Complex and lengthy criminal trials

A Report by JUSTICE

Chair of the Committee
Sir David Calvert-Smith



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CONTENTS

Executive Summary

I.	Introduction	1
II.	Investigation	6
III.	Pre-Trial	18
IV.	Trial	30
V.	The Jury	38
VI.	Conclusion	44
VII.	Annex	46
VIII.	Acknowledgments	49

EXECUTIVE SUMMARY

Complex and lengthy trials (CLTs) constitute a specific and longstanding concern of the criminal justice system. They require vast resources and have only got longer and more unmanageable as advances in technology have given rise to more and more electronic material, which must be reviewed, disclosed and then presented effectively at trial. Despite various reviews and protocols, which identify and offer solutions to the problems associated with CLTs, those problems persist, and the result is undue length, complexity and delay at all stages.

This report is our contribution to the reform proposals that have been set out in various reviews, protocols and cases over the past 30 years, updated for the current era and with CLTs specifically in mind. Drawing on our own experiences of CLTs, we review each of the processes involved in the conduct of a case – investigation, pre-trial and trial – and offer recommendations for each stage. Many of our recommendations build upon previous reviews. We repeat them to underline that problems persist despite being identified again and again. Our recommendations can be separated into three broad themes:

- Early engagement of relevant expertise. There is a need for those with relevant expertise to engage with the process, at the investigation stage, to ensure that this is both focused and proportionate to the alleged offence(s). Trial counsel need to be engaged from the pre-trial stage so that they can oversee the disclosure process, ensuring that it takes place as early as possible and that the relevant issues in the trial are identified.

- Case management. This needs to be undertaken by senior and independent officers in law enforcement and prosecution agencies at the investigation stage, to make sure that the investigation is focused and progresses as speedily as possible. The same judge should be responsible for case management from the start of the pre-trial stage, to the trial itself. The judge should assist the parties in narrowing the issues, pre-trial, and, at trial, in presenting a clear case to the jury.

- Use of technology. The criminal justice system is lagging behind other areas of public life. We propose the development of one evidence management system, built by the criminal justice system that makes use of agile and intuitive technology to meet the investigatory and preparatory needs of the system, and streamline evidence so that it can be easily reviewed and then presented. This will contribute to significant reductions to the time and costs involved.

We have devoted a chapter to the jury, including a consideration of its continuing role in CLTs. Although we have given careful and thorough consideration to the arguments in favour of abolishing the jury in such cases, we have remained (with one dissentient) consistent with JUSTICE's long-held view that the jury has an important constitutional role to play in legitimising the criminal trial process. The need to ensure and demonstrate legitimacy and transparency may be particularly acute in cases of a lengthy and complex nature. We set out in chapter four recommendations for the provision of aids aimed at helping jurors to cope with the additional burdens involved in trying a CLT, such as the need to remember complicated evidence presented over a long period of time.

Recommendations

Investigation

- Early identification of external expertise – legal, forensic, technical
- Involvement of prosecutor throughout proceedings
- Regular oversight by case management panels
- The development of one agile evidence management system, built by the criminal justice system, for all investigation, prosecution and defence review of material in the case
- Electronic disclosure of case materials, subject to PII, witness protection and operational needs, together with a summary of the case, as early as possible, and not less than two weeks, prior to interview

- Disclosure and interview training for police officers in serious and organised crime cases to ensure proper planning takes place

- Investigation time limit of 12 months, with power to extend by Detective Chief Superintendent. Possibility for a suspect to apply to the local Resident Judge after 12 months to review the investigation with power to order an investigation cease if continuation is deemed unreasonable.

Pre-trial

- Instruction of trial counsel once charges are laid

- Trial judge assigned from plea and trial preparation hearing who robustly manages the case and identifies the issues as early as possible, and where appropriate a commercial court judge with criminal experience

- Suitable preparation time for judges

- Training for CLTs, focussing on preparation and appropriate charges, to be available online for lawyers and judges

- Consolidation of existing guidance

- Resolution of outstanding disclosure issues through independent disclosure counsel

- Disclosure review to begin at the point of pre-interview disclosure

- E-disclosure through the evidence management system that allows secure access to defence

- Early identification of third party material and agreement or decision over which party seeks this

- Fuller case statements in the form of pleadings that set out the prosecution case according to offence; its elements; summary of how illegal activity fulfils the elements; summary of evidence that proves prosecution case; and defence case to answer each aspect

- Judicial scrutiny of indictment and identification of issues in the case
- Opportunity for defence to inform prosecution expert of any issues for consideration prior to preparation of report
- CLTs to follow pre-trial roadmap setting out each stage and actions to be undertaken according to a checklist and fixed timetable, as indicated in Table 1.
- A change in culture to commit to the requirements of CLTs. Case management hearings (conducted by conference call as appropriate) should be used to keep the case on track, requiring the attendance of senior oversight lawyers where necessary.

Trial

- Use of Electronic Presentation of Evidence (EPE) in all CLTs, with early preparation of the material to be displayed and disclosure of this to the defence so its accuracy can be checked well ahead of trial
- Tablets available to all jurors to engage better with the EPE material
- Standardised juror questionnaires so as to ensure all courts are identifying those who are best able to engage with CLTs
- Trial judges should be aware of jurors' and parties' unavoidable appointments and holidays and build in preparation days or legal argument as appropriate
- Engagement of juror alternates
- Use of a dedicated room for the jury to discuss and review evidence throughout the trial

- More written material to aid jurors' recall of the evidence and understanding of the legal issues, to include – the parties' pleadings (prosecution and defence statements); legal directions (given at the start of the trial or prior to evidence); route to verdict or summary of the questions that must be resolved and summary of the judge's summing up; a core bundle of the case that can be annotated, with agreed evidence and other written evidence added as the trial progresses; photographs of each witness and a neutral summary of their evidence

- Use of alternative buildings to hold CLTs where there are no security concerns

I. INTRODUCTION

Context

Pourtant nous la dirons encore. Toutes choses sont dites déjà; mais comme personne n'écoute, il faut toujours recommencer.

Everything has been said before, but since nobody listens we have to keep going back and beginning all over again. Andre Gide, Le Traite du Narcisse (1891)

1.1 The Lord Chief Justice, Lord Thomas of Cwmgiedd, launching the JUSTICE strategy in March 2014 raised, amongst other pressing issues of concern, the problem of fraud trials. He recalled that 30 years ago a JUSTICE working group reported with the publication *Fraud Trials* (1984) as a consultation response to the Fraud Trials Committee, chaired by Lord Roskill. That led to the establishment of the Serious Fraud Office in 1988. The Lord Chief Justice highlighted the reforms subsequently introduced to improve the operation of fraud trials, some very recent, but considered that the problems with disclosure and mode of trial have not been resolved. In particular, he considered that fraud investigations and trials are still far too slow and immensely expensive, and that not enough prosecutions are brought despite the re-energised Serious Fraud Office.

1.2 We convened this Working Party of expert JUSTICE members to try to provide solutions to some of these problems. Complex and Lengthy Trials (CLTs) constitute a specific concern of the criminal justice system, irrespective of offence type. They present unique challenges relating, not least, to:

- Allocation of people, finances and time (at all stages);
- The management of court resources;
- The organisation, storage and presentation of information;
- Disclosure; and
- Juries.

1.3 A constant stream of reviews, protocols and cases has identified that there are consistent failings in the approach of courts, practitioners and investigators in the management and presentation of CLTs.[1] JUSTICE gave evidence or delivered submissions to many of them[2] and the actions necessary to improve efficiency and fair management of CLTs have been suggested in all these reports.

1.4 Those responsible for the criminal justice system have not ignored the recommendations made. We recognise that there have been numerous low-profile successes in the investigation and prosecution of complex cases, and most commentators agree that the system used by the Serious Fraud Office to investigate and bring alleged perpetrators of financial crime to trial over more than 20 years works reasonably well.

1.5 No forward perspective on CLTs can properly be formed without an appreciation of the Protocol for the Control and Management of Heavy Fraud and other Complex Criminal Cases 2005 (hereafter the "Woolf Protocol", after the Lord Chief Justice by whom it was introduced). Indeed, its focus upon the centrality of real judicial case management is a key feature of this report. Detailed and dedicated work by the current senior and junior judiciary, through the introduction of the Criminal Procedure Rules and subsequent guidelines, such as the 2013 Judicial Protocol on Disclosure, and the approach to CLTs at Southwark Crown Court, must also be commended for producing a sea-change in the conduct of criminal trials. However, it is arguable that notwithstanding ten years of the Woolf Protocol, judicial case management of the level envisaged continues to be an aspiration rather than a uniform feature of CLTs. Likewise, engagement with the Woolf Protocol, and subsequent rules and protocols, by practitioners, whether prosecuting or defending, is not consistent. As recent critical appellate judgments indicate, there are still many examples of failed and expensive CLTs.[3] It follows that there continues to be a need to apply and develop the guidance.

1.6 It is with some caution that we approach our task of making further recommendations for reform. Until courts and practitioners apply the existing regime consistently, it is difficult to suggest further improvements.[4] In addition, since we started work there have been a number of positive developments, not least through Sir Brian Leveson's Review of Efficiency in Criminal Proceedings (the Leveson Review), the Better Case Management process and efforts to digitalise the criminal justice system. Nevertheless, we have reviewed the stages of the criminal process afresh for the current climate and have determined that there are particular, practical reforms that would help to prevent overly lengthy and complex trials.

What is a CLT?

1.7 In order to give our inquiry focus, we applied the Very High Cost Case definition of 60 days or more set out by the Legal Aid Agency. We also considered the definitions used by the Serious Fraud Office and the Financial Conduct Authority for the cases they take on. There were effectively two types of case which engaged our attention. First, cases which do not involve particularly complex legal or factual issues but which – through lack of good management at the investigation, pre-trial or trial stages – are allowed to occupy far more court time than they need. Second, cases of real complexity, both factual and legal, whose length could also be reduced by better focus at all three stages. These cases may begin with the investigation of a large organisation or criminal enterprise involving multiple parties, police force areas and jurisdictions. The suspicious activity, or preparation for it, may have taken place over a long period. The investigation will often generate vast amounts of material.

1.8 To give a snapshot of the time and cost currently expended on CLTs, information provided to us by the Legal Aid Agency reveals that over the last nine years (until end December 2014), there was an average of 26 cases that lasted 60 days or more each year. The defence costs alone per case (which often involved multiple defendants), from the issuance of a representation order to completion, were on average £2m.[5] Over the nine years surveyed, the average length of a case lasting 60 days or more from representation order to conclusion has leapt from 427 days to 1,407 days. Conversely the number of sitting days at trial has remained, on average, just under 60 days.[6] This may be explained in part by the changing portfolio of cases classed as VHCCs, first limited to 40 plus days and then 60 plus days. It will also have been affected by the growth in the volume and complexity of electronic material. As we explain in chapter four, concerning trials, some of this time may be "dead time" spent waiting for a suitable courtroom to become available. But a good proportion of it will be spent in preparation for and at the trial. The length of time taken in investigation, and the additional costs of investigation, prosecution and court[7] mean that these cases represent a vast expense to the public purse.

1.9 A number of our recommendations provide suggestions for the investigation and pre-trial stages that aim to improve focus and reduce length. Some members of our Working Party and other practitioners consider that the current funding system does not encourage defence lawyers to contribute to these aims. With payments made according to work done, there can be an incentive to prolong a case that may be possible to resolve through greater cooperation. We have not examined legal aid in this report due to the scope of our work and in the interests of brevity. A review of the fee structure may be necessary in order to give full effect to the reform of CLTs.

Our approach

1.10 Our aim has been to review the current processes that lead to CLTs in order to present a series of recommendations designed to deliver increased efficiency and effectiveness within the criminal justice processes, while maintaining the absolute right to a fair trial. We have considered the three stages of a case – investigation, pre-trial and trial – and identified at each stage where we think there is a need for reform. Our recommendations are set out in full in the executive summary.

1.11 There are three particular themes running through the report. The first is the early engagement of relevant expertise – be it prosecution lawyers at the outset of the investigation or judges from the first hearing in court. This can ensure that cases remain focused and proportionate. The second is case management, through both the oversight of law enforcement and prosecution supervisors, and the assigned trial judge. The third is the use of technology to streamline evidence and to review and then present it in a comprehensible way. The advancement of technology over the past few years is striking. The opportunity for reductions in time and cost by adopting electronic solutions to electronic problems cannot be ignored.

1.12 It is relevant that the actions necessary to improve the efficiency and fair management of CLTs generally require a higher level of co-operation between the parties, and between the parties and the court, than is ordinarily encountered in an adversarial criminal justice system. We make recommendations, as have others before us, concerning cooperation, and consider that a cultural shift is required to ensure that the necessary steps are taken to narrow the issues for trial in these cases.

1.13 Given that both the Lord Chief Justice and the Leveson Review have identified mode of trial as an area of concern in CLTs, we have considered in some detail the role of the jury. JUSTICE has long supported the constitutional role of the jury in legitimising the trial process for serious crime. Our review has borne that in mind, but carefully considered the arguments for and against retaining jury trial. These have been made over many years, through previous reform proposals and bills before Parliament. We conclude in chapter five, with one dissentient, Ros Wright QC, that there is no reason to assume jurors, given appropriate support, are incapable of trying CLTs. Nor do we accept that alternatives to jury trial are appropriate in these cases.

1.14 It is salutary to note the underlying aims of the Woolf Protocol: that the control of complex trials should be designed to assist juries and that they should seek to make proper use of public resources. There need be no conflict between these aims: the Woolf Protocol saw no such conflict and neither does this report. Indeed, in a properly functioning system they should be complementary.

II. INVESTIGATION

2.1 It may not be obvious at the outset whether an investigation will result in a CLT. However, the volume and complexity of the material will often indicate this to be the case. The investigation will determine the way the case is prosecuted at trial, and thus whether a CLT can be avoided or its length or complexity minimised. This chapter focuses on the conduct, planning and progression of an investigation. It recommends earlier decision making and engagement with technology.

Alternatives to prosecution

2.2 The police and other law enforcement agencies do not have the resources to react to every crime reported to them. There are clearly far more complaints made than any agency can handle. The nature of crime is also changing, with significant increases in cyber and economic crime.[8] Many cases simply will not be pursued through the criminal courts and complaints will go unanswered.

2.3 In cases of economic crime, other options could be used more frequently than is currently the case and may be acceptable to victims of crime, who often just want their money back and the fraudulent company prevented from accessing the market.[9] Examples of alternatives are civil recovery under Part 5 of the Proceeds of Crime Act 2002, tax interventions, civil claims, and regulatory proceedings. The view of JUSTICE and successive governments – now encapsulated in the Attorney General's guidance[10] – is that the reduction of crime is in general best secured by means of criminal proceedings, and that convictions are the best and fairest way to serve the public interest and secure public confidence in the system of justice. However, the AG's guidance also recognises the contribution to harm reduction that can be made by proper use of non-criminal powers where an early decision is taken that the prosecution is not feasible or a non-conviction based approach is more desirable in the circumstances of the case, taking into account the public interest.[11] An early decision as to whether this is the appropriate route would free up scarce resources to prosecute more speedily those crimes which should go to trial.[12]

Control of the investigation

2.4 Given the potential breadth of an inquiry that can result from a crime report, particularly if it relates to trafficking or financial crime, investigations need to identify the criminality that is capable of being prosecuted in a proportionate way. Notwithstanding the obligation to pursue all reasonable lines of enquiry, there is a danger of investigations meandering into tangential issues.

Allocation

2.5 At the start of an investigation, maximum cooperation between agencies is essential so that they can engage effectively and deploy properly skilled and experienced team members.

