend or vary the time limit for the submission of an application or notice regarding evidence or measures to assist a witness;

⁵⁶ The Justices' Clerks Rules 2005, No. 545 (L.10).

⁵⁷ This is limited to those measures which relate to the manner in which evidence is given such as the giving of evidence from behind a screen or via live link. The powers of a Justices' Clerk do not extend to directions such as directing that a video interview is admissible as examination in chief or the appointment of an intermediary.

⁵⁸ This does imply that the adjournment must follow a previous adjournment.

⁵⁹ *Chief Constable of Norfolk v Clayton* (1983) 147 JP 161, [1983] 1 All ER 984, [1983] 2 AC 473 is authority that the issue of joinder does not require the consent of the parties.

⁶⁰ See Rule 3.5 of the Criminal Procedure Rules.

⁶¹ See Rule 3.8 of The Criminal Procedure Rules under the Court's general power to extend a time limit.

- applications for all types of measure to assist a witness in a case;
- all listing decisions (for the avoidance of doubt);
- contested joinder applications⁶²;
- directions in relation to victim personal statements; and
- the ability to assign a solicitor for the purpose of cross examination⁶³.
- the power to transfer cases to another Magistrates' Court under section 27A MCA 1980, or, the provision be abolished in favour of giving full effect to a national jurisdiction.

116. As these are in the main procedural issues, they do not fall within the scope of the statutory requirement for a public hearing in summary proceedings as set out in section 121 MCA 1980. As Rule 3.5 CrimPR⁶⁴ already permits the use of technology for case progression outside the courtroom, it should be a simple step for changes to be put in place as a consequence of my recommendations.

117. **To support a more focused approach to out of court case progression consideration should be given to extending case progression powers of Justices Legal Advisers** but it is important to emphasise that this is intended to enhance the efficiency of the administrative aspects of case progression. Magistrates' and District Judges retain responsibility for case related judicial decisions. I see no blurring of the roles: each should play to their strengths in order to secure the most effective and efficient outcome for court users.

5.4 Disclosure in the Magistrates' Court

118. This issue has been explored in great detail in the course of three recent reviews⁶⁵. Given the proximity and detail of this work I have chosen not to revisit this subject. The disclosure reviews each contain a number of recommendations which I fully endorse.

119. To assist with the management and efficient disposal of cases, the recommendations of the

⁶² Despite the decision in *Chief Constable of Norfolk v Clayton* (1983) 147 JP 161, [1983] 1 All ER 984, [1983] 2 AC 473, the Justices' Clerks Rules 2005 still refers to the need for consent.

⁶³ Sections 36 & 38 of the Youth Justice & Criminal Evidence Act 1999

⁶⁴ Rule 3.5(2)(d):[The Court may] "for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means".

⁶⁵ See the Gross, LJ, *Review of disclosure in criminal proceedings* (Judiciary of England and Wales, September 2011); Gross LJ, Treacy LJ, *Further review of disclosure in criminal proceedings: sanctions for disclosure failure* (Judiciary of England and Wales, November 2012); Gross LJ, HHJ Kinch, Howard Riddle (Chief Magistrate) *Magistrates' Court disclosure review* (Judiciary of England and Wales, May 2014).

Disclosure Reviews should be implemented and the opportunity taken to build upon them. The role of the court should be incorporated into local bench training events/updates so appropriate intervention is effective and timely. The Judicial Business Group responsible for the management of the Magistrates' Court must monitor performance in these areas with the benefit of liaison with the local circuit judiciary to ensure consistency. This will both provide a degree of accountability but will also highlight possible differences in approach which can then be the subject of further consideration.

5.5 Assisting the EGP process - The EGP process in the Magistrates' Court

120. The Early Guilty Plea scheme for the Crown Court is discussed in Chapter 7 but the Magistrates' Court also has a significant part to play in ensuring that as many suitable cases as possible are brought into the scheme. Identifying Early Guilty Plea cases should be particularly useful for indictable-only offences, where there is no Plea before Venue hearing in the Magistrates' Court. Given that the Sentencing Guideline on Guilty Pleas now has to be read in light of decisions of the Court of Appeal and is presently undergoing revision, it would be helpful if the Sentencing Council could, when a revised Guideline is issued, clarify the meaning of the 'first reasonable opportunity' to indicate a plea of guilty.
121. As I discussed in the Allocation chapter of this Review (Chapter 4), the judiciary must take maximum advantage at those points in the process which enable courts to exert some influence on the destination of a case and the resources which that case could attract. EGP offers another opportunity to manage a case in this way. While it is for the prosecution and defence to identify cases which fall into the EGP scheme, this does not preclude the Magistrates' Court raising the issue when the scheme does not feature in the representations being made. Bearing in mind that approximately 70% of cases going to the Crown Court result in a guilty plea⁶⁶, there is potential for Magistrates and District Judges to challenge the prosecution and defence in relation to the progress being made concerning resolution of the issues in the case and the potential advantages of the EGP scheme.
122. In my view the Magistrates' Court has an important case management duty to ensure that a case uses only such court resources as are necessary, including the use of Crown Court time. In this respect the Magistrates' Court should always order Pre-Sentence Reports when a case has been identified as an EGP thereby increasing the prospect that the case will be dealt with at a single Crown Court hearing. In this area, also, **the role of the Magistrates within the Early Guilty Plea scheme should be emphasised and incorporated into local bench training, with its operation monitored (in the same way as the implementation of the Disclosure Reviews) by the Judicial Business Group.**

66 Court Statistics Quarterly, (MoJ, 2009-2013)

6 Listing

6.1 The Criminal Practice Direction Amendment Number 2, 2014

123. The Criminal Practice Direction Amendment Number 2, 2014, sets out in clear terms the purpose, manner and responsibility for the listing of cases in the Magistrates' and Crown Courts:

'Listing is a judicial responsibility and function. The overall purpose is to ensure that, as far as possible, all cases are brought to a hearing or trial in accordance with the interests of justice, that the resources available for criminal justice are deployed as effectively as possible, and that, consistent with the needs of the victims, witnesses of the prosecution and the defence and defendants, cases are heard by an appropriate Judge or bench with the minimum of delay'⁶⁷

124. The approach to how cases are listed and the local decisions as to how to prioritise the competing needs in individual cases has raised significant debate amongst the contributors to this Review, raising an important question: do the decisions the judiciary make concerning listing support the above, especially the need to deploy effectively the resources available for criminal justice?

6.2 The impact of the current approach

125. The exercise of listing cases for trial in the Magistrates' and Crown Courts has, to a real extent, become an exercise in risk limitation. List officers and Resident Judges understandably try to reduce, first, the inevitable impact of cracked or ineffective trials on courtroom utilisation and, second, the consequences that the ceiling on sitting days has on lengthening timescales for setting trial dates. With utilisation and timeliness being considered important measures of efficiency by HMCTS, the need to ensure each courtroom is fully utilised has understandably become a critical consideration when listing.
126. A number of recent reports have commented on the current approach. Sir Bill Jeffrey made the following observation:

"Inadequate preparation is the enemy of good advocacy. A combination of delay in assigning advocates (both prosecution and defence) and uncertainty over trial dates makes the system more hand to mouth than is conducive to good quality advocacy. [...] To make best use of court time, some flexibility over the scheduling of trials is inevitable, but the "warned list" system as it

67 [2014] EWCA Crim 1569.

operates in most parts of the country makes it very hard for advocates to plan their diaries, and increases the likelihood of changes of representative at the last minute.”⁶⁸

127. The ICPR report ‘*Out of the Shadows*’ highlighted the negative impact on the lives of those asked to attend court to give evidence because of the uncertainty around the listing of fixed trial dates.
128. “Cancellations and adjournments of court hearings are frustrating and stressful for victims and witnesses. More needs to be done to reduce this and all possible steps should be taken to minimise delays. Consideration should be given to limiting the number of times any case can be put on a ‘warned list’”⁶⁹.

While these reports are referring to the impact of the approach taken to listing in the Crown Court and the use of the warned list, a similar conclusion may be drawn as to the impact of double listing in the Magistrates’ Court. It is necessary to couple the above comments with the figures provided to the Review to the effect that over 65,000 witnesses were requested to attend court in 2013–14 to give evidence who then did not testify⁷⁰.

129. It is, therefore, a relatively easy conclusion to draw that the present approach to listing is likely to be a contributing factor to some of the most difficult problems affecting the criminal justice system, and that it has a particularly negative impact on efficiency and the experience of the public of our system of criminal justice.

6.3 Warned Lists/ ‘floaters’/ ‘fixed floaters’/backup fixtures/multiple listing

130. With only a few exceptions, all those consulted on the subject of listing suggested that the warned list, the ‘floating’ system, backup fixtures and multiple listing are far from perfect arrangements, but the general view was expressed that there is little to be offered by way of alternatives. For my part, I recognise it is important that courtrooms are efficiently utilised⁷¹ but we need to find ways of ensuring that a far higher proportion of cases are effective, thereby reducing or obviating the need for multiple listing in its various forms. It is the uncertainty in the present system that causes the court officials to pack the lists by way of warned lists, floaters and backup fixtures in the Crown Court and multiple listing in the Magistrates’ Courts.
131. It is to be noted that a few of the larger Crown Courts are able to operate without a warned

68 Jeffrey, B, *Independent criminal advocacy in England and Wales* (Ministry of Justice, 2014).

69 Hunter, G., Jacobson, J. and Kirby, A., *Out of the shadows: Victims’ and witnesses’ experiences of the Crown Court* (London, 2013).

70 Figures collated by West Yorkshire Police from all forces across England and Wales. Includes effective, ineffective and cracked trials.

71 Court room utilisation is an efficiency measure adopted by HMCTS.

list, but that is often the result of the flexibility provided by having a significant number of courtrooms and Judges. At some larger court centres the list combines fixtures with ‘fixed floaters’. Although a real element of uncertainty remains for cases in the latter bracket, they tend to stand a better chance of being effective than with the traditional floating system.

132. The warned list and floating system often means that the trial advocate is instructed late, and that the advocate who attends at the preliminary hearing or the PCMH will frequently not be instructed for the trial. I strongly support steps being taken to ensure that a single advocate has “ownership” of the case, to ensure that timely and informed decisions are taken and that the case is properly prepared.
133. Multiple listing in the Magistrates’ Court has the effect of ensuring that the courts are utilised to the greatest possible extent but at the cost of ineffective trials.
134. It is my firm view that we need to reduce to an absolute minimum the number of occasions on which the parties and the participants – including defendants in custody – are required to attend at court. The present system is wasteful and inefficient, in that it requires a wide variety of individuals to be available or present at court when there is a real risk that the case will be ineffective. The present arrangements often lead to duplication of work because fresh advocates are instructed for the adjourned hearing and (in the Crown Court) a different Judge may well have to read the papers.
135. Figures compiled by West Yorkshire Police referred to at paragraph 128 reveal scale of the impact on witnesses in the Magistrates’ Court when they are not called to give evidence. I am unaware of any similar monitoring in the Crown Court, but there is every reason to anticipate that the experience will be the same⁷². It would be helpful, in my view, to initiate proper research in the Crown Court on the consequences of the present listing system on victims and witnesses.

6.4 Establishing an environment for single/fixed listing

136. A substantial change to the current approach undoubtedly raises many valid concerns, the principal of which is the impact on victims and witnesses of longer waiting times for trial dates. But there are examples of where a change in approach has occurred which has made fixed or single listing a sensible option to be adopted. For example, in South West London, Richmond Magistrates’ Court has reached an effective trial rate of 75% for due care trials, making it possible to list these cases without any form of backup⁷³. This helpfully focuses attention on the question of the steps that are needed to achieve a level of effectiveness which will enable the

⁷² In Quarter 1 of 2014, there were 8,806 trials listed. Of these, 51% were effective, an improvement from 43% in Quarter 1 2010. This improvement corresponds to the fall in proportion of cracked trials in Quarter 1 2010 to 34% in Quarter 1 2014. Source: Court statistics Quarterly, MoJ.

⁷³ This has been possible because of a combination of factors, the main three being 1; Clear case ownership by the police; 2. Very little in the way of unused material; 3. The high percentage of unrepresented defendants.

courts to list by way of single fixtures.

137. In my view, in order to reduce the need for multiple listing, it is necessary to enable the court to predict whether a trial will be effective. To this end, I believe at least five things need to be achieved:
138. First, the initiative TSJ must be given every chance to succeed. Cases need to be subjected to real focus right from the outset, so that decisions on every relevant issue are taken well in advance of court hearings rather than being considered for the first time as the Magistrate or Judge puts the CPS under pressure in court. The CPS is committed to this initiative, and if it is successful it should see a significant reduction in ineffective hearings and trials. If there is greater certainty about disclosure, witness availability, the charges to be relied on *etc.*, the court will need fewer double listed or warned cases.
139. Second, as I have advocated elsewhere in this Report, there should be a Rules-based obligation on the defence and prosecution to discuss and liaise right from the beginning of a case. This will mean taking advantage of the time before the first hearing in the Magistrates' Court and, if the case is sent to the Crown Court, in the period before the first hearing at the Crown Court. The CPS lawyer with responsibility for the case should be clearly identified, and likewise as soon as a defendant retains a lawyer, this information should be shared (for instance, by the Legal Aid Agency).
140. Third, the EGP scheme should be given fresh impetus with renewed emphasis on weeding out as early as possible as many of the cases that will eventually end up as guilty pleas, but which currently result in cracked trials. Again, considerable energy needs to go into making this a success and strong local judicial oversight is needed to hold both the CPS and defence to account if defendants continue to enter late guilty pleas when no significant change in the evidence or the charge has occurred since the case was sent from the Magistrates' Court. I address the issue of the EGP scheme in more detail in Chapter 7.
141. Fourth, cases need to be managed in a more proactive and focussed way by the CPS. I understand that changes to the "optimum business model" will mean that there will be significantly better management of cases, and that the CPS has expressed the strong commitment to eradicate the present culture in which concentration on the case file and any requests that have been received by the defence are far too frequently left until the door of the court. Elsewhere in this Report I recommend the introduction of a single case progression officer, which should significantly help the prosecution and the defence to make realistic decisions at an early stage during the case.
142. Fifth, I am concerned that insufficient importance is attached to the need for a defendant in indictable-only offences to indicate at the Magistrates' Court whether or not they are intending to plead guilty. If the new Definitive Guideline is to the effect that maximum credit will

be accorded for a plea at the first Crown Court hearing regardless of silence when asked at the Magistrates' Court, this will involve unnecessary time and expenditure being spent on preparing cases that later result in guilty pleas. **I suggest that if there has been a 'not guilty' indication at the Magistrates' Court and a 'guilty' plea entered at the first Crown Court hearing, it should be open to the Judge, exercising his discretion, to reduce the credit for that plea, it not having been tendered at the first available opportunity.**

143. I acknowledge that uncertainty cannot be wholly eradicated, that some defendants will plead guilty at the last moment and that witnesses sometimes fail to attend notwithstanding appropriate efforts having been taken to secure their attendance. But that said, I am confident that a great deal can be done to reduce the present high level of cracked and ineffective trials. The transformation in approach that I advocate is not going to be achieved overnight, but I am firmly of the view that a radical change is essential in the way the courts manage their business. I am acutely aware of the rise in Crown Court work during 2014 and that any suggested change to the current approach to listing in this undoubtedly adverse environment will be seen as putting our already overburdened court lists in a position of greater risk. However, if potentially ineffective cases can be identified at an early stage, the benefits to all those involved in the case, brought about by a move away from the multiple listing of cases, will be very considerable. This applies particularly to the large category of victims and witnesses whose evidence is never reached and to counsel and solicitors who needlessly prepare for trials that are adjourned.
144. In my view, **the present approach to multiple listing, while it provides an immediate solution to the twin problems of optimum court utilisation and timely hearings, is also an inefficient means of organising the court's work and it frequently leads to dissatisfaction on the part of victims, witnesses, the general public and the professions. I therefore recommend that steps are taken to enable the courts to move towards single/fixed listing. The Judicial Business Group for the Magistrates' Court and the Resident Judge for the Crown Court should monitor the operation of listing and be accountable for its development best to meet the needs of the court and its users.**

6.5 Listing cases thematically within the Magistrates' Courts

145. It is a long-established practice in the Magistrates' Court to list a large number of similar cases in a single court, for example with road traffic offences. Several contributors to the Review have suggested this approach ought to be extended to a broader range of cases. This would have clear advantages for the CPS and the police, and a bench that is dealing with broadly similar cases is likely to be able to adjudicate on them with greater speed and efficiency than when dealing with a mixed list. Similarly, this approach could be applied if particular firms of solicitors or sets of Chambers have a large number of cases listed at the same court on the same day. Under current arrangements advocates are at risk of having their cases called on in different courts in the same building at the same time, leading to an inevitable waste of time. Given particularly that the number of firms of solicitors and sets of Chambers is likely to reduce, this possibility should be discussed on a local level with representatives of the defence in order to promote

a more efficient use of limited resources. **I therefore recommend that consideration is given to an increased use of thematic listing.**

6.6 Increasing flexibility in listing

146. It is notable that the operational hours of our court buildings have remained the same for decades. This must be one of the few public services which have failed to acknowledge the different ways that members of the public now live their lives and, in consequence, adapt to the different working environment.

147. In 2013, the MoJ published a report on the outcomes of a pilot to test the idea of a more flexible approach to the listing of cases in our Magistrates' Courts. The report concluded:

”The pilots illustrated that flexible arrangements are possible and can be effective. However, they also highlighted a number of challenges around implementation which have to be considered alongside the potential benefits of each model”⁷⁴.

148. The report also stated that “due to the nature of the specific models piloted, the intended beneficiaries of flexible justice – victims and witnesses – could not be included in this research to a large extent. The way in which they could benefit from flexible court models has therefore not been fully examined. However, when CJS practitioners were asked about the likely benefits for victims, witnesses and defendants, a number of advantages were identified”.

149. This possibility needs to be considered afresh. We ought to establish the extent to which victims and witnesses will benefit from a more flexible approach to the hours that our courts sit. I raise the question whether a third session⁷⁵ for trials in the Magistrates' Court could assist in moving away from double listing and assist in reducing the present delays.

150. Generally, a flexible approach to the court sitting day may well make the justice system more accessible to those who have difficulties attending during the present restricted timeframe, for instance individuals who are unable to leave work during normal working hours. **I therefore recommend changes are considered to the traditional opening and closing hours of the Magistrates' Courts as a means of tackling some of the inefficiencies identified in this Review. However, the views of the public and all court users should be taken into account when deciding on a new model**⁷⁶.

74 Rahim, N, et al., *Process evaluation of the flexible criminal justice system pilots* (Ministry of Justice, 2013).

75 Current timings are usually 1st session 10am to 1pm, 2nd session 2pm to 4.30pm, a proposed 3rd session 5pm to 7.30pm

76 I acknowledge that this may impact on current terms and conditions, and I don't underestimate the challenge posed in terms of reallocating costs and resources.

151. There are different problems in the Crown Court but I also address the possibility of adopting ‘adjusted hours’: see Chapter 8 The Crown Court trial.

6.7 Listing cases for a sentence hearing

152. Contributions from practitioners and figures produced by the TSJ programme⁷⁷ have led me to conclude that time and resources are frequently being wasted as a consequence of the practice of adjourning the sentencing hearing so that the Probation Service can prepare a pre-sentence report (‘PSR’) for cases that do not require a PSR or when an oral report would suffice.
153. Sections 156 to 158 of the Criminal Justice Act 2003 (as amended) set out the procedural requirements for imposing community sentences and discretionary custodial sentences. The relevant provisions as regards obtaining a PSR are broadly couched in mandatory terms that require the Judge to obtain and consider a pre-sentence report in these circumstances, although – put broadly – the Judge has the discretion to dispense with this requirement if he considers this step is “unnecessary”. However, in at least one instance the discretion to dispense with a report is circumscribed: for certain offenders who are under 18 a report must be obtained unless there is an existing report or reports⁷⁸.
154. Although greater use can and should be made of the discretion to dispense with reports, and an increased use of oral (“stand down”) or previous reports, consideration should be given to providing Judges with greater flexibility not to order reports. It is at least arguable that the presumption that a report will be obtained should be removed.
155. I note with approval that the practice has developed that when the suitable sentence is considered to be a community order which includes a single requirement that does not necessitate the involvement of probation (*e.g.* a curfew order), courts often proceed to sentence without the need for a written or oral report. This practice has been endorsed at paragraph 1.1.7 of the Sentencing Council’s document ‘New Sentences: Criminal Justice Act 2003’.
156. For the changes that I propose in this context to be effective, the courts must be staffed by sufficient probation officers to provide oral/stand down reports, thereby removing the need in a significant number of cases for an adjournment. In the circumstances, **there should be a reduction in the number of orders that are made for pre-sentence reports (with legislative change considered) and greater consistency in the presence of probation officers at court to ensure that oral and stand down reports can be provided.**

⁷⁷ In England and Wales 51.2% of guilty pleas are entered at the first Magistrates’ Court hearing, however the average number of hearings to disposal is 1.78.

