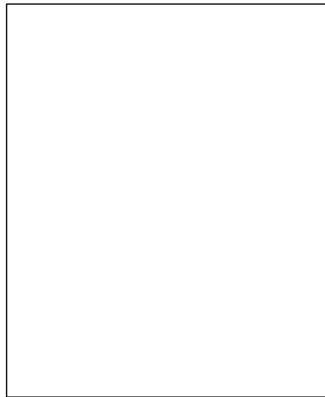
The Criminal Bar Association Newsletter December 2001

Contents:

The Auld Report: Part I 3
Science and Justice from a Prosecutor's Perspective 6
Fingerprint and DNA Evidence: A Reply 8
The American Bar Association 10
Extradition 10
Not In Front of the Barristers .. 12
Protocol for the Instruction of Barristers in the Magistrates' Court 14

Published by Sweet & Maxwell, publishers of Archbold, *on behalf of the Criminal Bar Association*

THE CHAIRMAN'S REPORT



CURATE'S EGG

On 8th October, Lord Justice Auld delivered. On 9th October, Lord Woolf gave the first major speech on Auld at the annual CBA Kalisher lecture. The Chief praised the committee's immaculate sense of timing! (see www.criminalbar.com for the full text of his speech). Our working parties, now hard at work, have an enormous task. We have particular concerns on removal of the right to elect, on the intermediate court, on a more damaging erosion of the rule against double jeopardy and on the place of juries in our system. Auld may bring more work for lawyers, but we will oppose those that smack too much of the rise and rise of the over-mighty state, and too little of inclusive justice.

Sir Robin's report is certainly creative. Most ideas could lead to a more efficient court system. We should be more responsive to victims and other court users, and more in tune with the technological world. A new overarching system of unified administration is sensible. Shortening the list of exemptions for jury service and preventing avoidance is to be welcomed. There is helpful acknowledgement that inadequate payment for the criminal bar has worked against efficient pre-trial procedures. We will improve these ideas, and give them practical effect. I promised in my last editorial that we would fight on matters of principle that weaken our justice system - and we will. If you have ideas and helpful views, we will channel them for you to the appropriate working party. Please send any ideas to: JenniferMaclean@BarCouncil.org.uk

The Auld report really does betray an unjustified distrust of the jury. The Press has described it as adopting a "judges know best " approach. Read the

Continued

The Auld Report

Science and Justice

Extradition

2002 CBA COMMITTEE ELECTIONS

THE COMMITTEE OF THE CBA

Chairman:	Bruce Houlder Q.C.
Vice-Chairman:	Peter Rook Q.C.
Secretary:	Brian O'Neill
Treasurer:	Nicholas Rhodes
Elected Members:	Jeremy Benson Q.C.
	Anthony Berry Q.C.
	William Clegg Q.C.
	Dorian Lovell-Pank Q.C.
	Sally O'Neill Q.C.
	Rock Tansey Q.C.
	Sasha Wass Q.C.
	Gareth Branston
	Emma Broadbent
	Daniel Janner
	Annabel Pilling
	Nick Wood
Co-opted Members:	Anthony Jennings Q.C.
	Andrew Trollope Q.C.
	John Riley
	David Whittaker
Circuit Reps:	David Bartlett (W)
	Robert Davies (W)
	Martin Picton (W)
	Peter Joyce Q.C. (M)
	Paul Farrer (M)
	Alan Conrad Q.C. (N)
	Philip Curran (N)
	Alan Simms (N)
	Nicholas Campbell Q.C. (NE)
	Simon Hickey (NE)
	Brian Mark (NE)
	Tom Storey (NE)
	D Anthony Evans Q.C.(W&C)
	Eugene Egan (W&C)
	David Potter (W&C)
Bar Council Members who Attend CBA Meetings	Roy Amlot Q.C.
	David Etherington Q.C.
	Courtenay Griffiths Q.C.
	Peter Lodder Q.C.
	Nigel Sangster Q.C.
	Warwick Aleeson
	Jeremy Barnett
	David Brock
	Samantha Cohen
	Christopher Coltart
	Maria Dineen
	John Dodd
	Andrew Hall
	Nicola Howard
	Antoinette Mackeson-Sandbach
Assistant Secretary:	Jonathan Green

report and you will see why. Public perceptions are discounted as almost irrelevant. "Perverse" acquittals should lead to appeals (so undermining jury trial further) and, in some cases, the judge should require the answers to questions from the jury and then deliver the verdict himself. These views do not seem to carry wide judicial support among many criminal court judges and it is scarcely surprising that this should be so.

Intermediate court

If public accountability is weakened by delivering two thirds of jury trials into the hands of district judges and two experienced magistrates, then public confidence in the criminal justice system will markedly decrease. Magistrates (unless retired) will rarely be available to try cases lasting longer than a day, and could not conceivably be described as "representative". Magistrates' courts are closing and "local" justice is increasingly becoming a thing of the past. Magistrates are unimpressed by being denied a role in sentencing as the amateur has to cede to the professional. Many of those senior magistrates, on whom the success of these proposals depend, are unimpressed with the whole idea of an intermediate court. They understand how unjust it is for an accused person to have to argue that he will probably get more than 2 years imprisonment before he gets a jury to try his case. How fair is that!

Without proper funding, the CJS will be less fair and may founder. Depressingly low morale could infect the whole criminal justice system. The past history of the CPS is proof of what might happen. The Lord Chancellor said in evidence to the Home Affairs Select Committee on 16th October: "Auld is…a massive, radical piece of work. The period for public comment ends at the end of January and if it comes into effect it will represent unquestionably the largest reform of criminal justice for over 30 years". He conjectured that "… we might be able to cherry pick some very important things for legislation this session but I do not hold out any particular hopes of that…I think it will take several years". Asked about manpower and costs, he frankly acknowledged that the work on this simply had not yet been done. He considers it will be cheaper, but the evidence of history may not be on his side. "Obviously there will be big costs as well", he admits, "…we have started thinking about it but any thinking is in its infancy". The night court plans in London and Manchester

EDITOR

David Whittaker
9 Bedford Row
London WC1R 4AZ
tel: 020 7489 2727; fax: 020 7489 2828

have been abandoned as they proved too expensive, and, despite Bar support, proved impossible to achieve with the other agencies concerned. To implement an intermediate court without an audit would be sheer folly.

Further delay in bringing cases to trial may be a consequence of an intermediate court. At present many magistrates' court cases which last longer than a day take far longer to bring to trial in the magistrates' court than in the Crown Court, and are subject to court dictated adjournments through lack of available magistrates.

CDS

Problems loom for the CDS too. An independent report by the Scottish Executive into the Scottish public defender pilot has found that not only is there a "statistically significant" higher conviction rate with public defenders, but also there was much resentment among defendants at being directed to the public defender at all. Far fewer of those who used a public defender felt that their lawyer had stood up for their rights compared with the private lawyer. Far fewer claimed they were treated "as if they mattered, rather than as 'job to be done'". A few politicians are likely to note the higher conviction rate with approval, but when it comes to the competing demands of justice proper representation and a fair trial must be paramount.