2.6 In cases of economic crime there can be overlap between the roles of the City Police, Serious Fraud Office (SFO), Competition and Markets Authority (CMA), and Financial Conduct Authority (FCA).[13] There is no formal process through which decisions are made as to which agency should investigate a complaint. Clearly the right decision is a crucial first step. While memoranda of understanding, protocols, and groups or clearing houses for particular crime exist,[14] these all rely upon communication and agreement between agencies. It is beyond the remit of this Working Party to focus on this area, save to suggest that the route to deciding who should take on an investigation, or lead others on it, could be made much clearer in guidance, or taken by an oversight body. If a central body decided which agency should take the case on and at what cost according to certain indicators and criteria (including the statutory functions of each agency), resources and funds may be spared and greater control of the case achieved. It would then be clearer to complainants and the public what happened in investigations, and who was responsible for operational decisions taken.[15] The National Crime Agency (NCA), through its new role as the lead agency on serious and organised crime, could use its powers to direct in certain cases more frequently, where it seems that no agency is investigating particular types of offence or offender.[16]

2.7 The NCA now also has a responsibility to bring together and develop intelligence on all types of serious and organised crime, to prioritise crime groups according to the threat they present, and to lead, support and coordinate the response.[17] To do this, it has established capabilities in thematic units to undertake specialist operations and support UK operational partners,[18] and operates a national tasking framework. For example, the UK Financial Intelligence Unit receives and sends Suspicious Activity Reports out to appropriate agencies, which may link the information to an existing investigation. This should support and help to focus the investigation in cases that will become CLTs.

2.8 The development of a national investigation allocation model, building on the NCA's responsibilities, which defines the location of the investigation based on seriousness, complexity and threat, would ensure appropriate allocation and identify the investigations which are likely to lead to CLTs.

Focus and expert engagement

2.9 Ensuring that an investigation in a complex case remains focused requires the police and other agencies to have custody and control of the case from the outset and to drive the process forward. Good management while putting intelligence together is essential. The requirement for external expertise should be identified early and sought as required from sources such as IT, legal, financial, forensic, and industry or sector-specific know-how. For example, sometimes it is necessary to shut down what seems like a possible line of enquiry in order to preserve focus, or to identify where there is no legal jurisdiction. External experts can assist in making this decision.

2.10 Early liaison between the police and prosecution, and the involvement of a prosecutor throughout, is essential for a complex case. The principal prosecution agencies have for many years supplied lawyers to work alongside investigators and, where necessary, other specialists, such as accountants. When that combination is well qualified and continuous the result has been investigations that are both focused and effective and has led to trials that have been conducted expeditiously.

2.11 Some agencies, the FCA and SFO for instance, have investigators, lawyers, and forensic experts working within the agency and from the outset of each investigation.[19]

2.12 The Police and the CPS, although they have been working more and more closely together, still have independent and separate statutory functions. Although Police and CPS guidance acknowledges the value of early engagement,[20] it is not happening in every case, or as early as prosecutors would like.[21] This may be because the police do not seek it until they think there is a problem. Waiting on CPS advice may also cause delay, and there may be operational reasons for the police to act with expediency. More needs to be done to implement existing guidance. In any case that may become a CLT, it is essential that investigators take advice, at the outset of an investigation and prior to any action, from experienced practitioners who will be able to predict the effect of certain lines of enquiry upon the likely outcome of a trial or trials, and ensure that the investigation is proportionate.[22]

Oversight

2.13 To enable agencies to conduct investigations expeditiously and appropriately, independent and experienced oversight mechanisms are required. We agree with CPS guidance, which recommends case management panels comprising senior investigation and prosecution professionals meet every four to 12 weeks during the case to review its strategy and progress.[23] It is not clear that this occurs in every case, or that such panels meet early and regularly enough to enable pitfalls to be avoided. Such oversight is crucial to preventing the investigation from becoming unwieldy.

Processing material with technology

2.14 One of the key, and growing, problems of CLT investigations is the sheer volume of material. Instead of the concern being for warehouses full of material that no one will ever be able to comprehend and analyse, which led to the Criminal Procedure and Investigations Act 1996 regime, it is now for the terabytes of electronic material that are generated in the course of business. The volume of material seized during investigation can lead to a case becoming a CLT – through emails, CCTV, phone records and a whole host of other materials. The aim should be to seize as little as possible, in accordance with the Attorney General's Supplementary Guidelines on Digitally Stored Material (2011) (The Attorney General's Digital Guidelines).[24] A team of forensic, legal and investigation experts, as recommended above, should assist in limiting seizure to what is relevant and necessary.[25] But, once seized, it must be accessed, secured, sifted for relevance, stored and shared. This requires huge resources.

2.15 However, as the problem lies in electronic technology, so does the solution. We agree with Sir Brian Leveson's suggestion that more use is made of technology.

2.16 How the material is interrogated and prepared for disclosure is a primary cause of undue length and complexity. Material is now increasingly produced in electronic format and must be served electronically in accordance with the Digital Case System. Yet, at the moment, an enormous amount of manual processing and document scanning is undertaken by the police in order to case build, which is both time consuming and costly. Forces do have multiple software programmes in order to capture and analyse material, but these produce a vast range of formats, which are often not compatible within force case management systems, never mind across other forces or the CPS. While programmes are used for forensic analysis, it is not general practice in long investigations for all material to be housed and reviewed in electronic software. Given the vast amount of digital material now being captured, and the reliance upon forensic experts to process the material, backlogs are occurring across the country. There are limited human resources available, which can lead to situations, in cases where an arrest is necessary for public safety reasons or to prevent a suspect from leaving the country, where detention time limits expire before material has been processed.

2.17 This is frustrating when the technology exists to avoid these pitfalls, and is being used by specialist prosecutors, such as the FCA, and some defence firms in financial cases. There are programmes (sometimes referred to as 'portfolio management solutions' in commercial jargon, but which essentially provide evidence management systems), which can process and store multiple types of file – documents and audio-visual – and audit each way the material is accessed and manipulated, enabling easier compliance with police data management guidelines and disclosure rules. They provide an intuitive interface that can enable less qualified officers to review material, rather than requiring the services of forensic experts, who are then free to focus on complex analysis. Document and case management platforms can be used to manage large and complex evidence and, once reviewed, to support efficient electronic disclosure exercises. They enable not only rudimentary word searches but also phrase, concept, and image searches as well as duplication, date and geographical filters.[26] The Attorney General's Digital Guidelines already acknowledge that these tools are necessary, as is the engagement of the defence in the search strategy.[27] The automated processes also increase efficiency and therefore provide significant resource and cost savings.

For example, Simmons and Simmons use a programme called Relativity that can be adapted to support large-scale document review exercises. In a recent case, human review of 215,000 documents was avoided at a time and cost saving of over 70 days and £290,000 by using "intuitive and powerful document review software". It suggests the key benefits to clients have included:

- Online access to advice, instructions, pleadings and evidential material;
- Reduced need for production and storage of hard copies;
- Reduced cost of document handling;
- Speedier turnaround of documents;
- Secure shared access to documents and collaborative analysis; and
- Ability to track progress of case development.

The FCA also provided an example of a case with two and a half million documents, which their evidence management system was able to reduce to 100,000 potentially relevant files. Further analysis reduced this to a manageable size for review.[28]

2.18 If all investigation and prosecution agencies could use similar software, the backlogs in case progression and disclosure processes might be significantly reduced. With the time savings and audit trail created by electronic tools, we consider that initial investment will be returned through reduced investigation and prosecution costs.

2.19 We do not suggest that technology is a panacea, and we acknowledge that significant investment is necessary to enable every large-scale investigation access to, and training in, this technology. In the largest of cases current technology will still struggle to produce a manageable case for review.[29] Document review/forensic experts will need to be engaged to ensure reviews are properly conducted. Our members have experienced failures in this process which cause greater delay to the proceedings once disclosure begins. Optical character recognition may not be capable of reading handwritten documents entirely accurately. Likewise, the type of material increasingly critical in serious and organised crime cases is generated by audio-visual files from CCTV, mobile phones and body worn cameras, which must be manually reviewed to determine relevance. However, electronic tools can use the metadata in these files to identify whether they might be relevant. Facial and image recognition technology has also vastly improved with, for example, the Child Abuse Image Database building a national graded image log that is already beginning to significantly reduce the time taken in device scanning for illegal images.[30]

2.20 The most recent spending review announced that £700m would be allocated to digitalising the courts. This investment is welcome and necessary. But the process must start earlier, in the police station. It is clear to us that a single evidence management system is necessary so that all police forces and law enforcement agencies are able to create secure cases within it, with log in access for each user, that will enable review of all types of data, connect into national databases and produce an electronic file for disclosure. This will then connect easily into the digital court process.

2.21 It is important that the right software is utilised and can be used across the country. Selecting programmes on a case-by-case and area-by-area basis is like reinventing the wheel every time suspicious activity is reported, yet this is what currently happens for most complex police investigations.[31] This is wasting money as well as resources. Those we have spoken to in this area agree that commercial products become out of date quickly, have complex licensing agreements attached which take additional time and cost to navigate, and do not integrate easily. Rather than try to pick the best product in a lengthy procurement exercise, we think a sensible alternative is available. The Common Platform, which is being used to deliver an electronic case system, is not a commercial product. It is software built in-house by the CPS and HMCTS, with a streamlined design, which is dedicated to the needs of our criminal justice system. Without ties to commercial firms it can be constantly updated to better serve the system's needs. It is developed according to Government Digital Service Principles[32] and uses an agile development programme. Subject to costs and approvals, it would be possible to build in any technology available, including an analytical tool.[33]

> The CJS Common Platform will transform the criminal justice system for all users. It will replace the existing IT systems of HMCTS & CPS with a single system, introducing a unified business process and removing all duplication of effort and re-keying. It will deliver a digital by default user centric system, taking away reliance on the current mixture of paper, digital material and DVDs and providing a streamlined, fully digital system. A single central database will hold all the material (including multi-media) necessary to deal with cases from charge to trial quickly and efficiently. Instead of material being passed from one agency to another, with multiple re-keying and occasional loss of papers, it will all be available from a single database, ensuring the most complete versions of cases can be accessed by all parties, including the defence and judiciary, at any time. Digital tools will enable on-line case progression by the parties and the scheduling of cases for hearings.

2.22 We think, given the success of this technology, the Home Office should develop a national evidence management system, fit for operational requirements, which investigation, prosecution – and even defence lawyers with appropriate access permission – can all make use of as the case file is built. Giving law enforcement agencies exactly what they need in terms of forensic and data review, rather than fitting an investigation into the constraints of US commercial products, would enable complex investigations to respond quickly and efficiently to complex criminal activity.

Effective Interviews

Planning

2.23 Conducting an interview in a case that will become a CLT is difficult and requires expertise. There is a significant volume of material, which may have been gathered from technical sources. The conduct under suspicion often spans a lengthy period and involves multiple activities, many of which are lawful, individuals and organisations. The way the interview is conducted is likely to have a significant impact upon the case outcome.

2.24 In the Working Party's experience, standards of interview are, to say the least, variable. Although there are good examples amongst the specialist agencies and police units, far too often it is clear that no proper thought or planning has gone into the interview. It is clear when officers do not have a handle on the case, as the interview is long and wide-ranging. The interview needs to be properly prepared, so that it has an evidential value, but also identifies the issues in the case to enable the activity to be appropriately charged. Interviews should be carefully planned and the suspicious activity fully understood. Other expert members of the team, such as lawyers and analysts, should assist preparation and the conduct of the interview to ensure the case is properly tested. Under-prepared interviews add no value to the case. This is particularly so when the interviewer cannot answer questions raised by the suspect's legal representatives and sticks only to a prepared script of questions. This happens too often in our experience. The interview strategy should then be reviewed with the oversight committee or panel recommended above.

Pre-Interview Disclosure

2.25 Many officers choose to use phased interviews where a suspect is questioned on a number of occasions over a period of time, pre-charge. We question whether this technique is appropriate in most CLT cases. There may be good reasons in an individual case – such as a risk of reprisals against a witness or destruction of evidence – for not revealing certain information to the suspect, but in general the more information provided ahead of interview, the fairer the interview and the more likely it is an account will be provided. If it is not, the stronger the inference of later concoction will be at trial where the suspect declines to answer a question to which he must then have known the answer if his defence is true.

2.26 For most investigations leading to a CLT, the suspect will be invited to attend interview rather than arrested. In any case, arrest without notice will seldom be appropriate in these types of case since there will be insufficient time for a legal representative to properly prepare for interview.[34] PACE Code C requires some pre-interview information to be provided at the discretion of the police.[35] In cases alleging economic crime, our members regularly only receive a short note upon arrival. Even where fuller information is provided it is simply a paper pack presented at the police station or other agency prior to interview. Such limited and late information often results in a no-comment interview, followed by phased disclosure and multiple interviews, and a climate of non-cooperation. This is because in many CLT cases, unless there is adequate disclosure, it may not be possible to fully advise whether an offence has been committed due to the technical nature of the acts involved. There may be a legitimate defence. In many cases we also believe that far more disclosure is required than is currently provided to comply with EU law.[36]

2.27 If the evidence is there, in most cases, disclosing it from the outset will require an explanation from the suspect and give greater weight to any special warnings and inferences that could be drawn at the trial stage.[37] On the other hand, the suspect may be able to provide an innocent explanation for certain conduct, for example by explaining industry or market practice of which the investigator may not be aware, which could then be eliminated from the enquiry, or he or she may choose to make admissions that reduce the conduct being tested at trial. Any of these scenarios could considerably shorten the subsequent proceedings.

2.28 In our view, full disclosure, subject to PII and witness protection, should be provided, together with a summary, at least two weeks (or as long a period as possible in the circumstances) prior to the interview taking place.[38] This would enable fuller preparation by all parties, and consultation between suspect and solicitor. As noted above, the Attorney General's Digital Guidelines envisage consultation on search terms to enable reasonable and proportionate search of the material. With disclosure prior to interview, defence input could legitimately be sought as early as the interview.

2.29 Following our recommendation that e-disclosure tools be used from the outset, the pre-interview disclosure should be electronic.

2.30 The College of Policing and National Interview Advisor agree that, in these types of case, such an approach is sensible for the advancement of the investigation and possible to achieve. The College of Policing and Crime Operational Support Unit should ensure that disclosure training is included in the specialist serious and organised crime courses available for officers to join such units, and that appropriate professional guidance is produced to enable such disclosure and planning to become standard. This recommendation will ensure that the interview, whether the suspect answers the questions or not, forms an important part of the case at trial, and offers a real opportunity for the suspect to respond to allegations.

Charge within reasonable time

2.31 The problem of when to charge, when to extend police bail, and when to do neither and rely upon invitations to return for further questioning under caution, is one which is almost impossible to resolve. We are concerned solely with the need to achieve trials that are properly focused and from which potential delays have been removed before they begin.

2.32 Charging before the investigation is complete leads to the possibility that the investigation will either terminate before the full extent of the offending has been discovered or that subsequent investigations will invalidate the decision. The police are sometimes put under strong pressure to charge as early as possible by varying combinations of media pressure and the desire within their force to deploy its limited resources to the greatest number of cases. Until recently the so-called "clear-up" statistics, which meant nothing more than that someone had been charged, provided a perverse incentive to charge before the evidence was gathered. Even now, our experience is that cases can run into difficulties at trial because the investigating team has been disbanded due to a belief that once the suspect is charged the "baton" passes to the prosecution, defence and the court.

2.33 However, waiting until the investigation is actually complete risks an unacceptable delay for both victim and suspect. People can be kept under suspicion for very lengthy periods while a complex investigation is taking place. Our members know this to be regularly in excess of two years in CLTs. This causes significant worry and uncertainty for both suspects and victims, which can be unfair, unreasonable and in any event very hard to bear. Suspects may be treated as "guilty by association" by the public, and may never in fact be charged. During this period they receive scant, if any, update on the progress of the investigation and why they remain a suspect.

2.34 We anticipate that there may soon be a statutory limitation in the region of 28 days, with the possibility of extension, placed upon police bail periods (with a longer period proposed in serious and complex cases).[39] The Home Office anticipates that the proposed changes to pre-charge bail will ensure a "more focused police investigation leading to speedier justice for the victim and accused" and will reduce the "negative effects" protracted periods of bail have on the lives of suspects.[40] We welcome this effort. However, while the bail period may be limited, as long as the investigation remains open, the official condition of suspicion will continue, with all of the concerns for the suspect and victim remaining.