⁷⁸ Criminal Justice Act 2003, S.156(4).

6.8 Raising the standards to the best performing areas and sharing good practice in listing

157. Although there is a considerable amount of data available on the work of the various parts of the CJS, none of it is presented in a way which allows for a unified or complete understanding of the performance of the system. This is highlighted by the fact that each agency measures its performance in different ways.
158. Even within HMCTS, the data is not necessarily sufficiently informative. A trial might ‘crack’ because the prosecution offer no evidence: this may mean that decisions taken at the beginning of the case were not sufficiently thought through or, alternatively, that a critical witness is no longer available. Similarly, the fact that alternative pleas are then accepted may reveal a failure to address appropriate resolution of the case earlier. Finally, some defendants plead guilty at the last possible moment, only when it becomes clear that the trial will go ahead and the witnesses are available: they have no interest in improving the efficiency of the system or saving public money. Taking all ‘cracked trials’ together may not assist a true understanding of the position or where the room for improvement is most obvious.
159. Similarly, in relation to ineffective trials, there can be many reasons why a trial does not proceed. Some are unavoidable: the defendant does not appear in answer to bail⁷⁹. Others require more detailed analysis and justify real concern: a witness is not present or there has been a failure to comply with case management orders which potentially jeopardise the fairness of an immediate trial. Trials that are ineffective come back into the system and are counted again (either as effective, cracked or again ineffective).
160. It has become clear from the comments received by my Review that a consistent set of performance measures across the CJS would be an important tool for improving the efficiency of the system and enhancing both our understanding and that of the public of its strengths and weaknesses. It is critical that effective comparisons can be made and the operation of the entire criminal justice process accurately evaluated. At present, the statistical information is provided in an unduly fragmented and inconsistent fashion.
161. This issue has been recently considered in the course of The Midland Circuit Performance Feedback Pilot led by the Presiding Judges, Thirlwall and Haddon-Cave JJ. It recommended frequent contact between Presiders and Resident Judges and so permits structured discussion about performance information (e.g. what it shows, where improvement is necessary, how that can be achieved). It has led to improved communication between the courts and the sharing of effective practice within Circuit. This provides a level of accountability for the performance of the courts and a number of recommendations were made which I strongly support:

⁷⁹ Although in the Magistrates’ Court, section 11 of the Magistrates’ Court Act 1980 and CrimPR rule 37.11(3) requires the court to proceed notwithstanding that the defendant fails to appear.

162. **A Judge should be involved in the National Improvement Board (responsible for setting performance standards) so that the judicial perspective of what is being measured is fully understood and relevant statistics kept accordingly.**

163. **A small cross-circuit working party of Presiding Judges and Resident Judges should be created to consider the HMCTS Data Envelopment Analysis tool⁸⁰ and to identify measures which assist in assessing the true effectiveness of the Crown Court. A similar approach should also be adopted for the development of the data collection for the CJS Common Platform.**

164. **Whilst accepting that the creation of CJS-wide performance measures may take some time to establish, I consider they would provide an important tool as part of the endeavour to raise standards.**

80 The aim is to measure the performance of Crown Courts and to compare performance across the country to enable best practice to be shared and implemented

7 The Crown Court: pre-trial

165. The importance of managing cases effectively before the formal trial in the Crown Court has long been recognised. Over twenty years ago, the Runciman Commission said that there was a “long and continuing history of attempts to extend the scope of pre-trial reviews for the purpose of clarifying in advance of trial the issues which the jury will be required to decide”. It added: “These attempts have not, thus far, achieved nearly as much as had been hoped”⁸¹. What is critical, however, is that Judges must be given sufficient time to prepare for all hearings likely to result in case management orders, whether designated as a preliminary hearing, or Plea and Case Management Hearings (PCMH).
166. Over the last few years, schemes intended to remedy the proliferation of late guilty pleas and ineffective case management have been developed in different court centres in different ways. To ensure consistency of approach (which is particularly important in relation to sentencing), it has therefore been essential to create a national scheme allowing a limited degree of local variation to reflect conditions within particular circuits. Strong views have been expressed about the advantages of one scheme as opposed to another with the result that, over a period of a year, in conjunction with a group of High Court and Resident Judges, the Senior Presiding Judge has been involved in detailed discussion about it.

7.1 National Early Guilty Plea (‘EGP’) scheme: supporting the principles

167. Reflecting that background, the rationale behind the scheme has been to create a national, consistent process in the Crown Court, eliciting guilty pleas in an efficient manner by producing the most effective opportunities for those who are guilty to plead at the earliest stage. The scheme is also designed to reduce the number of hearings per case across all Crown Court cases, which is not limited to those in which a guilty plea is entered before trial. It is reproduced as Appendix E to this Review.
168. The nature of the challenges to the scheme need to be understood. The draft proposal was submitted to the Criminal Procedure Rules Committee in March and a number of observations were received, in particular, from the defence practitioner members of the committee. These can be summarised as follows:
- a. **Otiose hearing:** There was disagreement with the proposal that there be an automatic preliminary hearing within 28 days of the case being sent from the Magistrates’ Court, due to the belief that it will be otiose and formulaic

⁸¹ Viscount Runciman of Doxford, *The Royal Commission on Criminal Justice* (HMSO, July 1993) at paragraph 2, Chapter 7, p.101.

(taking place in advance of the defence having papers or time to hold a conference, and without trial counsel present).

b. Unrealistic timeframe: For some, there was concern that the proposed timescale (28 days) was not realistic (although others felt that a shorter timescale could be achieved).

c. Increase in cracked/ineffective trials: There was concern that in cases where if, as proposed, there is no PCMH, there will be an increase in cracked trials or risk that such matters will only receive last minute attention.

d. Value of the PCMH: There was a strong view that the PCMH is an indispensable step in the process because of the functions currently performed at that hearing;

e. Legal Aid implications: It was believed that by implementing the scheme, it would be necessary to redraft the payment arrangements for publically funded cases. Reference was made to the Criminal Bills Assessment Manual and Regulations⁸², which it was claimed do not allow remuneration for work carried out more than 10 days before the first appearance.

7.1.1 Otiose trial and unrealistic timeframe

169. I will deal with points (a) and (b) above together as they emerge, in effect, from the same premise.

170. The concerns about the lack of information need to be understood in the context of the other work that has been carried out recently in the Magistrates' Disclosure Review⁸³. This report (to which reference is made in Chapter 5) contains a number of recommendations which linked to associated work carried out by the multi-agency Transforming Summary Justice (TSJ) group. The two pieces of work were in effect combined for implementation purposes. Implementation of TSJ has been underway since September 2014 and the required measures should be in place in all areas during the course of 2015.

171. When combined with the EGP initiative, it is clear that the concern regarding adequate information has been addressed. TSJ provides a solid foundation to the proposals set out in the EGP and case management scheme. Those cases in which pleas are anticipated will be identified by the police and CPS following charge. They will be listed, after charge, in a 14 day list (anticipated guilty plea) or 28 day list (anticipated not guilty plea). The successful operation

82 New guidance on crime billing and fees

83 Magistrates' Court Disclosure Review, 2014.

of that process requires that the initial details of the prosecution case (IDPC) are served before the 28-day first hearing in cases where a not guilty plea is anticipated⁸⁴.

172. Provided that this information is available before or at the first hearing in the Magistrates' Court⁸⁵, the defence will have sufficient information to identify the issues and make progress either at that hearing, or most certainly at the first hearing in the Crown Court which, according to the scheme, will be between 14 and 28 days from the date of sending from the Magistrates' Court⁸⁶. It is anticipated that a significant number of guilty pleas will be identified by parties in advance of or at the first hearing through improved communication practices and robust case management from the Judge.
173. The purpose of holding an automatic first hearing at this early stage will be to maximise the opportunity for early pleas from those who are guilty and thereby avoid the prosecution spending time and resources preparing unnecessary trial ready files. Furthermore, in cases in which a trial is anticipated, the hearing will encourage the representatives to identify the issues as early as possible and determine whether a further hearing is necessary or whether relevant judicial orders to enable the trial to be effective for the date listed could be achieved remotely by means of digital communication.

7.1.2 The proportion of cracked/ineffective trials

174. The third concern raised in response to the EGP scheme is that it will lead to an increase in ineffective trials. Again, I am confident that with the work done on EGP and other initiatives, this concern has been addressed. The CPS is in the process of restructuring the way in which it handles cases, putting in place an early review by a lawyer to ensure issues are considered at the earliest opportunity. Those cases which are destined for the Crown Court will be identified at the point of charge. Other changes in practice recommended by this Review will only improve the position.
175. It will be important for those cases considered unlikely to need a PCMH to be case managed appropriately at the first hearing and monitored between that point and the date of trial.
176. The Senior Presiding Judge is already in discussion with HMCTS about the role for a case progression officer (which I also support) and it is anticipated that improved communication between the CPS, the Court and the defence representatives in each case will lead to the identification of any concerns in advance of the trial date, and thereby reduce the risk of

84 See Chapter 5. I note, however, that in cases where the defendant is held in custody by the police before the first appearance in court this will not be possible.

85 See Chapter 5.

86 Note that each circuit has agreed a timeframe for the preliminary hearing to take place. The timeframes chosen are 14 days (North East) 21 days (London, South East, Northern and Wales) and 28 days (Midlands and Western) in each case from the date of sending.

ineffective or cracked trials. Although it is impossible to rule out all such instances, an improved focus and increase in the use of technology to monitor the position of each case should enable progress to be made⁸⁷.

7.1.3 Value of the PCMH

177. A broader concern raised by the responses to the EGP consultation was about the potential devaluing of the PCMH hearing. It is clear that the PCMH can represent a valuable step in the trial process; the question is whether it is the most appropriate hearing at which to deal with all of the matters that are currently expected to be dealt with at the PCMH. Such concerns were underlined by the practitioner members of the Criminal Procedure Rules Committee at its meeting on 12 December 2014 who emphasised the pivotal role played by the PCMH in recent years.
178. One of the major issues was the present failure of the police and the CPS to meet deadlines for disclosure and the consequent risk that it would not be possible to provide the information even earlier as required by Transforming Summary Justice. If that were so, meaningful case management at that automatic first hearing would not be possible and a full PCMH would be inevitable: both the police and CPS are aware of the responsibility that falls upon them and recognise the critical importance of delivering TSJ. Following discussion, the Criminal Procedure Rules Committee endorsed the scheme (requiring statistical evidence of its operation as soon as meaningful data could be obtained. On that basis, assuming that the foundations set by TSJ are achieved, some of the matters currently dealt with at the PCMH would be dealt with at the preliminary hearing. Witness availability should be provided by or at the preliminary hearing so that a trial date can be set in less complex cases. Identification of hearsay, bad character and special measures should also be identified at this earlier stage.
179. The value of the PCMH is not undermined and such a hearing remains crucial for those cases requiring it because they raise matters of complexity, sensitivity or because the interests of justice demand that one take place. Judicial discretion to hold a PCMH is preserved.
180. In many courts across the country, including those in London, preliminary hearings and PCMHs have been held routinely in all cases since mid-2013 following the abolition of committals. Some courts may continue to list many cases for PCMH because the Judge considers that the interests of justice require it. The difference under the EGP scheme will be that the Judge must at least apply his or her mind to the necessity of doing so and to the possibility of dealing with further directions in certain cases remotely, whether by email, telephone conferencing or other digital means. The aim should be to reduce the number of hearings at which all parties have to come together in court.

87 See Chapter 2 - the duty of direct engagement.

7.1.4 Legal Aid implications

181. The final concern raised was that the proposal would require a re-writing of the payment arrangements in publically funded cases. There has been close liaison with the Legal Aid Agency and assurances have been given that the proposed scheme will not create any adverse consequences for the defence. A solicitor can apply for a Representation Order at any point once the client is charged. In circumstances where urgent work is required, any such work can be claimed as long as it is within 10 days of a court hearing and they successfully apply for a Representation Order within five days of the initial instructions.
182. This should not be confused with Pre-Order Cover and Early Cover. These are separate fee schemes in which a provider can make a claim for a case in which the client fails either the interests of justice test (Pre-Order Cover) or is not financially eligible (Early Cover) and the application for a Representation Order is subsequently refused. These fees are designed to cover a limited amount of work that may have been undertaken by a provider whilst they are awaiting a decision.
183. **I wholeheartedly endorse this EGP scheme. My support is based upon a number of factors not least of which is the extensive work carried out over the last 12 months and, importantly, the undertakings given by all parties in the associated work on the TSJ scheme upon which the anticipated benefits of the scheme are founded⁸⁸.**

7.2 Reward for significant negotiations

184. I have raised elsewhere the need for parties to engage more effectively: in order to facilitate this, I have recommended a positive duty of engagement⁸⁹. Clearly, those cases which are identified at an early stage as “anticipated guilty plea” cases will be dealt with relatively speedily without the need for extensive discussion. Cases which are to be dealt with as anticipated not guilty pleas are, however, a different matter. Early engagement, to good effect, will be critical.
185. In some cases, that engagement will involve substantial negotiation between defence practitioners and the CPS not only in relation to a guilty plea but also as a means of reducing the issues so ensuring that any trial is as effective and efficient as possible, eliminating the waste that is so often evident in trials with witnesses being brought to court and then not required, issues floated (or threatened) and then abandoned and insufficient focus on the true issues which require detailed investigation. It seems to me that this work has the potential to benefit the system so very positively that it must be recognised financially.

88 This takes into account many of the recommendations made in the Magistrates’ Disclosure Review.

89 See Chapter 2.

186. I note in this connection that I am not the only one to draw this conclusion. In 2014, the Victoria (Australia) Legal Aid Commission carried out a detailed study of criminal proceedings in that jurisdiction. It recommended, amongst other things, that an additional payment should be available to a solicitor in proceedings which are resolved at or before the first hearing owing to the ‘significant negotiations’ necessary to achieve resolution⁹⁰.
187. It is important that nothing should be done which can be seen as a financial incentive to persuade a client to plead guilty. What is required is a positive approach to the resolution of the issues in the case to ensure that it takes up as little court time as is consistent with the proper and due administration of justice. In addition to seeking to ensure that cases go to trial only in circumstances in which there are real issues to resolve, this approach must encompass requiring the attendance only of those witnesses necessary for that end, timetabling witnesses and speeches, with realistic assessments of time required and otherwise treating the time of the court as an expensive commodity which must always be used wisely. Negotiations to this end would not need to take place at court – indeed I would expect that they do not – and could properly be dealt with by way of email exchange. In that way, there would be a clear and effective audit trail for the purposes of any later assessment by the LAA.
188. Of course, to be effective, this type of engagement will depend on a number of the other issues identified above: these include defence lawyers having access to a secure email address, the rapid grant of legal aid, the identification to the CPS of defence lawyers with conduct of the case, ownership of individual cases by the CPS in order that there is an identifiable lawyer with whom negotiation may take place.
189. There is an obvious and significant benefit to be gained for the system in such a measure whether it is the possible complete resolution of a case before the matter comes to trial or a real reduction in its complexity and length. As for the first, I have acknowledged elsewhere in this report that the costs – both financial and otherwise – for everyone involved in ineffective and cracked trials are simply too great for the status quo to continue. This step will complement the streamlining of the system which Transforming Summary Justice (‘TSJ’) will bring.
190. The relevant ‘test’ to be satisfied before such payments are triggered would need to be determined, but, as with Magistrates’ Court work, **I would recommend that the LAA examine a fee mechanism that rewards early significant engagement with the prosecution that results in the more effective and efficient early disposal of cases.**

⁹⁰ Delivering High Quality Criminal Trials – Consultation and options paper (Victoria Legal Aid, January 2014) p.38.

7.3 Case Progression Role:

7.3.1 Enforcing the Criminal Procedure Rules

191. While the Criminal Procedure Rules were created in an effort, at least in part, to engender a culture of responsibility for case progression, they are of little benefit if they are not observed. Although independence is a valuable, indeed essential, characteristic in our judiciary, that ‘independence’ does not extend to a choice as to whether or not to apply the rules, rules that have been introduced after careful deliberation by an expert committee and which are authorised by primary legislation.
192. The work carried out by Professor Penny Darbyshire⁹¹, supports my concern that there is a failure to implement properly the Rules in some areas. In her qualitative study, one Judge is quoted as saying: “The detail of the CPR is a desert to 95% of the Bar and a very large proportion of the Judges.” Another Judge admitted as much, saying: “I’ve never looked at them; don’t even know where they are.”
193. These may be extreme examples and I hope that they are. What they demonstrate however is that there appears to be a divide between the excellent work of the Criminal Procedure Rules Committee and the daily diet of the Crown Court. There may also, in my view, be a failure properly to disseminate the good work of the Committee and embed it in the consciousness of criminal practitioners. At the end of the day, compliance with the Rules is not optional but mandatory. In the circumstances, **I recommend that the Committee and the Judicial College consider ways of improving the extent to which criminal practitioners and Judges understand, engage with and put into daily practice the requirements of the Criminal Procedure Rules.**

7.3.2 Case progression: a new approach

194. I am eager to see a criminal process in which the parties to a case take the initiative and strive for compliance with Criminal Procedure Rules and judicial orders. However, as I have highlighted elsewhere in this chapter, I am very conscious of the limitations and regional disparity in the application of and the compliance with Criminal Procedure Rules and judicial orders. There is a clear need to improve compliance and cultural attitudes across the profession to the rules. The following approach may establish renewed vigour at least in relation to those rules regulating the preparation of cases for trial.

⁹¹ *Judicial Case Management in ten Crown courts* (Criminal Law Review, 2014(1)) p. 30-50. Professor Darbyshire observed 19 circuit Judges and interviewed 17, including 10 residents. Courts were chosen to represent a geographic and circuit spread and variety in size: two Northern, two North-Eastern, five South-Eastern (including the geographic Midlands) and one Western.

195. I have dealt with the role of case progression officers (“CPOs”) in relation to the Magistrates’ Court. In the Crown Court, also, to a significant extent, it has declined in recent years. This should be reversed and refreshed through a new approach. In the past there have been three CPOs employed respectively by HMCTS (for the court), the CPS and the defence. **I similarly recommend that there should be one case progression officer, responsible to the Judge whose role will be to ensure that all the participants have complied with their obligations at each stage of the case, and especially as regards judicial orders.** This post should be fully resourced, and not treated as an addition to an individual’s existing duties. The consequential savings as regards ineffective and unnecessary hearings and trials are likely to be considerable. This individual should work closely with the list officer to ensure that cases are listed and progressed in an appropriate and timely way. There may be a limit on the extent to which the CPO will receive confidential and privileged information but this should be of little significance: the CPO is principally responsible for ensuring that timetables are kept and the responsibilities of the various participants are discharged in a timely fashion, and if necessary any privileged or private submissions can be provided directly to the Judge during a hearing or in writing.
196. This recommendation needs to be read in the context of the CJS Common Platform. This, when in place, should enable the CPO to conduct most, if not all, of their work online. Given that delays by the parties, and failures on their part to comply with the case timetable, will be the subject of electronic notification revealed on the Common Platform case management system, it will be critical for these processes to be monitored by an individual with that dedicated function – namely the CPO.
197. I appreciate that a move to establish such a cross-CJS post will require negotiation amongst the agencies, especially regards funding but I would urge those within the MoJ to consider ways this could be achieved. Perhaps the role could be established through rule change within the Criminal Procedure Rules and developed using pilots to test the preferred operating model for such a concept.

