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The Criminal Justice (Mode of Trial) (No. 2) Bill

Bill 73 of 1999-2000

This paper is concerned with the *Criminal Justice (Mode of Trial) (No. 2) Bill*, which is due to be considered on second reading on Tuesday 7 March. Where defendants are contesting charges relating to offences triable either by magistrates or by a judge and jury at the Crown Court, the Bill seeks to give magistrates, rather than defendants, the choice of where the case should be tried. The Bill is an amended version of a Bill which was introduced in the House of Lords earlier this session but later withdrawn following a Government defeat on an amendment introduced during its committee stage there.

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Summary of main points

English criminal law classifies offences into those triable only summarily by magistrates, those triable only on indictment by a judge and jury at the Crown Court, and those triable either way. Where offences are triable either way an accused person may elect to be tried by a judge and jury at the Crown Court. The *Criminal Justice (Mode of Trial)(No. 2) Bill* aims to give the decision as to mode of trial in either way cases to magistrates rather than defendants, subject to an appeal to the Crown Court. This Bill, which was published on 22 February 2000 and is due to be considered on second reading on 7 March 2000, replaces a *Criminal Justice (Mode of Trial) Bill* introduced by the Government in the House of Lords on 18 November 1999. The earlier Bill had its second reading in the House of Lords on 2 December 1999¹ but was withdrawn following a Government defeat on an amendment introduced at the committee stage in the House of Lords². A new Bill, introduced in the House of Commons, was needed to enable the Government to invoke the *Parliament Acts* if the House of Lords were to reject the Bill once it had passed through the House of Commons.

This paper sets out the history of trial by jury and the current procedures for determining mode of trial in cases involving offences triable either-way. It goes on to summarise the recent developments concerning such trials, including research on mode of trial decisions and trial outcomes, the recommendations of the 1975 report of the James Committee, the 1993 report of the Royal Commission on Criminal Justice and the 1997 report of the Review of Delay in the Criminal Justice System (the Narey report), as well as subsequent developments leading up to the publication of the first *Criminal Justice (Mode of Trial Bill)*.

The paper then describes the changes to the procedures for determining mode of trial which are intended to be introduced by the *Criminal Justice (Mode of Trial)(No. 2) Bill*, including differences between this Bill and the earlier version. It goes on to set out some of the points raised in the debate on the proposals set out in the two versions of the Bill.

The issue of race as a factor in criminal trials has been raised during the debate on the Government's proposals and the next section of the paper summarises some of the research on this subject. This is followed by a chapter setting out some of the discussion on the "right" to trial by jury in English law. The final section of the paper deals with the means by which mode of trial is determined in Scotland and the sentencing powers of the Scottish criminal courts, both of which are matters that have been raised during the debate on the Bill.

¹ HL Deb 2 December 1999 c919-1004

² HL Deb 20 January 2000 c1246-1298

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I Origins and History of Trial by Jury

The early form and role of the jury was quite different from its form and role today. In the *Oxford Companion to Law* David Walker says that:

The origin of the jury is probably to be found in the importation, from Normandy, of a system of inquisitions in local courts by sworn witnesses. This was found in England shortly after the Norman Conquest, and from the first, combined with the existing procedure of the shire-moot. The earliest jury was a body of neighbours summoned by a public officer to give an oath as answer to some question.³

The *Oxford English Dictionary* gives as the origin of the word jury the Old French noun “jurée”, meaning an oath, judicial inquiry or inquest (as in the verb “jurer”, to swear), and the mediaeval Latin “jurata” from the verb “jurare”.

From early on the sworn inquest was used to enable the recognition on oath of a number of *probi nomines*⁴ selected to represent the neighbourhood and to testify of facts of which they had personal knowledge. David Walker notes that Henry II applied recognition by jury to all types of legal and fiscal business and that this type of procedure subsequently came to be used in many types of legal action. He adds that jurors were witnesses rather than judges of fact:

As originally established, the function of the jury was not to weigh evidence but to decide on the basis of their own knowledge, or the general belief of the district, and for this reason they were always selected from the hundred or district where the question for decision arose. If they did not have the knowledge they could readily ascertain it. They were accordingly witnesses rather than judges of fact.⁵

As far as criminal cases were concerned, Walker notes that at the end of the twelfth century, a person accused of crime by another could, on payment, obtain the right to be tried by jury. The presenting jurors decided as to the mode of proof. When trial by ordeal was prohibited by Pope Innocent III in November 1215 and other methods of establishing guilt, such as compurgation (which involved an accused seeking to clear himself by his own oath, bolstered by the oaths of others, usually friends and neighbours, who testified as to his character rather than the facts) also fell from favour, the need arose to find a new method of establishing guilt. In his book *Trial by Jury*, published in 1956, Sir Patrick Devlin (as he then was) suggested that it was natural that the judges who went out on circuit in England, who were left more or less to improvise a new method, should choose the jury.⁶ Gradually the practice developed of selecting a trial jury of 12.

³ David M. Walker *The Oxford Companion to Law* (1980) p.686

⁴ roughly translated, this means “good, upstanding names”

⁵ David M. Walker *The Oxford Companion to Law* (1980) p.686

⁶ Sir Patrick Devlin *Trial by Jury* (1956) p.10

Those crimes which were categorised as felonies were always tried “on indictment” with a jury. The accused had to consent to jury trial. The Statute of Westminster I (1275) provided that felons who refused jury trial should be committed to “a hard and strong prison” (*prison forte et dure*). Walker notes that the words *prison forte et dure* became transformed into *peine forte et dure*, a form of torture whereby, in the sixteenth century, the prisoner was placed between two boards on which increasingly heavy weights were placed until he “consented” to trial by jury or died.⁷ The last recorded case of crushing a prisoner to death is reported to have been at Cambridge in 1741. The practice was abolished in 1772. From 1827 onwards a plea of not guilty was ordered to be entered if an accused person declined to plead.

As the James Committee noted in its 1975 report on *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*, trial on indictment by a judge and jury remained the normal mode of trial for criminal offences until the middle of the nineteenth century.⁸ Before the establishment of professional police forces in the nineteenth century justices of the peace had general responsibilities for law enforcement and the investigation of crime and were not regarded as independent. They had an extensive criminal jurisdiction when sitting in quarter sessions with a jury, but their summary jurisdiction to try cases without a jury was very limited. There were two categories of offence: those triable on indictment by a judge and jury and a much smaller category of offences triable only summarily by magistrates. Those offences which were categorised as felonies were always tried on indictment.

The middle decades of the nineteenth century saw the enactment of a number of statutes permitting the summary trial of certain indictable offences, with the consent of the accused. In particular, an Act of 1855 “for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases” permitted certain cases of larceny, which was a felony, to be tried by magistrates, rather than by a judge and jury, as long as the accused person consented to this type of trial. In these cases an accused person who would otherwise have had to be tried by a jury could therefore waive this requirement and elect to be tried by magistrates instead.

The debates in Parliament on the Bill that became the 1855 Act reflect general concern that delays and expense resulting from the need for every felony to be tried by a judge and jury were bringing the criminal justice system in England and Wales into disrepute.⁹ Some peers were equally concerned, however, about the competence of the magistrates of the day to deal appropriately with the cases that came before them.¹⁰ In the debate on the committee stage of the Bill in the House of Lords the jurist and future Lord Chancellor, Lord Campbell, said he was glad that the maximum amount of imprisonment to be inflicted under the Bill was to be

⁷ David M. Walker *The Oxford Companion to Law* (1980) p.943

⁸ *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*. Report of the Interdepartmental Committee Cmnd 6323 November 1975 paragraph 12.

⁹ See eg. HL Deb 26 February 1855 c1871-1880; HL Deb 27 February 1855 c1958-1961

¹⁰ *ibid.*

limited to one year, which he thought sufficient to be imposed without the intervention of a jury. Hansard adds¹¹:

He was glad also that the noble and learned Lord had given the option of trial by jury; for had he not done so he must have opposed the Bill as unconstitutional.

The arrangements under the 1855 Act enabling people accused of certain indictable offences to consent to summary trial by magistrates was subsequently extended to other offences. The *Summary Jurisdiction Act 1879* consolidated much of the earlier legislation and listed for the first time those indictable offences which were triable summarily with the accused's consent. Section 17 of the 1879 Act also set out for the first time a general right to claim trial by jury, exercisable where the maximum sentence on summary conviction exceeded three months' imprisonment.

In their book *The Emergence of Penal Policy in Victorian and Edwardian England*, published in 1990, Leon Radzinowicz and Roger Hood suggest that the extension of magistrates' summary jurisdiction to a mass of indictable offences that had previously been tried by juries at the courts of Assize and Quarter Sessions was a major factor behind the "retreat from incarceration" that took place in the second half of the nineteenth century.¹² They note that there was a steady decline in the number of prosecutions from the 1880s onwards, which could be interpreted as the result of the deterrent effect of punishment for offences having been made speedier and more certain, if less severe.¹³ It could alternatively be seen as the result of a substantial decrease in crimes of all kinds and by all offenders which took place during this period.¹⁴ Radzinowicz and Hood go on to say that:

Whatever the interpretation, - and any interpretation must remain conjectural, - the movement for summary jurisdiction stands out as one of the most significant developments of the nineteenth century in the perception and control of crime. It also provides a classic example of how a change in criminal procedure can transform the perception of criminality.¹⁵

The Government's consultation paper *Determining Mode of Trial in Either-Way Cases*, published in July 1998, summarises developments in the categorisation of offences following the 1855 Act as follows:¹⁶

In the course of time the same arrangement was extended to some other indictable offences, and 'hybrid' offences (triable either summarily or on indictment) were created, some of which could be dealt with by magistrates *without* the defendant's

¹¹ Parliamentary Debates Third Series N.S Vol 136 c1959, 27.2.1855

¹² Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England*, (1990) p.618

¹³ *ibid.* p.623

¹⁴ *ibid.*

¹⁵ *ibid.* p623-4

¹⁶ Home Office, *Determining Mode of Trial in Either-Way Cases*, July 1998 paragraph 5

consent. By 1975 the Inter-Departmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (the James Committee) found that, as a result of these largely unrelated developments in the summary jurisdiction of magistrates' courts, the categories of case had multiplied to include, in addition to cases triable only on indictment or only summarily, indictable cases triable summarily with the defendant's consent, hybrid cases with and without a right to elect trial by jury, and summary cases which in certain circumstances could be tried on indictment. The James Committee sought to simplify these arrangements, and its recommendations led to the present classification of offences as summary, either way and indictable only.

The current classification of offences dates from the *Criminal Law Act 1977* that followed the publication of the James Committee report. The provisions of the 1977 Act were later repealed by the *Magistrates' Courts Act 1980*, which was largely a consolidation measure and maintained the classification set out in the 1977 Act.

II Current procedures for determining mode of trial in criminal cases

A. "Plea before venue" and magistrates decisions

The procedure for determining mode of trial in magistrates' courts was changed in October 1997 when section 49 of the *Criminal Procedure and Investigations Act 1996* was brought into force. The section inserted new sections 17A, 17B and 17C into the *Magistrates' Courts Act 1980*, introducing a new procedure generally referred to as "plea before venue" (PBV). Under this procedure, where a person who has attained the age of 18 years appears or is brought before a magistrates' court charged with an offence triable either way, the court must explain to the accused that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty. The court must also explain that if he does plead guilty the court will proceed to try him summarily and that he may then be committed to the Crown Court for sentence under section 38 of the 1980 Act if

- a) the court takes the view that greater punishment should be inflicted for the offence than it has power to impose; or
- b) where a violent or sexual offence is involved, that a custodial sentence for a term longer than the court has power to impose is necessary to protect the public from serious harm from him.

The court must then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

If the accused indicates a guilty plea the court then deals with the case as if it had always been a summary trial of an offence to which the accused had pleaded guilty. If the accused indicates that he would plead not guilty or fails to indicate how he would plead a different procedure applies. In this case, under section 19 of the *Magistrates' Courts Act 1980*, the magistrates' court must first give the prosecutor and then the accused an opportunity to make representations as to whether summary trial or trial on indictment would be more suitable. The court must then move on to consider itself which mode of trial would be more suitable, having regard to the following matters, set out in section 19(3):

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

Where the magistrates' court decides that the offence is more suitable for summary trial, section 20 of the *Magistrates' Courts Act 1980* requires the court to explain to the accused that it takes this view and that he can either consent to be so tried or, if he wishes, be tried by jury. The court must also tell him that if he is tried and convicted summarily by the magistrates' court he may be committed for sentence to the Crown Court under section 38 of the 1980 Act. The court will then ask the accused whether he consents to be tried summarily or wishes to be tried by a jury. If he consents to be tried summarily the court must proceed to try the matter summarily. If the accused does not consent to be tried summarily the court must proceed to commit the case of trial at the Crown Court.

If it appears to the magistrates' court that trial on indictment would be more suitable, section 21 of the 1980 Act requires the court to inform the accused of its decision and proceed to commit the case for trial at the Crown Court. In these circumstances the accused will not be asked whether or not he consents to be tried by jury and will not be able to choose summary trial by magistrates.

Section 19(4) of the 1980 Act provides that sections 19 to 21 of the 1980 Act do not apply if the prosecution is being carried on by the Attorney-General, the Solicitor-General or the Director of Public Prosecutions (DPP) and he or she applies for the offence to be tried on indictment. Where this happens the magistrates' court will have to proceed to commit the case for trial at the Crown Court. The DPP's power under section 19(4) to apply for an offence to be tried on indictment is only exercisable with the consent of the Attorney-General.¹⁷

Section 22 of the *Magistrates' Courts Act 1980* provides for offences of criminal damage involving damage costing up to £5,000 to be triable only summarily. Where damage greater

¹⁷ *Magistrates' Courts Act 1980* section 19(5)

than this is involved the court may proceed to consider whether summary trial or trial on indictment would be more suitable. If it is unclear whether or not the cost of the damage exceeds this sum, section 22(5) requires the court to explain to the accused that he can consent to be tried summarily for the offence, that if he does consent, he will definitely be tried that way, and that if he is tried summarily and convicted, his liability to imprisonment or a fine will be limited to 3 months and a £2,500 fine and the court will not be able to commit him to the Crown Court for sentence. Section 22(6) provides that the court must then ask the accused whether he consents to be tried summarily and if he consents, must proceed as if the value involved was £5,000 or less and the court was thus obliged to try the accused summarily. If the accused does not consent, the magistrates' court will have to proceed as if the value involved exceeded £5,000 and the court was therefore having to decide for itself which mode of trial would be appropriate.

National Mode of Trial Guidelines were introduced in 1995 to help magistrates decide whether or not to commit either way offences for trial in the Crown Court. These are intended to provide guidance rather than direction and are not intended to impinge on a magistrate's duty to consider each case individually and on its particular facts.¹⁸

In a written answer of 17 February 2000 the Home Office minister Charles Clarke set out the Government's view of the impact plea before venue has had on elections for trial:

Mr. Marshall-Andrews: To ask the Secretary of State for the Home Department what assessment he has made of the impact of the requirement to plead before venue for each of the years 1997, 1998 and 1999.

Mr. Charles Clarke: Section 49 of the Criminal Procedure and Investigations Act 1996 ("plea before venue") provides for defendants in either-way cases to be asked to indicate their plea before the magistrates decide whether to accept or decline jurisdiction. Its purpose is to allow cases in which a guilty plea is indicated, and which might previously have been committed for trial, to be dealt with by the magistrates themselves where the appropriate sentence (after any discount for the guilty plea) is within the court's powers, or if not through being committed to the Crown Court for sentence. The provision was implemented in October 1997, since when (as expected) substantially fewer cases have been committed for trial, but there has been a significant increase in the numbers committed for sentence. Statistics collected by the Crown Prosecution Service show that the percentage of either-way cases committed for trial reaching the Crown Court by way of the defendant's election was 28 per cent. in 1997 and 1998, and 32 per cent. in 1999.¹⁹

¹⁸ *Stones' Justices' Manual 1999* Vol. 1 paragraphs 1-6480 to 1-6492

¹⁹ HC Deb 17 February 2000 c622-623W

Number of defendants at magistrates' courts committed for trial or sentence for a triable either-way offence (3) in 1997, 1998 and January to June 1999 (4) <i>Year</i>	<i>Committed for trial</i>	<i>Committed for sentence</i>
1997	66,456	6,823
1998	51,952	18,185
January-June 1999(4)	25,777	9,533

(3) Where the triable either-way offence is the principal offence

(4) Data for this period are provisional

A person who is convicted by magistrates, having pleaded not guilty, may appeal to the Crown Court against the conviction.²⁰ The appeal will take the form of a re-hearing of the case.²¹ People convicted by magistrates may appeal to the Crown Court against sentence regardless of how they pleaded.