2.35 We consider that more needs to be done to ensure that the investigation is of a reasonable duration. We propose two mechanisms of review. First, we consider that an extendable time limit of 12 months should apply to all investigations from the point of the first interview as a suspect. This period seems reasonable to us given the complexity of such cases but also the impact upon the individuals affected.[41] An officer, independent of the investigation and of at least detective chief superintendent rank, should conduct an internal review of the investigation and at that point determine whether it should continue – identifying any necessary re-focus and priorities to be progressed. The officer should have a power to extend the investigation up to a further 12 months, but also to impose a more limited period. We see no reason why, with the recommendations we make above, any investigation should take longer than two years to charge.

2.36 Second, the suspect should have the right to apply to the local Resident Judge to discontinue the investigation. The proposed changes to pre-charge bail would involve magistrates' court oversight in complex cases from the six months point. We consider that the power of a more senior judge to discontinue should accordingly apply from 12 months after first interview (a less onerous timescale which puts significantly less pressure on the police to expedite its investigations). The courts already oversee the continuance of investigations, in part, through issuing search warrants[42] and extending pre-charge police detention.[43] The exercise of this power would be upon request rather than automatic, thereby responding better to the circumstances of each case. The police may wish to present sensitive information in response to the application, disclosure of which might prejudice the enquiry. This could be considered in the absence of the suspect and the public, should the judge consider it appropriate. Such a procedure would enable independent judicial consideration of the issues in the case. It should also lead to investigators communicating better with suspects about the ongoing inquiry, which would in turn avert unnecessary applications. Together with the oversight panel recommended above, this would ensure that the investigation stage remains focused and controlled.

III. PRE-TRIAL

3.1 Some of the key problems in CLTs occur during the pre-trial stage. The biggest issues are disclosure and opportunities, presented by the passage of time and perhaps the presence of multiple defendants, for the case to become unfocused and unwieldy. As with our investigation chapter, the solution to these problems lies in the early involvement of the trial teams and the full use of available technology. Much of what we say in this chapter has already been identified by Sir Brian Leveson in his Review in relation to all types of case, and is being implemented through the Better Case Management system now underway. In particular, we wholeheartedly endorse the four key principles of the Leveson Review: (1) getting it right first time; (2) case ownership; (3) duty of direct engagement; and (4) consistent judicial case management, together with the amendments to the Criminal Procedure Rules and Criminal Practice Direction already made, which give effect to those principles.

Preparation

3.2 A fundamental requirement for the progression of a CLT is to ensure that the criminality taken forward to trial is properly charged and that the evidence is identified and prepared to prosecute or defend those charges. The parties must be involved well in advance of the trial to ensure that progress remains focused. This requires both trial counsel and trial judge to be involved as early as possible. If this is done, deficiencies which would otherwise be identified too late at trial should be avoided.

3.3 Trial counsel should be instructed as soon as the charges are laid, so that they can advise and commence trial preparation as early as possible. Prosecution counsel should ideally be instructed well ahead of this so as to be able to advise on appropriate charges – and how many defendants to charge on one indictment. Since many, if not most, CLTs will involve both junior and senior counsel, we can only see a benefit to the progression and shortening of proceedings if both are instructed at this early stage.

3.4 There is a critical role for the judge in preparation of the case pre-trial to ensure that cases are appropriately managed, and that any problems are identified and dealt with early on. While ideally this should be the trial judge, in any event, it is important that the first case management judge deals with the case as if he or she were going to be the trial judge and progress as much as possible, as early as possible. As soon as a CLT is sent from a magistrates' court, the Resident or Presiding Judge should assign a suitable judge to the case, who should then liaise frequently with the parties to ensure all is ready for each stage. We think it sensible that, where possible, commercial judges who have experience of sitting in criminal cases be appointed to CLTs, given their experience of managing lengthy commercial litigation.

3.5 In order to carry out this case progression role effectively, Resident and Presiding judges should be able to insist that the designated judge for a potential CLT is given sufficient preparation time to read into the case in order to get to grips with it. In the view of all our practitioner members, insufficient time is currently set aside for this. The resources devoted to preparation time will be dwarfed by the time wasted at trial, when issues that should have been dealt with before trial have to be dealt with during it.

3.6 Early engagement will result in more defendants pleading guilty at an early stage rather than progressing matters through to trial, thus avoiding a CLT entirely.[44] Pleas are of course already offered through negotiations with the Crown and under the Serious and Organised Crime and Police Act 2005, and Goodyear indications. The first deferred prosecution agreement has just been used.[45] While there are issues of principle as to whether a corporate body should be allowed a benefit not allowed to an individual, corporations currently represent only a small number of CLT cases. However, our recommendations should facilitate their use, and other agreements, in appropriate cases.

Training in CLTs

3.7 Many of the problems with CLTs could be alleviated through better familiarity with their unique features. We consider that particular training for CLTs is necessary so that, when instructed, all practitioners are familiar with the relevant guidance and are confident about what needs to be done. Such training needs to be skills focused, similar to advocacy training. It would be about understanding preparation, and ensuring that material is put before the jury in a comprehensible format. This would avoid continuing difficulties with trial preparation and presentation.[46] It is also apparent that the poor identification of appropriate charges, number of co-defendants and/or inappropriate drafting of indictments continues to be a fundamental problem.[47] This element of any CLT is so essential, and its consequences so far-reaching, that it merits inclusion as a general training requirement for those who undertake CLTs.

3.8 Prosecution agencies already seek to provide appropriate material[48] to prosecutors, though we consider more could be done to ensure this guidance is widely adopted. Prosecuting advocates are generally selected on the basis of membership of appropriate panels, or experience, and are expected to conduct cases in accordance with stated guidelines. However, defence advocates and organisations operate under no such strictures. If the CLT regime is to be applied properly, all advocates, and designated judges, require appropriate training.

3.9 So far as the judiciary and prosecution agencies/advocates are concerned, the implementation of such training could be arranged as a matter of course, subject to available funding. Defence agencies/advocates will require encouragement. An accreditation requirement and panel advocates could be adopted to ensure training was undertaken, or in the alternative, a quality mark developed that would identify those suitably trained.

3.10 The availability of properly trained advocates is in the interests of the public and defendants. It would improve the quality of representation – indeed it would ensure that both defendants and the State are effectively represented – rather than impact upon choice, and it would assist firms, CPS lawyers and advocates to undertake this work. It would therefore be in their interests to receive such training. Joint training has proved to be very useful for prosecution and defence lawyers, advocates and case workers, and this would enable costs to be minimised. There are a variety of training methods that could be employed, such as virtual learning environments,[49] online toolkits,[50] in-house training and seminars. These methods of training are used to deliver continuing professional development by many organisations and most practitioners are familiar with them. The benefit of online and "on-demand" training is that this could be undertaken at the outset of a case, either for the first time or as an update.

3.11 With respect to judges, our members with experience of CLTs in particular court venues, such as Southwark and the Central Criminal Court, thought that where judges are allocated in advance they do take control of the case and trial management effectively. Yet research demonstrates that judicial experience and approach varies widely around the country.[51]

3.12 Case management and a familiarity with the problems in CLTs are essential to keeping them on track. It would seem sensible that only judges who have undertaken appropriate courses be able to manage such cases.[52] Although annual courses are helpful for newly ticketed judges, for those who need a quick refresher, or are rarely allocated a CLT and have not undertaken this training, we consider that more assistance is needed, and a short, compulsory course should be available. The Judicial College provides a Learning Management System that all judges access through the Judicial Intranet. This could be used to provide further CLT training. In our view, this would be best delivered by an online podcast with a log-in tracking system to ensure that judges view it, but which would allow them to do so in their own time, and enable all judges to fulfil the training requirement "on-demand". It could be supplemented by a downloadable checklist. The course could include not only best practice on organisation and robust control of the proceedings, but also use of technology during trial.[53] If judges are not familiar with this, it would help them understand what the parties are referring to, or even suggest the use of technology in their courtroom.

Guidance

3.13 There is also a need for consolidation of all the guidance and information available relating to CLTs. This is because there is an understandable lack of awareness of the different materials available for prosecutors, judges, police officers and defence lawyers.[54] Practitioners should be familiar with all available guidance so that they understand what obligations their counterparts have, and are also aware of any best practice to follow. This consolidation might take the form of a code or procedural rules for CLTs. It might take its starting point from the Woolf Protocol.[55]

3.14 The judges at Southwark Crown Court have long standing and regular experience in managing CLTs. They have their own in-house training sessions. We consider that their expertise and knowledge could be better utilised so as to assist judges in other courts. Although it is clear to us that the judges at that court already work well beyond the call of duty in this area, a "Southwark Protocol", regularly revised and updated, would, we believe, be of enormous assistance. This could then be delivered during training to ensure all professionals are suitably informed.

Disclosure

3.15 Lord Justice Gross' disclosure reviews have identified that disclosure is a cause for concern across all cases. We endorse his recommendations for change, which form part of the Better Case Management approach and are set out in summary form in the Annex. The recent case of *R v R* [2015] EWCA Crim 1941 (unreported, 21st December 2015), which has run aground at the disclosure stage, draws the guidance together within the context of heavy volume cases and much of what we recommend below is in line with that guidance.

3.16 The problem of sifting voluminous material and investigation continues from the investigation stage and is particularly acute in CLT cases. Once it is decided to charge, the disclosure schedule must be prepared. This takes an extremely long time in CLTs under current arrangements. Police staff manually schedule the material. A prosecutor then determines whether or not it is disclosable. The process causes inordinate delay. Too little material is disclosed at the beginning of the case and too much close to the trial date. Of particular concern in serious crime cases is the late service of visual footage from CCTV or other cameras, which prevents the trial taking place until all parties have viewed it and its length has been cropped to the relevant section(s). Often the late material is virtually irrelevant, but must nevertheless be carefully reviewed by the defence. Again and again this leads to the trial date being vacated, and with the current listings the delays will be up to and beyond 12 months.

3.17 The process of disclosure under the CPIA contributes to the problem. It requires the disclosure officer to determine what is relevant; what undermines the prosecution case and what may assist the defence. This will come at a time when there may have been little indication by the defence of what their case is. CPS guidance indicates that, in complex cases, disclosure management documents (DMDs) should now be used as they reveal the approach that the prosecution has taken to the disclosure exercise.[56] Our members have not thus far received these in cases they have defended. They should now be routinely used. We are advised by specialist prosecutors[57] that regularly meeting with the disclosure officer is crucial to understanding what processes they are using to sift material, and agree the parameters to the exercise and disclosure strategy. Disclosure is greatly assisted by the early involvement of prosecutors. In contrast, SFO and FCA investigations have in-house lawyers to carry out the disclosure function as part of the investigation team, which enables them to start from the outset of the case and to advise the prosecution team on what should be disclosed, rather than the other way around. It also means that they are usually able to disclose before the first appearance at a magistrates' court, despite cases involving large amounts of material.

3.18 We have recommended as full disclosure of the case as possible prior to interview in the previous chapter. This should continue through the pre-charge and pre-trial phases. Our hope is that this will help the defence to be able to provide an indication early on of what the issues in the case may be, and aid the CPIA process, as well as contributing suggested search terms for analysis of the material seized. Checking, or assisting investigators in the preparation of, the unused material schedule ought to be started by prosecutors alongside or very soon after preparation for interviews. As well as encouraging investigators to produce pre-interview disclosure, this would identify the difficult disclosure issues at the outset and ensure they are fully considered by the prosecution.

3.19 This will also enable prosecutors to choose sensible charges and prosecute the optimum number of co-defendants. In an extreme case, it would lead to the abandonment of a case because of insuperable disclosure problems rather than, as too often happens at present, the case being abandoned at the door of the court after much time and expense has been wasted. It would also help lead to the reduction or even demise of the amorphous common law 'conspiracy to defraud' offence, because it should be clear what the appropriate charge is at the outset.

e-disclosure

3.20 Material produced and disclosed by way of e-disclosure tools, as recommended in the previous chapter, would significantly shorten the disclosure exercise for the prosecution and preparation toward trial for all parties. In *R v R* the Court of Appeal endorsed the use of such programmes at [34]:

> *"To fulfil its duty under section 3 [CPIA], the prosecution must adopt a considered and appropriately resourced approach to giving initial disclosure. Such an approach must extend to and include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege ("LPP") and proposing search terms to be applied. The prosecution must explain what it is doing and what it will not be doing at this stage, ideally in the form of a "Disclosure Management Document"."*

3.21 The Court went on to acknowledge at [36] that, where there is a vast amount of material, it will be impossible to review each document individually, and the prosecution should apply appropriate sampling and search terms. Without using e-disclosure software, the process seems almost uncontrollable. One of our members recently received 8,000 pages of disclosure. When it was analysed, it was found to contain at least a quarter of duplication. Time spent by the parties in reviewing duplicated material is money wasted.[58] We recommend the development of one e-disclosure tool, or evidence management system, in the previous chapter. This tool should not only enable the police and prosecution to trawl and filter the relevant evidence to disclose, but also provide access to the defence in order to apply an analytical tool to the disclosed material. The defence team would simply have to log into the system to find the DMD, disclosure schedule and material to which they have access pursuant to the CPIA separated into prosecution case and unused material. Likewise, as we consider with pre-interview disclosure, subject to personal information and PII concerns, there should be little reason why much of the relevant material seized should not be made available in the software. This should prevent, as far as possible, late disclosure and the vacation of trial dates. It would also enable the defence to interrogate as much of the complex material as possible, as well as reducing challenges to the disclosure process.

3.22 There is an additional problem concerning access to potentially relevant third party material, and whether there is privilege attached to it or to other material, which delays progress of the case. Delay occurs over whose responsibility it is to seek such disclosure. Whether third party material is relevant must be identified as standard and a decision taken both as to whether its retention is necessary, and as to who should seek it, early on in order to ensure that it does not hold up proceedings. If legal privilege may attach to it, independent counsel may be required to resolve the issue, and time must be allocated promptly for this to take place.

3.23 We consider that the instruction of independent disclosure counsel would also usefully assist the process where agreement cannot be reached about the disclosure of items on the unused schedule. Both sides would be able to disclose confidential information, which independent counsel would be prevented from disclosing to the other party/parties, whilst using it to identify relevant material.

Progress to trial

Case pleadings

3.24 There is often very little scrutiny, pre-trial, of the prosecution case by the case management judge, and our members have been involved in a number of recent cases where the issues in the trial could and should have been identified earlier.[59] The Court of Appeal in *R v R* has recently underlined the role of the judge in the disclosure process – ensuring that it moves expeditiously through the first stage under section 3 CPIA and continues under sections 7A and 8 CPIA once the defence statement has clarified the issues. There needs to be a better mechanism for proper scrutiny of the prosecution case in CLTs. Pleadings tease out the case in civil proceedings and we consider a similar system should be used in CLTs. The case statements or summaries currently used are not sufficient to do this.

3.25 The prosecution case statement must form the basis of the prosecution's case pleading, as a formalised statement of case, and be followed from cradle to grave. This will mean that all parties and, in particular, the jury, can follow the case clearly and relate the prosecution case and the defence testing of it to the indictment.

3.26 The content of the pleading/summary should include:

- Identification of the offence(s);
- The elements of those offence(s);
- What the prosecution says was done to fulfil the elements of the offence(s);
- A brief summary of the evidence said to support those elements.

3.27 The defence case statement should then answer these elements once the disclosed material has been considered. While we recognise the ultimate right of the accused to remain silent, and that the prosecution must prove its case, we consider it to be insufficient in most CLT cases in which a positive case will be advanced for the defence to remain vague and unsubstantiated where full and early disclosure has been made by the prosecution. Nor do we think this is the best means of ensuring an effective defence in most cases, given the availability of inferences from silence, and the loss of the opportunity to narrow the issues. In order to identify the issues for trial, the defence should engage fully with the pre-trial process. The early involvement of trial counsel would enable them to assist in settling prosecution and defence case statements, pre-trial, and ensure these appropriately reflect the evidence.

3.28 Historically, some judges have been reluctant to get involved pre-trial because of the possibility of appearing partisan. However, the Better Case Management process requires judges to demand of the parties proper identification of the issues as well as progress. In CLT cases, we see the need for an extended case management role. There needs to be active case management involving scrutiny of the indictment, in accordance with the indictment rules, and the case pleadings to ensure that the trial is not overloaded by multiple charges and co-defendants and that charges properly reflect the way the case is being put, with the leave of the judge necessary for them to be amended.