7.4 The problem of sanctions

198. Ultimately, to be effective, robust case management relies on the ability of the court to ensure that its orders are complied with. In the event they are not, the court must rely on sanctions. The paucity of suitable sanctions is a matter upon which I have passed comment recently⁹² and was a matter which troubled Sir Robin Auld before me⁹³. I do not propose to rehearse those concerns here, but it is clear to me that wasted costs and adjournments are no way to remedy the enduring problems in the system.
199. Whatever we do, we must encourage a reduced tolerance for failure to comply with court

92 *Radiwilowicz* [2014] EWHC 2283 (Admin)

93 See paragraph 231 of his report.

directions along with a recognition of the role and responsibilities of the Judge in matters of case management⁹⁴. It cannot be right that a ‘culture of failure’ has developed in the courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of a document(s) or an application) is not met, there must be *good* reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general indifference to rule compliance. Whichever party has failed to comply or failed to meet the deadline, the opponent perceives objection as a waste of time because it will be largely pointless: there is no sanction that can be applied. Perhaps most significantly, it allows cases to ‘drift’, and for further hearings to take place unnecessarily. Such is the extent of these, and related, failures in one region that they were described last year by a member of the senior judiciary as undermining the Court’s authority and the rule of law⁹⁵.

200. Of real interest in this connection are the comments of Gross and Treacy LJ in the ‘Further review of disclosure in criminal proceedings’ published November 2012. They said [at footnote 14]:

“some Judges have developed less formal methods of censuring disclosure failures through their case management powers, such as escalating the complaint to the senior partner or Branch Crown Prosecutor, and requesting an explanation for the failure either in writing or in person, sometimes just outside the court’s regular sitting hours. So long as the methods remain within the Judge’s powers, these seem to us to be sensible developments if they are found to be effective locally”.

201. Such compliance hearings have their critics, some trenchant. However they appear not only to be effective but also largely self-extinguishing⁹⁶. Variations on this theme have been tried elsewhere:

“We introduced it mainly because [the case progression officer] was having a job with compliance. They wouldn’t put their certificate of readiness in until she got onto them. That was wasting time so if there isn’t a certificate, they’re in the Naughty Boys’ Court. It’s so long since we had to do that, I’ve forgotten when it is. The word gets around. It’s the embarrassment factor. They don’t want to be here at four on a Friday afternoon in the Naughty Boys’ Court. It worked very well. We did it two or three times.”⁹⁷

94 It is surprising that it is even necessary to record this requirement for it should be axiomatic that the Judge’s role in case management requires respect and willingness to engage. Although I trust that the example is exceptional, if not unique, that approach is not always followed: see [West \[2014\] EWCA Crim 1480](#).

95 This comment follows a circuit visit by the Senior Presiding Judge.

96 One Judge introduced such courts in 2005, with ‘defaulters’ being required to appear, unpaid, on Friday afternoons, to explain their failure to comply with a case management order. It was effective. By 2010, a compliance court was required to sit ‘two or three times a year’. By 2012 it was unnecessary.

97 From an anonymous Judge quoted in P Darbyshire, *Judicial Case Management in ten Crown Courts* (Criminal Law Review 2014(1)) p.8.

202. This addresses (at least in part) the frequently expressed criticism that the drawback of such courts is that they take away from the task in hand the very people who ought to be ensuring that failures which lead to an appearance in court do not occur. Short-term remedies may be relatively easily found – the application is made, the disclosure is provided, etc. But for there to be a reduction in numbers such that compliance courts become largely unnecessary, something more long-term appears to be arising out of them. It may be of course that the prospect of such an appearance creates the necessary momentum to identify problematic areas of work that might otherwise have gone unmanaged. It may be that they identify patterns of failure which help identify training or support needs. This perhaps ought to be the focus. **The police, CPS and defence practitioners must be held accountable for repeated default. Courts should therefore maintain a record of failures to comply with the Criminal Procedure Rules and insist on a compliance court appearance once a pattern of failure is identified: Presiding and Resident Judges should consider how best this can be achieved locally, ensuring that the focus of this mechanism addresses the real problem of delay and non-disclosure and is not a means by which tactical advantage may be taken by one party from technical failures to comply that are inconsequential to the real issue.** I have been informed in the course of the Review that some already do this: lessons can, perhaps, be learned from a procedure adopted in the Administrative Courts following utterly incompetent asylum and immigration applications for judicial review⁹⁸.
203. Whatever the explanation, it appears that these compliance hearings work. In the absence of other effective sanctions – despite the efforts of many over the years to identify suitable alternatives – we ought to embrace what works and I therefore endorse an approach which is based locally.

⁹⁸ See *R ex parte Hamid v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin); *R ex parte Butt v Secretary of State for the Home Department and other cases* [2014] EWHC 264 (Admin).

8 The Crown Court: trial

204. Reviewing the efficiency of the trial process is well-worn ground. The Philips Royal Commission⁹⁹, which reported in 1981, was directed by its terms of reference to examine pre-trial procedure. However, as it observed “it is the nature of the trial itself which largely determines the pre-trial procedure”¹⁰⁰. Similarly, Lord Roskill’s Committee’s Report¹⁰¹ in 1986 – which focused on fraud trials – said much that was of application to trials generally.
205. The Runciman Commission, appointed in the wake of mounting public concern over a number of high profile miscarriages of justice, was charged with examining the manner and supervision of police investigations, the role of the prosecutor, expert evidence, pre-trial and trial procedures, evidence, the role of the court and other machinery in correcting miscarriages of justice. And of course Lord Justice Auld’s Review of the Criminal Courts of England & Wales in 2001¹⁰² – devoted a weighty and significant chapter (11) to trial procedure and evidence. Neither is the problem unique to this jurisdiction¹⁰³.
206. This Review has considered a large number of proposals in this context. I have set out below only those which, if implemented, could and should cumulatively lead to a significant change in the length of many Crown Court trials without impacting adversely on the interests of justice and the proper balances that a criminal trial has to achieve. Efficiency in these circumstances can only benefit all who are involved in criminal justice.

8.1 Maximising available time in the Crown Court

8.1.1 Prisoners arriving on time

207. The Prisoner Escort Custody Service (‘PECS’) is one of the most costly single services contracted by the National Offender Management Service (‘NOMS’) and is critical to the efficient functioning of the criminal courts. The third generation PECS contracts became operational in August 2011. The jurisdiction is served by two contractors: Serco – which operates in London and the East of England – and GeoAmey which covers the remainder of England & Wales. The contracts cover movements from prison to court, also collections from

99 [1981] Cmnd 8092.

100 At paragraph 1.6

101 *Fraud Trials Committee Report* (HMSO, 1981).

102 The Auld Report.

103 By way of example, in 2009, the Attorney-General of New South Wales, Australia, tasked a Trial Efficiency Working Group to identify the causes of unnecessary length of criminal trials and evaluating possible solutions. The Group identified that the major problem affecting trial efficiency was a failure by Judges properly to manage the trial process. This was caused primarily by a failure to establish the significant issues early in the trial. See a [briefing by the NSW Parliamentary Library](#).

police stations to court, inter-prison transfers and returns to prisons at the end of the court day. In any given year, PECS will carry out roughly 850,000 prisoner movements. As at 2011, the average prisoner journey cost across England and Wales was approximately £161¹⁰⁴.

208. “DRACT” – the ‘Designated Ready at Court Time’ – is the time a prisoner has been received in the court custody area and processed ready for his appearance in the dock. It is not simply the arrival time at the court building. The contract requires contractors to deliver all prisoners by the times stated which are banded by the distance between the point of custody and the court¹⁰⁵. The minimum performance standard required is achievement of the delivery time in 90% of all cases.
209. The present obligations on contractors to meet a 90% success rate, however, means that 1 in 10 prisoners may not be ready for court when they ought to be and yet the contractors will still be delivering to contract. This has a huge knock-on effect on the business of the court in those cases, particularly where one or more prisoner concerned is significantly late. Furthermore, under the present contract for those travelling more than 45 miles, arrival at or after the time that the court is due to start is not a breach of the delivery time. I understand, of course, the problems of travelling distances but the cost of lost time to the court system appears to be ignored.
210. This strikes me as another example (others being, for example, ineffective trial rates) of what might appear to be the all too ready expectation of failure in the justice system. **I would urge those responsible to reconsider the terms of any future contract with prisoner movement providers. They must demand greater efficiency and properly manage performance of the contract. NOMS must also focus to a greater extent on re-organising the way that remand prisoners are processed and on ensuring that they are held in custodial institutions that are near to the court before which they are appearing, so that long journeys are avoided.**
211. The provision and availability of dock officers is a further issue for consideration.
212. In addition, we must not in future be left in a position where potential savings accrued from other efficiencies (e.g. prison to court video links) are limited by the terms of such contracts. **There must be provision in any future contract to benefit financially from the increasing efficiencies which will be derived from technological advances and improved working practices.**

104 Figures from *Prisoner Escort & Custody Services Contract User Guide* (National Offender Management Service, 15 August 2011).

105 The following times have been contracted with both suppliers: (1) up to and including 30 miles from prison – 09.30; (2) 30 to 45 miles – 10.00; (3) 45 to 60 miles – 10.30; (4) 60 to 100 miles – 12:00; (5) over 100 miles – agreed time.

213. Finally, in the interim and **with immediate effect, constructive dialogue must take place between Resident Judges, senior prison staff and prisoner movement providers as to how best to adapt the existing arrangements to achieve maximum efficiency. I know that in some areas engagement of this sort takes place. I endorse it, and encourage others to follow suit.**

8.1.2 Court sitting hours & flexible court arrangements

214. An issue for the Review has been whether courts should sit longer than they do. Conventional sitting hours for Magistrates' Courts are Monday to Friday 10am to 1pm and 2pm to about 4.30pm, sometimes finishing earlier or later according to the list. Sitting hours in the Crown Court and the Court of Appeal (Criminal Division) are much the same, although 10.30am is a more common start time. Many Crown Court Judges will, however, start earlier in order to deal with case management, bail applications and for other matters that cannot conveniently be resolved without a hearing. Some Magistrates' Courts sit on Saturdays and Bank Holidays, particularly in the larger Metropolitan areas.
215. A number of contributors to the Review have argued that courts should routinely sit for longer hours. On the face of it, the idea has merit: 10.30am to 4.30pm appears to be a short working day. Also, courts do not currently cater for those who work a full working day. For that reason, victims and witnesses of crimes may be reluctant to meet court requirements which do not easily match with their own requirements and serious inconvenience or prejudice can be caused to those (including jurors) who have to seek time off work to attend court.
216. It is a mistake, however, to think that the working days of Judges, Magistrates, court staff and all others who are involved in proceedings are confined to the sitting hours of the court. All court work needs considerable preparation and follow-up work that has to be conducted outside sitting times. Apart from the administrative work that court staff must perform outside the court sitting times, Judges have to work on the current trial or cases they are due to hear so as to be properly prepared and, in addition, deal with a number of different issues, perhaps of case management or bail in other cases. This is in addition to the increasing administrative burden of their office: that burden is particularly weighty in relation to Resident Judges who undertake a leadership role in the court centres where they sit. Advocates must consult with their clients sometimes before and after court, taking instructions on the issues that have arisen or may arise. This increasing pressure can also fall on Magistrates who also need to familiarise themselves with the papers and the issues of fact and law with which they may have to deal.
217. There may be scope however, for providing a better service for everyone – and potentially producing significant savings – in various initiatives already undertaken by Judges, Magistrates and court staff, and with the willing cooperation of those involved in the trial process. **It would certainly be of value to timetable case management or other hearings which can be conducted either by joint conference telephone or by some form of video**

conferencing outside court sitting hours so that instructed advocates can take part without disrupting trials which they are then undertaking.

218. Another approach (dealing with a different problem) is the concept of ‘Maxwell’ or ‘adjusted’ hours for contested trials. This term is used to describe a system where the trial sitting times are altered significantly: typically it would involve the court sitting from 09.30am until 1.30pm in the usual way – with Judge, legal representatives, the defendant and the jury. After a lunch break the court then reconvenes without a jury to deal with matters of law, preparation for the next day, etc. In this way jurors have greater flexibility with the afternoons away from court.
219. There was significant support from contributors to the Review for the flexible use of such arrangements. They support the needs of jurors and others, and appear – from anecdotal evidence at least – to provide the potential for significant savings in time, and therefore money.
220. One example of this working in practice has been provided to the Review by Lady Justice Rafferty, referring to her experience as a High Court Judge only a few years ago. Her contribution merits a lengthy extract:

“We sat daily with a listed start of 09.15 and often began by about 09.30. The single defendant was in custody at Belmarsh and answered an indictment of murder, GBH, attempted kidnap and other violence against five women...

We did not sit beyond about 1.45/2. I told the Bar at the outset that I would not require it to argue law in the afternoons except ‘by appointment’... If law were to be argued (and it did) we either did it during a morning, giving the jurors notice (another of the agreements the Bar and I reached) so they did not come until a time marking or at all, or during an afternoon, but exceptionally.

Every so often we did not sit for a day, to allow counsel to work on the case.

There was [a lot] of expert evidence. The afternoons allowed consultation with reduced pressure of time. Schedules became vital as a result of some of the expertise and were prepared mid-trial in detail and without holding things up.

The jurors could ‘lose’ four and a half months but live their lives. They kept appointments, saw teachers, did training courses, and so forth. After the verdict, I had enquiries made and the hours, plus the other adaptations I have described, all twelve had much welcomed.

Counsel assessed the saving of time, compared to the conventional hours, as at least one month...Key to the success was my not insisting on rigidity for timing of legal argument and on the Bar knowing from the start that a day here and there would be out of court. Even with generous sitting hours we achieved a real saving on pretty well all fronts.

I did a modified version of this nationwide over eleven years as an HCJ and it always paid dividends...One of my favourite methods, used as late as my last first instance trial...was to use adapted hours two or three days weekly and [revert to conventional court sitting times] during the balance.”

221. It is clear that arriving at such an arrangement requires the cooperation of all involved and in the case of a defendant in custody, particularly the prison service and the ‘PECS’ contractor: the system might only have worked because the prison in HMP Belmarsh is attached to Woolwich Crown Court: it might only be appropriate for certain types of fraud trial where defendants are on bail. What is critical, of course, is that the greater flexibility does not lead to time being wasted and extra expense incurred. I expect that if appropriate cooperation is forthcoming and discipline maintained, it has some potential. The usefulness of this approach may be limited to problems occurring in the system presently. I would envisage that with the implementation of the recommendations made above, the efficiencies gained would obviate the need to undertake this course.
222. **The number of cases in which the ‘Maxwell’ approach could be adopted is likely to be very limited, for example, to lengthy, complex trials where defendants are on bail or, perhaps, for certain terrorism trials at Woolwich Crown Court: before adopting this procedure in any case, the consent of a Presiding Judge must be obtained. The broader principle operating in such arrangements is also worth emphasising: there must be a willingness and commitment on the part of everyone involved to work flexibly to achieve greater efficiency. I encourage Judges actively to consider ways in which – appropriate to local conditions – they may adapt this principle¹⁰⁶.**

8.2 Evidence: Presentation

8.2.1 Expert evidence

223. Scientifically rigorous but accessible forensic science matters to the criminal justice system as a whole. The vast majority of serious cases, and a significant proportion of all Crown Court cases, now include presentation of one or more types of forensic evidence. But in large part because of its prevalence, we cannot afford to be complacent about its role in court. The pace of change

¹⁰⁶ This is not to encourage individual Judges to adopt idiosyncratic ways of working: models for improvement should be considered on a court by court basis and discussed by Resident Judges with a Presiding Judge and, if appropriate, the Senior Presiding Judge.

and complexity of techniques present challenges to all involved. The court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted.

224. In response to a recommendation by Parliament¹⁰⁷ and concern arising from cases in the early 2000s in relation to expert evidence, in March 2011 the Law Commission produced an excellent report on expert evidence in criminal proceedings.
225. One of the principal concerns of the Law Commission was that expert evidence was being admitted too readily, with too little scrutiny. It is a concern which my Review group shared and a matter on which I have passed comment recently¹⁰⁸. In the family jurisdiction, the Judge can rule whether expert evidence is needed: I do not advance this suggestion for criminal cases not least because such evidence is likely first have been obtained by the police during the investigation and only thereafter by the defence.
226. The Law Commission recommended the introduction of a statutory admissibility or reliability test – a proposal which the senior judiciary supported – with a list of factors to assist Judges in applying the test; and the codification of the existing law¹⁰⁹. Apart from providing a much surer basis for the admissibility of expert evidence, a further objective of the proposals (at least implicitly) was to avoid the risk of the jury being confused and distracted by complex and conflicting expert accounts.
227. The Government response in November 2013 rejected the recommendation of primary legislation¹¹⁰. However the Criminal Procedure Rules Committee has adopted as many of the recommendations as it could through Rules and these have been accompanied by Practice Directions¹¹¹. Thus although the common law remains the source of the criteria by reference to which the court must assess admissibility, the Rules list those matters which must be covered in the experts’ report so that the court may conduct such an assessment. The Practice Directions list the factors the court may take into account in determining the reliability of expert opinion. Furthermore, the Rules encourage discussion between the parties in advance of trial, where more than one party wishes to introduce expert evidence¹¹², and enable the court to direct that the experts meet¹¹³, and if possible produce a report setting out the areas where they agree and disagree¹¹⁴. In this way, the issues to be put to the jury may be narrowed to those where there

107 House of Commons Science and Technology Committee, *Forensic Science on trial* (March 2005).

108 See paragraphs 43 and 44 of the judgment in [H \[2014\] EWCA Crim 1555](#).

109 For a summary of the recommendations, see Part 9 of Law Com No 325 at page 137 onwards.

110 [The Government’s response to the Law Commission report: “Expert evidence in criminal proceedings in England and Wales”](#) Law Com No.325, MoJ, 2013. It is stated at page 4 that the government is unable to implement the recommendations legislatively – notwithstanding a shared concern on the issue of experts in criminal proceedings – due to current financial constraints.

111 Crim PD 33A.4 –33A.5

112 Rule 33.6

113 Rule 33.6(2)(a)

114 Rule 33.6(2)(b)

is disagreement.

228. The credibility of the criminal justice system depends on the quality of the science underpinning the forensic evidence: it is necessary in order to preserve confidence in experts and the scientific evidence they present. **In relation to the more esoteric areas of science, more research as to its validity is needed. This is so in particular in relation to those disciplines where there is very little peer reviewed, published evidence.** For example, gait analysis and facial mapping.
229. Alongside the need for research is the need for regulation. The role of the Forensic Science Regulator is to ensure that the provision of forensic science across the CJS is subject to an appropriate regime of scientific standards. At its most basic level it should ensure minimum quality and security standards for the accreditation of forensic laboratories. **There are differing views on the question of statutory powers for a Forensic Science Regulator, but my view is that such powers are now necessary to ensure and if necessary enforce compliance with quality standards.**
230. Regulation and governance are matters of concern not only in England and Wales; they are international concerns. This was identified by the US National Academy of Science report in 2009, which summarised the consistent message it heard as follows:
- “The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community... This can only be done with effective leadership at the highest levels... pursuant to national standards and with a significant infusion of federal funds.”
231. The report went on to recommend the creation of a National Institute of Forensic Science in the US. Closer to home, the House of Commons Science and Technology Committee concluded last year:
- “There are risks to the justice system’s ability to convict criminals and meet the needs of victims unless there is a proper strategy for forensic science following the closure of the [Forensic Science Service].”¹¹⁵

115 Science and Technology Committee, *Second Report of session 2013-14*, Forensic Science.

232. I would welcome a similar development in England and Wales to that recommended by the NAS¹¹⁶.
233. From 1999 to 2009, the Council for Registration of Forensic Practitioners was intended to fulfil this function, providing the court with a single point of reference for the competence of forensic experts. The system had failings however, including its voluntary registration system and the exclusion of those accredited through other channels. Since the closure of the Council, the Chartered Society of Forensic Science Society ('CSFCS') and other bodies¹¹⁷ have looked to close the gap: the CSFCS has acquired Royal Charter status and is introducing a system of accreditation to set uniform standards for members acquiring chartered status. In my view, these bodies must be supported in their efforts to ensure appropriate accreditation for expert witnesses.

i. Understanding of forensic evidence

234. Juries cannot and should not be expected to understand and interpret complex scientific concepts. This is important for several reasons, but certainly in order to avoid unnecessary use of limited court resources, and in order to prevent juries reaching perverse decisions which might contribute to a loss of confidence not only in specific scientific areas but more fundamentally in the system of trial by jury.
235. This is not to say that opposing scientific views should not be placed before the jury. Instead, this should be restricted to only those circumstances where it genuinely is an issue, and efforts made to minimise the number of contentious scientific questions in relation to which a jury is asked to make a decision. It is rare to have a case where a large part of the complex technical or scientific evidence is not common ground.
236. **Courts must use more frequently their power (pursuant to CPR 33.6(2) of the Criminal Procedure Rules) to direct a discussion between experts and jointly agree at the earliest possible stage before trial those issues on which they agree and those on which they do not, and to prepare a joint statement for use in evidence indicating the measure of their agreement and a summary of the reasons for their disagreement.**
237. To aid jury understanding – an idea developed by Lord Thomas CJ, in conjunction with the Forensic Science Regulator – is a series of 'primer' documents, relating to the most popular areas of forensic science, presenting the science in an accessible, plain English format. These 'primers' would be restricted to the areas on which there is consensus amongst the scientific

116 See the suggestion by Edmond in "Advice for the courts? Sufficiently reliable assistance with forensic science and medicine: Part 2", (2012) 16(3) E&P 263, where he argues in favour of "multidisciplinary advisory panels". See also Edmond and Roberts, "The Law Commission's report on expert evidence in criminal proceedings" [2011] Crim LR 844 at 857 onwards.