B. Sentencing

1. The sentencing powers of magistrates in England and Wales.

The maximum term of imprisonment which a magistrates' court may impose on an offender convicted of a single offence triable either-way is 6 months. Consecutive sentences may be imposed on offenders convicted of more than one such offence, but the aggregate term of imprisonment imposed on an offender convicted of 2 or more offences triable either-way may not exceed 12 months.²²

Section 38 of the *Magistrates' Act 1980* enables a magistrates' court dealing with an offender convicted of an either-way offence to commit the offender to the Crown Court for sentence if the magistrates' court takes the view that the offence was so serious that greater punishment should be inflicted than the magistrates have power to impose or, in the case of a violent or sexual offence, that a custodial sentence for a term longer than the magistrates' court has power to impose is necessary to protect the public from serious harm from the offender.

2. Discounts for early guilty pleas

A person who leads guilty at an early stage in the proceedings against him may receive a lighter sentence than would otherwise have been the case. The principle of discounts for early pleas of guilty, which was developed initially by the courts, was given statutory backing by section 48 of the *Criminal Justice and Public Order Act 1994*, following a recommendation

²⁰ *Magistrates' Courts Act 1980* s.108

²¹ *Supreme Court Act 1981* s.79(3) and see Archbold, *Criminal Pleading, Evidence and Practice 2000* paragraph 2-184

²² *Magistrates' Courts Act 1980* ss 31, 133

by the Royal Commission on Criminal Justice that this should be done.²³ Section 48(1)-(2) provides that:

(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court a court shall take into account-

- a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
- b) the circumstances in which this was given

(2) If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.

As the Crown Court has the power to impose heavier sentences than those which are available to magistrates courts, a defendant who pleads guilty, having elected trial by jury at the Crown Court, runs the risk of being given a heavier sentence than would have been the case had the defendant elected summary trial and not been committed by the magistrates to the Crown Court for sentence. Research by the Home Office and others on the extent to which this risk is borne out is summarised in section A of Part III of this paper and in Part VI of this paper, which is concerned with the issue of race as a factor in the outcome of criminal trials.

C. The Classification of Offences

The provisions of the *Magistrates Courts Act 1980* concerning the classification of offences have been amended several times since 1980. The amendments have usually been aimed at reducing pressure on the Crown Court and have therefore tended to consist of the reclassification of particular either-way offences as offences triable only summarily. For example, following the publication in 1986 of a Home Office consultation paper on *The distribution of business between the Crown Court and Magistrates' Courts*, sections 37-39 of the *Criminal Justice Act 1988* reclassified unauthorised vehicle-taking and certain other road traffic offences; common assault and battery; and criminal damage where the value involved did not exceed £2,000²⁴, as offences triable only summarily. The £2,000 limit on summary jurisdiction in cases involving criminal damage was later increased to £5,000 by section 46 of the *Criminal Justice and Public Order Act 1994*. As summary offences are those in respect of which a defendant has no right to elect trial by jury, these changes have all removed that right from defendants charged with these offences.

²³ *Report of the Royal Commission on Criminal Justice* Cm 2263 July 1993 Chapter 7 paragraph 47 and p.202 recommendation 156

²⁴ the previous limit was £400

Offences triable only on indictment include the following:

- Murder
- Manslaughter, including causing death by dangerous driving and causing death by careless driving while under the influence of drink or drugs
- Wounding with intent to do grievous bodily harm
- Buggery
- Rape
- Aggravated Burglary
- Robbery
- Arson with intent to endanger life or destroy or damage property
- Blackmail
- Kidnapping
- Treason
- Riot
- Possession of firearms with intent to endanger life or cause fear of violence
- Carrying a firearm with criminal intent
- Unlawful sexual intercourse with a girl under 13

As far as triable either-way offences are concerned, the Home Office minister Charles Clarke explained in a written answer of 11 February 2000 that:

There is no readily available list of triable either-way offences. Appendix 4 of the annual Command Paper "Criminal Statistics England and Wales" lists just over 370 triable either-way offence codes which are used for statistical purposes. Each code may cover more than one offence and these codes cover approximately 700 offences. Other triable either-way offences are grouped together under one 'ad hoc' code.²⁵

The list of triable either-way offence codes set out in Appendix 4 of *Criminal Statistics, England and Wales 1997*²⁶ includes the following:

- Making threats to kill
- Assault occasioning actual bodily harm
- Offences involving possession of offensive weapons or articles with blades or points without lawful authority or excuse
- Assault with intent to resist apprehension
- Breach of the conditions of an injunction against harassment
- Putting people in fear of violence

²⁵ HC Deb 11 February 2000 c318W

²⁶ Cm 4162 November 1998

- Child abduction
- Indecent Assault
- Indecency between males
- Unlawful sexual intercourse with a girl under 16
- Burglary
- Theft
- Handling stolen goods
- Most offences involving fraud, including obtaining property by deception and obtaining pecuniary advantage by deception
- Criminal damage of over £5000
- Production or being concerned in the production of controlled drugs
- Supplying or offering to supply a controlled drug
- Possession of a controlled drug
- Possession of a controlled drug with intent to supply
- Going equipped for stealing
- Violent disorder
- Affray
- Possessing firearms or shotguns and ammunition without a certificate and a number of other firearms offences, other than those triable only on indictment
- Possession of obscene material
- Cruelty to children

In a written answer to a question from Simon Hughes on 22 February 2000 the Home Secretary provided a following list of the 20 most common triable either-way offences, defined by the number of defendants prosecuted at magistrates' courts in 1998. This is set out on the following page:²⁷

²⁷ HC Deb 22 February 2000 c864-865W

Most common triable either way offences (9)	
<i>Offence description</i>	<i>Prosecutions</i>
1. Stealing from shops and stalls	77,914
2. Absconding by person released on bail	45,495
3. Assaults occasioning actual bodily harm	38,020
4. Ad hoc offences under the Theft Act 1968, section 1	26,525
5. Non-aggravated burglary in a dwelling	25,512
6. Having possession of cannabis	24,395
7. False statements by company directors	21,184
8. Non-aggravated burglary other than in a dwelling	20,459
9. Affray	17,600
10. Obtaining property by deception	16,018
11. Criminal damage excluding arson, endangering life and racial aggravation	14,148
12. Wounding or inflicting grievous bodily harm (inflicting bodily injury with or without weapon)	7,158
13. Possession of offensive weapons without lawful authority or reasonable excuse	7,141
14. Stealing from motor vehicles	6,728
15. Stealing from the person of another	6,256
16. Where the vehicle was driven dangerously, where injury to any person or damage to any property was caused or damage was caused to the vehicle	6,161
17. Dangerous driving	5,820
18. Undertaking or assisting in the retention, removal, disposal or realisation of stolen goods or arranging to do so	5,653
19. Violent disorder	5,337
20. Having an article with a blade or point in a public place	4,867

There is no generally available list of those offences which are only triable summarily offences, but they include:

- Assault on a constable
- Common assault and battery
- Cruelty to animals
- Criminal damage of up to £5,000
- Taking a vehicle
- Disorderly conduct, or causing harassment, alarm and distress
- Intentional harassment, alarm or distress
- Causing fear or provocation of violence
- Brothel-keeping
- Many road traffic offences

III Recent developments concerning the trial of either-way offences

A. Research studies on mode of trial decisions

A Home Office research study by David Riley and Julie Vennard, published in 1988, reporting research carried out on either-way cases concluded in October and November 1986, commented that:

Recent years have seen an upward trend in the number and proportion of triable-either-way cases committed to the Crown Court and in the proportion of defendants remanded in custody to await trial. Almost 90 per cent of cases committed for trial to the Crown Court are triable-either-way, that is, they may be dealt with either by magistrates or at the Crown Court. Decisions both by magistrates in declining jurisdiction and by defendants in electing trial largely determine the volumes of Crown Court business.²⁸

The report examined the influence of a range of factors on magistrates' and defendants' mode of trial decisions. The study's findings were summarised in the forward to the report as follows:

The study found that overall, in two-fifths of committals to the Crown Court magistrates had declined jurisdiction, taking the view that the case was not suitable for summary trial. Magistrates' decisions closely corresponded to representations made by prosecutors on the appropriate trial venue. There was also wide area variation in the proportion of cases in which magistrates declined jurisdiction. In the remaining three-fifths of cases committed to the Crown Court, defendants exercised their option to be tried by jury. The majority of defendants electing trial intended to contest their case and saw the Crown Court as offering a better chance of acquittal; this apparently outweighed the risk of a more severe sentence if convicted. When their case finally came to court, however, only a minority actually pleaded not guilty.²⁹

In their concluding chapter the reports authors commented that:

For defendants who admit their guilt, there are on the face of it few advantages in Crown Court trial: cases are likely to take longer to come to court and the upper limit on Crown Court sentences exceeds that in the magistrates' court. It has been argued that the additional delay at the Crown Court represents an attraction for some defendants anxious, for example, to enhance mitigating factors (such as stable personal relationships or employment record) or to maximise time spent remanded in

²⁸ David Riley and Julie Vennard, *Triable-either-way cases: Crown Court or magistrates' court?* – Home Office Research Study 98 (1988) p.iii

²⁹ *ibid.*

custody to offset a prospective custodial sentence. The present survey provides some support for this view, but according to their solicitors, most defendants who elected intending to plead guilty were motivated by factors other than delay. The reasons most frequently cited to explain this choice of venue were the defendants' previous experience with the courts, and greater confidence in a hearing at the Crown Court than before magistrates. This is consistent with the finding that some three-fifths of those who elected and eventually pleaded guilty were, at the time mode of trial was decided, actively considering contesting their cases. The decision to plead guilty often appeared to have been taken at a later stage.³⁰

The proportionate use of custody is much higher at the Crown Court for all offence groups and the authors comment that the knowledge of this would seem to be a strong disincentive to electing trial there. Noting that the advice on venue offered by defence solicitors might be expected to reflect their experience of sentencing practices at the two modes of trial, the authors go on to say:

On the other hand, since the Crown Court deals by and large with the more serious either-way cases, it is to be expected that the proportionate use of imprisonment is higher there than in the lower courts. In like cases it may be that judges at some courts pass more lenient sentences than magistrates, or are no more stringent. This would explain why, according to their solicitors, some defendants in the present sample elected believing they would receive a lighter sentence than if convicted by magistrates. For others, the prospect of a fairer hearing and better chance of acquittal evidently outweighed any fears about the sentence the judge might impose on conviction.³¹

A 1992 Home Office study by Carol Hedderman and David Moxon, of defendants convicted of either-way offences in 1990, sought to examine the way in which they were treated at magistrates' courts and the Crown Court, including the reasons for the decisions leading to Crown Court trial. It also sought to compare the severity of sentence at the two venues while controlling for other factors. The study was not concerned with and did not include acquitted defendants. Among its findings were the following:

Almost 60 per cent of cases dealt with in the Crown Court were sent there because magistrates declined jurisdiction. Yet magistrates' sentencing powers would have been sufficient to deal with a majority of these cases.

Nearly three-quarters of those denied a choice of venue [i.e. those whose cases were sent to the Crown Court because magistrates declined jurisdiction] would have chosen to be dealt with at a magistrates' court (mostly in expectation of a lighter sentence and/or a quicker trial).

³⁰ *ibid.* p.23

³¹ *ibid.* p.23

Most of those who chose to be dealt with at the Crown Court were influenced by the prospect of acquittal; yet the majority (82 per cent) ended up pleading guilty to all charges on which they were convicted.

There was little evidence that the considerable variations in sentencing practice between individual courts had any systematic influence on defendants' decisions as to venue.

More than half of those who elected Crown Court trial said that the possibility of a lighter sentence at the Crown Court influenced their decision. Yet the Crown Court made far more use of custody than magistrates' courts, irrespective of the area. This remained true when cases were matched on a number of factors. This analysis showed that judges were three times as likely to impose immediate custody, and sentences were on average two and a half times as long. Overall, therefore, they imposed more than seven times as much custody in comparable cases.

One third of defendants who elected trial would, in retrospect, have preferred to have been dealt with at a magistrates' court.

70 per cent of those who elected Crown Court trial had done so on the advice of a barrister or solicitor. Only five per cent had been advised to opt for summary trial.

A substantial number of defendants, including some who intended to plead guilty from the outset, chose to be dealt with at the Crown Court because they did not trust magistrates to give due weight to their case, often feeling that they would be biased in favour of the police; in almost one quarter of cases where solicitors advised their client to plead guilty from the outset they nevertheless favoured Crown Court trial.

Late changes of plea were often associated with late changes in the offences charged, and it is possible that if charges could have been agreed prior to the mode of trial decision more defendants would have been content to accept summary trial.

Even where magistrates declined jurisdiction, well over half the defendants received sentences that could have been imposed by magistrates.³²

A Lord Chancellor's Department research report entitled *Review of Delay in the Criminal Justice System*, published in December 1997 reviewed literature published between 1992 and 1997 on the issue of delay in the criminal justice system. The author of the report, Dr Satnam Choongh, noted the following amongst the reasons put forward in the literature as to why cases are so frequently adjourned and why cases that are listed for trial "crack" on or very near the date of the hearing:

- The majority of defendants who elect Crown Court trial inexplicably plead guilty at the last moment, wasting time and resources;

³² Carol Hedderman and David Moxon, *Magistrates' court or Crown Court? Mode of trial decisions and sentencing* Home Office Research Study No. 125 (1992) p.vi-vii

- Defendants have no incentive to plead guilty until the last minute because:
 - As unconvicted defendants they can serve more of their sentence on remand and enjoy privileges not extended to convicted prisoners;
 - There is always the possibility that witnesses may not attend trial
 - They want to know whether or not the judge is lenient before deciding whether to acknowledge their guilt, and
 - They simply do not want to make a difficult decision until they absolutely have to.³³

Dr Choongh's report stated that as far as the Crown Court was concerned, research findings challenged most of the hypotheses set out as reasons for cracked trials. It went on:

In Zander's study only 6 per cent of defence solicitors said that the plea had changed because the defendant had changed his mind. In the vast majority of cracked cases the collapse came about because the defence spoke and advised the defendant about his plea only on the day of the hearing or, more commonly, because the prosecution reduced the charges or decided not to offer any evidence. This finding receives support from Plotnikoff and Woolfson's 1993 study. It would seem, therefore that far from being responsible for the vast majority of cracked trials, defendants are either not advised how to plead until the day of the trial, are not charged with the appropriate offence/s until the day of the hearing, or are rightly advised by their lawyers not to plead guilty until the day of trial because there is every possibility that the charges will be reduced.³⁴

The report went on to say that some of the other reasons put forward to explain inefficiency and delay in the process were similarly undermined by the research findings:

There is no support in research findings for the argument that defendants should be deprived of the right to elect trial by jury because the majority of them plead guilty after electing to go to the Crown Court. It is simply not known how many defendants elect trial and then plead guilty. The Hedderman and Moxon (1992) study was based not on a sample of all defendants who elected trial, but only on those who elected trial and were convicted. It found that 75 per cent of convicted defendants who had elected for trial had pleaded guilty, but that in the majority of cases this was by no means inexplicable. They had changed their plea because the prosecution had reduced the charges.³⁵

³³ Dr. Satnam Choongh, *Review of Delay in the Criminal Justice System* Lord Chancellor's Department Research Series no. 2/97 December 1997 p.8

³⁴ *ibid.* p.10

³⁵ *ibid.* p.11

As far as magistrates' courts were concerned, Dr Choongh said:

Two studies in the last five years have looked at the problem of cracked trials in magistrates courts. Raine and Willson (1992) found a collapse rate of 40 per cent. In 14 per cent of those cases the trial cracked because the prosecution offered no evidence, and in 26 per cent because the defendant changed his plea to guilty. The study does not provide any information on why defendants changed their plea at the last minute, and the findings therefore neither support nor disprove the above hypothesis that defendants conceal their plea until the last minute for strategic reasons.³⁶

B. Proposals to remove the right to elect jury trial

At the start of its investigations in November 1973 the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court (the James Committee) prepared a note for consultation in order to focus attention on what appeared to be the main issues. In order to stimulate discussion the note included a proposal that magistrates should decide the mode of trial for offences that were triable either-way. In its report, published in November 1975, the Committee noted that the proposal would enable the business of the criminal courts to be regulated more exactly and economically and would have the added advantage of enabling the intermediate category of offences to be extended to include some existing summary offences for which trial on indictment might occasionally be appropriate. The Committee commented:

