The Criminal Jurisdiction of the Courts

Working Group on the Jurisdiction of the Courts

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FOREWORD

The genesis of the Working Group on the Jurisdiction of the Courts is to be found in a broad-ranging and reflective address, entitled: "The Irish Courts System in the 21st Century: Planning for the Future," which the Chief Justice delivered to the Law Society of University College Cork in March 2001. The Chief Justice observed that the "Irish courts system, since it was first established in 1924, [had] never been subject to any critical analysis…" He concluded that address by outlining the kind of body which could now undertake that task. He recalled that our present system, established by *The Courts of Justice Act, 1924*, implemented the recommendations of the Judiciary Committee under the chairmanship of Lord Glenavy, which reported with commendable speed and remarkable succinctness in 1923, and that it remains largely unchanged to the present day.

I was personally greatly honoured, if not a little daunted, when the Chief Justice and the Courts Service Board invited me to chair the Working Group.

The Working Group's Terms of Reference, published in January 2002, focus essentially on the issue of jurisdiction, as appears from the opening and principal paragraph (the Terms of Reference are set out in full at Appendix I). The Working Group is required to carry out its work in three or more modules. The first module is concerned exclusively with the criminal law and is the subject of this Report. While our common law heritage reflects centuries of British rule, it is a remarkable fact that our constitutional founding fathers formed a profound attachment to the institution of trial by jury in particular. The Constitution enshrines the objective of jury trial, while recognising the need for courts of summary jurisdiction for minor offences. The Working Group is, naturally, constrained by the constitutional framework. In practice, of course, more than 95% of all criminal offences are tried summarily. The Working Group at an early stage divided its consideration into issues concerning summary jurisdiction on the one hand, and trial on indictment on the other. The issues are considered in detail in the body of the Report.

In general terms, we found that the Central Criminal Court, which exercises the criminal jurisdiction of the High Court, and thus handles the most serious cases, is unable, due to inherent characteristics of its caseload, to eliminate the very serious delays. There is, in general, a high level of satisfaction with the District Court and Circuit Court as functioning judicial institutions. The first performs the essential task of disposing of very large numbers of minor offences. The second handles all indictable crime, other than murder and rape, on a basis of local jurisdiction. In the result, the

Working Group is not recommending in this Report any departure from the existing structure of the courts, though it recommends, in some cases by a majority, radical alterations to the systems of allocating jurisdiction between courts and in relation to appeals. It also makes significant recommendations regarding trial process and sentencing.

Whether the Report measures up to the expectations of those who established it is for others to judge. The recommendations of the Working Group will, no doubt, be received with varying degrees of enthusiasm. It is to be hoped, at the very least, that they will stimulate serious debate and further study. The very fact of producing a detailed and systematic study of the entire criminal justice system has, I believe, a value of its own. In particular, the statistical information on the system – now produced for the very first time – will encourage more systematic gathering of information, which is indispensable to the analysis which should inform policy-making. The seminar of July 2002 and the conference of November 2002 held by the Working Group generated widespread serious debate even in advance of this Report.

The Report has been somewhat over a year in the making. It has involved a great deal of work. Thanks are due to many people. I am grateful to all those who submitted observations to the Working Group. I hope they are not disappointed by the result and that they will understand that, in some cases, points raised were not within the scope of our Terms of Reference. Thanks, in particular, are due to all those who, though not members of the Working Group, attended and helped our discussions at the seminar in July 2002. I also express appreciation to the distinguished speakers - from Ireland and abroad – who gave their time to attend and present papers at our November conference. I should add those who chaired sessions of the conference: Mr. Justice Francis Murphy, Mr. Justice Hugh Geoghegan and Professor Dermot Walsh. I would like to extend a particular word of thanks to Sir Robin Auld, who readily agreed to meet me in London at an early stage of our work and who gave much helpful advice and to Professor Michael Zander, whom I also met in London and who familiarised himself carefully with aspects of Irish law before speaking at the conference.

The Chief Justice gave generous support and help throughout, as did Mrs. Justice Susan Denham, Chairperson of the Courts Service Board. My colleagues, Mr. Justice Hugh Geoghegan and Mr. Justice Adrian Hardiman readily responded to my many requests for advice or comment. As will appear from the body of the Report, we have been able, on certain points, to work in parallel with the Law Reform Commission, whose consultation papers, reports and seminars have been a valuable resource. The fact that we reached different conclusions on certain points does not diminish the value of the joint work.

The members of the Working Group themselves attended assiduously at our fortnightly meetings and at our individual all-day sessions, despite their heavy judicial and professional responsibilities. The presence of a number of judges, with extensive practical experience and knowledge of the different courts, was essential to the task. I cannot fail to mention the exceptional contribution of Mr. Noel Rubotham, Director of Reform and Development of the Courts Service. Apart from being an active member of the Working Group, he performed the multiple roles of *rapporteur*, convenor and administrator with extraordinary skill, intelligence and dedication. He was very ably assisted by the ever helpful Ms. Olive Caulfield, Secretary to the Working Group, who gave support of a consistently high quality to the Working Group, availing also of her own experience in the District Court. She organised the events of the Working Group with quiet efficiency. She was capably supported in this by her colleague in the Directorate of Reform and Development, Mr. Bernard Regan. The Working Group's Legal Researchers, Ms. Flo Haines and Ms. Majella Redmond, produced numerous research papers of the highest quality. These provided invaluable material for our discussions and then formed the building blocks of the Report.

We are also grateful to the Courts Service, particularly to Mr. P.J. Fitzpatrick, Chief Executive Officer and Mr. Diarmaid MacDiarmada, Director of Operations, Circuit and District Courts, and his colleagues, for their unfailing support and help. Ms. Geraldine Manners, registrar to the Court of Criminal Appeal, provided extremely useful explanations and information about the work of that court. Mr. Rónán Kennedy, Executive Legal Officer to the Chief Justice and Editor of the Judicial Studies Institute Journal, gave generously of his time and expertise, and kindly facilitated publication in the Journal of the November conference papers. Finally, thanks are due to Mr. Mark O'Connell, Barrister-at-Law, who undertook the task of detailed reading and proofing of the entire Report.

Nial Fennelly,
Chairman,
Supreme Court,
Dublin 7.

CHAPTER ONE

Introduction

Terms of Reference and Composition

1. The Working Group on the Jurisdiction of the Courts was established following a decision of the Board of the Courts Service on the 30th October 2001, with the following Terms of Reference:

> "I. To examine the existing jurisdiction of the courts of Ireland and make recommendations as to any changes which, in the opinion of the Working Group, are desirable in the interests of the fair, expeditious and economic administration of justice, including proposals for the establishment of new courts jurisdictions, whether appellate or first instance, for determining the appropriate number of judges for each jurisdiction and the supporting staff required in such jurisdictions and for alterations in the quantitative or geographical limitations of existing jurisdictions;
>
> II. With a view to (I), to conduct research into:
> (a) The manner in which the courts of Ireland have operated since their establishment in 1924 and are likely to continue operating in the future on the assumption that the existing structures remain unchanged;
> (b) The manner in which the administration of justice is conducted in other jurisdictions to the extent that the Working Group considers such research might be helpful:
>
> III. To make such further recommendations as to changes in the law which, in the opinion of the Working Group, are desirable in order to secure the fairer, more expeditious and more economic administration of justice;
>
> IV. To make such interim reports as it considers appropriate.
>
> It is proposed that the Working Group will carry out its functions in three or more modules. The first module will be concerned exclusively with the criminal law and the second with the civil law. The third module will consider such general changes in the court structures as may be necessary in the light of the conclusions of the first and second modules and any other considerations the Working Group considers relevant. If the Working Group considers it necessary for the purposes of its report on the matters set out above, it is empowered to establish further modules."

2. The complete text of the Terms of Reference and provisions as to the composition of the Working Group are set out in Appendix I of the Report. The module the subject-matter of this Report is that relating to the criminal jurisdiction of the courts, and the composition of the Working Group for the purpose of that module was initially prescribed as follows:

3. Mr. Justice Nial Fennelly of the Supreme Court was appointed Chairman of the Working Group, the other members of which were to be nominated as follows:

- One ordinary judge nominated by the president of each jurisdiction;
- One representative of the bar and one representative of the solicitors profession nominated by the Bar Council and the Law Society of Ireland;
- A representative of the Courts Service nominated by the staff;
- A representative officer from both the Department of Justice, Equality and Law Reform and the Department of Finance nominated by the relevant Ministers;
- An officer of the Office of the Attorney General nominated by the Attorney General;
- An officer of the Director of Public Prosecutions nominated by the Director;
- The President of the Law Reform Commission or a member of the Commission nominated by the president;
- Two members from the Faculty of Law of the six universities in Ireland, one from the Dublin-based universities and one from the universities outside Dublin, to be nominated by the chairman of the Working Group;
- A representative of Victim Support; and
- A representative of the National Crime Council.

4. A senior officer of the Courts Service was to be appointed to the Working Group with responsibility for the provision of administrative support to the Working Group.

5. The membership of the Working Group was announced on the 10th January 2002. On the 29th July 2002, the Courts Service Board decided to expand the membership to include a nominee of the Commissioner of An Garda Síochána.

6, In addition to the Chairman, the members appointed were the following:

- The Honourable Mr. Justice Paul Carney, as nominee of the President of the High Court;
- His Honour Judge Patrick McCartan, as nominee of the President of the Circuit Court;
- His Honour Judge Peter A. Smithwick, President of the District Court;
- Mr. Michael Durack, S.C., as nominee of the General Council of the Bar of Ireland;
- Mr. Ken Murphy, nominee of the Incorporated Law Society of Ireland;

- Mr. John McGreevy Courts Service staff nominee;
- Mr. John Cronin, nominee of the Department of Justice, Equality and Law Reform;
- Mr. Michael Errity, nominee of the Department of Finance;
- Ms. Claire Loftus, Chief Prosecution Solicitor, nominee of the Director of Public Prosecutions;
- Ms. Caitlín Ni Fhlaitheartaigh, B.L., nominee of the Attorney General;
- The Honourable Mr. Justice Declan Budd, President of the Law Reform Commission;
- Professor Finbarr McAuley, Faculty of Law, University College Dublin;
- Mr. Tom O'Malley, Law Faculty, National University of Ireland, Galway;
- Donal Egan, B.L., nominee of Victim Support;
- Judge Michael Reilly, nominee of the National Crime Council;
- Assistant Commissioner T. A. Hickey, nominee of the Commissioner of An Garda Síochána;
- Mr. Noel Rubotham, Director of Reform and Development, Courts Service.

7. Mr. James McGuill, solicitor, replaced the Director General of the Incorporated Law Society at the Director General's request at the commencement of the Working Group's deliberations. Mr. John McGreevy was replaced as nominee of the Courts Service staff by Mr. Liam Convey with effect from the 5th November 2002. Mr. Finbar O'Malley replaced Ms. Ní Fhlaitheartaigh during the latter's absence temporarily, while on secondment from the Office of the Attorney General. Ms. Olive Caulfield, Assistant Principal Officer in the Directorate of Reform and Development of the Courts Service, was appointed Secretary to the Working Group.

General Principles

8. The Working Group conceives the objects of the criminal justice system as being to apprehend and try those accused of crime, to convict those guilty of crime and to acquit the innocent. In this process, regard must at all times be had to the rights and duties of the respective interests and to the need for trials to be conducted in due course of law and with due regard to the interests of the victims of crime and the rights of accused.

The Historical Context

9. By contrast with the position in our largest neighbouring jurisdiction,[1] little change has taken place in the structures underpinning the administration of justice in Ireland since the establishment of an independent courts system in 1924. Systemic analysis of the criminal courts in particular has been a rarity since that time.

1 A list of the public enquiries, reviews and commissions concerned with the administration of criminal justice in England and Wales between 1963 and 2000 is set out at page 5 of the *Review of the Criminal Courts of England and Wales* by Lord Justice Auld (London: HMSO, 2001).

The Judiciary Committee Report (1923)

10. The foundation of the State brought with it "drastic reform"[2] for the courts then in operation. The system instituted in 1924 owed much of its character to the recommendations of the Judiciary Committee, chaired by Lord Glenavy, which was appointed on the 27th January 1923 to advise the Executive Council on the establishment of courts for the exercise of judicial power and the administration of justice in Saorstát Éireann. It was clear from the outset that there was a desire to abolish the British Judiciary following the "long struggle for the right to rule in our own country".[3] It was stated that "nothing [was] more prized among our newly-won liberties than the liberty to construct a system of judiciary and an administration of law and justice according to the dictates of our own needs and after a pattern of our own designing".[4] The adoption of the 1922 Constitution necessitated the establishment of a new courts system in order to carry out the intentions of Article 73 of the Constitution. Article 73 envisaged the establishment of a Supreme Court of Justice, a High Court of Justice and Courts of "local and limited jurisdiction". The Committee therefore did not have *carte blanche* and had to confine itself to this framework.

11. In addition to its Chairman, who was a former Lord Chancellor, the Committee was composed of eleven other members, including the Attorney General,[5] the Master of the Rolls,[6] four members of the Judiciary,[7] one member of the Inner Bar, the President of the Dublin Chamber of Commerce[8] and three other lawyers.[9] The Committee submitted a written report some four months after its appointment. As the report was unanimous, it "… was not thought… necessary to set out the reasons upon which our recommendations [were] based."[10] The report, in just 16 pages, recommended the establishment of a District Court, Circuit Court, High Court, Court of Appeal and Supreme Court of Appeal, to exercise both civil and criminal jurisdiction.

12. With regard to criminal jurisdiction, the Glenavy Committee recommended that a District Court be established to replace the petty sessions courts, presided over by a District Judge sitting alone, with jurisdiction to hear minor offences and to dispose of preliminary issues for trial by jury. It proposed that the County Court be abolished and replaced by a court based in circuits having both civil and criminal jurisdiction. The country would be divided into eight such circuits, each circuit covering a population of approximately 400,000 people. Each court of this circuit would be referred to as a 'Circuit Court' and would have criminal jurisdiction over all felonies and misdemeanours save for murder, high treason and piracy. The Circuit Court would also have jurisdiction to hear appeals from the District Court. The adoption of this recommendation in *The Courts of Justice Act, 1924* was described as "the greatest change that [has] been made."[11]

13. The Committee recommended that a High Court be established to sit permanently in Dublin with similar jurisdiction to the High Court under the British system,[12] each judge of the Court to be capable of trying all cases within their jurisdiction. It was further recommended that a 'Central Criminal Court'

2 Newark, F.H., *Notes on Irish Legal History*, (Belfast: Marjory Boyd (Printer for Queen's University, Belfast), 1960), at page 32.

3 Letter from the President of the Executive Council to each member of the Committee, dated 29th January 1923.

4 *Ibid.*

5 Hugh Kennedy.

6 The Right Honourable Charles A. O'Connor.

7 Supreme Court Judges Cathaoir MacDaibhid and James Creed Meredith, County Court Judge Johnston and District Justice Lughaidh Breathnach.

8 William Hewat.

9 Timothy Sullivan K.C., John O'Byrne B.L.., Patrick J. Brady, solicitor, and Henry Murphy, former Crown Solicitor.

10 Judiciary Committee, *Report of the Judiciary Committee* (Dublin: The Stationery Office, 1923), at page 26.

11 Hanna, J., *The Statute Law of the Irish Free State 1922-28* (Dublin: Alex Thom and Co. Ltd., 1929), at page 17. There appears to be no comment on the fact that the Judicature Commission in England had in the previous century (see First Report (London: HMSO, 1869)) recommended that England be divided into 'Circuits' instead of using the boundaries of the Counties for the purposes of courts, which would not have represented an even population distribution.

12 *Report of the Judiciary Committee*, n 10 *supra*, at page 19.

be constituted for Dublin and the Home Counties (Louth, Meath, Kildare and Wicklow), to have jurisdiction in all matters except those within the jurisdiction of the Circuit Court and to hear cases sent to it from the Circuit Court.[13] A Commission of Assize should be sent as required for criminal matters, at such times as the Executive might determine, and the Central Criminal Court should be available for all cases not disposed of at the assizes.

14. A Court of Criminal Appeal should be established, consisting of a Supreme Court Judge, presiding, and at least two High Court Judges. The Committee proposed that a Supreme Court of Appeal consisting of a President and two judges be established to hear appeals lying from decisions of the High Court and all motions for new trial or judgment in *nisi prius* cases, which could be made directly to the Supreme Court. The recommendations of Glenavy were substantially adopted in *The Courts of Justice Act, 1924.*

The Joint Committee on The Courts of Justice Act, 1924 (1930)

15. In November 1929, the Joint Committee on The Courts of Justice Act, 1924, was established under the chairmanship of Daniel Morrissey T.D., to "consider what, if any, amendments are required" in respect of *The Courts of Justice Act, 1924*, and reported one year later with its findings.[14] The recommendations of the Committee were almost entirely related to civil jurisdiction, the most significant of those as to civil jurisdiction relating largely to revision of arrangements for remittal or transfer of actions from the Circuit Court to the High Court, to the manner of hearing of appeals from the Circuit Court to the High Court and to provision of additional judicial resources.

16. The *Courts of Justice Act, 1936* adopted some of the recommendations of the Joint Committee but as the principal provisions of the 1924 Act had not been called into question, the structure remained as it had been since its establishment.

Developments Since 1937

17. Although the Constitution of 1937 envisaged the establishment of a new courts system, this did not take place until 1961 when the *Courts (Establishment and Constitution) Act, 1961* and the *Courts (Supplemental Provisions) Act, 1961* were enacted. This opportunity to address any perceived deficiencies in the existing system was not availed of, and the newly-established courts did not differ in any material respect from their predecessors.

18. The Committee on Court Practice and Procedure, established in 1962, has from time to time conducted investigations in the area of jurisdiction as well as examining problems of procedure.[15] In its Fifth Interim Report, entitled Increase of Jurisdiction of the District Court and Circuit Court, the Committee on Court Practice and Procedure made a number of recommendations regarding the civil jurisdiction of those courts, notably concerning alteration of monetary limits and

13 The predecessor of this Court was the Dublin City Commission. The Central Criminal Court was the term used when the assizes sat in London. It is now the title of the Crown Court in London.

14 Report dated 6th of November 1930.

15 As to reports on procedural matters, see in particular the First and Twenty-Fourth Interim Reports, dealing with the preliminary examination of indictable offences.

transfer of original licensing jurisdiction to the District Court, making some recommendations in respect of the extension of the District Court's sentencing jurisdiction in the event of a plea, on adjustment in property values attaching to certain offences in the First Schedule to the *Criminal Justice Act, 1951*, and on extension of the system of "on the spot" fines, and criminal jurisdiction.

19. In its Sixth Interim Report on the Criminal Jurisdiction of the High Court, the Committee made recommendations regarding arrangements for transfer of trials within the Circuit Court and from the Circuit Court to the High Court. In its Twelfth Interim Report, the Committee considered the organisation of the courts, making various recommendations as to alteration of the Dublin Metropolitan District, the distribution of business at venues, reorganisation of Circuits and allocation of trials and appeals to venues, as well as various operational matters. No recommendations of significance were made in relation to the exercise of criminal jurisdiction.

20. The Law Reform Commission has also had occasion to examine aspects of criminal jurisdiction as well as procedure. An example of one such study was its *Report on Rape and Allied Offences*,[16] when it made recommendations on the jurisdictional arrangements for the trial of those offences. A second example was its *Report on Penalties for Minor Offences*,[17] in which it made proposals as to the limits of the District Court's powers of sanction in respect of summary offences. The Commission most recently issued a Consultation Paper on prosecution appeals in cases tried on indictment.[18]

21. The Working Group on a Courts Commission, chaired by Mrs. Justice Susan Denham, carried out a general review of the institutional arrangements for management and administration of the courts, issuing a series of six reports between April 1996 and November 1998 on the administration of the courts, leading to the establishment of the Courts Service in November 1999. The reports also dealt with specific areas of jurisdiction such as family law and drug crime, and on more general issues such as court vacations and judicial conduct and ethics.

22. It is fair to say, in light of the foregoing, that the remit accorded to the Working Group represents a timely and unique opportunity to examine in a comprehensive manner a system for administering criminal justice which has remained unchanged in its essential elements for the past eighty years or so.

Working Method

23. During the course of its deliberations on the current module, the Working Group met as a general rule on a fortnightly basis and for the purpose of preparing the text of this Report held a number of one-day sessions and a weekend session.

16 Law Reform Commission, *Report on Rape and Allied Offences* (LRC 24-1988).

17 Law Reform Commission, *Report on Penalties for Minor Offences* (LRC 69-2003).

18 Law Reform Commission, *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment* (LRC CP19-2002).

24. A range of materials was assembled and distributed to Members, including reports, studies and consultation papers, concerning reform of courts systems in this and other jurisdictions, and dating back to the Judiciary Committee Report of 1923 (Glenavy).

25. Two sub-groups, on the District Court's jurisdiction and the jurisdictions concerned with trial of indictable crime, chaired by Judge Michael Reilly and Mr. Justice Paul Carney respectively, were established by the Working Group and embarked upon an examination of these areas.

Public Consultation

26. At its second meeting on the 12th February 2002, the Working Group approved the terms of an invitation to the public to submit observations, which was published in the national daily newspapers on the 14th February 2002. Simultaneously, a website section for the Working Group, created within the Courts Service website (http://www.courts.ie), was launched, providing details of the Terms of Reference and composition of the Working Group, its membership and working methods and a facility for the public to submit representations by e-mail. The Working Group purposely did not fix a deadline for the receipt of observations.

27. A total of 26 representations were received by the Working Group. A list of those making submissions in respect of the criminal justice module is contained in Appendix II. The Working Group takes this opportunity to express its appreciation of the assistance which those respondents have afforded to the Working Group's deliberations. Certain submissions contained representations in respect of areas, such as the provision of facilities for particular court users, which did not fall strictly within the Terms of Reference of the Working Group. The Working Group is conveying those representations to the Courts Service for further consideration insofar as they are relevant to the Service's statutory mandate.

Research and Inquiry

28. The Terms of Reference laid emphasis upon the importance of research, both statistical and legal in the evaluation of the existing jurisdictional arrangements and of any changes proposed thereto. The Working Group engaged, following a public procurement exercise, the services of Professors John Jackson and Sean Doran of the Institute of Criminology and Criminal Justice, Queen's University, Belfast, to undertake an investigation involving (a) the recovery of statistics on salient aspects of the caseloads of the various criminal court jurisdictions and (b) the conduct of a survey of opinion among a wide range of respondents concerned with the operation of the criminal justice system from the judiciary,

legal practitioners, both prosecution and defence and An Garda Síochána. The remit, methodology and conduct of this research and inquiry project are treated in greater depth in Chapter 7 of this Report. The full text of the Professors' Report, entitled *A Study of the Jurisdiction of the Criminal Courts in Ireland,* is contained in Appendix V and is separately paginated.

29. The Working Group also undertook a comprehensive programme of legal research, engaging two legal researchers, Ms. Majella Redmond and Ms. Flo Haines, who worked under the supervision of Mr. Noel Rubotham, Director of Reform and Development in the Courts Service. This programme encompassed the origin and development of the summary and indictment jurisdictions, the historical background to the allocation of offences for summary trial or trial by jury, the statutory regime and case-law relating to the criminal trial process, jurisdictional and trial process models in other jurisdictions and criminal justice reform initiatives abroad.

Events Organised

30. On the 20th July 2002, the Working Group organised a one-day seminar in which members of the judiciary, practitioners from the Bar and the solicitors' profession concerned with the administration of criminal justice participated. The seminar comprised three sessions dealing separately with summary jurisdiction, trial on indictment and the criminal trial process. The object of the seminar was to identify the issues in the current organisation and operation of the criminal jurisdiction of the courts which were a cause for concern or, indeed, for satisfaction on the part of those who had day-to-day responsibility for or professional contact with the system. The seminar proved to be a rich source of information and ideas regarding the problems affecting the area. The Working Group wishes to record its indebtedness to those who gave their time and expertise to the proceedings.

31. On the 22nd and 23rd November 2003, a full weekend conference was organised in Dublin, attended by a wide range of members of the judiciary, practitioners, and professional interest and advocacy groups, as well as those who had made submissions on the criminal justice module. The conference agenda comprised four sessions: Criminal Trials – Fixing the Jurisdiction; Criminal Trial Process; The Trial of Sexual Crime; and Sanctions for Criminal Offences. The Working Group was privileged to secure the attendance of very distinguished guest speakers from neighbouring jurisdictions as well as the Netherlands, the keynote address being given by Lord Justice Auld, author of the Review of the Criminal Courts of England and Wales of October 2001. The quality and range of the papers presented, the level of participation from those attending and by general acknowledgement, the professional way in which the conference was organised, made for a remarkably successful and memorable event, giving the Working Group much to reflect upon as it entered the final stage of its deliberations. The

Working Group wishes to express its gratitude to Lord Justice Auld and his fellow speakers for their contributions to the conference's success, and to the 120 delegates who attended. The Conference agenda and list of speakers is set out in Appendix III. The papers delivered at the Conference have recently been published in a special issue of the Journal of the Judicial Studies Institute.[19]

The Scheme of the Report

32. The breakdown of this Report by chapter reflects to a large extent the areas identified by the Working Group at the early stages of its deliberations as being appropriate for distinct attention. However, the experience derived from the conduct of the statistical research exercise carried out on its behalf was such that the Working Group felt it appropriate to give separate consideration to the arrangements within the Courts Service for the recording and collection of statistics on the caseloads received and disposed of by the various court jurisdictions. A separate chapter has, accordingly, been devoted to the current arrangements and to measures to improve statistical recording and collection.