In evidence to the Select Committee on 16th October, the Lord Chancellor said: "As far as the Criminal Defence Service is concerned, this is an experiment. It is an experiment only. If public defenders do not bring benefits to the system then we will not continue with them". Justice is a fragile thing and experiments can be dangerous – and we should all be aware of the threat that some politically inspired changes may pose to public confidence. What benefits could there possibly be? There is scant evidence of real benefit to justice from international experience, and simply no need for it here now that the government suggest themselves that legal costs are under control.

Sentencing too is a hot topic. If some of the Halliday sentencing reforms become reality, even more cases will fall short of the two year threshold for jury trial, and make deeper inroads into the right to trial by jury. These sentencing reforms provided the backdrop to the CBA workshop at the Bar conference, and the session was by far the best attended of the afternoon. Our speakers were all excellent and thought provoking, and the conference afforded us an opportunity to make a real and public contribution to the sentencing debate.

Bruce Houlder Q.C.

THE AULD REPORT: PART 1

John Dodd considers some important topics in the Auld Report.

And so it has arrived, almost 700 pages of profound analysis from the pen of Lord Justice Auld, representing over 2 years work, work to which many individuals and groups, including the Bar Council and the CBA have contributed. The Report is plainly likely to inspire debate in the years to come and also to influence proposals for legislation that will impact in ways as yet unclear upon the lives of all who work in the criminal courts. Those at the criminal bar should ensure that we understand just what the report says and for that of course there is no real alternative but to read the work in its comprehensive entirety. What follows is an attempt to guide the reader through some of the 12 chapters of the report. Other aspects will be considered in the next edition of the *Newsletter*.

Remit

Auld L.J. was asked by the Lord Chancellor, the Home Secretary and the Attorney-General in December 1999 to examine the ways of the criminal courts with a view to ensuring that justice was delivered within those courts both fairly and efficiently having regard to all interested parties. Auld tried to identify those aspects of the present system that in his view clearly needed change and then to suggest what those necessary changes might be.

The report emphasises the need to identify the overall purposes of criminal justice but recognises that this is not a straightforward task, there are many with a stake in the system – but in the event accepts that the criminal justice system must firstly seek to reduce crime and the fear of crime and secondly should dispense justice fairly and promote confidence in the law. It acknowledges however that society should not expect too much from the system. Present sentencing structures are regarded as blunt instruments of social repair, although separate proposals for the development of new sentences are seen as possibly succeeding in diverting some from a career in crime.

Auld begins in a sense by recommending the comprehensive codification of the criminal law in terms of offences, procedure, evidence and sentence, in his own words: "I take the opportunity early in the Report to join the swelling chorus for codification ….. A basic tool for understanding and application of the law commonplace in many civil and common law jurisdictions".

Juries

Auld begins this important chapter by reminding us of the special status afforded the jury in our system of criminal justice, but notes that support for retention however is not universal. He points out that only about 1 per cent of all criminal trials in England and Wales culminate in trial by jury. The historical provenance of trial by jury is traced and we are told that there is no such thing as a constitutional right to trial by jury. What is acknowledged is that "the

jury retains its aura – one of involvement in the administration of justice. For many this counts for more than its efficiency as a fact finding tribunal".

He sees no good argument for altering the magic number of 12 jurors, despite a lack of any rational basis for choosing that figure, but does see very good reason for permitting the swearing of reserve jurors in long cases. He is anxious to see enforcement of the duty to perform jury service, and to see the removal of all categories of ineligibility for service that are based on occupation – even to the extent of welcoming judges onto juries in England and Wales, as they are in parts of the USA. Auld looked also at categories of disability and felt that the criminal justice system should aim at including rather than excluding those with disability "because such inclusiveness is a mark of a modern, civilised society".

The report calls for action to deal with the potential for racial prejudice in an all-white jury, recommending that in a case where the Court considers "race is likely to be relevant to an issue of importance in the case", the Judge should have a power to select up to three members from an ethnic group to serve. Interestingly there is no call for a return to any right of peremptory challenge or of extending the present right to challenge for cause.

Research

Auld also considers the thorny question of allowing research into the workings of the jury – work that could assist, firstly, in determining whether juries should continue at all as fact finders in serious cases and, secondly, in establishing if they can be given more help to do their job. Auld himself comes down against it on the basis, in part, because there is already much research material available from around the world. He does not doubt that the jury should retain their position in serious cases and is conscious of how much more could and should be done to help the jury in practical and common sense ways. He considers that the section 8 of the Contempt of Court Act restrictions should, however, be amended to allow the trial judge and the Court of Appeal to investigate any alleged impropriety by a jury.

Perverse verdicts

On perverse verdicts the report is controversial. Auld puts it in this way: "Although juries may have the ability to dispense with or nullify the law, they have no right to do so … I regard the ability of jurors to acquit, and it also follows, convict, in defiance of the law and in disregard of their oaths, as more than illogicality. It is an affront to the legal process and the main purpose of the criminal justice system – the control of crime – of which they are so important a part." Juries, it is said, have no right to acquit in defiance of the law or in disregard of the evidence.

The report also recommends that defendants should have the right, with the consent of the court, to opt for trial by judge alone in all cases now tried on indictment.

Either way offences

It is in this chapter that Auld grapples with one of the major issues in the report – the trial of either way offences. He records the two competing views, on the one hand the claim that there are too many trivial cases taking up valuable time in the Crown Court, on the other the claim that trial by judge and jury is the fairest form of trial and should not be further reduced. The report explains the genesis of the classification, recognises that there is no good reason for changing the system of classification and that the real issue is as to whom should decide how these either way offences are to be tried. Answering that question takes the report once again on a trip through history before the author expresses his view which is that it should be the Court, not the Crown or defendant, who decides in the either way case where it should be tried.

For fraud and other complex cases the report expresses the view that "Many fraud and other cases, by reason of their length, complexity and speciality now demand more of the traditional English jury than it is equipped to provide". Auld says: "I am firmly of the view that we should wait no longer before introducing a more just and efficient form of trial in serious and complex fraud cases" and recommends that, as an alternative to trial by judge and jury in serious and complex fraud cases, the trial judge should be able to direct trial by himself sitting with lay members of appropriate experience or indeed just by himself where the defendant has asked for trial by judge alone.

In relation to young defendants, that is to say those under 18, who are charged with an indictable offence the report recommends the removal of all such cases to the youth court, albeit one constituted rather differently to the current model – the suggestion is that the seriousness of the case to be tried should be marked by the involvement of a judge of appropriate rank, be it High Court, Circuit or Recorder, sitting with at least two magistrates and exercising the full jurisdiction of the Crown Court.

Fitness to plead is also dealt with in this chapter and the recommendation is simply that the determination should be made not by jury but by judge. The chapter concludes with some specific recommendations concerning the jury; of interest is the proposal that jury service should become a much more flexible thing than it is at present – perhaps making it shorter, all with the aim of making service more inclusive and worthwhile.