If there is no check on the defendant's right of election, the intermediate category must necessarily be restricted so as to ensure that the system is not overwhelmed by defendants electing trial on indictment in comparatively minor cases. In a system in which the magistrates' court decided the venue, it would be possible to regulate the practice of the courts and, in consequence, the distribution of business by laying down, either by statute or by regulations or by means of a practice direction, the criteria which the magistrates should apply.³⁷

Despite weighty support for the proposal that magistrates, rather than defendants, should decide the mode of trial in cases involving offences triable either way, the Committee rejected it for the following reasons:

First, there would be an inherent difficulty in the court having to decide the importance of the case. It would be difficult to lay down appropriate criteria for the court to apply and there would be a danger of there being applied inconsistently by different courts. Secondly, the strong opposition of many of those who made representations and gave evidence upon this issue showed that the suggestion was

³⁶ *ibid.* p.12

³⁷ *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts* Cmnd 6323 November 1975 paragraph 56

unlikely to be acceptable to a wide sector of the public. Thirdly, a proposal to substitute the decision of the magistrates for the defendant's right to elect trial by jury is unattractive in so far as it would lead to the magistrates trying summarily a case in which the same court (albeit differently constituted) had refused the defendant's request for jury trial. The court would be placed in an invidious position if a defendant simply took objection to magistrates' courts generally or to a magistrate personally. Fourthly, a procedure involving the hearing and determination by the magistrates of representations about the mode of trial, possibly a trial before different justices and the establishment of an appellate process would be a potential cause of delay in the disposal of business and would create an additional task for both magistrates' courts and the Crown Court. Fifthly, although the majority of defendants consent to summary trial, both the OPCS survey and the Sheffield research show that defendants themselves attach great importance to the choice of forum at present vested in a defendant.³⁸

The Committee went on :

Most of those who at present elect trial by jury do so for reasons connected with the possibility of conviction: they think that they will get a fairer trial, or that their case will be considered more carefully or that they will have a better chance of acquittal in the Crown Court. What matters to them is the fact of conviction or acquittal. Except in the most serious cases, where the defendant knows that if convicted he will receive a substantial sentence of imprisonment, loss of reputation or loss of livelihood rather than the possible sentence may well be what is uppermost in his mind. But these are matters which are related not only to the particular offence, but also to the personal characteristics of the defendant. A professional person of good character, if convicted of a minor offence of dishonesty, for example, will suffer in reputation and may lose his livelihood, whereas for a person with a long record of similar offences the only penalty will probably be the sentence actually imposed. This suggests that if the magistrates' court were to decide the mode of trial, it would be both necessary and right for it to have regard to the consequences of conviction for the defendant, which would inevitably involve considering his character and standing in the community. We consider that it would be quite unacceptable for the courts to discriminate in this way. It would offend against the principle of equality before the law if particular classes of people or people of some standing in the community were able, in effect, to choose their tribunal, while others were denied that choice. Jury trial should be available either to anyone charged with a particular offence, regardless of his personal position, or to no one.³⁹

In its report published in July 1993 the Royal Commission on Criminal Justice considered the current arrangements for determining mode of trial, in the context of the problems caused at the Crown Court by the volume of cases having to be dealt with there and the pressure this was placing on the criminal justice system. The Commission recommended that:

³⁸ *ibid.* paragraph 59

³⁹ *ibid*

In cases involving either-way offences the defendant should no longer have the right to insist on trial by a jury. Where the CPS and the defendant agree that the case is suitable for summary trial, it should proceed to trial in the magistrates' court. The case should go to the Crown Court for trial if both prosecution and defence agree that it should be tried on indictment. Where the defence do not agree with the CPS's proposal on which court should try the case, the matter should be referred to the magistrates for a decision.

Legislation should refer to the various matters (including potential loss of reputation) which the magistrates should take into account in determining mode of trial.⁴⁰

Professor Michael Zander Q.C., emeritus Professor of Law at the London School of Economics, who was a member of the Royal Commission on Criminal Justice, has been a strong supporter of the present Government's proposal to remove the right of defendants charged with either-way offences to elect trial by jury. In an article in the *Guardian* on 25 May 1999, commenting on the Commission's reasons for recommending change, he said:

One reason was principle. Because trial in the Crown Court is more elaborate, more costly and generally regarded as "better" than trial in the magistrates' court, it should obviously be reserved for the most serious cases. The gravity of the case is something that should be judged objectively by the system, not subjectively by the defendant who, understandably, may have quite other considerations in mind – including just putting off the evil day.

Of course, the defendant's view should be taken into account, but the decision should rest with the system. In Scotland it is taken by the prosecution. So far as the Royal Commission could discover, this seems completely uncontroversial there.⁴¹

He went on:

Media coverage has given the impression that the proposal affects all the 18,500 or so defendants charged with either-way offences who now opt for jury trial. This is not so. Over 70% of these defendants end by pleading guilty and therefore never have a jury trial. This was another very powerful reason for the Royal Commission's proposal. Electing for trial by jury but then pleading guilty, often at the door of the court, has a variety of serious negative effects.⁴²

Professor Zander also commented that:

Opponents of the reform pray in aid Magna Carta, ignoring the fact that the defendant's right to choose jury trial dates only from 1855. It is true that juries acquit more often than magistrates, but in the Royal Commission's view it is as wrong to

⁴⁰ *Report of the Royal Commission on Criminal Justice* Cm 2263 July 1993 p.198 paragraphs 114-115

⁴¹ "Juries: the case against" – *Guardian* 25.5.1999. For the position in Scotland, see part VIII of this paper

⁴² *ibid.*

give the defendant the right to insist on the level of court that will give him a better chance of acquittal as it would be to give him the choice of a more lenient judge.⁴³

A Home Office consultation document *Mode of Trial*⁴⁴, published in July 1995, invited views on a number of possible options aimed at retaining more cases in magistrates' courts:

- re-classification of a number of additional offences as triable only summarily
- restricting a defendant's right to elect trial by jury
- obliging defendants to enter a plea before the mode of trial decision is taken.

In its final response to the Royal Commission's report the previous Government said:

The Royal Commission's proposals were aimed at retaining more business in magistrates' courts by removing from the defendant the unfettered right to insist on trial by jury. The Government agrees the importance of preventing business going unnecessarily to the Crown Court, but considers that such a fundamental change to the right to jury trial as that proposed by the Royal Commission should not be undertaken unless it is clear that would be the only possible way of achieving the objective. The Government therefore issued in July 1995 a consultation paper which canvassed opinions both on the Royal Commission's proposals and on alternative options of reclassification of offences and of obliging defendants to enter a plea before the mode of trial decision is taken. Following the consultation exercise, which ended on 2 October 1995, the Government has concluded that the last option, obliging defendants to indicate their plea before the mode of trial decision is taken, offers the best solution. The Government has therefore included a clause to this effect in the Criminal Procedure and Investigations Bill which is currently before Parliament. Assuming that the provision is enacted, the results will be monitored and the Royal Commission's recommendations reconsidered in the light of the results of that monitoring exercise.⁴⁵

The clause referred to in this extract is now section 49 of the *Criminal Procedure and Investigations Act 1996*, which came into force on 1 October 1997 and introduced the new "plea before venue" procedure described in part II of this paper.

C. The Narey report and beyond

On 27 February 1997 the previous Government published the report of a *Review of Delay in the Criminal Justice System* (the Narey Report) which recommended that defendants should no longer be able to veto the decision of magistrates to retain jurisdiction of cases. In his

⁴³ *ibid.* For a discussion of Magna Carta and the "right" to jury trial see part VII of this paper

⁴⁴ Home Office *Mode of Trial* Cm 2908 July 1995

⁴⁵ *Royal Commission on Criminal Justice: Final Government Response* June 1996 paragraph 70

statement to the House of Commons announcing the publication of the report Michael Howard, who was then Home Secretary, said:

Finally, the review makes recommendations about cases that go to the Crown court. About 20 per cent. of all those tried in the Crown court - about 24,000 defendants each year - insist on being tried there, despite magistrates having previously decided that the case was more suitable for them to deal with. About two thirds of those defendants then plead guilty at the Crown court. About three quarters are found guilty.

The reviewer recommends that it should be for magistrates to take the decision as to which cases triable either in magistrates courts or the Crown court, such as theft, handling stolen goods or burglary, need to be committed to the higher court. Those seeking Crown court trial without good reason, perhaps simply to delay proceedings, would no longer be able to overrule the magistrates' view that they should try the case. On the other hand, defendants with a good reason for jury trial - perhaps because of the complexity of the case, because they are defending an unblemished reputation or because of the potential effect of a conviction on the individual - would be able to present those reasons to magistrates, who would be free to commit the case.

That is not a new idea. It builds on a very similar recommendation made in 1993 by the Royal Commission on Criminal Justice. It recognised the need for a more rational basis for distributing cases between the courts and it noted that, in Scotland, the decision on whether a defendant should be entitled to jury trial is made by the prosecutor.

I recognise that this recommendation is extremely sensitive, as any proposal to restrict the availability of jury trial is bound to arouse strong feelings. Jury trial is a central feature of our system of justice and one to which the Government are entirely committed. We would not wish to restrict it without very careful thought. On the other hand, the report's recommendation offers substantial advantages. It would divert from the Crown court cases--often of a petty nature--which do not need to be there. It might also make it easier to pursue another of the report's recommendations, also favoured by the royal commission, under which the most serious offences, those triable only at the Crown court, could be handled more effectively and more speedily by starting there from the outset, rather than spending about half their life in magistrates courts awaiting committal.

We shall want to consider both those recommendations particularly carefully in the light of views expressed. If other avenues of approach are suggested, we shall of course consider them. There may also need to be a right of appeal against the magistrates' decision not to allow a case to go to the Crown court and, of course, anyone convicted by magistrates would, as now, have a right of appeal against conviction or sentence to a judge - but not a jury - at the Crown court.⁴⁶

⁴⁶ HC Deb 27 February 1997 c431-432

In replying to this statement Jack Straw, who was then the shadow home affairs spokesman, made the following comments about the report's proposal to restrict defendants' rights to elect trial by jury:

Let me now refer to the proposal to end the right of many defendants to elect for trial by jury, even though they may face charges of dishonesty, and their reputation and their whole future may be at stake. I note that in his statement the Secretary of State has been altogether more tentative than those from his office who briefed the *Daily Mail* this morning. Surely, cutting down the right to jury trial, making the system less fair, is not only wrong but short-sighted, and likely to prove ineffective. I therefore urge the Secretary of State not to accept the proposal.⁴⁷

He went on to say:

If a police officer, a Member of Parliament or even a Secretary of State were charged with an offence of dishonesty, would they not insist on being tried by a jury? If that is the case, why should others be denied that right of election?

I also press the Secretary of State on whether the proposal will work as intended. Is he not aware that, despite a reduced case load, during the past 10 years delays in the magistrates court have increased by 50 per cent. - more than in the Crown court? Will not the proposal, forcing mini-trials on magistrates about which court should hear a case, the delays that might occur when there was an interlocutory appeal against a decision, and more contested trials in the magistrates court simply worsen those delays?

Does not the author of the review, Mr. Narey, undermine his whole case by admitting that the

"proportion of cases committed to the Crown Court . . . which are the result of defendant elections has dropped in recent years"

and that the problem, which can be dealt with in other ways, is that two thirds of referrals to the Crown Court are made, not by the election of the defendant, but by the magistrates alone declining to hear the case in their courts?

As any defendant convicted in a magistrates court has an absolute right to a complete rehearing of his case in the Crown court, might not there be a significant increase in such appeals to the Crown court, thus increasing the Crown court work load, too? That aspect was wholly ignored by the author and the royal commission.⁴⁸

In July 1998 the Home office published a consultation paper on *Determining Mode of trial in Either-Way Cases* which sought views on the appropriateness of defendants charged with

⁴⁷ *ibid* c433-434

⁴⁸ *ibid*

offences triable either way being able to choose a Crown Court trial, even though magistrates had indicated that they would be content to deal with the particular case. The consultation paper made the following comments about plea rates and acquittal rates

Defendants in the Crown Court are more likely to plead not guilty than those who are tried in magistrates' courts: around one-third of defendants who go to the Crown Court plead not guilty to some or all charges, compared with fewer than one in ten in magistrates' courts. The percentage of defendants pleading not guilty in the Crown Court appears to be much the same whether they have elected to be tried there or have been directed there by the magistrates. At first sight this seems surprising since it might have been expected that defendants who elect would have a greater propensity to plead not guilty; but on the other hand, directed cases are likely to be relatively serious and possibly more likely to be contested for that reason.

Defendants in the Crown Court are also more likely to be acquitted: the chance of being acquitted on a contested charge is approximately 40 per cent in the Crown Court compared with 25 per cent in magistrates' courts. It is unclear, however, whether this is because juries are more inclined to acquit - rightly or wrongly - than magistrates, or because defendants with a good defence are more likely to be tried in the Crown Court, either as a result of having elected or (conceivably) by direction of the magistrates.⁴⁹

The consultation paper requested justifications for the present arrangements from those who thought they were appropriate and asked whether, if respondents considered the present system unsatisfactory, they would favour

- a) the reclassification of minor theft (or of other specified offences, and if so, which)?
- b) the abolition of election for trial where the defendant has previous convictions?
- c) the outright abolition of election for trial?⁵⁰

It went on:

If you consider that election for trial should be ended, should the decision rest with the magistrates? If so, should they be under a statutory obligation to take account of certain factors, including the consequences of conviction for the defendant?⁵¹

The Home Office minister Lord Bassam of Brighton recently provided the following statistics on the number of either way offences committed to trial in the Crown Court, and the proportion of cases committed on the election of the defendant, rather than because magistrates declined jurisdiction:

Lord Windlesham asked Her Majesty's Government:

⁴⁹*Determining Mode of trial in Either-Way Cases* Home Office July 1998 paragraphs 8 and 9

⁵⁰ *ibid.* paragraph 35

⁵¹ *ibid.*

What was the number of either-way offences committed to trial in the Crown Court in each of the years from 1987 to 1997 inclusive, showing the annual year on year percentage change and the proportion of elected cases to all cases committed for trial in the Crown Court.

Lord Bassam of Brighton: Figures provided by the Attorney-General's department which relate to prosecutions by the Crown Prosecution Service are given in the table:⁵²

Year	Either-way offences committed for trial	Year on year per cent change	Per cent of either-way cases committed on election of defendant
1987	95,854		53
1988	105,505	10	45
1989	98,542	-7	42
1990	94,149	-4	38
1991	97,622	4	36
1992	91,829	-6	37
1993	75,867	-17	35
1994	71,436	-6	35
1995	79,324	11	33
1996	71,654	-10	32
1997	77,804	9	28

These figures show that an increasing proportion of cases committed for trial at the Crown Court arrive there because the magistrates have declined jurisdiction, rather than because defendants have elected trial by jury. The Home Office consultation paper *Determining Mode of Trial in Either-Way Cases* published in July 1998 acknowledged this, noting that:

There has been a steady decrease over the last ten years in the percentage of either-way cases committed to the Crown Court for trial which arrive there by way of election, rather than because the magistrates decline jurisdiction. In 1987, elected cases accounted for 53 per cent of committals for trial; since then the proportion has gradually fallen to the present level of 28 per cent. Why the proportion of elected cases should have fallen is not clear. Indeed, efforts have been made to encourage magistrates to retain more cases, notably through advice published under the aegis of the Criminal Justice Consultative Council as the 'National Mode of Trial Guidelines', and it might therefore have been expected that directed cases would decrease and that elected cases would accordingly form a *higher* proportion of the total. A possible explanation is that some defendants have concluded that (as Home Office research has demonstrated) those who plead guilty having elected Crown Court trial are likely to receive a substantially heavier sentence than if they had pleaded guilty in the magistrates' court.

⁵² HL Deb 2 February 2000 WA37

Nevertheless, the number of defendants charged with either-way offences who elect to be tried in the Crown Court remains substantial; about 22,000 did so in 1997. The number of elected cases which proceed as contested trials in the Crown Court is much lower, because more often than not the defendant subsequently pleads guilty.⁵³

The consultation period following the publication of the Home Office paper ended on 30 September 1998. A summary of the responses to the consultation exercise was deposited in the Library on 1 July 1999.⁵⁴ It noted amongst the organisations and individuals who favoured abolition of the defendant's right to choose jury trial were the Magistrates' Association, Association of Chief Police Officers, Justices' Clerks' Society, Crown Prosecution Service, HM Customs and Excise, the Royal College of Psychiatrists, a number of judges and several police forces. Those opposed to abolition included the Criminal Bar Association, the Bar Council, the Association of Magisterial Officers, the Society of Labour Lawyers, the Law Society, the Legal Action Group, the Legal Committee of the Joint Council of HM Stipendiary Magistrates, Justice, Liberty, the Institute of Race Relations, the Howard League for Penal Reform, NACRO, Northumbria Police and a number of judges, law practitioners and others. Copies of some of the responses to the Government's proposals were deposited in the House of Commons Library on 24 February 2000.