19 The papers and presentations delivered at the conference are listed in the bibliography to this Report.

CHAPTER TWO

Conclusions and Recommendations

Summary Jurisdiction

Limits of District Court's Jurisdiction

Imprisonment

33. The majority of the Working Group does not consider that there is any substantial justification for reducing the existing maximum sentencing powers of the District Court. On the other hand, the Working Group is concerned at the general tendency to provide almost as a matter of routine that newly created offences be punishable by imprisonment of up to 12 months. This is a matter of legislative policy. It is not amenable to rules of general application. Responsible government departments should expressly address the levels of punishment proposed for each newly created offence and explain why it is considered necessary to propose, in particular, the maximum level of imprisonment on summary conviction. (Paragraphs 187-188)

Fines

34. In the light of all the circumstances, but especially on the basis of its judgment of the value of the prevailing fine limit of €3,000 in today's conditions, the Working Group believes it is much too low. That limit could almost certainly be increased by a factor of three. The Working Group recommends that the general limit of fine be increased to €10,000. (Paragraph 198)

Ancillary Penalties

35. The Working Group does not consider that it can make any recommendations concerning the significance of ancillary orders in the assessment of whether an offence charged and whose trial is pending in the District Court is minor. It does not even appear that it would serve any purpose to recommend that legislation specify whether a particular order is intended to serve as a punishment. In *Conroy's* case, the Supreme Court rejected any suggestion that the nature of a disqualification could "be determined simply by a description used in a statute." It was for the Court to "determine its nature from an examination of its essential qualities rather than its description…" Therefore, pending any further clarification of the governing principles, it will be for the District Court, where

appropriate, to decide, in the light of all the circumstances, whether an offence is minor and fit to be tried summarily. (Paragraph 213)

The Right to Jury Trial

36. It seems to the Working Group that, as a matter of elementary principle, legislative rules concerning such a fundamental question as the right to jury trial should at the very least be consistent. This is not to say that differentiation may not be desirable – it may well be justifiable. The Working Group is unable to identify any rational justification for the present system. While it is possible to identify a broad distinction between the treatment of offences against the person and against property, respectively, it has not been possible to identify a reason for this differentiation. (Paragraph 307)

37. The Working Group believes that the inconsistency so described offends against basic principles of fairness and justice. Accused persons should be treated equally by the criminal justice system. Put otherwise, they may be treated differently only on the basis of objective and rational criteria. Where a decision has to be made as to whether a case is to be tried summarily or by a jury, a fundamental constitutional rule is at issue. All accused persons are entitled to rely on the same rights. Assuming that there should be a consistent rule, the question is which of the alternative systems corresponds most closely with the interests of fairness and justice. This is not to forget the criteria of efficiency and economy, but fairness and justice are the prime considerations. (Paragraph 309)

38. The Working Group is of the view that, in all cases where summary trial or jury trial are optional, the accused should be entitled to opt for jury trial. (Paragraph 312)

39. Such statistics as are available – and they are admittedly limited – tend to suggest that there is no serious danger that the grant of the right to jury trial would be abused. The absence of a proper statistical basis for assessment of this issue is a matter of legitimate concern. It would be possible, before any decision was made to adopt the proposal of the Working Group, to commission further research. An extension of the sample survey of cases conducted by the Working Group to cover a longer period and more centres would be possible. What is needed is a longitudinal or "tracking" survey, tracing the history of a sample of cases through the District Court to the Circuit Court. The Working Group recommends that such a survey be conducted without delay. It could be limited to sample venues, obviously including the Dublin Metropolitan District. (Paragraph 313.5)

40. The Working Group has considered the argument that there is an objective and rational basis for the preferential treatment of those accused of certain offences, essentially those involving fraud or dishonesty. Following very full debate, the Working Group does not accept that these arguments provide a convincing rationale for the present system. The preservation of the option for all charges of offences of fraud and theft, including robbery, and its withholding in the case

of all offences of assault and criminal damage to property calls for some explanation relevant to the character of the offences. (Paragraph 314-315)

41. The Working Group has also considered the possibility that a distinction could be made between what might be broadly described as ordinary criminal offences, on the one hand, and what are sometimes called regulatory offences on the other. An argument has been put before the Working Group to the effect that, even if the right to opt for jury trial should be extended to all cases of offences triable either summarily or on indictment, nonetheless, special considerations apply in the case of regulatory offences. The Working Group accepts that there are some grounds for making such a distinction. Member Claire Loftus, Chief Prosecution Solicitor, has argued for one in her Dissenting Statement to this Report. However, the conclusion of the majority of the Working Group remains that such a distinction should not be made. (Paragraphs 316-318)

A Statutory Mechanism of Allocation

42. No purpose would be served by requiring the accused to make an election before the District Judge has decided whether or not to refuse jurisdiction to try a case in which the Director of Public Prosecutions has opted for summary trial. The Working Group recommends that the Director of Public Prosecutions should be required to inform the court, within a specified period, whether he intends to opt for summary trial. A hearing should then be arranged to inform the judge of the nature of the case, so as to enable him to decide whether or not to accept jurisdiction. If jurisdiction is accepted, he should inform the accused in open court, in accordance with the procedure now in force – so that the accused then has the opportunity to opt in favour of or against jury trial. (Paragraph 323)

Special Provisions for Children Charged with Offences

43. Section 75 of the *Children Act, 2001* does not permit summary trial of any offence which must be tried in the Central Criminal Court. If the recommendations of the Working Group regarding the initial return for trial of murder and rape offences were to be accepted, it would be necessary to amend section 75. (Paragraph 341)

44. *The Children Act, 2001* was introduced following a period of intensive study and consultation. In view of this, and given that the legislation has only very recently entered into force, the Working Group does not consider it appropriate or desirable to examine afresh this area of the courts' jurisdiction. (Paragraph 342)

Appeals and Review of District Court Decisions

Appeals Generally

45. In the survey of opinion on this area, 65 percent of respondents considered the current system of appeal by way of rehearing from the District Court to the Circuit Court to be satisfactory or very satisfactory. That indication of a high

level of satisfaction understates the level of satisfaction of the judiciary and practitioners with arrangements, given the large number of Garda respondents – over 50 percent – who expressed dissatisfaction. This confirms the impression gained by the Working Group in the course of its consultations with the judiciary and practitioners. The Working Group does not propose any alteration in the appeals mechanism from the District to the Circuit Court. (Paragraph 346)

Prosecution Appeals against Sentence

46. The Programme for Government of June 2002 contained a proposal to extend the Director of Public Prosecutions' right of appeal against lenient sentences "to serious cases before the District Court." In the course of the Working Group's discussions, the point was made at the outset that serious cases, by definition, should not, in any event, be dealt with in the District Court. A number of arguments, rooted both in principle and in practicality, have been advanced as to why no prosecution right of appeal on grounds of undue leniency should lie from a sentence imposed by the District Court:

1. If a case has been assigned to the District Court in the first place, it is to be presumed that a relatively light sentence is appropriate. It is therefore unlikely that any perceived leniency in sentence will be of appreciable significance in any event.
2. Since the majority of cases in the District Court are prosecuted by a member of An Garda Síochána, it would be impractical to require the prosecuting Garda to report on any case where he or she might consider the sentence to be unduly lenient. In the absence of a reporting procedure, the exercise would be likely to become media-driven, which would not be acceptable.
3. District Court cases are already subject to a defendant's right to appeal by way of complete re-hearing in the Circuit Court. It is unclear what would happen if the prosecution brought an undue leniency appeal at the same time as the defendant exercised his appeal right.
4. There is no recording of reasons for sentencing in the District Court. As there is no transcript and no record, it is very difficult to reconcile a difference of opinion as to what was said, the only record being any notes taken by solicitor or counsel.
5. There is also the practical issue of resources. Arguably, the resources required by the prosecution to undertake this additional responsibility would outweigh the minor gain likely to be achieved through the introduction of such a right of appeal. (Paragraph 347)

47. The Working Group accepts these arguments and does not recommend any extension of the right of appeal by the prosecution from decisions on sentence by the District Court. (Paragraph 348)

Case Stated

48. Concern has been raised at the absence of sufficient monitoring arrangements in the procedure for appeal by way of a case stated, whether by way of rule of court or practice, once leave has been given to appeal. The Working Group considers that this vacuum in procedure could best be addressed by provision for a review hearing in the High Court within 28 days of the lodgement of the case stated, to enable the Court to assume more active supervision. Order 62, rule 4 of the Rules of the Superior Courts should be amended accordingly. Furthermore, there is need for advance monitoring in the District Court. Sometimes, the defendant, having complied with the 14-day time limit for lodgement and service of the notice of application to state a case, has no incentive to pursue the matter. Order 102 of the District Court Rules should be amended by insertion of an appropriate rule providing for the matter to be listed for further consideration until such time as the Case Stated is signed and despatched. (Paragraphs 356 and 358)

Judicial Review

49. The Working Group does not see any justification for any substantive change to the judicial review remedy. (Paragraph 367)

Provision of Reasons for Decisions

50. The Working Group notes the undoubted obligation of all courts, including the District Court to give clear and adequate reasons for their decisions. It has considered the recommendation of the Law Reform Commission, in its *Report on Penalties for Minor Offences*, as to the recording in writing by District Judges of reasons for decisions involving a custodial sentence. The Working Group has been informed that the implementation of an obligation to give written reasons for custodial decisions is not possible within the parameters of the existing workload of the District Court. It would necessitate the provision of recording equipment in all courts. In the view of the Working Group, that would be desirable for many reasons. The information available to the Working Group does not suggest, however, that this is likely to occur in the immediately foreseeable future. As an alternative, additional judicial resources would be necessary, if every custodial sentence had to be justified by reasoning to the level required by the recommendation of the Law Reform Commission. (Paragraph 391)

51. Having recognised the obligation of judges of all courts to furnish reasons for their decisions, the majority of the Working Group does not find it necessary to make a recommendation on whether these reasons should take a particular form or whether they should be in writing. A Minority Report on this issue has been entered by a number of members. (Paragraph 392)

Indictment Jurisdiction

Special Criminal Court

52. The jurisdiction of the Special Criminal Court has been the subject of specific examination quite recently and the Working Group has taken the view that it would not be appropriate to re-visit the issues considered in the course of that exercise. (Paragraph 396)

National Criminal Court

53. In the absence of any compelling arguments in its favour and being satisfied as to the significant likely inefficiencies and waste attendant upon such a model the Working Group does not recommend the establishment of a National Criminal Court. (Paragraph 560)

Allocation of Trial of Crime on Indictment

54. Having concluded that it should not recommend the establishment of a National Criminal Court for reasons relating to the necessary structure and operation of such a single integrated court, the Working Group emphasises that this is not to reject the desired objectives of a National Criminal Court, namely that there should be a flexible mechanism for allocation of cases to the court and venue best placed to ensure fair and expeditious disposal of any particular case. In the view of the Working Group, much may be done by way of jurisdictional reform to secure these objectives. Any changes must preserve the current efficiency of the Circuit Court but must reform those inflexible aspects which contribute to trial delays in the Central Criminal Court. (Paragraph 561)

55. Of the various possible models for allocation of crime for trial on indictment, the Working Group considers that the option of preserving the separate jurisdictions of the Circuit Court and Central Criminal Court but with new arrangements for transferring cases both within the Circuit Court and between that court and the Central Criminal Court, offer the best possibility of achieving the objectives of flexibility in allocation and suitability of court and venue. (Paragraph 563)

56. No constitutional obstacle appears to arise in relation to the assignment to the Circuit Court of all the categories of indictable crime which actually reach the courts. But the Working Group recognises that there are serious objections to the trial of certain classes of case of the most serious kind in any court other than the High Court. (Paragraph 569)

57. The Working Group agrees that in no circumstances should jurisdiction be conferred on the Circuit Court to try any of those special and rare cases of extreme seriousness and importance which have traditionally been reserved to the Central Criminal Court. A prime example is the offence of treason, which is defined by Article 39 of the Constitution and the *Treason Act, 1939*. The same

should apply to offences of a treasonable character created by sections 6, 7 or 8 of the *Offences against the State Act, 1939*. For different reasons relating not merely to the local nature of the Circuit Court's geographical jurisdiction but more pertinently to their gravity, the offences already reserved to the Central Criminal Court under the *Geneva Conventions Act, 1962* and the G*enocide Act, 1973* should also remain exclusively assigned to that court. None of these offences has to date reached the Court. Nonetheless, in the event that they did arise, it seems to the Working Group that they should automatically be returnable to the Central Criminal Court. Offences of piracy scarcely warrant similar treatment. (Paragraph 570)

58. In view of the novelty and complexity of the comparatively new area of competition law and the fact that the Oireachtas has very recently decided to accept the recommendation in this area of the *Competition and Mergers Review Group*, the Working Group believes that any prosecutions on indictment for offences contrary to sections 6 or 7 of the *Competition Act* should be tried in the Central Criminal Court. (Paragraph 431)

59. All other indictable offences should in the view of the Working Group be treated, for the purposes of jurisdiction, as forming part of one corpus of criminal offences. (Paragraph 571)

60. The Circuit Court should have concurrent jurisdiction with the Central Criminal Court in respect of the trial of all offences on indictment, other than those which it has recommended be retained within the exclusive jurisdiction of the Central Criminal Court. To that end, all cases – subject to the exceptions mentioned – should be returned for trial initially to the Circuit Court in accordance with the existing rules on local jurisdiction. However, the existing exclusive jurisdiction of the Central Criminal Court in respect of murder and rape and cognate offences exists for good reason. Murder is still commonly regarded as the most serious of offences. This is reflected in the mandatory sentence of life imprisonment which it attracts. Similarly, society has gradually given proper recognition to the exceptional seriousness of the crime of rape and a number of similar offences. (Paragraph 571)

61. The Working Group has considered at length the arguments advanced in favour of retaining rape offences within the exclusive jurisdiction of the Central Criminal Court because of their gravity. There is no doubt that many – probably most – such offences are appropriate for trial at the highest indictment level. But the Working Group is not convinced that a blanket assignment of such cases to the Central Criminal Court serves either the general public interest in the prosecution of such offences or indeed the interests of the victim. Quite aside from this consideration, the opportunity now available to the prosecution under statute to appeal unduly lenient sentences – coupled with the jurisprudence in this area – should address any concern which might remain regarding consistency in sentencing in such cases in the Circuit Court. (Paragraph 572)

62. In recognition of the particular attributes of murder and rape and their cognate counterparts, it is proposed that, in any case of a return for trial in which a charge for one of these offences has been included as a count in the indictment, on the return of the case to the Circuit Court, there should be a hearing at the earliest opportunity, upon notice to the Director of Public Prosecutions and to the accused. The purpose of the hearing would be to consider whether the case should be transferred for trial to the Central Criminal Court, or for trial to the most appropriate Circuit Court venue (whether within the Circuit or in another Circuit). The judge, in considering the order to be made on such a hearing, would be required to have regard to the overriding interests of justice and should have regard in particular to the following:

a) the nature of the case and of facts alleged;
b) the degree of gravity or complexity of the case, having regard to those facts;
c) the views of the complainant (in the case of murder, the relatives of the deceased);
d) the convenience of the parties and of witnesses;
e) where appropriate, the need to preserve the anonymity of the complainant/accused having regard to sections 7 and 8, *Criminal Law (Rape) Act, 1981*, as amended by section 17(2), *Criminal Law (Rape) (Amendment) Act, 1990;*
f) any risk of prejudicial publicity;
g) any risk of intimidation of witnesses or jurors; and
h) the objective of an expeditious trial. (Paragraph 573)

63. In other cases, either the Director of Public Prosecutions or the accused would also be entitled to apply on notice to the court – not later than 14 days following the return for trial – for an order transferring the case for trial to the Central Criminal Court. The judge considering such an application would be obliged to consider the same criteria as mentioned in the paragraph immediately above. (Paragraph 574)

Criminal Appeals in Indictable Cases

Verification of Transcripts

64. Section 33 of *The Courts of Justice Act, 1924*, as amended, requires the transcript to be verified by the trial judge. This gives rise to some concern. By contrast with the amended version of section 33 of the Act of 1924, Order 86, rule 14, of the Rules of the Superior Courts obliges the official stenographer to certify the shorthand note at the end of the trial and to have it certified by the trial judge. The Working Group understands that many judges interpret their obligation as being to certify that the transcript is indeed the record of the trial, rather than to verify its contents. The Working Group believes that this approach is reasonable but considers that any ambiguity arising should be removed by amendment of the *Criminal Justice (Miscellaneous Provisions) Act, 1997* so as to

restrict clearly the function of the trial judge to identification of the transcript as being a record of the trial. Provision should also be made by statute obviating the requirement of certification in cases where the trial judge has retired or is deceased. (Paragraph 606)

Notices of Appeal

65. It should be noted that there is no express provision in the rules for the acceptance of a notice of application for leave to appeal without grounds or for steps to be taken to pursue a lodgement. The Registrar and the judge in charge of the Court of Criminal Appeal quite properly take the lodged form as constituting the notice of application. Nonetheless, it would be preferable to bring the rules into conformity with the practice. Although the general non-observance of the rules is undesirable, the Working Group acknowledges that the problems relating to the current practice in the Court of Criminal Appeal are inevitable, where the great majority of applicants submit their own applications from prison. The rules – without altering the time limit for appealing – should make special provision for the late acceptance of grounds of appeal. A possible and practical approach would be to introduce a rule to the effect that where the notice of appeal does not contain the grounds, the appeal will not be treated as effective and that no further steps shall be taken to process it until an amended notice is lodged. (Paragraph 610)

Stenography/Recording Technology

66. With the improved recording technology that is now available, delays in production of trial transcripts are avoidable. This is a matter for better management of resources. We believe that the Courts Service should examine the contractual arrangements with agencies providing stenographic services, with a view to the introduction of required levels of performance. A substantial reduction in delays in providing transcripts should make the earlier hearing of appeals achievable. (Paragraph 613)

Court of Criminal Appeal

67. The Working Group does not recommend the abolition of the Court of Criminal Appeal. In fact it believes that the presence on the statute book of sections 3(2) and 4 of the *Courts and Court Officers Act, 1995*, which provide for the abolition of the Court of Criminal Appeal and the transfer of its powers to the Supreme Court, creates confusion about the status of the court. These provisions should be repealed unless the government intends to implement them fully in the short term. (Paragraph 630)

Composition and Organisation of the Court of Criminal Appeal

68. Notwithstanding the recommendation above, the Working Group proposes that a cadre of judges should be dedicated to hearing appeals in the Court of Criminal Appeal for a defined period. In order to achieve the objective of consistency, that period should be at least two years. It should include two Supreme Court and at

least six High Court judges. This should not mean that those judges are entirely removed from the other work of their respective courts. It will be important to strike a balance. The court – composed of one group of three judges drawn from the cadre – should sit for extended periods of perhaps two to three successive weeks to hear listed appeals. (Paragraph 639)

69. It should be possible to implement the foregoing proposals within the terms of the existing legislation constituting the Court of Criminal Appeal. It is true that both the *Courts of Justice Act 1924* and the *Courts (Establishment and Constitution) Act, 1961* appear to imply that a court will be assembled *ad hoc* to hear particular appeals as they arise. To that extent, it is desirable that the statutory foundation of the court be reconsidered. But nothing in the wording of section 3(2) of the 1961 Act prevents the Chief Justice from making arrangements for the selection of a restricted number of judges to do the work of the Court of Criminal Appeal. (Paragraph 641)

Certificates of Leave to Appeal

70. The Working Group recommends that the requirement of leave to appeal be abolished. It does not conform to the reality of the conduct of cases in the Court of Criminal Appeal and performs no meaningful purpose. (Paragraph 645)

71. But the Working Group would draw attention to the provisions of section 5 of the *Criminal Procedure Act, 1993*. This section provides for the summary determination by the Court of Criminal Appeal of applications for leave to appeal which do not show any substantial ground of appeal and of applications for review of an alleged miscarriage of justice or excessive sentence. The Working Group considers that it would be preferable to establish a system whereby the judge in charge of the lists would initiate the procedure following the latter's consideration of the case list. The statute should be amended accordingly. (Paragraph 646)

Appeals to the Supreme Court from the Court of Criminal Appeal

72. The Working Group is of opinion that provision should be made for the Director of Public Prosecutions or the Attorney General to seek a certificate from the Court of Criminal Appeal to appeal to the Supreme Court on a point of law of exceptional public importance. One member of the Group raised the question of whether a decision of the Supreme Court favourable to the prosecution would unfairly cast doubt on an acquittal already ruled upon by the Court of Criminal Appeal. That is of course a possibility, just as it would be in the case of any later decision of a court suggesting that an earlier ruling favourable to the defence had been incorrect. This could also arise in the case of employment of the limited mechanism provided by the *Criminal Procedure Act, 1967*. However, since the justification for such a provision would be the clarification of the law in the public interest, the procedure should not put in jeopardy any decision in favour of the convicted person made by the Court of Criminal Appeal. In other

words, it should be without prejudice to the decision of the Court of Criminal Appeal in the particular case. An alternative mechanism would be to establish a procedure along the lines of the English Attorney General's Reference. It should also be possible to limit indirect damage to the acquittal or other favourable ruling of the Court of Criminal Appeal by using numbers, initials or another mechanism to protect anonymity. Since the original accused person would no longer have a substantive interest, it would also follow that the Court would need to appoint counsel to argue the point against the prosecution. (Paragraph 648)

73. The long-established rule is that an appellant – armed with a certificate of leave to appeal to the Supreme Court on a point of law of exceptional public importance – is entitled on the hearing of the appeal to argue every point in the appeal, including points already rejected by the Court of Criminal Appeal. This is a long-standing anomaly. It seems to offer an appellant affected by an important point of law the facility of re-arguing points determined against him – a facility not available to other unsuccessful appellants. It is even possible for him to abandon the certified point and concentrate on the original appeal points. The Working Group has reached no firm view on this issue but draws attention to its anomalous character. (Paragraph 649)

Conclusions on Sentencing Guidelines

74. The Working Group is of opinion that there is a need for some system of objective guidance for sentencing judges at all levels. The Working Group has not been able to study the matter in sufficient depth to enable it to make final recommendations. It takes the opportunity of drawing attention to the possible options which exist to promote consistency in the approach of the courts to sentencing at first instance, bearing in mind the differences in the appellate arrangements for the indictment and summary jurisdictions. The solution could be found within the current arrangements, through effective dissemination within those jurisdictions of decisions which are regarded as being authoritative in nature. The selection on appeal of a potential benchmark case or a group of such cases for the purposes of a detailed judgment could be of considerable assistance to trial judges. It would also serve to explain to practitioners and the wider public the reasoning underlying sentencing generally. Borrowing from the experience of other jurisdictions, another option would be to establish by statute a body having the function of providing sentencing guidelines. The remit of such a body, as demonstrated by the respective models cited above, might be more prescriptive in nature – thus possibly encroaching upon judicial discretion. Alternatively it might facilitate greater flexibility, establishing norms from which, having regard to the circumstances, a trial judge could depart. Membership of the body could be confined to members of the judiciary, or could include a wider representation from experts or representatives of interested agencies or other bodies. The Working Group suggests that the entire issue of sentencing warrants independent study. (Paragraph 670)

Appeals by the Prosecution

75. The Working Group is satisfied that there is a compelling case for extending the range of situations in which the prosecution can have a point decided at a higher level. In the first instance, this could be achieved by extending the range of points of law covered by section 34 of the *Criminal Procedure Act, 1967*. Except for the fact that it would be without prejudice to an acquitted person, the procedure would be similar to that under section 2 of the *Summary Jurisdiction Act, 1857*. (Paragraph 692)

76. If this procedure were to be extended, it would be desirable that the acquitted person have the right to retain counsel to present argument on his behalf. This is the case under the English Attorney General's Reference. Furthermore, his anonymity would also have to be maintained. This could be done by denoting the case by number – similar to the English system. (Paragraph 693)

The Criminal Trial Process

Summary Jurisdiction

Trial Procedure Generally

77. The Working Group considers that the flexibility in approach permitted by the jurisprudence sufficiently elucidates the manner in which summary trial of offences should be conducted and does not recommend any greater elaboration – whether by statute or rule of court – of the procedures in this area. (Paragraph 709)

Ascertainment of Plea

78. The Working Group would recommend that Order 23, rule 1 of the District Court Rules be amended so as to require the District Court to ascertain expressly the accused's plea in "summary only" cases, as provided for in Order 24, rule 1 in relation to indictable cases tried summarily. (Paragraph 710)

Indictment Jurisdiction

Period for Service of Book of Evidence

79. The Working Group recommends that the existing 42-day period set for service of the Book of Evidence should be extended to 90 days. Section 4B(3) of the *Criminal Procedure Act, 1967*, as inserted by the *Criminal Justice Act, 1999*, should be amended by the substitution in sub-paragraph (a) for "there is good reason for doing so" of "there is good reason, in the special circumstances of the case, for doing so". It has been brought to the Working Group's attention that in a small number of cases the prosecution will at all times have intended that the case be disposed of summarily so that no Book of Evidence has to be served but is taken by surprise when the judge declines jurisdiction or the accused elects for jury trial. In the view of the Working Group, depending on the facts, such circumstances could amount to sufficient reason to extend the time.

Nonetheless the 90 days here proposed should continue to run from the date of first appearance in court. (Paragraph 726)

Taking of Depositions

80. The Working Group agrees that the requirement that depositions be taken in the District Court is cumbersome and can contribute to significantly delaying proceedings. The taking of depositions is undoubtedly an administrative rather than a judicial function. But the taking of depositions may be an occasion for requests for rulings in relation to evidence which would require to be dealt with by a judge. The Working Group recommends that section 4F of the 1967 Act be amended so as to provide that evidence directed to be taken under that section – whether by way of sworn deposition or by video link – be taken before a judge of the court to which the return for trial has been made. (Paragraph 727)

Evidence by Video-Link

81. The Working Group considers that the existing facility for the giving of evidence by live television link should be extended – by leave of the court to which the return for trial has been made – to encompass the evidence of any witness other than the accused. This is subject to the condition that the accused consents and the court is satisfied that it would not be contrary to the interests of justice for the evidence to be taken in that manner. Clearly the extension of this facility has implications for investment by the Courts Service and possibly by the prosecuting authorities in audio-visual links and video-recording facilities. However, the Working Group is of the view that the costs of such investment are likely to be recouped to the Exchequer in the medium term from savings in travel and subsistence, quite apart from the burden on local availability of Garda resources which it would alleviate. (Paragraph 739)

Pre-Trial Procedures on Indictment

82. The Working Group did not see a basis for contemplating alteration of the present constitutionally-ordained balance between the rights of the accused and the legitimate interests of the prosecution in criminal proceedings. Accordingly, the Working Group did not entertain the proposition that any change be made to the current extent of the disclosure obligations of the defence, which are at present effectively limited to alibi defence and – in the case of the offence of membership of an unlawful organisation – notification of supporting witnesses. By the same token, the Working Group does not consider that a pre-trial hearing mechanism should be accompanied by a facility for the court to impose sanctions or penalties for failure to cooperate with current procedures. The introduction of sanctions designed to put pressure on an accused or his legal representative to reach agreement with the prosecution on an issue or to comply with a timetable, would probably operate to redraw the balance adversely for the accused. (Paragraph 772)

83. On the other hand, there is already sufficient statutory provision for an accused to benefit from an early plea of guilty. Aside from this, it has been represented

to the Working Group that early guilty pleas are significantly influenced by the degree of disclosure by the prosecution of the nature and extent of the evidence against the accused. A pre-trial hearing should improve the conditions necessary for the defence to make an informed assessment of the arguments for and against an early plea. (Paragraph 773)

84. A pre-trial procedure has the potential to reduce the need for determination in the course of trial – by way of a *voir dire* – of issues of admissibility of certain categories of evidence. Clearly some admissibility issues may arise during or may appropriately only be resolved at the trial itself. Others – such as the determination of the validity of a warrant or other legal instrument or of evidence within a chain – may be disposable in advance of trial.A pre-trial hearing should provide an effective vehicle for this. (Paragraph 774)

85. The Working Group recommends that a Preliminary Hearing be introduced in all cases on arraignment with the following functions:

- to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations;
- to identify areas in which evidence should be agreed or admitted under the *Criminal Justice Act, 1984*, sections 21 and 22 including admission of expert reports;
- to identify any evidence which might require to be taken by video-link and to make arrangements for the taking of such evidence;
- to ascertain any other arrangements which may have to be made regarding information technology, use of interpreters or other facilities;
- to enable the determination of those types of issue of admissibility of evidence which by their nature are capable of being dealt with prior to trial;
- to receive and deal with a plea or fix a hearing for sentencing;
- to identify any issue of insanity or fitness to plead which may arise; and
- to enable the court to establish the likely length of the trial. (Paragraph 775)

86. The above list is not intended to be exhaustive. Other applications – for example for a stay or dismissal, transfer of trial venue or for separate trials, or for transfer of an indictment from one indictment jurisdiction to another – may be made at any stage up to and including trial. But the Preliminary Hearing would serve as a means of concentrating the efforts of prosecution and accused in resolving those issues which it would be proper and feasible to finalise in advance of trial. An example of such a matter is the taking of depositions. Identifying the need for the taking of depositions at such a hearing sufficiently in advance of the trial date should assist in avoiding postponement of the trial. (Paragraph 776)

87. The Working Group is of the view that cooperation by an accused – having received legal advice – with the objectives of the Preliminary Hearing should be recognised in law as a factor to which the trial court may give consideration when imposing sentence in the event of a conviction in the same way as it may

take into account the stage at which a plea of guilty is made. (Paragraph 777)

88. The Preliminary Hearing should be introduced on a pilot basis, in one court of the Circuit Court in Dublin, in one Circuit of that Court outside Dublin and in one court of the Central Criminal Court. For purposes of continuity and to assist in monitoring of the pilots, it is important that specific judges and court registrars be assigned to each pilot. The pilot exercises should involve the logging of data on the actual timescales for specific stages of the pre-trial process, on the frequency of adjournments and on the level of costs incurred. (Paragraph 778)