Experts

3.29 Expert evidence in CLTs can also hold up the process toward trial. A prosecution expert must review the material, which may be vast, and comment upon it. Once the defence see the expert evidence, they usually want to instruct their own expert to review the evidence and the expert opinion. CPS guidance states that expert evidence should be obtained at the investigation stage.[60] We agree that if an essential element requires explanation, the case should have expert opinion as early as possible. This does not happen as regularly as it should. We consider that, as part of the pre-interview disclosure exercise, the defence team should be made aware of any proposed expert opinion. This would provide the defence with an opportunity to ensure that the expert takes into account all important issues, prior to providing a report. This would save a significant amount of time during the pre-trial stage as, often, once served, the defence criticises the basis of the expert opinion, requiring an additional report and so on *ad infinitum*.

3.30 There is increasing judicial willingness to explore the possibility of joint expert reports under Part 19 Criminal Procedure Rules, which we welcome, and the requirement for streamlined forensic reports already seeks to resolve expert evidence early. Coupled with our recommendations, this should enable expert evidence to be resolved really early in the pre-trial process so that it does not affect the trial listing and length.

Pre-trial timetable

3.31 We consider it essential that CLT cases follow a pre-trial roadmap. Given the multiple and complex elements of a case, and the long period of time that passes prior to trial, this would ensure that the parties do not miss any important features that could de-rail the trial fixture and/or lengthen the eventual trial. It should follow the order of actions necessary in the case and include a checklist to record when each stage is finalised – working toward the composite whole being achieved, namely trial readiness, within a reasonable period of time and with all issues identified.

3.32 It should include a calendar from the first day in court, to trial, identifying the time limits for compliance with each direction. We have set out an indicative diagram to represent such a roadmap at Table 1. This reflects our recommendations for early disclosure and the BCM timetable. Although this will involve much earlier resolution of the pre-trial stages in CLTs, we consider that it will be possible in almost all CLTs for the timetable to be met. This is because early and ongoing preparation of disclosure, pre-charge, and the use of appropriate e-disclosure tools, will shift identification of both prosecution and defence cases into the pre-charge phase. Early instruction of trial counsel will likewise enable the early identification of the issues in the case and the settling of case pleadings. We accept that, where there has not been a lengthy and structured investigation period, a partially altered timetable, by agreement or direction, may be necessary.

3.33 All of these processes must involve:

- The engagement of the parties;
- Discussion of areas of contention; and
- Resolution ahead of each hearing where possible to ensure that the hearing can be used to set directions that progress the case towards trial.

3.34 Maintaining the roadmap will require similarly robust case management by the trial judge, as well as being the responsibility of the case progression officer – all features recommended in the Leveson Review and currently being implemented by BCM. It should be built into the Defence Case System as a distinct procedure for CLTs.

Compliance

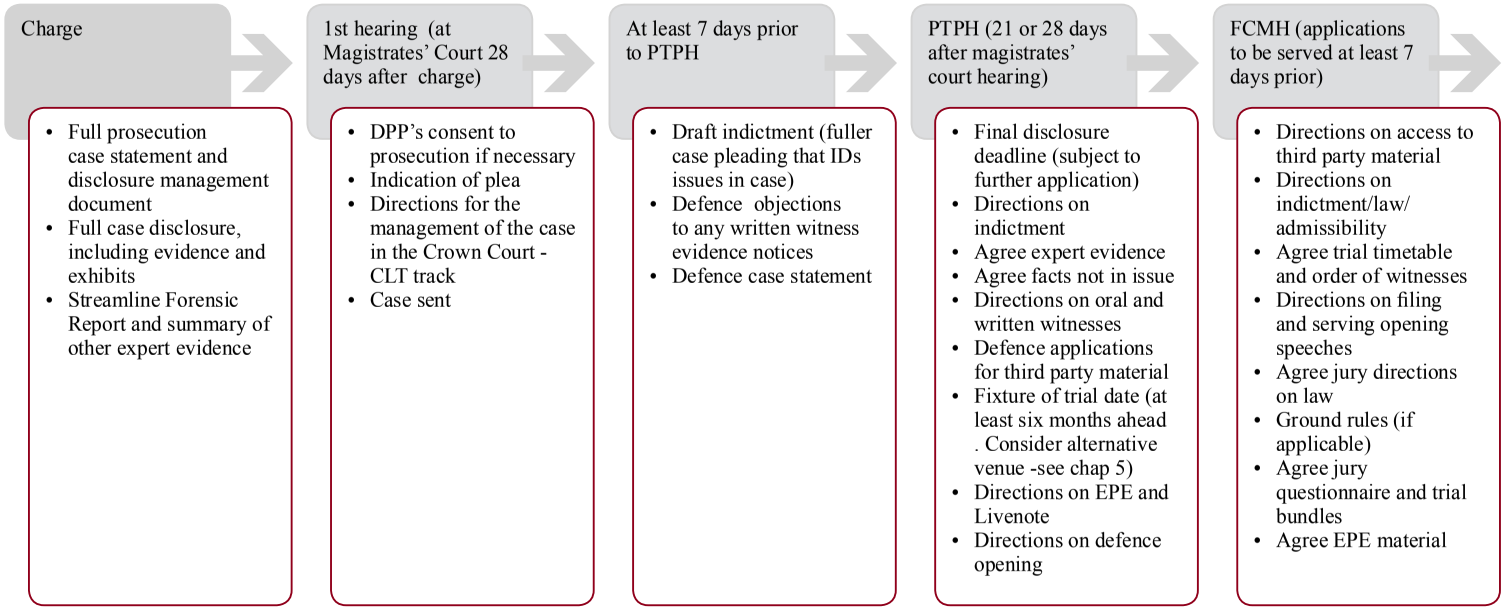
3.35 Compliance with the altered features of case progression will be necessary from all parties in CLTs to reduce their burden. Early engagement of trial counsel, the taking of responsibility for the case by the parties, and oversight of senior practitioners and the trial judge, recommended in the Leveson Review and throughout this report, will require commitment. Lord Justice Gross' 2012 review of disclosure identified the difficulties of applying sanctions in criminal cases. We consider that a cultural shift is necessary amongst all actors to make any of these changes successful. Practitioners should acknowledge that the current system is unsatisfactory, inhibits the successful operation of the justice system, and is a drain on resources. The judiciary and parties must be prepared to ensure the trial progresses on time, and as simply and swiftly as possible. Further case management hearings should be used to keep the case on track if failings are identified, which, where necessary, should require the attendance of senior lawyers from the prosecution authorities and/or defence firms who have the capacity to effectively resolve the issue.

Conference calls

3.36 We endorse the use of recorded (or at least minuted and later agreed) conference calls, by telephone or visual link, for all case progression hearings to resolve issues. These have the advantage of guaranteeing the participation of trial advocates. Too often, hearings during normal court sitting hours are less useful because of their absence. Some judges already take this course, before or after court sittings, to avoid clashes with other cases and further delay.

Table I: Roadmap on Pre-trial progress in CLTs

This roadmap reflects the Better Case Management initiative, which builds on the four key principles of the Leveson report: (1) Getting it right first time, (2) Case ownership, (3) Duty of direct engagement, (4) Consistent judicial case management; Rule 3 of the Criminal Procedure Rules 2015 on case management; Criminal Practice Directions Amendment No. 4 and the Woolf and Gross protocols. It also assumes that the recommendations made in chapter II of this Report will have been fulfilled. NB The presumption is that this timetable will be met in all CLTs. Where there has not been a lengthy and structured investigation period a partially altered timetable may be necessary. Case progression by email and remote hearing should take place between court hearings, with recourse to court for failures.



Key
PTPH = Plea and Trial Preparation Hearing
FCMH = Further Case Management Hearing
EPE = Electronic presentation of evidence

IV. TRIAL

4.1 The Working Party has concluded that juries should be retained in CLTs for the reasons set out in the next chapter. Nevertheless, we consider that there are changes that can be made to the trial process to ensure that the experience is improved for jurors. We anticipate that the proposals we make with regard to the investigation and pre-trial stages of a case will have the most significant impact upon how the trial progresses, and will help to prevent a trial snowballing out of control. Proceedings could also be made clearer, and shorter, as a consequence of the further proposals we set out below.

Presentation

4.2 The Working Party considers that the type of evidence generally heard in CLTs does not usually involve a greater volume of witnesses than are heard in ordinary trials, and therefore witnesses are not more difficult to manage. However, the volume of documentary and forensic material that has to be made sense of as evidence does take a significant period of time to work though. Such evidence is increasingly digitalised, as we have identified in previous chapters. Better ways to identify and present this information can be utilised across all CLTs.

Electronic Presentation of Evidence

4.3 The Digital Case System (DCS) is now being rolled out across the country.[61] Digital capability involves electronic screens that can display video material and replicate the advocate's laptop screen to display a relevant document, such as a statement, graphic or electronic exhibit, which will already have been made available to court professionals via the DCS. This is welcome and useful for the majority of cases. Any visual presentation is a helpful scaffold upon which to rest the oral evidence and take experts through material. Any material produced for digital presentation in this form can be organised by the advocates prior to trial.

4.4 For CLTs, however, in our view it does not go far enough. Electronic Presentation of Evidence (EPE) is necessary. This is more advanced technology that can *interactively organise* and present evidential material (e.g. emails, documents, graphics and spreadsheets) in electronic format via installed technology, with an operating technician present throughout the trial.[62] It is used where there is a need to take the jury through a large volume of documentation.

4.5 Most commonly it will consist of electronic pages of documents that are presented on screens situated around the courtroom, but it also embraces other technologies such as 3D graphics and virtual reconstructions – anything that will aid the clarity of the case being presented.[63] The technology enables enlargement, highlighting, comparison of multiple PDFs, overlay text, annotation, and animation of graphics on the screen (some of our members find it is useful when dealing with documents with small writing, for example invoices, which can be blown up larger on a screen). For example, the SFO used this type of presentational material in the Prudential Commercial Investments case.[64] It presented geographical timelines to show how money and suspects had moved around, rather than requiring the jury to look through pages of flight bookings to work out who flew where and when.[65]

LGC explains on its website that:

"[I]t is common, therefore, for part of any presentation to have a graphic timeline with markers to allow specific items to be viewed in detail. Cases with multiple protagonists often contain biographical summaries, usually linked to geospatial information such as home and friends' addresses, meeting places and movements. Evidence to link individuals with locations, such as witness statements, CCTV, telephone cell site and network analysis, audio recordings, email and other types of correspondence, can all be linked into a single graphic format that provides access to the raw material at the click of a button." See http://www.lgcgroup.com/services/digital-investigation/electronic-evidence/#.VgPhectVikp

4.6 There are a number of benefits to digital evidence already recognised through the DCS. It is considered that EPE technology can save approximately one third of court time and cost in criminal trials – it takes an average of 3.5 minutes for everyone during a trial to locate a paragraph amongst the paper bundles, compared to 2-3 seconds to bring it up on screen.[66] It can also make lengthy, document-intensive trials interesting for juries, and makes it easier to follow and focus on the relevant material.

4.7 Of course, the technology must be selectively used as part of a well prepared case, in order to present evidence in the best way possible. The schedule of electronic material must be prepared in advance with the technicians so that the evidence can be worked through quickly on the screen, and the technician knows what needs to be focused on or highlighted. As graphics and the order of documents cannot easily be amended once they are put in the relevant software, it is important that the material to be used is disclosed well in advance of the trial, and in the working documents rather than as PDFs, which cannot be interrogated or amended. Sometimes these are provided by the prosecuting agency at a very late stage, and attempting to amend them prior to trial where the defendant believes them to be inaccurate or misleading can cause delay.

4.8 The presentations need to be kept simple in order to aid the trial process. It will be necessary to engage the jury in the evidence through their core bundle as well as provide examples on screen. For example, if a point is to be made about a series of invoices demonstrating transactions, one can be included in the bundle and then others scrolled through and compared on the screen, followed by analytical information about their content. The jurors are given a core bundle, which they are able to annotate and highlight to assist them throughout the trial, and everything presented on the screens should be available for them to retire with.

4.9 We are aware that some trials are now taking place entirely digitally, with jurors being given their bundles uploaded to tablets, as a result of a pilot scheme being operated by the CPS Specialist Fraud Division. Some of our Working Party members have been involved in trials using this technology. The tablets were capable of holding all the documentary material relating to the alleged activity, as well as chronologies and diagrams. It was felt that the process was quicker, it taking much less time to locate relevant pages, and certainly much less cumbersome: the courtroom was a better environment without the reams of paper usually required, and the jury was able to scroll through everything much more easily, while still being able to annotate and highlight the evidence. Our members were struck by the speed and ease with which jurors got to grips with the technology, having had only half a day of training on it at the start of the trial. This underlines the fact that technology is otherwise part of everyday life and the justice system is lagging behind with its use of paper. The CPS estimated in one case that it took about a week off the length of an 11 week trial and saved around £80,000 on printing costs.

4.10 In our view it may be necessary that some evidence will have to be produced in hard copy, for example the large A3 booklets of cell site analysis. Presentation of this type of evidence on screen could be difficult because of the need to compare multiple columns. However, it may be that electronic solutions could be developed even for this evidence.

4.11 The Woolf Protocol recommended the use of EPE as a potential saver of huge amounts of time, but despite this and its proven usefulness, there are still many courts which do not use EPE. Not only does this mean that trials without EPE are lasting longer than they need to, but also, where a need for EPE is identified, trials can be delayed whilst waiting for an appropriately-equipped courtroom to become available. There are only nine courts equipped for EPE around the country,[67] with no plans to expand despite there being an extensive array of reliable technology to deliver EPE.[68] It may be that some of these benefits will be achieved through the increasing digital capability of the courts, but we do consider that it is sensible to make use of the best technology to organise and present the large volume of material involved in CLTs, rather than rely on counsel to do this on their laptops. In our view, given the increasing volume of electronic evidence being collected in all types of complex and lengthy case, it would be best practice for EPE to be available in many more courts and for it to be included in the in-house built court digitalisation process.

Time management

4.12 In our experience, the trial timetable is largely kept to, but relies, again, on robust case management by the trial judge. Good practice involves a brief review at the end of each court day as to what is coming the following day and whether the timetable is being maintained. There is also a benefit to setting aside regular time away from the jury, for example Friday afternoons, for legal argument and discussion about narrowing the issues, rather than doing this on an ad hoc basis. This enables the jury to be released for the rest of the day rather than having to wait for an issue to be resolved.

4.13 We consider that sitting hours for the jury are long enough,[69] and ought not to be extended to reduce the overall trial length, particularly since the hours outside sitting time are used by the advocates and judge for preparation and case progression. In fact, in some instances, it may be appropriate that the hours be shortened to assist jurors with child care arrangements and other commitments. Given the number of people involved in the trial, it is inevitable that there will be delays due to transport, sickness and so forth. There is little that can be done to avoid these problems.[70] However, appointments and holidays should be identified at the beginning of the trial and accommodated, but also utilised for legal arguments and case progression.

4.14 Jury pools should be given a detailed questionnaire by the judge, after discussions with the parties and prior to empanelment, to ensure that jurors are actually able to sit on a lengthy trial. Although – contrary to popular opinion – there is evidence of juries being representative of their local population, even in long cases,[71] such questionnaires should enquire about literacy and numeracy skills to ensure that the juror will be able to follow particularly complex material. Good practice reduces the pool down to approximately 15 potential jurors who are then asked to go away and check whether there are any other reasons not to attend, and the panel is usually finalised the following day. Our understanding is that these questionnaires are often prepared on an ad hoc basis by the trial prosecutor. A standard template of sensible questions should be prepared as a starting point for all prosecutors, to ensure appropriate explanations about the operation of CLTs is included and all relevant information is captured in the jurors' answers.

4.15 The provision of juror alternates, to sit apart from the 12 unless called on to join the jury, is a sensible investment in case a juror or jurors are unable to continue because of an unforeseen event. This avoids the trial having to be vacated and re-started months later when a clear period can be found.

Jury Aids

4.16 In our view, much more can be done to assist the jury with their task. As set out above, it has already been identified that EPE and digital files can significantly support jurors' understanding and navigation through a lengthy and complex case.