117 Including the Expert Witness Institute and the Academy of Experts.

community and would assist juries in understanding the concepts underpinning the issues in their case. **I firmly support the development of suitable mechanisms whether in the form of ‘primer’ documents or electronic presentation aids relating to the most common forms of forensic evidence**¹¹⁸.

ii. Disclosure of reports

238. I understand that a recent survey of 186 experts across a wide range of disciplines revealed that almost one third of them said that they felt they had been asked or felt under pressure to alter a report in way that damaged their impartiality¹¹⁹. Their experiences ranged from being asked to remove sections of reports that were seen as damaging to the client’s case to being asked to rewrite them in their favour. Others said that some solicitors had even refused to pay them if they felt that they had written an “unhelpful” report. Contributions made during the course of the Review suggest that this is a problem.

239. If accurate, this is a deplorable state of affairs. Lawyers who engage in such practices seek to undermine the duty of impartiality owed by the expert to the court. In so doing, they seek to undermine the authority of the court and sail perilously close to contempt of court. The Criminal Procedure Rules (as at 6 October 2014) state [emphasis added]:

“33.2.—(1) An expert must help the court to achieve the overriding objective by giving opinion which is—

(a) objective and unbiased; and

(b) within the expert’s area or areas of expertise.

(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.”

240. There is already a requirement in the Rules for experts to notify the Court, *when giving evidence in person* ‘to inform all parties and the court if the expert’s opinion changes from that contained in a report served as evidence or given in a statement’¹²⁰.

241. It has been suggested that it may be possible to remedy this problem by requiring that all expert

118 The impact on the fairness of this form of presentation should be the subject of research. See also B. Dann, V. Hans and D. Kaye, *Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested DNA Evidence*, U.S. Department of Justice (2005).

119 The Times, Thursday November 20 2014, p.6.

120 Rule 33.2(3) (c).

reports be served upon the court, irrespective of whether or not that report (or a subsequent report) is then adduced in evidence, or the expert is called to give evidence in person. The court would then have to exercise its discretion as to whether or not to require that the report be served upon the opposing side. I suspect, however, that this would simply lead to the first identification of the expert's view being communicated orally rather than by way of report; even if it were otherwise, it is likely to bring with it considerable scope for what is potentially unprofitable satellite cross-examination on 'drafts'. Given its potential ramifications, this requires further reflection, and I would suggest it is a matter for others to consider in due course.

242. In my view, the better course is for greater emphasis to be put on the obligations contained in the Criminal Procedure Rules not only for the expert to provide assurance that the opinion has been prepared objectively with a view to the overriding duty to the court but also to ensure that the court is informed of any significant change of opinion and the reasons therefore. If it was otherwise, such behaviour not only places the integrity of the expert at risk but it potentially undermines the trial process. **The Criminal Procedure Rules Committee should consider the terms of the certificate required as part of the standard assurance that every expert report must carry.**

iii. Getting expert reports more quickly

243. When the defence seek to rely on expert evidence, it is usually necessary to apply for legal aid to pay for it. If the Judge directs or indicates that it is a suitable case for a defence expert, it is still a matter for the Legal Aid Agency to decide whether to fund it. That body can and sometimes does effectively overrule the Judge's view by declining to authorise the instruction of an expert. Even when it agrees with the Judge, the need to obtain – and the slow process in granting – authorisation is a frequent cause of delay in the preparation of cases for trial.
244. **When it is appropriate, in a publicly funded case, at an early hearing or in writing, a fully explained application for expert evidence should be made and, bearing in mind the impact on public funds and the obligation to deploy limited resources proportionately, the court should be prepared to provide a reasoned decision as to whether it is justified: this could be done by email or following a video hearing. If it is, that direction should be regarded by the Legal Aid Agency as strong evidence to support the application such that if it decides not to grant funding, it must provide full reasons which must be passed to the relevant court.**
245. **The Criminal Procedure Rules should encourage greater use by legal practitioners of video-conferencing and other similar technology for communicating and conferring with experts in preparation for trial.**
246. **The law and the provision of facilities on a national basis should be developed to**

encourage experts to give evidence by video link or other similar technology in appropriate cases.

8.2.2 ABE Evidence

247. A number of contributors to the Review have raised as a significant problem the length of many Achieving Best Evidence or ‘ABE’ interviews. As I have identified elsewhere in this report, there is a pressing need to distinguish between the two quite different purposes of the interview: the first is as an investigative tool; and the second is as a means by which evidence of an offence is adduced in court.
248. Part of the problem is that interviewers frequently are unaware of what allegations the complainant(s) are going to make, and so it is not always possible to intervene to shorten an interview while it is ongoing. The result is a long interview. It is also frequently the case that the parts of the interview on which the prosecution later relies as evidence at trial represent only a fraction of the total length of the interview.
249. I am aware that efforts are underway – arising out of the Review’s consultation process – to reconsider the training of officers involved in planning and conducting ABE interviews. I support any efforts which are directed towards improving skills and assist in excising unnecessary material.
250. **After a first general investigative interview conducted in accordance with best practice (taken from the ABE practice guide), in most cases, there should be a second, far shorter interview, ordered, chronologically presented and directed only to the relevant material.** This arrangement would much more satisfactorily fit the second, non-investigative, purpose of these interviews. **It is this interview that should be presented as examination in chief.** The first interview would be available if required but would not form the basis of evidence in chief¹²¹.
251. Since now approximately 40% of Crown Court trials involve sexual offences – and therefore usually ABE interviews – a reduction in the length of ABE interviews would have a dramatic effect on reducing the length of jury trials in those cases without in any way damaging the presentation of the witnesses’ evidence. If there is no second interview, Judges should be robust in ordering appropriate editing.

121 I note that the Joint Inspection Report (published February 2012) on the experience of young victims and witnesses in the criminal justice system draws similar conclusions on improving the structure of ABE interviews.

8.2.3 Use of remote witness links/video testimony

252. Many Judges have expressed to me real concerns that, while they are of course in favour of exploiting technology to aid efficiency, they doubt the ability of existing video technology to be extended further. Indeed they have concerns about the capacity of existing technology to meet its current remit. These are fears shared by numerous groups I have consulted with during the course of the Review. Some of the failures identified would appear to be the consequence of a lack of proper support for the operation of existing technology. I have lost count of the number of times I have heard that there was no-one in court who knew how to deal with apparent faults with the equipment.
253. Of note in this connection is that the report of a 2013 Australian Trial Efficiency Working Group (set up by the Attorney General of New South Wales), found that a significant contributory factor to delay was issues related to the use of technology in the courtroom¹²². These included the inadequate training of court staff to operate devices necessary for the presentation of electronic evidence, problems with the compatibility of various evidence formats and the availability of hardware. These problems, it seems, are not unique to courts in England & Wales.
254. It may be that there is an issue concerning the lack of appropriate training for court staff on the efficient use of court technology. **I recommend that a review of this training is undertaken and refresher training implemented as appropriate to ensure that in each court centre there are always at least one member of staff with sufficient knowledge to ensure that courts are deriving as much benefit as possible from existing technology. As the technology is improved, that training should be further extended.**
255. There are also undoubtedly sound concerns about the fact that technology is introduced – and on a national basis – without the proper consultation of the primary users of that technology – Judges and court staff. There are also questions around the impact on jury perception and decision making when remote witness links/video testimony is used. This is being explored presently by the way of academic research¹²³. **Accordingly, I recommend that there is a greater involvement by Judges and court staff on a local level in the manner in which future technological developments are implemented.**

122 Insofar as they are relevant to this review other factors identified by the Working Group were: (1) the conduct of counsel; (2) a failure to identify early issues in contention; (3) the method of presentation of some evidence; and (4) continuity of staff. Some of these factors are explored in our domestic context elsewhere in this report.

123 See the work being conducted by Professor Cheryl Thomas with the UCL Jury Project. Issues addressed include whether juries perceive a witness who gives evidence in the witness box in court as more believable than a witness giving evidence “remotely”, and how this affects jury verdicts.

8.3 The 'culture' of advocacy

8.3.1 Ground Rules approach

256. The national arrangements for gathering evidence from child witnesses have been inadequate for some time, but that is due to change.
257. Studies have shown that traditional cross-examination techniques when used with children may be evidentially problematic¹²⁴. While a trial Judge of course has broad scope in the interests of justice to manage the trial, including the control of questioning¹²⁵, that is a consideration for the trial once it is underway, and so the stable door is already wide open. It is also worth noting that there is a limit to the extent to which a Judge may properly intervene once questioning is underway without running the risk of seeming to descend into the arena and thereby potentially creating the perception of unfairness and – in extreme cases – imperilling any resulting conviction¹²⁶. Far better to have made clear from the start where the boundaries of questioning lie.
258. The Pigot Committee in 1989 proposed a scheme under which the whole of a young child's evidence, including cross-examination, would be obtained out of court and in advance of trial. When the suspected offence came to light the child would first be interviewed by trained examiners, this interview being video-recorded. If this interview confirmed the commission of an offence the tape would be shown to the defence, who could then request a further interview at which they could put their questions to the child, in the presence of a Judge. At the eventual trial, should there be one, the first video-interview would replace the child's live evidence-in-chief, the second video interview would replace the child's live cross-examination and, without exceptional circumstances and an order of the court, the child would take no further part in the proceedings. It is worth noting that the full Pigot proposal was implemented in Western Australia and similar schemes operate in a number of European jurisdictions. In Norway, since 1926, there has been provision for the evidence of a child witness to be taken out of court.
259. In 1999, a provision designed to give effect to this was included in the Youth Justice and

124 See, for example, J R Spencer & M E Lamb (eds) (2012) *Children and Cross-examination – Time to change the rules!* Hart; K Hanna et al (2010) *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy*, Institute of Public Policy, AUT University; L Ellison (2001) *The Adversarial Process and the Vulnerable Witness*, Oxford, OUP; K Saywitz (2002) *Developmental Underpinnings of Children's Testimony* in H Westcott et al (eds) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* Chichester, Wiley; and Henderson (n.7).

125 See the 'overriding objective' – Pt 1, Criminal Procedure Rules 2014.

126 Although there has been helpful support from the Court of Appeal (Criminal Division) concerning the acceptable extent of intervention by the trial Judge in the case of *Farooqi et al* [2013] EWCA Crim 1649. See also the recent conjoined case of *Lubemba* [2014] and *JP* EWCA Crim 2064, where (in *JP*) the Judge impermissibly denied the defence the opportunity of cross-examining the evidence of a young complainant, but in *Lubemba* itself, a different Judge entirely correctly limited cross-examination to 45 minutes and interrupted when defence counsel asked inappropriate questions.

Criminal Evidence Act but was not brought into force. Eventually, in December 2013, a pilot scheme was announced involving three courts – Leeds, Liverpool and Kingston-on-Thames. Technological problems aside, it is proving to be a huge success, due in no small part to the very substantial efforts of all those involved. Part of the success of the scheme has been the requirement in the form of a ‘ground rules hearing’ for setting the limits of cross-examination of the witness¹²⁷. I anticipate that in due course, with the correct technological support, such hearings may take place in a virtual environment and need not require the physical attendance of the parties and all the attendant costs of such a hearing.

260. The new approach means it has proved possible to challenge the account given by a witness, but without risking poor quality and potentially misleading evidence being given (as with traditional cross-examination techniques). Another significant outcome is that the time spent on such cross-examinations has reduced sharply¹²⁸.
261. The extent to which cross-examination should be limited has been considered previously. The report of the Runciman Commission set out the following suggestion¹²⁹:

“[A] Judge should also explain that he or she will not hesitate to intervene if it seems necessary to do so to prevent the harassment or intimidation of a witness by counsel for either side. At the moment Judges may not always act quickly enough to prevent the bullying of witnesses, including experts. We accept that counsel sometimes need to pursue a line of questioning that is distressing or even offensive to the witness. But it is possible to do this in a courteous way, and it is for the Judge to ensure that counsel does so.”

262. Attention has been drawn to Rule 403 of the United States Federal Rules of Evidence. This empowers Judges to exclude evidence if:

“Although relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

127 CPD I paras 3E.1 – 3E.6.

128 Important guidance can be found in the Advocates Gateway: *Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court*. These materials deal with the handling of child and vulnerable witnesses, special measures etc.

129 Chapter eight, paras 12-14, p.121-122

263. If such a widely drawn power is available¹³⁰ or were to be given to Judges under our system, it would be important that counsel should have the right to reapply for the evidence to be heard if its value could be demonstrated in the light of subsequent evidence and argument. At present, subject to judicial discretion pursuant to s. 78 of the Police and Evidence Act 1984, it is for the parties to decide on what relevant evidence they intend to rely although it is always open to the court to restrict examination or cross examination for good reason¹³¹. However, it is at least arguable that some more specific rule would encourage Judges to be more robust in preventing juries from having to sit through evidence which will add little or nothing to what is already before them: this would apply particularly in the cases where had been a preparatory hearing.
264. **I accordingly recommend that consideration be given to specifically and unambiguously extending the power of the court to prevent repetitious or otherwise unnecessary evidence and to control prolix, irrelevant or oppressive questioning of witnesses. For clarity, if approved, a Practice Direction or decision of the Court of Appeal (Criminal Division) would be necessary: the alternative would be legislation.** This recommendation is not simply directed to saving time and money but because, without sacrificing fairness to the defendant, shorter trials will make it easier for juries to keep in their memories the essential facts of the case. It will never be in the interests of justice that witnesses should be subjected to bullying and intimidatory tactics by counsel or to deliberately and unnecessarily prolonged cross-examination.
265. The language of this recommendation comes from Lord Justice Auld who considered the matter (at Chapter 11, para. 34, p.527):

“[T]he Bar and solicitors have done much by way of continuation training and the promulgation of codes of conduct to improve the general quality of advocacy. With encouragement from the Court of Appeal (Criminal Division), and greater emphasis in training, Judges and Magistrates are now more alert than formerly to their power and duty to intervene to prevent repetitious or otherwise unnecessary evidence and to control prolix, irrelevant or oppressive questioning of witnesses. There is still room for improvement in advocates’ conduct trials, particularly at the junior and inexperienced end of the professions, resulting in all too often costly appeals with little benefit to the defendant/appellant or to justice. And there are still the odd cases when a Judge has not acted as firmly as he might have done to prevent incompetence or misconduct. Often the decision when to intervene is a difficult one, and it is not aided by the developing tension between Article 6, in its focus on due process, and the safety of the conviction. There may also be a difficulty for a

130 S. 82(3) of the Police and Criminal Evidence Act 1984 provides that “Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion: whether that would extend to preventing all evidence which falls within Rule 403 is arguable although the common law would certainly allow exclusion of evidence the prejudicial effect of which exceeds its probative value.

131 See Crim PR 3.11(d).

Judge in a long trial to assess the impact of individual rulings on the fairness of the trial over-all. There are, in the end, matters of judgement in individual cases, some of which can be troublesome to the Court of Appeal when the matter reaches them. I do not believe that legislation of the sort urged by the Runciman Royal Commission¹³² is necessary as an encouragement to Judges to be robust in their control of proceedings or a practical aid in keeping them within proper bounds. But the Court of Appeal should support them.”

266. Far better, it seems to me, to have clear pre-agreed limits to the nature and extent of such cross-examination – subject to a degree of flexibility once the trial is underway and as necessary in all the circumstances of the case.
267. Ground Rules hearings are presently limited to the cross examination of a particular category of vulnerable witnesses: they are necessary where there is an intermediary and good practice in all cases with either a young witness or a witness (including a defendant) who has ‘communication issues’. **Ground Rules arrangements ought to be extended to all categories of ‘vulnerable’ witness. In due course, consideration should be given to whether or not this approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses).**
268. This brings me to the excellent work of the Advocacy Training Council (‘ATC’)¹³³, and the importance of the Advocates’ Gateway. In 2012, the Advocacy Training Council launched ‘The Advocates Gateway’ (‘TAG’), which is an online web portal through which important guidance material – including ‘toolkits’- is placed into the public domain. The ‘toolkits’ set out good practice guidance for Judges and advocates when preparing for and conducting trials in cases involving witnesses with communication or other needs¹³⁴.
269. In the past two years, a whole series of toolkits have been placed on TAG which deal with a wide range of problems extending from case management in young and other vulnerable witness cases right through to planning the questioning of witnesses with hidden disabilities. The standard expected by users of the toolkit is appropriately high: they are not framed by reference to the minimum standard that a practitioner can get away with.

132 [1993] Cm 2263.

133 Indeed, it was the Advocacy Training Council which, in 2011, published a report entitled “Raising the Bar” which contained an analysis of and a guide to the treatment of vulnerable witnesses in court proceedings. Drawn from evidence gathered over a period of 20 months from experts including practitioners, members of the judiciary, intermediaries, psychiatrists, MoJ officials and social workers, the Report made 48 recommendations for the legal profession and for other bodies. The report also contained a series of ‘toolkits’ designed to be used by advocates as they prepare to question vulnerable people.

134 I am grateful to Green J, Chair of the Advocacy Training Council, for his powerful analysis of the essential role of good advocacy and the means by which we might achieve higher standards: “*Advocacy in Peril?*”, Keynote address for the International Advocacy Teaching Conference, Nottingham Trent University 28 June 2014.

270. Significantly, these ‘toolkits’ have been designed and developed in conjunction with the judiciary. They have, therefore, the level of support necessary for the guidance contained in them to be adopted successfully in court.
271. I wholeheartedly endorse this development. **I would encourage the ATC to expand the range of toolkits to encompass as many areas of criminal practice as practicable, and encourage the judiciary to promote the use of such toolkits as a means of raising – and then maintaining – standards of advocacy.**

8.3.2 Time Management of cross-examination and speeches

i. Opening Speeches

272. When done well, opening speeches are invaluable. They set out for the jury the principal issues in the trial, and the evidence which is to be adduced in support of the case. They should clarify, rather than obfuscate. A good speech, however, is not necessarily a long speech¹³⁵.
273. The Review has heard from a number of contributors that many prosecution openings, for example, are unnecessarily long and detailed. The purpose of the opening is of course to help the jury understand what the case they are to hear is concerned with, not necessarily to give them a detailed exposition of all the evidence to be adduced. It is a way of presenting the ‘story’ in a more logical manner than might emerge from the way in which the witnesses (who might cross time and issues) are called.
274. The proposal (made by some) for a time limit on the prosecution opening speech would be an artificial device and insufficiently flexible to accommodate the wide variety of cases, in terms of length and complexity, dealt with in the Crown Court. Instead, refinement of the issues to be litigated and strict confinement of the proposed evidence to the issues ought to reduce the need in a significant number of cases for a lengthy prosecution opening speech. Although I consider general time-tabling and judicial control of trials entirely appropriate (discussed below), I do not support a set time limit specifically for the prosecution opening, I do, however, make a general **recommendation that the jury should not be overloaded by an opening which provides greater detail of the proposed evidence or the law than is demonstrably appropriate to their understanding of the case and the issues.** In the first instance, this should be for the DPP to consider; ultimately, however, it will fall within the case management powers of the court¹³⁶.