89. The Preliminary Hearing should take place at an early stage after arraignment – ideally within two weeks thereafter. While desirable, it may not be practical to expect that the hearing be before the trial judge. Furthermore in view of the limited judicial resources in Circuits outside Dublin – and the different listing arrangements for trials on those Circuits – it is acknowledged that it may not be feasible to hold Preliminary Hearings outside Dublin. But the holding of the Preliminary Hearing within a short period of arraignment is considered essential in order to generate the benefits of early identification of issues. Quite apart from this, the fixing of such a hearing close to the trial date would be counterproductive, in that it would encourage the deferring to the later hearing of pleas which currently are made at arraignment stage. The Working Group suggests that the timing of the hearing in the Circuit Court and Central Criminal Court should for the duration of the pilot exercises be fixed by practice direction by the President of the Circuit Court for that court. In the higher courts the timing should be fixed by the President of the High Court in consultation with the judge in charge of the list in the Central Criminal Court. The pilots should identify the optimal date for the hearing which should be fixed – whether by rule of court or further practice direction – for the longer term. (Paragraph 779)

90. The full cooperation of both branches of the legal profession will be essential to the success of the pilots. Also of significance will be the function of the judiciary in demonstrating the value of the project. In this latter regard, there may well be a role for the Judicial Studies Institute in providing training and inviting judges from neighbouring jurisdictions to impart their experience in operating pre-trial regimes in criminal cases. The retention of suitably specialised staff from one of the University Law Faculties to conduct and report on the monitoring exercise should be considered with a view to ensuring an expert and objective evaluation of the exercise. (Paragraph 780)

91. It is important that the Preliminary Hearing be attended by counsel who will be (a) familiar with the case; (b) scheduled to attend the trial and (c) sufficiently instructed in the matter as to indicate the client's position, including the entry of a plea. This in itself presupposes that counsel will have had an opportunity to be briefed on the case by the instructing solicitor. In the case of legally-aided accused persons, this would require that arrangements would permit the payment of an appropriate fee to counsel for the hearing. Provision under the

criminal legal aid scheme to involve counsel prior to briefing for hearing would enable evaluation of the case and facilitate an early plea where appropriate. While this may be seen as generating additional expense to the exchequer, the Working Group is of the view that the possible savings from avoidance of collapsed or prolonged trials justify the expense. (Paragraph 781)

Electronic Recording of Interviews

92. The Working Group considers that the active utilisation of electronic recording by audio-visual means should be promoted in the interviewing of all suspects – at least in cases of offences triable on indictment. The Working Group understands that research into recording of interviews in England did show that too many police interviews were poorly prepared and ineptly handled. This study also emphasises the importance of adequately resourced training in the proper use of equipment and presentation of the record of the interview. (Paragraph 789)

Rules of Criminal Procedure

93. The Working Group is aware that the Committee on Court Practice and Procedure is at present considering the future shape and functions of the courts' rules-making committees, and does not wish to encroach upon those deliberations. However, the Working Group is convinced of the need for a comprehensive and coherent code of rules of criminal procedure – an object which could be achieved under the existing rules-making arrangements by appropriate liaison between the three jurisdiction-based rules committees of the courts. (Paragraph 791)

Statistics

94. It should be a key responsibility of line-managers within the operational area of the Courts Service to ensure – both by training and through periodic verification and review, that the practice of recording of statistics by court staff is consistent, comprehensive and accurate. Line-managers should be accountable to their respective Directors of Operations for the quality and timely production of statistics generated by their offices or units. The Working Group notes the personal interest taken by the Chief Executive Officer of the Courts Service in this issue, which is indeed of sufficient importance to merit that it be ultimately overseen by the Chief Executive Officer. (Paragraph 831)

95. Changes should not be made to the legal system without an essential body of predictive information. Resolution of debate on key issues of expedition, fairness and economy in the functioning of the courts will often rest upon interpretation of statistical information. It is therefore essential that the Courts Service – as the sole custodian of the data in many cases– maintains its awareness through liaison with other agencies, interest groups and research institutions of the areas in which data needs to be captured and retrieved. (Paragraph 834)

CHAPTER THREE

Summary Jurisdiction

The Constitutional Background

96. The Working Group has proceeded on the assumption that it must work within the present constitutional framework. In any respect where the Constitution provides for the nature, structure or jurisdiction of the courts, the Working Group has sought to formulate solutions falling within those parameters.

97. Where the trial of criminal matters is concerned, the Constitution effectively limits itself to providing for jury trial and its exceptions. Article 38 of the Constitution provides:

> "1. No person shall be tried on any criminal charge save in due course of law.
> 2. Minor offences may be tried by courts of summary jurisdiction.
> 3. 1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
> 2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.
> 4. 1° Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.
> 2° A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.
> 5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.
> 6. The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article."

98. This reproduces the essence of Article 72 of the Constitution of Saorstát Éireann. It provided:

> "No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal."

99. Considered against the historical background, it is clear that both in 1922 and in 1937, the framers of the respective constitutions intended to incorporate into the constitutional structure of the State the existing division of modes of trial into summary trial and trial on indictment. The notions of jury trial and summary jurisdiction did not have to be defined. They represented existing well-established institutions of the law.

100. It will be noted that, while the Constitution enshrines expressly the institution of jury trial in mandatory terms, the trial of minor offences by courts of summary jurisdiction is optional. Thus, while the State is obliged to provide for the trial by jury of all non-minor offences, it may also decide that a minor offence is triable by jury. The notion of indictable offence is not a constitutional one: it is the statutory designation of an offence that is to be tried by jury. It may – for the reason given – include minor offences. Furthermore, even summary offences may be added to an indictment if they arise out of the same set of facts to which the other counts on the indictment relate.[20]

101. In essence therefore, while a person accused of a non-minor offence must be tried by jury, a person accused of a minor offence has no corresponding right to be tried summarily. The vast majority – probably about 95 percent – of all criminal offences are tried summarily in the District Court, the only court of summary jurisdiction.

102. For a better understanding of the nature of courts of summary jurisdiction as well as of the particular jurisdictional issues and problems that the Working Group has enquired into, it is necessary to trace the origins of that mode of trial and the legal provisions which governed it historically.

Origins and Development of Summary Jurisdiction

103. There are two preliminary points which cast some light on the original nature of summary jurisdiction. Firstly, it was from its beginnings and remained at all times entirely a creature of statute. Blackstone defined a summary proceeding as "such as is directed by several acts of parliament… for the common law is stranger to it…"[21] Unlike the institution of the jury, it is not a product of the common law. Secondly, Justices of the Peace exercised, for many centuries, extensive administrative powers alongside their rather more limited criminal functions.

20 This is provided by section 6 of the *Criminal Justice Act, 1951*. In *The State (Cahill) v President of the Circuit Court and the AG, and The State (AG) v District Justice Fitzpatrick* [1954] IR 128, this section was interpreted by Murnaghan J. in the Supreme Court. He held that once an order had been made sending forward for trial on indictment for the major charge, then the summary offences immediately became indictable. The Court commented that as the indictment is drawn up after the return for trial, it therefore enabled the Attorney General (the D.P.P. since 1975) to add the summary offences to the indictment.

21 Blackstone, William, *Blackstone's Commentaries*, Volume IV, (12th ed.) (Edward Christian, ed.) (London: Strahan and Woodfall, 1793-1795), at page 280.

104. It is unnecessary to trace the origins of the institution of Justice of the Peace to its earlier late mediaeval roots which go back possibly as far as 1195. A statute of 1361[22] first used the title – though an earlier Act of 1327 had spoken of "good and lawful men" to be appointed in every county to "guard the peace."[23] They were appointed by the King's special commission under the Great Seal. The commission delimited their powers. It normally applied to the area of the county or "shire."

105. The justices were not required to be legally qualified and were in effect, unpaid. They were the predecessors of the lay magistracy, which still exists in England and Wales as well as Northern Ireland. Being appointed by the Crown, they could be removed from office at the discretion of the Crown.

106. Over the centuries, such an array of civil and other powers and duties were added to justices that it has been said that "[a] vast and confused mass of legislation which defies analysis conferred wide and very miscellaneous powers."[24] In the 19th century these powers were incorporated in the modern system of local government.

107. From the outset, the criminal powers of the justices were far from exclusively or even principally judicial. The primary function of "keeping the peace" authorised the Justice of the Peace to take such actions as suppressing riots and affrays. "Their constant function was to take indictments of felonies and misdemeanours, and to hold the accused until trial by royal judges."[25] This is the function of committing for trial on a charge of an indictable offence.

108. The justices could exercise their primary criminal jurisdiction – the power to try a person and to convict or acquit, either summarily at petty sessions or on indictment – where the justices presided with a jury at quarter sessions. Each statute would decide whether they were to sit as a bench of two or more or whether they might sit as a single justice. The more serious crimes were tried at quarter sessions. Thus, the powers of quarter sessions overlapped to some extent with those of the assizes, though the latter had exclusive power to try murder and other especially serious offences.

109. In the very earliest period, justices' powers under summary jurisdiction were very limited both as to the nature of the offences triable and as to the penalties they could impose. One of their best-known functions was the enforcement of the game laws.

110. The following passage from the report of the James Committee in 1975 paints the picture very well:[26]

> "Until the middle of the nineteenth century the normal mode of trial for criminal offences was trial on indictment by judge and jury. Justices had an extensive criminal jurisdiction when

22 34 Edward III, c.1. According to Bolton, Sir Richard, *A Justice of Peace for Ireland* (Michael Travers, ed.) (Dublin: Leathley and Moore, 1750), at page 3, "In anno domini 1327 Justices or Commissioners of the Peace were first created ordained and by the Statute of 1 Ed 3 cap.16 by which statute it was ordained that in every shire of the realm certain persons should be assigned… to keep the peace, and their authority was enlarged by the Statutes of 4 Ed. 3. c.2, 18 Ed. 3 c.2 and 34 Ed. 3 c.1."

23 For a fuller account, see Manchester, A. H., *Modern Legal History* (London: Butterworths, 1980).

24 Plucknett, T. F. T. (ed.), Taswell-Langmead's Constitutional History (11th ed.) (London: Sweet & Maxwell, 1960).

25 *Ibid*, at page 126.

26 Home Office, Lord Chancellor's Office, *Report of the Interdepartmental Committee on The Distribution of Criminal Business between the Crown Court and Magistrates Courts* (Cmnd. 6323) (London: HMSO, 1975), at pages 7-8, paragraph 12.

sitting in quarter sessions with a jury, but their summary jurisdiction was very limited. From early times different statutes had authorised one, or sometimes two, justices to inflict penalties on certain offenders, but these measures, of which the Statutes of Labourers and the Poor Laws were examples, were often concerned with the transgression of administrative rules rather than with criminal offences proper. The criminal matters that justices were empowered to deal with 'out of sessions' were characteristically minor offences and disturbances of local order. An Act of Elizabeth I, for example, empowered a single justice to deal with robbers of gardens and orchards and persons proved to have broken hedges and fences and committed other similar petty offences. If the offender did not make sufficient compensation to the victim, the justices could order him to be whipped. In 1746 justices were empowered to fine profane swearers: one shilling for labourers, seamen and soldiers and five shillings for gentlemen. In the following year another Act enabled a single justice to commit to a house of correction for one month's hard labour an apprentice found to have committed certain misdemeanours against his employer. There were many similar provisions in other Acts. In particular, over the years there was a series of statutes conferring on justices out of sessions power to deal with rogues, vagabonds and 'sturdy beggars'. A typical power was that of committing vagrants and petty offenders to houses of correction until the next quarter sessions and ordering them to be whipped."

The Justices in Ireland

111. The shiring of Ireland – particularly in the 16th century – on the model of English government, facilitated the introduction of the system of justices of the peace.[27] The Lord Chancellor appointed them – though generally on the advice of members of the landowning class. They were no less obliged to perform a policing role than their English counterparts, perhaps more so.

112. It is clear that many magistrates engaged enthusiastically in the enforcement of the law outside court.[28] The powers of justices to sit alone as judges of summary jurisdiction were limited prior to the 19th century. As in England, they normally presided at quarter sessions and therefore with a jury.[29] In reality, it was not until the 19th century that summary jurisdiction was put on a more coherent footing.

113. The Magistrates' Courts in Ireland were properly established as the courts of petty sessions only in 1827.[30] From that time, they were required to sit in regular petty sessions in a "public justice room." In earlier times, justices habitually sat in their homes. There was also a paid clerk to keep a written record.

114. The powers and jurisdictions of the Dublin Divisional Justices emanated principally from the *Dublin Police Act, 1842*[31] which had its own procedures. This disparity was remedied by section 4 of the *Summary Jurisdiction (Ireland) (Amendment) Act, 1871* which conferred the powers of the ordinary Justices of the Peace on the Dublin Divisional Justices.

27 See Crawford, Jon G., *Anglicising the Government of Ireland – The Irish Privy Council and the Expansion of Tudor Rule, 1556–78* (Dublin: Irish Academic Press, 1993).

28 On the history of the Justices of the Peace in Ireland, see generally Garnham, Neal, *The Courts, Crime and the Criminal Law in Ireland, 1692–1760* (Dublin: Irish Academic Press, 1996).

29 Garnham, *ibid*, at page 77.

30 *Petty Sessions (Ireland) Act, 1827* (7 & 8 Geo. IV, c.67).

31 5 & 6 Vict. c.24.

115. The *Constabulary (Ireland) Act, 1836*[32] provided for the appointment of Resident Magistrates (R.M.s), paid justices who did not need to be legally qualified. The R.M.s were even more overtly concerned with the maintenance of law and order than the lay justices.[33] Many had served as soldiers or policemen. They worked closely with the Royal Irish Constabulary, took an active part in the suppression of disturbances – including the "reading of the Riot Act" – even to the extent of directing the military. They were very much seen as representatives of the landowning class, though this was ameliorated somewhat towards the end of the century with the appointment of the 'Morley' magistrates, many of whom were Catholics.[34] The R.M.s did, of course, also sit both at petty and quarter sessions with the unpaid justices.

116. Following the first meeting of Dáil Éireann in 1919, a new system of courts was established by the Republicans with the intention of ousting the jurisdiction of the ordinary 'British' courts.[35] The Parish Court was created to deal with petty crime and minor civil matters[36] and above that, the District Court was established to hear appeals and more important civil and criminal matters.[37] A Rules Committee was established and a 'Circuit Court' with an unlimited criminal and civil jurisdiction was created as well as a 'Supreme Court' in Dublin. By 1921, there were at least 900 Parish Courts and over 70 District Courts. Officially these Courts had no recognition, as may be illustrated by the Bar Council's guidelines. It passed a resolution stating that it would be unprofessional for its members to appear before the Dáil Courts, but if they did so, no action would be taken against them. Despite this, these Courts flourished to such an extent that when Saorstát Éireann was established in 1922, there were in fact two systems of courts in place: the Dáil Courts and the Supreme Court of Judicature in Southern Ireland – alongside the assizes and quarter sessions, County Courts and courts of petty sessions. The time had come for the new State to decide what system was most suited to Irish needs. In order to ascertain this, the Government appointed a Judiciary Committee.

117. Reference has been made in the introductory chapter to the recommendations of the Judiciary Committee. Insofar as summary jurisdiction was concerned, the Committee recommended that a District Court be established to replace the petty sessions courts, presided over by a District Judge sitting alone, with jurisdiction to hear minor offences and to dispose of preliminary issues for trial by jury. It recommended that a number of offences be disposed of by the District Court: larceny, embezzlement, false pretences and receiving money or goods up to the value of £10, assault occasioning actual bodily harm, indecent assault with a maximum sentencing jurisdiction of six months, malicious damage up to a value of £20 or unlimited jurisdiction if the accused consents. The sentencing limit would be one year's imprisonment whereas the limit would be six months for burglary and housebreaking. Terms of two months' imprisonment could be handed down for less serious offences. These offences could be sent forward to the Circuit Court if the District Justice wished to exercise his discretion to do so.

32 6 & 7 Wm. 4, c.13.

33 See Bonsall, Penny, *The Irish RMs* (Dublin: Four Courts Press, 1998).

34 Appointed during the tenure of John Morley, (Liberal) Chief Secretary for Ireland, 1892-5.

35 As Sinn Féin created these courts, they were known as the "Sinn Féin Courts" and also as the Dáil Courts.

36 *Rules and Forms, Parish and District Courts* (Saorstát na hÉireann: Department of Home Affairs, 1921), at page 4.

37 *Ibid,* at pages 5-6.

118. In August of the same year, the *Dáil Éireann Courts (Winding Up) Act, 1923* was enacted, which provided for the appointment of Judicial Commissioners to dispose of cases pending before the Dáil Courts and for other measures with a view to winding up those courts.

The Foundations of the District Court

119. During the transitional phase between the signing of the Treaty in December 1922 and the passing of *The Courts of Justice Act, 1924*, the new State acted to establish a new court of summary jurisdiction staffed by properly qualified persons. On 23rd August 1922, the government instructed the R.M.s that they should consider themselves on leave. This was called the "Notice to Quit." At the end of September, it announced the termination of all commissions of the peace granted by the former British administration. It then used the power conferred by the *Constabulary (Ireland) Act, 1836* and in effect, replaced all the existing magistrates with 27 persons, who were described as District Justices.

120. By virtue of section 6 of the *Adaptation of Enactments Act, 1922*, "every power, authority and duty conferred or imposed by any British Statute" either on a Justice or on two or more Justices acting together or on an R.M. was thenceforth to be exercisable or to be performed by one District Justice.

121. The *District Justices (Temporary Provisions) Act, 1923* ("the Act of 1923"), section 2(2) provided:

> "A District Justice sitting in and holding a District Court pursuant to this Act shall have all the powers, jurisdiction and authority which were immediately before the 6th day of December, 1922, vested by statute or otherwise in a Justice of the Peace sitting in Petty Sessions."

122. Thus, only the strictly summary jurisdiction powers of the former justices and none of their functions as justices presiding in quarter sessions were transferred to the District Justices. Finally the District Court was formally established by section 67 of *The Courts of Justice Act, 1924*. Section 78 confers – by way of transferred jurisdiction – all jurisdiction exercised by virtue of the Act of 1923 or under any other Act then in force, as well as that which was exercisable by the Divisional Justices of the Dublin Metropolitan Police District along with the other jurisdiction.[38]

123. The present District Court came into existence by virtue of section 5 of the *Courts (Establishment and Constitution) Act, 1961*. Section 5 of the *Courts (Establishment and Constitution) Act, 1961*, provided for the establishment of the District Court in accordance with the present Constitution: "... a Court of First Instance, which shall be called the District Court, shall stand established."

124. Upon its establishment, all jurisdiction in criminal cases vested in the former District Court became vested in the new court.[39] So the present District Court

38 See Kennedy C.J. in *R (Moore) v O'Hanrahan* [1927] I.R. at page 416, for an explanation of these matters.

39 *Courts (Supplemental Provisions) Act, 1961*, sections 33 and 48.

jurisdiction can also be identified only by reference to the pre-existing legislation. The jurisdiction enjoyed by its predecessor derived from what were collectively called the Summary Jurisdiction Acts. These comprised:

- The powers, jurisdictions and authorities which prior to 6 December 1922 were vested in Justices of the Peace sitting at petty sessions;[40]
- The powers, authorities and duties vested in a Justice of the Peace when not sitting at petty sessions. These powers derived mainly from the *Petty Sessions (Ireland) Act, 1851*, which consolidated and revised the Acts regulating proceedings at petty sessions and the duties and powers of Justices of the Peace out of quarter sessions when dealing with cases of summary jurisdiction, and from the various subsequent Acts amending and extending those powers;
- All jurisdiction vested in the Divisional Justices of the Police District of Dublin Metropolis. The *Petty Sessions (Ireland) Act, 1851*, did not extend to the Dublin Metropolitan Police District when enacted (section 41);
- All jurisdiction vested in a Justice of the Peace by the *Towns Improvement (Ireland) Act, 1854*. The Act applied only to towns comprising a population of 1,500 inhabitants or more. It had its own particular procedures for dealing with petty offences against public order and the preservation of health and cleanliness in towns;
- All jurisdiction conferred by any statute on the former District Court.

The Criminal Jurisdiction of the District Court

125. The District Court is a court of local and limited jurisdiction comprising a President and 52 District Judges. The country is divided geographically into the Dublin Metropolitan District and 23 provincial Districts. Each provincial District is subdivided into District Court Areas. There are 202 such areas with a scheduled court sitting in each. The business of the District Court is administered by 42 District Court offices or clerkships. Since the abolition[41] of the preliminary examination procedure, the principal aspects of the criminal jurisdiction of the District Court are its function as a court of trial. The District Court as a court of primary criminal jurisdiction has power to try persons charged with offences, which are generally classified under three headings:

- Offences triable summarily only;
- Offences which may be tried either summarily or on indictment at the discretion of the Director of Public Prosecutions – but subject to the overriding right of the District Judge to decline jurisdiction. These are usually called hybrid offences;
- Indictable offences which are triable summarily, but subject to conditions, in particular the consent of both the Director of Public Prosecutions and the accused, usually called either-way offences.

126. In addition to the functions of the District Court as a court of trial, the following matters need to be considered:

40 Section 77, *The Courts of Justice Act, 1924*.

41 By the *Criminal Justice Act, 1999*.

- The process of appeal at the instance of the accused, which in most cases[42] is by way of complete rehearing to the Circuit Court[43] (section 18 of the *Courts of Justice Act, 1928*);
- The appeal by way of Case Stated pursuant to section 2 of the *Summary Jurisdiction Act, 1857*, as extended by section 51 of the *Courts (Supplemental) Provisions Act, 1961*;
- The system for returning of persons charged with indictable offences to the Circuit Court or the Central Criminal Court, as the case may be.

127. The Working Group considers that it must give particular consideration to the following aspects of the criminal jurisdiction of the District Court:

- The limits of the sentencing jurisdiction of the court as they exist at present;
- The nature, rationale and justification for the distinction between the procedures applicable respectively to hybrid and either-way offences.

Sentencing Limits: Imprisonment

Prior to 1922

128. Neither the former courts of petty sessions, nor since 1922, the District Court, have been subject by statute to any general limit as to the sentence which could be imposed on conviction for a summary offence. The law has not generally imposed any limit on the sentence that could be imposed upon summary conviction, whether in the case of the former courts of petty sessions or since 1922, the District Court. The only generally applicable limit is that which has been applied since the middle of the 19th century in respect of indictable offences triable summarily. As will appear from the analysis of that regime, courts of summary jurisdiction could not originally sentence a person convicted of such an offence for a term in excess of six months.

129. As already stated,[44] summary offences can be created only by express statutory provision. Each statute which created a summary offence stipulated an individual maximum sentence. In many instances, only a fine could be imposed. In those cases, the statute normally provided for a term of imprisonment in default of payment.

130. Sentences were normally short. Each Act laid down maximum sentences for each offence. Occasionally there was a general provision for a maximum term of imprisonment where no specific term was set. An example of this is in the *Dublin Police Act, 1842*. This Act created a large number of misdemeanours and other offences triable summarily, many of which were public order offences. In only one case – keeping a gaming house – was a sentence of as much as six months or a £100 fine – then a very substantial sum – authorised. Section 36 provided for a fine of up to £5 or up to one month's imprisonment for any offences created by the Act for which no specific penalties were laid down.

42 If an appeal is against sentence only, the Circuit Court is not entitled to rehear the entire case, except to such extent necessary for the purpose of adjudicating on the correct sentence which should be imposed in the particular circumstances (see section 50, *Courts (Supplemental Provisions) Act, 1961* and *The State (Aherne) v Cotter* [1982] I.R. 188 at page 210).

43 Commonly referred to as the "Circuit Criminal Court".

44 See paragraph 103 *supra*.

131. Following the more systematic organisation of summary jurisdiction from 1827, a series of statutes during the middle period of the 19th century created a large number of new summary offences. In general, these enactments specified short maximum sentences of imprisonment. An offence of unlawfully assaulting or beating anyone carried a maximum penalty of two months' imprisonment and an offence of aggravated assault on a boy under 14 or on a female of any age, provided for a penalty of up to six months' imprisonment.[45]

132. The *Summary Jurisdiction (Ireland) Act, 1851*[46] created specific offences with a variety of terms of imprisonment, ranging from seven days to three months. That Act resorted principally to an extensive use of fines. The offence of assaulting a police officer in the execution of his duty carried a term of imprisonment of up to six months or, for a second conviction occurring for a similar assault within two years, up to nine months' imprisonment.[47]

133. The harshness of contemporary prison conditions prior to their reform later in the century, has been proffered as an explanation for the tendency to limit terms of imprisonment for the newly created summary offences. Lord Goddard remarked that: "In the days when shot drill, crank drill and the tread mill were common everyday accompaniments of imprisonment, at least of imprisonment with hard labour, a sentence of two years' imprisonment was, no doubt, regarded as a very severe sentence…"[48] However, since extremely harsh sentences were frequently prescribed at the time, for indictable offences, the limitation of punishment for summary conviction must have another explanation.

134. In any event, some exceptions to the generally short periods of imprisonment existed. The *Malicious Injuries Act, 1828* authorised a Justice of the Peace to impose up to 12 months' imprisonment upon summary conviction for an offence of destroying trees under the value of £5.[49] This was one of the maximum terms available in the courts of summary jurisdiction for a single offence with no previous convictions and it may have been one of the first instances of a 12-month penalty being available in a summary court.

135. In respect of consecutive sentences, in the courts of summary jurisdiction, the *Criminal Justice (Administration) Act, 1914* provided that:

> "where two or more sentences [were] passed… [and] ordered to run consecutively the aggregate term of imprisonment shall not exceed six months, unless such sentences included at least two sentences for indictable offences dealt with summarily by consent or on a plea of guilty, in which case the aggregate term of imprisonment shall not exceed 12 months."[50]

136. In summary, in the great majority of cases prior to 1922, maximum terms of imprisonment were of six months or less. But there were important exceptions. Punishment for some malicious damage offences could rise to 12 months. Prior convictions could, in certain cases – some larcenies and any cases of indictable

45 Sections 42 and 43 of the *Offences against the Person Act, 1861* (24 & 25 Vic. c.100), respectively.

46 14 & 15 Vict. c.92.

47 Section 12 of the *Prevention of Crimes Act, 1871* (34 & 35 Vict. c.112).

48 *R. v Morris* [1951] 1 K.B. 394.

49 See section 20, 9 Geo. 4, c.56 (*circa* 1828).

50 Section 18 of the 1914 Act was repealed by the *Criminal Justice Act, 1951*, which instead provided in section 5 that "where a sentence of imprisonment is passed on any person by the District Court, the Court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously sentenced, so however that where two or more sentences passed by the District Court are ordered to run consecutively the aggregate term of imprisonment shall not exceed 12 months," thereby removing the requirement that the offences included two indictable offences triable summarily.

offences triable summarily – justify sentences of up to two years.

After 1922

137. As has been seen, the basic powers of the courts of petty sessions were transferred to the District Court on its establishment. However, there were a number of specific provisions regarding penalty.

138. *The Courts of Justice Act, 1924*, by virtue of section 77B, made a number of offences triable summarily. These were: larceny; receiving; embezzlement; false pretences; malicious damage to property, where the money or property involved did not exceed £20 in value; assault occasioning actual bodily harm; indecent assault; burglary or housebreaking, or attempts at either; and riot or unlawful assembly.[51] The sentence available to the court on summary disposal was limited to six months' imprisonment, with or without hard labour. The newly established District Court could impose a term of up to 12 months when sentencing for two or more offences to run consecutively.[52] There seems to have been a general legislative policy, or an assumption, that the District Court's sentencing power should be limited to a maximum term of six months' imprisonment. By way of illustration, the *Criminal Law (Amendment) Act, 1935*, created a maximum term of six months' imprisonment for an offence tried under the Act, such as defilement of a girl between ages 15 and 17, or attempted unlawful carnal knowledge.[53]

139. Prior to the passing of the *Criminal Justice Act, 1951* (discussed below), a term of 12 months' imprisonment for a summary offence appeared only exceptionally – and for no obvious reason.