In a speech to the Police Federation conference on 19 May 1999 the Home Secretary, Jack Straw, announced that legislation would be introduced as soon as possible abolishing the ability of defendants to choose Crown Court trial in either-way cases and giving the decision, whether or not a case should go to the Crown Court for jury trial, to magistrates rather than defendants. In his speech the Home Secretary said:

We have looked at this issue in considerable detail and with great care. At the outset I was opposed to change and said so. But the more we have considered it the more we believed the system needed reform.

On 19 May 1999 the Home Office minister Mike O'Brien responded to a Private Notice Question from Douglas Hogg about the Government's proposals for change⁵⁵. The Home Secretary also answered a Written Question from Clive Efford setting out his intentions in the following terms:

Mr. Straw: The Royal Commission on Criminal Justice, and more recently the Narey Review of Delay in the Criminal Justice System, recommended that defendants should not be able to choose to be tried by a jury in either-way cases which magistrates have indicated that they would be content to hear.

Having considered this recommendation and the responses to the consultation paper I issued last year on election for trial, I am announcing today that I will be bringing

⁵³ *Determining Mode of Trial in Either-Way Cases: A Consultation Paper* Home Office July 1998 paragraphs 6-7

⁵⁴ DEP 99/1429

⁵⁵ HC Deb 19 May 1999 c1065-1073

forward legislation when parliamentary time allows to abolish the ability of defendants to elect for jury trial in either-way cases (where the cases are triable either on indictment at the Crown Court or summarily at the magistrates' court).

The Government readily acknowledge that jury trial is preferable for certain sorts of either-way case. The question is whether it should be available at the choice of the defendant, or restricted to cases which objectively warrant it. In the same way that defendants do not have a choice of which magistrate, or which judge and jury, hears their case, we believe that defendants should not be able to choose a criminal justice jurisdiction where their case is tried. England and Wales is almost alone in allowing defendants a choice of court. In most jurisdictions, it is a matter for the court. In Scotland, it is at the election of the prosecution.

The majority of cases in which the defendant elects for Crown Court trial result eventually in guilty pleas, but only after greater inconvenience and worry to victims and witnesses, and at considerable extra cost. This Government's proposals will end the practice that many rightly regard as a manipulation of the criminal justice system by defendants demanding Crown Court trial for no good reason other than to delay proceedings.

But there will be safeguards. In determining where the case should be tried, magistrates' will be required to have regard not only to any defence representations, but also to such factors as the gravity of the offence, the complexity of the case and the effect of conviction (as legislation already requires) and the likely sentence on the defendants livelihood and reputation. Defendants will also be given an interlocutory right of appeal to the Crown Court against the Magistrates' decision on mode of trial.⁵⁶

The *Criminal Justice (Mode of Trial) Bill* [HL Bill 3 of 1999-2000] which was introduced in the House of Lords was designed to implement the Government's proposals. The Bill had its second reading in the House of Lords on 2 December 1999⁵⁷. It was withdrawn following a Government defeat on an amendment introduced at the committee stage in the House of Lords⁵⁸ but the Home Secretary, Jack Straw, said that he intended to re-introduce a similar Bill in the House of Commons.⁵⁹ A new Bill, introduced in the House of Commons, was needed to enable the Government to invoke the *Parliament Acts* if the House of Lords were to reject the Bill once it had passed through the House of Commons. The *Criminal Justice (Mode of Trial) (No. 2) Bill* was duly introduced in the House of Commons on 22 February 2000.

On 14 December the Lord Chancellor, Lord Irvine of Lairg, announced a review of the criminal courts, to be carried out by Lord Justice Auld, a senior judge in the Court of Appeal.

⁵⁶ HC Deb 19 May 1999 c373-4W

⁵⁷ HL Deb 2 December 1999 c919-1004

⁵⁸ HL Deb 20 January 2000 c1246-1298

⁵⁹ HC Deb 14 February 2000 c407W

Lord Justice Auld is to report on the working of the criminal courts by the end of 2000. His terms of reference are as follows:-

A review into the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law.⁶⁰

A number of commentators have suggested that the Government should wait until Lord Justice Auld has completed his review of the working of the criminal courts before deciding on whether or not to pursue its present proposals.⁶¹

A Home Office research report entitled *The Cost of Criminal Justice*, published on 15 November 1999, put a price on proceedings in the criminal courts.⁶² A Home Office press notice announcing its publication gave the following summary of the report's findings:

- Magistrates' court proceedings cost on average £550;
- An average magistrates' court sentence costs £250 although prison sentences imposed at magistrates' courts cost £4,950 on average;
- On average Crown Court proceedings cost £8,600;
- The average cost of a Crown Court sentence is £23,900 while the average cost of a prison sentence imposed is £30,500; and
- The average cost per person proceeded against in all courts including sentence is £2,700⁶³

IV The Criminal Justice (Mode of Trial) (No. 2 Bill)

The *Criminal Justice (Mode of Trial)(No. 2) Bill*⁶⁴ has the same structure as its predecessor, the *Criminal Justice (Mode of Trial) Bill*⁶⁵. The main provisions are set out in Clause 1, which

⁶⁰ Lord Chancellor launches review of the criminal courts – Lord Chancellor's Department press notice 14 December 1999

⁶¹ see e.g. "Straw 'confused' on jury trial Bill" – *Times* 17.2.2000 (letter from the shadow Attorney-General Edward Garnier QC) Liberty Briefing, *Mode of Trial Bill – Commons*; "Jury injustice" (Lee Bridges) – *Independent* 29.2.2000

⁶² *The Cost of Criminal Justice* Home Office Research Findings No. 103

⁶³ The Cost of Criminal Justice – Home Office press notice 15.11.1999

⁶⁴ HC Bill 73 of 1999-2000

seeks to amend the procedure for determining mode of trial for offences triable either way by substituting new sections 19 to 22 of the *Magistrates' Courts Act 1980*.

The new section 19 is designed to enable magistrates to consider whether a defendant charged with an offence triable either-way should be tried in the magistrates' court or the Crown Court. Section 19(2) lists a number of matters to which the court should have regard in considering this question. The Government has made alterations to the list, which originally appeared as section 19(3) in Clause 1 of the first version of the *Criminal Justice (Mode of Trial) Bill*. That section provided that the matters which the court should consider were:

- a) the nature of the case;
- b) whether the circumstances make the offence one of serious character;
- c) whether the punishment which a magistrates' court would have power to impose for it would be adequate;
- d) whether the accused's livelihood would be substantially diminished as a result of conviction or as a result of punishment of a kind or magnitude likely to be imposed by the court on conviction;
- e) whether the accused's reputation would be seriously damaged as a result of conviction or as a result of punishment of a kind or magnitude likely to be imposed by the court on conviction;
- f) any other circumstances which appear to the court to be relevant

The requirement that magistrates' should consider the matters set out in paragraphs d) and e) of this list proved highly controversial, with critics complaining that they would lead to a "two-tier" system of justice and diminish the principle of equality before the law. In his speech during the debate on the second reading of the *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Conservative peer Lord Cope of Berkeley suggested, for example, that the provisions might lead to unemployed defendants tending to have a different form of trial from employed defendants purely on the grounds that they were unemployed.⁶⁶

References to potential damage to a defendant's reputation, diminution of a defendant's livelihood and the "serious character" of the offence have been dropped from the list of matters to which magistrates are to have regard under section 19(2) by virtue of Clause 1 of the new Bill. The new list of matters to be considered is as follows:

- (a) the nature of the case;
- (b) any of the circumstances of the offence (but not of the accused) which appears to the court to be relevant; and
- (c) whether, having regard to the matters to be considered under paragraph (b), the punishment which a magistrates' court would have power to impose for the offence would be adequate.

⁶⁵ HL Bill 3 of 1999-2000

⁶⁶ HL Deb 2 December 1999 c930

Magistrates will have to give the prosecutor and the accused an opportunity to make representations and will be required to have regard to any such representations made.

Clause 1 of the previous *Criminal Justice (Mode of Trial) Bill* also sought to introduce a new section 19(4) of the *Magistrates' Courts Act 1980*, which would have enabled a magistrates' court considering mode of trial to obtain receive information about the previous convictions of the accused, including details of the convictions, if these were necessary to rebut or explain anything said by the accused, or to enable the court to consider whether the accused's reputation would be seriously damaged as a result of conviction or the punishment resulting from it. Where a justice of the peace was informed in the course of these proceedings that the accused had a previous conviction, a new section 19 (5) would have ensured that he or she did not participate in any subsequent criminal proceedings in relation to the offence. These provisions have also been removed from the new version of section 19 set out in the *Criminal Justice (Mode of Trial)(No. 2) Bill*.

The new section 20 of the *Magistrates Courts Act 1980* set out in Clause 1 of the Bill seeks to establish the procedure to be followed once a magistrates' court has made a decision on the mode of trial. There is a change from the version of section 20 set out in Clause 1 of the earlier version of the Bill in that the court will now be required to give reasons for its decision.

Where the court decides that the accused should be tried summarily it is intended that he should be tried summarily, unless he succeeds in an appeal to the Crown Court under section 20(4) of the 1980 Act as inserted by Clause 1. The right of appeal will only be available if, at the mode of trial hearing, the accused has made representations to the magistrates' court that he ought to be tried on indictment. The Bill's *Explanatory Notes* say that details of the procedure governing this appeal will be contained in separate rules of court. Where an appeal to the Crown Court is successful the case will be returned to the magistrates' court for committal proceedings prior to trial in the Crown Court.

The new section 21 of the 1980 Act set out in Clause 1 is intended to replace and re-enact the provisions in section 19(4)-(5) of the 1980 Act which provide for offences to be tried on indictment where this is requested by the Attorney-General, Solicitor-General or Director of Public Prosecutions.

As with the present arrangements under the 1980 Act, there will be no specific procedure enabling an accused person to seek to be tried summarily by magistrates where magistrates have decided that the case should be tried on indictment with a jury at the Crown Court.

The new section 22 of the *Magistrates Courts Act 1980*, set out in Clause 1 of the Bill, is designed generally to re-enact the current provisions of section 22 governing the mode of trial for offences of criminal damage but remove the requirement, in cases where it is unclear whether the damage involved does or does not exceed £5,000, for the court to seek the defendant's consent to proceeding as if the offence were triable only summarily. Instead, where the court is satisfied that the sum involved exceeds £5,000, it is to proceed to

determine the mode of trial under sections 19 to 21 of the Act. In any other case the offence will be treated as if it were triable only summarily.

The Bill does not seek to amend or remove the “plea before venue” procedure set out in sections 17A to 17C of the 1980, which was introduced by section 49 of the *Criminal Procedure and Investigations Act 1996* and is described earlier in this paper.⁶⁷ This procedure will have to take place before the procedures under new sections 19 to 21 came into play. The proposed new sections of the 1980 Act will therefore only apply where a defendant, having been asked whether he would plead guilty were the case to proceed, either indicates that he would plead not guilty or declines to give an indication as to plea.

As far as the financial effects of the Bill are concerned, the *Explanatory Notes* for the previous *Criminal Justice (Mode of Trial) Bill* stated that the Government estimated a reduction of around 12,000 Crown Court trials per annum, with these cases instead being tried in the magistrates’ court. There would be some extra costs arising from the new right of appeal to the Crown Court. The resulting net saving was estimated at about £105 million. The *Explanatory Notes* for the new *Criminal Justice (Mode of Trial) (No. 2) Bill* state that, under the new provisions, the Government estimates a reduction in the number of Crown Court trials of around 14,000 per annum. The resulting net resource saving is now estimated at about £128 million. Both sets of *Explanatory Notes* state that the Bill has no public sector manpower implications.

In a written answer of 27 January 2000 to a question from the Conservative home affairs spokeswoman, Ann Widdecombe, about the Government’s estimates of the number of appeals and the cost and delay involved in the appeal procedure, the Home Secretary, Jack Straw, said:

The new appeal procedure would be fast and efficient with determination within forty-eight hours in most cases. Our estimate is that even if as many as a quarter of defendants who had been refused Crown Court trial were to appeal, the cost of the resulting hearings would be less than £500,000. No additional delay would be caused by these appeals, since they would run concurrently with the progress of the case in the magistrates court.⁶⁸

The Home Secretary gave the following additional information about appeal procedures in a written answer to a question from Ann Widdecombe on 2 February 2000:

Miss Widdecombe: To ask the Secretary of State for the Home Department (1) if it is his intention to allow prosecution and defence to make oral representations in open court during an appeal against magistrates decision on mode of trial under his proposal to restrict the right to elect trial by jury;

⁶⁷ see Part IIA of this paper

⁶⁸ HC Deb 27 January 2000 c250W

(2) what estimate he has made of the cost of an appeal to the Crown Court against magistrates decision as to mode of trial, under his proposals to restrict the right to trial by jury;

(3) further to his answer of 27 January 2000, Official Report, column 250W, on Crown Court appeals, what his estimate is of the number of defendants who would appeal to the Crown Court against magistrates decisions as to mode of trial each year under his proposals; and what assumptions underlie that estimate.

Mr. Straw: The Government believe that most of these appeals could be determined very quickly on the basis of the papers by a single judge. However, they intend to give the judge the power to permit oral representations to be made to him by both the prosecution and defence if he considers it necessary in the interests of justice to do so. It is estimated that a paper based appeal to the Crown Court would cost £90 and an oral appeal would cost an additional £182. It is assumed that 3,000⁶⁹ or 25 per cent. of defendants would appeal.⁷⁰

In a written Answer on 16 February 2000 the Home Secretary gave the Government's estimate of the number and cost of additional appeals to the Crown Court under its proposals as follows:

Miss Widdecombe: To ask the Secretary of State for the Home Department what estimate he has made of the (a) number and (b) cost of additional appeals to the Crown Court against the (i) verdicts and (ii) sentences of magistrates, under his proposals to restrict the right to trial by jury.

Mr. Straw [holding answer 2 February 2000]: Only 1 per cent. of defendants appeal against conviction and sentence following a trial in the magistrates' courts and the model which has been used to estimate costs assumes that the effect will be de minimis. Even if as many as 10 per cent. of previously electing defendants chose to appeal following conviction after a contested trial, there would be fewer than 200 additional appeals, at a cost of less than £250,000.⁷¹

The Home Office minister Charles Clarke gave the following information about the proposed appeal procedures in written answers to questions from Mr Lidington on 9 February 2000:

Mr. Charles Clarke: The appeal would be a re-hearing by a circuit judge of the magistrates decision. It would be open to either of the parties to seek an oral hearing in the notice of appeal, and it would be for the discretion of the judge whether to allow an oral hearing to take place. It would also be for his discretion whether to allow the parties to adduce further evidence (including, in the unlikely event that it

⁶⁹ the figure of 3,900 appears in Hansard but was corrected in a later written answer – HC Deb 9 February 2000 c171W

⁷⁰ HC Deb 2 February 2000 c599W

⁷¹ HC Deb 16 February 2000 c544W

would be necessary, evidence from expert or other witnesses) in support of their representations.⁷²

In answer to a subsequent written question Mr Clarke went on to say:

In estimating the cost of appeals against mode of trial, the generous assumptions have been made that in 25 per cent. of cases the defendant might appeal, and that 17.5 per cent. of cases will require an oral hearing. In total, less than 650 judicial hours would be spent on these appeals per year. The costs have been based on court time, prosecution costs and legal aid standard fee rates.⁷³

V The Debate on the Consultation Paper and the *Criminal Justice (Mode of Trial) Bills*

As has already been noted⁷⁴ the proposal to abolish the defendant's right to elect jury trial was supported by magistrates, the Association of Chief Police Officers, the Crown Prosecution Service, a number of judges, a number of police forces and others. It was opposed by the Bar Council, the Law Society, Justice, Liberty, NACRO, the Howard League for Penal Reform, the Institute of Race Relations, Northumbria Police and a number of judges.

A. Arguments in support of the Bill

A Home Office press notice issued by the Home Office on 19 November 1999, the day the *Criminal Justice (Mode of Trial) Bill* was introduced in the House of Lords, reported the Home Secretary as saying:

Trial by jury is a key freedom in our democracy. But giving defendants a choice of courts is not. It is frankly eccentric which is why we in England and Wales are almost alone in allowing this arrangement to continue. This Bill does not abolish jury trial. It does however ensure that the decision whether the magistrates or the Crown Court should try 'either-way' cases is made objectively by the court on clear criteria. This was a key recommendation of the Royal Commission on Criminal Justice chaired by Lord Runciman. But we are adding a safeguard, which is an interlocutory right of appeal to a Crown Court judge against a decision by the magistrates that they should hear the case.