Unified Criminal Court

The Chapter entitled "A Unified Criminal Court" contains some of the most far-reaching proposals of the entire report. It begins with nine principles identified by the author which I crudely summarise here:

- Whilst different cases may call for different tribunals and practices, each should provide a fair hearing and outcome;
- The type of tribunal should be proportionate in terms of form, time and cost to the seriousness/complexity of the

offence and the severity of sentence;

- Allocation of case to court should itself be done by a court;
- All court practices should be simple and the same – whatever the level;
- Once allocated, cases should stay at the same level;
- Decisions about allocation must be made on the basis that all levels of court work equally well;
- The structure of courts should contribute to the efficient working of the whole system;
- The system of administration should itself aim to achieve justice in the flexible use of all resources;
- The courts should treat all involved with consideration.

Auld then records that his Review demonstrated a strong case for unifying Crown and Magistrates courts; the differences in practices and administration he considers are divisive and inefficient. A unified criminal court would help to improve public confidence: "I have in mind a single criminal court … in which professional judges and lay magistrates would sit, at their different levels, all as judges of the same court".

Such a unified court, Auld argues, would, amongst other things, facilitate more consistency in the approach to trial and sentence. It would also help to remove the "present large and widely perceived gap between lay magistrates and the Crown Court".

He lists three aspects of the current system that militate against the proper objectives of a fair and efficient criminal justice system: firstly, the fact that some cases start in the magistrates' court but conclude in the Crown court whether for trial or sentence, makes for delay; secondly, confusion is generated by virtue of the fact that the two levels have their own practices and codes; and thirdly, the separate administrations can lead to delays and mistakes. Auld recognises that there are arguments against unification but comes down clearly in favour of one court.

He then goes on to look at jurisdiction and has no difficulty with continuing "the basic boundary line" between indictable and summary: "The question is whether for many cases around the borderline, a mixed tribunal would be a more acceptable and appropriate forum". He expresses strong support for a new, middle tier of court, consisting of professional judge and two lay magistrates (common in some other European jurisdictions). He expects no real difficulty in being able to find sufficient lay members (compare the remarks of Kay L.J. at the recent Bar Conference).

The heart of the proposal is set out clearly by the author: "There should be a third tier for the middle range of cases that do not warrant the cumbersome and expensive fact finding exercise of trial by judge and jury, but which are sufficiently serious or difficult, or their outcome is of some consequence to the public or defendant, to merit a combination of professional and lay judges". The criteria for allocation would be primarily related to sentence – Auld suggests that where, on a worst case scenario, the defendant might expect up to 2 years or a substantial fine (in relation to an either way offence) the middle tier court would deal with the case. The exact setting of the criteria would be a matter for more debate. Trials would be shorter, the judge would still have full responsibility for sentencing decisions at their conclusion.

As if sensing that this is perhaps too radical step to be taken all at one go, the report urges that a defendant at least be allowed to opt for such a tribunal or for trial by judge alone.

Allocation

The decision as to who allocates and how is addressed in the report; Auld comes down firmly in favour of such decisions being taken in respect of the either way offences by a district judge at least where there is any dispute between the parties. The allocation would be made having considered the seriousness of the offence alleged and the judge would decide which of the three tiers of the unified court should deal with the case.

The chapter continues rather less contentiously by looking at the consequences of unification for the Circuit system which has already satisfied the author as to its *raison d'être*. Just one observation; Auld warns that ties of tradition and affection to the present system felt by both bench and bar will not hinder change if that is deemed necessary in the wider interests of criminal justice. The demands created by the workload on the South Eastern circuit receive special mention – the appointment of a third Presider (Bell J.) may have staved off the revival of a proposal to take London out of the SE Circuit, for the time being at least.

Sentencing

The report looks briefly at sentencing – conscious of the fact that John Halliday's major report on sentencing was due for publication at about the same time. Auld does however call for codification of the law concerning sentencing and its maintenance under the Criminal Justice Council. He calls also for "honesty and simplicity in sentencing" – he says that the sentencer is aiming to communicate to the offender, the victim and the public gallery. He says the sentence pronounced should be the sentence served. He asks that the sentencer be relieved of the current obligation to recite a mantra on passing sentence "so that they can pronounce sentence simply and shortly, addressing the defendant rather than the Court of Appeal". Sentencing information should be made available through IT.

Auld looks briefly at the Halliday sentencing review and expresses support for the concept of the sentencing court being responsible for reviewing the working of the sentence, although he notes the practical problems and the possible cost implications.

John Dodd
2 Bedford Row

SCIENCE AND JUSTICE FROM A PROSECUTOR'S PERSPECTIVE

David Calvert-Smith Q.C. , Director of Public Prosecutions, addressed the Second Joint Meeting of the Forensic Science Society and the Forensic Science Service on the interrelation of science and justice within the criminal justice system. The following is an extract of his speech.

Expert evidence usually consists not only of a description of scientific facts, observations and processes, but also of an opinion as to what these mean in the context of the case in question.

In criminal trials opinion evidence is usually inadmissible. However, the opinion of an expert forms an exception to this rule, where the issues that the court is required to determine are far removed from the court's experience and knowledge. Where a matter does call for such evidence, only a suitably qualified expert can give it. In *R v Bonython* (1984) 38 S.A.A.R. 45, the South Australian Supreme Court held that, in deciding whether to admit expert evidence, there were two questions for the judge to decide:

"The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This may be divided into two parts:

(a) Whether the subject matter of the opinion is such that a person without instruction or experience in the area ... would be able to form a sound judgement on the matter without the assistance of witnesses possessing special knowledge and experience in the area; and

(b) Whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience....

The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court".

The first question, whether a lay person is able to form a sound judgement on an issue without the assistance of an expert's opinion, can be troublesome. It was the Court of Appeal's determination of this issue, in the cases of *R v Doheny, R v Adams* (1997) 1 Cr.App.R. 369, that created what is seen by many scientists as the paradoxical position of expert evidence in the field of DNA analysis.

In the *Doheny and Adams* cases the essential issue had been whether or not the defendants had left the crime stains resulting from the offences of rape and buggery. The Court of Appeal held that a forensic expert in such a case should give evidence of the match between the DNA in the crime stain and the blood sample taken from the defendant. He should also give the jury his view of the frequency with which the matching DNA characteristics were likely to be found in the population at large, and possibly the size of that population. He should not, however, be asked his opinion on the likelihood that it was the defendant who left the crime stain, nor should he use terminology which may lead a jury to believe that he was expressing such an opinion.

It was stated to be a matter for the jury alone to decide whether the defendant did in fact leave the stain, or whether it was possible that someone else with the same matching DNA characteristics had done so. The consequence of this is that when a court has to decide whether or not a fingerprint, or even an ear print, belongs to a defendant, the opinion of an expert can be admitted into the equation. But where the evidence in question is that of a DNA match, the expert cannot assist the jury with his opinion as to identity of source.

The second question, about the extent of a witnesses' scientific or professional expertise, is not an issue that generally causes difficulty for the prosecution although it sometimes does with medical evidence. Nevertheless, the true status of 'expert' witnesses called by the defence in some cases can be difficult to gauge or challenge. This is an area that, in time, will benefit considerably from the establishment of the Council for the Registration of Forensic Practitioners (CRFP) launched in October 2000.

CRFB

The CRFP's objective is to promote public confidence in forensic practice by:

- Publishing a register of competent practitioners;
- Ensuring through periodic revalidation that they maintain an acceptable level of competence; and
- Dealing with practitioners who fail to do so by means of established disciplinary procedures.