140. The *Public Safety (Punishment of Offenders) Act, 1924*, which applied in Ireland for one year,[54] granted the District Court jurisdiction to impose a term of imprisonment of up to 18 months: 12 months for an offence that was scheduled under the Act, plus a further term of six months, to commence at the expiration of the previous term of imprisonment if a fine imposed was defaulted on. This legislation was enacted only because of unrest and civil disturbance. The penalty under the Act was challenged unsuccessfully in *The King (Eustace) v District Justice of County Tipperary*,[55] where the Court held that an offence under section 9 was a minor offence and the fact that the penalty had been increased did not alter the character of the offence.[56] Lavery J. criticised this decision in *Melling's* case,[57] as did Kenny J. in *Conroy's* case.[58]

141. A term of 12 months' imprisonment was authorised on summary conviction by:

- section 6(6)(a) of the *Supplies and Services (Temporary Provisions) Act, 1946*;[59]
- section 8 of the *Emergency Powers (Continuance and Amendment) Act, 1942*;
- section 3 of the *Fisheries (Amendment) Act, 1944*.[60]

142. Section 4(1) of the *Criminal Justice Act, 1951* (as amended by section 17 of the *Criminal Justice Act, 1984*) established the punishment for scheduled offences tried

51 This list was extended by section 5 of the *Criminal Law (Amendment) Act, 1935* and by section 24 of the *Enforcement of Court Orders Act, 1926*.

52 Under section 18 of the *Criminal Law (Administration) Act, 1914*, which applied until 1951.

53 Sections 5 and 2 respectively.

54 In force from the 21st April 1924 to the 20th April 1925.

55 [1924] 2 I.R. 69.

56 The Supreme Court, in *Melling v Ó Mathghamhna* [1962] 1 I.R. 1, did not agree with the view that the penalty did not alter the character of the offence. It was of the opinion in *Melling* and in *Conroy v Attorney General* [1965] 1 I.R. 411 that the severity of the penalty is one of the indicia of a minor offence.

57 *Melling v O'Mathghamhna*, *ibid*, at page 17.

58 *Conroy v Attorney General* [1965] I.R. 411, at page 423.

59 The Act, being temporary, expired on the 31st December 1947, having been in force since the 2nd September, 1946.

60 Amending section 26 of the principal *Fisheries Act, 1939*; the 1944 Act also provided for terms of imprisonment of six months, on summary trial. There was no debate about the increase on the usual ceiling of six months for summary trial.

summarily as a fine not exceeding £1,000 (€1,269.74) or a maximum term of imprisonment of 12 months, or both. This represented a considerable departure from the legislative policy which had been followed since the foundation of the State and in the specific case of indictable offences triable summarily – for almost a century.

143. Statutes creating new summary offences have more recently shown a marked tendency towards penalties of up to 12 months' imprisonment. This appears to have been more prevalent since 1984. Naturally, shorter terms are frequently prescribed. The following are examples of a 12 month term of imprisonment appearing in a variety of offences *before* 1984 as well as after 1984:[61]

- any indictable offence dealt with summarily under section 13 (3)(a) of the *Criminal Procedure Act, 1967*;
- section 12 (b)(i) of the *Criminal Law Act, 1976* (giving false information to the Gardaí);
- section 27(2) of the *Misuse of Drugs Act, 1977* (possession of cannabis other than for personal use).[62] Another section of the Act provides for a penalty of up to six months' imprisonment;
- section 2(5) of the *Criminal Damage Act, 1991* for an offence under the Act triable summarily;
- section 17 of the *Criminal Justice (Public Order) Act, 1994* (blackmail or extortion).[63]
- section 6 (1)(a) of the *Child Trafficking and Pornography Act, 1998*;
- section 7 of the *Adoption Act, 1998*, (giving a child for adoption to a non-relative); and
- section 31 of the *Turf Development Act, 1998* (not disclosing an interest when required).

144. In a rare example of a parliamentary debate on the issue, concerning the *Criminal Justice (Public Order) Bill, 1993*, Mr. Desmond O'Malley T.D. said that a term of 12 months' imprisonment on summary conviction was excessive for a new offence proposed in that Bill:

> "… particularly when the monetary side of it is limited to a fine of £1,000. I would think that for almost anybody 12 months' imprisonment is umpteen times worse than a fine of £1,000. One wonders if a period of 12 months' imprisonment would be open to a constitutional challenge."[64]

145. Another member responded:

> "I believe the term of imprisonment should remain at 12 months. In our legislation we should show the public and the criminals that we mean business. At the end of the day the judge has discretion to impose a sentence. If the term of imprisonment was pitched at six months it might not mirror the gravity of this type of crime".[65]

61 Note that the range of fines that are available alongside the penalty of 12 months' imprisonment varies considerably and appears to be from £250 upwards. Many offences contain a fine of up to £1,500 and/or a term of imprisonment of up to three, six or 12 months, in addition to this fine. At least one statute provides for a fine of €1,900 and/or a term of imprisonment of three months and another subsection of the same section provides for a fine of €1,900 and/or a term of six months' imprisonment, showing that a set fine should not be equated with a term of imprisonment; see section 5 of the *Public Health (Tobacco) Act, 2002*.

62 The Act, which creates different terms of imprisonment does so as the then Minister for Health, Mr. Brendan Corish T.D., said "… in all the circumstances I think it is best to have just one Schedule but, of course, to have different penalties for the various offences," *Dáil Debates*, Volume 298, 31st March 1977. This seems to be the general way in which various terms of imprisonment appear in one Act for summary conviction. The creation of a Schedule for this Act, however, was not adopted.

63 It was stated by Mr. Gay Mitchell T.D. that "these were substantial penalties," *Dáil Debates*, Volume 436, 23rd November, 1993.

64 *Dáil Debates*, Volume 435, 16th November 1993.

65 *Ibid, per* Mr. Dermot Ahern T.D.

146. Mrs. Geoghegan Quinn, the then Minister, said that she had:

> "… no strong view in relation to the amendment except that… sometimes when we put down a marker in legislation in relation to a maximum penalty everybody assumes immediately that the maximum becomes the norm. In fact, as we see the courts operating, the maximum does not become the norm in very many cases. I would be inclined to go along with both Deputies when they say we should leave some discretion to the judges. They will hear both sides of the story, will be privy to all the information and all the evidence and will have had the opportunity of hearing the person accused being cross-examined by the lawyers from both sides. I have no strong views on the amendment but perhaps Deputy O'Malley, as a former practising lawyer, would accept that it would be better to leave the imposition of the term of imprisonment to the judge."[66]

147. The 12 month term was eventually adopted.

Sentencing Limits: Fines

148. The subject of maximum fines attracts less attention than does that of imprisonment. The District Court punishes offenders by fining in the great majority of cases. The level of fine is rarely such as to give rise to any question of the limit of fine which might be constitutionally permissible.

149. There is a strong continuing tendency to provide for up to 12 months' imprisonment for summary offences but a lack of consistency as to the appropriate level of accompanying or alternative fine. Recent statutory practice suggests that the prevailing maximum fine on summary conviction is does not exceed €3,000. But a fine of up to €3,000 sits with a term of imprisonment of up to six months under the *Competition Act, 2002*[67] and up to 12 months under the *Tribunals of Inquiry (Evidence) (Amendment) Act, 2002*. A number of sections of the *Competition Act, 2002* and the *Prevention of Corruption (Amendment) Act,* 2001, section 2(4) provide instances of the €3,000 maximum.

150. In seeking guidance, it is useful to consider the practice in other jurisdictions – particularly England and Wales. Of course this jurisdiction is not subject to a constitutional test as to fines maxima. The maximum fine in respect of a summary offence is specified in the statutory provision creating the offence, which generally sets the fine by reference to a level on a standard scale of fines – rather than by reference to a specific sum of money. The provision creating an offence in England and Wales generally indicates whether a fine may be imposed in addition to any sentence of imprisonment or as an alternative to imprisonment. If a statute refers only to punishment by means of imprisonment, this nevertheless includes the power to impose a level 3 fine (Stg£1,000).[68] Magistrates are not limited as to the aggregate fine which they may impose.

66 *Ibid*, in response to Mr. Desmond O'Malley T.D. and Mr. Dermot Ahern T.D.

67 It was said in the Dáil by Ms. Mary Harney T.D. that she wished "to harmonise the penalties for summary offences throughout the Bill. All summary offences in this Bill are punishable by a fine of €1,900 with an equivalent term of imprisonment, which is six months, except in the section concerned where the period is 12 months. The amendment is proposed to ensure consistency between fines and their corresponding jail terms," *Dáil Debates*, Volume 169, 20th February 2002. The fine was subsequently increased to €3,000. The Bill also gave exclusive jurisdiction to the Central Criminal Court for certain of fences under the Act.

68 Section 34(3), *Magistrates Court Act, 1980*.

151. A lower maximum fine applies to offenders under 18 years of age in England and Wales. If convicted of an offence which normally carries a fine in excess of Stg£1,000, the amount of the fine imposed cannot exceed Stg£1,000.[69] In the case of an offender aged under 14 the limit is Stg£250.

152. The principle underlying the general maximum fine cannot easily be deduced from a comparison of all such cases. It is more helpful to examine the provisions for cases of indictable offences triable summarily.

153. In England and Wales, the sentencing power of magistrates in respect of fines is generally limited to Stg£5,000. This applies to a defendant convicted summarily of an either-way offence.[70] However, the Stg£5,000 limit is not absolute. If an offence was created by a statute passed after 1977, the maximum fine is that prescribed in the particular statute, whether this is more or less than Stg£5,000. The Stg£5,000 ceiling similarly does not apply to continuing offences where the court may impose a penalty for each day on which the offence is continued after a specified date, or to certain specified either-way offences under the *Misuse of Drugs Act, 1971*.[71]

154. Section 37(2) of the *Criminal Justice Act, 1982* contains a standard scale of maximum fines for summary offences. It ranges from Stg£200 at level 1, to Stg£5,000 at level 5. The Home Secretary has power under section 37 of the Act to increase or reduce these levels in accordance with inflation.

Sentencing Limits for Minor Offences

155. The District Court has jurisdiction to try offences only if they are minor.

156. In the case of an indictable offence designated as triable summarily, the court must be of the opinion that the facts proved or alleged in the particular case constitute a minor offence fit to be tried summarily. In *The State (O'Hagan) v Delap*,[72] O'Hanlon J. held that:

> "... where the District Judge, in the course of a summary trial, comes to the conclusion on proper grounds that the matter is not one which is fit to be tried summarily; in such circumstances he is entitled to discontinue the summary trial, notwithstanding the fact that he has previously formed the opinion mentioned in s. 2, sub-s. 2 (a), of the Act of 1951 and has embarked on the trial of the charge against the accused".

157. If it emerges in the course of the summary trial that the offence was not, in fact, minor in nature, the District Court Judge is obliged to send the case forward for trial by jury in the Circuit Court; otherwise, the judge would be acting in excess of jurisdiction.[73] The Court may also decline jurisdiction where the sentencing powers open to the Court are considered to be inadequate. Once the District Court has accepted jurisdiction and convicted a defendant, the court can no longer decline jurisdiction even if the facts which emerge at the sentencing stage indicate that the sentencing options are inadequate.[74]

69 Section 36, *ibid.*

70 The offences are listed in Schedule 1 to the *Magistrates Court Act, 1980*. The amount is referred to as "the prescribed sum"; section 32(9) of the Act.

71 See sections 32(4) and (5) of the *Magistrates Court Act, 1980*.

72 [1982]1 I.R. 213.

73 *The State (McDonagh) v Ó hUadhaigh*, High Court, unreported, March 1979, *per* McMahon J.

74 *Feeney v Clifford* [1989] I.R. 668.

158. The position in the case of hybrid offences, i.e. offences triable summarily or on indictment depending on the decision of the Director of Public Prosecutions, is a special one. Unlike the case of either-way offences, where statute assigns an express role to the District Court, the duty of the judge to consider whether the offence charged is such that the judge is bound to decline jurisdiction, depends entirely on judge-made law. Although the decision as to whether the case should be tried summarily or on indictment is, on paper, a matter entirely for the Director of Public Prosecutions – and the statute accords no function in the matter to the District Judge – it is clear that the latter has an important function in the matter. Henchy J. stated in *State (McEvitt) v Delap*,[75] that he would:

> "… infer that it was the legislative intention that the trial of [the] offence… is to be a summary one when the District Justice duly determines that the offence is a minor one, and that otherwise the trial is to be on indictment."

159. The Constitution is silent as to what constitutes a minor offence and thus it has fallen to the courts to determine the matter. In the leading cases of *Melling v O'Mathghamhna*[76] and *Conroy v Attorney General*[77] the Supreme Court identified two aspects of a minor offence which were particularly pertinent, namely (a) the severity of the penalty which it attracts and (b) the moral quality of the offence. In *The State (Rollinson) v Kelly*[78] Henchy and Griffin JJ. held that in the case of a fine, the primary criterion in ruling whether an offence is minor is the scale of the penalty actually imposed, rather than the maximum authorised by statute.[79] McCarthy J. regarded "the time [when] the relevant convictions were recorded"[80] as the point at which the test should apply. Hederman J. was of the view that "the principal criterion is the severity of the sentence or penalty that the offence might attract in the court in which the accused is to be tried at the time of his trial".[81] O'Higgins C.J., disagreeing with the majority that the penalty in question was a minor one, examined the severity of the penalty at the time of its enactment and at the time of entry into force of the Constitution[82]. McCarthy J. did not address this point. Woods[83] favours the approach of Henchy and Griffin JJ., though the Law Reform Commission observes that "the law is still somewhat undecided on this particular point".[84] The moral quality of an offence has not received as much judicial attention as the aspect of the penalty imposed, although it can be an important factor in certain types of offences.[85]

160. In *Mallon v Minister for Agriculture*, Costello J. in the High Court stated:

> "I have come quite clearly to the conclusion that an offence which attracts a two year prison sentence cannot be regarded as a 'minor' one and I am quite satisfied that, in so far as these regulations provide for the summary trial of an offence which carries such a term, they infringe Article 38 [of the Constitution]."[86]

161. But he did accept that a maximum sentence of 12 months was a permissible penalty for a minor offence.[87] In *Meagher v O'Leary*[88] the power to impose a term of two years' imprisonment for two consecutive sentences under section 12(1)

75 [1981] I.R. 125, at page 133.

76 [1962] I.R. 1.

77 [1965] I.R. 411.

78 [1984] I.R. 248.

79 *C.f. In Re Haughey* [1971] I.R. 217 where the court found the severity of the penalty authorised was the most important criteria. It was said in *Rollinson* that *In Re Haughey* permitted an unlimited penalty following summary trial, which was unconstitutional.

80 *In Re Haughey* [1971] I.R. 217, at page 267.

81 *In Re Haughey* [1971] I.R. 217, at page 266.

82 *In Re Haughey* [1971] I.R. 217, at page 257.

83 Woods, James, *District Court Practice and Procedure in Criminal Cases* (Limerick: Woods, 1994), at page 20.

84 Law Reform Commission, *Consultation Paper on Penalties for Minor Offences* (LRC CP18-2002), at page 15.

85 Fatal offences under the Road Traffic Acts and under Health and Safety Acts can involve the consideration of the moral quality of the act. In *O'Sullivan v Hartnett* [1983] I.L.R.M. 79 Henchy J. referred to it as being a factor. That case involved unlawful catching of salmon, where it was stated, "the moral guilt in catching one salmon when fishing… is negligible, whereas… the moral guilt in catching 900 salmon illegally is very considerable."

86 High Court, unreported, 22nd July 1994, at page 3.

87 This finding was not challenged in the Supreme Court: [1996] 1 I.R. 517.

88 [1998] I.L.R.M. 211.

of the *Criminal Justice Act, 1984* was considered. The question to be decided was whether the permissible limit of punishment for minor offences was exceeded if the two year maximum penalty is constituted as an aggregation of two or more lesser sentences imposed consecutively in respect of different offences tried together. The court felt that "it was imperative that a maximum aggregate sentence be set by the Oireachtas that would accord with the requirements of fairness and constitutional justice."[89]

162. In *Kostan v Ireland,*[90] McWilliam J. held that the forfeiture of fish and fishing gear amounting to a total of £102,000 (€129,513.28) was both a penalty and a direct consequence of a conviction under section 221 of the *Fisheries (Consolidation) Act* and removed the offence from the category of minor offences triable summarily.

163. So at the risk of over-simplification it can be said that the power to impose a prison sentence of 12 months will not on its own render an offence non-minor. On the other hand, it seems that the contrary conclusion will be drawn where there is power to impose two years' imprisonment for a single offence.

Summary Sentencing Limits in other Jurisdictions

164. The current state of Irish law and legislative policy regarding the limits of punishment on summary conviction is the product of our own particular legal and constitutional history. As already explained, the constitutional division of offences into minor and non-minor reflects this history. It follows that the most instructive comparative examples are likely to come from common law countries with a similar history.

165. The most instructive models are likely to be the three other jurisdictions on these islands. Sentence limits are not necessarily the subject of a rule of general application. What follows is an attempt to describe the general position in simple terms.

166. At the time of independence, the current general limit of sentence on summary conviction in Britain – though excluding Scotland – was six months' imprisonment. In the first instance, this flows from legislative practice. The maximum punishment for summary offences does not exceed six months. It is frequently much less. It is possible to discern a rule of more general application from the manner of allocating mode of trial in either-way or hybrid offences. A two-stage procedure applies whereby the magistrates' court first determines if the offence is suitable for summary trial and the accused opts whether to be tried on indictment. If the accused opts for summary trial and is convicted summarily, the maximum sentence is six months' imprisonment or a £5,000 fine.[91] So the general six month limit on magistrates' sentencing powers has been maintained. Lord Justice Auld, in his Review of the Criminal Courts of England and Wales,[92] found "no general or wide-based support for a change in the general limit" and recommended no change. But the Home Secretary, the Lord Chancellor and the Attorney General, in paragraph 4.19 of their subsequent

89 *Meagher v O'Leary* [1998] I.L.R.M. 211, *per* Moriarty J. at page 219.

90 [1978] I.L.R.M. 12.

91 Where there are concurrent or consecutive sentences, the sentence may be up to 12 months.

92 *Review of the Criminal Courts of England and Wales* n 1 *supra,* at page 101, paragraph 20.

white paper, *Justice for All*, said:

> "We will legislate to increase magistrates' sentencing powers to 12 months, and to allow us to increase them up to a maximum of 18 months, depending on the results of evaluations, and taking account of any necessary additional training requirements."

167. This proposal is contained in the new *Criminal Justice Bill, 2002*.[93]

168. In Northern Ireland also, magistrates are limited to a maximum of six months' imprisonment. The effective limit in Scotland is three months. Although the sheriff court may try cases both summarily and on indictment – known as solemn procedure – its sentencing power, when exercising summary jurisdiction, is limited to three months, or six months for a second or subsequent conviction. These sentences relate to convictions regarding the attempted or actual dishonest appropriation of property as well as personal violence.[94] The sheriff has the power to impose a fine "not exceeding the prescribed sum."[95] The result of this is that all serious cases are dealt with under solemn procedure in the High Court.[96]

169. In its *Consultation Paper on Penalties for Minor Offences*,[97] the Law Reform Commission summarised the situation in a number of jurisdictions, where – like in Ireland – there is a constitutional right to trial by jury. In New Zealand, section 24 of the *Bill of Rights Act, 1990* confers a right to jury trial for any offence punishable by imprisonment for a term in excess of three months. The Commission discusses some issues of conflict between this provision and other statutes. It is sufficient, we think, to note the standard set at three months for summary trial.

170. The Law Reform Commission also examines the position which exists under the Constitution of the United States of America. Article III, section 2, clause 3 of the Constitution states: "The trial of all Crimes … shall be by jury…" Although it is not expressly recognised in the text of the Constitution, the courts – in particular the Supreme Court of the United States – have recognised that there may be trial without a jury for "petty" offences. There is no explicit statement as to the maximum sentence which may be constitutionally imposed for a petty offence. In the 1855 case of *State v Conlin*,[98] the Court spoke of "imprisonment in the county jail for a brief and limited period." In 1970, in *Baldwin v New York*,[99] three members of the Court thought that sentences of more than six months could not be authorised for such offences. It is always important to remember that Federal rules do not necessarily apply to the states in all instances. Dicta in one case[100] suggest that the Federal rules may not apply to the states and that the relevant amendments to the Federal Constitution did not invalidate a New York provision for a sentence of up to 12 months' imprisonment without a jury trial.

171. The predominant presumption over a long period in the major common law jurisdictions has been in favour of jury trial and against summary trial, where the

93 Clause 138 of the Bill, as introduced.

94 Section 5(3), *Criminal Procedure (Scotland) Act, 1995.* Note that section 13(2)(b) of the *Crime and Punishment (Scotland) Act, 1997* increases the sentence to 12 months but this provision has not yet been implemented.

95 Section 5(2)(a), *Criminal Procedure (Scotland) Act, 1995.* The prescribed sum currently means £5,000: section 225 of the Act.

96 Lord Bonomy, *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary* (Edinburgh: Scottish Executive Justice Department, 2002), at paragraph 3.4. (The report is accessible on http://www.scotland.gov.uk/library5/justice/rppj-00.asp).

97 Law Reform Commission, *Consultation Paper on Penalties for Minor Offences*, n 84 *supra*.

98 27 Vt. 318.

99 399 U.S. 66.

100 *Williams v Florida* 399 U.S. 78.

possible penalty will exceed six months' imprisonment. Apart from Ireland, the exceptions include some states in the United States; Canada, where the right to jury trial depends on the availability of a sentence of five years or more; and the Australian state of Victoria, where the right to trial by jury is a purely statutory one.[101]

Conclusion on Sentencing Limits: Imprisonment

172. Consideration of the sentencing limit of the District Court involves issues of principle but also practical questions of effect. To a large extent, the question of whether a particular level of sentence represents the fair limit for a summary conviction is a matter of judgment. In addition, however, it is obvious that account must be taken of the probable effect of change. Reduced to simple terms, to what extent would the District Court be unable to impose the sentences it currently imposes if its maximum sentencing power were reduced to say, six months' imprisonment?

173. As has been seen, the District Court can only be given jurisdiction to try minor offences. The principal criterion for judgment of a minor offence is penalty. The Supreme Court has held that a maximum sentence of 12 months does not take an offence out of the minor category. This suffices to show that a 12 month sentencing power is not as a matter of principle, offensive on constitutional grounds. It is true that the comparative material suggests strongly that in common law countries, offences attracting a penalty of more than six months should not be tried without a jury.

174. The most striking contrary example is that of England and Wales, where there appears to be diminishing enthusiasm at the highest levels for jury trial. The government is proposing to increase the sentencing power of magistrates to 12 and possibly to 18 months.

175. In its Fifth Interim Report, *Increase of Jurisdiction of the District Court and Circuit Court*, delivered in April, 1966, the Committee on Court Practice and Procedure was unanimously of the view that no change be made in the courts' jurisdiction in respect of offences disposable summarily, although the majority favoured an increase in the monetary limits as to property values prescribed in respect of some scheduled offences under the 1951 Act.[102] The majority – Mr. Justice Kenny dissenting – considered it anomalous and undesirable that there should be any limit on the District Court's sentencing power in respect of indictable offences where a plea of guilty had been entered. It regarded the limit as giving rise to a danger that pleas might be induced by an expectation of unduly light sentences. It was of the view that the disposal of a case on a plea of guilty did not constitute a trial on a criminal charge so as to infringe the constitutional prohibition on trial

101 Sections 2 and 3 of the *Constitution Act, 1975 (Vic.)* and the *Imperial Acts Application Act, 1922*. There is no constitutional right to trial by jury, as there is under the Australian Federal Constitution in respect of the trial of Federal offences charged on indictment

102 Committee on Court Practice and Procedure, *Increase of Jurisdiction of the District Court and the Circuit Court*, Fifth Interim Report (Dublin: Stationery Office, 1966) at paragraph 39 of the Report.

103 *Ibid*, paragraph 41 of the Report.

without jury in non-minor cases[103] and it recommended that the District Court have equivalent sentencing power to that of the Circuit Court in such cases.

176. In February 2003, the Law Reform Commission considered in detail the limits which should apply to the District Court's sentencing powers in its *Report on Penalties for Minor Offences* as well as in its earlier Consultation Paper on the subject. The Commission was unanimously of the view that ideally, the restriction on a citizen's liberty represented by a term of imprisonment of six to 12 months should only be visited on a person following a jury trial. A sentence of 12 months' imprisonment was said to be inappropriate as a penalty for a minor offence save in cases of indictable offences where the accused consented to summary trial or pleaded guilty before the District Court. But a majority of the Commission was unable to recommend at the present time legislation to this effect due in part to the difficulty in appraising the likely consequence of such a measure given the absence of nationwide statistical information on sentencing of offenders in the District Court and the frequency of sentences within the six to 12 months range. The majority also considered that a wider choice of non-custodial sanctions and measures should be available to the District Court before the sentencing powers of that Court were reduced. The majority recommended that District Court judges voluntarily restrict themselves in such cases to a six month sentencing maximum.

177. A minority of the Commission relied upon information as to sentencing outcomes procured from the computerised Criminal Case Tracking System in operation in the District Court in the Dublin and Limerick urban areas.[104] It did not consider that the potential impact of the reduction in sentencing powers recommended would be likely to render the proposal unworkable or to be such as to override the principle that a sentence of more than six months should only be imposed following a jury trial. The minority therefore recommended a legislative approach to a limitation of the sentencing maximum.

178. The Commission went on to suggest to the All-Party Oireachtas Committee on the Constitution that its "recommendation might be copper-fastened by the only foolproof method, namely a constitutional amendment." It acknowledged that its role did not extend to proposing such amendments. It also drew attention to the forthcoming report of this Working Group on the allocation of jurisdiction between the District Court and the Circuit Court.

179. It is possible to argue plausibly for the view cited by the Commission that there was "a lot to be said for the view that imprisonment for any length of time at all represents such a comprehensive restriction on an individual's liberty that it ought only to be visited on a person following a trial with the highest form of protection."[105] The Working Group is conscious of the possible force of this argument. In its most stark form, it would take the term "minor" literally and conclude that summary courts could not be empowered to sentence to prison.

104 The same material as is referred to in this Report at paragraphs 274-275.

105 At paragraph 6.20 of the Consultation Paper, n 84 *supra*.

The Law Reform Commission itself rejected this approach "for the entirely pragmatic reason that it would cause such an upheaval in our system for the administration of justice."[106]

180. The Working Group rejects the same argument for a different reason – based on history and the proper interpretation of the Constitution. As is explained in the earlier part of this Report,[107] a system of summary jurisdiction had existed for many centuries. It is sufficient to recall that there was a cohesive organisation of courts of summary jurisdiction in existence at the foundation of the State in 1922. The legislation of 1922 to 1924 transferred the several elements of the former summary jurisdiction to the new District Court. This same system of summary jurisdiction existed at the date of adoption of the present Constitution in 1937, and it was transferred to the present District Court in 1961. The references to "minor offences" and summary trial in Article 38 of the Constitution clearly refer to the system of summary jurisdiction as it existed.[108] The Supreme Court of the United States appears to have given its approval to summary trial of "petty" offences on a similar basis. In *Callan v Wilson*,[109] Harlan J. cited *Byers v Commonwealth*:[110]

> "According to many adjudged cases arising under constitutions which declare generally that the right of trial by jury shall remain inviolate there are certain minor or petty offenses that may be proceeded against summarily, and without a jury… Byers v. Commonwealth, 42 Pa. St. 89, 94, affords an illustration… It was there held that while the founders of the Commonwealth of Pennsylvania brought with them to their new abode the right of trial by jury, and while that mode of trial was considered the right of every Englishman too sacred to be surrendered or taken away, summary convictions for petty offenses against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury."