I readily acknowledged that I have changed my mind on this issue over the last three years. I hope others do too. This is one of those issues where the more one examines the case, the more persuasive is the argument for change. And the new provision of a

⁷² HC Deb 9 February 2000 c170W

⁷³ *ibid* c171W

⁷⁴ see p.29

special right of appeal in any event deals with one of my key worries when I was in Opposition.

Too many defendants have been working the system, demanding Crown Court trial purely to delay proceedings. Not only does this cause suffering and distress to victims and witnesses, but it also costs the taxpayer a lot of money in extra court costs. We estimate that this Bill would save the taxpayer over #100 million. This is not however just about money and delay, but about the public interest in an efficient criminal justice system.

I have of course been sensitive to the concerns that this change could adversely affect Black and Asian defendants. It has been said that proportionately more black defendants elect for trial. There is no firm evidence for this. But if it is so, it is not necessarily to their advantage. Where such defendants were convicted, the effect of electing would be to increase the penalties imposed on them, since the Crown Court sentences more heavily than magistrates for equivalent offences. There is no evidence that magistrates' courts do discriminate against Black and Asian defendants, and remarkably few complaints of miscarriages of justice in respect of magistrates' trials. This may partly be because a defendant dissatisfied with his or her conviction in a magistrates' court has an absolute right to a complete retrial in the Crown Court (before a judge and two magistrates, not a jury) - whilst there is no such general right to a retrial from a jury conviction. This right of retrial, together with the new interlocutory right of appeal against a refusal of jury trial, add up to important safeguards.

Those who extravagantly complain that this change would fundamentally affect civil liberties should answer one question. Where is the evidence that the quality of justice in Scotland is less than in England and Wales? In Scotland, defendants have no choice of courts.

The defendant's choice of jury trial has never been an ancient right - it is an anomaly which is replicated virtually no where else. This Bill would ensure that jury trial is available for cases that objectively warrant it, while safeguarding defendants' access to a fair trial.

This legislation is part of our modernisation programme for the Criminal Justice System. It will make it more effective and efficient without compromising the quality of justice.⁷⁵

The Home Office press notice of 24 February 2000 announcing the publication of the new *Criminal Justice (Mode of Trial) (No. 2) Bill* reported the Home Secretary as saying:

This Bill is an important part of our drive to modernise the criminal justice system, reduce delay and alleviate the stress suffered by witnesses and victims. We made it clear when the Bill was rejected by the Lords that it would be re-introduced.

⁷⁵ Criminal Justice (Mode of Trial) Bill – Home Office Press Notice 19.11.1999

However, we have listened carefully to the arguments and we have made appropriate changes to the Bill.

We have responded to the fears raised about the potential effects of the provisions relating to reputation and livelihood in the original Mode of Trial Bill. There was a perception that these provisions might discriminate in favour of prosperous or employed defendants.

Under the No 2 Bill, therefore, courts would consider the circumstances of the offences but not the circumstances of the defendant. The changes we have made would assist the courts to make an objective judgement on whether the case should be tried in the magistrates' courts rather than the Crown Court. It would also make any appeals on mode of trial simpler and easier to handle.

In addition, we have improved the safeguards relating to appeals on mode of trial. Under the new Bill, magistrates would be required to give reasons for their decisions. It is also our intention that such appeals would be determined by a Resident Judge or his nominated deputy, which will ensure greater consistency in decision-making.

The Government is determined to reform the criminal justice system. This measure is an important part of our programme to tackle delays, while maintaining necessary safeguards. The Bill gives effect to a unanimous recommendation of the 1993 Royal Commission on Criminal Justice but with the added safeguard of the right of appeal to a Crown Court judge. It brings our own system more into line with that in Scotland, where defendants have never had a choice of court.⁷⁶

In his speech opening the debate on the second reading of the *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Attorney-General, Lord Williams of Mostyn, set out the context in which the Government was seeking to introduce its provisions as follows:

I want to reiterate one or two facts. Every year well over 90 per cent of all criminal cases are dealt with in the magistrates' courts; that is, 1.8 million cases. Around 400,000 of those are either-way cases. By contrast, around 65,000 either-way cases are dealt with in the Crown Court. Of those, 47,000 were directed to the Crown Court by magistrates; 18,500 defendants elected for Crown Court trial. Those facts are based on 1998 figures.

When it is suggested that in some way, which I have not been able to understand (doubtless my own deficiency) this is an attack on immemorial rights, Magna Carta or any other statute that happens to be conveniently at hand, I remind your Lordships that of those who elected trial, 60 per cent pleaded guilty; 15 per cent were acquitted by the jury. Of those who elected trial at the Crown Court (these are the facts and I

⁷⁶ Changes to new mode of trial bill announced – Home Office press notice 24.2.2000

make no commentary on them) and were convicted, 90 per cent had previous convictions and over one-third had 10 or more.⁷⁷

On the same occasion Lord Williams made the following comments about the Government's proposed right of appeal against a magistrates' court's decision to try summarily a case involving an offence triable either-way:

I return to what I submit is critical in the scheme of this reform. This Bill introduces a new right of appeal to the Crown Court for the defendant where a magistrates' court decides to try the either-way case itself. The appeal will be heard by a circuit judge who will be able to review the papers relating to the magistrates' decision very quickly, in exactly the same way as Crown Courts currently deal with appeals relating to bail decisions. It is the same tribunal which will be deciding on the venue of trial as presently deals with bail.⁷⁸

He went on:

Therefore, the decision about venue is entrusted to a level of the judiciary. Already the Crown Court judge, sitting alone, decides on bail or sentence in the overwhelming number of cases. That is in the context of what presently exists as a right for those tried in the magistrates' court; namely, the automatic right of appeal to the Crown Court. So there is duality: the automatic right to appeal on venue--the place of trial--and the automatic right to appeal on conviction and/or sentence, if there is a conviction in the magistrates' court.

I remind your Lordships that no such automatic right of appeal against conviction and sentence is available if one is convicted and sentenced in the Crown Court by judge and jury. I also remind your Lordships that the automatic right of appeal to a Crown Court judge sitting with magistrates involves a complete re-hearing of all the evidence. That is quite different from the circumscribed right of appeal to the Court of Appeal (Criminal Division) which essentially is based on whether or not there were deficiencies in the conduct of the trial. We believe that under this scheme, with appeal to the Crown Court judge being automatic in the context of venue, the magistrates' decisions should be careful and responsible.

For serious cases, the accepted means for defendants to be tried in our jurisdiction is by jury. It is extremely important that that should continue where the state and the citizen are engaged in matters of proportionate importance. We want to strengthen and improve the workings of the jury system in serious cases. We do not want the system to be unable to deal promptly with serious cases so that very often those accused of serious crime are remanded for too long a period in prison conditions which very often are not satisfactory. Apart from the interests of the prosecution and the defendant, I suggest that the wider community has a legitimate interest, which is not confined to that of the prosecution or the defendant in a specific case. It has a

⁷⁷HL Deb 2 December 1999 c921

⁷⁸ *ibid* c921-922

wider, sustainable interest in the efficient, just, fair and prompt conduct of the criminal process. I suggest that in many cases those who elect trial by jury on trivial matters are distorting the system. The law allows them to do it. I do not attach any obloquy to them. I suggest to your Lordships that we are entitled to have a care for the value of the jury system in appropriate cases.

I do not believe that that system has attached to it any great public support when it discovers that thousands of pounds and hours of scarce court time--it is a very scarce resource indeed--have been devoted to what would be looked at objectively in all the circumstances as quite trivial allegations of theft. Is it right that someone, let us say, who has 10 previous convictions for shoplifting a jelly or a banana from Tesco is automatically entitled to the right to trial by jury? That is disproportionate and not part of a system that should be encouraged.

I repeat that 97 per cent of criminal cases are tried by magistrates. They are drawn from local communities. They come from a wide range of social backgrounds. They are people of different ages and ethnicity. I agree and concede that in the past some sections of our society have been under-represented on the magistracy. I know that the noble and learned Lord the Lord Chancellor is attending to that in the way he is appointing new magistrates.

Lord Williams noted that amongst those offences which are triable only by magistrates are common assault, criminal damage of under £5,000 and taking a vehicle, all of which might affect a person's reputation and livelihood.⁷⁹ He added that while financial considerations were an issue they were not the only relevant consideration:

It is not simply a matter of cash because cash is not the only relevant resource; judicial and Crown Court time is limited. It is not right, fair, appropriate or supportable that those who are complainants, alleged victims or witnesses in serious cases should have to wait a long time before the issue is determined. It is not right that a child should have to wait what is to that child an eternity to have a trial where the child is a complainant in a case of sexual abuse, with all the unimaginable strains and stresses that that child undergoes. It is not right that the system cannot accommodate those cases more promptly. It is not right that victims and witnesses should have to wait many months unnecessarily before they can give their evidence; to be subjected to the challenge that they cannot really remember what happened; to be disillusioned with what the criminal justice system offers them by way of solace; and to be bitterly discontented at the fact that time passes and they seem to be without even the claim for reasonable redress.

Therefore cash is not the only resource. Judges' time and Crown Court time are also important. It is important that our fellow citizens should wish to serve as jurors in cases they regard as appropriate to the time and voluntary effort they provide. The Crown Court system is more expensive but I stress that I do not believe that that is the determinant. I suggest that within the figures I have produced there are many people

⁷⁹ *ibid.* c924

who elect trial in the Crown Court to put off the evil day; to delay proceedings; to "hobble" the sentencing judge in coming to the appropriate sentence, as it is much more difficult to sentence appropriately in the minor case where time has passed; and in the hope that witnesses will not turn up or simply become so disenchanted with the system that they can no longer be bothered with it.

We have listened with great care to the views of the noble and learned Lord the Lord Chief Justice and the senior judiciary. They propose the safeguard of giving the defendant a right of appeal on venue. I have set out my own position--which was perfectly well known, in any event--which is in entire accord with what they suggested. I ask with a degree of confidence that this debate should at least address the issues.⁸⁰

During the debate on the committee stage of the previous *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Lord Chief Justice, Lord Bingham of Cornhill, spoke in favour of the Bill, saying:

The procedure of the criminal courts at all levels should be such as will promote the fair disposal of cases, minimise the risk of miscarriages of justice, achieve such expedition and efficiency as is consistent with fairness and command public confidence in the administration of criminal justice. So far, I suspect, there is little argument. The present procedure, which allows a defendant to elect trial by judge and jury on an either way offence, does not lead to unfairness; it does not lead to miscarriages of justice; and it does not undermine public confidence. There is therefore no imperative need to change the existing procedure on the ground that it fails those important tests. If it did, no doubt the rule would have been changed long ago. But the existing procedure is, I suggest, subject to other weaknesses.⁸¹

He went on:

It is clear that any new procedure introduced to remedy these weaknesses must satisfy the tests already mentioned. It must promote the fair disposal of cases, it must minimise the risk of miscarriages, it must achieve such expedition and efficiency as is consistent with fairness, and it must command public confidence. Many of your Lordships are apprehensive that the procedure in the Bill will not meet those criteria. That is not an opinion I share and I hope that the Committee will allow me to say why not.

I take as my starting point two very familiar but indisputable facts. First, over 90 per cent of criminal cases begin and end in the magistrates' courts. Secondly, the summary offences over which magistrates have exclusive jurisdiction--there is no question of a judge and jury--include offences of considerable seriousness. A number were mentioned at the Second Reading debate: keeping a brothel, assaulting a police constable in the execution of his duty, criminal damage up to £5,000, taking a car

⁸⁰ *ibid.* c924-925

⁸¹ HL Deb 20 January 2000 c1252

without authority--offences which may well merit a term of imprisonment or detention. Magistrates have exclusive jurisdiction also over offences such as driving while unfit or breathalyser offences, conviction for which would in all probability spell professional death to most of us in this House. The magistrates' exercise of exclusive jurisdiction in these cases, deciding questions of guilt and sentence, does not arouse anxiety because we have confidence that the magistrates bring to their task the qualities of fairness, open-mindedness, human insight and common sense which commended them for appointment in the first place.

If we are willing, as we are and have been for centuries, to entrust these great responsibilities to magistrates up and down the country--lay and stipendiary, I draw no distinction--it seems to me strange to balk at entrusting to them the power to decide whether, subject to appeal, a case is more fitted for summary trial or trial by judge and jury. I would confidently expect magistrates to decide that question with the same fairness, open-mindedness, human insight and common sense as every other issue which they resolve.

If I should declare an interest as the 29,000th member of the Magistrates' Association--albeit an honorary member--I proudly do so. Members of the Committee who have apprehensions concerning the new proposal no doubt fear that magistrates will seize jurisdiction over cases which ought, in all fairness, to be tried by judge and jury. I suggest that that fear is misplaced. Of the either-way offences now tried in the Crown Court, a majority are there because the magistrates declined jurisdiction. Of those committed to the Crown Court for sentence, a majority receive a sentence which the magistrates themselves could have imposed.

The truth is that magistrates have shown themselves to be respectful, even deferential towards the Crown Court, readily recognising that there are cases which more properly belong there.

However, throughout discussion of the matter I have thought it essential that there should be a right of appeal for any defendant denied trial by judge and jury in an either-way case. My reasons may be obvious; they are certainly simple. The possibility of review concentrates the mind and improves the quality of decision-making. It is a safeguard against arbitrariness. It will enable the occasional aberrant decision to be corrected. It will cater for borderline cases in which different people can reasonably take different views. As in any other criminal context, I would expect any doubt to be resolved in favour of the defendant.

I attach great importance to the fact that the appeal will lie to nominated circuit judges, all of whom will be strong adherents of jury trial in appropriate cases because I, for my part, have never met a judge who was not.⁸²

⁸² *ibid* c1253-1254

Lord Bingham ended by saying that his views were shared by a large number of judges. He had invited any who disagreed with the proposals to write to him and few had done so. He felt that there was considerable unanimity among judges on the issue.⁸³

B. Arguments against the Bill

Some critics of the Government's proposals concerning mode of trial have argued that the Government's analysis of the current situation is incorrect and that the change will not have the desired effects of reducing court delays and court costs. Others have argued that it is wrong in principle to remove the right of a defendant charged with an either-way offence to elect trial by jury and that the change will undermine public confidence in the criminal justice system. Some of these arguments are set out in the following pages.

1. Arguments about the factual basis and practical effects of the Government's proposals.

Some critics of the Government's proposals have disagreed with the Government's view of the reasons why some defendants charged with either-way offences choose jury trial, which is that "too many defendants have been working the system, demanding Crown Court trial purely to delay the proceedings".⁸⁴

In an article published in the *New Law Journal* on 30 October 1998⁸⁵ David Wolchover and Anthony Heaton-Armstrong noted that, according to the consultation paper, there had been a steady decrease over the previous 10 years in the proportion of either-way cases being committed to the Crown Court for trial which arrived there because the defendant had elected to be tried there, rather than because the magistrates themselves had declined jurisdiction.⁸⁶ They suggested that this decline could be attributed to the combined effect of the plea before venue procedure enacted by the *Criminal Procedure and Investigations Act 1996* and the sentence discount for early pleas of guilty. They particularly noted the possible impact of the principle laid down by the Court of Appeal in the 1986 case of *R. v Hollington and Emmens*, 7 Cr App R(S) 168 that a defendant who delays a plea of guilty in order to obtain some advantage cannot expect the same discount as where an intention to plead guilty is indicated at an early stage.

Wolchover and Heaton-Armstrong also suggested that the most frequent and obvious cause of defendants pleading guilty at the Crown Court after having elected trial there was not a hidden desire to gain delay but rather a loss of nerve when faced with advice which would be more robust than that which would have been given at earlier stages. Other commentators

⁸³ *ibid.* c1254-1255

⁸⁴ Criminal Justice (Mode of Trial) Bill – Removing the Ability to Elect Jury Trial” – Home office press notice 19.11.1999

⁸⁵ “New Labour’s attack on trial by jury” – *New Law Journal* 30 October 1998

⁸⁶ the relevant extract from the consultation paper is set out on p.29-30 of this paper

have emphasised the fuller disclosure of evidence that takes place prior to trials on indictment at the Crown Court.⁸⁷ In a subsequent article published in the *New Law Journal* about what they termed the “myth” of manipulative election by defendants, Wolchover and Heaton-Armstrong also said that to suggest that defendants elected trial in the hope of applying pressure on the Crown was a “travesty of what generally happens” for in their experience, the vast majority of charge reductions by the Crown Prosecution Service originated before cases were committed to the Crown Court.⁸⁸

In her speech during the second reading debate on the *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Labour peer and QC Baroness Kennedy of the Shaws said:

It is regrettable that the Government have embarked on such a politically controversial and unnecessary reform. A key theme underlying the Government’s arguments in favour of abolition of the right of election is that many defendants are manipulative, almost malign, and that they play the system to cause unnecessary delay and to attempt to avoid the consequences of their anti-social behaviour.