135 Blaise Pascal, a 17th Century French philosopher and mathematician is reputed to have said “Je n’ai fait celle-ci plus longue que parce que je n’ai pas eu le loisir de la faire plus courte”. [I made it long because I didn’t have the time to make it short.]

136 Research by the UCL Jury Project is examining the impact of a range of different approaches to presenting cases to juries, including defence opening.

ii. Defence Opening Speech: Identification of Issues

275. Like Lord Justice Auld before me¹³⁷, I have long been surprised the lack of any formal provision for a short opening defence speech. By this, I mean one which takes place immediately after the prosecution opening, rather than at the commencement of the defence case, as may presently occur. I am not suggesting an opening speech responding to the prosecution opening. Its purpose (which can be in response to a question from the Judge) is to provide the jury with focus as to the issues they are likely to be called on to decide. The jury would then be alert to those issues from the outset rather than under the present position where they are enlightened only if they could be divined from cross examination or in the closing stages of the trial.
276. Having the prosecution and defence each set out the issues in the case in this way would also provide an opportunity for the Judge to provide certain directions at the beginning of the trial: I have in mind the specific issues to be considered in identification cases (following *Turnbull*), alerting the jury to what they should be looking out for while the evidence is being called, but before it is called. Even if the defence opening is simply to the effect that the prosecution is put to proof on all issues, there is no reason why that should not be explained.
277. A requirement for the defence to make clear to the jury the matters on which it intends to rely will undeniably assist the jury and thus make the trial more effective. The purpose is a focused explanation of the issues for the jury as the defence submit them to be: this should only be in accordance with the defence statement served in advance on the court. If the defence statement has been amended, that should form the basis of the explanation (even if, later in the case, the earlier defence statement becomes admissible in evidence): it is the case that is to be advanced to the jury that has to be explained.
278. It has been suggested that the prosecution opening speech should be served upon the defence in advance of the trial. I consider that, save for the most exceptional cases (in which an appropriate order may be made by the Judge), this will not be necessary as it will be plain from the prosecution papers the basis on which the prosecution will open the case.
279. I recognise that for this to be effective, requiring an identification of the issues will have to be mandatory. If not, those cases in which the jury perhaps would benefit most from the defence advocates guidance (perhaps where a no comment interview occurred) are precisely those cases in which defence counsel may choose not to assist. Accordingly, **I recommend that the Criminal Procedure Rules be amended so as to require, immediately following the prosecution opening, a public identification by the defence of the issues in the case.**

137 See Chapter 11, paragraph 28, p.524.

iii. Examination, Cross Examination and Closing Speeches

280. There is ample scope, within the Criminal Procedure Rules, for Judges to control the pace of the trial by time-tabling or otherwise restricting inappropriate or prolix questioning or closing speeches of undue length. The fact is, however, that such powers are rarely exercised, doubtless because of the general culture of the adversarial process practised in this country that Judges are arbiters or umpires. Active case management both before and during a trial necessarily involves greater participation; this can give rise to misunderstanding and lead to complaint on appeal (however infrequently such complaints succeed).
281. Trials can no longer meander through the evidence on the basis that they will take as long as the advocates wish it to take. Robust case management at all stages is absolutely essential and can be conducted without justifiably giving rise to any criticism of unfairness either to the parties or the process. This relates to the need to call witnesses, the extent of the evidence to be obtained through each witness and cross examination as well as the speeches of all parties. **A change of culture so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case is essential. Trial Judges should approach each case with these principles in mind actively manage the case accordingly; the Court of Appeal (Criminal Division) should support Judges in this endeavour.**

iv. Early Judicial Directions

282. The section that follows deals with the approach of the court to directions and summing up but, at the various stages of the trial (including at the beginning), there is room to provide assistance and focus to the jury while at the same time clarifying the way in which the task of judging the case should be approached. Thus, by way of example, in an identification case, it seems sensible that the standard *Turnbull* directions as to line of sight, distance and lighting, etc., could ensure that the jury listen to the evidence with the correct criteria in mind and so are in a better position to evaluate what they are hearing. A description of the potential significance of particular types of evidence (of which an example might be admissible hearsay) could also be provided in advance of that evidence being given.
283. I know of no reason why it should not be open to the Judge to provide appropriate directions at whatever stage of the trial he or she considers it appropriate to do so. What is essential, however, is that a note is kept of when these directions are given so that if the case falls for review by the Court of Appeal (Criminal Division) the entirety of the assistance provided by way of directions in relation to a challenged decision is then available to the court.
284. Research conducted in 2012-13 with actual jurors at court found clear evidence that jurors

want Judges to provide them with written directions on the law in writing¹³⁸.

8.4 Routes to Verdict and Summing up by reference to issues

285. The role, desirability and efficiency of judicial summing up of the facts at the end of a case have been questioned by many, both here and abroad. In the current climate, shortening the duration of trials through a focus on the issues in the case and by more effective trial management is a proper goal. That focus on shortening trial lengths properly leads to a consideration of a number of procedural issues surrounding the way in which the jury are assisted by advocates and Judge. Most significant concerns the need for the trial Judge to sum up the facts of the case which is an exercise that can add hours, days or, in extreme cases, weeks to the length of a trial¹³⁹.

8.4.1 Background

286. In considering any change of approach to the summing-up, it may be helpful to understand how our present system has developed.

287. For many years, there was no right for defence counsel to address the jury, so it was the Judge who gave the address to the jury immediately after the prosecution speech¹⁴⁰. In addition to dealing with the law, the purpose of the summing up was not simply to remind the jury of the evidence. The Judge was free to – and did – make comment on the merits of the case. Today, Judges continue to be free to comment on the evidence, but they must do so in a balanced way and make clear that decisions of fact are entirely a matter for the jury. Furthermore, Judges must be careful to avoid too much ‘colour’ in a summing-up¹⁴¹.

288. In cases of complexity, Judges have more recently moved away from a purely oral exposition of the law and provided written directions in the form of “Route to Verdicts” identifying a logical progression of propositions which apply the law to the specific facts then being considered. Some also provide a copy of the directions of law so that the jury can have the precise terms of the directions to hand while deliberating. These developments are to be encouraged and should become the standard approach to be adopted in every case.

8.4.2 Experience of other Jurisdictions

289. In his address to the Supreme and Federal Court Judges’ Conference earlier this year, a former Judge of the Federal Court of Australia and present Judge of the Court of Appeal, Supreme

138 C. Thomas “*Avoiding the perfect storm of juror contempt*” (Crim Law Review Issue 6, 2013).

139 CT to provide summary of relevant research.

140 In *R v White* (1811) 170 ER 1318, there is a reference to a defence right to address the jury but no authority is cited. A statutory basis can be found in s. 2 of the Criminal Procedure Act 1865.

141 And so avoid comments from defence counsel such as “The jury should be asked whether they found for the defendant or for his Lordship” (see *The Last Serjeant*, A M Sullivan, 1952, p.288).

Court of Victoria, Justice Mark Weinberg, stated, “The obligation on trial Judges to summarise the law and evidence in trial has become one of the most significant contributors to the length and complexity of jury directions in Victoria”.

290. The duration of summing up in other common law jurisdictions varies. Justice Weinberg¹⁴² cites various examples.

“Following a comprehensive survey of a number of Australian and New Zealand Judges in 2006, it was found that the average estimated length of the Judge’s charge to the jury following a ten day trial in Victoria was 255 minutes. For a twenty day trial, that figure increased to 349 minutes. In contrast, our New Zealand brethren reported that the average charge for a ten day trial occupied some 76 minutes, and for a 20 day trial, 108 minutes. In fact, it was found that putting to one side New South Wales and Tasmania, jury directions in Victoria took far longer than any other state or territory in Australia. Western Australian directions, in terms of length, rival those of New Zealand. Looking further abroad, jury instructions (as they are known in the United States) usually take no more than about 30 minutes.”

291. Elaborating on this last comparison, Judges in the United States do not, as a general rule, give any directions as to the evidence. In Florida, for example, the Evidence Code specifically states: “A Judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.”¹⁴³
292. In Canada, there is far less use of juries in criminal trials (many being tried by a Judge alone). Where a jury is used, however, the Judge has a positive duty to summarise evidence to the jury. The appellate court has however emphasised the need for brevity. In *Daley*¹⁴⁴ the court explained that the “duty of a trial Judge is not to undertake an exhaustive review of the evidence,” which may “serve to confuse a jury.” As an example, another court¹⁴⁵ stated that “reading for several continuous hours of extended passages of evidence from the Judge’s notes is a practice to be discouraged.”
293. In Australia, Judges are generally required to sum up evidence to the jury, though this practice is changing. In New South Wales, the trial Judge may choose not to summarise the evidence if he or she feels that the summary is not necessary given the circumstances of the trial and the relatively uncomplicated nature of the evidence presented. In Victoria, since the Jury Directions Act 2013, the Judge need not give a summary of the evidence but must identify only “so much

142 Jury Directions on Trial – A pathway through the labyrinth? Supreme and Federal Court Judges’ Conference, Darwin 5-9th July 2014.

143 [The 2014 Florida Statutes](#)

144 *R. v. Daley* [2007] 3 S.C.R. 523, paras. 56, 76 (Can.)

145 *R. v. MacKay* [2005] 3 S.C.R. 607, para. 2 (Can.)

of the evidence as he or she considers necessary to assist the jury to determine the issues in the trial”: see s.179 (c).

294. In New Zealand, Judges still sum up the facts and they are required to offer a “succinct but accurate summary of the issues of fact as to which a decision is required,”¹⁴⁶ and it must be tailored to the particular case. This position however may be changing with an increased emphasis on a practice referred to as “fact based question trails”, where Judges present a jury with a series of questions, the answers to which identify whether the relevant ingredients of the offence charged are established. It is likely that this is equivalent to the Routes to Verdict approach now frequently adopted in this country.
295. In Scotland, where the trial process is different, jury directions are quite brief. Even in complex trials, very little reference is made to the evidence beyond that which is necessary to identify the issues and to lay the basis for any appropriate warning.
296. The system must, of course, meet the fair trial requirements of Article 6 of the European Convention on Human Rights although in *Taxquet v Belgium*¹⁴⁷, the critical requirement in relation to reasons, as “a vital safeguard against arbitrariness” is that, for a trial to be fair, the accused (and the public) must be able to understand the verdict given by a jury¹⁴⁸.
297. I see no great difficulty in complying with these principles by ensuring that the route to verdict posed for the jury identifies the analysis that the jury is required to undertake in order to reach that verdict. When taken with the evidential analysis of the issues (which is not the same as an exhaustive analysis of the evidence), it should be beyond argument that the accused and the public can understand the verdict and so satisfy the requirements of Article 6.

8.4.3 Impact on Jurors

298. Whilst the justification for retaining the summing up in its present form remains that it assists the jury, this is a far from universal view of its impact. Research is currently being conducted in England & Wales, the results of which are expected in 2015¹⁴⁹, but research from New

146 *R v Fotu* [1995] 3 NZLR 129 (CA), 1995 NZLR LEXIS 763, at 29 (N.Z.) (quoting *R v Lawrence*, [1982] A.C. 510, 519 (U.K.)).

147 [2012] 54 EHRR 933.

148 The decision also makes it plain, however, that the absence of a reasoned verdict by a jury does not in itself constitute a breach of the accused’s right to a fair trial. The Court acknowledged that its task is to assess – on the basis of the proceedings as a whole and in the specific context of the legal system concerned – whether, in the light of all the circumstances of the case, the proceedings afforded sufficient safeguards against arbitrariness and made it possible for the accused to understand why he was found guilty. Other safeguards are also necessary such as directions or guidance on legal issues, precisely and unequivocally forming a framework on which the verdicts are based and any avenues of appeal open to a convicted accused.

149 UCL Jury Project, Professor Cheryl Thomas.

Zealand¹⁵⁰ suggests that juries in fact gain little from the summation of the facts and some positively found it unhelpful:

“Jurors rarely mentioned the Judge’s summary of the evidence. Two specifically said that it repeated what they had heard already and was unnecessary, and a few others suggested that it was boring and they did not listen to it. For the most part, when jurors were questioned about the Judge’s summing-up, they focused on the directions on the law. Equally, when they indicated how the jury had taken the Judge’s directions into account during deliberations, they referred to the law and the standard directions but did not mention the evidence. While it is not possible to conclude with confidence that juries were unaffected by the content of the Judge’s summing-up on the facts, this does nevertheless suggest that the Judge’s comments in this respect are of only minor importance and that juries are unlikely to be affected by nuances or minor omissions in those comments.”

299. Neither does the law necessarily require exhaustive analysis of all the facts in the case let alone a repetition of all the points that were (or could be) made on behalf of the Crown and the defence¹⁵¹. The jury must be given help to focus on the real issues in the case.

8.4.4 Impact on trial length

300. Accordingly, although the impact should continue to be the subject of Professor Thomas’ research, in addition to the earlier recommendations in relation to prosecution opening speeches, defence identification of the issues immediately thereafter and a change of culture in relation to the Criminal Procedure Rules, the way in which the issues are put to the jury after the evidence has been concluded also bears review.

301. At present, although there is frequently a discussion with counsel as to the appropriate directions in law (and in many cases, a written Route to Verdict will be the subject of argument and, if necessary, ruling) such a discussion is in the absence of the jury. Then, in the presence of the jury, closing speeches almost invariably identify the advocates’ views as to the law (‘subject to the direction which the Judge will provide’). This view may follow the Judge’s prior analysis but not necessarily in his words; in any event, it can create room for confusion or, at best, is simply a repetition of that which the Judge has to say in any event.

302. On the other hand, the jury will be assisted if the Judge gives the formal directions as to the law (burden and standard of proof; separate verdicts; ingredients of the offence and route to verdicts

150 Warren Young et al.; *Juries in Criminal Trials, Part Two* (1999) paragraph 7.25. To what extent this research is replicated in this country remains to be seen.

151 See *Younas (Faisal) v HM Advocate* [2014] HCJAC 114.

etc.) before speeches, leaving evidence and other specific directions until after speeches¹⁵². That will focus the advocates on the need to fashion their speeches around the legal principles that the Judge has authoritatively identified.

303. As to the facts, it is important to underline that before the Judge summarises the evidence, the jury have heard the prosecution opening, each witness (examined and cross examined) and prosecution and defence closing speeches each addressing the facts from their respective positions. Whereas it is important that the Judge collects the issues together and identifies where the evidence relevant to those issues is to be found, the issue is the value to the jury of such an analysis.
304. It ought to be clear that this proposal should, other than in the most unusual of circumstances, lead to a significant shortening of the trial. Furthermore, given the volume, the time saved over a year should be substantial. It is worthy of note that Lord Justice Auld considered this issue at length and arrived at a similar conclusion¹⁵³ though there was no subsequent implementation of his recommendations.
305. I recognise that such a sea-change would be more welcomed by Judges if some training was available from the Judicial College. This is because trial Judges will have developed their own style, developed in some cases over many years, and may be reluctant to change what they believe is tried and tested. In addition, therefore, there will have to be tangible support for such an approach from the Court of Appeal (Criminal Division). If necessary, the issue should be considered by the Criminal Procedure Rule Committee: insofar as I am able, I will encourage support for the proposal both by the Committee and the Court.

8.4.5 Recommendations

306. **When appropriate, a Judge should be prepared to provide such directions as will assist the jury to evaluate the evidence either after the opening or prior to it being given. Directions on the approach to identification evidence provide one example.**
307. **The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the Judge understands it to be and to the issues and evidence in the case.**
308. **These questions – the ‘route to verdict’ – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached.**

152 This has been the practice by some Judges in the Crown Court at Isleworth for some time, although I understand it has only been adopted with the consent of the parties.

153 See paragraphs 41-55 of Chapter 11, p.532-538.

309. **These directions, along with the standard generic directions relevant to all criminal trials should be provided before speeches so that advocates can tailor their remarks to the law as the Judge has propounded it and so avoid repetition (frequently in slightly different language) of the legal principles.**

310. **The Judge should remind the jury of the salient issues in the case and (save in the simplest of cases) the nature of the evidence relevant to each issue. This need be only in summary form to bring the detail back to the minds of the jury, including a balanced account of the issues raised by the defence. It is not necessary to recount all relevant evidence. Appropriate training on the constituents of an effective summing up should be a standard part of the Crime seminars provided by the Judicial College.**

9 Transition

311. The proposals which emerge from this Review are designed to create a system which moves both effectively and efficiently from arrest to charge; from determination of plea either to sentence (in the event of a guilty plea) or allocation and pre-trial arrangements; from trial to final result. At each stage, those engaged at the time (whether police, CPS, defence lawyers, the court or NOMS) have to work not only to make best use of their own resources but also to have regard to the needs of others engaged in the same process. Developing those links and ensuring that all those in the CJS boat pull in the same direction will take time and energy both in the initiation phase and also in maintenance of progress.

312. Even greater difficulty will be generated by the need to establish new ways of working while, at the same time, dealing with the existing cases that are in the system but unresolved: what might be called 'legacy cases'. Thus, at the same time that the police and CPS are improving their processes so that the right decision is made at the earliest stage of a case and then progressed accordingly, they are having to deal with issues and trials in cases that are stuck in the system and which, because of lack of available courts, are unlikely to be tried for many months. This inevitably means having to work on cases proceeding in two different streams at the same time.

9.1 The Police and CPS

313. The scope of this Review does not extend into an analysis of the way in which the police service is financed or, more particularly, how that funding is split between the various public services which the police have to provide: it is therefore for Chief Constables within their own forces to determine how, for the period of transition, they will deal with the consequences of new cases having to be processed quickly while, at the same time, bringing older cases up to the necessary standard for prosecution and, if necessary, trial. In saying that, I do not deny or seek to minimise the size of the problem.

314. On the basis that the CPS is a prosecuting authority only (and has no other duties), its position is less opaque than that of the police. However, I am concerned that its problems are more serious because, unlike the police, there is no opportunity to divert resources from other areas of work unconnected with the prosecution of crime. Pulling resources from one area of work (such as advocacy) so that lawyers can take responsibility for new cases while dealing with the old work will be challenging. At the same time, Transforming Summary Justice will also have to be implemented. Having said that, TSJ and the related plans to reform processes in the Crown Court provide the fundamental building blocks for an efficient criminal justice system; CPS is pivotal to its success and there is no alternative to tackling the transition head on.

315. I recognise that the success of the new criminal justice systems and cultures which this Review

seeks to introduce and embed requires far more than delivery by the CPS: other agencies are involved and must play their full part. The overlap – or transition period – will, however, be particularly challenging and, in my view, simply cannot be achieved without help. The common platform will, in time, provide the scope for further savings but until the IT is available (which will not be in the period of this transition), the CPS will have to work with current systems.

316. In those circumstances, it is my view that the particular pressures on the CPS will have to be recognised. Although it is not a matter for me, one option for the DPP to consider would be whether the lawyers currently involved in advocacy in the Crown Court could be more effectively deployed. They could have responsibility of the day to day management of the additional work consequent upon the need to process the legacy cases, while at the same time dealing with the new work coming through TSJ and the implementation of the recommendations of this Review. In this transition phase, the Crown Court work could be undertaken by independent advocates. Although they would require funding for those hearings, beyond that they would not impose any resource burden on the CPS or generate personnel difficulties when the transition has passed and, hopefully with CJS Common Platform, a more effective and efficient method of working becomes embedded. **To that end, I recommend that the Treasury should be asked to fund the transition period for the CPS to ensure that the necessary work can be completed and the new systems implemented: although it would need detailed consideration, I anticipate that the period involved could be 12-18 months depending on the CPS area involved.**

9.2 HMCTS

317. The same problem will confront HMCTS where the distribution of funding for Crown Court crime is governed by the ‘currency’ of sitting days. Thus, each region is allocated a number of sitting days which represents the maximum work period within which to conduct the criminal business of the Crown Court. It is for that reason that court rooms might be empty while, at the same time, trials are delayed for want of Judges and staff to dispose of them.
318. This creates an acute problem. Already at present, there is at least one Crown Court centre which is fixing trial dates as far ahead as 2016 in cases in which the defendant is on bail. This is doubtless causing a considerable increase in the stress placed on victims and witnesses. In addition, such necessary practices increase the likelihood of defendants pleading not guilty, knowing that their trials will not come up for a considerable period by which time even if victims and witnesses have not lost interest or moved away (so that the case collapses), memories will be affected and the direct evidence less persuasive. Even if that does not happen and a guilty plea is entered, the mitigation of having the case hanging over the defendant’s head may well carry weight with the sentencing court. This creates a downward spiral in which the guilty plea which is ultimately entered and which was inevitable from the initial papers is not entered expeditiously. The consequence is further cost incurred in unnecessary case preparation and further delay which only further increases the pressure on lists.