181. In the leading case of *Melling v Ó Mathghamhna,*[111] Lavery J. in the majority judgment, basing himself on the same line of American cases, held that "… in construing a provision of a constitution as a fundamental law, it is necessary to consider how the law stood when the [constitution was adopted]."[112] He also noted that "when the Constitution of 1922 and the Constitution of 1937 were enacted, imprisonment for a subsequent offence against the Customs Acts might be for a period of 12 months."[113]

182. While it is true that the prevailing general sentence limit in 1937 was six months' imprisonment and the current one is 12 months, this is a matter of degree and does not affect the principal point that the District Court and its predecessors for a long time had power to impose prison sentences when the Constitution provided for summary trial of minor offences. It is necessary to look at the social as well as the legal context. District Courts have had the power to impose sentences of up to 12 months for a single offence for more than 50 years. In cases of consecutive offences, this may extend to two years and on rare occasions to four years.

106 *Ibid*.

107 See Origins and Development of Summary Jurisdiction, page 27 *et seq*.

108 A similar approach was taken by Lavery J. in his judgments in *Melling v Ó Mathghamhna* [1962] I.R. 1 and *Conroy v Attorney General* [1965] I.R. 411 (see below).

109 127 U.S. 540 (1888).

110 42 Pa. St. 89, 94.

111 [1962] I.R. 1.

112 [1962] I.R. 1, at page 13. The sentence dealt with the interpretation of a statute and of a constitution. The principle applies to both, hence the need to edit the words used.

113 [1962] I.R. 1, at page 16.

183. The statistical analysis already presented shows that sentences of more than six months' imprisonment are imposed in about 17.5 percent of cases – both summary and indictable triable summarily – where the District Court imposes a custodial sentence.

184. The Working Group has not received any submissions to the effect that the limit be reduced. There is no evidence that the public or defendants would favour a reduction.

185. The *Report of the Constitution Review Group* published in 1996[114] recommended that there be no change in Article 38.2. It noted that the courts had specified the factors to be taken into account in defining a minor offence and that the legislature did not specify whether an offence was intended to be minor but "leaves the matter to the courts."[115] The report contains no mention of the current maximum penalty. This is useful, if negative evidence of absence of concern that this limit might call for some modification of the constitutional provision.

186. The evidence, discussed elsewhere in this Report, is that the vast majority of defendants who have that right, fail to opt for trial by jury. There is a low rate of appeal from decisions of the District Court. The indications are that there is considerable confidence in the District Court.

187. The majority of the Working Group does not consider that there is any substantial justification for reducing the existing maximum sentencing powers of the District Court. Admittedly, this view is at variance with that expressed by the Law Reform Commission in its Report. In any event, the Commission does not propose any alteration in the limit for cases of indictable offences tried summarily with the consent of the accused or which are the subject of a plea in the District Court.

188. On the other hand, the Working Group is concerned at the general tendency to provide almost as a matter of routine that newly created offences be punishable by imprisonment of up to 12 months. This is a matter of legislative policy. It is not amenable to rules of general application. Responsible government departments should expressly address the levels of punishment proposed for each newly created offence and explain why it is considered necessary to propose the maximum level of imprisonment on summary conviction.

Conclusion on Sentencing Limits: Fines

189. Less attention has been paid to the limits of sentencing power in respect of fines than has been the case in respect of imprisonment. It is inherently impossible to devise guidelines for the level of monetary penalty which would take an offence

114 Constitution Review Group, *Report of the Constitution Review Group* (Pn. 2632) (Dublin: Stationery Office, 1996).

115 *Ibid,* at page 196.

out of the minor category. Notoriously, money does not have a fixed value. The past 50 years have seen periods of more or less rapid inflation.

190. One point at least seems to be settled. In *State (Rollinson) v Kelly,*[116] a majority of the Supreme Court[117] were of the view that the severity of the penalty should be assessed by reference to values prevailing at the time the fine is imposed. Several members of the court referred to the fact that an excise penalty of £100 had, in 1962, in *Melling v Ó Mathghamhna,*[118] did not to prevent the offence being a minor one. And applying an inflation factor of nine, they concluded that a £500 excise penalty was not sufficiently severe as to take the offence out of the minor category. Griffin J. thought it "a moderate sum."[119] In the third edition of Kelly on *The Irish Constitution* it was noted that the Oireachtas appeared to be of the view that a fine of £1,000 was the maximum which could be imposed following summary conviction.[120] It has already been noted that at the present time the general tendency is to set the standard in or about €3,000.

191. It is clear that a fine of the same amount will affect different defendants differently, having regard to their means. In its *Consultation Paper on Penalties for Minor Offences*,[121] the Law Reform Commission discussed whether the means of the accused were a relevant factor in assessing whether the penalty was appropriate to a minor offence but concluded that while there was no clear authority, principle pointed in that direction. Some support for that view is provided by the judgment of Denham J. in *The People (Director of Public Prosecutions) v M.*[122] Introducing the principle of proportionality into sentencing, she said:

> "However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court."

192. Section 43 of the *Criminal Justice (Administration) Act, 1914* provides, in relation to the District Court:

> "[A] court of summary jurisdiction, in fixing the amount of any fine to be imposed on an offender, shall take into consideration, amongst other things, the means of an offender so far as they appear or are known to the court."[123]

193. In its *Report on Penalties for Minor Offences*,[124] the Law Reform Commission has given thorough consideration to the question of reviewing the upper fines limit.[125] In particular, the Report notes the arguments in reference to the justification for and the problems attendant upon increasing the limit. The Commission recalls the view expressed in the Consultation Paper that the "constitutionally permitted fine is too low." It makes three points.

194. Firstly, in the absence of any recently considered review, the current maximum

116 [1984] I.R. 248.

117 O'Higgins C.J. expressed the view that the severity of the excise penalty of £500, at issue, should be assessed by reference to the date of its enactment, more than fifty years earlier, when it must have been "a very heavy penalty indeed."

118 [1962] I.R. 1.

119 [1962] I.R. 1, at page 264.

120 Hogan, Gerard and Gerry Whyte, *The Irish Constitution* (3rd ed.) (Dublin: Butterworths, 1994), at page 632.

121 *Consultation Paper on Penalties for Minor Offences,* n 84 *supra,* at paragraphs 8.11-8.17.

122 [1994] 3 I.R. 306, at page 316.

123 This is reflected in Order 23, rule 4 of the District Court Rules, S.I. 93 of 1997.

124 *Report on Penalties for Minor Offences,* n 17 *supra.*

125 *Ibid,* chapters 4-6.

figure of €3,000 may not reflect the effects of inflation. It suggests that inflation indexing of the £100 excise penalty considered in *Melling* – using 1922 as the base year – would produce a figure of £4,000 or €5,079. The Commission suggests that the changing impact of a penalty may be better represented by changing wage rates than changing prices. The second would give a factor of 19 based on 1953; the first would produce a factor of 66.

195. Secondly, the criminal jurisdiction of the District Court has not kept pace with increases in its civil jurisdiction. The civil jurisdiction of the court in 1924 was £25,[126] which – following adjustment for inflation – would now be €1,365 (£1,075). Under section 14 of the *Courts and Court Officers Act, 2002* – not yet in force – it will be €20,000 (£15,750).

196. Thirdly, there is an imbalance between the power to imprison and the power to fine. Based on a comparison of other common law jurisdictions, the Commission considers that a custodial sentence is much more severe punishment than a fine.

197. The Working Group finds itself in agreement with the view of the Commission. It may be that it is not so much that the constitutionally permitted level of fine is too low but rather that the maximum level is higher than is currently believed. In the view of the Working Group, the comparison with England and Wales, where the maximum fine is Stg£5,000, is particularly appropriate. This equates to about €7,500. There is no acceptable degree of equivalence between a sum of money and a month in prison. Nonetheless, it seems that while this jurisdiction permits imprisonment for 12 months for a minor offence, it limits the level of fine to a sum which is modest in present circumstances. It is particularly important that the District Court has been obliged to take the means of the offender into consideration. So a true judgment of the severity of a fine must take this element into account. As stated by Lavery J. in *Melling,* this is a matter of "first impression."

198. In light of all the circumstances, but especially on the basis of its judgment of the value of €3,000 in today's conditions, the Working Group believes it is much too low. The Working Group recommends that the general limit of fine be increased to €10,000.

Ancillary Penalties

199. In common with other courts, the District Court has power to impose ancillary penalties, *i.e.* punishment other than a fine or a term of imprisonment in the case of certain offences. There are a very large number of statutory provisions for the confiscation or forfeiture of articles used in the commission of or the proceeds of crime. These provisions take many forms. The best known is the power – sometimes the obligation – of a court to impose a disqualification from driving on a person convicted of certain road traffic offences. Many other statutes provide for the confiscation of articles such as firearms or offensive weapons or

126 Section 77A, *The Courts of Justice Act, 1924.*

the proceeds of drug trafficking. Revenue statutes frequently provide for forfeiture or confiscation.

200. Several recent statutes confine the power to impose an ancillary penalty to cases of conviction on indictment. Clearly, in these cases, severe penalties could not be imposed for minor offences. For example, on a conviction on indictment for certain offences – such as breaches of an order relating to foot and mouth disease – under the *Diseases of Animals Act, 1966* and the *Diseases of Animals (Amendment) Act, 2001*, the court may order the forfeiture to the Minister of any land, premises, vehicle, vessel, aircraft or container involved in the commission of the offence. A second example can be found in section 4 of the *Illegal Immigrants (Trafficking) Act, 2000*, where any vehicle used to commit the offence of trafficking in immigrants may be forfeited – but only if the conviction is on indictment.

201. The *Fisheries (Amendment) Act, 1978* is more complex. Section 2 confers power on the District Court to try summarily a number of fisheries offences set out in Table 1 to the section. Table I sets out the penalties for conviction on indictment, which include forfeiture at the discretion of the court of any fish or fishing gear found on the boat to which the offence relates. But section 2(2) subjects summary trial to:

- the opinion of the judge that "the facts proved[127] against the defendant so charged constitute a minor offence fit to be tried summarily;"
- the consent of the Attorney General; and
- the condition that "the defendant – on being informed by the Justice of his right to be tried by a jury – does not object to being tried summarily."

202. The Act also confers power to order the forfeiture of fishing boats used in the commission of certain offences – but only where the conviction is on indictment.[128]

203. Where a confiscation order is made on foot of a criminal conviction, the action is of a civil nature. An important example is an application pursuant to section 4 of the *Criminal Justice Act, 1994*.[129] In *Gilligan v Special Criminal Court and others*,[130] McCracken J. held that the provisions of section 4 of the *Criminal Justice Act, 1994* for inquiry into whether a convicted person had benefited from drug trafficking were not ancillary to the jurisdiction of the Special Criminal Court in relation to the trial of offences. Section 4 of the Act of 1994 relates specifically to drug trafficking. Section 61 of the same Act[131] creates a novel and general type of forfeiture power. It provides that:

> "… where a person is convicted of an offence, and –
> (a) the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued –

127 It is not clear why the legislature departed from the formula "proved or alleged" used in section 2 of the *Criminal Justice Act, 1951*.

128 Section 4, *Criminal Justice Act, 1951*.

129 As amended by section 25 of the *Criminal Justice Act, 1999*. This provision applies only in the case of conviction on indictment.

130 High Court, unreported, 8th November 2002. At the time of going to print an appeal to the Supreme Court is pending in this case.

131 As amended in respect of certain firearms offences by section 17 of the *Offences against the State (Amendment) Act, 1998*.

(i) has been used for the purpose of committing, or facilitating the commission of, any offence, or

(ii) was intended by him to be used for that purpose,

or

(b) the offence, or an offence which the court has taken into consideration in determining his sentence, consists of unlawful possession of property which –

(i) has been lawfully seized from him, or

(ii) was in his possession or under his control at the time when he was apprehended for the offence of which he has been convicted or when a summons in respect of that offence was issued,

the court may make an order under this section (referred to in this Act as a "forfeiture order") in respect of that property, and may do so whether or not it also deals with the offender in respect of the offence in any other way.

(2) In considering whether to make a forfeiture order in respect of any property a court shall have regard:

(a) to the value of the property, and

(b) to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making)."

204. It is not clear whether the reasoning of McCracken J. in relation to section 4 of the Act of 1994 applies to section 61 also. There are differences between the two procedures. Under section 4, there has to be a separate inquiry which may take place after sentencing and the civil burden of proof applies.[132] On the other hand, it is notable that the court may – under section 61 – order the forfeiture of articles which had been or were intended to be used for the commission of any offence – not merely the one for which the defendant had been convicted. For present purposes, it suffices to say that the existence of forfeiture as a penal remedy is a useful guide as to whether an offence is minor in nature.

205. There are, in any event, many cases where the District Judge has power to impose significant ancillary penalties in addition to financial and custodial penalties. A recently created example is the power – pursuant to section 13 of the *Intoxicating Liquor Act, 2000*,[133] as amended – on conviction of offences relating to the sale of intoxicating liquor to persons under the age of 18. The District Court is obliged to make a temporary closure order in respect of the licensed premises where the offence was committed. The closure must be for up to seven days in the case of a first offence and from seven to 30 days in the case of subsequent offences.

206. The *Road Traffic Act, 1995* obliges the District Court to impose a "consequential disqualification order" from holding a driving licence on a person convicted of driving or being in charge of a motor vehicle while under the influence of alcohol or a drug[134] along with a number of other offences connected with the breathalyser system.[135] In addition, the District Judge has power to impose

132 Section 4(6), *Criminal Justice Act, 1994*.

133 By inserting a new section 36A into the *Intoxicating Liquor Act, 1988*.

134 Sections 49 and 50 of the *Road Traffic Act, 1961*, as amended.

135 Sections 13, 14 and 15 of the *Road Traffic Act, 1994*.

ancillary, *i.e.* discretionary disqualification orders on conviction of any road traffic offences.[136]

207. The entire gamut of a District Court judge's penalties – including fines, imprisonment and other ancillary orders – should be considered when determining the seriousness of any given offence. The leading case remains *Melling v Ó Mathghamhna*,[137] where Lavery J. recalled that a number of important decisions in the United States recognised the following principles for deciding the seriousness of an offence: how the law stood when the statute was passed; the severity of the penalty; the moral quality of the act; and its relation to common law crimes. The second was, he thought, the most important consideration. Clearly the penalty there in issue – the right of the Revenue Commissioners to claim three times the duty payable on the smuggled goods or £100 – had to be weighed in the balance when the District Court was considering whether to decline jurisdiction on the ground that the offence was not minor. Although the court was divided as to whether the actual penalty removed the offence from the minor category, it seems that this principle was agreed.[138]

208. In *Conroy v Attorney General,*[139] the Supreme Court held that the moral element was secondary and only relevant where it was a necessary ingredient in the offence.[140] Walsh J. – delivering the unanimous judgment of the court – did not consider that the disqualification from driving was part of the primary punishment for the offence of driving under the influence of alcohol. He went on:

> "In so far as it may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character. One must not lose sight, however, of the real nature of the disqualification order which is that it is essentially a finding of unfitness of the person concerned to hold a driving licence."

209. The decision in *Conroy* sets limits on the degree to which the use of ancillary punishment orders may be used in the determination of the gravity of an offence. It is apparent that some ancillary orders may have a preventive as well as or independent of a punitive purpose. This is a difficult matter to determine but it does appear to fall to the District Court to make that judgment when considering whether to decline jurisdiction.[141]

210. In *O'Sullivan v Hartnett*,[142] the Supreme Court dealt with a case where a fish dealer was charged with possession or control of 900 salmon unlawfully captured contrary to section 182(2) of the *Fisheries (Consolidation) Act, 1959*. The penalty under section 182(4) could be a fine of almost £1,000 or a term of imprisonment of up to six months. In addition, the 900 salmon could be confiscated. The Court held that the "severity in the circumstances of the case of the consequences of conviction [marked] the offences charged as being other than minor offences." It restricted the declaration made to the actual offences charged and not to any

136 Section 27, *Road Traffic Act, 1961*.

137 [1962] I.R. 1.

138 See Kingsmill Moore J., *ibid*, at page 34 and Ó Dálaigh J. at page 48.

139 [1965] I.R. 411.

140 *Per* Walsh J., *ibid* at page 436.

141 The authors – Gerard Hogan and Gerry Whyte – of *The Irish Constitution* n 120 *supra,* criticise this decision and the cases that followed it to the extent of "protesting" against the distinction between primary and secondary punishment.

142 [1983] I.L.R.M. 79.

offence charged under the section. At an earlier point in his judgment, Henchy J. expressed the view that it might be "necessary in an appropriate case to review the criteria laid down in the decided cases for deciding whether an offence is minor or not".

211. It can be seen that the law is not – to say the least – absolutely clear. The principle remains that the punishment prescribed for an offence is the most relevant matter in determining whether the offence is minor. But it is not clear whether the judgment on that issue has to be made by the District Court by reference to the punishment prescribed or that which is likely to be imposed or indeed how the District Court is to assess the punitive elements in secondary punishments. Nor is it clear how the District Court is to judge in each case, whether an ancillary order would be wholly or partially punitive.

212. The above is an account of the state of the law concerning the significance of ancillary orders in the assessment of whether an offence charged in the District Court is minor. Only the High Court and – on appeal – the Supreme Court have power to decide the correct interpretation of the legislation concerned in the light of the Constitution and on the criteria which govern such decisions.

213. The Working Group does not consider that it can make any recommendations on the matter. It does not even appear that it would serve any purpose to recommend that legislation specify whether a particular order is intended to serve as a punishment. In Conroy's case, the Supreme Court rejected any suggestion that the nature of a disqualification could "be determined simply by a description used in a statute." It was for the Court to "determine its nature from an examination of its essential qualities rather than its description…" Therefore – pending any further clarification of the governing principles – it will be for the District Court, where appropriate, to decide in the light of all the circumstances, whether an offence is minor and fit to be tried summarily.

Either-Way Offences

Prior to 1922

214. The common law presumed that every person charged with a criminal offence would be tried by jury. Blackstone deplored the growth – even in his time – of summary jurisdiction "which has, of late been so far extended, as if a check be not timely given, to threaten our admirable and truly English trial by jury…"[143] But the greatest expansion took place in the 19th century. In his great work, *The History of the Criminal Law of England*,[144] Sir James Stephen wrote that the function of the Justices was to deal with "matters of small importance, more particularly with offences in the nature of trifling nuisances or disturbances of good order, jurisdiction in cases of serious crime being reserved for juries."[145] The fact remained that every offence was indictable and triable by judge and jury – either

143 Blackstone, n 21 *supra*, at page 280.

144 Stephen, Sir James Fitzjames, *History of the Criminal Law of England*, Volume 1 (1st ed.) (London: MacMillan & Co., 1883) at page 123.

145 *Ibid*.

at assizes or at quarter sessions – unless statute expressly provided for summary jurisdiction. Indictable and summary offences remained in separate compartments. Statutes usually provided also that a person could not be prosecuted separately for different offences – one indictable and one summary – arising out of the same set of facts.

215. But an innovation was introduced providing that some indictable offences could, in certain circumstances be tried summarily. A number of isolated instances appear in the statute books prior to 1855:

- In 1832, section 11 of the *Special Constables Act*,[146] an Act to amend the law in Ireland to appoint Special Constables for the preservation of the peace, provided in the case of assault on a constable in the execution of his office for a £20 fine on summary conviction or on indictment for such penalty as was applicable.
- Section 37 of the *Dublin Police Act, 1842* created a number of either-way offences.
- For the first time, the *Summary Jurisdiction (Ir.) Act, 1851*[147] provided for summary trial before a single Magistrate[148] of a person under the age of 14 years for the offence of simple larceny or that he could be tried on indictment. Section 6 provided:

> "…if the justice is of the opinion, before any such person shall have made his defence, that the charge is from any circumstance a fit subject for prosecution by indictment (or if the parent or next friend of such person shall, upon his being called upon to answer the charge, object to the case being summarily disposed of under the provisions of this Act), the justices shall, instead of summarily adjudicating, deal with the case as one to be prosecuted by indictment at assizes or quarter sessions."

216. However, none of these statutes established a systematic mechanism providing that an individually denominated offence could be tried either summarily or on indictment. This only occurred with the *Criminal Justice Act, 1855*.[149] The debates on the Bill are instructive. The Lord Chancellor stated:[150]

> "…the trial of offenders for petty offences had much engrossed public attention. It had been felt, not without justice, that to commit for trial at the Assizes or Sessions persons charged with very petty larcenies, had tended neither to reform the offender himself – which should be an important object in all punishment – nor to the repression of the offences. Several evils had resulted from it. In the first place, it occasioned to the public very unnecessary expense…but when a prisoner was tried at the assizes, or at quarter sessions, for a petty larceny of the value of a shilling or two, the effect on the public mind was very injurious, exciting as it usually did a feeling, if not of sympathy for the prisoner, at all events of regret for the delay in bringing him to trial, and it would be infinitely better if such cases were disposed of in a summary way, as were many cognate offences."

146 2 & 3 William IV c.108.

147 14 & 15 Victoria c.92.

148 Prior statutes had required two Justices of the Peace to determine matters.

149 18 & 19 Victoria c.126, as amended by 31 & 32 Victoria c.116: the Act applied to Great Britain and Ireland, but not to Scotland.

150 Hansard, 26th February 1855.

217. At the time, there was great delay in jury trials. Frequently, a person was released on conviction because he had already served the full length of his sentence. In light of this, Lord Brougham analysed the statistics for the year 1850: out of 1,500 cases, 60 percent were for larcenies under the amount of five shillings. For that very reason, he had previously introduced the *Speedy Trial of Offenders Bill*, following a petition of the Cumberland Magistrates. The latter Bill was defeated, yet the *Criminal Justice Bill, 1855* contained similar provisions and was subsequently passed.

218. Among others, Lord Brougham felt it essential that in cases of larceny of small amounts, the option be given to the accused of being tried before the Magistrates' Court or of having their cases sent forward to quarter sessions or the assizes. The value of the goods in question – originally proposed as the basis of summary trial – was 20 shillings. This was reduced to five shillings in the Act as passed. It was thought that "if they embraced all offences up to the former amount…the result would have been to throw such an amount of business on the Petty Sessions that the magistracy – particularly in rural districts – would have found themselves unable to dispose of [such a volume of trials]."[151]

219. Section 1 of the *Criminal Justice Act, 1855* provided:

> "Where any person is charged…with having committed simple larceny, and the value…does not in the judgment of such justices exceed five shillings…[he may be dealt with] summarily…provided always that if the person charged do not consent to have the case heard and determined by such justices; or if it appears to such justices that the offence is one which, owing to a previous conviction of the person charged, is punishable by law with transportation or penal servitude; or if such justices be of the opinion that the charge is, from any other circumstances, fit to be made the subject of prosecution by indictment rather than to be disposed of summarily, such justices shall, instead of adjudicating thereon, deal with the case in all respects as if this Act had not been passed."

220. Section 2 provided that the Court would hear the evidence of the prosecution witnesses and then ask the accused if he consented to the trial being held summarily or if he desired that it should be sent for trial by a jury at sessions or assizes. It was reiterated throughout the debates that the great safeguard of liberty was trial by jury and that an accused should have the right to elect for jury trial.

221. Section 3 provided that where a charge is for simple larceny, the value of which exceeds five shillings – the justices might dispose of it summarily "if the case appears to them to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers of this Act." So the Act gave justices summary jurisdiction over theft and embezzlement where the value at stake was less than five shillings, if the accused consented. It also gave them the power to take a plea of guilty in cases where the value of the property

151 Hansard (Lords debates), Volume 136, 27th February 1855, at page 1960.

exceeded five shillings. In addition to these provisions, the *Larceny Act, 1861*[152] made the stealing of various things triable summarily – regardless of the value. Summary jurisdiction was also allowed for some indictable offences which related to the causing of malicious damage to certain types of property under the *Malicious Damage Act, 1861*.[153]

222. Later legislation expanded the range of indictable offences triable summarily. Section 2 of the *Summary Jurisdiction (Ireland) Act, 1862*[154] provided for summary trial of certain offences under the *Offences against the Person Act, 1861*,[155] namely:

- section 38 – assault on peace officers;
- section 39 – assault with the intention to obstruct the sale of grain;[156]
- section 40 – assault on seamen;
- section 42 – common assault which provided: "…two justices of the peace [with] concurrent jurisdiction to punish such assaults…if they shall consider the offence so trivial as not to require being dealt with by a superior tribunal";[157]
- section 13 – aggravated assault on a female or on a boy under the age of 14;

223. The *Summary Jurisdiction (Ireland) Act, 1871*,[158] section 9 of which permitted summary trial in the Dublin Metropolitan area only of the offence of attempting to commit suicide. It was essential that the accused admit the offence and that he consent to summary trial. But if the court was of the opinion that the charge was fit to be made the subject of prosecution by indictment – rather than to be disposed of summarily – the court had the authority to send the accused forward for trial on indictment.[159]

224. By 1887,[160] it was thought that "time and circumstances [had] run in favour of the summary tribunals". Summary convictions did not carry the same stigma as being found guilty by indictment. The advantages of such a court for ordinary cases were that they were "prompt and inexpensive."[161]

225. In England at this time, section 17(1)(2) of the *Summary Jurisdiction Act, 1879*,[162] an Act which was never extended to Ireland, conferred a right to elect to be tried by a jury for summary offences which attracted a penalty in excess of three months' imprisonment. Henchy J. described this as "a statutory option to be tried by jury in respect of a summary offence."[163]

226. In essence, the history of the development of the courts of summary jurisdiction during the 19th century is that it was thought to be acceptable to avail of the advantages of a summary trial – but only because the subjects retained the right to elect for trial by jury. This remained the position in Ireland up to 1922.

After 1922

227. Following independence, the *Public Safety (Punishment of Offences) Temporary Act,*

152 24 & 25 Vict. c.96.

153 24 & 25 Vict. c.97.

154 25 & 26 Vict. c.50.

155 24 & 25 Vict. c.100.

156 See also assault on a surveyor in the execution of his duty; section 164 of the *Grand Jury (Ireland) Act, 1836* (6 & 7 Wm.4, c.116).

157 This was repealed by the *Criminal Justice Act, 1951*.

158 34 & 35 Vict. c.76.

159 Section 85 of the *Courts of Justice Act, 1936*, extended the jurisdiction to try offences of attempted suicide to all sittings of the District Court and not just those sitting in Dublin, but prior to this enactment it was only triable summarily in Dublin. This offence was repealed by the *Criminal Law (Suicide) Act, 1993*.

160 According to Humphreys, Henry, *The Criminal Law and Procedure (Ireland) Act, 1887* (Dublin: Hodges and Figgis, 1887).

161 *Ibid*, at 17.

162 42 & 43 Vict. c.49. An offender who was liable to three months' imprisonment on summary conviction "and which is not an assault, may, on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by jury, and thereupon… the offence shall as respects the person… be deemed to be an indictable offence..." In addition, the *Criminal Law Consolidations Act, 1861* also gave a wider jurisdiction to the summary courts but the Act did not seem to apply to Ireland.

163 *State (McEvitt) v Delap* [1981] I.R. 125 at page 133.

1924 – a temporary or emergency measure, in force from April 1924 to April 1925 – [164] created a Schedule of 12 indictable offences triable summarily under section 1(2) of the Act. The Schedule was designed for "certain offences which [were] rather rife as the result of the exuberance of the last two years… [and] which [were] viewed most seriously by the department responsible for order, security and decency of life in the country".[165] The offences in the Schedule included:

- robbery under arms;
- arson of any house factory or other building or crops; and
- injuring or destroying any house, factory or agricultural property.