Although I accept that there are such people in the system, in my experience that description does not fit most ordinary defendants. The majority of citizens say that they do not understand all that there is to understand about the criminal justice system and how it operates. I suggest that most accused people are in exactly the same position of bewilderment at the situation in which they find themselves. They are usually people with social problems rather than manipulative people. They are confused, and want above all else to escape from their immediate predicament as soon as possible, even when it may not be in their best legal interest to do so. Obviously, they want to minimise the negative consequences for themselves; but that is not the same as seeking to avoid the consequences altogether. After all, the vast majority of defendants, even those charged with the most serious either-way offences plead guilty-- 95 per cent plead guilty and are dealt with in a magistrates’ court. The majority even of those who are dealt with on electable (either-way) offences ask to have them dealt with in the magistrates’ court.

It seems that the findings of the Royal Commission report are the grounds most cited to justify the change. The commission reported in 1993, at a time when 34,000 cases were being taken to the Crown Court as a result of election. That number has been reduced to 18,000. The reasons are the introduction of “plea before venue” and the new legislative requirement that lawyers and the courts must advise those who are accused that credit will be given for an early plea. For those reasons, we have seen an enormous reduction in cases going for trial.

It is true that some accused, usually on legal advice, will delay their guilty plea, but often for good reason. I do not want it to be imagined that it is only those who are abusing the system who do that. Sometimes, people want to see whether the system

⁸⁷ HL Deb 2 December 1999 c932

⁸⁸ see also the speech by Baroness Kennedy of the Shaws during the second reading debate on the Bill in the House of Lords HL Deb 2 December 1999 at c971-972

itself will review the case against them in the light of emerging evidence. Perhaps I may quote from a letter in *The Times* on 25th November from Lee Bridges, the respected academic and director of the Legal Research Institute. He says:

"It is true that many defendants who elect and subsequently plead guilty do so after the charges against them have been reduced. But there is no evidence that such reductions in charges are the result of 'pressure on the Crown', or are unjustified.

"In fact, both Home Office and independent research shows that black and Asian defendants not only have higher rates of acquittal but also have charges against them dropped or reduced more often than whites. This is consistent with a pattern of police discrimination in 'over-charging' ethnic minority suspects. When such defendants elect jury trial, this sets off a more thorough review of the evidence by the Crown, frequently leading to charges being changed.

"Denying defendants this right may well serve to reinforce police racism".

We should also do well to remember that no fewer than 25 per cent of all either-way cases end up in terminations without a formal decision of the court, usually as a result of the prosecution dropping the charges. My noble and learned friend may say that, as a result of delay, sometimes witnesses do not turn up. But sometimes dishonest witnesses decide to retract their statements, or want to avoid being cross-examined and found wanting. Sometimes, alibis are found, and that makes all the difference. Sometimes, when the CPS has had time to review the case, evidential issues come to light to show that the case could never succeed. So there are very good reasons why cases are dropped or original charges reduced due to over-charging. If we put the right of election for jury trial into that context, we know that the vast majority of defendants--24 out of 25--given the option, choose to have their case dealt with in a magistrates' court. So we are dealing with a very small proportion of cases.⁸⁹

An editorial by Dr. David Thomas QC, in *Current Sentencing Practice News* described the detail of the Bill as "bizarre", noting that the Bill proposed to retain a number of features of the law which the Government's scheme would, he suggested, make redundant. These included the requirement that a magistrates' court should treat criminal damage to the value of less than £5,000 as a summary offence, with the result that relatively serious cases of criminal damage were treated as summary offences punishable by a maximum of three months' imprisonment. They also included the "plea before venue" procedure introduced by the *Criminal Procedure and Investigations Act 1996*. Dr Thomas suggested that the process of deciding which court would try a defendant and which court would sentence him on conviction, would become almost as complex under the Government's scheme as it was before the James Committee reported in 1975. He set out his view of the process as follows:

⁸⁹ HL Deb 2 December 1999 c970-972

A defendant appears before the magistrates' court charged with an either way offence. He is asked to indicate whether he would plead guilty and indicates that he would plead not guilty. The court accordingly proceeds to determine mode of trial in accordance with what will be the new section 19 of the Magistrates' Court Act 1980. The magistrates' court, having heard representations from both parties, decides on summary trial. The defendant appeals against this decision to the Crown Court. If the Crown Court decides on favour of the defendant, the case must be returned to the magistrates' court for committal proceedings; if the Crown Court decides against the defendant, the case will be returned to the magistrates' court for trial. After the conclusion of the summary trial, the magistrates' court may decide that the offence was too serious for them to deal with after all and commit the defendant to the Crown Court for sentence under Magistrates' Courts Act 1980, s.38 (which is not affected by the Bill). It is difficult to see how this procedure will save costs or speed up the administration of criminal justice. Any defendant who seriously wants to be tried in the Crown Court will still be entitled to go to the Crown Court on appeal against a decision of the magistrates' court that the case should be tried summarily. The appeal may in some cases involve costs not significantly less than the trial of a short case, and will be followed in any event (if successful) by a trial in the Crown Court.⁹⁰

In his speech on the second reading of the *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Conservative peer Lord Cope of Berkeley said that his party was opposed to the Bill. He suggested that any savings of time or money that the Government hoped to achieve as a result of the Bill would prove to be illusory, partly because the introduction of a right of appeal would eliminate them.⁹¹ He went on:

The Bill makes delay and expense more likely, certainly in comparison with the proposal in its original form. Under the Bill a case would need to go to the magistrates; then to the Crown Court on appeal; and, if refused, back to the magistrates or, if granted, to be heard by the full Crown Court. As the noble and learned Lord said, it would need to go to different magistrates in case the original ones were biased by having heard about any previous convictions of the accused. It seems therefore that the chances of reducing delay by the Bill are illusory.

Of course we all want to reduce delays in the law. The previous government considered this proposal from that point of view. After due thought--and, no doubt, after studying the noble and learned Lord's article in *The Times*--my colleagues in the Home Office at the time took different action to reduce delays and to deal with the apparent mischief of the accused waiting until he or she got to the doors of the Crown Court and only then pleading guilty. The heavier sentences being imposed by the Crown Court for pleading guilty at a late stage in the legal process have come to the attention of criminals and they have become much more wary of that ploy, judging by the figures that I have seen.

⁹⁰ "Either way offences" – *Current Sentencing Practice News* Issue 4, December 31, 1999 p.8

⁹¹ *ibid.* c926-927

In addition, since 1997, under the 1996 Act there began the process known as "plea before venue", whereby the accused has to enter a plea of guilty or not guilty before it is decided whether the case will be transferred to the Crown Court. For the past two years, only those pleading not guilty have had the choice of venue. The Minister of State, Mr Paul Boateng, said in July that plea before venue had led to a considerable decrease in Crown Court cases. Presumably as a result of these two changes, we know that the number of "either way" cases going to the Crown Court fell from 35,000 a year at the time of the Royal Commission to 18,500 in the last full year for which we have figures. I think those are the facts, one of which, at least, was confirmed by the noble and learned Lord in his remarks. So apparently the delay has been much reduced already.

In other words, the choice of jury trial is to be taken away in these circumstances for no good financial reason and illusory--certainly unproven--reductions in legal delays.⁹²

On 24 February 2000 the Bar Council announced the publication of the results of a nationwide survey showing that Crown Courts were currently able to hear short trials almost twice as quickly as magistrates' courts. A Bar Council press notice on the research said this meant that the shorter either-way cases that the Home Secretary wanted to switch from the Crown Court to the magistrates' court would in fact take much longer to be tried and quoted the Chairman of the Bar Council Jonathan Hirst QC as saying:

This fresh evidence confirms what we have always known – that the planned curbs on jury trials will add to cost and delay the court system.⁹³

2. Objections in principle

Critics who have argued that it would be wrong in principle to remove the right to choose jury trial from defendants charged with either way offences have stressed the merits of jury trial over trial in a magistrates' court and the need to preserve public confidence in the criminal justice system, particularly where the treatment of ethnic minorities is concerned. A summary of research on race and the outcome of criminal trials is set out in part VI of this paper.

Some critics have been particularly concerned about what they see as the potential unfairness of a defendant who has had no choice about mode of trial being committed to the Crown Court for sentence by a magistrates' court which, having taken the decision to try the case summarily, subsequently decides that its sentencing powers are inadequate to deal with the offender.

⁹² *ibid.* c.927-928

⁹³ "Straw jury reforms 'will worsen court delays' –new research" – General Council of the Bar press notice 24.2.2000

The Home Secretary has referred to Scotland as an example of a jurisdiction in which defendants had no choice about mode of trial. Some critics have argued that if defendants charged with either way offences in England and Wales are to join people accused of criminal offences in Scotland in having no right to choose trial by a jury, they should, like their Scottish counterparts tried using the summary procedure in Scotland, be free of the risk that the court which convicts them will commit them to a higher court for sentencing.⁹⁴ The Government has said it has no plans to implement this proposal.⁹⁵ An outline of the procedure for determining mode of trial in Scotland is set out in part VIII of this paper.

An editorial in the *Times* on 25 February 2000 about the new version of the Bill said:

The issue of principle that Mr Straw's latest Bill ignores is one of sentencing. The new Bill still lets defendants denied trial by jury go, with fewer rights, before a magistrate – though they can then be sent to the Crown Court for a heavier sentence than a magistrates can impose. It remains unfair for a person to risk a long sentence without benefit of a full trial.⁹⁶

In his speech during the second reading debate on the *Criminal Justice (Mode of Trial) Bill* in the House of Lords the Liberal Democrat peer and QC Lord Thomas of Gresford set out his view of the merits of jury trial over trial in a magistrates' court as follows:

Trial by jury started with important safeguards and those have developed over the years to address the deficiencies which have emerged. Consider the jury as the judges of the facts, the arbiters of the ultimate decision of guilt or innocence. Juries are a cross-section of the community from which they are chosen for their age, gender, religion, intelligence and ethnic background, and they determine the facts. They come to court for a fortnight or three weeks, open-minded, anxious to do their duty as they are instructed, and that is exactly what they do.⁹⁷

He went on:

There is also a professional judge who will ensure that the trial is properly conducted according to law and will give the appropriate rulings. In the Crown Court there is full disclosure. To balance the developments that have taken place elsewhere in the jury system, we now have not simply the disclosure of witness statements, which has always been part and parcel of the higher courts, but also primary disclosure of documents. There has been the introduction, for very good reason, of defence statements and there is now secondary disclosure where documents are brought out by the prosecution and handed to the defence. It is the failure of that to happen in the past that has caused some of the miscarriages of justice. There are now no surprises-- nothing up the sleeve of either prosecution or defence. Indeed, where information or

⁹⁴ "Jack Straw's juryless courts" (Lee Bridges) - *Guardian* 25.11.1999

⁹⁵ HC Deb 17 February 2000 c622W

⁹⁶ "When more means less" – *Times* 25.2.2000

⁹⁷ HL Deb 2 December 1999 c931-932

documents are withheld in the public interest--where public interest immunity is claimed--that is now vetted by the judge, who looks at that information and at those documents and either approves the decision of the prosecution to withhold it or rejects that decision.

The other advantage of a jury trial is that legal argument takes place in the absence of the jury; for example, on whether character should be an issue or whether admissions are admissible. Previous convictions or admissions which are not admissible are not heard by, and do not in any way prejudice the minds of, the jury. Furthermore, the legal principles that a judge in a Crown Court trial applies, both on matters in the absence of the jury and in a summing up, are stated and discussed openly in court and any error that there may be will be rectified on appeal. Finally, in the Crown Court there is a full record of the proceedings.

Let us contrast that with the situation in the magistrates' court. Lay magistrates themselves are extremely public spirited. They work for nothing. I do not criticise them on a personal basis. But if the Magistrates' Association wants to get involved in this argument on the side of the promoters of the Bill, I believe that the spotlight should be turned on that system and that we should take a proper look at it. It is, as the noble Lord said, an enclosed system with which magistrates on the whole are very pleased. But it is not the envy of the world. No other common law system rushes to adopt the system of lay magistrates advised by a clerk. They do not exist as such even in Scotland.

In my father's day, the magistrates' court was known as the police court. In my day, looking back, it was extraordinary how the magistrates' courts were run by the great landowners and coalowners of the district. In a coal-mining and industrial area such as my own, which had returned no Conservative Member of Parliament in this century, it was nevertheless the landowners who ran the magistrates' courts. I shall not name them--their scions, their sons, were Members of your Lordships' House until three weeks ago and it would perhaps be inappropriate for me to do so. It may be that the composition of the magistrates' court today has changed from 30 years ago, but it is still predominantly white, middle aged and middle class. The understanding of magistrates and the sympathy that should be shown to the way of life of the young, the ethnic minorities and the gay community may not be outstanding features of magistrates' courts.

Very little else about the system has altered over the past 30 years. Advice on legal matters is still obtained from the clerk--perhaps one in two or one in three may be a qualified solicitor or barrister. Advice is given in retirement and not in open court. The clerk is called to discuss legal issues in the magistrates' retiring room. The advice cannot be checked. Only on an application to state a case to the Divisional Court has legal reasoning to be given. It is only then that one will learn what kind of advice and what quality of advice has been given to the magistrates. Disclosure is rudimentary. In summary-only trials, no obligation exists on the prosecution to disclose anything to the defence. In either-way cases, the prosecution must give what is called advance information, which may be no more than a case summary or perhaps a photostat of an officer's notebook. Sometimes--for example, my last experience in a magistrates' court earlier this year - one is given a series of statements on the day that one arrives

in court. The noble Lord, Lord Cope, referred to the fact that one has to catch up with the prosecution case on the hoof. In the magistrates' court, the cards of the prosecution are still kept closely to the chest.

Legal argument is determined by lay magistrates. Previous convictions and alleged admissions and their admissibility are argued before the lay magistrates. If they decide that a character should not go in or that an admission is not admissible, they are then forced to conduct what in one case the Court of Appeal described as the "mental gymnastics" of thrusting out of their mind all that they have learnt about the particular defendant--his string of convictions or the fact that he has made admissions which have been ruled out. Again, as magistrates do not give reasons, it is a matter of pure speculation in a magistrates' court as to whether the magistrates have been properly advised as to the law and then actually applied the law to the facts. The proceedings are not recorded, save by the clerk writing it all out in hand--writing as much as he can get down. Not even stipendiary magistrates give reasons. In other jurisdictions - for example, the district court in Hong Kong - reasons for verdict are a requirement. It is possible to look at the way the case has been decided by the magistrate, to look at whether he has got the law right, and to see whether he has applied the law to the facts, so that his conclusions can be challenged.

The only possible justification for these derogations from the fairness of a trial in the Crown Court is the limited sentencing power of the magistrates - six months for one offence or a maximum of 12 months for consecutive sentencing for either-way offences. If the Bill goes forward, I believe that the next step will be a Bill to increase to two years the sentencing power of the magistrates. That is the power of the sheriff in Scotland. I am quite certain that that would come in quickly and we would be told by the noble and learned Lord that, on balance, he has made the right decision. I have heard him say that about 20 times. In all the legislation that he promotes, "on balance" he has got it right. That is the way he always puts it. I sometimes think of him as a tightrope walker crossing the swimming baths in Rhyl, in spangled tights - sometimes falling in.

The point I am seeking to make is that the procedural reforms that have been made in the Crown Court in response to the well-known miscarriages of justice have passed the magistrates' court by. For each one of the well-known cases, there must be hundreds of little miscarriages going on in the magistrates' court which undermine, drip, by drip, by drip, people's confidence in the system. So when the acquittal rate in contested trials in the Crown Court runs at 40 per cent and in the magistrates' court at 25 per cent, the reason is not that juries are gullible, or are ready to be hoodwinked, or are easily moved by emotive speeches from mendacious counsel; it is that the trial process in the Crown Court is open, fairer and more up-to-date, and the jury which decides the issues understands the people who are appearing in front of it, whether as witnesses or as defendants.