In so doing, the CRFP will perform an invaluable service for the criminal justice system in the UK, as it will enhance the credibility of forensic witnesses called by both the prosecution and the defence.

However, this process of revalidation, and the existence of a central body to whom complaints against forensic practitioners can be reported, will of course have implications for the process of disclosing unused material, under the provisions of the Criminal Procedure

REMINDER

The DPP has introduced a new protocol that requires prosecutors to keep a record of the basis on which a plea is accepted. It is essential that this responsibility is respected.

and Investigations Act 1996 (CPIA). The issues raised are difficult ones [and] this is an area currently receiving consideration by the CPS.

What prosecutors need from expert witnesses

Whatever the area of scientific expertise, the prosecution needs to be able to rely with confidence upon what expert witnesses say. Above all, we require clarity, impartiality, and certainty.

[One] must not assume that lawyers or the court will be familiar with or understand the science or its application to the case. [And] if the members of the jury, let alone lawyers and judge, do not fully understand the evidence, it will mean that they cannot be satisfied of guilt. Giving clearly explained, unambiguous evidence in a statement can also often prevent the need to attend court in the first place, as the main reason for being called to give evidence in person is that the statement is incomprehensible in some respect.

In addition to being clear, an expert witness must also be independent. An expert witness owes a duty to the court, not to the client. But also, as a prosecution witness, you should identify and bring to the prosecutor's attention any weakness in, or limitation on, your opinion. We need to be aware of any alternative explanations, not just the best, or the one that we were hoping to hear.

What prosecutors need from the Forensic Science Service

As well as needing expert evidence to be clear, unambiguous and impartial, the prosecution also needs to receive it as early in the criminal process as possible. Forensic findings are often crucial to the decision whether or not a case should proceed at all, and if so, on what charge.

The importance of speeding up the procedures by which evidence can be made available to the prosecutor has been increased by the recommendations of the Narey Report (1997) on tackling delay in the criminal justice system. Many of the recommendations were incorporated into the Crime and Disorder Act 1998. In particular, sections 51 and 52 of the Act provide for an adult charged with an indictable only matter to be sent straight from a preliminary hearing in the magistrates' court to the Crown Court, for trial there on that matter and any related offences. This means that cases where the defendant is in custody will have their preliminary hearing in the Crown Court within eight days of the magistrates' court hearing. Bail cases will be listed within a maximum period of 28 days. Service of the prosecution case papers should take place within four to six weeks of that preliminary hearing, and applications for extensions will not be routinely acceded to, as Crown Court judges will then have responsibility for the early case management.

In addition to this, changes to the criteria for the extension of custody time limits have led the judiciary to impose a tougher regime in this area, making applications for their extension even less likely to succeed than before.

The Forensic Science Service protocol

Faced with the time constraints imposed by these developments, the Forensic Science Service, the police and the CPS set up an interagency working group to consider what action should be taken to speed up delivery of scientific results and evidence. Whilst recognising that some scientific processes do take time to complete, poor communications and inefficient procedures were identified as some of the most important factors leading to delays.

In June 1999 a protocol or tripartite agreement was produced which sought to improve the process of getting exhibits to the laboratories for examination and notifying recipients of the results. This was to be achieved by a system of advance notification and proper identification of priorities of not only the range of casework, but also of particular aspects within each individual case. A new uniform priority classification system was adopted, with the designation 'Critical' attached to matters directly affected by the provisions of the Crime and Disorder Act, such as cases involving custody time limits or young offenders.

The protocol has been used as a template for the development of a series of local agreements between CPS Areas and their respective police forces. The protocol has been supplemented by new laboratory submission forms which were devised and adopted to harmonise the processes throughout England and Wales, thereby ensuring that the laboratories, and subsequently the courts, receive adequate and timely information.

The development of this protocol and the implementation of the procedures it recommends represents an excellent example of the "joined-up" criminal justice system in action.

Conflicts between scientific development and the legal process

The ever increasing requirement for speed in the provision of evidence imposed by legislative developments and government initiatives, is not the only area in which the demands of the criminal justice system and even the law itself, can appear to conflict with scientific developments.

Databases and digital images

Although it comes perhaps more within the realms of technology than pure science, the capacity to capture and store scientific information digitally on extensive national databases is one such area. Along with the enormous benefits brought by such developments, come

the disadvantages associated with the need to fit those capabilities within our existing law, until such time as new legislation can be enacted which is designed to complement it. In the face of busy legislative programmes, that is no simple or short-term task.

Hearsay

The laws of evidence also have the potential to create conflict between the criminal process and scientific progress. The rules against the admissibility of hearsay have enormous resource implications for the police, the FSS and the CPS, in the context of increasingly sophisticated forensic analysis that is carried out in a series of different tests by different experts, often in different geographical locations.

[And while] the judgement in the case of *R v Jackson* (1996) 2 Cr.App.R. 420 has been of considerable help in allowing the development of the system of Forensic Examination Reports, this system is wholly reliant on the co-operation of the defence, which for obvious reasons is not always forthcoming.

Abuse of process

The breathtaking advances in DNA analysis, with Low Copy Number DNA profiling and the FSS SGM Plus system, now allow forensic science to assist in solving cases that have been left open for very many years in anticipation of just such progress. However, as such cases arise more frequently in the future, it is likely that more will be contested on the basis that after such an extensive period of time the defendant is unable to raise an adequate defence, such as one based on alibi. In those circumstances cases may be lost because of the fear that defendants cannot receive a fair trial. Clearly, such decisions will turn on the facts of each case.

Human Rights Act 1998

Finally, one other area in which science could potentially conflict with legislation is under the Human Rights Act 1998, [particularly] Article[s] 6 [and] 8.

Concern has already been voiced that the mere existence of a DNA database is an infringement to the right to privacy. This is unlikely to form the basis of any serious challenge because, although some ECHR rights are absolute, Article 8 is one of those that may be subject to restrictions where a legitimate public interest also requires protection and the operation of a properly and transparently run DNA database for the purpose of fighting crime is likely to come within the requirements.

However, the use to which the information kept on the database is put may raise more complex issues. For example, those considering possible changes to the restrictions found in section 64 (3B) of PACE, on the use of DNA profiles retained despite the subject's acquittal, will need to consider very carefully all of the ECHR implications.

Another linked area where difficulties could arise is in connection with the right not to incriminate oneself. There have already been successful challenges, under Article 6, to the exercise of compulsory powers which lead to self-incrimination in the form of written or verbal evidence, such as in the Scottish High Court of Justiciary case of *Brown v Procurator Fiscal*. As part of that judgement the Court referred expressly to an important passage in the 1996 case of *Saunders v United Kingdom*, which stated as follows:

"The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as... bodily tissue for the purpose of DNA testing".

This is a comforting confirmation of the general European approach to this area, but the position remains open to challenge. This is particularly so where samples are taken, retained and used in relation to persons who are merely suspected of an offence or who have even been cleared of any criminal culpability.

David Calvert-Smith Q.C.
Director of Public Prosecutions

(The Director's speech is reproduced in full in Science and Justice 2001; 41(2): 121-126)

A REPLY

Dr. Ian Evett of the Forensic Science Service responds to Graham Cooke's article on DNA evidence.