228. By virtue of the combined effect of Article 72 of the Constitution of Saorstát Éireann and section 1(6) of the Act, the court had jurisdiction to try offences in the First Schedule only if it was of the opinion that the facts proved against the accused constituted a minor offence fit to be tried summarily. Apart from the obvious serious nature of the offences, it is notable that the court's sentencing powers were considerably enlarged; it could impose a sentence of up to 12 months' imprisonment and/or a fine of up to £50.[166] In default of payment of the fine, the court could impose up to an additional six months' imprisonment to be served after any sentence originally imposed. This far exceeded the six month penalty that represented the generally prevailing jurisdictional limit of the District Court for indictable offences triable summarily at that time.[167]

229. *The Courts of Justice Act, 1924* established the District Court as a local court of summary jurisdiction, granting it power to dispose of matters including those which would previously have been dealt with at petty sessions. Section 77B granted the District Court the power to deal with certain offences that would – prior to the Act's adoption – have been indictable only. The court could deal with certain specified offences – provided that the facts proved against the accused constituted a minor offence fit to be tried summarily and the accused did not object to summary trial. As mentioned earlier, it is the practice to call these either-way offences and to describe as hybrid offences those offences where the Director of Public Prosecutions has the sole discretion as to whether the case is to be tried summarily or on indictment. The Attorney General, in the debate on the enactment of the 1924 Act, attempted to remove the right of election which was to be conferred on the accused. He argued that the rationale behind section 77B was to "enable the Court to decide whether the case is a minor one and can be disposed of summarily… it is highly desirable that the District Justice should be able to say that he could treat such a case as a minor offence and dispose of it there and then… [and it] should not be a matter of election"[168]. The consensus of the Dáil was to retain the right of the accused to elect, having in mind an accused who – although possibly in a small minority – "prefers to have the charge hanging over him because he is not confident that his character would be fully investigated at a summary court and prefers to go to a jury".[169] Further debate centred on the importance of an accused being informed of his right to elect and

164 Section 11(2), *Public Safety (Punishment of Offences) Temporary Act, 1924.*

165 *Dáil Debates*, Volume 6, 20th February 1924, *per* Minister for Justice, Mr. Kevin O'Higgins T.D.

166 See debate of the 11th March 1924 when consideration was given to the amount of a monetary fine which equated to a term of imprisonment of six or 12 months.

167 See section 77B of *The Courts of Justice Act, 1924*.

168 *Dáil Debates*, Volume 5, 4th December 1923.

169 Mr. Johnson T.D., *ibid*.

it was subsequently accepted that after "inquiry having been made of him by the Justice,"[170] he would be asked if he objected to summary trial.

230. Interestingly, the category of offences for which this section provided were not debated in either the Dáil or the Seanad[171] and the expansion of the jurisdiction in relation to each particular offence was not considered. The offences in this category which could be tried summarily under section 77B were:

i) larceny, receiving, embezzlement or false pretences where the amount did not exceed £20 in value;
ii) assault occasioning actual bodily harm;
iii) indecent assault;
iv) burglary or housebreaking or attempts at either;
v) riot or unlawful assembly if not part of a conspiracy;
vi) malicious damage to property where the damage did not exceed £20.

231. In any such case tried summarily, a sentence of six months' imprisonment "with or without hard labour" was the maximum sentence to be imposed. The section did not impose any limit on the imposition of fines.

232. In the period between 1924 and 1951, the legislature attached the same procedure to some newly created offences.[172] The *Criminal Justice Act, 1951* repealed section 77B of *The Courts of Justice Act, 1924* and substituted a schedule of 21 indictable offences which were triable summarily. The Minister for Justice stated that: "the principle of a summary trial for certain classes of indictable offences having been long since established and having worked well in practice, it was perhaps inevitable that the first reform to suggest itself should be an extension of the range of indictable offences that might be tried summarily".[173] The introduction was seen as a "substantial alteration in the law" that would "help in speeding up the machinery and administration of justice… to all accused persons [and] in the long run… mean that law will not be just as expensive as it was."[174] It was also seen to be beneficial to the accused person, as it "save[d] expense... time and... trouble"[175] and provided an additional and possibly more acceptable way of holding a trial. As in the case of the 1924 Act, the First Schedule of indictable offences triable summarily was not debated – other than the comment by one member that "no member has made any reference to what should be in the Schedule… but in the long run the Minister for Justice on the advice of the Attorney General and other experts is probably the best person to decide".[176]

233. The criteria were the same as in the Act of 1924 and thus section 2 provided that the offences listed in the First Schedule might be tried summarily but on the following conditions:

i) that the Court was of opinion that the facts proved or alleged constitute a minor offence fit to be so tried, and
ii) that the accused, on being informed by the Court of his right to be tried with a jury, did not object to being tried summarily.

170 Section 77B, *The Courts of Justice Act, 1924*.

171 Major Bryan Cooper T.D. complained that the amendment proposing removal of the right of election was introduced at Report Stage, thus depriving T.D.s of the right of further amendment: *Dáil Debates*, Volume 5, 4th December 1923.

172 Section 11 of the *Wireless Telegraphy Act, 1926* created an either-way offence, but limited the penalty on summary conviction to one month, a restriction retained on the inclusion of this offence in the First Schedule to the Act of 1951. On amendment by section 12 of the *Broadcasting and Wireless Telegraphy Act, 1988*, the legislature followed the more modern practice of making the offence summary or indictable at the discretion only of the Director of Public Prosecutions. Section 5 of the *Criminal Law Amendment Act, 1935,* repealed in 1951, made either-way offences those cases of attempted unlawful carnal knowledge of young persons which were made misdemeanours by the Act.

173 Seanad Debates, Volume 118, 3rd November 1949, *per* General Seán MacEoin T.D.

174 *Dáil Debates*, Volume 118, 24th November 1949, *per* Captain Peadar Cowan T.D., speaking in relation to the *Criminal Justice Bill, 1949*.

175 *Dáil Debates*, Volume 118, 24th November 1949, *per* Mr. T.F. O'Higgins T.D.

176 *Dáil Debates*, *ibid*, *per* Mr. A.P. Byrne T.D.

234. The inclusion of "facts alleged" in (i) meant that it would no longer be necessary for the District Court to spend time taking depositions before deciding if the offence was a minor one.[177] The Court could consider the opening statement of the prosecution or read the charge – and base its decision on this without formal proof being required. The accused's right to object to summary trial was retained as an unqualified right at his option to request a trial by jury.[178]

235. The Act of 1951 was subsequently amended by several statutes. The Minister for Justice has power under section 2(1)(b) to add any indictable offence to the First Schedule. No Minister has ever exercised this power, which remains on the statute book. On the other hand, four offences, reference numbers 22, 23, 24 and 25, have been added to the First Schedule by statute. Two were added by section 19(2)(c) of the *Criminal Procedure Act, 1967*:

> 22. "An offence under section 13 of the Debtors (Ireland) Act, 1872";[179]
> 23. "An offence under sections 20, 21, 22, 23 or 51 of the Malicious Damage Act, 1861."[180]

236. Two were added by the *Criminal Law Act, 1997*:

> 24. "An offence under section 7(2) of the Criminal Law Act, 1997," impeding the apprehension or prosecution of a person believed guilty of an arrestable offence;
> 25. "An offence under section 8 of the Criminal Law Act, 1997," accepting payment for not disclosing evidence to assist in the prosecution of an arrestable offence.

237. There have been some changes in the provisions regarding the consent of the prosecution. The Act of 1951, as amended by section 19(b) of the Act of 1967, required the consent of the Attorney General for summary disposal of some of the offences numbered in the First Schedule. The reference numbers were: 1, public mischief; 2, obstruction of the administration of justice; 3, perjury; 9, assault on a peace officer; 8, and 15, certain larceny offences, where the value exceeded £200. This provision is now of largely historic interest. In every case of a scheduled offence under the 1951 Act, summary trial is now subject to the additional condition that "…the Director of Public Prosecutions consents to the accused being tried summarily for such offence."[181]

238. So what was the nature and purpose of the 1951 system? As already stated, the Minister for Justice upon the introduction of the Act of 1951 referred to "the principle of a summary trial for certain classes of indictable offences". The offences scheduled to the Act of 1951 were almost entirely in the areas of ordinary crime. As amended on the two occasions mentioned, it covered five traditional areas of crime: offences of dishonesty, offences involving damage to property, assaults, sexual offences and offences against public order. From time to time, the legislature has abolished or redefined offences, created new ones,

177 Despite the fact that the offence has to be a minor one, the Minister stated in the Dáil that the scheduled offences "are all very serious and indictable". Formerly, the facts had to be "proved."

178 The *Criminal Justice (Miscellaneous Provisions) Act, 1997* added a third limb to section 2 of the 1951 Act by requiring that in addition to the criteria at (i) and (ii), the Director of Public Prosecutions consents to the accused being tried summarily for such offence.

179 The section of the Act of 1872, since repealed by section 3 of the *Criminal Justice (Theft and Fraud Offences) Act, 2001*, concerned various types of fraudulent behaviour, such as obtaining credit by fraud and acting to defraud creditors.

180 These sections were repealed by the *Criminal Damage Act, 1991* and replaced by hybrid offences.

181 Section 8, *Criminal Justice (Miscellaneous Provisions) Act, 1997*.

amended the ingredients of offences or altered the penalties. The net effect has been to alter radically the 25 offences scheduled to the Act of 1951. Only five of the original 21 offences, one of the two offences added in 1967 and the two added in 1997 remain subject to the regime enacted in 1951.[182]

239. In the same period the nature and range of criminal offences has also changed. Many more aspects of human and economic activity are regulated so that many of the newer offences are of a regulatory character. These include such areas of regulatory law as planning, the environment, company law, competition law, safety, health and welfare at work – aside from the many matters which European Community law obliges Member States to regulate. Insofar as legislative change has affected offences subject to the regime of the Act of 1951, the Working Group has sought to discern the underlying policy.

240. One can begin by examining the two principal categories of criminal offence: offences against the person – including related offences against public order – and offences against property. It is difficult to assign certain types of offence definitively to either. For example, drugs offences – almost unknown in 1951 – do not easily fit either description.

Assault and Related Offences

241. The summary offence of common assault was replaced by section 2 of the *Non-Fatal Offences against the Person Act, 1997* with assault, which is also a summary offence. Assault occasioning actual bodily harm, contrary to section 47 of the *Offences against the Person Act, 1861*, was listed as reference number 5 in the First Schedule to the Act of 1951. It was repealed by section 28 of the Act of 1997. In turn, the latter created a wide range of new offences: assault causing harm, section 3; threats to kill or cause serious harm, section 5; injuring or threatening to injure with a syringe, section 6; possession of a syringe or blood with intent, section 7; placing or abandoning a syringe with intent or causing injury, section 8; various forms of coercion, section 9; harassment, section 10; administering substances capable of interfering with bodily functions, section 12; conduct creating substantial risk of death, section 130; endangering traffic, section 14; false imprisonment, section 15; abduction of a child, sections 16 and 17. In the case of prosecution for any of these hybrid offences, the Director of Public Prosecutions alone decides whether the case is to be tried summarily or on indictment. So the sole case of assault, which was an either-way offence, was removed from that regime. The accused has no right to opt for jury trial in the case of any of the new offences.

242. The *Firearms and Offensive Weapons Act, 1990* had also created a number of new offences such as possession of a flick-knife, possession of any article "with intent to cause injury to, incapacitate or intimidate any person…", trespassing with a knife or production of any article "likely unlawfully to intimidate." Each of these is a hybrid offence, with a maximum penalty of five years' imprisonment.

182 The *Criminal Damage Act, 1991* repealed the relevant sections of the 1861 Act though not the related part of the First Schedule.

243. Similarly the *Criminal Justice (Public Order) Act, 1994* ("the Act of 1994") created new hybrid offences: affray, section 16; blackmail, extortion and demanding with menaces, section17 and assault with intent, section 18. Sections 14 and 15, respectively, abolish the common law offences of riot and unlawful assembly mentioned at reference number 4 of the First Schedule to the Act of 1951. They create new indictable offences of riot – involving at least 12 persons – and violent disorder –involving at least three persons – each subject to a maximum penalty of ten years' imprisonment on conviction on indictment.

244. The Act of 1994 also repeals section 38 of the *Offences against the Person Act, 1861* which deals with the offence of assault or obstruction of a peace officer. Section 19 replaces it with a more widely worded provision, but one essentially concerned with assaulting "a peace officer in the execution of his duty…" The section covers assaults on other persons either "acting in aid of a peace officer" or "with intent to resist or prevent" apprehension. The notable point is that – while not referring to the Act of 1951 – the section contains the words "having elected for summary disposal of the offence" before the reference to "summary conviction." The additional words were interpolated by way of an amendment which was accepted by the Minister for Justice because an offence under the former section 38 was included in the First Schedule – in reference number 9. In addition however, the Minister expressed an intention to "examine the question of the approach to the election to opt for summary trials and in particular the scheduled offences under the 1951 Act, including those relating to the assault of a peace officer." But as far as the Working Group is aware, no such examination appears to have taken place.

245. In the course of its work, the Group has been informed on several occasions of concerns regarding the practice of prosecutions under section 19 of the Act of 1994, receiving comments from several firms of solicitors practising regularly in the area of criminal law. In essence, it has been suggested that, in order to defeat the statutory right of a defendant to opt for jury trial, the prosecution not infrequently chooses to prosecute summarily for assault pursuant to section 2 of the Act of 1997. In this way, the right of an accused to opt for jury trial – as would be his right if prosecuted under section 19 of the Act of 1994 – would be defeated. In such cases, the file would not be referred to the Director of Public Prosecutions. The Director has sought information from prosecution practitioners and An Garda Síochána and has indicated that there was never an intention to use a section 2 assault charge to circumvent the right to elect for jury trial. The Director of Public Prosecutions informed the Working Group that he intended to review prosecution policy in relation to the use of the two sections – including the question of whether files should be referred to him.

246. It is interesting to compare section 19 of the Act of 1994 with section 41 of the *Criminal Justice Act, 1999*, since each is concerned with the protection of peace officers and – potentially –members of the public who become involved in the keeping of the peace or the administration of justice. The latter section creates

offences of harming, threatening or menacing persons assisting An Garda Síochána, jurors or witnesses. Unlike section 19 of the Act of 1994, this section creates a hybrid offence, giving no right to opt for jury trial.

247. The First Schedule to the Act of 1951 contained reference to three sexual offences. The common law offence of indecent assault[183] – which formerly appeared at reference number 6 of the First Schedule – has been replaced by the new or "recast"[184] offence of "sexual assault" provided by section 2 of the *Criminal Law (Rape) (Amendment) Act, 1990*. Section 10 of the *Criminal Law (Rape) Act, 1981*, repealed by the Act of 1990, had prescribed a penalty of up to ten years' imprisonment. The Act of 1990 established two new offences: sexual assault, subject to a maximum penalty of five years' imprisonment; and aggravated sexual assault (section 3), subject to a maximum penalty of life imprisonment in the event of this offence being assigned exclusively to the Central Criminal Court. Section 16 of the Act of 1990 deals with sexual assault and provides for an allocation mechanism identical to that set out in section 2 of the Act of 1951.

248. Mentioned at reference number 19 of the First Schedule are attempts to commit offences of unlawful carnal knowledge, contrary to the *Criminal Law (Amendment) Act, 1935* against a girl under the age of 15 (section 1(2)), under the age of 17 (section 2(2) as amended by the *Criminal Law Act, 1997*), or a feeble-minded person (section 4).

249. On the other hand, while reference number 12 listed an offence under section 11 of the *Criminal Law Amendment Act, 1885*, that section was repealed by the *Criminal Law (Sexual Offences), 1993*, which established new offences of buggery against persons below certain ages. All offences were subject to substantially increased penalties and without provision for summary trial.

Offences against Property

250. The First Schedule includes a number of larceny and malicious damage offences and a small number of other offences of dishonesty, permitting an accused person to opt for trial by jury in accordance with the procedure laid down in the Act. These offences are dealt with in reference numbers 8, 14 and 15 of the First Schedule, as substituted by section 19 of the *Criminal Procedure Act, 1967*, and amended by 21(5) of the *Criminal Law (Jurisdiction) Act, 1976*. They are:

- offences contrary to the *Larceny Act, 1861*, which dealt with a large number of specific types of property (animals, growing things, documents etc.);
- offences of burglary and aggravated burglary established by sections 23A and 23B of the *Larceny Act, 1916* and inserted by the act of 1976;
- other offences against the *Larceny Act, 1916*.

251. In the case of offences contrary to the *Larceny Act,* 1861 and the burglary offences, the 1951 procedure applied without any limit as to the value of the property involved. Offences in the third category were subject to that procedure

183 See *Doolan v Director of Public Prosecutions* [1992] 2 I.R. 399.

184 Charleton, Peter, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* (Dublin: Butterworths, 1999), at page 649, paragraph 8.184.

if the value of the property involved did not exceed £200 or the Director of Public Prosecutions[185] consented. Similarly, offences of false accounting contrary to section 1 of the *Falsification of Accounts Act, 1875* (reference number 11), forgery contrary to the *Forgery Act, 1913* (reference number 13) and obtaining by false pretences contrary to section 10 of the act of 1951 (reference number 20) were also subject to this procedure.

252. The effect of these complex provisions may be summarised as follows. The procedure under section 2(2) of the Act of 1951 applied in respect of the following offences:

> 8. An offence under the *Larceny Act, 1861* [subject to a £200 limit unless the Attorney General consented]
> 14. An offence under section 23A, 23B or 28 of the *Larceny Act, 1916*
> 15. An offence under any provision (other than sections 23A, 23B and 28) of the *Larceny Act, 1916* [subject to a £200 limit in the case of sections 23A & 23B, unless the Attorney General consented].

253. No change was made at the time of enactment of some amendments to the law of larceny by the *Larceny Act, 1990*. The major consolidating statute, the *Criminal Justice (Fraud and Theft Offences) Act, 2001* repealed and replaced the *Larceny Acts, 1861,*[186] *1916 and 1990*, the *Falsification of Accounts Act, 1875* and the *Forgery Act, 1913*. It re-enacted the existing provisions regarding summary jurisdiction. Section 53 provides:

> "(1) The District Court may try summarily a person charged with an indictable offence under this Act if –
> (a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,
> (b) the accused, on being informed by the Court of his or her right to be tried with a jury, does not object to being tried summarily, and
> (c) the Director of Public Prosecutions consents to the accused being tried summarily for the offence.
> (2) On conviction by the District Court for an indictable offence tried summarily under subsection (1) the accused shall be liable to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both such fine and imprisonment."

254. Accordingly, all theft and fraud offences – regardless of gravity – are made either-way offences. This appears to have taken place without debate or any consideration of the radically different approach applied to offences under this Act compared with the greater part of the rest of the criminal law.

255. Another category of offences conferring the right on the defendant to opt for jury trial is established by section 2 of the *Fisheries (Amendment) Act, 1978* (discussed at paragraph 112 above). The language of this provision is similar to

185 Since 1975.

186 Except sections 12-16 and 24-25 of the Act.

section 2 of the Act of 1951, except that the District Court has to decide whether the offence is minor on the basis of facts "proved" and not alleged.

256. The position regarding offences of malicious damage to property is quite different. Section 15 of the *Criminal Damage Act, 1991* repealed all of the sections of the *Malicious Damage Act, 1861* mentioned[187] in reference number 23 of the First Schedule. The Act of 1991 created a comprehensive range of offences of damage to property, including arson. All these are hybrid offences. In no case of malicious damage has the accused's right to opt for jury trial been retained.

257. The *Casual Trading Acts, 1980 and 1995* constitute an interesting and probably unique example of the legislature reversing the right to opt for jury trial. Section 3 of the Act of 1980 created certain offences of unauthorised trading. Section 15(1) made these indictable offences. Section 15(2) conferred jurisdiction on the District Court to try such cases summarily, subject to the opinion of the judge as to the minor nature of the offence, and the consent of the Director of Public Prosecutions on condition that:

> "... the defendant (on being informed by the Justice of his right to be tried by a jury) does not object to being tried summarily ..."

258. The *Casual Trading Act, 1995* abolished this right of the defendant and converted the offences into hybrid offences. Mr. Richard Bruton T.D., proffered the following explanation on introducing the Bill:

> "... the courts' jurisdiction in relation to offences will be streamlined in the sense that a defendant's current right to trial by jury for an offence which the court and the Director of Public Prosecutions may consider to be fit to be tried summarily will be removed, again in accordance with current trends."[188]

259. He said, in support of this measure:

> "The pursuing of summary prosecutions by local authorities should be permitted without the option of seeking trial by jury. My understanding is that the right to seek trial by jury has been abused in that it has been used as a tactic for evading prosecution where it is decided by the Director of Public Prosecutions that the cost of a trial by jury would be excessive."[189]

260. The debates do not disclose any further evidence to support the suggestion of abuse.

261. It has, however, been suggested to the Working Group that some regulatory bodies empowered to prosecute statutory offences may similarly be inhibited by the cost of prosecutions, if there is an election for jury trial.

187 By virtue of section 19 of the *Criminal Procedure Act, 1967*.

188 *Dáil Debates*, Volume 440, 9th March 1994.

189 *Ibid*.

The General Picture

262. The overall position regarding the summary trial of indictable offences may be summarised as follows:

- almost all assaults – including several of the newly created indictable offences against the person, such as "syringe attacks" – and possession of offensive weapons are now hybrid;
- in the case of assault on a peace officer, section 19, *Criminal Justice (Public Order) Act, 1994*, in unique language makes the provision for summary trial conditional on the accused "having elected for summary disposal". But where the Director of Public Prosecutions charges a person in the District Court with an offence of threatening or menacing a person who is assisting An Garda Síochána contrary to section 41 of the *Criminal Justice Act, 1999*, he has no such right;
- a person charged with violent disorder contrary to section 15 of the Act of 1994 may elect for jury trial but not if the charge is affray – section 16 – or demanding with menaces – section 17;
- the offences of sexual assault or attempt to commit unlawful carnal knowledge remain either-way offences;
- virtually all offences of dishonesty – including robbery – are either-way offences;
- no malicious damage offences are either-way;
- generally speaking, other than the cases specifically mentioned above, new legislation provides only for hybrid and not for either-way offences;
- children under 18 years of age have a universal right to opt for jury trial in every case of a summary prosecution for an indictable offence.

Sentencing on a Guilty Plea

263. The category of indictable offences which the District Court could dispose of was broadened by the *Criminal Procedure Act, 1967*. It included any indictable offence with the exception of an offence under the *Treason Act, 1939*, murder, attempt to murder, conspiracy to murder, piracy, genocide – as inserted by section 6 of the *Genocide Act, 1973* – and various offences under statutes relating to an international context.[190] The Court must satisfy itself that the accused understands the nature of the offence and the facts alleged and that the Director of Public Prosecutions[191] consents to deal with the offence summarily.[192] Section 20 of the *Criminal Law (Rape) (Amendment) Act, 1990* precludes the District Court from dealing with the offences of rape, rape under section 4 of the Act and aggravated sexual assault on a plea of guilty. But that restriction does not prevent an accused being sent forward on a plea of guilty for sentence on those charges. Section 19 of the 1990 Act also amended the First Schedule to the 1951 Act. The First Schedule has been further amended by the *Criminal Law (Jurisdiction) Act, 1976* and other statutes to such an extent that the public policy expressed by the then Minister for Justice in the Dáil to have just one complete and up to date First Schedule cannot be said to have been fulfilled.[193]

190 An offence under the *Criminal Justice (United Nations Convention against Torture) Act, 2000* (as inserted by section 8 of the *Criminal Justice (United Nations Convention against Torture) Act, 2000*), the offence of murder under section 2 of the *Criminal Justice (Safety of United Nations Workers) Act, 2000*, or an attempt or conspiracy to commit that offence (as inserted by section 7(a) of the *Criminal Justice (Safety of United Nations Workers) Act, 2000*), or a grave breach such as is referred to in section 3(1)(i) of the *Geneva Conventions Act, 1962*, including an offence by an accessory before or after the fact.

191 The Attorney General up to 1975.

192 Section 13(5) states that "this section shall not affect the jurisdiction of the Court under section 2 of the *Criminal Justice Act, 1951*."

193 The Minister for Justice, Mr. Brian Lenihan, T.D., at the debates on the *Criminal Procedure Bill, 1965* stated that "instead of amending the First Schedule to the *Criminal Justice Act, 1951* merely by reference, the relevant parts of that Schedule are now being written out in full in their revised form", *Dáil Debates*, Volume 227, 8th March 1967.

Either-Way Offences in England and Wales

264. The experience of England and Wales with either-way offences is instructive. The *Criminal Justice Act, 1855* made summary trial of indictable offences possible in the entire of what was then the United Kingdom of Great Britain and Ireland. So the two systems have a common origin. But the right of an accused person to opt for jury trial has remained a central feature of the English system, while it has been significantly eroded in this jurisdiction – except in the case of children. Divergence commenced even prior to 1922. As has already been stated, the *Summary Jurisdiction Act of 1879* conferred a right to elect to be tried by a jury for summary offences which attracted a penalty in excess of three months' imprisonment. This never applied to Ireland.

265. In 1975, a committee under the chairmanship of Lord Justice James – the James Committee – on *The Distribution of Criminal Business between the Crown Court and Magistrates Courts*[194] examined the history in general of the allocation of cases between courts of summary jurisdiction and jury courts. It found the existing rules "governing the distribution of criminal business between the …courts [to be] complicated, confusing and anomalous." This description applies with equal force to the corresponding system in this jurisdiction. The James Committee found the same types of anomaly as have grown up here. Some indictable offences were triable summarily only with the consent of the accused. In the category of hybrid offences, some carried a right to trial by jury but others did not. But in general, this right existed where the offence carried a maximum sentence of more than three months' imprisonment. Such a provision has never existed here. Perhaps it reflects the more limited sentencing powers of English magistrates.

266. The James Committee traced the history of either-way offences to the mid-19th century. The contents of the statutory schedules were revised and enlarged on a number of occasions – notably in 1925, 1952 and 1962. These schedules were longer than either that of 1924 or 1951 in this jurisdiction, but their character has generally been somewhat similar. The following passage from the report probably fairly represents the character of scheduled offences:

> "Since alternative modes of trial have been available for certain offences it has been rare for new scheduled offences to be created except when existing indictable or scheduled offences are being redefined; most entirely new offences for which it has been thought right to provide the possibility of trial on indictment have been made hybrid. As a result the scheduled offences tend to be concerned with behaviour that is inherently criminal while the hybrid have been more regulatory in character. As a result therefore the scheduled offences tend to be more serious than the hybrid offences, although this is by no means an invariable rule…"[195]

267. The Committee found the origin of the hybrid category to be less clear. There were some in the later part of the 19th century.[196]

194 *Report of the Interdepartmental Committee on The Distribution of Criminal Business between the Crown Court and the Magistrates Courts,* n 26 *supra.*

195 *Ibid*, at paragraph 18.

196 For example, section 91 of the *Explosive Substances Act, 1875*.

268. The James Committee approached the question of allocation of criminal business "from the standpoint of principle." It analysed the options of choice of forum by the prosecution and by the court. It found that a preponderance of opinion was opposed to leaving the choice entirely to the prosecution. It made two points in particular against leaving it to the magistrate's court. Firstly, there would be a danger of criteria being applied inconsistently by different courts. Secondly, it considered that it would be unattractive for a defendant to be tried summarily by a court, which – even if differently constituted – had rejected his request for jury trial.

269. Turning to the preservation of the accused's option for jury trial, it observed:

> "The existing right to elect trial by jury is so long established in our criminal justice system and valued so highly that its total abrogation requires very compelling reasons."

270. It commented relevantly on the differentiation between either-way and hybrid offences :

> "… given a class of offences triable on indictment or summarily, we can see no justification in principle for according defendants a right to jury trial in respect of some of them but denying it in respect of others."