These proposals mean that the proportion of wrongful convictions will rise and the confidence of the public will decline. They also mean - I know that other noble Lords will refer to this - that people from the ethnic minorities will suffer quite disproportionately. It is not necessary for me to fulminate about Magna Carta or ancient rights and so forth. There has been a lot of nonsense said on that. However,

the fact is that for the purpose of saving money this Government seek to deprive defendants of their right to be tried by a fairer and more up-to-date system.⁹⁸

The Conservative peer Lord Cope gave his party's view of the arguments of principle concerning the defendant's right to choose jury trial as follows:

It is said that this choice, ancient in origin - although I agree with the noble and learned Lord that it has been modified considerably over the years - is not allowed in many other countries' legal systems. "Modernisation", therefore, suggests that we should bring our system into line with those of other people. I do not accept that. What is at stake here is our people's confidence in our legal system.

English and Welsh people have been taught to expect that if they are in serious difficulty with the law they will have automatically, or be able to opt for, a trial by jury--that is to say, ordinary people deciding one's guilt or innocence; not clever lawyers or distant judges, but people like themselves. Those who practice in the courts often say how seriously jurors take their duties. Those who have been on juries recognise that this system works and take their duties seriously.

To take away this right of choice in such cases is to take the decision about venue back to the authorities. All authority is criticised these days and has to earn such respect as it can get. People can relate to a box full of jurors much more readily than to a bench of magistrates, however carefully chosen. They will trust their future to them more readily. It is essential that the criminal justice system should have the confidence of the public and this part of our traditional freedoms should not be taken away - particularly not for the sake of copying other countries and certainly not on such flimsy evidence of advantage in terms of money or swifter decisions.

There is a substantial number of our fellow citizens whose trust in the system is already particularly low and to whom we should give particular attention. I refer, of course, to the ethnic minorities. We have the report on the Lawrence case, which set that out for us. It is perverse in the extreme for the Home Office to be setting out now to damage that precious trust by this measure. Not long ago, we agreed in all parts of the House that the criminal justice system - not just the police - should do everything possible to build up the confidence of ethnic minorities. This measure attacks that confidence. That has been made absolutely clear in the representations made to me and, no doubt, to other noble Lords.

The next point of principle concerns the nature of defence. The difference between summary jurisdiction in the magistrates' court and trial on indictment in the Crown Court is not only that the jury decide questions of fact instead of the magistrates; the whole defence arrangements are different. In the magistrates' court, the defence has to respond to the prosecution case as it develops during the trial on the hoof, as it were. In the Crown Court, the defence sees the prosecution case in full, with all the papers, before the trial and can therefore respond more fully to all the accusations that are

⁹⁸ HL Deb 2 December 1999 c931-934

made. It is no wonder that those concerned primarily with prosecution favour the Bill; they do not have to disclose before trial in that way. We above all people should look to the interests of the defence and the liberty of the subject. Parliament should be the champion of the rights of the individual against the state.

We shall also wish to examine the problem of how defendants are expected to argue that they should be tried in the Crown Court before they have seen the prosecution case, either when they are before the magistrates or when they are on appeal - if it goes to appeal - about venue. As the Bill stands, the defence is expected to make representations to the magistrates and, if necessary, to argue for the venue in the Crown Court on the basis of a formal charge only, without the particulars of the evidence and the witnesses that the prosecution would have to show to the defence before the Crown Court heard the case. If the magistrates are to make sound decisions about where the case should be heard, both they and the defence must have a clear idea of the case and of the evidence against the accused.⁹⁹

In its briefing on the Bill the civil liberties pressure group Liberty says:

We believe the government's proposed changes will lead to a decline in the standard of criminal justice, an increase in the number of wrongful convictions and a wide perception of unfairness and discrimination.¹⁰⁰

The briefing goes on to say that Liberty believes:

- That jury trial is fundamentally more democratic and likely to achieve a fairer result than trial in a Magistrates Court
- It is more important to deliver the very best and highest standards of criminal justice, rather than the cheapest.
- There should be no discrimination about who is able to exercise the right to jury trial.
- The proposals will have a disproportionate effect on black defendants because they are more likely to choose jury trial, less likely to have confidence in the system and more likely to plead not guilty.
- The proposals only affect 4% of either-way cases. This number is still reducing. The effect of other measures to reduce the numbers in the Crown Court, like plea before venue need to be properly assessed.
- There are other options the government could take to reduce the numbers of people going to Crown Court without reducing everyone's right to chose jury trial.¹⁰¹
- That because of concerns about the potential unfairness of the proposals, from all parties in the House of Lords, the government could refer the matter for further consideration. Lord Justice Auld has recently been asked to review the criminal

⁹⁹ *ibid.* c928-929

¹⁰⁰ Liberty Briefing, *Mode of Trial Bill - Commons*

¹⁰¹ the Liberty briefing goes on to discuss these

justice system. His review has the scope to cover both Magistrates and Crown Courts.¹⁰²

Many peers and commentators expressed concern about the inclusion in the original version of the Bill of potential damage to the defendant's reputation and livelihood as factors that magistrates could take into account in considering whether to try a defendant summarily or commit him for trial at the Crown Court. As has already been mentioned, these factors are not included in the new version of the Bill introduced in the House of Commons. As far as the new version of the Bill is concerned, the *Guardian* and the *Times* both noted the Home Office estimate that up to 2,000 fewer defendants a year would have their cases heard by a judge and jury because JPs would no longer be taking account of the impact of their decision on the defendant's reputation or livelihood.¹⁰³ The *Guardian* article reported the Home Secretary as saying that he had decided to remove the injustice by denying the middle classes the right to choose jury trial as well. It also quoted the director of Liberty, John Wadham, as saying:

This bill is no better than the last. To avoid being seen to be creating a two-tier system of justice, the government have equalised downwards....The right to jury trial must not be eroded to save money.¹⁰⁴

An article in the *Independent* on 25 February 2000 noted that while the Bill was supported by magistrates and chiefs of police it was opposed by lawyers. The article noted the Bar Council's objections to the Bill and quoted the president of the Law Society, Robert Sayer, as saying the new Bill was a "profoundly misguided and deeply unpopular measure".¹⁰⁵

VI Research on race and the outcome of criminal trials

In a book published in 1992 entitled *Race and Sentencing* Roger Hood reported the results of a study carried out for the Commission for Racial Equality which examined over 3,000 cases heard at five Crown Courts in 1989. He noted that his study had confirmed long-held suspicions that the over-representation of Afro-Caribbean men and women in the prison system was largely a product of their over-representation among those convicted of crime and sentenced in the Crown Courts. He went on to say:

The best estimate that it is possible to make from this study is that 80 per cent of the over-representation of black male offenders in the prison population was due to their over-representation among those convicted at the Crown Court and to the type and circumstances of the offences of which black men were convicted. The remaining 20

¹⁰² *ibid.*

¹⁰³ "Straw deal will cut extra 2,000 jury trials" – *Times* 25.2.2000; "Straw's new jury trial limits" – *Guardian* 25.2.2000

¹⁰⁴ *ibid.*

¹⁰⁵ "New Bill to restrict jury trials published by Straw" – *Independent* 25.2.2000

per cent, in the case of males but not of females, appeared to be due to differential treatment and other factors which influence the nature and length of the sentences imposed: two thirds of it resulting from the higher proportion of black defendants who pleaded not guilty and who were, as a consequence, more liable on conviction to receive longer custodial sentences.¹⁰⁶

He suggested that features meriting further investigation as factors or circumstances which might produce a higher rate of convictions amongst the black population were the higher proportion of black people being charged with offences that were triable only on indictment at the Crown Court rather than triable either-way. He added:

This would not, of course, have meant that all these black defendants would have accepted summary trial. The reason is that considerably more of them had, early on in the procedure, signified their intention to plead not guilty: 46 per cent of blacks and Asians compared with 36 per cent of whites charged with robbery. Nevertheless, the unavailability of discretion to deal with these offences either-way inevitably brings more black defendants into the arena of the Crown Court and its greater propensity to inflict a custodial penalty.¹⁰⁷

Black defendants were also at a disadvantage, Hood found, because they were more likely to be remanded in custody by magistrates who committed them for trial. They were also much less likely to have had a social inquiry report prepared on their background, mainly because a considerably higher proportion of them signalled their intention to plead not guilty, but also because fewer who pleaded guilty were reported on, although the reasons for this were not known. Being already in custody, pleading not guilty, and not having a report were all associated with a higher probability of receiving a custodial sentence or with a lengthier sentence. Roger Hood went on to say:

It would appear, therefore, that ethnic minority defendants were inadvertently subjected to a form of indirect discrimination at the point of sentence due to the fact that they chose more often to contest the case against them. Because of the way that the system works to encourage guilty pleas through a 'discount' on sentence, which has been shown to produce a substantial reduction, and because it is the policy of the Probation Service not generally to make social inquiry reports on those who intend to contest the case against them, black defendants obviously put themselves at greater risk of custody and longer sentences.¹⁰⁸

Section 3 of the *Criminal Justice Act 1991* now makes it mandatory rather than discretionary for a court to obtain and consider a pre-sentence report (a new form of social inquiry report) before imposing a custodial sentence. This requirement may only be dispensed with if, in the

¹⁰⁶ Roger Hood, *Race and Sentencing: A Study in the Crown Court - A Report for the Commission for Racial Equality* (1992) p.179

¹⁰⁷ *ibid.* p.180

¹⁰⁸ *ibid.* p.182

circumstances of the case, the court is of the opinion that it is unnecessary to obtain such a report.

In a research study carried out for the Royal Commission on Criminal Justice and published in March 1993, Marian Fitzgerald examined existing research on ethnic minorities and the criminal justice system,¹⁰⁹ including the study of Crown Courts carried out by Roger Hood.¹¹⁰ Marian Fitzgerald's summary of the conclusions from research and the questions they raise includes the following findings about plea, mode of trial and trial outcome:

5. Afro-Caribbeans are more likely to plead not guilty to the charges against them.

Questions here include:

- whether Afro-Caribbeans are more likely to have been accused of crimes they did not commit;
- whether they receive different legal advice (and why).

The findings of higher acquittal rates (see 7) implicitly support the first of these propositions; but the second has received no research attention.

The greater likelihood of their contesting the charges against them 'de facto' increases their chances of receiving a harsher sentence if found guilty and Hood has raised the possibility that this constitutes indirect discrimination.

6. Afro-Caribbeans are more likely to be tried at Crown Court.

Questions here include:

- to what extent this reflects the charges for which they are tried;
- to what extent it reflects 'not guilty' pleas;
- whether Afro-Caribbeans in triable either-way cases are more likely to elect Crown Court trial (and, if so, whether this is a result of the legal advice they receive);
- whether magistrates are more likely to decline jurisdiction over them (and, if so, whether this reflects area differences or differences between individual magistrates).

¹⁰⁹ Marian Fitzgerald, *Ethnic minorities and the criminal justice system* (1993) Royal Commission on Criminal Justice Study 20

¹¹⁰ Roger Hood, *Race and Sentencing* (1992)

7. Afro-Caribbeans are more likely to be acquitted.

Questions here include:

- how far this reflects the greater extent to which they plead not guilty;
- the relationship to their greater likelihood of being tried at the Crown Court;
- whether they are more likely than whites to have been charged with crimes of which they are innocent;
- the quality of legal representation available to different groups.

There is an obvious inference that Afro-Caribbeans have disproportionately been brought into the criminal justice system and carried through to its end point without due cause. However, Crown Court trial itself increases the likelihood of acquittal; and there are problems with interpreting acquittal as synonymous with innocence. On the other hand, it cannot safely be assumed that magistrates, judges and juries will rectify injustices which have occurred earlier in the system. This leaves open the question of whether Afro-Caribbeans who are not, in fact, guilty are acquitted at the same rate as whites; and this, in turn, has further implications for the conduct and outcome of appeals – an area which has not been explored in the research to date.

8. Afro-Caribbeans found guilty of crimes are more likely to receive more and longer custodial sentences and a different range of non-custodial disposals.

Questions here include:

- how far this reflects the seriousness of the crimes in question;
- the effect of other ‘legal’ factors such as plea and previous offences;
- the consequences of more being sentenced at the Crown Court;
- the impact of ‘social’ factors;
- whether fewer of the many ‘mitigating’ factors work to the advantage of Afro-Caribbeans;
- the effect of area variations in sentencing practice, given the uneven geographical spread of Afro-Caribbeans;
- the implications of differences in practice between sentencers;

- the influence of other agencies on sentencers – whether in terms of recommendations or of earlier interventions in bringing cases to the point of trial.¹¹¹

A 1998 Home Office Research Study by Claire Flood-Page and Alan Mackie entitled *Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s*, analysed a sample of 3,005 cases in magistrates' courts in 1994-95 and 1,777 cases in the Crown Court in 1995-96. The study found that in the magistrates' courts the differences in the sentencing of ethnic minorities were complex:

The same proportion of white, black and Asian men received a custodial sentence. Slightly more white and black offenders received a community sentence. A higher proportion of Asian men were fined. Much of these differences can be explained by the characteristics of offenders from different ethnic groups.

Ninety-two per cent of white defendants in this sample pleaded guilty compared to 85% of black and 86% of Asian defendants. Ethnic minorities are less likely to have a pre-sentence report which makes a community sentence less likely. This in turn, is linked to the fact that a PSR is not normally prepared in advance of those pleading not guilty.¹¹²

In the Crown Court the study found:

Three-quarters of white defendants in this sample pleaded guilty compared to two-thirds of black and Asian defendants. White and black defendants were more likely than Asians to have a pre-sentence report, which tends to preclude a community sentence.

There are also differences in the type of offences for which offenders from different ethnic minority groups are sentenced. Hood (1992:196) found that black offenders sentenced in the Crown Court were more likely than white or Asian offenders to have been convicted of robbery or supplying drugs and fewer were dealt with for burglary, theft or fraud. In the present study a higher proportion of black defendants were sentenced for drug offences and robbery; rather fewer were sentenced for violence. A high proportion of Asian offenders (26%) were convicted of violent offences but were much less likely to be sentenced for burglary or robbery than either white or black offenders.

Published statistics consistently show greater over-representation of Afro-Caribbeans in the remand population than among sentenced prisoners. On this sample black offenders were more likely to have been remanded in custody than white defendants. A number of factors mean that black defendants are more likely to be tried in the

¹¹¹ Marian Fitzgerald, *Ethnic minorities and the criminal justice system* (1993) Royal Commission on Criminal Justice Study 20 p.34-36

¹¹² Claire Flood-Page and Alan Mackie *Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990's* Home Research Study 180 (1998) p.116-117

Crown Court than white defendants: they are more likely to be charged with indictable-only offences (especially robbery) and a higher proportion of black defendants charged with a triable either-way offence were committed for trial at the Crown Court – often because they chose jury trial.¹¹³

As far as sentencing at the Crown Court was concerned the study found that:

Among first offenders a similar proportion of white, black and Asian men received a custodial sentence. A slightly higher proportion of black offenders received a community sentence, although this was not statistically significant at the five per cent level. Among those with previous convictions, although a higher proportion of Asians than whites or blacks received a custodial sentence, the difference was not statistically significant.¹¹⁴

In October 1999 the Crown Prosecution Service (CPS) published a document entitled *Race and Crown Prosecution Service Decisions*, which was a report of a study by Dr. Bonny Mhlanga analysing decisions taken by CPS lawyers in the autumn of 1996 on just over 5,500 young people charged with offences by the police. About a quarter of the sample were of ethnic minority origin. As far as outcomes at court were concerned the study found that:

The CPS was more likely to offer no evidence at court (resulting in the withdrawal of a case) in cases involving black defendants charged with affray/violent disorder, and in cases involving Asian defendants charged with TWOC¹¹⁵/vehicle interference or road traffic offences.