319. If there is no available court time to dispose of the work, cases entering the system cannot be listed earlier. Priority has to be given to cases in which the defendant is remanded in custody and those cases which must attract accelerated listings (such as, for example, domestic violence or an allegation of sexual crime, particularly if a child is involved). The result is that the critical need to list all cases earlier, thereby maintaining the pressure to deal with the issues from the moment of charge, will not be achieved. Thus, in the same way that the CPS needs additional resources to cover the transition, so **HMCTS requires transitional funding to provide additional sitting days and available Judges to dispose of the legacy work while at the same time processing new cases earlier and with greater efficacy and efficiency.** It must also be recognised that legal aid costs in total will necessarily increase for the period as more work is being processed over the same period.

9.3 NOMS

320. The problems for NOMS are in part systemic and in part a consequence of recommendations I have made. In relation to the former, **negotiations (and, if necessary, contractual modifications) are required to improve the problems arising from**

(1) the ways in which PECS operates both in relation to timely delivery of defendants to court; (so as not to hold up the court) and

(2) the provision of dock officers leading to delay and steps put in place to ensure that remand prisoners are held close to their court of trial.

321. As to the latter, provision should be made for accessible electronic facilities to allow lawyers to take instructions from their clients. These electronic facilities made available to remand prisoners need to be restricted or locked to links only with lawyers. This will require only one officer to monitor (without hearing the content of) many such interviews and relieve pressure on legal visits. At the same time, such provision constitutes a much more efficient use of the time of the defence lawyer. **Funding for appropriate internet-based video conferencing at remand prisons will form an integral part of the package aimed at improving efficiency and reducing costs with positive benefits to the administration of justice.**

10 Further Observations: Out of Scope

322. This Review was established to focus on improvements to the systems of criminal justice that could be implemented without primary legislation. The mechanisms visualised included not only changes to the Criminal Procedure Rules and organisational changes but also alterations to the culture which surrounds practices in the criminal courts.
323. In the course of the Review, it has been necessary to revisit recommendations that have arisen from earlier reviews (and, in particular, the Review of the Criminal Courts of England and Wales conducted by Lord Justice Auld which reported in October 2001). These reviews led to recommendations which required legislation which was not taken forward notwithstanding its potential to lead to greater efficiency. A number have been discussed in this Review and although legislative change is outside the Terms of Reference which I have been asked to address, it is appropriate to identify other potential approaches so that policy decisions can be considered.

10.1 Appeals in cases from summary jurisdiction¹⁵⁴

324. At present, the less serious the alleged offence, the greater the possible rights of appeal. In the course of the Review, it has been suggested that this is disproportionate and, in the light of developments within the Magistrates' Court, no longer justifiable.
325. The Magistrates' Court deals with less serious crime. However, a person found guilty in the Magistrates Court may appeal as of right against conviction or against sentence to the Crown Court composed of a Circuit Judge or Recorder sitting with at least two lay Magistrates not involved in the case below¹⁵⁵. The procedure is the same as that for a summary trial and the parties are not limited to, or bound to call all, the evidence called before the Magistrates' Court. The Crown Court may affirm or amend the Magistrates' decision, or may remit the matter back to them giving its opinion for its disposal¹⁵⁶.
326. Both sides also have an additional right of appeal from a final decision of a Magistrates' Court¹⁵⁷ or, alternatively, from the Crown Court on appeal from the Magistrates' Court¹⁵⁸ direct to the High Court, Queen's Bench Division on points of law by way of case stated. Under this

154 See, in particular, the analysis provided by Lord Justice Auld in his report of the *Review of the Criminal Courts of England and Wales*, at Chapter 12.

155 See section 108 of the Magistrates' Court Act 1980.

156 See section 48 of the Supreme Court Act 1981.

157 Except where there is a separate statutory right of appeal to the High Court or where an enactment makes the Magistrates decision final.

158 See section 28 of the Supreme Court Act 1981.

procedure, one or other party (or both) may challenge a decision or other proceeding of the Magistrates on the ground that it is wrong in law or in excess of jurisdiction. Application must be made to the Magistrates to state a case for the opinion of the High Court: a refusal to do so (on the grounds that it is frivolous) can itself be challenged, with leave of the High Court, by way of judicial review. As in the case of a notice of appeal to the Crown Court, the application must be made within 21 days of the order of which complaint is made. Despite this route having been confined to points of law, there is scope for overlap between law and fact in that a finding of fact can be challenged on the basis that there was no evidence to support it or, expressed differently, one which no reasonable tribunal could have made. A defendant who applies to appeal straight from a Magistrates' Court to the High Court by way of case stated loses his right of appeal to the Crown Court.

327. The other route is to challenge the Magistrates' decisions or decisions of the Crown Court on appeal from the Magistrates' Court, in the High Court by way of a claim for judicial review. Judicial review is concerned with failure to exercise, or acting in excess of, jurisdiction, regularity of the decision-making process and, through it, the legality (including the rationality) of the decision itself. Although judicial review lies in circumstances where appeal by way of case stated is not possible, there is a considerable overlap between the two jurisdictions. It is generally more appropriate to go to the Crown Court if the question is essentially one of fact and by way of case stated to the High Court when Magistrates have acted within their jurisdiction but have made a mistake in law.
328. From the High Court, in a criminal cause or matter, with leave, a further appeal can lie to the Supreme Court in the event that a point of law of general public importance is involved in the decision. Thus, it is entirely possible that three levels of appeal can be initiated – from Magistrates' Court to Crown Court (which involves a complete rehearing), from Crown Court to High Court and from High Court to Supreme Court.
329. This is to be contrasted with appeals from the Crown Court which is concerned with the more serious criminal cases. In those cases, an appeal against conviction or sentence lies only with the leave of a High Court Judge or the Court of Appeal (Criminal Division). It does not consist of any form of rehearing but, in relation to conviction, is limited to challenging decisions of law or procedural irregularity and, in relation to sentence, to the question whether the sentence is wrong in principle or manifestly excessive. An appeal from the Court of Appeal lies to the Supreme Court but, again, only with leave on a point of law of general public importance.
330. There are several features of the present arrangements in relation to appeals from the Magistrates' Court which may be considered unacceptable. First, there are three partially overlapping routes of appeal. Depending on the matter challenged, a defendant may take his point of law to the Crown Court by way of rehearing or by one of two different procedures to the same tribunal in the High Court. Depending on which he chooses, a convicted defendant may make his way on a point of law to the High Court via a rehearing in the Crown Court or lose his right to

such a rehearing if he proceeds straight to the High Court.

331. Second, although the Magistrates' Court is not a court of record, notes of evidence are maintained (and necessary for the preparation of a case stated). Further, both lay Magistrates and District Judges give reasons for their decisions which require them to justify why and on what evidence they decided the matter and, where there was a conflict of evidence, why they have preferred one version over another. These reasons are available and can be challenged either on the basis that they are not justified by the evidence or, alternatively, that they reveal an error of law. At present, without restriction, there is an unfettered right of appeal against conviction which requires all the witnesses to attend court for a further trial. Restricting the right of appeal to a review of the type conducted in the Court of Appeal (Criminal Division) would avoid that obligation, subject (as can happen in the Court of Appeal) to an order, in appropriate cases, that the case be re-tried.
332. Third, it is anomalous that there should be a right of appeal available as of right and capable of turning on points of law from a Magistrates' Court to the Crown Court (which must be by way of rehearing) when the two other forms of challenge on points of law going to the High Court require some form of judicial filter whether because of the need for leave or the ability to refuse to state a case.
333. Finally, there is little point in retaining two distinct and partially overlapping procedures for challenging Magistrates' Court jurisdictional and other legal errors in the same tribunal in the High Court. A similarly odd position is that, depending on the form of challenge chosen, different time limits apply either to the start of the process or the stages by which it reaches hearing.
334. If this approach was adopted, an application for permission to appeal could be in writing, as would the Judge's decision, unless for any reason of urgency (e.g. bail), the application should be made orally. The appeal itself could be heard by a Judge sitting alone (either a circuit Judge or a High Court Judge if the case merited it) or, particularly in relation to sentence, a Judge with Magistrates. Importantly, the case would be heard not by way of rehearing, either on conviction or on sentence, but on a point or points of law and on other grounds that presently to the Court of Appeal that a conviction is 'unsafe' or a sentence unlawful, wrong in principle or manifestly excessive.
335. It is appropriate to mention a countervailing consideration. If such restrictions were introduced, reasons provided by the bench would be subject to much greater scrutiny and could require more detail than is presently provided. In that event, more time would be taken fashioning and deploying them: to that extent, the restriction could be counter-productive.

10.2 Changes to the right to elect trial by jury

336. Although expressed views are not unanimous, the Review has heard the voices of many involved in the criminal justice system calling for a change to the right to elect trial by jury. A court, not a defendant, it is said, should decide how he is to be tried.
337. The right to jury trial began in the 19th century as an elective right to *avoid* the obligation of trial by jury in a limited number of indictable cases. To understand this, it must be put in context of the harsher criminal law of the day in which most crimes were indictable and subject to severe punishment, and in which the trial process provided very few of the protections currently afforded to defendants.
338. In drawing a line between the two forms of trial, the public has a proper interest in the financial and human cost of the criminal justice system and how best to apply its limited resources, with recognisable justice to all. Ultimately, it is a policy decision, according to the nature and seriousness of the offence, and in the light of the public interest, how different offences should be tried.
339. It is of course implicit in a scheme of ‘either-way’ offences that – depending on the seriousness and other circumstances of the case – some cases simply do not merit the more elaborate, costly and time-consuming procedures of the Crown Court. Others by their very nature, or, perhaps, the consequences to those accused of crime, justify different facilities and more searching procedures than those which the Magistrates’ Court may offer.
340. If the decision as to mode of trial falls to the Magistrates’ Court, a right of appeal – for both defence and prosecution – from any mode of trial decision on which they were at issue should lie with a Circuit Judge nominated for the purpose. Notwithstanding the limited number of additional hearings which this route of appeal may generate, it is clear from the figures provided above that there would be very substantial savings in time and money because of the diversion of cases away from the Crown Court. The number of such cases is not restricted to those that presently elect trial: if the Magistrates are prepared to retain trial in more cases than at present, it is inevitable that a number of those will result in election.
341. I do no more here than attempt to reflect the strength of the feeling on this topic of those who contributed to the Review and suggest that the excellent work carried out in this regard by Lord Justice Auld is revisited. I add only the fact that jurors, required to give up their time to undertake that important civic duty not infrequently at considerable personal cost (on the basis that the allowances do not reach the level of their earnings) are equally not infrequently concerned that their time is ‘wasted’ by what are perceived to be trivial cases, whether the value of the sum stolen or the loss caused is far exceeded by the cost to the public purse of the trial. This issue is of the highest order of public policy; if the right of election is to be maintained,

however, it must be paid for by the provision of appropriate funding for the system.

342. In summary, one contributor to the Review noted the comments of Lord Hardie, then the Lord Advocate, in the Committee Stage of the first Mode of Trial Bill in the House of Lords:

“...in determining the appropriate forum for trial, an objective assessment founded on relevant and specified criteria would appear to be more just and equitable than one dependant on the subjective views and considerations of the accused. The objective approach balances the interests of the accused against the interest of society in general and victims and witness in particular.

What is essential in any system is that the various interests are balanced; that society’s interests, as represented by victims and witnesses, are balanced against the interest of the accused. But what must be ensured is that the accused is protected from the effect of arbitrary decisions. Who better to perform such a task than an independent judiciary?”

10.3 Changes to indictable only offences

343. In the course of the Review, a number of suggestions have been made in this area. They include the proposition that trial by jury should remain the primary form of trial of the more serious offences triable on indictment, but that this should be subject to two exceptions:

- 1) Defendants in the Crown Court should be entitled with the court’s consent to opt for trial by Judge alone;
- 2) In serious and complex frauds the nominated trial Judge should have the power to direct trial by himself (or, if the defendant requests, by himself);

10.3.1 Defendant’s option for trial by Judge alone

344. This is a widespread feature of other common law jurisdictions based on our system of trial by Judge and jury. It is widely used in the United States, and in various forms in Canada, New Zealand and Australia. The popularity of the approach appears to be because it is a simpler, speedier and cheaper procedure than trial by jury. It may also be an attractive option for defendants. Possible reasons include¹⁵⁹:

- Defendants with ‘technical’ defences who wish a verdict to be accompanied by appealable reasoning or who, in any event, want a fully reasoned decision;

¹⁵⁹ With gratitude to the work of Professors John Jackson and Sean Doran, *Judge Without Jury* (Clarendon Press, 1995)

- Some defendants, often in cases which are factually or legally extremely complex have a real anxiety that the tribunal will be able fully to understand their case;
- Defendants who are charged with offences that attract particular public opprobrium, such as sexual/sadistic violence, or from minorities or sects who may consider the Judge to be a more objective tribunal than a jury;
- Where there is publicity adverse to the defence; and
- Defendants in cases turning on alleged confessions or identification, where Judges tend to be more rigorous in the weight afforded to alleged confession and in their assessment of evidence of purported identification than juries tend to be.

345. It remains for further consideration whether it should apply to all indictable offences, as it has done in Canada since 1985¹⁶⁰ or exclude the most serious cases as in New Zealand where offences carrying a maximum of 14 years imprisonment or a mandatory life term are excluded¹⁶¹.

346. If this proposal is worth pursuing, it would be more appropriate to allow the Judge to decide on a case by case basis whether to accede to the defendant's request for trial without jury, rather than imposing a general statutory limit on offences to which the option could apply. The Judge should decide the matter further to hearing representations from both sides. Further, the Judge should be entitled to override the defendant's wish for trial by Judge alone if he (the Judge) considers that the public interest requires a jury, for example, in case of certain offences against the State or public order.

10.3.2 Serious and complex frauds

347. The special problems presented by serious and complex frauds need little rehearsal, and they have been of concern for some time. Over thirty years ago, Lord Roskill was appointed to chair a Fraud Trials Committee to consider how more justly, expeditiously and economically these cases could be conducted. In 1986 the Committee reported, and a number of its recommendations were implemented in the Criminal Justice Act of 1987.

348. One recommendation which was not implemented was the replacement of juries for trials of serious and complex fraud¹⁶².

349. In 1993, the Runciman Commission did not feel able to make recommendations on the

160 Canadian Criminal Code, (RSC, 1985) C-46, ss. 473, 476.

161 Crimes Act 1961, ss361 A-C and 361B(5) and see generally the New Zealand Law Commission's Report 69, *Juries in Criminal Trials* (Wellington NZ, February 2001) paragraphs 58-71.

162 See paragraphs 8.47 – 8.51.

matter without the benefit of jury research which it considered was barred by section 8 of the Contempt of Court Act 1981¹⁶³.

350. Sir Robin Auld, in 2001, was rather bolder: he considered that jury trials in such cases should be replaced by a tribunal of a Judge and two lay members¹⁶⁴.

351. Since then, the debate has resurfaced occasionally, but the arguments advanced for and against are broadly the same:

352. Arguments for

- Jury trial is a democratic institution and the right of a citizen in all serious cases – which of course includes serious and complex frauds;
- The random nature of jury selection ensures fairness and independence;
- The issue for the jury to resolve is mostly one of dishonesty, which is of course quintessentially a matter for the jury. By reason of their number and mix they are as well as, if not better equipped than, a smaller tribunal, however professional, to assess the reliability and credibility of witnesses;
- There is no evidence – for example in the form of jury research – that juries cannot cope with long and complex cases or that their decisions in them are contrary to the evidence;
- There is openness in the parties being required to accommodate the jury's newness to the subject matter by presenting their respective cases in a simple and easily digestible manner.

353. Arguments against

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

163 See Chapter 8, paragraphs 76–81, *Royal Commission on Criminal Justice*.

164 See Chapter 5, paragraph 184, p.204.

- The length of such trials – sometimes of several months – is an unreasonable intrusion on jurors’ personal and working lives, going way beyond the conventional requirement for such duty of about two weeks’ service;
- Judges, with their forensic and legal experience would be better equipped to deal more justly and expeditiously with such cases;
- That would also have the benefit of greater openness, since the Judge would provide a fully reasoned and appealable decision instead of the present inscrutable verdict of the jury;
- The length of jury trials in fraud cases is very costly to the public and also, because of limited judicial and court resources, unduly delays the efficient disposal of other cases waiting for trial.

354. The possibility in such cases of replacing a jury with a Judge (or a tribunal of Judge and two specialist lay members) was analysed with great care by Lord Justice Auld¹⁶⁵. He concluded not only that the proposal had considerable merit, but also that it ought to be implemented as soon as possible. No legislation was then immediately proposed.

355. It is worth noting that one of the main stated reasons for not implementing many of the recommendations which have been made in this area is the hope that other reforms would tackle the problem. Evidently, they have not. If anything, comments made to the Review suggest that such trials appear to be even longer and more technically challenging.

356. In the event, in 2003, legislation was passed which did implement this recommendation although affirmative resolutions were required before it could be brought into effect. No such resolution was ever tabled and the provisions were repealed¹⁶⁶. While I hesitate to suggest that further consideration be given to a proposal which has been the subject of recent Parliamentary scrutiny, it is clear that the very real expense of exceptionally long trials would be reduced if Judges (with assessors) conducted these trials. First, they would understand (or far more readily understand) the financial and commercial context, likely to be entirely foreign to those not involved in the relevant business world. Second, they could pre-read and direct the parties to the central issues thereby avoiding what would otherwise be the necessary deployment of a great body of complex evidence.

357. I am aware that the Judges at Southwark Crown Court (who try the vast bulk of the most serious fraud) believe that more time and expense is taken up in the interlocutory hearings surrounding these cases rather than the trials. If the parties know that the Judge who is to find

¹⁶⁵ Chapter 5, paragraphs 173-206, pages 200-214.

¹⁶⁶ Section 43 of the Criminal Justice Act 2003 allowing for non jury trial in serious and complex fraud trials has been repealed by s. 113 of the Protection of Freedoms Act 2012.

the facts is dealing with all aspects of the case, however, it is not implausible to suggest that greater focus on the real issues (rather than satellite concerns) will result. It is worth adding that trials of similar complexity in the Chancery Division and the Commercial Court can be much shorter because the Judge is able to provide feedback to the parties both on the evidence and the arguments that appear persuasive and those that have only of marginal (if any) relevance.

358. It is, of course, entirely a matter for Parliament to determine how these cases should be resolved. However, if these trials are to continue to be conducted with juries, they will have to be funded appropriately¹⁶⁷.

10.4 A Unified Criminal Court

359. There was a call for a unified court in the 2001 report by Lord Justice Auld¹⁶⁸. I am not going to rehearse the reasoning and options put forward by that report. What is clear to me is the specific solutions put forward in 2001 were very much suited to the environment then. What still carries significant weight is that a unified court would allow for greater jurisdictional flexibility in the allocation of cases, and the ability to match judicial resources to caseload.

360. The creation of HMCS and subsequently, in 2011, of HMCTS brought into being the single administrative body that was seen by Lord Justice Auld as the starting point for a unified criminal court. The administrative support provided by HMCTS to the judiciary reflects his vision with clusters of Crown and Magistrates' Courts being supported by single administrative units. However, I believe three not insignificant factors have held back the move to a fully unified system. These are the lack of a single IT system, the very distinct physical estate the two jurisdictions still maintain and the absence of legislation to support the free movement of criminal work between the jurisdictional tiers.

361. Two of the above are being addressed, the first through the development of the CJS Common Platform and the second through HMCTS reform programme. These two alone will only improve the single administrative function: legislation is required to modernise the management of cases that a single system would offer.