271. Therefore the James Committee recommended that there be a single category of intermediate offence triable either on indictment or summarily and that the defendant should have a right to elect in all such cases.[197] The recommendations of the James Committee on this issue were accepted and implemented by the *Criminal Law Act, 1977*. The *Magistrates Court Act, 1980* provided for a mode of trial hearing at which "the Court shall consider whether… the offence appears more suitable for summary trial or for trial on indictment." Both the prosecution and the accused may make representations. The court is required to have regard to the nature of the case, whether the circumstances are such as to make the offence one of a serious character, whether the penalty the magistrates have power to impose would be adequate and any other circumstance considered relevant. When the magistrates decide that the case is suitable for summary hearing, they must inform the defendant of his right to elect for jury trial.

272. Since the report of the James Committee, there appears to have been a general shift of official opinion in England. In 1993, the Royal Commission on Criminal Justice[198] under the chairmanship of Lord Runciman recommended that the system be changed. It reviewed a number of research papers. It appeared that most defendants opted for jury trial because they believed that they would get a fairer trial and have a better chance of acquittal. This seemed to be supported by figures showing that the chances of acquittal were higher – 57 percent – in the Crown Court than in the Magistrates' Court – 30 percent. On the other hand most such defendants who elected for jury trial pleaded guilty. This group

197 Subject to some exceptions in the case of small thefts and minor criminal damage. Interestingly, the Committee declined to consider that the potential effects on the reputation of a defendant of conviction even of minor dishonesty warranted granting a right to jury trial. The gravity of an offence should be determined objectively and not by reference to its consequences for the offender.

198 The Royal Commission on Criminal Justice, *Report* (Cm. 2263) (London: HMSO, 1993).

were mistaken in their sentencing expectations: they were more likely to receive an immediate custodial sentence and sentences were much longer at the Crown Court.

273. The Runciman Commission recommended abolishing the defendant's right to opt for jury trial. It thought that fewer cases should be sent forward to the Crown Court. It based its recommendation principally on the need for a "more rational distribution of cases between the higher and lower courts." It noted, but did not accept, arguments against the reduction of availability of jury trial. It rejected in particular the suggestion that the defendant should have the right to "choose their court of trial solely on the basis that they will get a fairer hearing." Magistrates "should be trusted to try cases fairly…" No action was taken to implement this recommendation of the Runciman Commission. In 1997, Mr. Martin Narey, a senior Home Office official forcefully repeated the Runciman Commission recommendations. He thought that defendants were engaged in "expensive manipulation of the criminal justice system." In 1999 and 2000, the British government made two unsuccessful and controversial legislative attempts to assign to magistrates the sole function of deciding mode of trial. According to Lord Justice Auld, the first of these bills was defeated in the House of Lords "largely on the central and vehement argument of its opponents that it would remove a long established and fundamental right of the citizen to trial by jury."

274. Lord Justice Auld in his *Review of the Criminal Courts of England and Wales* discussed the issue fully but came down firmly in favour of the Runciman and Narey recommendations. In his view, "a court, not a defendant, should decide how he is to be tried." He was of the opinion that "the 'right to trial by jury'… is not some ancient, constitutional, fundamental or even broad right of the citizen to jury trial." Nonetheless, *Justice for All*, the White Paper presented to Parliament in July 2002 by the Home Secretary, the Lord Chancellor and the Attorney General, decided that "the right of defendants in these cases to elect trial by jury in the Crown Court ought to remain." The paper gave no reason for rejecting the Auld proposals on this point. Indeed, it appeared to accept several of his arguments in the following passage:

> "All too often defendants will elect for trial, then after some time plead guilty in the Crown Court and receive a sentence which magistrates could have passed. Alternatively, they will hope to avoid a trial altogether, or perceive a better chance of being acquitted although guilty. The motive will often be to prolong the process in the hope of reducing the chance of either the victim or necessary witnesses giving evidence."[199]

275. At the same time, it noted that in 2000, 87 percent of either-way offences were dealt with by magistrates, nine percent went to the Crown Court because the magistrate declined jurisdiction and just four percent went to the Crown Court because the defendant elected.

199 *Justice for All* (Cm. 5563) (London: The Stationery Office, 2002), at page 73, paragraph 4.22.

276. Of course it is absolutely crucial to recall that the central status accorded to jury trial by our Constitution is absent from the law of England and Wales. Nonetheless, this history is strangely ironic in two respects. For many years, the "standpoint of principle" espoused by the James Committee has fallen from favour. It has been replaced by a powerful and consistent tendency towards the abolition of the defendant's right to elect for jury trial and against the principle of jury trial in general. Nonetheless, this tendency has – even in the current climate – failed in its objective. Even more strikingly, the current English system preserves a right to elect for jury trial which can be traced back to at least as early as 1879 in England, but which was not extended to Ireland. In recent decades, Ireland has evolved substantially towards the denial of that right by favouring hybrid offences.

277. In Scotland, the prosecuting authority alone determines mode of trial. The Crown decides whether an offence is to be tried in the district court, the sheriff court or the High Court, unless the offence is one which is reserved to a particular court – e.g. murder and rape are triable only in the High Court. If the case is to be tried in the sheriff court, the procurator fiscal decides whether the case is to be tried under solemn procedure (i.e. with a jury) or under summary procedure with a single judge. The procurator fiscal's decision is final and unappealable, the accused having no right to opt for jury trial. The Runciman Commission noted the absence of controversy surrounding this issue in Scotland but declined to propose that the Crown Prosecution Service be given similar responsibilities in England and Wales. Having considered oral evidence given to the Commission, it felt that such a recommendation would – given the different history and context in England and Wales – be unacceptable for the time being at least.[200]

278. In the statistical research undertaken by it in respect of the summary jurisdiction, the Working Group sought to elucidate three principal issues in particular, *viz.* sentencing patterns in the range six months or over; the outcome of the Director of Public Prosecutions' choice of trial regime; and the outcome in the case of either-way offences.

Information on Sentencing in Excess of Six Months

279. Any proposal to reduce the maximum sentencing power of the District Court below the current maximum of 12 months raises the question of how many sentences might be affected. Ideally, the Working Group would like to know much more about the profile of District Court sentencing. It would be useful to know how many sentences are imposed at each level of severity, for each category of offence including summary and hybrid offences as well as indictable offences triable summarily. Such a profile might usefully include a breakdown of offences as between Road Traffic Acts cases, assaults and breaches relating to property. In fact virtually no information of this type is available – either current or historic. In these circumstances the Working Group – with the advice of its experts – conducted a sample survey of a number of sites.

200 The Royal Commission on Criminal Justice, *Report*, n 198 *supra*, at page 87.

280. The Working Group extracted data from the Criminal Case Tracking System (C.C.T.S.) referred to above for the year 2001. Although the data extracted covers only Dublin and Limerick, there is no reason to doubt the value of its information on a general basis. The total number of offences tracked was 211,901 or approximately 47 percent of all offences dealt with in the District Court in that year. As is usual in the District Court, statistics are based on the number of offences rather than the number of individual incidents or defendants.

281. Immediate – or unsuspended – sentences of imprisonment were imposed for 3,988 or 1.9 percent of all offences. 2,540 of these – or 64 percent – were summary offences. There were 708 sentences in excess of six months – representing 17.8 percent of all prison sentences. A total of 195 – or 27.5 percent – were for summary offences. Based on a manual examination, 347 of the 708 cases were for offences against property, 97 for breach of bail conditions, 94 Road Traffic Act offences, 53 dishonesty offences, 50 assault cases, 24 drugs offences and 43 miscellaneous offences.

282. Therefore, to the extent that the District Court imposes sentences of imprisonment, a significant number are for periods in excess of six months.

The Director of Public Prosecution's Choice of Trial Venue

283. Particularly in relation to hybrid offences, the Director of Public Prosecutions has the sole right – subject to the decision of the District Judge to refuse jurisdiction – to decide whether an offence should be tried summarily or on indictment.[201] Accordingly, it is of interest to examine whether decisions of the Director of Public Prosecutions in favour of summary trial turn out to be appropriate in all cases. This exercise is inherently subject to the criticism that it benefits from hindsight. The object is to discern whether in instances where the Director of Public Prosecutions has opted to treat the hybrid offences summarily and the District Judge has declined jurisdiction, the ultimate sentence imposed in the Circuit Court was within the jurisdiction of the District Court.

284. The Working Group conducted an extremely limited sampling tracking exercise. It used a sample of 75 offences where the Director of Public Prosecutions had the power to elect for trial on indictment. The offences were taken from the manual sample described above and were sent forward for trial. All of these were offences returned for trial from Dublin District Court in the month of February 2002. Of the 75 offences, the Director of Public Prosecutions elected for trial on indictment in 58 offences and the District Judge declined jurisdiction in 17 offences. These offences, where the District Judge had declined jurisdiction, were then tracked through manually to the Circuit Court. The result was as follows:

201 In *The D.P.P. v Judge O'Donnell and Kelly*, High Court, unreported 24th July 2002, Murphy J. held that in such cases it is the sole right of the Director of Public Prosecutions to determine whether the charge should be prosecuted summarily or on indictment, subject to the District Judge who may refuse jurisdiction on the grounds that the offence is non minor. The accused had no right to insist one way or the other as to the venue for trial.

Table 3A

A.	Imprisonment of less than 1 year	-
B.	Imprisonment of 1 year or more	1
C.	Imprisonment 2 years or more	2
D.	Imprisonment 3 years or more	4
E.	Nolle prosequi	8
F.	Acquittal	1
G.	Other	1

285. Obviously, the results of such a narrow sample should be approached with extreme caution. At first sight, these figures might appear to indicate that in a number of cases – six out of 17 offences – where the Director of Public Prosecutions has accepted District Court jurisdiction but the judge has declined it, a sentence in excess of the normal jurisdiction of the District Court has been imposed in the Circuit Court.

286. But there is no ordained procedure for the allocation of jurisdiction between District Court and Circuit Court. The fact that the District Court has declined jurisdiction does not mean that the Director of Public Prosecutions has misjudged the seriousness of the case. The judge often refuses jurisdiction before the Director of Public Prosecutions has given any direction. In these cases, it is possible that the judge has declined jurisdiction before the Director of Public Prosecutions has decided whether the case should be tried summarily. It is reasonable to infer therefore, that both the Director of Public Prosecutions and the judge would have arrived at the same conclusion. In any event, it is inherent in the system that the judge should have the right to decline jurisdiction – even where the Director of Public Prosecutions is prepared to propose summary disposal. There are also a significant number of cases of *nolle prosequi* where cases are sent forward because the judge declines jurisdiction. This may occur because the Director of Public Prosecutions has not been properly informed by An Garda Síochána. On reviewing the file, he may well decide that there is insufficient evidence to warrant a prosecution.

Either-Way Offences

287. The statistics regarding this category of offence are not generally available. For example, the Annual Report of the Courts Service for 2001 includes the following statistics:

Table 3B

	2000	2001
Total number of criminal cases	450,105	446,705
Summary cases	386,719	386,075
Indictable cases dealt with summarily	47,815	50,431

288. But the description, indictable cases dealt with summarily, includes offences properly so called, i.e. either-way offences, where the accused has the right to opt for jury trial; and hybrid offences, which have been tried summarily solely at the discretion of the Director of Public Prosecutions – without distinguishing between the two categories. In order to arrive at a breakdown, it is necessary to go to the CCTS figures, covering 211,901 offences for 2001 – or 47 percent of the national total. According to the CCTS figures, 8,945 either-way offences and 5,628 hybrid offences were dealt with in the District Court in 2001, a total of 14,573. This breakdown when applied to the total 2001 figures would suggest that one might project a figure of 31,000 as the national figure for either-way offences.

289. The sole source of any information available to the Working Group on the percentage of defendants who elect to go forward for trial is its own manual survey. This suggests that in the same base and period, there were 532 offences in which the accused had the option for jury trial. Of these, in only five offences was the option exercised. Three of these were tracked in the exercise regarding 75 offences. A sentence of three years' imprisonment was imposed in each case. These figures are at least consistent with the experience of the District Court judiciary – as described in exchanges with the Working Group. It is also consistent with the evidence used by the Runciman Commission in England and Wales. It seems clear that defendants rarely exercise their right to opt for jury trial. Whether that result can be extrapolated to other offences where the Director of Public Prosecutions currently has the sole right of decision must be considered separately.

Conclusion on Either-Way Offences

290. The legislative changes in relation to summary trial of indictable offences over the past 50 years have already been fully described. When the Director of Public Prosecutions prosecutes a person in the District Court for an indictable offence, that person has the right to opt for jury trial in some cases but not all. Summary trial of the great majority of offences against property is conditional on the accused being informed that he has the right to be tried by jury and waiving that right. No such right exists in the case of nearly all offences against the person and

of almost all newly created offences. But a child charged with any indictable offence other than murder, manslaughter or a rape offence[202] has the unqualified right to opt for jury trial. As the statistics show, a person so accused waives that right in more than 95 percent of cases. In almost no case of indictable offences against the person has the accused any right to object to summary trial.

291. It has become routine in recent decades that newly created offences may be tried either summarily or on indictment. No detailed rationale for the apparent change in policy appears to have been publicly expounded. While isolated cases occurred well before the passing of the 1951 Act,[203] the Working Group understands that representations were made by the former Director of Public Prosecutions to the Government as far back as the late 1970s in favour of the use of the hybrid formula in legislation when framing offences.

292. Firstly, it is essential to recall the important constitutional principles at stake. The Constitution lays down the general proposition that "no person shall be tried for any criminal charge without a jury." So while the Oireachtas designates offences as either indictable or summary, the Constitution speaks only generally of a distinction between offences for which jury trial is mandated and "minor offences" for which summary trial is possible.[204] Jury trial is the founding principle of criminal trial under the Constitution.

293. Where an offence is designated as indictable, jury trial is automatic. The State is constitutionally permitted to ordain that a new minor offence be triable on an indictment. But normally it is not sensible for the Oireachtas to do this. Indictable offences are normally serious. The State may similarly designate any offence as summary – subject to the constitutional proviso that it must be a minor offence. If it is not, the law will be unconstitutional. The District Judge is placed in an anomalous position. He is prohibited from raising or considering any argument that a particular law is contrary to the constitution.[205] Nonetheless, it is clear that a person charged under such a provision may bring an action in the High Court for a declaration of unconstitutionality of the law.

294. Legislation creating a hybrid offence does not necessarily coincide with the constitutional distinction. It provides that to perform a given act is an offence:

- which if tried summarily, attracts a maximum penalty of 12 months' imprisonment or a fine of, say €3,000 – or both;
- which if tried on indictment, attracts a possible maximum penalty of, say five years' imprisonment or a fine of, say €10,000 – or both.

295. In this way, the offence is not designated as either indictable or summary. The Director of Public Prosecutions decides on the facts of every case – subject to the right of the District Judge to decline jurisdiction.

296. The survey of opinion carried out by the Working Group with the assistance of

202 More precisely, any offence, "other than an offence which is required to be tried by the Central Criminal Court or manslaughter…" (section 75, *Children Act, 2001*).

203 See section 33 of the *Dangerous Drugs Act, 1934.*

204 Article 38, section 5 provides: "No person shall be tried on any criminal charge save in due course of law. Minor offences may be tried by courts of summary jurisdiction."

205 *D.P.P. v Dougan* [1997] 1 I.L.R.M. 550.

Professors Jackson and Doran elicited the views of respondents as to the Director of Public Prosecutions' power to decide mode of trial. Some 68.5 percent of respondents considered that the Director of Public Prosecution's power of decision should be retained or expanded; 22.1 percent considering that it should be reduced; 5.2 percent recommending its abolition, and 4.3 percent making no comment. Of these, approximately 52 percent of prosecution respondents – the Director of Public Prosecutions and his officers, prosecution solicitors, prosecuting counsel and An Garda Síochána – recommended expansion but only 12.5 percent of prosecuting counsel respondents shared this view. Just 50 percent of the latter considered that it should be retained as at present.

297. In its submission to the Working Group, the Association of District Court Judges noted the pivotal role played by the Director of Public Prosecutions in determining the mode of trial of indictable offences and remarked that:

> "… the DPP is independent in his role and the rationale for assigning cases to either the District Court or the Circuit Court is not always clear, nor is the DPP obliged to give such reasons to the court or to the accused… However it is the view of many judges of the District Court that the DPP has increasingly decided to proceed with cases in the District Court which cases ten to fifteen years ago would never have remained in the District Court but would have almost automatically have gone for trial before a judge and jury in the Circuit Criminal Court.The pattern is particularly so in cases where the accused has no right of election and the DPP has a discretion to proceed either in a summary manner or on indictment… Some District Court judges regard this trend as a dumbing down of charges for quick disposal in the District Court…"

298. In an address to the District Court Judges' conference in October 2002, the Director of Public Prosecutions explained his approach to the choice of jurisdiction. He reviewed the decided cases on the criteria for identifying a minor offence and said that he followed the criterion of whether "the offence can be regarded as a minor one fit to be tried summarily." He expanded by referring to the *Statement of General Guidelines for Prosecutors*,[206] issued in October 2001, paragraph 12.13 of which makes clear that:

> "the main factor to be taken into account is whether the sentencing options open to the District Court would be adequate to deal with the alleged conduct complained of having regard to all the circumstances of the case and in particular the seriousness of the offence."

299. The Director considers this to accord with the case law. He explained further:

> "Moral culpability is, of course, also a factor, although the case law does not greatly assist in assessing it. Perhaps the reason for this is that in sentencing a judge will always have regard to the

206 (Dublin: Office of the Director of Public Prosecutions, 2001). It is available from http://www.dppireland.ie/images/E_Guidelines.pdf.

> convicted person's moral culpability and therefore approaching a case by asking "what sentence will the judge impose if he or she finds the accused guilty" also encompasses this aspect of the case, even though it may seem to put the cart before the horse to ask what the sentence is likely to be before asking what is the degree of moral blame."

300. The Director has stated specifically that a decision in favour of summary trial has never been made in order to save money.

301. The position as to the extent of the availability of the option for jury trial is broadly that a person under the age of 18 has the right to opt for jury trial in every case where he is charged summarily with an indictable offence; every person of any age has that right if charged summarily with an offence of dishonesty; subject to a small number of exceptions, an accused, of 18 years or more does not have that right in any other case.

302. Whether any given offence is to be tried summarily or on indictment necessarily involves a consideration of the provisions of the Constitution as to trial by jury. The designation of an offence as indictable should normally mean that in principle it must be tried by jury. This conundrum must be analysed. If, on its facts, the offence is minor, the Director of Public Prosecutions may be expected to direct summary trial. But any decision of his to choose trial on indictment cannot be opposed either by the District Judge or the accused. Where he opts for summary trial, the District Judge may agree to accept jurisdiction if he is satisfied that the offence is minor. If not, he must refuse jurisdiction.

303. The process so described leads to a joint judgment of the Director of Public Prosecutions and the District Judge as to whether the offence is minor, with the consequence that it may not be tried by jury. But if the offence is hybrid the accused has no statutory right to opt for jury trial. Nonetheless since he has a lively interest in the decision, it is reasonable that he should be permitted the right to seek to persuade the District Judge that on its facts, the case is non-minor. The Working Group has been informed that such submissions are in practice entertained. If he does avail of that possibility on the other hand he may find himself in an invidious position. He is submitting to the Court – possibly the trial judge – that the case on its facts is too serious to be a minor offence. Having heard submissions from the Director of Public Prosecutions, the District Judge may rule that it is minor. The absurdity could arise that the prosecution would argue that the offence was less serious than the defence maintained. When it comes to trial and more particularly sentencing, the District Judge may well recall the submission made at an earlier stage regarding the seriousness of the offence. This could be avoided by ensuring that the case is tried by a different judge.

304. What is at issue here is a point of the utmost importance with regard to the mode of trial in the light of the constitutional provision for trial by jury. The State now routinely establishes new offences according to the formula described above. The offence is in itself, neither indictable nor summary. It can be either –

depending on the decision of the Director of Public Prosecutions. There are no statutory criteria governing this decision. As stated, the Director of Public Prosecutions may opt – with no possibility of objection – for trial on indictment. It is only where he opts for summary trial that the District Judge may override his decision, if he is not satisfied that the offence is minor. But there is no express statutory provision governing the District Judge's power to refuse summary trial. His power to do so is based directly on the Constitution and case law.[207] This is to be contrasted with the explicit statutory provisions of the *Criminal Justice Act, 1951*, the *Criminal Justice (Fraud and Theft Offences) Act, 2001* and the *Children Act, 2001* as well as some other specific provisions. This scheme leaves no statutory place for the accused to invoke his constitutional right to trial by jury.

305. It is necessary to consider the merits and defects of the present system. The first aspect of the system is its inconsistency. Generally, a person accused of an offence against property has the right to object to summary trial while a person accused of an offence against the person does not have that right. This does not seem to be based on any coherent or publicly enunciated policy. The offences of aggravated burglary and robbery – contrary to sections 13 and 14 respectively of the *Criminal Justice (Theft and Fraud Offences) Act, 2001* – are extremely serious offences involving the use of violence or the threat of violence. They are punishable with imprisonment for life. It is difficult to conceive of circumstances in which either of these offences would be judged minor. Yet, the either-way procedure applies to them.[208] It is theoretically possible for them to be tried summarily subject to the right of the accused to opt for trial on indictment. On the other hand, a person accused in the District Court of the offence of assault occasioning harm – unlike a person accused formerly of assault occasioning actual bodily harm – does not enjoy that right.

306. At this point, the lively debate which has taken place in recent years in England and Wales may be relevant. The James Committee – it will be recalled could – "see no justification in principle for according defendants a right to jury trial in respect of some of them but denying it in respect of others." If successors to James have advocated change it has been in the direction of a different, but single and consistent rule. Nobody advocates a return to the pre-James situation.

307. It seems to the Working Group that as a matter of elementary principle, legislative rules concerning such a fundamental question as the right to jury trial should at the very least be consistent. This is not to say that differentiation may not be desirable – it may well be justifiable. The Working Group is unable to identify any rational justification for the present system. While it is possible to identify a broad distinction between the treatment of offences against the person and against property respectively it has not been possible to identify a reason for this differentiation.

308. Assuming in each case that the Director of Public Prosecutions elects for summary trial, why should a person charged with robbery have the right to opt for jury trial,[209] while someone charged with threatening another with a syringe

207 *The State (McEvitt) v Delap* [1981] I.R. 125.

208 Section 53, *Criminal Justice (Theft and Fraud Offences) Act, 2001.*

209 See sections 14 and 53 of the *Criminal Justice (Theft and Fraud Offences) Act, 2001.*

does not?[210] In addition, suspects up to 18 years of age enjoy the right to opt for trial by jury no matter what the offence,[211] whereas adults do not. In any event, there are such internal inconsistencies in the two broad categories as to suggest that they are not based on a coherent policy.

309. It seems to the Working Group that the inconsistency so described offends against basic principles of fairness and justice. Accused persons should be treated equally by the criminal justice system. Put otherwise, they may be treated differently only on the basis of objective and rational criteria. Where a decision has to be made as to whether a case is to be tried summarily or by a jury, a fundamental constitutional rule is at issue. All accused persons are entitled to rely on the same rights. Assuming that there should be a consistent rule, the question is which of the alternative systems corresponds most closely with the interests of fairness and justice. This is not to forget the criteria of efficiency and economy; but fairness and justice are the prime considerations.

310. The system pertaining to hybrid offences has the merit of flexibility. By using it, the legislature abstains from designating offences as either indictable or summary. Each offence it creates may be routed through either channel. In effect, it delegates to the Director of Public Prosecutions the primary task of deciding the mode of trial based on the facts of each case. It is true that in the case of either-way offences, he also makes such a choice. Where he opts for trial on indictment, his decision is final. On the other hand, his election for summary trial is subject to the agreement of the accused.

311. The Director of Public Prosecutions – when exercising his power to designate the trial venue – is manifestly obliged to bear in mind that jury trial may be constitutionally required. The accused has a direct and real interest in respect for that provision. Nobody can doubt that the Director of Public Prosecutions must and will act constitutionally. He has made it clear to the Working Group that he acts according to criteria which respect the constitutional provisions. But he must make judgment in a large number of cases. His choice of venue is subject only to the power and duty of the District Judge to decline jurisdiction when he – contrary to the opinion of the Director of Public Prosecutions – judges that the offence is not minor. Reference has been made already to a significant body of opinion within the District Court judiciary to the effect that the Director of Public Prosecutions not infrequently opts for summary trial in cases which could not reasonably be considered minor. The exclusion of any role for the accused in this process means that the person most directly and intimately affected by the decision has no statutory right to make submissions. For reasons already explained, it would not be fair to the accused to expect him to make submissions which are potentially against his interest.

210 See section 6 of the *Non-Fatal Offences against the Person Act, 1997*.

211 As already noted, this does not apply to manslaughter or to any offence which must be tried in the Central Criminal Court, in practice, murder and rape offences.

312. The Working Group is of the view that, in all cases where summary trial or jury trial are optional, the accused should be entitled to opt for jury trial.

313. This conclusion is reached for the following principal reasons:

1. The history of either-way offences demonstrates that a system designed to provide speedier and less expensive trial of minor offences was, at the same time intended to preserve the right – then existing only at common law – to trial by jury. This historic right has now been elevated to the level of a constitutional right. The Working Group is fully conscious of the very different approach favoured by a number of highly distinguished reporters and commentators in recent times in England and Wales. In part, such conclusions proceed from an analysis of the nature of the either-way system as introduced in the 19th century, as constituting a novel statutory procedure conferring a right to trial by jury for minor offences. The Working Group does not share this view. It has been demonstrated that the system was an encroachment on a pre-existing common law right. Aside from this, the English situation is not comparable, given the constitutional provision for jury trial in this jurisdiction. Finally, it is particularly striking that in England, legislative attempts to abolish the right to opt for jury trial have been rejected by Parliament and that the British Government no longer proposes this change. In the result, defendants' rights are more generously protected in this respect in England than Ireland.
2. The 1951 Act – and its predecessor of 1924 – laid down a scheme for the continuation of the existing either-way system. The Minister at that time spoke of "the principle of a summary trial for certain classes of indictable offences having been long since established and having worked well in practice…" No clear reason has been advanced for so substantial a departure from that system. No evidence has been put forward to suggest that the system is abused or that excessive numbers of defendants exercise the option.
3. In any event, subsequent departures from that scheme have been inconsistent. This has been analysed in detail. The conferring of a right to trial by jury on a person accused summarily of an offence against property while denying it in respect of every offence against the person of comparable gravity lacks any rational basis. Such unreasoned differentiation in treatment is inherently discriminatory and unfair.
4. The system in its essence tends to erode the right to trial by jury by excluding it from a wide range of offences.
5. Such statistics as are available – and they are admittedly limited – tend to suggest that there is no serious danger that the grant of the right to jury trial would be abused. The available statistics tend to confirm the proposition that only a very small number - certainly not more than five per cent of the accused persons who enjoy this right – avail of it. More importantly, this impression is fully in accord with the experience of the judges of the District Court who have discussed the matter with the Working Group. The absence of a proper statistical basis for assessment of

this issue is a matter of legitimate concern. It should be possible – before any decision was made to adopt the proposal of the Working Group – to commission further research. An extension of the sample survey to cover a longer period and more centres would be possible. What is needed is a longitudinal or tracking survey, tracing the history of a sample of cases through the District Court to the Circuit Court. The Working Group recommends that such a survey be conducted without delay. It could be limited to sample venues – obviously including the Dublin Metropolitan District.

6. Decisions made at the line of demarcation between summary and jury trial involve the constitutional rights of the accused. They entail judgment as to whether or not an offence is minor. The Director of Public Prosecutions and the District Judge alone make the decision in hybrid cases. If the decision in favour of summary trial is made with the consent of the accused, there is greater comfort that the constitutional right has not been invaded. It has been held that the right to trial by jury is capable of being waived.[212] In the United States, there is an established system of "jury waiver."