4.17 The investigation into the failed Jubilee Line case revealed that jurors discussed witnesses and evidence frequently during the course of the trial.[72] It would therefore appear artificial to assume that this only occurs during retirement to consider the verdict(s), especially in lengthy cases.[73] Most discussion between the Jubilee Line jurors took place when the jurors had just come out of court, while the evidence was fresh in their minds. The jurors expressed frustration at not being able to take their notes out of the courtroom, and the assumption that they did not need time to think through what was being presented. They were also frustrated when the jury room was not available to them, and they could only wait in the jury lounge where it was not possible to discuss the case (since this should only happen when the full jury is present).

4.18 A room assigned to the jury in CLT cases from which to enter and leave the courtroom would give them the opportunity to discuss recent evidence as a group and iron out any confusion that would otherwise influence their impression of the subsequent evidence. Rehearsing the evidence early on through group discussion might help them remember when they come to deliberate upon the verdict, and avoid inaccuracies embedding in their minds as fact.

4.19 Written directions are not universally utilised for jurors, despite the encouragement of the practice.[74] We strongly support Sir Brian Leveson's recommendation for written factual questions,[75] or routes to verdict, to assist jurors in reaching their verdict, which would also clearly demonstrate how the decision was reached.[76]

4.20 Sir Brian has also recommended that judicial directions, particularly on the law, take place at the outset of the trial, or prior to evidence on that issue being taken.[77] Rule 25.14 of the Criminal Procedure Rules 2015 now requires the judge to direct the jury as to the law at any time that will help the jurors evaluate the evidence that they will hear. We agree with Sir Brian that it is far more useful that jurors receive the relevant legal framework before hearing evidence, in order to determine whether that evidence meets the relevant standards.[78] It seems quite remarkable that this has not been a requirement until now, and that jurors may have sat for weeks listening to evidence without definitive legal parameters to guide them, only receiving these at the very end of the case after the lawyers have given closing speeches. The potential confusion caused by this delay in guidance is heightened in CLTs.

4.21 The directions ought to identify, in clear and accessible language, the main issue to be decided at each stage.[79] Although we consider summaries of the issues in the case and summing up would be helpful, at the outset and end of the case respectively, it would not be useful to have speeches set out in full. This is because the case may shift during the course of the trial and there is a danger of jurors relying too heavily on the written material, rather than the actual evidence, and assessing too closely whether the evidence meets the written statement. Facts set out in the summary of the judge's summing up must be agreed by the parties.

4.22 We consider that in all CLTs jurors should receive the following aids in combination:

- A written summary of the legal issues in the case – taken from the parties' pleaded cases;[80]
- A core bundle, that they can highlight and notate throughout the trial, which will expand as the trial progresses; [81]
- A running bundle to which photographs of each witness, their name and neutral summary of evidence can be added to help jurors remember their evidence;[82]
- A written summary of the judge's summing up and route to verdict so that these can be taken into the jury room on retirement;
- Written directions on the relevant legal issues in the case, to be given with an oral direction at the start of the trial on the legal ingredients of the offence (such as dishonesty), and, where appropriate, prior to evidence being heard (such as identification evidence).[83]

Delays in listing

4.23 From our members' experience, it can take anything from 15 months to five years from the first hearing when the trial is listed for a CLT to actually be heard.[84] At Southwark Crown Court, trials are fixed for around 12 months ahead, and are sometimes adjourned (usually because of a disclosure issue). There then needs to be another fixture, with usually another 12 months lead in time, unless another trial has cracked and the case can come on earlier. There may then be another delay, and so on. As we set out above, this can be due to waiting for an EPE enabled court to become available, or because it is difficult to find a court with sufficient free time to hear a case that requires at least 60 days sitting time amongst other cases in the list. Our members estimate that six to nine months is needed to go through the vast volume of disclosure and prepare for trial. Therefore, there is up to six months of waiting time simply because a court is unavailable from the first listing, and considerably more than that if the trial is unable to go ahead at the first fixture. Delay can cause memory recall difficulty for witnesses and defendants, risking the trial becoming unfair.

4.24 More can be done to ensure trials are heard sooner. In our view, given that there are a finite number of hearing rooms in our Crown Court estate, it follows that some lengthy trials should be held elsewhere – either in other court buildings, such as magistrates', civil or commercial courts that are underutilised,[85] or other public buildings such as town halls that are hired for that purpose without charge. Some of our members were involved in the *Butte Mining* trial,[86] which took place satisfactorily at the Chichester Rents office building. A trial would require a sufficient number of multi-functional (or empty at hire) rooms to ensure that the hearing can properly progress. We estimate that a CLT will require at least:

- A large trial room appropriately equipped with EPE, tables and chairs for the (multiple) parties, judge and court staff, a suitably placed area for the jury, an area for the public;
- A jury room;
- Rooms for judge, prosecution and defence;
- Separate waiting areas for prosecution and defence witnesses.[87]

4.25 JUSTICE published a report in July 2015 advocating that use of the dock in criminal trials be abolished, due to its potential adverse impact upon the defendant's right to a fair trial.[88] In the report, we propose that alternative security measures are utilised by HMCTS to ensure safety is preserved in the courtroom. This will require a change in approach to court security through the exploration of other restraint mechanisms and a review of Prisoner Escort Contracts. We also propose that more thought is given by the court to the need for security in the courtroom, through an assessment of the potential risk posed by suspects.

4.26 While CLT cases involving serious crime may need security of some kind, we consider that the vast majority involving financial crime or other non-violent conspiracy or misfeasance in public office offences do not.[89] If no cells or security are needed, finding buildings with the requisite space, as set out above, will enable many CLTs to be heard much earlier, significantly reducing the overall length of the case. This will correspondingly free up Crown Courts to hear more CLTs requiring security measures, sooner.

4.27 Such a proposal would require additional judicial and court staff support. However, if commercial judges were assigned to the CLT cases being heard in these 'pop up' courts, as we recommend in the previous chapter, not only would this aid in providing experienced judicial oversight, it would prevent interference with the existing listings that can be affected by the appearance of a CLT.

V. THE JURY

5.1 Over the last 50 years, the question of removing the jury from certain types of trial has been asked and answered many times. The possible changes which have been recommended in this country and adopted in many other common law jurisdictions are many and various. JUSTICE has been a longstanding proponent of jury trial and continues to recognise its value as the most transparent, accessible and legitimate way of trying serious criminal charges.

5.2 The focus of this Working Party has been on finding ways of improving the process, from investigation through to trial, for trials of all types of offence which are likely to last more than 60 working days. It is therefore impossible to ignore this issue, which was the subject of fresh legislation as recently as 2013, and has even more recently received attention in the Leveson Review, and about which there has been some recent relevant research.

5.3 While we would accept the proposition that trial by a single judge rather than by judge and jury would likely result in shorter and therefore less expensive criminal trials, we do not – with one dissentient – recommend any change to the current position in respect of the cases which are the subject of this report. This is, in essence, because we share JUSTICE's long held view, but we answer the more pressing arguments for abolition in CLTs in this chapter.

5.4 Over the years, the following alternatives have been suggested:

- In "complex fraud" cases – judge with two assessors;[90]
- In "serious and complex fraud" trials – judge alone with experts chosen from a panel[91] or, at the defendant's election, judge alone;[92]
- In "complex and/or lengthy" trials – judge alone on application by the prosecution with the approval by the Lord Chief Justice of the judge's order;[93]
- In "complex and/or lengthy" trials – judge alone on application to a High Court Judge;[94]
- In "exceptionally long" trials – judge with assessors.[95]

5.5 We do not consider any of these to be suitable alternatives to jury trial.

Arguments in favour of and against jury abolition in CLTs

5.6 The remainder of this chapter groups together, in summary, the arguments deployed in the various proposals for the restriction of jury trial in fraud or other lengthy or complex cases and our rejection of those arguments.

i. Shorter and therefore cheaper trials[96]

5.7 This argument is generally accepted albeit with reservations. One reason for the attempt to reintroduce s.43 Criminal Justice Act 2003 (CJA) in 2006 was the fear that indictments might be made too short simply to accommodate the time and intellectual ability of jurors, the suggestion being that, with judge alone trials, the huge indictments presented in some European countries might be possible.[97] Longer indictments will take longer to try. It is also likely that, in complex cases, the reasoned judgment will require time to write following the closing speeches, thus occupying the time often spent now by juries considering their verdicts.[98]

ii. Inability of juries to understand evidence in certain complex trials[99]

5.8 There is no compelling evidence to support this argument. Such evidence as there is – bearing in mind the prohibition on individual jurors revealing the details of their discussions – points the other way and supports Walter Merricks' summary of the submissions made to the Roskill Commission in his lone dissent, which is generally regarded as the *locus classicus* of the defence of jury trial, even for long fraud cases.[100]

5.9 Moreover, our members consider it the role of the advocate and trial judge to ensure the case is comprehensible to the jury, no matter how technical. Nor is it our experience that jurors have struggled to follow the long and complex cases to which we have been a party. In the vast majority of cases, the technical details are ironed out before the trial, by agreement or judicial ruling, so that most cases boil down to establishing dishonesty, knowledge or participation, albeit with a complex factual background.

iii. The burden on jurors of long trials and a possible diminution of their ability to retain the evidence in their minds[101]

5.10 Although this is undeniable, the only evidence from a jury – discharged from giving a verdict after 21 months in the so-called *Jubilee Line* case – in the public domain indicates that, although there was a heavy burden, it was a burden that they were prepared to shoulder and that to a remarkable degree the jury retained the evidence.[102]

iv. A consequential dilution of the quality of jurors – "the unemployed and housewives"[103]

5.11 The research on this issue again points the other way.[104] Since Roskill and Auld LJJ reported, the pool of potential jurors has widened significantly as a result of Schedule 33 CJA. Now, all the members of this Working Party are eligible to serve on juries. But the new eligibility rules did not change the representative nature of jurors. As Professor Cheryl Thomas, of University College, London has written, "[E]ven before these new eligibility rules were introduced, serving jurors were remarkably representative of the local community in terms of ethnicity, gender, income, occupation and religion".[105]

v. Judges would be able to pre-read and thereby eliminate irrelevant material and "direct the parties to the central issues"[106]

5.12 Many of the changes brought about in the last decade or more have been devoted to increasing the degree to which the trial can be reduced to its essentials, both as to the factual issues and the legal framework of the case, before it is first presented to the jury. Moreover, many of the changes we have recommended in earlier chapters have been devoted to further improvements, in particular in those cases not on their face obviously serious or complex but which have "grown like Topsy" during the trial, have grossly exceeded their original time estimate and have aggravated the anticipated burden on all – including of course the jury. As the changes are achieved, many matters may be agreed between the parties so that greater focus on the central issues will take place.

5.13 The requirement for both parties, and the judge, to present the case in a way in which a random selection of the public understands, makes it likely that the trial will be understood by the public at large whether by reading reports or attending the trial.[107] We consider this to be an important, legitimising part of the criminal justice process for serious cases.

5.14 Jury service is a visible and practical way of ensuring that the public takes part, and therefore has confidence, in the criminal justice system. Virtually every verdict in a criminal trial is returned by lay members of the public – whether magistrates or jurors. It is also one of the only duties which (almost) every elector must perform if summoned to do so and thus provides a balance of some kind between the rights we enjoy and the duties we owe in return to the State.

vi. The advantage in complex cases of a reasoned judgment to the conduct of some appeals[108]

5.15 We consider that the judge's summing up to the jury, together with proper steps to decision, should provide an equally comprehensible picture of the reasons why a conviction was recorded. In addition, as a result of the high standard of proof required for a conviction, an acquittal by the jury may often be based on a finding that, although it thought it was more likely than not, or even highly probable, that the defendant was guilty, it was not satisfied so as to feel sure. Such a finding in a reasoned judgment is unlikely to increase public confidence in the justice system as a whole, or in the approach of particular judges over time. None of the reports or reviews to which we have referred have advocated the adoption of the Scottish "not proven" verdict, perhaps for this reason.

5.16 We would also have concerns that, with the more robust case management advocated by the Leveson Review and recommended in our earlier chapters, it would be very difficult for the judge to retain their impartial stance as the tribunal of fact. Engaging a fresh trial judge would incur more cost and delay as a result of duplicated preparation time.

vii. Other jurisdictions have allowed non-jury trials, and given the defendant the right (within limits) to select the type of tribunal which will try him or her[109]

5.17 An examination of alternatives to jury trial in other jurisdictions reveals great variation in the way the change has been effected and in the way in which it has been embraced.[110] Although the length and cost of complex trials has been cited as one reason for limiting jury trial, the actual limits affect cases whether short, long, complex or simple.

5.18 Various exclusions have been set:

- Serious offences with a particular maximum sentence,
- Offences which require a decision based upon "community standards" or when a public official is on trial. In this jurisdiction, obscenity, indecency, dangerousness and dishonesty are obvious examples.[111]
- All cases in which the defendant has not sought judge-only trial.[112]

5.19 In many of these jurisdictions there has also been a concern that pre-trial publicity in certain notorious cases would be prejudicial. The answer in all jurisdictions except New Zealand has been to give the accused the right to elect trial by judge alone.[113] If the defendant had a right to elect trial by judge alone he would be more likely to do so on the basis of a belief that it offered a better chance of an acquittal, rather than concern about the length of the trial. That, similarly, is usually the reason for choosing jury rather than summary trial in either way cases. For the system to allow selection of jury trial in order notionally to improve the defendant's chances of an acquittal is one thing. To allow trial by judge alone for that reason does not seem equally as appealing, especially if the choice could be made after the identity of the judge became known.

Conclusion

5.20 Since the Roskill Report in 1986, and even since Sir Robin Auld's report in 2001, pre-trial case management, technological assistance and the general ability of members of the public to use new technology has improved out of all recognition. The reports, reviews and protocols to which we have referred in earlier chapters have all contributed to this improvement. We highlight, as well, the updating of the fraud course by the Judicial College and individual court-based training under the auspices of the Recorder of Westminster at Southwark Crown Court, where so many complex fraud cases are tried. While we make further recommendations throughout this report, all of these changes have improved the experience for jurors.

5.21 As Walter Merricks, the lone dissenter on the Roskill Committee contended:

> *"[B]efore Parliament should be asked to abrogate the constitutional right [to jury trial], it could and should require it to be demonstrated not only that jury trial has broken down in serious fraud cases, but also that all procedural improvements have been considered and found inadequate."*[114]

5.22 Throughout the period of 50 years to which we have referred, the overwhelming majority of practitioners, whether advocates or judges, have opposed any restriction of jury trial. Although it is perhaps to be expected that those used to a particular system will be inclined to support it, the remarkable degree of unanimity suggests that the system is still fit for purpose.[115]

5.23 In the light of our firm view that the problems posed by CLTs should not be fixed by limiting jury trial we have not expressed a view as between judge alone, judge with assessors, judge and jurats, or a panel of judges. The pros and cons of the possible variants have been thoroughly discussed in the reports we have summarised – without any consensus emerging.

5.24 Irrespective of the starting point, for all the reasons set out above, we continue to consider jury trial an important aspect of the criminal trial process. The length and complexity of the trial can never be the deciding factor in a judge-only election procedure. In fact, the types of case in which lengthy and complex proceedings occur may be the least suited to judge alone trial, for reasons of legitimacy, transparency and public confidence, avoidance of bias and ensuring that the proceedings do not become ever more lengthy and complex.

VI. CONCLUSION

6.1 CLTs require vast resources to investigate, prosecute and try. Despite many efforts to control them over the years, they are still getting longer and more unwieldy. This report is our contribution to the reform proposals, updated for the current era. We have reviewed each of the processes – investigation, pre-trial and trial – involved in the conduct of a case and made detailed recommendations based on our own experience of the problems of CLTs and the evidence other experts have kindly provided to us.

6.2 We acknowledge that many of our recommendations have been made in previous reviews of this area, are set out in guidance that is already followed, and that, even as we were carrying out our work, the Better Case Management and Digital Case Systems began to operate to improve the preparation of all criminal trials. In repeating recommendations made by others we underline that the same problems occur in CLTs as in other trials, but are of course amplified. We reiterate the principles necessary to ensure that CLTs remain focused and controlled at all stages – and that despite the problems having been identified again and again, they continue to occur.