362. Currently all criminal cases start in the Magistrates' Court and then, in either way cases, subject to allocation criteria, some are sent to the Crown Court. I have made a number of observations on the importance of getting this decision right under our current system. The reason the decision as to allocation is so crucial is that there are currently very limited ways for cases to move back to the summary courts once sent. A system needs to be in place so that the right judicial and financial resources are matched to the right type of case¹⁶⁹. Criminal cases evolve

167 See the discussion in *R v Crawley* [2014] EWCA Crim 1028.

168 The Auld Report, Chapter. 7, p. 269-314

169 Indictable only offences commencing in the Magistrates' Court is one such example of mismatching resources.

and change and this needs to be acknowledged and procedures put in place to manage this reality.

363. A unified criminal court does not mean a concentration of all courts in present Crown Court centres or Magistrates' Court centres. Instead, it means an examination of what other estate is held by statutory agencies within a given local area and a creative consideration of how these combined assets could be used more flexibly.

10.5 Technical Changes

364. In addition to changes to substantive law and procedure, a number of technical changes would undeniably facilitate the earlier despatch of criminal business.

10.5.1 Is there a need for an indictment?

365. The need for change in this area was identified as long ago as 1981 by the Philips Royal Commission when it recommended the replacement of the alternative methods of commencing a prosecution. It described the existing arrangements as "the relics of the mid-nineteenth century system". Sir Robin Auld's report of 2001 broadly supported – and augmented – the Philips recommendations, but nothing of any consequence has been done to change the structure in the 33 years since Philips reported.
366. Currently, when a case reaches the Crown Court, the original charge or summons is withdrawn and replaced by an indictment. An indictment is in effect simply a written accusation of the crime(s) concerned. It is signed, usually by a member of court staff. Irrespective of where the case started its life, the Crown Court may not try it until the above procedure has been completed. This is notwithstanding that all the indictment does (or should do) is to re-state in a different form the contents of the charge or summons. Although indictments, charges and summonses are governed by similar considerations as to particularity of accusation, duplicity, accuracy, etc., the formalities of drafting and preferring an indictment are peculiar to the Crown Court, in the main contained in the Indictments Act 1915, though the form and content and the service of an indictment are now governed by Rule 14 of the CrimPR 2014. Additional guidance is contained in the Consolidated Criminal Practice Direction Part IV.34.
367. The many thousands of indictments prepared each year amount to a significant and unnecessary administrative burden for the prosecution and the courts to administer. The most persuasive argument in favour of the current system – that it acts as a check on the legal basis of the prosecution case – does not withstand examination, since neither by law nor practice does the signatory normally consider the contents of the indictment. That is left for the Judge at the PCMH, or other pre-trial hearing. It would be far simpler and more efficient to maintain the same form of charge throughout the case and subject it to the same procedural and drafting requirements at all stages. To signify the final settlement of the prosecution case, the prosecution

should be required to serve on the court and all parties at the latest by a specified hearing a final trial copy of the charges on which it will rely. This permits a review of the charges to be undertaken in the same way as takes place today for the more complicated indictments. Thereafter, further amendments or alterations should be permissible only with the leave of the trial court.

10.5.2 Allocation Decisions

368. Consideration should be given to moving the responsibility for allocation guidelines from the Sentencing Council for England and Wales to the Criminal Procedure Rules Committee: this would require an amendment to the Coroners and Justice Act 2009. First, allocation is a procedural mechanism for ensuring that a particular case is heard before the most appropriate court: is affected by sentence but not, in any sense, part of the sentence. Secondly, many directions as to allocation as to judicial control of cases are already contained within the Rules or Directions. Third, the mechanism for change in the Sentencing Council generally mandates a lengthy consultation process; such a move would allow for a swifter mechanism for adjustment more responsive to developing circumstances.

10.5.3 Consolidation of Sentencing Law and Practice

369. Primarily for reasons not connected to the efficient running of the criminal justice system, over the last 25 years sentencing law has been subject to frequent and substantial change. The result is that imposing a sentence on a convicted defendant has become an unnecessarily complicated and difficult process. This is a frequent complaint from the judiciary at all levels and is undeniably well founded.

370. So difficult a task is it sometimes that it prompts judicial comment such as this:

“Section 174(1)(b)(i) of the Criminal Justice Act 2003 requires a court passing sentence to explain to an offender in ordinary language the effect of the sentence. This requirement has been in place since 1991. These proceedings show that, in relation to perfectly ordinary consecutive sentences imposed since the coming into force of much of the Criminal Justice Act 2003, that task is impossible. Indeed, so impossible is it that it has taken from 12 noon until 12 minutes to 5, with a slightly lengthier short adjournment than usual for reading purposes, to explain the relevant statutory provisions to me, a professional Judge.

The position at which I have arrived and which I will explain in detail in a moment is one of which I despair. It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory

provisions what a sentence means in practice. That is the effect here.”¹⁷⁰

371. Although guidelines issued by the Sentencing Guidelines Council and, more recently, the Sentencing Council for England and Wales have meant that it is no longer necessary to trawl through decisions of the Court of Appeal (Criminal Division) to identify the appropriate range for a particular offence, statutory provisions regarding sentencing in general and ancillary orders in particular are almost impenetrable. They are to be found scattered around different statutes, some of the provisions coming into force at different times (or, as yet, not at all). Time (and cost) is expended in ensuring that the correct provisions are applied.
372. For some years, the Law Commission has been keen to incorporate codification of the law and practice of sentencing into its work plan: for 2014, that suggestion has now been taken up. In the circumstances, I commend that decision: it is high time for proper consideration to be given to a comprehensive consolidation of sentencing practice and procedure. Whether or not this takes the form of a ‘Sentencing Code’ is for the Law Commission to determine. This work and the implementation of appropriate recommendations should be undertaken as a matter of urgency.

¹⁷⁰ *R (on the application of Noone) v Governor of Drake Hall & Secretary of State for Justice* [2008] EWHC 287 (Admin) per Mitting J, at paragraphs 1 and 2.

11 Summary of Recommendations

Chapter 2: Overarching Principles

Getting it Right First Time

1. This is particularly important for the police and the CPS who are the gatekeepers of the entry into the criminal justice process. If they make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence, considerable delay can be eradicated. [Paragraph 25]

Case Ownership

2. For each case, in the police, the CPS and for the defence, to maximise the opportunities for case management, there must be one person who is (and is identified to be) responsible for the conduct of the case. [Paragraph 26]
3. In order for case ownership to work in practice, the Legal Aid Agency should change the definition of 'instructed advocate' to the advocate who conducts the main hearing. [Paragraph 31]

Duty of Direct Engagement

4. The Criminal Procedure Rules (and Practice Directions, as appropriate) should:
 - 4.1 place a duty of direct engagement between identified representatives who have case ownership responsibilities; [Paragraph 33]
 - 4.2 require that engagement to be at the first available opportunity before the first hearing; [Paragraph 34]
 - 4.3 place an obligation on any party to justify the need for an interlocutory hearing to take the form of a formal court hearing with all parties present. [Paragraph 37]

Consistent judicial case management

5. Effective and consistent judicial case management require the court robustly to manage its work. To that end, all parties must be required to comply with the Criminal Procedure Rules and to work to identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency. [Paragraph 38]
6. To assist the courts in consistent decision making statistical information should be more readily available, tailored to the needs of the court specifically to assist with allocation and sentencing decisions. [Paragraph 39]

Chapter 3 The role of IT

7. Essential prerequisites for remote hearings are high quality equipment; digital recording and access; a mechanism for cases to be queued; involvement of advocates instructed for the substantive hearing; video facilities in prison (both for participation in court proceedings and out of court conferences; a mechanism for showing exhibits; training. [Paragraph 47]
8. A committee should be constituted of representatives from the relevant participants in the criminal justice system¹ to determine best practice in the conduct of such hearings which should then be included in Criminal Practice Rules or Directions. [Paragraph 47]
9. Moving to a position where interlocutory hearings occur out of court, the utilisation of audio and video hearings, with a view to countrywide implementation, should be made a priority within the work of the CJS Efficiency Programme. [Paragraph 49]
10. Within the prison estate, appropriately locked-down computers linking lawyers and in-custody clients via internet-based video conferencing would allow instructions to be obtained far more efficiently and with considerable saving of time and public money. Similar facilities would also be of value in police stations. [Paragraph 50]
11. Part of the work of the CJS Efficiency Programme and the enhancement of IT within the courts must be to ensure that digital evidence (in whatever form) can be presented easily and without the delay or complications associated with present attempts to do so. [Paragraph 51]
12. Further testing and pilots involving the use of body worn video should be encouraged and

¹ This should include the Judicial College, HMCTS, the Bar, the Law Society, the CPS, the Probation Service and NOMS.

mechanisms developed to ensure that this evidence can be deployed in court without disruption to the business of the court. [Paragraph 57]

Chapter 4 Allocation

13. Those who make charging decisions must be appropriately trained in the law (including the evidential requirements of specific offences) and the CPS standards and practice relating to appropriate levels of charge depending on the specific facts. There must also be a mechanism for review of inappropriate charges and a proper line of accountability to the Director of Public Prosecutions. [Paragraph 63]
14. The allocation procedure could be conducted more quickly if the defence was invited to indicate at the outset if the accused intends to elect Crown Court trial. If so, there would be little to be gained from hearing sometimes lengthy representations about whether the case is suitable for summary trial. A Criminal Practice Direction allowing for this change in approach should suffice. [Paragraph 77]
15. Magistrates' Courts must be encouraged to be far more robust in their application of the allocation guideline which mandates that either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient. The word 'likely' does not mean 'possible' and permits the court to take account of potential mitigation and guilty plea, so can encompass cases where the discount for a guilty plea is the feature that brings the case into the Magistrates' jurisdiction. It is important to underline that, provided the option to commit for sentence is publicly identified, the decision to retain jurisdiction does not fetter discretion to commit for sentence even after requesting a pre-sentence report. [Paragraph 78]
16. Local Resident and other Circuit Judges should be encouraged to engage with Magistrates' training to assist in the approach to allocation decisions and to highlight the extent to which sentences imposed in the local Crown Court are within the sentencing powers of magistrates. This training can supplement training of legal advisors and magistrates which should incorporate analysis of some of the common errors which impact on the current allocation process. The Judicial Business Group responsible for the management of the Magistrates' Court must monitor allocation decisions with the benefit of feedback from the Crown Court and be accountable for training in this area. [Paragraph 79]
17. The Sentencing Council should reconsider the Allocation Guideline and the Magistrates' Courts Sentencing Guidelines in the light of the amendments brought about by the implementation of Schedule 3 of the Criminal Justice Act 2003 (bringing committals to an end) and further to encourage the retention of jurisdiction in cases where a combination of lack of complexity and gravity point to the conclusion that summary trial is justified and does not satisfy the test that it is likely that the court's sentencing powers will be insufficient even if, after full examination of the circumstances, it then becomes appropriate to commit for sentence. [Paragraph 80]

18. The Sentencing Guideline on Allocation should be construed such that, in cases where magistrates are uncertain about the adequacy of their powers (short of it being likely that they are not), they can retain the case and commit for sentence if they later take the view that the case falls outside their sentencing powers. This possibility needs to be made clear to the accused. [Paragraph 81]
19. The judiciary should investigate the reasons for differences in allocation in different parts of the country for which purpose HMCTS should collect and provide the appropriate statistics; feedback should be available for local Magistrates' Courts on the comparative information. Part of the training and refresher training for Magistrates should revolve around the significance and impact of allocation decisions. [Paragraph 82]

Chapter 5 The Magistrates' Court

20. I fully support the principles behind Transforming Summary Justice. The ten key characteristics which TSJ identifies are the essential building blocks for a simple summary process and echo earlier drives for efficiency. The scheme will require substantial commitment from all agencies and those working in the Magistrates' Courts whose cooperation, engagement and collaboration will be vital if TSJ is to have the success that is necessary to improve summary justice. [Paragraph 86]
21. Given the nature of the TSJ process at the pre first hearing stage (bail cases having a 14 or 28 day lead in time), I strongly encourage the parties to take advantage of this period and enter into early discussion in order that the first hearing is as effective as possible. [Paragraph 92]
22. In such offence types characterised by high guilty plea rate and simple file build, I would urge those implementing TSJ to examine ways in which a fast track approach to first hearing for some offences could be achieved. [Paragraph 94]
23. I would therefore recommend that the LAA work with the CPS and the defence community in order to introduce a process by which details of the named lawyers for prosecution and defence in any particular case can be matched and exchanged, thereby facilitating the early disclosure of Initial Disclosure of the Prosecution Case (IDPC). [Paragraph 96]
24. When the above is in place the Criminal Procedure Rules Committee should consider rule amendments, first to create a firm responsibility on the prosecution to provide the IDPC to the identified defence representative at the earliest opportunity and secondly for the identified defence representative and CPS advocate to engage in discussions about the case at the earliest opportunity. [Paragraph 97]

25. The LAA should examine the possibilities of a redistribution of the money available for defence lawyers, to support the efforts required for early engagement with clients so as to resolve the case or identify the true issues. [Paragraph 99]
26. HMCTS should establish a single Case Progression Officer and develop processes which move case progression into the hands of appropriate legal or other teams within HMCTS, using currently available technology where it is appropriate and of value. [Paragraph 107]
27. A Justices' Legal Advisor should have power to extend time pursuant to the Criminal Procedure Rules subject only to the trial date remaining unaffected. To support a more focused approach to out of court case progression consideration should be given to extending case progression powers of Justices Legal Advisers. [Paragraph 114 and 117]
28. To assist with the management and efficient disposal of cases, the recommendations of the Disclosure Reviews should be implemented. The role of Magistrates within the Early Guilty Plea scheme should also be emphasised. Both should be incorporated into local bench training events/updates so appropriate intervention is effective and timely. The Judicial Business Group responsible for the management of the Magistrates' Court must monitor performance in these areas with the benefit of liaison with the local circuit judiciary to ensure consistency. This will both provide a degree of accountability but will also highlight possible differences in approach which can then be the subject of further consideration. [Paragraph 122]

Chapter 6 Listing

29. I suggest that if there has been a 'not guilty' indication at the Magistrates' Court and a 'guilty' plea entered at the first Crown Court hearing, it should be open to the judge, exercising his discretion, to reduce the credit for that plea, it not having been tendered at the first available opportunity. [Paragraph 142]
30. The present approach to multiple listing, while it provides an immediate solution to the twin problems of optimum court utilisation and timely hearings, is also an inefficient means of organising the court's work and it frequently leads to dissatisfaction on the part of victims, witnesses, the general public and the professions. I therefore recommend that steps are taken to enable the courts to move towards single/fixed listing. The Judicial Business Group for the Magistrates' Court and the Resident Judge for the Crown Court should monitor the operation of listing and be accountable for its development best to meet the needs of the court and its users. [Paragraph 144]
31. Consideration should be given to an increased use of thematic listing. [Paragraph 145]

32. Changes should be considered to the traditional opening and closing hours of the Magistrates' Courts as a means of tackling some of the inefficiencies identified in this Review. However, the views of the public and all court users should be taken into account when deciding on a new model. [Paragraph 150]
33. There should be a reduction in the number of orders that are made for pre-sentence reports (with legislative change considered) and greater consistency in the presence of probation officers at court to ensure that oral and stand down reports can be provided. [Paragraph 156]
34. A judge should be involved in the National Improvement Board (responsible for setting performance standards) so that the judicial perspective of what is being measured is fully understood and relevant statistics kept accordingly. [Paragraph 162]
35. A small cross-circuit working party of Presiding Judges and Resident Judges should be created to consider the HMCTS Data Envelopment Analysis tool and to identify measures which assist in assessing the true effectiveness of the Crown Court. A similar approach should also be adopted for the development of the data collection for the CJS Common Platform. [Paragraph 163]
36. Whilst accepting that the creation of CJS-wide performance measures may take some time to establish, I consider they would provide important tool as part of the endeavour to raise standards. [Paragraph 164]

Chapter 7 Crown Court Pre Trial

37. I wholeheartedly endorse the EGP scheme. My support is based upon a number of factors not least of which is the extensive work carried out over the last 12 months and, importantly, the undertakings given by all parties in the associated work on the TSJ scheme upon which the anticipated benefits of the scheme are founded. [Paragraph 183]
38. I would recommend that the LAA examine a fee mechanism that rewards early significant engagement with the prosecution that results in the more effective and efficient early disposal of cases. [Paragraph 190]
39. I recommend that the Committee and the Judicial College consider ways of improving the extent to which criminal practitioners and judges understand, engage with and put into daily practice the requirements of the Criminal Procedure Rules. [Paragraph 193]

40. I recommend that there should be one case progression officer, responsible to the judge whose role will be to ensure that all the participants have complied with their obligations at each stage of the case, and especially as regards judicial orders. [Paragraph 195]
41. The police, CPS and defence practitioners must be held accountable for repeated default. Courts should therefore maintain a record of failures to comply with the Criminal Procedure Rules and insist on a compliance court appearance once a pattern of failure is identified: Presiding and Resident Judges should consider how best this can be achieved locally, ensuring that the focus of this mechanism addresses the real problem of delay and non-disclosure and is not a means by which tactical advantage may be taken by one party from technical failures to comply that are inconsequential to the real issue. [Paragraph 202]

Chapter 8 Crown Court Trial

Maximising available time in the Crown Court

42. In relation to prisoners arriving at court on time. I would urge those responsible to reconsider the terms of any future contract with prisoner movement providers. They must demand greater efficiency and properly manage performance of the contract. NOMS must also focus to a greater extent on re-organising the way that remand prisoners are processed and on ensuring that they are held in custodial institutions that are near to the court before which they are appearing, so that long journeys are avoided. [Paragraph 210]
43. There must be provision in any future contract to benefit financially from the increasing efficiencies which will be derived from technological advances and improved working practices. [Paragraph 212]
44. With immediate effect, constructive dialogue must take place between resident judges, senior prison staff and prisoner movement providers as to how best to adapt the existing arrangements to achieve maximum efficiency. I know that in some areas engagement of this sort takes place. I endorse it, and encourage others to follow suit. [Paragraph 213]
45. In relation to court sitting hours and flexible court arrangements, it would certainly be of value to time table case management or other hearings which can be conducted either by joint conference telephone or by some form of video conferencing outside court sitting hours so that instructed advocates can take part without disrupting trials which they are then undertaking. [Paragraph 217]

46. The number of cases in which the ‘Maxwell’ approach could be adopted is likely to be very limited, for example, to lengthy, complex trials where defendants are on bail or, perhaps, for certain terrorism trials at Woolwich Crown Court: before adopting this procedure in any case, the consent of a Presiding Judge must be obtained. The broader principle operating in such arrangements is also worth emphasising: there must be a willingness and commitment on the part of everyone involved to work flexibly to achieve greater efficiency. I encourage judges actively to consider ways in which – appropriate to local conditions – they may adapt this principle. [Paragraph 222]

47. **Expert evidence**

47.1 In relation to the more esoteric areas of science, more research as to its validity is needed. This is so in particular in relation to those disciplines where there is very little peer reviewed, published evidence. [Paragraph 228]

47.2 There are differing views on the question of statutory powers for a Forensic Science Regulator, but my view is that such powers are now necessary to ensure and if necessary enforce compliance with quality standards. [Paragraph 229]

47.3 Courts must use more frequently their power (pursuant to CPR 33.6(2) of the Criminal Procedure Rules) to direct a discussion between experts and jointly agree at the earliest possible stage before trial those issues on which they agree and those on which they do not, and to prepare a joint statement for use in evidence indicating the measure of their agreement and a summary of the reasons for their disagreement. [Paragraph 236]

47.4 I firmly support the development of suitable mechanisms whether in the form of ‘primer’ documents or electronic presentation aids relating to the most common forms of forensic evidence. [Paragraph 237]

47.5 The Criminal Procedure Rules Committee should consider the terms of the certificate required as part of the standard assurance that every expert report must carry. [Paragraph 242]

47.6 When it is appropriate, in a publicly funded case, at an early hearing or in writing, a fully explained application should be made for expert evidence and, bearing in mind the impact on public funds and the obligation to deploy limited resources proportionately, the court should be prepared to provide a reasoned decision as to whether it is justified: this could be done by email or following a video hearing. If it is, that direction should

be regarded by the Legal Aid Agency as strong evidence to support the application such that if it decides not to grant funding, it must provide full reasons which must be passed to the relevant court. [Paragraph 244]