Black and Asian defendants prosecuted by the CPS were more likely to be acquitted at the magistrates' court. In particular, Asian defendants charged with road traffic offences, and black defendants charged with theft, TWOC/vehicle interference, robbery or affray/violent disorder were more likely to be acquitted than their white counterparts.¹¹⁶

The Home Office Research and Statistics Directorate publication *Statistics on Race and the Criminal Justice System*, published in December 1999 contained the following comments about Crown Prosecution Service research:

6.2 The Crown Prosecution Service (CPS) does not directly measure the ethnicity of defendants whose cases they deal with, as they are unlikely to have visual contact. They do however have available information collected by police officers on the ethnic appearance of persons arrested that can be combined with other information collected by the CPS. A study by Dr Bonny Mhlanga (1999) considered cases referred to the CPS and found that in comparison with white defendants:

¹¹³ *ibid.* p.118

¹¹⁴ *ibid.* p119

¹¹⁵ taking a vehicle without consent

¹¹⁶ Dr. Bonny Mhlanga, *Race and Crown Prosecution Service Decisions* (CPS October 1999) p.iii

- A higher proportion of cases involving Asians was discontinued on evidential grounds.
- The CPS discontinued a higher proportion of cases involving black defendants on public interest grounds.
- The CPS was more likely to reduce the charges brought by the police against black defendants charged with affray/violent disorder or theft.¹¹⁷

The Home Office publication also contained the following information about magistrates' courts:

6.3 Currently pilots are taking place in eleven police force areas into the transfer of ethnic appearance data collected by the police on persons arrested to the magistrates' and Crown Court's computer systems. It was explained earlier (paragraph 2.11) that in all the Crown Court and many of the magistrates' courts taking part in the pilot studies the level of missing data is at least one quarter, thus making it impossible to identify any ethnic difference in court decisions at a local level. Information is, however, included here from magistrates' courts in four of the pilot areas (Lancashire, Leicestershire, Northumbria and West Yorkshire (part)) where the missing data levels for all indictable prosecutions were respectively 4%, 12%, 9% and 12%. Some information has also been provided for the Crown Court by combining data received from all the pilot areas where such data was available.

6.4 Information is available on both the outcomes of prosecutions and sentencing. However the depth of analysis possible is limited because of the small number of cases for each ethnic group. Due to this, it is not possible to present data by offence or age group, both of which are known to vary amongst the ethnic groups. In addition other factors such as previous convictions cannot be taken into account. Research by Roger Hood (1992) at the Crown Court has shown that even when relevant factors were allowed for there were still differences between the sentencing of different ethnic groups.

6.5 Prosecutions, after listing at the magistrates' court, may be terminated early for a number of reasons which include the case being discontinued by the Crown Prosecution Service, the case being withdrawn at or during the court hearing or being written off. Combining the four police force areas a higher proportion of prosecutions of ethnic minorities (36% of black defendants and 35% Asians) were terminated early compared with white defendants (29%). A further 1% of prosecutions for all ethnic groups were dismissed. When the data was restricted to triable either way offences identical figures were obtained. These findings are consistent with those obtained in the Mhlanga report although it is not possible to analyse the data in the same detail due to the small number of cases included.

¹¹⁷ *Statistics on Race and the Criminal Justice System: A Home Office publication under section 95 of the Criminal Justice Act 1991* Home Office Research and Statistics Directorate December 1999 p.37

6.6 Cases concerning ethnic minority defendants in the four police force areas were also found more likely to be committed to the Crown Court for trial. For triable either way offences, the proportion committed for trial for black defendants (13%) and Asians (15%) was above that for white defendants (10%). However information was not available as to whether these committals resulted from the defendant electing for a Crown Court trial or from magistrates declining jurisdiction. Preliminary data collected from the Crown Court in all the eleven pilot areas also suggested that ethnic minorities dealt with at the Crown Court were less likely to plead guilty and more likely to be acquitted. 64% of black defendants tried for triable either way offences at the Crown Court pleaded guilty compared with 62% of Asians and 73% of white defendants; overall 19% of black defendants were acquitted, 24% of Asians and 16% of white defendants. Although this Crown Court data is based upon a small number of courts the results are again consistent with those of the Mhlanga report.

6.7 Sentencing patterns are known to vary substantially between courts. For the four police force areas considered (Table 6.2) there was no clear evidence of differences between ethnic groups in the patterns of sentencing at magistrates' courts. For example, excluding cases where areas had less than 50 defendants in a particular ethnic group, the use of immediate custody was lower for Asians in Lancashire and Leicestershire than for white and black people, but similar in West Yorkshire and Northumbria. The use of custody was highest for black people in Leicestershire. Similarly, the use of community sentences and fines showed similarly no clear pattern.¹¹⁸

VII Trial by Jury as a Constitutional Right.

Clause 39 of the *Magna Carta* of 1215, as translated from the original Latin, provides that:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.¹¹⁹

In his *Commentaries* the eighteenth century jurist Sir William Blackstone said that the *Magna Carta* had "secured to every Englishman that trial by his peers which was the grand bulwark of his liberties". He went on:

So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace,

¹¹⁸ *ibid.* p.37-38

¹¹⁹ Translation from the Latin by the British Library at <http://www.bl.uk/diglib/magna-carta/magna-carta-text.html>

commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.¹²⁰

In his book *Trial by Jury*, published in 1956, Sir Patrick Devlin said:

For more than seven out of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishmen got the justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.¹²¹

He famously went on to say:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.¹²²

In his *History of English Law* William Holdsworth comments that it is clear that the words in Clause 39 of the Magna Carta do not refer to trial by jury. He adds:

A trial by a royal judge and a body of recognitors who found the facts was exactly what the barons did not want. What they did want was first a tribunal of the old type in which all the suitors were judges both of law and fact, and secondly a tribunal in which they would not be judged by their inferiors. Some of them did not consider that the royal judges, none of them would have considered that a body of recognitors, were their peers. It is in this respect that the clause is reactionary.¹²³

William Holdsworth set out his view of the significance of Clauses 38, 39 and 40 of the Magna Carta in the following terms:

It was said in the seventeenth century that these clauses embodied the principles of the writ of Habeas Corpus and of trial by jury; and for these interpretations early mediaeval authority could be cited. It is not difficult to show that, taken literally,

¹²⁰ Blackstone's *Commentaries* Book 4 pp.349-350

¹²¹ Sir Patrick Devlin *Trial by Jury* (1956) p. 159-160

¹²² *ibid.* p.164

¹²³ William Holdsworth, *A History of English Law* (Seventh Edition, reprinted 1966) Volume I p.59-60

these interpretations are false. Trial by jury was yet in its infancy. The writ of Habeas Corpus was not yet invented; and, as we shall see, it was long after it was invented that it was applied to protect the liberty of the subject. But there is a sense in which these interpretations are true. These clauses do embody a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property: they do assert a right to a free trial, to a pure and unbought measure of justice. They are an attempt, in the language of the thirteenth century, to realise these ideals [...] This is the real sense in which trial by jury and the writ of Habeas Corpus may claim descent from these clauses of the Charter. The historian may prove that there is not strict agnatic relationship: he must admit that there is a natural – a cognatic link.¹²⁴

In recent years Penny Darbyshire has been a notable critic of the way in which discussion of the criminal justice system has in her view tended to focus on trial by jury rather than trial in the magistrates' court, although it is in the magistrates' court that most offenders are now tried.¹²⁵ In an article published in the *Criminal Law Review* in 1991 she suggested that the traditional justifications used in praise and defence of the jury were conceptually unsound. She argued that defenders of the jury system inflated its importance by portraying the “right” to jury trial as central to the criminal justice system and as a guardian of due process and civil liberties and commented:

If the jury is such as “palladium” of English justice (Blackstone) why is it reserved for such a small number of cases, most defendants being treated to the cheaper, less flamboyant “trivial” justice of the magistrates' court? If the jury is such a guardian of our liberties and of justice, are we implying that magistrates dispense some lesser form of justice? Are we implying that, since we invest so much cash and rhetoric in the jury system, that it is more likely to do justice and get the verdict right, whatever that means, than the magistrates? If so, why do we, in this, the fairest of legal systems, allow most of our defendants to be processed by magistrates' courts? And, this being the case, why have academics invested so much argument and research into the jury?¹²⁶

Penny Darbyshire went on to criticise the notion that there is a “constitutional right” to jury trial, noting that three problems arose in connection with this:

- a. the supposed guarantee of a right to jury trial in Magna Carta as a matter of historical accuracy. Having noted the views of a number of legal historians and constitutional lawyers she comments that:

As these and other historians have pointed out, by Magna Carta the barons simply sought to secure a deal from King John, within which they

¹²⁴ William Holdsworth, *A History of English Law* (Third edition, 1923) Volume II p.214-215

¹²⁵ See e.g. Penny Darbyshire, “An Essay on the Importance and Neglect of the Magistracy” [1997] *Crim LR* 627-643 at p.627

¹²⁶ Penny Darbyshire, “The Lamp That Shows That Freedom Lives – Is it Worth the Candle?” – [1991] *Crim LR* 740-752 at p.741

safeguarded their right to be judged by judges of no lesser rank than themselves. *Liber homo* has been translated as either “freeman” or “freeholder” and “freeman” did not mean what it does today. As we should remember from school history, freemen were a limited class in the feudal system.¹²⁷

- b. what is meant by a “constitutional right” to jury trial in the English legal system. She suggests that some writers speak as if there were an entrenched right to jury trial, as there is in the United States Constitution or the Canadian Bill of Rights, when in fact the sovereignty of the UK Parliament means that “we do not have any entrenched rights, especially in issues beyond the grasp of EC or international law”,¹²⁸
- c. What is meant, in jurisprudential terms, by asserting that there is a right to jury trial. She notes that the term “right”, at least to “will” theorists, implies a choice, something which a person charged with an either-way offence has in respect of mode of trial, but which is not available to a person charged with an offence triable only on indictment, who must be tried by a jury at the Crown Court and whose only choice is as to plea.

She goes on to say:

Not only does the concept of a right to jury trial in indictable offences fail to accord with “will” theories of rights, it also fails to satisfy classical “interest” theories of rights and I would extend my argument here to include triable either-way offences, According to interest theories, as I would apply them here, jury trial can only be described as a “right” if the intended beneficiary of the court’s duty to provide that right is the defendant. If the purpose of jury trial is primarily ideological, as I argue here, as a symbol to legitimate the criminal justice system, then the defendant is the unintended beneficiary and thus, cannot be said to have a real right to jury trial.¹²⁹

Darbyshire also criticised what she suggests is a failure by jury protagonists to distinguish between randomness and representativeness when celebrating jury trial as a “trial by peers”. She noted that random selection from the community was unlikely to produce a cross-section of that community unless some form of stratified sampling were used. She also criticised the argument that the jury was a defence against state power, noting that for every case which was held up as an example of this, such as the acquittal of Clive Ponting, there were many more instances, such as the convictions of the Guildford Four and the Birmingham Six, in which people had been wrongly convicted by juries.¹³⁰

In an article published in the *Criminal Law Review* in 1997 responding to the points raised by Penny Darbyshire Bruce Houlder Q.C. suggested that while the use of language by those who

¹²⁷ *ibid.* p.743

¹²⁸ *ibid.*

¹²⁹ *ibid.* p.744

¹³⁰ *ibid.* p.747

argued that there was a “constitutional right” to jury trial could reasonably be criticised, the term was a loose, somewhat inaccurate, shorthand expression well understood by those who used it.¹³¹ He also noted that Penny Darbyshire had not suggested a practical alternative to “random” selection, although he himself thought it might be possible for the selection of jury members to be better targeted to individual cases under trial. On the subject of whether or not the jury was “an injection of democracy into the legal system” he said he preferred Lord Devlin’s view to Penny Darbyshire’s, adding that:

A jury is indeed a symbol of “participatory democracy”. Penny Darbyshire concedes that the magistracy is not representative of the community as a whole (although it is becoming more so). This however is not the point. We cannot all be magistrates but all of us can be jurors.¹³²

Bruce Houlder argued that the notorious cases involving miscarriages of criminal justice in recent years were not the fault of juries, but of shortcomings in the investigation and trial process. He set out the following further arguments in support of the defendant’s continued right of election:

1. We are now a sophisticated democracy which has learned the wisdom of involving individuals in the administration of justice.
2. The effect of an apparently inconsequential crime on a particular victim, and the effect on a particular defendant of a conviction, may have no relationship. Offences often described as petty may have devastating consequences for the defendant as much as the victim. The consequences to a defendant, sometimes an innocent one, may last for a lifetime.
3. Jury trial has an educating effect on those who participate in its process and is not separate from responsibility to society in general.
4. A conviction by a jury is usually something that even a convicted defendant can live with, however he may resent it. He feels he has a better chance of being understood by a jury and that there is some justice in that. The decision of a less representative tribunal may ultimately do little to rehabilitate an offender and may serve to increase his sense of separateness from society in general.
5. Seeing justice done is equally as important to most people as an elusive certainty in the correctness of the conviction or acquittal. Any judgment by a cross-section of society is far more satisfactory than a system of justice that depends on the State for the selection of fact-finders as well as its investigator, prosecutor and sentencer.
6. The person principally affected by the decision to prosecute is the defendant himself. He did not ask to be charged, and at the point when mode of trial is decided,

¹³¹ Bruce Houlder Q.C. “The Importance of Preserving the Jury System and the Right of Election for Trial” [1997] *Crim LR* 875-881 at p.879

¹³² *ibid.*

the law deems him to be innocent. He has a diminishing number of protections available to him now and needs a right to a jury trial more than ever before.

7. We should trust a jury. It is not their fault if they get it wrong, but that does not mean that others would get it right. We should ask ourselves perhaps what would happen if the spotlight were turned on convictions, albeit less headline grabbing, by magistrates. It is unlikely that the correctness of their decisions could not be equally assailed. I do not know a single fair-minded magistrate who would disagree with that.¹³³

VIII Determining Mode of Trial in Scotland

There are three criminal courts in Scotland:

- The High Court of Justiciary, whose judges deal with the most serious crimes and which has exclusive jurisdiction in respect of some crimes such as murder, rape and treason;
- Sheriff courts, which deal principally with less serious offences committed within the district over which they have jurisdiction. Sheriffs are judges who must have been legally qualified as solicitors or advocates for at least 10 years at the time of their appointment;
- District courts, which deal with minor offences and are the administrative responsibility of the local authority. They consist of benches made up of one or more lay justices of the peace,¹³⁴ or in some cases, a stipendiary magistrate.¹³⁵

Criminal cases in Scotland are dealt with using one of two methods of criminal procedure:

- Solemn procedure, used in both the High Court and the sheriff court, in which the accused person is tried before a judge sitting with a jury of 15 lay people

¹³³ *ibid.*

¹³⁴ *District Courts (Scotland) Act 1975* s.9

¹³⁵ *ibid.* s.5

- Summary procedure, used in sheriff and district courts, where the judge sits without a jury.

The sheriff has jurisdiction in both summary and solemn criminal cases. Some statutes creating criminal offences specify that the offence must be tried using the summary procedure, or that it must be tried on indictment using the solemn procedure, or that it is triable either-way. Where cases involve offences, whether common law or statutory, which can be tried in the sheriff court using either the solemn or the summary procedure, it is the procurators fiscal (the prosecutors) who decide which procedure should be used. They will also of course be responsible for prosecuting the offender.

Most criminal offences in Scotland are common law rather than statutory offences. Where a statute provides a maximum penalty for a particular offence which is below the maximum penalty available to the court that is dealing with the cases the court will of course be limited by the maximum penalty set out in the statute which creates the offence.

Where a case is dealt with using the summary procedure, the sheriff may impose prison sentences of up to 3 months (or 6 months where the person is convicted of a second or subsequent offence inferring dishonest appropriation, or attempted appropriation, of property, or personal violence), or a fine not exceeding the “prescribed sum” (currently £5,000).¹³⁶ Where the solemn procedure is used the sheriff may impose imprisonment for up to 3 years and unlimited financial penalties.¹³⁷

Where the solemn procedure is used the sheriff may remit the case to the High Court of Justiciary for sentencing if he or she considers that a heavier penalty should be imposed.¹³⁸ This power to remit to the High Court of Justiciary is not available where the summary procedure is used.

District courts may impose sentences of imprisonment of up to 60 days and fines of up to £2,500.¹³⁹ A local authority may appoint a stipendiary magistrate, who must be a professional lawyer of at least 5 years’ standing, to serve in a district court. A stipendiary magistrate sitting in the district court has the same summary criminal jurisdiction and powers as a sheriff.¹⁴⁰ Only Glasgow currently has stipendiary magistrates sitting at the district court. A person whose case is dealt with by a lay justice but who happens to appear before a stipendiary magistrate when the case is disposed of may therefore receive a heavier

¹³⁶ *Criminal Procedure (Scotland) Act 1995* s.5(2)-(3)

¹³⁷ *ibid.* s.3(3)

¹³⁸ *ibid.* s.195(1)

¹³⁹ *ibid.* s.7(6)

¹⁴⁰ *Criminal Procedure (Scotland) Act 1995* s.7(5)

sentence.¹⁴¹ Neither lay justices nor stipendiary magistrates in the district court may remit cases for sentencing purposes to courts with greater sentencing powers.

¹⁴¹ *Main v. Normand* 1996 SCCR 256; *Graham v. Normand* 1996 SCCR 371. See Stair Memorial Encyclopaedia *The Laws of Scotland* 1998 Cumulative Supplement referring to Vol 6 paragraph 1160