6.3 The singular cause of difficulties in modern CLTs is electronic material – reviewing vast amounts of seized digital material in multiple formats for relevance; identifying the evidence to form the prosecution case; considering whether material is disclosable; and presenting the material at trial. These are the procedures which result in undue length, complexity and unacceptable delay.

6.4 The solutions to this problem lie, we consider, within three broad themes across each conduct area.

6.5 First, early engagement of relevant expertise at the investigation stage to ensure that the seizure and search of material is focused and proportionate to the alleged criminal activity and of trial counsel at the pre-trial stage, to ensure that disclosure takes place as early possible, and the issues in the trial are identified.

6.6 Second, case management, by senior and independent law enforcement and prosecution agencies at the investigation stage to ensure that the investigation is focused and progresses as quickly as possible, and by the same trial judge from the start of the pre-trial stage through to the trial, who can assist the parties to narrow the issues and present a clear case for the jury to consider.

6.7 Third, adoption of agile and intuitive technology, built by the criminal justice system to meet its investigation and preparation needs, without compatibility boundaries across police forces, prosecution units or defence firms, which enables all trials to be presented with visual aids rather than reams of paper.

6.8 Our particular recommendations are set out in the executive summary at the beginning of this report. We make practical recommendations to aid the three themes in each stage – for example, pre-interview electronic disclosure and interview planning to ensure that the interview produces evidence that can be used at trial and enables the suspect to put forward a response; and the use of alternative venues to hold trials, where there is no security risk, to reduce the waiting time for a courtroom.

6.9 We have considered the role of the jury in some detail, and despite concerns that juries add length to trial, we consider (with one dissentient) that jury trial is too valuable a part of our system to be interfered with.

6.10 We urge the government, law enforcement and prosecution agencies, defence lawyers and judiciary to give our recommendations serious consideration. It is clear to us that with some investment in technology, tighter management and a proper atmosphere of cooperation between the parties and the court significant reductions in the cost and time burden of CLTs can be achieved.

VII. ANNEX – DISCLOSURE REVIEWS AND GUIDELINES

The 2011 Review of Disclosure

Much of our concern about disclosure is dealt with in Gross LJ's 2011 Review of Disclosure in Criminal Proceedings. The recommendations made there were for:

(1) Early engagement in investigation by the prosecution to control and focus on what to seize;

(2) Better handling by the prosecution of disclosure material, which the then DPP suggested would in future be done through four documents – prosecution strategy document, charge selection and indictment (both internal), disclosure management document and prosecution case statement (both to be served on court and defence).[116] Gross LJ also recommends a disclosure bundle, to be prepared and added to by the CPS, pre-trial, of disclosable unused material;

(3) Defence cooperation in the timely identification of relevant issues, defence statements and section 8 CPIA applications;

(4) Early case management role of the judge to identify the issues and make robust decisions concerning disclosure and ultimately exclusion of evidence where disclosed late;[117]

(5) Greater engagement at PCMH stage of the LAA officer to determine the appropriate rate of VHCC preparation;

(6) Technology – better ways to search electronic material. Gross LJ compared the Admiralty and Commercial Court practice and Civil Procedure Rules guidance;

(7) Consolidation of guidance – too much duplication.

Subsequent Guidance

The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, December 2013 and the Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners, December 2013 were prepared following the recommendations of Gross LJ in his 2011 review and take account of Gross LJ and Treacy LJ's 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure', 2012. They are similarly structured and should be read together. Whilst the Guidelines largely replicate the principles set out in the Protocol, they

are primarily directed at the prosecution's operational duties of disclosure. As such, this summary is largely drawn from the Protocol. Criminal Practice Direction 15A: Disclosure of Unused Material (paragraph 15A.1) states that all parties must comply with these documents.

i. Investigations

The AG Guidelines set out that investigators and disclosure officers should approach their duties in a "thinking manner" from the outset (including giving thought to defining, and thereby limiting, the scope of a potentially lengthy investigation), must be fair and objective, and must work with the prosecution to ensure disclosure obligations are met. They should be familiar with the CPIA Code of Practice. A clear strategy is required in the case of CLTs.

ii. A prosecution-led disclosure process

Particularly with CLTs, it is important that the prosecution adheres to the overarching principle that unused material will fall to be disclosed if, and only if, it meets the applicable test for disclosure, subject to any overriding public interest considerations. It should also be mindful of its continuing duty of disclosure. Sufficient prosecution attention and resources must be allocated to the task of applying the CPIA regime (see *R v Olu, Wilson and Brooks* [2010] EWCA Crim 2975 at 42), with the defence playing its role in directing the prosecution to material which might meet the test for disclosure. A disclosure management document, or similar, will be of particular assistance in CLTs. The AG Guidelines set out the purpose and content of this document in detail. It should be updated throughout and may include an explanation of the prosecution's general understanding of the defence case, its general approach to disclosure, and information relating to digital material, reasonable lines of enquiry and linked investigations.

iii. Robust judicial case management

If possible, the trial judge should be identified at the outset, and judges should be prepared to give early guidance as to the prosecution's approach to disclosure.

iv. Co-operation between legal representatives

The judge and the other party are to be informed of any difficulties as soon as they arise. The court should be provided with an up to date timetable for disclosure wherever there are material changes. The timely service and consideration of defence statements is stressed, with the prosecution, particularly in CLTs, assisting by providing in writing any deficiencies it has identified in the defence statement.

The Protocol states that all requests for disclosure should utilise the section 8 application form, even where no hearing is sought. It promotes discussion and co-operation between the parties, to ensure applications are only made when strictly necessary. Where they are made, the application must be served well in advance, and service of a defence statement is an essential precondition. The AG Guidelines, however, appear to advocate a more formal procedure in the first instance: they state that the prosecution should only answer requests for disclosure if the request is relevant to and directed to an issue identified in the defence statement, phrasing which suggests that the defence and the prosecution should consider the relevance of a request independently of one another, the defence before, and the prosecution after, an application has been made. The VHCC Guidance (aimed primarily at prosecutors) similarly advocates and expands upon this formal, adversarial approach to section 8 applications.

v. Use of technology

Particularly in CLTs, the defence is required to assist in the early identification of real issues, and to contribute to the search terms and parameters of any electronically held material.[118] The Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material 2011 (now annexed to the AG's Guidelines on Disclosure 2013) is of particular relevance and assistance in the context of digitally stored material in CLTs.

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HH Judge Leonard QC
Sir Brian Leveson, President, Queen's Bench Division of the High Court
Claire Lipworth, Chief Criminal Counsel, Financial Conduct Authority
Gregor McGill, Director of Legal Services, CPS
HH Judge McCreath, Recorder of Westminster
Helen Mascurine, Court Administrator Southwark Crown Court
Trilby Millett, Advanced Associate, Criminal Disclosure Unit, Financial Conduct Authority
Ministry of Justice
Sue Patten, Head of Specialist Fraud Division, CPS
Janet Potter, Head of Mersey/Cheshire Complex Case Unit, CPS
D. Sgt Peter Salter, Merseyside Police
Gary Shaw, National Interview Adviser, National Crime Agency
Professor Richard Susskind OBE
Professor Cheryl Thomas, University College London

Lord Justice Treacey
David Tucker, Faculty Lead, Crime and Criminal Justice, College of Policing
Paul Whittaker, CJS Common Platform Programme

Finally I must express my, and the Working Party's, appreciation for the research, enthusiasm and drafting skills of Jodie Blackstock who has kept us all informed and focused on the work necessary to produce this report.



Sir David Calvert-Smith

Endnotes

1 An exhaustive list is unnecessary, but consider, for example: *Fraud Trials Committee Report* (London: HMSO, 1986), chaired by Lord Roskill, P.C. (the Roskill Report); Auld, LJ, *Review of the Criminal Courts of England and Wales* (Ministry of Justice, 2001), available at http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/index.htm (the Auld Review); Lord Woolf, LCJ, The Protocol for the Control and Management of Heavy Fraud and Complex Criminal Cases (2005), http://www.justice.gov.uk/courts/procedure-rules/criminal/pd-protocol/pd_protocol; and the recent *Review of Efficiency in Criminal Proceedings* (2015) (the Leveson Review) has touched on the subject as a continuing area of concern.

2 In *Fraud Trials*, JUSTICE made 45 detailed recommendations with regard to the investigation and trial process, with particular emphasis on ensuring sufficient expertise in the process, both for investigators and court litigators, and case management led at an early stage by the designated judge. We also strongly supported the right to jury trial and rejected the suggestion that assessors be used, due to anticipated practical difficulties.

Subsequently, in our evidence to the Royal Commission on Criminal Justice, CM 2263 (HMSO, 1993), we argued for better use of pre-trial procedures to clarify the issues, accepting that this would require the cooperation of the defence as well as the prosecution. We suggested that such procedures should include disclosure of prosecution evidence and production of the prosecution's case summary, as well as specific defences, and deal with arguments about expert evidence and admissibility. We thought then that both sides at an early stage would have to look seriously at the strength of their case in the light of the charges to be brought and the evidence available.

3 Consider for example the observations of Lord Hope in re *Kanaris* [2013] UKHL 2 at paras.14 to 17, and Henderson J in *R v Quillan and Others* [2015] EWCA Crim 538 at paras.5 to 13; *R v Boardman* [2015] EWCA Crim 175 and most recently *R v R* [2015] EWCA Crim 1941 (unreported, 21st December 2015).

4 As to further proposals for improvement: "The Criminal Justice System is currently crowded with plans for future development", Leveson, *op cit*., note 1 at para.12. Likewise, the system is suffering from "transformation exhaustion", Leveson op.cit., note 1 at para.14. There may be little benefit in adding to this crowding or this exhaustion.

5 This excludes the cases that started as VHCC contracts but went shorter than 60 days for which there were 17 on average per year costing £986k – in 2014 two cases taken to completion were a combined £759,518 in defence costs.

6 Although sitting days leapt from 38 in 2011 to 57 in 2012 and then stayed around the 50-60 day mark, we do not have figures for the sitting days prior to 2011 to discern if the increase is a recent trend. The number of sitting days has not correspondingly increased with the overall length of proceedings.

7 It is much more difficult to obtain reliable statistics relating to these aspects of the case and we do not provide figures here.

8 There were 6.5m criminal incidents recorded in the year ending June 2015. In particular, there was an increase of nine per cent (nearly 600,000 offences) in the volume of fraud offences referred to the National Fraud Intelligence Bureau (NFIB), ONS Statistical Bulletin, Crime in England and Wales, Year Ending June 2015, 15 October 2015, p2, available at: http://www.ons.gov.uk/ons/dcp171778_419450.pdf. A study between May and August 2015 found that there were approximately 5.1m incidents of fraud and 2.5m incidents of computers or other devices being infected with a virus, or otherwise being hacked, ONS, Improving Crime Statistics in England and Wales, October 2015, available at: http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/year-ending-june-2015/sty-fraud.html. The Fraud Advisory Panel notes that during 2011/2012, less than 10 per cent of the individual crimes reported to Action Fraud and passed on to the NFIB were then referred to a police force or other law enforcement agency, Fraud Advisory Panel, *Obtaining Redress and Improving Outcomes for the Victims of Fraud* (2013).

9 See Fraud Review, Final Report (2006), pp.238 – 240 and Fraud Advisory Panel, Obtaining Redress and Improving Outcomes for the Victims of Fraud (2013).

10 AGO, Asset Recovery powers for prosecutors: guidance and background note, 2009, available at: https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009 The Prosecutors' Convention 2009 and CPS Guidance (CPS, Very High Cost Cases: A guide to Best Practice, December 2012) identify civil recovery as an option to be considered.

11 A former JUSTICE working party, *Serious Fraud* (1992), while supporting prosecution in the public interest of avoiding one law for the poor and one for the rich, observed that there is always a grey area, and it is in such circumstances that, rather than letting a case fall away because it fails to pass the evidentiary threshold, civil recovery should be pursued.

12 The National Crime Agency, Serious Fraud Office, HM Revenue and Customs, the Competition and Markets Authority, and Financial Conduct Authority all have identified civil and/or regulatory options to tackle criminal activity. The SFO is focusing its efforts on the biggest and most serious cases, and appears to not be using civil recovery as often as it did three years ago. See https://www.sfo.gov.uk/about-us/#Stagesofacase. It seems that the SFO could make more use of its civil recovery powers where large investigations cannot proceed. Another alternative to prosecution that will reduce the burden of CLTs has been the creation by statute of deferred prosecution agreements, a topic that we briefly deal with in chapter three.

13 Examples have been provided to the Working Party of investigations run without lawyers in the team or other necessary experience and months have been wasted on areas where prosecution cannot be undertaken by that agency.

14 For example, the FCA Enforcement Guide contains in Annex 2 'Guidelines on investigation of cases of interest or concern to the FCA and other prosecuting and investigating agencies' (April, 2014). It also has a clearinghouse called 'FINNET' – the Financial crime network. There is also the fraud investigation group which meets to share expertise and discuss the most sensitive cases. We understand that the SFO had originally declined to prosecute in the LIBOR case but, through this group, took it up on the basis that the FCA would offer expertise. Where there are allegations of bribery, a memorandum of understanding details the monthly meeting of the 'Bribery Intelligence' clearing house between National Crime Agency, City of London Police, SFO, Ministry of Defence Police and the Crown Office and Procurator Fiscal Service in Scotland, which identifies leads, referrals and intelligence, and decides which agency should investigate.

15 Which are requirements set out in Chapters 2 and 5 of the Code of Practice for Victims of Crime (MoJ, 2013), available at: https://www.cps.gov.uk/publications/docs/victims_code_2013.pdf

16 The NCA can already ask for assistance from other UK law enforcement agencies, including the SFO, HMRC and FCA. Where satisfactory voluntary arrangements cannot be made, or made in time, the Director of the NCA can direct police forces in England and Wales or the British Transport Police to take action. See Crime and Courts Act 2013 and NCA, The NCA Commitment to Working in Partnership with UK Operational Partners, August 2015, p.4, which sets out statutory tasking arrangements between the NCA and other agencies.

17 Ibid p.10.

18 As well as maintaining an overseas liaison network through which to form international partnerships, see NCA and Home Office, National Framework Document, May 2015.

19 However, we understand that changes have recently occurred in both agencies, with examples where less experienced investigators were involved and lawyers were not embedded in the initial team. When there are changes in staff during the course of an investigation, the same difficulties can arise, whereby legal or forensic issues are not identified early enough.

20 See The Pre Charge Protocol for Serious and Complex Casework between the CPS Complex Case Unit and (then) ACPO, 2010, which identifies the need for a nominated prosecutor at the outset of the case and throughout the investigative stage to advise on the legal aspects of procedural decision making, and ensure evidence is suitable for court: "Early formation of the Prosecution Team working together to develop a strong and accurate case provides the

best opportunity for the right charging decisions to be made from the outset and for the best evidence to be obtained for presentation to the jury", and also CPS, Very High Cost Cases: A guide to Best Practice, December 2012.

21 For example, in organised crime cases the arrangement is to engage prosecutors within seven days of tasking to a criminal outcome, where seizure and arrest may already have occurred. By contrast, the NCA involve the prosecution at the outset as a matter of course. We are aware that in Merseyside there is a strong relationship between the local complex case unit (CCU) and the CPS, who advise on the direction of the investigation. The Merseyside example is one which has built up through the personal contacts and experience of head of CID and head of CPS in Cheshire. Monthly meetings are held by the Detective Chief Superintendent and Head of CCU to allocate a prosecutor to each case from as early as possible, and ensure there is governance of the progress of the investigation. The drug trafficking and murder enquiries that are managed in this way, and could potentially become CLTs, often lead to early guilty pleas.

22 In all aspects – targets; reasonable lines of inquiry; seizure; disclosure strategy and use of technology.

23 CPS, Very High Cost Cases: A guide to Best Practice, December 2012, pp 12 and 13.

24 Annexed to the Attorney General's 2013 Disclosure guidelines at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf

25 The FCA meet as a full team of forensic, document management, disclosure, legal, as well as investigative, expertise prior to the seizure to develop a plan of what to look for so as to try to obtain only relevant documents. Where possible they do this through triage of the devices on site.