I write in connection with the article by Mr. Graham Cooke entitled "Fingerprint and DNA Evidence" in the June issue of the CBA *Newsletter*.

Mr. Cooke and I have had many discussions over the last ten years about how the statistical aspects of the interpretation of DNA evidence should be presented to a jury. We both recognise the importance of an approach that is logically correct, comprehensible and impartial. This is a tall order and it is fair to record that there are points of disagreement between us as to how the problem should be solved.

The nature of forensic science is changing rapidly, in no small measure as a consequence of the huge impact of DNA technology. Traditionally, courts have welcomed the evidence from the expert who gave an opinion of the kind "these two items have come from the same source". Such an opinion is easy for a jury to understand, even though the scientific issues underlying the pursuit might be extremely complex. Now, with DNA, we have the

power to do something quite different; forensic scientists are able to provide a numerical statistic for assessing the weight of evidence in relation to the pair of propositions that two DNA samples have either come from the same person or from two different persons. In time, most forensic scientists would like to believe that such statistical assessments will become possible in relation to all evidence types; though the day is, no doubt, far off for such complex pursuits as handwriting comparison.

This new development brings with it the challenge of presenting the statistic in a manner that assists the court in setting the DNA evidence into the framework of the circumstances of the individual trial. I, and colleagues, have written at length on this challenge in the *Criminal Law Review* ("DNA profiling: a discussion of issues relating to the reporting of very small match probabilities", *C.L.R.*, May 2000, 341-355) an article that Mr. Cooke refers to. We do not claim that what we say is the last word (far from it): every week we see new cases with complex twists and turns that require new and insightful approaches to interpretation. There is no simple answer and there is a need for a deeper appreciation of the core issues among the members of the legal profession who contribute to criminal proceedings.

As Mr. Cooke explains, it is our usual practice in the FSS to quote the figure "of the order 1 in a billion" in answer to questions of the kind "what is the probability that an unknown person, unrelated to the defendant, would match the profile from the crime stain?" Our reasons for that policy are explained in detail in a paper in the scientific literature (Statistical analyses to support forensic interpretation for a new ten-locus STR profiling system, *International Journal of Legal Medicine* 2001, 114). Mr. Cooke then goes on to explain a method for explaining the potential impact of the 1 in a billion figure in the context of a criminal trial. It is my view that his method is overly simplistic and thus not helpful, for the following reasons.

First, the treatment is predicated on the assumption that the suspect is one of a population of 50 million potential suspects for the crime: every one of the 50 million is to be regarded as "equally likely" to have been the source of the crime sample. This is an uncomfortable and entirely artificial device. If, for example, the crime is a housebreaking in Folkestone, then does it make sense to treat a three year-old from Carlisle as being equally likely to have committed the offence as a nineteen year-old from the next street to the burgled premises?

The idea that using such a suspect population is necessarily "conservative" does not hold much water either: whether or not it is conservative depends on the other evidence. If, for example, the suspect, arising from a database match, dwells in Truro yet the crime was committed in Aberdeen it is not "conservative" to assign the same probability to his being the offender as a resident Aberdonian.

Second, Mr. Cooke's treatment requires visualising 200 cases that are, in some way, exchangeable with the case at hand. This is no more realistic than the first assumption. In any individual case, whether or not the suspect is "guilty" (to speak in Mr. Cooke's terms) depends not only on the DNA evidence but on all of the aspects of the non-scientific evidence that are relevant in that particular case. These cannot possibly be the same from case to case so the device of 200 similar cases is entirely artificial and, in my view, not helpful.

Finally, Mr. Cooke concludes "…it seems that scientists are still giving opinion evidence about the weight to be given to DNA evidence despite the clear guidance in *Doheny*". But the relevant passage in *Doheny* did not refer to "weight of evidence". It said: "The scientist should not be asked his opinion of the likelihood that it was the Defendant who left the crime stain": "likelihood" and "weight of evidence" are completely different concepts in the calculus of uncertainty. To assess weight of evidence the scientist must consider two propositions, one prosecution and one defence, and consider the probability of the *evidence* given each of the two propositions. It is the ratio of these two probabilities that determines weight of evidence. This is the foundation of balanced, robust and logical scientific interpretation.

Dr Ian W. Evett
Forensic Science Service

REVIEW OF CORONER SERVICES SEEKS CONTACTS AND INFORMATION

Home Office Ministers have appointed a Group to review the arrangements in England, Wales and Northern Ireland for death certification, inquests, post-mortem examinations, and the full range of services provided by Coroners.

This is to be a fundamental review of death certification and related issues and of coroner services to see what reforms may be needed. We wish to have a wide and diverse range of opinion on the workings of the present arrangements.

People or groups who would like to respond to this invitation are asked to write to our secretary, Mike Gallagher, or to phone him.

Later this year we shall be creating one or more small reference groups to help us in our work. Anyone interested in joining such a group should let Mike Gallagher know.

Contact details: Mike Gallagher, The Review of Coroner Services, 100 Pall Mall, St. James's, London SW1Y 5HP. Tel: 020 7664 8898

THE AMERICAN BAR ASSOCIATION

The ABA held its annual conference in Chicago between 2nd and 8th August 2001.

The ABA, with a membership of over 400,000, is a significant and influential organisation. This year the conference attracted 11,000 lawyers and international guests from over 64 countries to conduct and attend association business.

The conference caters for all branches of law and legal and judicial activity. Each specialised section of the ABA puts on its own programme. The Criminal Justice Section is one of the largest sections. With 34 officers and council members, a permanent staff of 10 and 22 committees each focusing on an area of professional concern, it dwarfs the CBA.

The conference is the forum for the discussion of problems facing the criminal lawyer at every level. We attended council and committee meetings relating to defence and prosecution services, international criminal law, race and racism, juvenile justice and panel discussions on crimes against the elderly, the death penalty moratorium (in Illinois) and criminal trials for the general practitioner, to name but a few.

On 6th August, together with the Chairman and Vice-Chairman of the Bar, we had meetings at the White House and the State Department respectively with Alberto Gonzales, assistant to the President and White House Counsel and Pierre-Richard Prosper, President Bush's new Ambassador-at-large for War Crimes.

The criminal bar was well represented in Chicago and Washington. In addition to the usual suspects, Anesta Weekes Q.C., Linda Dobbs Q.C. and Courtenay Griffiths Q.C. provided powerful support for the Bar's and CBA's initiatives.

Space does not permit a full report on the ABA conference. The topics that we do consider are of importance to the UK criminal practitioner include the US public defender system, capital cases, the US stance on the International Criminal Court, drugs and the drug courts and human rights. We hope to make some of these the subject of future articles for the *Newsletter*.

Next year the ABA holds its conference in Washington.

Bruce Houlder Q.C.
Chairman

Dorian Lovell-Pank Q.C.
Chairman, International Sub-Committee

REMINDER

It is vital that all members are fully acquainted with the "new" Attorney-General's guidelines on disclosure of information in criminal proceedings. They are reproduced in the 2002 edition of *Archbold*, Chapter 12 and in the supplements to the 2001 edition.

EXTRADITION

John Hardy was a member of the CBA Working Party which responded to Home Office proposals for the reform of the law on extradition.