47.7 The Criminal Procedure Rules should encourage greater use by legal practitioners of video-conferencing and other similar technology for communicating and conferring with experts in preparation for trial. [Paragraph 245]

47.8 The law and the provision of facilities on a national basis should be developed to encourage experts to give evidence by video link or other similar technology in appropriate cases. [Paragraph 246]

48. **Achieving Best Evidence**

48.1 After a first general investigative interview conducted in accordance with best practice (taken from the ABE practice guide), in most cases, there should be a second, far shorter interview, ordered, chronologically presented and directed only to the relevant material. It is this interview that should be presented as examination in chief. [Paragraph 250]

49. **Use of remote witness links/video testimony**

49.1 I recommend that a review of training for court staff on the efficient use of court technology is undertaken and refresher training implemented as appropriate to ensure that in each court centre, there are is always at least one member of staff with sufficient knowledge to ensure that courts are deriving as much benefit as possible from existing technology. As the technology is improved, that training should be further extended. [Paragraph 254]

49.2 I recommend that there is a greater involvement by judges and court staff on a local level in the manner in which future technological developments are implemented. [Paragraph 255]

50. **Ground rules approach**

- 50.1 I accordingly recommend that consideration be given to specifically and unambiguously extending the power of the court to prevent repetitious or otherwise unnecessary evidence and to control prolix, irrelevant or oppressive questioning of witnesses. For clarity, if approved, a Practice Direction or decision of the Court of Appeal (Criminal Division) would be necessary: the alternative would be legislation. [Paragraph 264]
- 50.2 Ground Rules arrangements ought to be extended to all categories of ‘vulnerable’ witness. In due course, consideration should be given to whether or not this approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses). [Paragraph 267]
- 50.3 I would encourage the ATC to expand the range of toolkits to encompass as many areas of criminal practice as practicable, and encourage the judiciary to promote the use of such toolkits as a means of raising – and then maintaining – standards of advocacy. [Paragraph 271]

51. Opening Speeches

- 51.1 I recommend that the jury should not be overloaded by an opening which provides greater detail of the proposed evidence or the law than is demonstrably appropriate to their understanding of the case and the issues. [Paragraph 274]
- 51.2 I recommend that the Criminal Procedure Rules be amended so as to require, immediately following the prosecution opening, a public identification by the defence of the issues in the case. [Paragraph 279]
- 51.3 A change of culture so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case is essential. Trial judges should approach each case with these principles in mind actively manage the case accordingly; the Court of Appeal (Criminal Division) should support judges in this endeavour. [Paragraph 281]

52. Route to verdict

- 52.1 When appropriate, a judge should be prepared to provide such directions as will assist the jury to evaluate the evidence either after the opening of the case or prior to it being given. Directions on the approach to identification evidence provide one example. [Paragraph 306]
- 52.2 The judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the judge understands it to be and to the issues and evidence in the case. [Paragraph 307]
- 52.3 These questions – the ‘route to verdict’ – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached. [Paragraph 308]
- 52.4 These directions, along with the standard generic directions relevant to all criminal trials should be provided before speeches so that advocates can tailor their remarks to the law as the judge has propounded it and so avoid repetition (frequently in slightly different language) of the legal principles. [Paragraph 309]
- 52.5 The judge should remind the jury of the salient issues in the case and (save in the simplest of cases) the nature of the evidence relevant to each issue. This need be only in summary form to bring the detail back to the minds of the jury, including a balanced account of the issues raised by the defence. It is not necessary to recount all relevant evidence. Appropriate training on the constituents of an effective summing up should be a standard part of the Crime seminars provided by the Judicial College. [Paragraph 310]

Chapter 9 Transition

53. The Treasury should be asked to fund the transition period for the CPS to ensure that the necessary work can be completed and the new systems implemented: although it would need detailed consideration, I anticipate that the period involved could be 12-18 months depending on the CPS area involved. [Paragraph 316]
54. HMCTS will require transitional funding to provide additional sitting days and available judges to dispose of the legacy work while at the same time processing new cases earlier and with greater efficacy and efficiency. [Paragraph 319]
55. Negotiations (and, if necessary, contractual modifications) are required to improve the problems arising from the ways in which PECS operates both in relation to timely delivery to court (so

as not to hold up the court) and the provision of dock officers leading to delay and steps put in place to ensure that remand prisoners are held close to their court of trial. [Paragraph 320]

56. Funding appropriate internet based video conferencing at remand prisons will form an integral part of the package aimed at improving efficiency and reducing costs with positive benefits to the administration of justice. [Paragraph 321]

12 Appendices

Appendix A

List of contributors – Review Groups

Plenary Group

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His Honour Judge Murphy, Resident Judge, Peterborough Crown Court

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Her Honour Judge Newberry, Harrow Crown Court

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His Honour Judge Patrick, Wood Green Crown Court

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His Honour Judge Prince, Resident Judge, Durham Crown Court

His Honour Judge Pringle QC, Resident Judge, Oxford Crown Court

The Hon. Lady Rae, Scottish Supreme Court Judge

His Honour Judge Radford, Resident Judge, Snaresbrook Crown Court

The Rt. Hon. Lady Justice Rafferty

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His Honour Judge Rees, Resident Judge, Cardiff Crown Court

Rachel Renwick, Court Administrator, Derby Crown Court

His Honour Judge Richardson QC, Resident Judge, Kingston-upon-Hull Crown Court

Malcolm Richardson J.P., Magistrates' Association

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Professor Julian Roberts, Oxford University

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Nicola Silverleaf, Magistrates' Association

The Hon. Mr Justice Singh, Presiding Judge, South Eastern Circuit

His Honour Judge Sloan QC, Resident Judge, Newcastle Crown Court

Professor AT Smith, Victoria University of Wellington

Janine Smith, Crown Prosecution Service

Jonathan Solly, Secretariat, Criminal Procedure Rules Committee

Daniel Sternberg, Barrister

His Honour Judge Stockdale QC, Resident Judge, Manchester Crown Court

His Honour Judge Stokes QC, Resident Judge, Nottingham Crown Court

James Subbiani, Criminal Law Solicitors' Association

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The Hon. Mr Justice Sweeney, Presiding Judge, South Eastern Circuit

His Honour Judge Tabor QC, Resident Judge, Gloucester Crown Court

Stacey Tasker, Deputy Director, Operational Services, NOMS

Amy Taylor, researcher, Law Commission

Sarah Taylor, researcher, Law Commission

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The Hon. Mr Justice Teare, Presiding Judge, Western Circuit

The Hon. Mrs Justice Thirlwall, Presiding Judge, Midland Circuit

Professor Cheryl Thomas, University College London

The Rt. Hon. The Lord Thomas, Lord Chief Justice

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His Honour Judge Thomas QC, Resident Judge, Bradford Crown Court

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Guy Tompkins, Her Majesty's Courts & Tribunals Service

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His Honour Judge Tremberg, Resident Judge, Great Grimsby Crown Court

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Pamela Yee, Web and Editorial Officer, Judicial Office

Appendix C

List of Contributors - Organisations

Association of Chief Police Officers

Aylesbury Crown Court

The Bar Council

Birmingham Law Society

Birmingham Magistrates' Court

Birmingham Crown Court

Centre for Justice Innovation

Chartered Institute of Legal Executives

Council of Circuit Judges

Criminal Bar Association

Criminal Cases Review Commission

Criminal Law Solicitors' Association

Criminal Procedure Rules Committee

Criminal Justice Council

Crown Prosecution Service

Ealing Magistrates' Court

Forensic Science Regulator

Glasgow High Court

Glasgow Sheriff Court

Her Majesty's Courts & Tribunals Service

Her Majesty's Treasury

Institute for Criminal Policy Research

Isleworth Crown Court

Judicial Office

Justices' Clerks' Society

The Law Society of England & Wales

London Criminal Court's Solicitor's Association

Magistrates' Association

Medway Magistrates' Court

Ministry of Justice

Ministry of Justice, Scotland

National Bench Chairs Forum

National Offender Management Service

HMP Pentonville

Public Defenders Service

Sentencing Council

Snaresbrook Crown Court

Southwark Crown Court

Thames Magistrates' Court

US Attorney's Office, State Department of New York, USA

Victoria Legal Aid Commission, Australia

Wimbledon Magistrates' Court

Wood Green Crown Court

Winchester Crown Court

Appendix D

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Appendix E

The National Early Guilty Plea Scheme

Early Guilty Pleas and Initial Case Management

Principles

- A single, national consistent process for the Crown Court;
- Reduction in the number of hearings per case in the Crown Court;
- Emphasises the importance of case management;
- Preserves judicial discretion;
- Disposes of guilty plea cases at the first hearing in the Crown Court whenever possible;
- Requires measures to be taken to hold hearings through digital means where possible and appropriate, making full use of the technology available; and
- Takes into account the Victims' Code.

Process

(1) Magistrates' Court

- 1.1 Where a guilty plea is either entered or indicated, a pre-sentence report should be requested when sending the case to the Crown Court where there is in the opinion of the Court, (a) a realistic alternative to a custodial disposal; (b) an issue as to dangerousness; or (c) some other appropriate reason for doing so.
- 1.2 The bench will be expected to case manage actively the matter at this stage and where possible elicit a guilty plea, in line with the recommendations in the Magistrates' Disclosure Review and Transforming Summary Justice.

(2) Crown Court

- 2.1 All cases must be listed for a mandatory first hearing in the Crown Court within 28 days post sending from the Magistrates' Court, save and unless in an individual case (or in a series of related cases) the Resident Judge orders otherwise.
- 2.2 The date set for the first Crown Court hearing must be consistent within each circuit.

- 2.3 Where, after a case has been sent to the Crown Court, but before the first hearing, the Defence indicate that a guilty plea is anticipated, they should request the preparation of a pre-sentence report where, in their opinion, the criteria in 1.1 (a) or (b) are fulfilled.
- 2.4 If a guilty plea is entered at the first hearing in the Crown Court then the matter should proceed to sentence where possible, ideally with a stand down PSR if appropriate. [Given that the prosecution is unlikely to serve further material between sending and the first hearing taking place, discussions will take place between the parties to determine plea in advance of the hearing.]
- 2.5 If a not guilty plea is entered at the first hearing in the Crown Court, case management should take place in preparation for trial. Appropriate time should be allocated to allow for proper consideration of the issues.
- 2.6 All parties are expected to comply with the Criminal Procedure Rules in relation to Case management and assisting the court at all times.

(3) Pre-First Hearing Activity

- 3.1 The prosecution will have provided sufficient information before the first hearing in the magistrates' court to ensure that the defence and court can take an informed view on venue, plea and, where the matter is contested, establish the extent and nature of the issues in the case to enable case management to take place.
- 3.2 As a matter of generality, the prosecution is expected to have made available the following material by the first hearing in the magistrates' court:
- A summary of the circumstances of the offence(s) including any account given by the defendant in interview
 - Statements and exhibits that the prosecution has identified as being of importance for the purpose of plea or initial case management, including any relevant CCTV that would be relied upon at trial and any Streamlined Forensic Report
 - Details of witness availability¹
 - Defendant's previous convictions
 - Victim Personal Statements if available

¹ Where the case is manifestly destined for the Crown Court, it may be unlikely that the prosecution will have details of witness availability by the first hearing in the Magistrates' Court. The prosecution will however be required to have such details by the first hearing in the Crown Court. The prosecution will be expected to apply sensible judgment as to likely jurisdiction and will therefore be at risk should the Bench decide, contrary to their representations, that the case should be tried summarily.

- An indication of any medical or other expert evidence that the prosecution is likely to adduce in relation to a victim or the defendant
- Any information as to special measures, bad character or hearsay, where applicable

3.3 The prosecution will have identified likely guilty pleas before the Magistrates' Court hearing. Further engagement between parties in the period between sending and the first Crown Court hearing is to be expected, to elicit further guilty pleas where possible and, in contested cases, to establish the extent of the issues in the case as between the parties.

(4) Plea and Case Management Hearing

4.1 Subject to a judicial discretion to the contrary, a Plea and Case Management Hearing should take place in the following cases:

- Class 1 cases;
- Class 2 cases which carry a maximum penalty of 10 years or more;
- all cases involving death by driving (whether dangerous or careless), or in the workplace;
- cases involving vulnerable witnesses;
- cases where the defendant is a child or disadvantaged ;
- cases where there is a corporate or unrepresented defendant;
- cases where the trial length is such that a further hearing is desirable;
- cases where expert evidence is to be introduced;
- cases where a party requests a hearing to enter a plea;
- cases where an application to dismiss or stay has been made;
- all cases where arraignment has not taken place whether because of an issue relating to fitness to plead, or abuse of process or sufficiency of evidence, or for any other reason;
- all cases where there are likely to be linked criminal and care directions in accordance with the 2013 Protocol; and

4.2 Cases outside of the above categories would not require a PCMH, unless a judge decides that the interests of justice require that a further hearing should be held, and it is expected that the next appearance in court would be for trial.

- 4.3 If a party fails to comply with a Judge's orders, parties may be brought into court without the defendant present.

(5) Case progression

- 5.1 Case progression should be managed outside the court hearing where appropriate through use of technology. Staff should be formally nominated with case progression as part of their role.

(6) Sentencing

- 6.1 With regard to credit for guilty pleas, the topic is under review by the Sentencing Council. The Sentencing Guidelines Council Reduction in Sentence for a Guilty Plea, Definitive Guideline and *R v Caley* [2012] EWCA Crim 2821, [2013] Crim LR 342, represent existing sentencing practice and continue to apply until the Sentencing Council produces a new guideline.

13 Glossary

Associate Prosecutor

A CPS employee who is trained to present cases in the Magistrates' Court on pleas of guilty, to prove them where the defendant does not attend or to conduct trials of non-imprisonable offences.

Case management system (CMS)

IT system for case management used by the CPS. Through links with police systems CMS receives electronic case material. Such material is intended to progressively replace paper files as part of the T3 implementation.

CJS Common Platform

Is an IT-enabled business change programme. Its objective is to deliver radical business change across HMCTS and CPS and support more effective working between agencies in the criminal justice system.

CJSM

Criminal Justice Secure Mail System

Code for Crown Prosecutors

The public document that sets out the framework for prosecution decision-making. Crown Prosecutors have the Director of Public Prosecutions' power to determine cases delegated to them, but must exercise them in accordance with the Code and its two stage test – the evidential and the public interest stages. Cases should only proceed if, firstly, there is sufficient evidence to provide a realistic prospect of conviction and, secondly, if the prosecution is required in the public interest. See also Threshold Test.

Committal for trial

Procedure whereby a defendant was (prior to May 2013) in an either way case moved from the Magistrates' Court to the Crown Court for trial, usually upon service of the prosecution evidence on the defence, but occasionally after consideration of the evidence by the Magistrates. See also either way offences.

Contested case

A case where the defendant elects to plead not guilty, or declines to enter a plea, thereby requiring the case to go to trial.

CPS Direct (CPSD)

This is a scheme to support decision making under the charging scheme. Lawyers are available on a single national telephone number so that advice can be obtained at any time.

Court orders/directions

An order or direction made by the court at a case progression hearing requiring the prosecution/defence to comply with a timetable of preparatory work for a trial. These orders are often made under the Criminal Procedure Rules.

Cracked trial

A case listed for a contested trial which does not proceed, either because the defendant changes his plea to guilty, or pleads to an alternative charge, or because the prosecution offer no evidence.

Criminal Justice: Simple, Speedy, Summary (CJSSS)

An initiative introducing more efficient ways of working by all parts of the criminal justice system, working together with the judiciary, so that cases brought to the Magistrates' Courts are dealt with more quickly. In particular it aims to reduce the number of hearings in a case and the time from charge to case completion.

Criminal Procedure Rules (CPR)

Criminal Procedure Rules determine the way a case is managed as it progresses through the criminal courts in England and Wales. The rules apply in all Magistrates' Courts, the Crown Court and the Court of Appeal (Criminal Division).

Crown Advocate (CA)

A lawyer employed by the CPS who has a right of audience in the Crown Court.

Custody time limits (CTLs)

The statutory time limit for keeping a defendant in custody awaiting trial. May be extended by the court in certain circumstances.

Discontinuance

The formal dropping of a case by the CPS through written notice (under section 23 Prosecution of Offences Act 1985).

Early Guilty Plea scheme (EGP)

A scheme introduced by the Senior Presiding Judge in a number of Crown Court centres which aims to identify cases where a guilty plea is likely. The aim is to separate these cases into EGP courts which expedite the plea and sentence thereby avoiding unnecessary preparation work.

Either way offences

Offences of middle range seriousness which can be heard either in the Magistrates' or Crown Court. The defendant retains a right to choose jury trial at Crown Court but otherwise the venue for trial is determined by the Magistrates.

File endorsements

Notes on a case file that either explain events or decisions in court or that provide a written record of out of court activity.

Indictable only, indictment

Cases involving offences which can be heard only at the Crown Court (e.g. rape, murder, serious assaults). The details of the charge(s) are set out in a formal document called the “indictment”.

Ineffective trial

A case listed for a contested trial that is unable to proceed as expected and which is adjourned to a later date.

Instructions to counsel

The papers which go to counsel setting out the history of a case and how it should be dealt with at court, together with case reports. These are sometimes referred to as the “brief to counsel”.

Plea and case management hearing (PCMH)

A plea and case management hearing takes place in every case in the Crown Court and is often the first hearing after committal or sending in indictable only cases. Its purpose is twofold: to take a plea from the defendant, and to ensure that all necessary steps are taken in preparation for trial or sentence and that sufficient information has been provided for a trial date or sentencing hearing to be arranged.

Pre-charge/charging decision

Since the Criminal Justice Act 2003, this is the process by which the police and CPS decide whether there is sufficient evidence for a suspect to be prosecuted. The process is governed by the Director’s guidance.

Pre-trial application

An application usually made by the prosecution to the court to introduce certain forms of evidence in a trial (e.g. bad character, hearsay etc).

Prosecutor’s duty of disclosure

The prosecution has a duty to disclose to the defence material gathered during the investigation of a criminal offence, which is not intended to be used as evidence against the defendant, but which may undermine the prosecution case or assist the defence case. Initial (formerly known as “primary”) disclosure is supplied routinely in all contested cases. Continuing (formerly “secondary”) disclosure is supplied after service of a defence statement. Timeliness of the provision of disclosure is covered in the Criminal Procedure Rules.

Representation Order

Covers representation by a solicitor and, if necessary, by a barrister in criminal cases. To qualify for a

Representation Order in the Magistrates' Court, you must meet certain financial conditions.

Review

The process whereby a Crown Prosecutor determines that a case received from the police satisfies and continues to satisfy the legal test for prosecution in the Code for Crown Prosecutors.

Section 51 Crime and Disorder Act 1998

A procedure for fast-tracking indictable only cases to the Crown Court, which now deals with such cases from a very early stage – the defendant is sent to the Crown Court by the Magistrates.

Sensitive material

Any relevant material in a police investigative file not forming part of the case against the defendant, the disclosure of which may not be in the public interest.

Sentencing Council

The Sentencing Council for England and Wales promotes greater consistency in sentencing, whilst maintaining the independence of the judiciary. The Council produces guidelines on sentencing for the judiciary and aims to increase public understanding of sentencing.

Special measures applications

The Youth Justice and Criminal Evidence Act 1999 provides for a range of special measures to enable vulnerable or intimidated witnesses in a criminal trial to give their best evidence. Measures include giving evidence through a live TV link, screens around the witness box and intermediaries. A special measures application is made to the court within set time limits and can be made by the prosecution or defence.

Streamlined process (Director's guidance)

Procedures agreed between the CPS and police to streamline the content of prosecution case files; a restricted amount of information and evidence is initially included where there is an expectation that the defendant will plead guilty.

Summary offences

Offences which can only be dealt with in the Magistrates' Courts, e.g. most motoring offences, minor public order and assault offences.

Unused material

Material collected by the police during an investigation but which is not being used as evidence in any prosecution. The prosecutor must consider whether or not to disclose it to the defendant.

Upgrade file

The full case file provided by the police for a contested hearing.