26 The Home Office's Centre for Applied Science and Technology reviewed some of these tools in 2014, and explains in more detail how they can facilitate investigations in its report, D. Lawton et al, *e-discovery in digital forensic investigations*, CAST Publication No. 32/14 (Home Office, 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394779/ediscovery-digital-forensic-investigations-3214.pdf The US has pioneered what is termed "e-discovery" use in corporate litigation, and it is increasingly being used in the UK by specialist prosecuting agencies. For example, Simmons and Simmons describes its Relativity database as "robust, flexible and configurable, which allows the creation of a database structure and document store that can be aligned to the specific requirements of the matter." Other corporate firms and agencies have similar document management systems, such as Intella, HP Enterprise, and ediscovery.com (from Kroll Ontrack). The FCA uses Nuix for initial forensic investigation and Autonomy for review and disclosure. The Financial Reporting Council uses another product called Recommind, which is the market leader in predictive coding. In the civil sphere, Practice Direction 31B of the Civil Procedure Rules provides procedural guidance for use of electronic review tools. Six years ago, when the technology was far less developed, Jackson LJ explained (at para 37.2.2 of the Jackson Report (Review of Civil Litigation Costs Final Report, 2009)):

> *"On 22nd June 2009 I attended an e-disclosure demonstration at 4 Pump Court chambers. Three different specialist providers each took data from the Enron case and demonstrated how their respective software systems could search, sample, categorise and organise the data. The object of each of these systems is (i) to whittle down as far as possible the potentially relevant documents which will be passed to the lawyers for review and (ii) to enable the lawyers to search and organise documents passed to them. I am bound to say that the systems developed by each of those specialist providers are extremely impressive. I am sure that it would assist other members of the judiciary to know what technological help is available to the parties, to enable them to manage the disclosure process."*

27 *Supra*, at A42-44.

28 Other experts suggest that certain e-discovery technology can reduce the review process by *three quarters*, see T. Stretton and A. Molyneux, (from Kroll Ontrack), 'E-discovery – What Corporate Counsel Need to Know', Criminal Law and Justice Weekly, Vol. 177, 30th November 2013, p.795 – 796, at 796.

29 In a recent case, 30 million documents produced by a third party had to be reviewed. It took the software two weeks to process.

30 The database provides an automated scan of all the images on a device to check for known and previously graded images – from standard software icons through to convicted offenders and indecent photographs. Where images have been shared between illicit rings or downloaded from the internet, this enables investigations to link into previous operations with a simple scan.

31 Many police forces have to buy access to software to aid review of vast material in a particular case. In economic crime, e-discovery software has sometimes been purchased by agreement between the SFO and a defence firm for a specific case. Our members report that the software used has not been consistent and has had limited functionality for the tasks required.

32 See https://www.gov.uk/design-principles, which focus on open and iterative processes.

33 It differs from the Digital Case System, which depends on legacy systems to make case material available for hearings. We are also aware that the CPS is developing an internal evidence management system for complex cases, which should provide a full range of analytical tools for prosecutors, based on e-discovery. The Met is also in the midst of a major overhaul of its technology through the Total Technology Strategy, which will include information management tools (currently being developed with a programme titled Case Overview and Prosecutions Application). Although this plan envisages using suppliers, there is recognition of the difficulties caused with multiple contracts and proposals to avoid these in future, see Metropolitan Police, One Met, Total Technology: Digital Policing 2014-2017, available at http://content.met.police.uk/cs/Satellite?blobcol=urldata&blobheadername1=Content-Type&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22140%2F125%2FTotal+Technology+Strategy+-+2014-2017.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1283686449257&ssbinary=true

34 Para 2.9(e)(i) of PACE Code G requires officers to consider whether arrest is necessary prior to interview. Where it is necessary for the police to react to criminal activity and arrest a suspect, it is unlikely that the types of investigations we are considering here, already involving significant amounts of data, will have taken place.

35 Code C para 11.1A requires that, prior to interview, a suspect and their solicitor must be given sufficient information to enable them to understand the nature of any alleged offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence. Note 11ZA further clarifies that what is sufficient disclosure:

> *"[W]ill depend on the circumstances of the case, but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly."*

36 EU Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p.1–10, came into force in June 2014. It is given effect by PACE Code C and the pre-existing CPIA regime. Article 6 requires that suspects are provided with information about the criminal act they are suspected of committing promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. Recital 28 clarifies that this should be, at the latest, before their first investigative interview.

37 The suspect may decline to answer questions, as is their right. However, they should be given the opportunity to answer, and in order to help them understand the nature of the allegation against them it is just as important that the questions are clear and properly focused and that as much information is provided in advance as possible. If the suspect is put on trial it is likely, whether he or she gives evidence or not, that a failure to answer questions will be a matter which the jury will be asked to consider, pursuant to s.34 Criminal Justice and Public Order Act 1994. Frequently, interview questioning is insufficiently clear to elicit the moment in the interview at which the suspect could have

answered the question which they have just answered in the witness box months or years later. An inability to do so will often result in the suspect being able – with good reason – to decline to answer questions.

38 There may be certain organised crime cases where such disclosure may interfere with the investigation and frustrate any subsequent prosecution. In these cases, sensible decisions will have to be made about the risk of disclosure compared to the effectiveness of the interview. It may be that certain disclosure of complex data could be made in advance. Alternatively, full disclosure could be made upon arrest and a longer legal consultation be facilitated during the police detention period.

39 Policing and Crime Bill 2016, Part 4, Chapter 1

40 Home Office, *Pre-charge bail: summary of consultation responses and proposals for legislation* (March, 2015), p.4.

41 There are unfortunately no statistics available on the average length of investigation in complex cases. We rely on our members' experience for what we consider to be a reasonable period.

42 Pursuant to s. 8(1) PACE 1984. Part of the test with which the court must be satisfied is that there are reasonable grounds to believe that there is material of substantial value to the investigation and that it is likely to be relevant evidence. It requires "the most mature careful consideration of all the facts of the case" (per Lord Widgery CJ in *Williams v Summerfield* [1972] 2 QB 512, 518). The order must also be article 8 ECHR compliant, which involves reviewing the investigation to date in order to ascertain whether or not the interference with the suspect's rights is necessary and proportionate (see *Keegan v UK* (2007) 44 EHRR 33).

43 Pursuant to s. 43(4) PACE 1984, further detention after 36 hours is only justified if it is necessary to secure or preserve evidence relating to an indictable offence for which the suspect is arrested, or for questioning, and the investigation is being conducted diligently and expeditiously.

44 The Better Case Management process is already resulting in more guilty pleas at the Plea and Trial Preparation Stage in all Crown Court cases, see Gross LJ, BCM Newsletter, Issue 4, 27th November 2015.

45 *SFO v Standard Bank PLC*, unreported, Southwark Crown Court, 30th November 2015. As Leveson, LJ noted in *Standard Bank*, 'the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate' at [4]. There followed much discussion in the legal presses as to their suitability and prospective regularity – in particular whether civil remedies may be more appropriate. See J. Pickworth, 'Who would want a deferred prosecution agreement?', *The Brief*, 18th December 2015; E. Reyes, "Punchy' debut for deferred prosecution agreements', *Law Society Gazette*, 27th November 2015; 'First DPA negotiated with SFO', New Law Journal, 10th December 2015.

46 Drawing upon the materials already available, and our recommendations throughout this report, such training should address the following:

- Familiarity with the relevant legislation, protocols and practices relating to procedure;
- Case analysis and the identification of appropriate charges / drawing of appropriate Indictments;
- Information technology for the purposes of storage and retrieval of material;
- Information technology for the presentation of material in court, including EPE;
- The reduction of case material to appropriate schedules / key documents / defined issues.

47 See for example *R v Evans* [2014] 1 WLR 2817; *R v Quillan* [2015] EWCA Crim 538.

48 For example the CPS VHCC Guide to Best Practice, above. Prosecution materials are available in other common law jurisdictions: see for example the US Department of Justice Fraud Section at www.justice.gov/criminal/fraud; and the Australian Government Attorney-General's Department fraud control materials at http://www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/default.aspx.

49 The CPS VHCC Guide to Best Practice aspires to this by virtue of the proposed 'Knowledge Information Management' ('KIM') site which would enable practitioners to access an electronic workspace to share best practice: Principle 8 – Knowledge and Skills. The identification of the component parts of KIM may assist in providing a framework for training more generally.

50 The development and application of the Advocates Gateway Toolkits defining best practice in the context of vulnerable witnesses and defendants are an exemplar: http://www.theadvocatesgateway.org/toolkits.

51 P. Darbyshire, 'Judicial case management in ten Crown Courts', Crim. L.R. 30. Leveson identifies that elements of the judiciary also fail to appreciate the application of the Criminal Procedure Rules: Leveson Review, *op.cit*., paras. 191 to 193. This does not bode well for the appropriate application of rules and procedure for CLTs without proper training.

52 The Judicial College offers annual courses for judges. The Crown Court trial seminar includes compulsory training on case management. Additionally, there are optional two-day seminars on long and complex trials, serious sexual offences and serious crime.

53 We discuss this further in the next chapter.

54 These include, for example, the CPS VHCC guidance, the materials mentioned in the investigation chapter and particular parts of the Criminal Procedure Rules.

55 Such an idea is in keeping with previous reviews, for example Lord Justice Gross' 2011 disclosure review recommended one place for guidance on disclosure.

56 These must be served on the defence and the court. The document should set out the position that the prosecution takes in dealing with unused material and enable prosecutors to take a more proactive and transparent approach to disclosure. It must be tailored to the individual case and explain the approach taken to the different types of material and aspects of disclosure, VHCC Guide to Best Practice, *op.cit*. pp.31-33.

57 At the CPS Organised Crime and Specialist Fraud Divisions.

58 Especially as defence reviewing of disclosure is paid by the page.

59 See also the recent cases of *Quillian and Evans, supra*, where the prosecution cases only became clear part way through the trials, and some elements remained at odds with other parts for the duration.

60 VHCC guidance, *supra*.

61 We were able to speak to the Recorder of Westminster and Judge Leonard and to witness the "rehearsals" of the digital court experiment carried out at Southwark Crown Court during the summer of 2015, the introductory talk at Woolwich Crown Court, and our members are now set up on the system and getting to grips with it in their cases.

62 SFO Operational Handbook, 'Electronic Presentation of Evidence,' PUB1, July 2012, available at http://www.sfo.gov.uk/media/106019/electronic_presentation_of_evidence_sfo_operational_handbook_topic.pdf and http://www.sfo.gov.uk/about-us/how-we-work/6-trial/how-the-sfo-is-making-evidence-easier-for-juries-to-understand.aspx (website currently being updated)

63 L. Burton, *Electronic presentation of evidence*, Oxford Legal Research Library, November 2007, available at http://www.infolaw.co.uk/newsletter/2007/11/electronic-presentation-of-evidence/

64 *R v Roope and others* [2009].

65 http://www.sfo.gov.uk/about-us/how-we-work/6-trial/how-the-sfo-is-making-evidence-easier-for-juries-to-understand.aspx (website currently being updated)

66 SFO, *supra*; Burton, *supra*. The SFO also records that visual communication can increase retention rate from 20 per cent to 80 per cent.

67 Birmingham; Blackfriars; Bristol; Ipswich; Kingston; Leeds; Liverpool; Manchester; and Southwark. The courts were upgraded in 2012; information provided by HMCTS. However, this equipment is now out of date and most prosecutions tend to hire EPE for trials.

68 There are a number of companies offering the service to courts, such as Digital Oasis, Merrill Legal Solutions, and LGC.

69 These are almost universally 10am – 4.30pm.

70 One of our members recalls the court arranging for flu jabs for the jury during a winter trial in an attempt to prevent collective illness.

71 See Professor Cheryl Thomas' University College London Jury Project, set out below and in chapter five.

72 S. Lloyd-Bostock, T*he Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge-only Trial in Long and Complex cases?* Crim. LR [2007] 255.

73 Empirical research conducted in the US and New Zealand has also found that jurors do not postpone deliberation until the end of the trial, as was previously assumed. Rather, they are cognitively engaged throughout, attempting to organise the evidence into a narrative as it is received. See R. Hastie et al, *Inside the Jury* (1983, Cambridge, MA: Harvard University Press); W. Young et al, *Juries in Criminal Trials*, New Zealand Law Commission R69, (2001, Wellington, New Zealand) at http://www.nzlii.org/nz/other/nzlc/report/R69/R69.pdf; B.M. Dann et al, 'Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested DNA Evidence, Final Technical Report' (2005) at https://www.ncjrs.gov/pdffiles1/nij/grants/211000.pdf.

74 Professor Thomas' research, which involved interviews with actual jurors, found that 100 per cent of jurors who received written directions found them helpful, and that 85 per cent of jurors who did not would have liked to have done so. C. Thomas, 'Avoiding the perfect storm of juror contempt', Crim L.R. 2013 6, 483-503, p.497. There is also a great deal of research from other jurisdictions which suggests that jurors perform better with written instructions: See, for instance, W. Young et al, *Juries in Criminal Trials*, *supra*; M.O. Miller & T.A.Mauet, 'The Psychology of Jury Persuasion' (1999) 22 Am.J.Trial.Advoc. 549 at 563; J.D.Lieberman & B.D. Sales, 'What social science teaches us about the jury instruction process' (1997) 3 psychol. Pub. Pol'y & L. 589 at 626; L. Heuer & S.D. Penrod, 'Instructing Jurors: A Field Experiment with Written and Preliminary Instructions' (1989) *Law and Human Behaviour* 13 at 409. Based on this research, Darbyshire recommends that in this jurisdiction juries are given relevant written as well as verbal instructions on the law both prior to trial and at the close of evidence, Darbyshire et al, *What Can the English legal System Learn from Jury Research Published up to 2001?* (2002) Kingston University, 90 (Occasional Paper Series 49), p.61). Although Darbyshire addresses a particular need of longer trials by recommending that a pre-trial review would permit judge and counsel to agree a brief set of directions (p.50), it should be noted that she excludes particularly long and complex trials from the scope of her recommendations because she considers that juries should be abolished in such cases (p.62).

75 Leveson Review, section 8.4. Sir Brian cites Professor Thomas' 2012-13 research at pp.74-5, para. 284.

76 The Crown Court Bench Book (2010) contains illustrations of routes to verdict. Chapter 1 recommends that "where a case is complex" (p.3) it should be considered whether there is an advantage in making use of a route to verdict. *Crown Court Bench Book 2010*, at https://www.judiciary.gov.uk.

77 Recommendation 306. We also find sensible Darbyshire's recommendation that such legal directions, once given, be pinned on the jury's retiring room wall as an aid to understanding and recollection, *supra* p.50.

78 Longstanding research supports this. See, for example: J.D. Lieberman & B.D. Sales, 'What social science tells us about the jury instruction process,' *op. cit*.; R. Lempert, 'Telling tales in court: trial procedure and the story model' [1991] Cardoza L.R. vol 13:59; L. Heuer & S.D. Penrod, 'Instructing Jurors: a field experiment with written and preliminary instructions,' *op. cit*. The New Zealand Law Commission has observed that the framework provided by pre-instruction is important in view of research that shows jurors adopt such a framework in order to construct a narrative from the evidence, W. Young et. al, *Juries in Criminal Trials, op. cit*.

79 Both Darbyshire and Thomas highlight juror comprehension of the language used by judges when directing as an area in which further research and improvement are required (see Darbyshire (2002), p.35; Thomas (2010), p.51). Darbyshire considers that the specimen directions previously published by the Judicial Studies Board were often syntactically confusing. Since 2010 it has been the responsibility of the individual judge to craft appropriate directions in each case, following the guidance provided by the Crown Court Bench Book 2010 and in compliance with case law. There does not appear to have been any research into juror comprehension of legal directions since the specimen directions were withdrawn.

80 As recommended in the pre-trial chapter.

81 Darbyshire endorses research which concludes that note-taking alone can be more of an obstacle to comprehension than an aid, partly because jurors are generally not skilled at note-taking and attempting to capture a full record of live evidence may inhibit visual cues from witnesses (Darbyshire (2002), p.47). Similarly, Dann's US study found that note-taking, alone, did not increase juror comprehension, as it requires jurors to rely entirely on their own initiative. However, a combination of aids, including note-taking, was found to have a positive effect on juror comprehension of evidence (Dann, pp.70-73).