On 3 August 2001 I appeared at Bow Street Magistrates' Court to represent a defendant accused of peddling a small number of individual doses of heroin. The offences were (allegedly) committed in the summer holidays last year in Prague; hence the requesting state was the Czech Republic. Nothing unusual in that you may think and, so far, you would be right, although you may be surprised that such a relatively minor level of offending should warrant recourse to the grand panoply of the extradition process.

Concerns

But there is something very unusual about the case; and something very worrying. The Defendant is a Romany. She and her parents had arrived in the United Kingdom in March of this year, and her parents had applied for political asylum. Accounts of the persecution of Romany people in former East European countries are well documented, and it takes little imagination to envisage how the criminal justice systems of the fledgling democracies of Eastern Europe are disposed towards defendants who are the subject of endemic discrimination.

All very well, you may say, but is that your best point? No, it is not. My best point is that the girl whose extradition has been requested is a mere sixteen years old. To my knowledge she is the youngest person ever to be the subject of an extradition request. So far as is known only one other minor's return has been requested, and he attained the age of majority during the extradition proceedings.

It has always seemed to me that the Bar, although conservative in nature, is liberal in outlook. Thus it is with some confidence that I suggest that most members of the Bar would find the idea of uprooting a 16 year-old girl from her asylum-seeking family, and subjecting her to extradition proceedings with a view to returning her to the very country from which her parents have sought to escape persecution, utterly repellent.

At the very least, you might think, our extradition law and procedures must contain provisions to prevent this sort of thing happening. They do not. There is no minimum age limit for extradition, the Court at Bow Street has no discretion to decline to commit if the bare minimum legal requirements are made out, there is no abuse of process jurisdiction in the Magistrates' Court or the High Court, the High Court's powers to grant *Habeas Corpus* are circumscribed by statute, and only the Secretary of State has an unfettered discretion to refuse to order extradition. As is well known, the

Secretary of State has, in the recent past, been amiably disposed to an elderly South American retired tyrant and a post-natally depressed terrorist wanted for conspiring to cause explosions at British Army bases on the Rhine, but there is an understandable feeling that these cases involved collateral issues.

Since he commences the extradition process in the Courts by issuing an 'Authority to Proceed', and has done so in the case of my lay client, it is fair to assume that the Secretary of State has as yet seen nothing wrong, unjust or oppressive in her prospective extradition. While not suggesting that her position is hopeless, the reality for my client is that her prospects are none too encouraging.

Against the background of this case, you may well be surprised to hear that the Home Office thinks there are too many safeguards and protections built into our schemes of extradition, particularly in the European Convention scheme insofar as it concerns countries which are also members of the European Union. The Czech Republic, of course, is one of the twelve candidate states whose incorporation into the Union is foreshadowed in the Treaty of Nice. So, too, are Bulgaria and Turkey, to name but two.

Home Office proposals

Thus one of the key proposals in the Home Office Review, published in March 2001, is that a 'backing of warrants' scheme should be introduced to cover the United Kingdom's extradition arrangements with all 15 of its present and, by implication, all 12 of its prospective European Union partners. At first blush this may seem a sensible proposal; after all, we recognise the unchallengeable legitimacy of their criminal justice systems, do we not? And look, for example, at the 'Schengen' scheme of border-abolition between the Benelux countries. That works well, does it not? As does our backing of warrants scheme with the Republic of Ireland. However, these schemes are local to neighbouring countries with long track-records of association and co-operation and almost identical systems of criminal justice.

The trouble with a 'Panglossian' view of *all* our European partners is that it is wholly unrealistic. "All of the Member States (of the EU) are well-established democracies with whom we have close political and economic ties" declare the authors of the Review, as though this decidedly contentious assessment is reason enough in itself for dispensing with basic safeguards. "We have an opportunity to be in the European vanguard in setting the pace for changes in extradition within the EU" they boast. And there lies the rub: the Review is not so much an analysis of the law, but more a political manifesto. In fact practitioners have rather different experiences. For example, the Divisional Court has repeatedly found Italian, Portuguese and Turkish requests wanting for a variety of reasons. On another level, and a matter of wider concern, is the fact that public prosecutors across Europe wield enormous unaccountable powers, often uncontrolled or ineffectively controlled by courts.

Double criminality

Of course these are but examples, and it is right to acknowledge that much European justice is justly done; yet the Utopian view that the Home Office have developed of the EU inclines them to do away with all rights and protections for accused and convicted persons. Thus 'double criminality' (the rule that the conduct alleged must be criminal according to the law of both the requesting and the requested states) is, say the Home Office, no longer necessary. By way of illustration of the absurdities such a proposal could cause, in Italy it is a criminal offence to be cruel to your wife! Perhaps this proposal, if enacted, will lead to fewer holidays in Chiantishire, as husbands find themselves unable to risk the odd domestic disagreement!

Rule of speciality

Equally, the 'rule of speciality' is scheduled for the chop (the rule which prohibits trial for any offence committed by a person before his return other than that for which his return is expressly granted). But this rule is central to the principle of reciprocity, and is one of the necessary limitations in the extradition process: the requested state guarantees to its subjects that it will invade their liberty only so far as to surrender them for matters expressly identified in advance, and assures them that they will not be the victims of arbitrary and unlimited proceedings when they are surrendered. Absent such a guarantee the extradition process would risk losing democratic approval.

Aside from constitutional concerns, there is the matter of diplomatic reality: to take off all one's clothes and rush naked and defenceless into the sea may be exhilarating, but it is unwise to suppose that all our EU partners will be quite so willing (or permitted by their own domestic constitutional law) to strip off their rights and safeguards before taking the plunge.

More alarmingly, the Review contemplates a much reduced role for the Secretary of State in EU cases. He would have no power to intervene in the process on a discretionary basis. That may simplify matters, but the difficulty is that the House of Lords have held in a series of cases that the reason there is no abuse of process jurisdiction in the courts in extradition cases is that Parliament has fixed the Secretary of State with the discretionary power to prevent extraditions which are wrong, unjust or oppressive. The present proposals do not envisage transferring the discretionary power to the Courts: hence there would be a vacuum of responsibility, and by law extraditions would proceed irrespective of whether they were wrong, unjust or oppressive. What democratic mandate can the Government possibly claim for such a proposal?

CBA response

The CBA, on receiving notice of these proposed "reforms", set up a committee to draft its response to the proposals. That committee, consisting of Alun Jones Q.C., John Hardy and Mark Summers, produced a comprehensive response reflecting the fact that the proposals are much wider than can be summarised in an article such as this. Consequently, I have concentrated only on the EU Member States proposals. There are, though, other contentious proposals for other schemes involving, for example Commonwealth countries and colonies. Here again the theme is along the lines of "who needs safeguards in 21st century Utopia?" Who indeed? The *reductio ad absurdum* is " just get them on the plane and have done with it".

Your committee, however, preferred the balanced assessment put forward by Lord Griffiths in *R v Horseferry Road Magistrates' Court ex parte Bennett* (1993) 2 W.L.R. 90, 104H:

"Extradition procedures are designed not only to ensure that criminals are returned from one country to another, *but also to protect the rights of those who are accused of crimes by the requesting country...*" [Emphasis added].

It is difficult to divorce these proposals from the Government's evident intention to do away with many of the bulwarks of our domestic criminal justice system (jury trials, the right to silence, the right to an advocate of one's choice *etc.*) and its tandem intention to whittle away many of our basic freedoms (confiscation without conviction, restriction of movement in and out of the country on suspicion of hooliganistic tendencies and the like). "Don't worry, dear boy, people with nothing to hide have nothing to fear" and other such siren sentiments are repeatedly trotted out in support of the programme of progressive de-liberalisation.

But we all know that our criminal justice system is worth fighting to preserve, which is not to say that it does not require reform and improvement; while many of us recognise that the Government's proposals for reform and improvement, dressed up in the superficially attractive garb of "modernisation", in fact amount to no more than a widespread transfer of power from the courts to the executive. So it is with extradition law; how much easier for the executive to get rid of the irritating obstacles sometimes encountered in the Courts by simply getting rid of the Courts' *effective* powers altogether. The Review proposals are a dangerous step along this road.

Your committee did not, however, adopt an entrenched and Luddite attitude to all the proposals in the Review. In particular, we supported the proposals to do away with the arcane and archaic requirements as to authentication of papers submitted in support of requests. Moreover, we made concrete proposals of our own: the delays in the process are not attributable to the existence of rights, protections and safeguards, but to the multiplicity of decision-makers and the number of occasions in the process when a decision has to be made. A streamlined procedure would see the withdrawal of the Secretary of State (save for a power to intervene where the national interest so demanded), a speedy form of committal (as exists at present) and a "one-stop" appeal to the Divisional Court (and, with leave, to the House of Lords) whose powers should be expanded to enable it to discharge in all cases where, for whatever reasons, it would be wrong, unjust or oppressive to extradite.

Your Committee's proposals are considered, sensible, moderate where necessary, and radical where necessary. They would bring about a streamlining of the extradition process without jeopardising the rights of those who are subject to the most invasive procedure known under our law. Even my 16 year-old client would retain some prospect of defeating the request, a prospect which simply would not exist under the Review proposals. Is it too much to hope that our proposals might be adopted?

Unhappily, experience thus far with the Government of today suggests that merit and sensibility automatically disqualify proposals from consideration, while Her Majesty's Opposition are too busy trying to extradite one another from power and influence to have any time to worry about anyone being extradited to injustice or oppression. It looks as though, once again, it falls to the CBA and all members of the Bar to stand up and carry the fight.

John Hardy
3 Raymond Buildings

(Although this article was written before the September 11 atrocities, the author's expressed views remain the same)

CBA COMMITTEE ELECTIONS

Nominations are invited for the following positions:

TREASURER: A term of office of two years from January 2002.

ASSISTANT SECRETARY: In future this will be a one year position at the end of which the Assistant Secretary will assume the post of Secretary; however, as this is a recent constitutional amendment, the successful candidate will take over as Secretary in April 2002.

COMMITTEE MEMBER: There are four places to be filled one of which is reserved for a junior under 7 years' call. Each place carries a tenure of three years.

Candidates for election must be members of the CBA.

Candidates should send a letter of nomination to me (signed by a proposer and seconder, both of whom must be members of the CBA) to be received by 5pm on Friday 14th December.

NOT IN FRONT OF THE BARRISTERS!

Whatever disputes we may have had about unused material, we have always taken for granted that we would have unimpeded access to the evidence to be used against a defendant. Not for much longer it seems, if my recent experience is anything to go by.

I was recently instructed to represent a man charged with two counts of supplying crack cocaine to two under cover police officers (described as "test purchasers"). The matter was listed for trial but was unable to proceed because the prosecution could not produce certain evidence.

This case is a small part of an anti-drugs operation at Earl's Court. The test purchasers armed themselves with a concealed surveillance camera and, having previously targeted my client, approached him and purported to conduct two drugs deals with him. The resultant film was not copied but, following the decision in *R v X Justices ex parte J and S 16th* June 1999, defence solicitors and defendant were allowed supervised access to the films in prison. Because the prison were unable to provide facilities (which had been arranged) for me to view the videos when I attended for a conference, I had not had the opportunity to view them before trial.

As a consequence I made a application to the learned judge to order that the prosecution serve copies of the tapes on me personally in return for my undertaking not to copy or disseminate them, nor to allow anyone other than my solicitors or client to view the films. The learned judge granted my application and the tapes were ordered to be handed over by 6 pm that evening.

The following day the prosecution had the matter relisted to apply to the judge to revise her ruling of the day before. Among their reasons for asking the judge to reconsider her order was the suggestion that I might make a copy of the relevant tape. I do not blame my opponent who was simply passing on the concerns of the police. I did mention to the learned judge that to my knowledge there was no special unit in Scotland Yard set up to investigate corrupt barristers! And that the tapes would certainly be as safe with me as with the police. But if the police regularly manage to persuade courts that barristers are capable of dishonestly breaching undertakings that they have given to the court, then I fear that it will not be long before the police can determine who can defend certain cases. I should say that the learned judge was not persuaded by the prosecution and the order remained in force.

Jonathan Ingram
Francis Taylor Building

PROTOCOL FOR THE INSTRUCTION OF COUNSEL IN THE MAGISTRATES' COURT

Since April this year we are back to a system where the Bar is dependent upon solicitors for payment in respect of advocacy undertaken in the magistrates' court. Solicitors hold the purse strings as they contract with and are paid by the Legal Services Commission and the Bar is paid from the payment they receive.

The CBA and the Young Bar are concerned that the Bar should receive a fair level of remuneration. Over several months negotiations have taken place with the London Criminal Courts Solicitors Association (LCCSA) to try and agree a protocol which will provide guidance for both sides of the profession.

There were considerable difficulties in achieving a formula which was sufficiently simple to avoid the risk of the document becoming too complicated and / or restrictive to a degree that would make it less likely to be adopted.

In September a protocol was agreed. It sets out in broad terms what is required of both solicitor and counsel. It makes provision for chambers to invoice monthly and for monthly payments to be made by solicitors. Annex A includes the basis for rates of pay and sets out the factors to be taken into account. Importantly under the protocol solicitors have agreed that barristers should be paid 2/3rd travelling time and 2/3rd waiting time over and above the set fee.

Barristers can revert to the Legal Services Commission if they are not paid within 30 days. However, in a spirit of co-operation, we have agreed not to do so without first requiring an explanation from the solicitor.

It is a 'living document'. It is to be reviewed annually (first review 31st January 2002.) Its object is a 'best practice' framework. Of course, it is not compulsory. Nevertheless we strongly recommend all chambers to follow the guidelines so that a fair level of remuneration is achieved in return for a good quality service.

Peter Rook Q.C. for the CBA
Edward Bowles for the Young Bar

THE PROTOCOL

"This protocol shall be referred to as the protocol for instructing counsel in cases covered by Legal Services Commission General Criminal Contract. It will be reviewed on or before 31st January 2002 and thereafter on or before 31st December annually.

The object of this protocol is to provide a 'best practice' framework concerning the instruction of counsel to attend Magistrates' Courts on behalf of clients instructed by firms within the Greater London area for work done under the General Criminal Contract.