82 A practice known to be used by HHJ Rivlin QC, and was followed in *R v Page*, Southwark Crown Court, April-July 2009.

83 Although the jury deliberation process is a collective exercise, drawing on 12 people's recall and understanding, Professor Thomas' research with the UCL Jury project nevertheless demonstrates a significant increase in recall with written directions: 48 per cent of jurors receiving written directions on the law were able to recall the two legal questions relevant to the trial as compared to 31 per cent who only received oral directions, *Are Juries Fair?* Ministry of Justice Research Series 1/10 (2010), p38, available at http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries/fair-research.pdf.

84 The average length of a CLT has been steadily increasing over the past few years, with cases taking an average 427 days from representation order to conclusion in 2006 and 1,407 days in 2014, Legal Aid Agency, 2015.

85 Such as the Rolls Building or the Civil Justice Centre in Manchester.

86 *R v Smith & Ors*, which lasted approximately 11 months from May 1997 to May 1998.

87 We are developing the ideas of what courts require to function properly and whether alternative spaces can be used in our other current working party *What is a Court?*, which will report its findings in April.

88 Through the possibility of prejudicing the jury, and interfering with the effective participation in one's defence and dignity in the administration of justice, *In the Dock: Reassessing the use of the dock in criminal trials*, (JUSTICE, 2015), available at http://justice.org.uk/in-the-dock/

89 For example the mobile phone intercept trial of *Coulson and others* during 2014 in which all seven defendants were required to sit in a secure dock for the entire eight month duration. Speaking at the launch of the JUSTICE docks report, Anthony Burton CBE, who acted in the trial, commented: "An application was made to the trial judge for the eight defendants to be allowed out of the dock – there were no security concerns. The application failed, not on those grounds, but because there was no room in the well of the court for them to sit. So they sat in the glass dock for eight months looking like a row of exhibits."

90 The Roskill Report, *op. cit*. The Committee considered and rejected, in turn:

(1) Special juries, consisting of persons with "above average standard of education, training and experience" which it said would be "putting the clock back". Also, they would not have "the degree of special knowledge or expertise which would be required in order properly to grasp the points of concern in a complex case" (para. 8.44);

(2) Trial by judge alone. "An experienced judge sitting alone would be the most economic way of trying a complex case. It would, however, place a considerable burden on the judge to be the sole decision-maker, and he would not have available to him the assistance of those who are skilled in the subject matter of the case … We should add that very few of those who submitted evidence to us supported the proposal that a judge alone should try complex fraud cases." (para. 8.46); and,

(3) Trial by a panel of judges. The Report concluded that the proposal had "failed to win widespread support among our witnesses." "The strain on judicial manpower was a frequently quoted disadvantage of this proposal. More significant, in our view, is the fact that a panel of judges would simply provide more judicial expertise, whereas what is required for complex fraud cases is supplementary knowledge and experience of the business world." (para. 8.47)

By a majority of 7-1 the Roskill Committee recommended that complex fraud cases falling within certain narrow guidelines should be tried by a judge and two lay members selected from a panel of persons with the requisite qualifications. The targeted cases were not necessarily cases involving great sums of money or copious documentation or many witnesses, though any of those features might be present. The cases identified by the Committee as cases falling within the proposed guidelines were frauds "in which the dishonesty is buried in a series of inter-related transactions, most frequently in a market offering highly-specialised services or in areas of high-finance involving (for example) manipulation of the ownership of companies" (p.153). Walter Merricks pointed out in his Dissent (p.192, para. C3) that most fraud trials would not fall within that definition.

91 This proposal closely resembles the system in the Jersey and Guernsey jurisdictions where *Jurats* are appointed until retirement, on application, on the basis of their particular professional skills and background and act as the fact finders in many criminal trials.

92 The Auld Review, *op. cit*.

93 *Justice For All*, (CM 5563, July 2002), available at http://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf. The idea of judge and lay assessors was rejected. The expertise of such persons could be helpful, "[h]owever, identifying and recruiting suitable people raises considerable difficulties not least because this would represent a substantial commitment over a long period" (at para. 4.28). The idea of a judge alone trial was then taken up in the Criminal Justice Act 2003, s. 43, but the section was never brought into force. Sections 44 and 46, which enable judge alone trials for any offence in which there are valid fears of jury tampering before the start of the trial (s.44) or during the trial (s. 46), were brought into force. Section 44 has been used once since the passage of the Act (see *R v Twomey and others* [2011] EWCA Crim 8). Section 46 has not yet been used.

94 Fraud Trials (Without a Jury) Bill 2006. This Bill was also not passed into law and the dormant s. 43 Criminal Justice Act 2003 was repealed by the Protection of Freedoms Act 2012, s. 113.

95 Leveson Review: in Chapter 10 "Further Observations: Out of Scope". Having, like Sir Robin Auld, set out the arguments for and against juries in such cases and having rehearsed the fate of s. 43 CJA 2003, Sir Brian said:

> *"While I hesitate to suggest that further consideration be given to a proposal which has been the subject of recent Parliamentary scrutiny, it is clear that the very real expense of exceptionally long trials would be reduced if judges (with assessors) conducted these trials. First, they would understand (or far more readily understand) the financial and commercial context, likely to be entirely foreign to those not involved in the relevant business world. Second, they could pre-read and direct the parties to the central issues thereby avoiding what would otherwise be the necessary deployment of a great body of complex evidence",* p.91, para. 356.

He did not take the matter further except to say that, if these cases were to continue to be conducted with juries, they would have to be funded appropriately, p.92, para. 358.

96 Roskill Report.

97 The Attorney General (then Lord Goldsmith) introduced the Bill at Second Reading. Two arguments formed the basis for seeking the change in law, namely that the need to prune the indictment to reduce complexity meant that offences were not fully prosecuted, and secondly, that the burden placed on the jury reduced its representativeness, Hansard, Second Reading HL Debates, starting at 20 Mar 2007, Col 1146, http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70320-0003.htm

98 In *Twomey and Others*, op cit, the only case heard by judge alone following the enactment of s. 46 CJA 2003, the judge needed nine days to complete his reasoned judgment on the verdict, though the first three jury trials took: 'a very lengthy' period; six months; and four months, nine days respectively, while Mr Justice Treacy (as he then was) took two months, nine days, which is considerably shorter.

99 Roskill Report, and relied on in s. 43 and the Fraud Trials (Without a Jury) Bill.

100 A cautionary note on the viability of such an assessment has been expressed:

> *"Competency is difficult to measure, as is any correlation between complex trials and poor levels of understanding among juries. Concerns about juror competency also over-emphasise the need for legal skill and experience, and neglect the jury's role in reflecting democratic ideals of community participation in the justice system and bringing a range of experiences and values to the issues to be decided in a case."* New Zealand Law Commission, *Juries in Criminal Trials, Part One: a discussion paper* (1998), pp.4 and 5, at http://www.nzlii.org/nz/other/nzlc/pp/PP32/PP32.pdf

Limited research has been conducted as to jurors' experiences of trial. What research there is demonstrates that jurors take their role seriously, consider jury trial important and derive satisfaction from service. It has been concluded that four out of five jurors are competent to serve on a major fraud trial and abolition would not be warranted on the ground of cognitive unfitness, T. Honess et al, "Juror Competence in Processing Complex Information: Implications from a simulation of the Maxwell Trial" [1998] Crim LR 763. In surveys of jurors' attitudes, 90 per cent thought it was not at all difficult, or not very difficult, to understand and remember evidence in trials, M. Zander and P. Henderson, *Crown Court Study, Research Study No 19, Royal Commission on Criminal Justice* (HMSO, 1993) at pp 206, 216-217; Mathews et al, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: a Study in Six Courts* (Research Development and Statistics Directorate, Home Office Online Report No. 05/04, 2004), and that where some difficulties were found, it was generally attributable to the way in which the evidence was presented, not to the personal incapacity of the jurors, Young et al, *Juries in Criminal Trials Part Two: a Summary of the Research Findings* (Law Commission of New Zealand, Wellington, November 1999); D. Kirk, *Fraud Trials: a brave new world*, J. Crim. L. (2005) 508 (noting the foreman's letter to the Financial Times following the *Guinness II* trial forcefully stating that the jury had understood all the issues in the case and were only frustrated with the speed of defence cross examination). See also note 102 on the *Jubilee Line* case.

101 Roskill Report, para. 8.34, relying on research carried out on its behalf by the Medical Research Centre Applied Psychology Unit.

102 The *Jubilee Line* case (*R v Raymond and others*) has widely been seen as jury trial at its most disastrous. The trial ran for 21 months with a substantial amount of evidence still to be heard. In March 2005 the prosecution conceded that it was no longer viable on the ground that no jury could be expected to remember and assess evidence that had been given 18 months earlier. An HMCPSI investigation involved interviews with jurors five months after the trial had collapsed.

> *"…they showed quite impressive familiarity with the charges, issues and evidence, despite the length of time that had elapsed and the fact that they did not have their notes or access to documents nor an opportunity to think back*

and refresh their memories. They recalled particular parts of the evidence, particular witnesses and the substance of their evidence. They recalled the different counts … Occasionally, there were individual failures of recollection, but one advantage of the jury system is that not all jurors are likely to have forgotten the same piece of evidence, if it is of any importance", Review of the Investigation and Criminal Proceedings relating to the Jubilee Line Case, (HMCPS Inspectorate), 2006, p.106, para. 11.7.

The group appeared to be very co-operative and mutually-supportive, encompassing all ages and backgrounds.

The inquiry found that the jury was frustrated with the extremely slow manner in which the case was presented. As a result of the way the prosecution led the case, it was necessary for the defence to laboriously address a large number of documents. Likewise, the inquiry found that trial counsel were not completely clear as to what had to be proved on one count, and shifted ground in the course of the trial, making it harder to follow and ultimately causing it to unravel.

The jurors did express concerns about the length of the trial and its impact upon their employment, salaries, the possibility of holidays and their career prospects, and how the burden increased for them as time progressed. But their frustrations were with the lack of assistance offered rather than their duty as jurors. The review concluded that the Jubilee Line trial did not indicate that fraud cases are unsuitable for jury trial, or that there was a problem with the ability of the jury to cope. Rather, the trial showed how cases which are intrinsically manageable can become very long and complex and ultimately unmanageable because of the way they are handled. See also S. Lloyd-Bostock, *The Jubilee Line Jurors, op. cit*.

103 Roskill Report, reporting on views expressed to the Fraud Trials Committee, p.138, para. 8.19.

104 Unpublished research but kindly supplied to the Working Group by Professor Thomas and published here with her permission. The data were drawn from her research resulting in C.Thomas, *Are Juries Fair?* (2010). Professor Thomas studied jurors taking part in "standard" and long length trials. Comparing jurors in ten standard trials (two weeks or less) and ten long trials (four weeks or more, most of which lasted many months) from a single court in a five month period, she found that "there was remarkably little difference between the range of backgrounds represented in each." There was "no real significant difference across a wide range of factors including gender, age, employment status (including self-employed), profession, income, ethnicity, religion and first language". Although there was approximately 20 per cent more full time employment reflected on standard length trials, and correspondingly more members working part time, retired, student or looking after family reflected on long trials, the professions from which they came were very similar.

105 C. Thomas, "Exposing the Myths of Jury Service" [2008] Crim LR 415, 422. See also M. Zander and P. Henderson, *Crown Court Study, op. cit*. at 8.13.

106 Leveson Review, para. 356.

107 The importance of this was highlighted by Merricks:

"The assumption appears to be that some cases are so complex that only experts are capable of understanding the allegations, and that consequently there could be no public explanation comprehensible to the layman. The trial might then be reduced to exchanges between the lawyers and the tribunal, conducted in impenetrable jargon. ... I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible", Dissent, Roskill, para. C120.

The central issue in most fraud trials, Merricks suggested, was dishonesty. To entrust that judgment to experts was dangerous.

108 Leveson Review, citing J. Jackson and S. Doran, *Judge without Jury* (Clarendon Press, 1995).

109 Leveson Review, and also Law Commission of New Zealand, *Juries in Criminal Trials: a discussion paper* (1998), available at http://www.nzlii.org/nz/other/nzlc/pp/PP32/PP32.pdf

110 Similar common law jurisdictions considered by Leveson and our Working Party are Australia, Canada, New Zealand and the U.S.

111 See for example the dishonesty test set out in *R v Ghosh* [1982] 1 QB 1053.

112 E.g. no jury waiver is possible for felonies in North Carolina, *Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend FRCP 23(a)*, 26 U.C. Davis L. Rev. at 324; New Zealand's Criminal Procedure Act 2011 excludes offences carrying 14 years of imprisonment or a mandatory life term; Canada suggests a jury trial may be warranted for particular defendants in public office, or where community standards are in issue, Public Prosecution Service of Canada Deskbook, Chapter 3:10, at http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch10.html; Australian Commonwealth indictable offences must be by jury trial, s. 80 Australian Constitution: murder, manslaughter and sexual offences require jury trial in the Australian Capital Territory, Criminal Proceedings Legislative Amendment Act 2011; objective community standards may require jury consideration in New South Wales (s.132 Criminal Procedure Act 1986), Western Australia (s.118(6) Criminal Procedure Act 2004), and Queensland (s.615(5) Criminal Code).

113 In New Zealand, the norm is for judge alone trial with a right to elect jury trial in what are termed 'category three' cases, with a sentence of life imprisonment or two years or more, save for specific offence types, Criminal Procedure Act 2011. Section 102 of that Act makes provision for judge alone trials in long and complex cases involving 20 or more sitting days and for which the penalty would not be life imprisonment or 14 years or more.

114 Roskill Report, p.193, para. C11.

115 JUSTICE has a long history of support for the jury system. It would at first sight be surprising, therefore, if a JUSTICE Committee were to recommend a diminution of the right to trial by jury. However, with the exception of the academics, all the other members of the Working Party have extensive experience of long, complex criminal cases whether as judge, barrister, solicitor or police officer, some for the prosecution, some for the defence, some for both prosecution and defence.

Merricks, in his dissent to the Roskill Report, observed:

> *"The vast majority of the police, the solicitors' profession (from the defence and prosecution perspectives), the magistrates, and Bar opposed the removal of jury trial. Whilst views among the judiciary were divided, it is clear that many judges had grave reservations about removing the right to jury trial. These views cut across the political spectrum: both the Society of Conservative Lawyers and the Society of Labour Lawyers were emphatic in insisting on the retention of jury trial. The submissions from the Bar – and barristers might be thought to have the closest instincts on the matter – were almost unanimous."* Roskill Report, p.192, paras. C5-7.

Many former or practising criminal lawyer Peers attended the debate on the Fraud (Trials Without a Jury) Bill 2006 and spoke in favour of jury trial – Lord Kingsland, Lord Elystan-Morgan, Lord Hunt, Lord Carlile, Lord Brennan, Baroness Mallalieu, Lord Thomas of Gresford, who quoted Baroness Kennedy from the CJA 2003 debates, and non-legal Peers Baroness Thomas (who had been called for jury service twice and had spoken with judges), and Lord James (who had chaired 11 public companies over 25 years, which had lost significant sums to fraud). Their views provided helpful insight into the opinions of the profession regarding the management of complex and lengthy trials.

English judges interviewed by New York Supreme Court Judge Robert Julian in 2007 not only clearly favoured jury trial, they were strong and passionate advocates for the jury. They believed that juries carry out a good, democratic and fair role and understand properly managed and presented serious cases. By contrast, there was no support for judge-only trials replacing juries, with many judges expressing concern about perceived or actual unfairness and partiality. They felt that judges risk becoming case hardened, and unable to put prejudicial material they have ruled inadmissible out of their minds during the trial. They also felt that, when asking relevant questions to determine the issues, there

is a risk they could be seen by the parties to be prematurely deciding the outcome. Some interviewed judges sat in both criminal and civil trials. They expressed a view that there was a significant difference between the purpose and arrangement of each, some highlighting the constitutional relevance of juries in criminal trials. R. Julian, Judicial Perspectives on the Conduct of *Serious Fraud Trials*, Crim LR [2007] pp.751-769.

116 These documents have since been cemented in the VHCC guidance.

117 This was enforced in the case of *Boardman*, op cit.

118 See Protocol, p.8.



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