The London Criminal Courts Solicitors' Association, the Criminal Bar Association and the Young Barristers' Committee of the Bar Council hope that this document will assist in obtaining consistent standards of service and fair levels of remuneration for the young bar.

Counsel shall be the barrister attending a court upon instructions from the solicitor.

A The solicitor agrees as follows:

1. Those instructions shall be given (except in the case of an emergency) in writing sent by e-mail, fax, DX or post.

2. That instructions shall, whenever appropriate, include at least the following:

a) Name, address, date of birth and telephone number of the client;

b) Copies of charges, TIC's, advance information (whether case summary or statements) and exhibits;

c) Bail details or reasons for remand into custody, stage of proceedings, object of the hearing in question and bail instructions;

d) Unique File Number (UFN) and a copy of the grant of representation order, where available, or instructions to make application for a representation order;

e) Proof of evidence of client, including antecedents, previous convictions and comment on prosecution case.

3. That payment shall be made in the month following receipt of counsel's fee note and report of result of hearing.

4. Payment to counsel shall be based on the guidance set out in Annex A, attached hereto. The purpose of Annex A is to recommend a basis for payment of counsel's fees that is fair and reasonable.

5. To pay counsel whether or not a representation order exists unless agreed to the contrary.

B Counsel agrees as follows:

1. On the day of the hearing, or within 24 hours thereof, counsel shall forward a written report on the case to the instructing solicitors. (The written report shall so far as is possible include all the information referred to in Annex B).

2. To act as counsel, from the solicitor's approved list of counsel (save in exceptional circumstances) for the solicitor advising and assisting the client at the relevant hearing.

3. To ensure that the number of cases accepted at any time will not diminish the quality of the service offered to the client of the solicitor.

4. That on the day of the hearing counsel will, by telephone, advise the solicitor of the result of the hearing and any emergency work which is to be carried out.

5. Counsel's chambers will invoice the solicitor collectively, once a month, so that the solicitor may pay the invoice in a single transfer to chambers.

6. If counsel's fees are not paid within 30 days, counsel's clerk will ordinarily require an explanation before a decision is taken to revert to the LSC for payment.

ANNEX A

1. Formal hearings (remands, paper committals, bail applications in the magistrates' court) £35 plus 2/3rd of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting time (in addition to any travelling expenses reasonably incurred by counsel and which are recoverable by the solicitor) plus VAT.

2. Contested hearings (including Section 6(1) committals). Best practice would suggest either 2/3rd of the rate payable to the solicitor under the General Criminal Contract in respect of travel, waiting, preparation, attendance and advocacy (in addition to any travelling expenses reasonably incurred by counsel which are recoverable by the solicitor) plus VAT; or a fixed fee of between £60 and £120 plus 2/3rd of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting time (in addition to any travelling expenses reasonably incurred by counsel and which are recoverable by the solicitor) plus VAT .

   Factors to be taken into account should include the amount of time involved, the difficulty or gravity of the case, and the experience of counsel engaged.

3. Bail appeals to the Crown Court: £45 plus 2/3rd of the rate payable to the solicitor under the General Criminal Contract in respect of travel and waiting (in addition to travelling expenses reasonably incurred by counsel which are recoverable by the solicitor) plus VAT."

   (Annex B is currently unavailable)

RECENT REPORTS OF CBA WORKING PARTIES

Mar 2001 CBA Response to "Speeding Up Youth Committals in the Crown Court", *by Anthony Berry Q.C. and Gareth Branston*

April 2001 CBA response to "Recovering the Proceeds of Crime", *by Andrew Trollope Q.C., Rudi Fortson, Simon Farrell and Bobbie Cheema*

April 2001 CBA Working Party Report on the Public Availability of Documents Laid Before the Court of Appeal (Criminal Division), *by Victor Temple Q.C., Paul Taylor, Mark Summers and Duncan Penny*

April 2001 Restrictions on Evidence of Questions About The Complainant's Previous Sexual History, *by Peter Rook Q.C.*

May 2001 Guidance on Matters to be taken into account by Q.C.'s and Juniors – Applications under Regulation 12 of the Criminal Defence Service (General) Regulations 2001

May 2001 CBA Response to Age Discrimination in Pupillage and Tenancy Selection, *by Courtenay Griffiths Q.C., Martin Picton and Christopher Coltart*

May 2001 CBA Response to Bar Council Education and Training Committee's Funding of Pupillage: Consultation on Waivers, *by Sally O'Neill Q.C., James Hines, Emma Broadbent and Robin McCoubrey*

June 2001 CBA Response to A Review of the Victim's Charter, *by David Fisher Q.C., John Riley and Samantha Cohen*

July 2001 CBA Response to the Consultation Draft Document "Guidance for the use of an Intermediary under Section 29 of the Youth Justice and Criminal Evidence Act 1999, *by Peter Rook Q.C., Gareth Rees, John Riley and Gillian Jones*

July 2001 CBA Response to "A Review of the Rehabilitation of Offenders Act 1974", *by Jeremy Benson Q.C., James Hines and Nicola Howard*

July 2001 CBA Response to the Development of Materials which tell Young Defendants about Court, *Sally O'Neill Q.C., John Riley and Gareth Branston*

Sept 2001 The Revised Graduated Fees Scheme, *by Andrew Hall*

Sept 2001 CBA Response to the Strategic Consultation Document (Version 2.1) Dated June 2001

Sept 2001 Proposal for Extended Hours Sitting in High Crime Areas – the CBA Response, *by Peter Rook Q.C., Anthony Berry Q.C., Nick Wood, Bozzie Sheffie, Christopher Coltart and Nicola Howard*

Oct 2001 CBA Response to the Home Office Consultation on Sentencing Reform "Making Punishment Work", A Review of the Sentencing Framework of England and Wales, *by Jeremy Benson Q.C., David Etherington Q.C., John Dodd, Adrian Kayne and Kate Wilkinson*

Oct 2001 CBA Working Party Response to the Kentridge Report, *by Peter Lodder Q.C., Rock Tansey Q.C., Emma Broadbent and Warwick Aleeson*

Oct 2001 CBA Working Group Response on The Home Office Draft Guidance Document on the International Criminal Court Act 2001, *by Dorian Lovell-Pank Q.C., Jeremy Dein and Karim Khan*

Oct 2001 Response of the CBA to the Proposals by the Task Force on Child Protection on the Internet, *by Peter Rook Q.C., Gareth Rees, John Riley and Gillian Jones*

DATES FOR DIARIES

February 23 2002	Vulnerable witnesses seminar in Bristol
April 20 2002	CBA annual conference
April 26 2002	CBA dinner

HIGH COST CASES

We are starting to hear some disturbing stories of unrealistic ideas about necessary preparation time in high cost cases. This is unacceptable and wholly unjust to those accused. If true, it would also be evidence of the hand of the Legal Services Commission working in precisely the way we were told it would not – towards state control of the defence. If you have evidence please let **Simon Levack** at the **Bar Council** know about it.

WWW.TRIALBYJURY.COM

www.trialbyjury.co.uk is a web-site dedicated to supporting the right to trial by jury. Visitors to the site can sign a web-petition and e-mail their MP's.

The petition is in response to the Auld Review. Supporters will need to sign it before the 31st January 2002, which is the end of the Government's designated period of consultation.