314. The Working Group has considered the argument that there is an objective and rational basis for the preferential treatment of those accused of certain offences – essentially those involving fraud or dishonesty. The crime of larceny was – until recent times, a felony. It was regarded as a serious offence, socially and morally. Legislation disqualifies those convicted of offences of dishonesty from holding a wide range of positions in various corporate bodies.[213] Such a conviction would bring ruin or disgrace upon a person convicted of it to a greater extent than in the case of conviction of many other offences. The argument is illustrated most vividly by the hypothesis of a bishop being accused of shoplifting.

315. Following full debate, the Working Group does not accept that these arguments provide a convincing rationale for the present system. Firstly, the First Schedule to the Act of 1951 was not confined to offences of dishonesty. Notably, it included assault occasioning actual bodily harm and certain malicious damage offences. There is no explanation for their later removal from the First Schedule. Secondly, a small number of subsequent statutes confer the right to opt for jury trial. These are: sexual assault, contrary to section 16 of the *Criminal Law (Rape) (Amendment) Act, 1990*; offences contrary to section 2 of the *Fisheries (Amendment) Act, 1978*; assault on a peace officer, contrary to section 19 of the *Criminal Justice (Public Order) Act, 1994* and a number of offences involving the obstruction of justice contrary to the *Criminal Law Act, 1997*. Thirdly, the contention discussed here does not appear to provide a cogent and objective rationale for the system. The preservation of the option for all charges of offences of fraud and theft, including robbery and its withholding, in the case of all offences of assault and criminal damage to property, calls for some explanation relevant to the character of the offences.

212 *The State (Byrne) v Frawley)* [1978] I.R.. 326, *per* Finlay P. at page 333; Henchy J. at page 349: "An informed and deliberate decision was made to turn down that opportunity [to object to an unconstitutional jury]."

213 Section 19 of the *Trustee Savings Act, 1989* disqualifies a person convicted of an offence involving fraud or dishonesty or sentenced to six months' imprisonment or more for any offence of acting as a trustee.

316. The Working Group has also considered the possibility that a distinction could be made between what might be broadly described as ordinary criminal offences on the one hand, and what are sometimes called regulatory offences on the other. It will be recalled that in England, the James Committee reported that the former were normally treated as either-way offences, while the latter were normally hybrid. Attention has also been drawn to the special history of the *Casual Trading Acts, 1980* and *1995*, where the Oireachtas converted an either-way offence into a hybrid offence. An argument has been put before the Working Group to the effect that even if the right to opt for jury trial should be extended to all cases of offences triable either summarily or on indictment, nonetheless, special considerations apply in the case of regulatory offences.

317. It is probable that a workable definition could be devised. Ordinary crime would include all offences of fraud or dishonesty, all violent offences against the person, including all sexual offences, offences of public disorder, possession of firearms and other offensive weapons, road traffic offences and drugs offences. Regulatory offences would include all infringements of schemes of statutory regulation of commerce, trade, employment and use of property. Therefore, these would include the planning laws, health and safety legislation, environmental and agricultural regulations, tax and company legislation and many kindred subjects. There would be marginal cases but there is a genuine objective distinction between these two types of statute and the offences they create. For present purposes, it is suggested that there is not such a strong argument for extending the right to opt for a jury trial in the case of all regulatory offences where the Director of Public Prosecutions has the right to choose summary trial or trial on indictment. Many areas of regulation are assigned to statutory bodies, such as local authorities. These normally conduct District Court prosecutions themselves. The casual trading example shows that where an economic activity is regulated, it is possible for an organised group to come together to frustrate the purposes of the relevant legislation. That might extend to abusive exercise of the right to opt for jury trial. Regulatory bodies with limited budgets, might be deterred from pursuing prosecutions in such circumstances.

318. The Working Group accepts that there are some grounds for making such a distinction. Member Claire Loftus, Chief Prosecution Solicitor, has argued for one in her Dissenting Statement to this Report. However, the conclusion of the Working Group remains that such a distinction should not be made. In England and Wales, the right to opt across the range of all offences has existed since the late 1970s. It is not suggested in any of the recent discussions of the issue of mode of trial, that the right to opt for jury trial is abusively exercised in the cases of traders or others charged with regulatory offences. While the instance of the *Casual Trading Acts* has been identified as a possible example, no data appears actually to be available to identify the nature or extent of the supposed abuse.

A Statutory Mechanism of Allocation

319. If the recommendation made in this Report for the extension of the right of the accused to elect for jury trial is accepted, the creation of a formal and transparent mechanism will be all the more important.

320. In England and Wales, following the Report of the James Committee and the introduction of the general right of election, a single detailed statutory procedure was put in place with the enactment of the *Magistrates Courts Act, 1980*. It dealt with either-way offences where the accused indicated his intention to plead not guilty. The court must afford the prosecutor and the accused an opportunity to make representations as to which mode of trial would be more suitable. It must then consider – having regard to any such representations – whether the offence appears to be more suitable for summary trial or for trial on indictment. In doing so, it has regard to certain prescribed criteria such as seriousness of the case and the available punishment. If it appears to the court that the offence is more suitable for trial on indictment, it must tell the accused and then proceed to enquire into the information as examining justices. If it appears to the court that the offence is suitable for summary trial, it must explain this to the accused in ordinary language. It must inform him that he can consent either to be tried summarily or by jury – whichever he wishes.

321. It does not appear necessary to adopt quite such an elaborate procedure here. It must be recalled that in England and Wales, the magistrates make a judgment on whether the case is suitable for summary trial and it bases its decision on the gravity of the offence charged. Here the question is whether the offence is minor. Each of the three persons who are party to the decision approaches it from a different point of view.

322. The Director of Public Prosecutions is fully entitled to opt for trial on indictment, even if the case is one which could be tried summarily. Neither the judge nor the accused can object. As the statistics show, the great majority of cases tried in the Circuit Court are offences which could, if minor, be tried summarily. Moreover, the great majority of those cases reach that court because the Director of Public Prosecutions decides that they should be tried on indictment. Clearly the Director of Public Prosecutions, in making these decisions, is guided by the constitutional limits on the power of the District Court. The important point is that the decision of the Director of Public Prosecutions is the central event in all such cases. It is logical and practical therefore, that the Director of Public Prosecutions first informs the District Court of his intentions in the matter and the accused must be notified. The Director of Public Prosecutions has communicated his disagreement with any change in the current system. Member Claire Loftus discusses this fully in her Dissenting Statement. It is accepted that the statutory mechanism should not preclude the accused from announcing his decision to opt for jury trial at any stage. Presumably, the judge can do so only as soon as he is sufficiently informed of the nature of the case.

323. Only in the event that the Director of Public Prosecutions opts for summary trial does the judge have to consider whether the case is a minor one fit to be tried summarily. If he decides to decline jurisdiction, the case must go forward for trial – regardless of the wishes of the Director of Public Prosecutions or the accused. Only where both the prosecution and the judge have opted for summary trial, does the accused's election come into play. No purpose would be served by introducing the accused into the process at an earlier stage. Accordingly, the procedure followed in the Magistrates' Court does not seem appropriate. The Working Group recommends that the Director of Public Prosecutions should be required to inform the court within a specified period, whether he intends to opt for summary trial. A hearing should then be arranged to inform the judge of the nature of the case so as to enable him to decide whether to accept jurisdiction. If jurisdiction is accepted, he should inform the accused in open court – in accordance with the procedure now in force – so that the accused then has the opportunity to opt in favour of or against jury trial.

Special Provisions for Children Charged with Offences

324. As Charleton, McDermott and Bolger observe, "... criminal law is essentially an adult business."[214] The common law rule was that a child under the age of seven years was *doli incapax,* incapable of committing a crime. Furthermore, there was a rebuttable presumption to the same effect in the case of children over seven but under 14 years of age. After courts of summary jurisdiction had acquired substantial powers for the trial of indictable cases, it was decided to establish special provisions for the trial of children.

325. The *Summary Jurisdiction Over Children (Ireland) Act, 1884* was introduced in order "to mitigate the position of children and young persons who were brought before summary tribunals".[215] It gave the magistrates power to try all children and young persons under 16 years of age for any offence except homicide. In the case of a child, the parent or guardian could object to the case being dealt with summarily and in the case of a young person between 12 and 16 years of age, the young person had to consent to being tried summarily. In the case of a child, the court was required, if it thought it expedient, to deal summarily with the offence and it could inflict the same punishment as might have been inflicted had the case been tried on indictment. Section 5, which related to the trial of young persons, provided for additional consideration to be given in determining jurisdiction. The court had to consider if it thought it expedient so to do, but it also had to consider – having regard to the character and antecedents of the person charged – the nature of the offence and all the circumstances of the case. In both instances, the court was required to reduce the charge into writing, explain the meaning of summary trial and also explain the meaning of trial at assizes or quarter sessions.

214 Charleton, McDermott and Bolger, *Criminal Law*, n 184 *supra,* at page 1171.

215 Hansard, 6th March 1884, *per* Mr. Gibson M.P.

326. The *Children Act, 1908* constituted the basis of juvenile justice throughout the twentieth century.[216] It expanded the category of child to encompass a person under the age of 14. A young person was a person of between 14 and 16 years. It was thought that children and young persons "should receive at the hands of the law a treatment differentiated to suit (their) special needs".[217] In the debates on the Bill in the House of Lords, an attempt was made to remove the requirement of the consent to summary trial of the child or young person. Lord Alverstone claimed that:

> "… if it got about that under this new legislation only consent could give the magistrate jurisdiction parents and guardians might be inclined to withhold their consent. It was obviously important that in the Courts for dealing with these cases the magistrates should have this power without the consent of the parent or guardian".[218]

327. However, immediately after the proposal, it was stated that "great importance was attached to the privilege of the possibility of trial by jury and it would be a serious matter to take that right away"[219] from an accused. So the right of election for children and young person was retained.

328. The *Children Act*, *2001*[220] devised a new comprehensive approach to juvenile justice, adapting further the existing special procedures.[221] It raised the age criminal responsibility to 12 years, but retained the presumption that a child under the age of 14 "is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong". A child is defined as a person less than 18 years of age.[222]

329. The Act provides that the District Court – when dealing with offences allegedly committed by a child – or with applications for orders relating to a child at which their attendance is required, or when exercising any other jurisdiction conferred on the Children Court by the Act or any other Act (including the *Child Care Act, 1991*) – shall hold special sittings as the Children Court.[223] Provision is made for a District Judge to receive special training before presiding over the Children Court.[224]

330. Section 75 confers jurisdiction on the Children Court to "deal"[225] summarily with a child charged with any indictable offence other than manslaughter and those offences within the remit of the Central Criminal Court, "unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily."[226]

331. Section 75(2) provides: "in deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of –
the age and level of maturity of the child concerned, and
any other facts that it considers relevant."

216 For a comprehensive review of this Act and of the *Children Act, 2001*, see Walsh, Dermot, *Criminal Procedure* (Dublin: Thomson Round Hall, 2002).

217 Hansard, 10th February 1908, at page 1436.

218 Hansard, Volume 195, 4th November 1908, at page 1181.

219 *Ibid.*

220 Not yet fully into force, as of May 2003.

221 The District Court's jurisdiction had previously derived from the *Summary Jurisdiction over Children (Ireland) Act, 1884*, sections 4 and 5, but this Act has been repealed by the 2001 Act.

222 Section 3, *Children Act, 2001*.

223 Section 71, *Children Act, 2001*.

224 Section 72, *Children Act, 2001*. This is applicable only to judges appointed from 15 December 1995 onwards.

225 The verb "deal" is apparently employed in different senses in both sub-sections 1 and 3 of section 75.

226 Section 75(3), *Children Act, 2001*.

332. Section 75(3) precludes the Court from trying summarily any indictable offence where the child – on being informed by the Court of his or her right to be tried by a jury – does not consent to summary disposal.

333. Therefore in the case of a child, only the judge and the child are involved in the decision as to whether the case is to be tried on indictment. The Director of Public Prosecutions does not have the right to refuse summary trial.

334. Where a child is charged with an indictable offence jointly with an adult, the Children Court shall deal with the child in accordance with section 75 and the adult in accordance with the regime which applies to summary trial of indictable offences in the District Court.

335. Where a child pleads guilty to an offence of manslaughter or "one which is required to be tried by the Central Criminal Court," the Children Court being satisfied that the latter understands the nature of the offence and facts alleged, the Court may send the child forward for sentence unless the Director of Public Prosecutions withholds consent.[227]

336. So the 2001 Act creates a category of either-way offences – by reference to the type of accused – akin to that of the existing either-way offences, save that the consent of the Director of Public Prosecutions to summary disposal is not required, and the Court is obliged to consider the factors referred to in section 75(2) above.

337. Child offenders are subject to a distinct system of sanctions and penalties. Upon a conviction, the court is empowered to make a range of orders[228] – including a parental supervision order,[229] an order imposing a community sanction[230] or a detention order.[231] Where the child accepts responsibility for the offence charged and the Court considers it desirable that an action plan be formulated at a family conference and the child's parent or guardian agrees to participate in such a conference, the Court may direct the Probation and Welfare Service to convene a family conference.[232] The Court will adjourn proceedings until the conference has been held. At a resumed court sitting to review the child's compliance with the action plan, it is open to the Court to resume proceedings in respect of the offence with which the child has been charged or if satisfied of the child's compliance with the action plan, it may dismiss the charge.[233]

338. The payment of bail money into court[234] does not apply to those under the age of 18.[235] Upon a finding of guilt in the case of a child dealt with summarily, the maximum fine which may be imposed is half that which the District Court could impose upon an adult of full age and capacity.[236] Where satisfied of the guilt of a child, the Court may bind over the parent or guardian – with their consent[237] – to exercise proper and adequate control over the child.[238]

227 Section 75(5) and (6), *Children Act, 2001*.

228 Section 98, *Children Act, 2001*.

229 Section 98(e), *Children Act, 2001*.

230 Section 98(g), *Children Act, 2001*.

231 Section 98(h), *Children Act, 2001*. Moreover, this order may be deferred pursuant to section 144.

232 Section 78, *Children Act, 2001*.

233 Section 84, *Children Act, 2001*.

234 Pursuant to section 5 of the *Bail Act, 1997*.

235 Pursuant to section 89 of the *Children Act, 2001*.

236 Section 108, *Children Act, 2001*.

237 If such consent is not forthcoming and the Court views the refusal as unreasonable, it may be treated as if it were a contempt of court.

238 Section 114, *Children Act, 2001*.

339. The Court is precluded from imposing a sentence of imprisonment on a child.[239] Lastly, the anonymity of a child in court proceedings is guaranteed.[240]

340. The obvious and longstanding policy of the criminal law regarding children is that they should be treated differently so far as trial, conviction and sentence are concerned from adults. In particular, they should have the protection of anonymity. It is part of this policy that trials should be conducted in special children's courts and without the formality of a normal criminal trial. This entails making an exception also in respect of jury trial. Summary trial should be the norm. But section 75 of the Act respects the requirements of the Constitution on two levels: firstly, the right of a child accused of an indictable offence to opt for jury trial is preserved; secondly, it makes a particular exception of manslaughter and any offence which must be tried in the Central Criminal Court. Those offences are at the most serious end of the spectrum. They obviously cannot be minor and cannot be tried summarily.

341. Significantly, section 75 does not permit summary trial of any offence which must be tried in the Central Criminal Court. If the recommendations of the Working Group regarding the return of murder and rape offences were to be accepted, it would be necessary to amend section 75. In that event – and without such an amendment – it would follow from the general scheme of the Children Act that such offences could be tried summarily. That would not be in accordance with the legislative intention that they be tried on indictment or indeed with the Constitution.

342. The *Children Act, 2001* was introduced following a period of intensive study and consultation. In view of this – and given that the legislation has only very recently entered into force – the Working Group does not consider it appropriate or desirable to examine afresh this area of the courts' jurisdiction.

343. In effect, a comprehensive and self-contained regime governs all juvenile crime. The jurisdiction of the Children Court – a part of the District Court and thus a court of summary jurisdiction – depends on the offence being minor and fit to be tried summarily. But the right to opt for jury trial is expressly guaranteed to any child for whom summary trial for any indictable offence is proposed. This means that firstly, the right to opt for jury trial is available to children in the case of every type of charge where in many cases it is not available to adults. Secondly, and to contrary effect, there is a possibility of summary trial for a wide range of indictable offences not triable summarily in the case of adults.

Appeals and Judicial Review

Ordinary Appeals from the District Court

344. Section 85 of *The Courts of Justice Act, 1924* empowered the Circuit Court to hear an appeal from the District Court in criminal cases. But its jurisdiction was

239 Section 156, *Children Act, 2001.*

240 Section 252, *Children Act, 2001.*

limited to cases involving a term of imprisonment greater than one month or a fine exceeding 20 shillings. These restrictions were removed by section 18 of the *Courts of Justice Act, 1928*.[241] In *The Attorney General (Lambe) v Fitzgerald*,[242] the court held that this provision permitted an appeal against both conviction and sentence. Once both are stated as being appealed against in the notice of appeal, an accused is entitled to a re-hearing of the case. An accused is also entitled to appeal against conviction where a plea of guilty has been entered in the District Court: the fact that he pleaded guilty in the District Court may affect his credit on the rehearing and go to the issue of guilt but the appellant is still entitled to a full rehearing on the matter. The Circuit Court effectively substitutes its order for the whole or part of the order appealed against.[243] If an appeal is against sentence only, the Circuit Court is not entitled to rehear the entire case, except to adjudicate on the correct sentence which should be imposed in the particular circumstances.[244] Section 18 provides that the appeal may be brought "by the person against whom the order shall have been made". Save for a very limited number of statutory exceptions,[245] a right of appeal is not available to the prosecution other than by way of case stated. One such exception is section 310 of the *Fisheries (Consolidation) Act, 1959*, which grants to the prosecutor of an offence, under any provision of the Act, the right to appeal against an order of dismissal made by the District Court and to a judge of the Circuit Court the power to vary, confirm or reverse such order. The constitutionality of this section was impugned in *Considine v Shannon Regional Fisheries Board*.[246] In the Supreme Court, Hamilton C.J., in dismissing the plaintiff's claim, stated:

> "It is clear from… many… authorities that the common law rule that there should be no appeal from an acquittal of a criminal charge was subject to the right of the legislature to provide for such an appeal provided that such right was given in clear and unambiguous language and that a trial "in due course of law" did not necessarily involve the preclusion of a right of appeal in the event of an acquittal. As stated by O'Higgins C.J. in *The People v. O'Shea* [1982] I.R. 384 at p. 403: –
>
> 'The phrase 'in due course of law' denotes fair and just procedures in the conduct of the trial and the due application of the relevant law: it denotes no more.'"[247]

345. Decisions of the Circuit Court on appeal are final, conclusive and unappealable. Appeals to the Circuit Court are by way of hearing *de novo*,[248] which entails the Court hearing oral testimony in the same manner as the District Court – including evidence that may not have been adduced in the District Court.

346. In the survey of opinion on this area, 65 percent of respondents considered the current system of appeal by way of rehearing from the District Court to the Circuit Court to be satisfactory or very satisfactory. As Professors Jackson and Doran note,[249] that indication of a high level of satisfaction understates the level of satisfaction of judiciary and practitioners with arrangements given the large number of Garda respondents (over 50 percent) who expressed dissatisfaction. This confirms the impression gained

241 An appeal also lies in respect of an order dismissing the case under section 1(1) of the *Probation of Offenders Act, 1907*, by virtue of section 33 of the *Courts of Justice Act, 1953*.

242 [1973] 1 I.R. 195.

243 Section 18, *Courts of Justice Act, 1928*; *The Attorney General (Lambe) v Fitzgerald* [1973] I.R. 195 at page 198.

244 Section 50, *Courts (Supplemental Provisions) Act, 1961*; *The State (Aherne) v Cotter* [1982] I.R. 188 at page 210.

245 For example, section 2 of the *Summary Jurisdiction Act, 1857* (as extended by section 51 of the *Courts (Supplemental Provisions) Act, 1961*) provides that the prosecution (or the defence) may request an appeal on a point of law by case stated to the High Court. A further right of appeal then lies to the Supreme Court from the High Court decision.

246 [1997] 2 I.R. 404.

247 *Ibid*, at page 421.

248 *The State (Attorney General) v Connolly* [1948] I.R. 176.

249 At paragraph 11.13 of their report.

by the Working Group in the course of its consultations with the judiciary and practitioners. The Working Group does not propose any alteration in the appeals mechanism from the District to the Circuit Court.

Prosecution Appeals against Sentence

347. The Programme for Government of June 2002 contained a proposal to extend the Director of Public Prosecution's right of appeal against lenient sentences "to serious cases before the District Court."[250] In the course of the Working Group's discussions, the point was made at the outset that serious cases should not be dealt with in the District Court in any event. A number of arguments – rooted both in principle and in practicality – have been advanced as to why no prosecution right of appeal on grounds of undue leniency should lie from a sentence imposed by the District Court:

1. If a case has been assigned to the District Court in the first place, it is to be presumed that a relatively light sentence is appropriate. It is therefore unlikely that any perceived leniency in sentence will be of appreciable significance in any event.
2. In the District Court, where the majority of cases are prosecuted by a member of An Garda Síochána, it would be impractical to require the prosecuting Garda to report on any case where he or she might consider the sentence to be unduly lenient. In the absence of a reporting procedure, the exercise would be likely to become media-driven, which would not be acceptable.
3. District Court cases are already subject to a defendant's right to appeal by way of complete re-hearing in the Circuit Court. It is unclear what would happen if the prosecution brought an undue leniency appeal at the same time as the defendant exercised his appeal right.
4. There is no recording of reasons for sentencing in the District Court. As there is no transcript and no record, it is very difficult to reconcile a difference of opinion as to what was said, the only record being any notes taken by solicitor or counsel in the District Court.
5. Finally, there is also the very practical issue of resources. Arguably, the resources required by the prosecution to undertake this additional responsibility would outweigh the minor gain likely to be achieved through the introduction of such a right of appeal.

348. The Working Group accepts these arguments and does not recommend any extension of the right of appeal by the prosecution from decisions on sentence by the District Court.

Appeals to the High Court by way of Case Stated

349. A case may be stated to the High Court by a District Judge on a point of law at the request of any party in proceedings "heard and determined"[251] summarily.[252] This is known as an appeal by way of case stated. A dismissal under section 1(1) of the *Probation of Offenders Act, 1907* may be the subject of an appeal by way of case stated.[253]

250 *An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats*, June 2002, http://www.taoiseach.gov.ie/upload/publications/1480.rtf, at page 25.

251 In *The D.P.P. v Early* [1998] 3 I.R. 158 this was interpreted to mean that the evidence must have been heard and the decision of the court pronounced. In *Folen and McGrath v Garavan*, High Court, unreported, 9th November 2001, Morris J. opined: "In my view until facts are found or agreed to the extent as to enable the High Court to determine the law on those established facts an application to state a consultative case stated must be regarded as frivolous."

252 Section 2, *Summary Jurisdiction Act 1857*, as extended by section 51, *Courts (Supplemental Provisions) Act, 1961*.

253 *Oaten v Auty* (1919) 83 J.P. 173.

350. The court may refuse the application if it considers it to be frivolous.[254] In *Fitzgerald v The Director of Public Prosecutions*,[255] the High Court considered a challenge to the constitutionality of the proviso contained in section 4 of the *Summary Jurisdiction Act, 1857*, which prevented a District Judge from refusing to state a case where the application had been made to him by the Director of Public Prosecutions. The Court considered whether it would be constitutional to mandate a District Judge to exercise his discretion in a particular way. Kearns J. found that as section 4 completely removed the discretion of the District Judge to decide whether or not to state a case, there was an element of "offensiveness" in that section, which "can only be seen as a superfluous and discriminatory statutory provision."[256] If the Court refuses to refer the case on the grounds of it being frivolous, a party may apply for an order of mandamus requiring the Court to state the case and the High Court can consider the issue of frivolity.[257]

351. The appeal by way of case stated may be availed of to appeal against an acquittal as well as a conviction.[258] In the absence of an application by one of the parties to the proceedings, the District Judge can state a case for the opinion of the High Court on his own initiative, where the case raises questions as to the District Court's jurisdiction. Blayney J., in *Sports Arena Ltd. v O'Reilly*,[259] held that where a District Judge strikes out a case on the grounds that he has no jurisdiction to hear it, he is not entitled to refuse a request to state a case which is sought by the party seeking to challenge that decision.

352. The appeal by way of case stated procedure does not apply to hearings in respect of indictable offences not being dealt with summarily by the court. By contrast with the consultative case stated, either party would appear to have an unrestricted right of appeal to the Supreme Court from the High Court decision.[260] The High Court – or the Supreme Court on appeal from the latter court – may amend the District Court's decision as it thinks fit. Alternatively, the court may refer the matter back to the District Court but the Judge is then *functus officio* and has no jurisdiction to hear any further evidence as the case has been heard and determined.[261]

Consultative Case Stated to the High Court

353. This procedure is provided for by section 52 of the *Courts (Supplemental Provisions) Act, 1961*. An application may be made either by any party to the proceedings or by the court itself prior to the determination of the case. One purpose of the section is to allow the judge to obtain the advice and opinion of the High Court so as to assist the former in reaching the correct legal decision, which is why it is commonly referred to as a consultative case stated. But the section is more restrictive than the appeal by way of case stated procedure in one important respect; there is no automatic right of appeal to the Supreme Court and it is only with leave of the High Court that a decision may be appealed.[262] This issue has been considered particularly in light of Article 34.4.3 of the Constitution which provides for an appeal to the Supreme Court from all

254 Section 4 of the *Summary Jurisdiction Act, 1857*: see *Sports Arena Ltd v O'Reilly* [1987] 1 I.R. 189.

255 High Court, unreported, 4 May 2001, *per* Kearns J.

256 *Ibid*.

257 *The State (Turley) v O'Floinn and Another* [1968] 1 I.R. 245. However in *The State (Reilly) v District Justice for Clones* [1935] 1 I.R. 1, the High Court refused to interfere with the Court not referring the case as it had considered and judicially determined the question.

258 *The D.P.P. v Nangle* [1984] I.L.R.M. 171.

259 [1987] 1 I.R. 189, at page 191.

260 Article 34.4.3 of the Constitution; *The Attorney General (Fahy) v Bruen* [1936] I.R. 750 at page 764.

261 *T. v T.* [1983] I.R. 29.

262 Section 52(2), *Courts (Supplemental Provisions) Act, 1961*.

decisions of the High Court – subject to exceptions and regulations prescribed by law. In *Minister for Justice v Wang Zhu Jie*,[263] it had been argued that section 52(2) did not unambiguously except the decision of the High Court on such case stated from the provisions of Article 34.4.3 of the Constitution. The Supreme Court held that section 52 should be construed as effecting an exception to the right of appeal to the Supreme Court provided for in Article 34.4.3. Finlay C.J. explained:

> "The provision confining the right of further appeal to the Supreme Court to cases in which the High Court has granted leave is in my view unambiguous. It constitutes, within the provisions of Article 34, s. 4, sub-s. 3 of the Constitution what was properly described by Walsh J. in *The People (Attorney General) v. Conmey* [1975] I.R. 341 as a qualified exception to the general right of appeal, introduced by legislation to deal with an additional jurisdiction granted to the High Court by statute over and above the original jurisdiction conferred upon it by the Constitution."

354. Section 52(1) requires that the District Judge shall – if requested by one of the parties – refer any question of law arising in those proceedings to the High Court for determination. After the decision of the High Court or Supreme Court has been made, the case will be referred back to the District Court for the hearing to recommence in light of the guidance of the High Court. Once the case has been referred back and a determination made, an accused is entitled to exercise his right of appeal by way of rehearing to the Circuit Court.[264] As in the case of appeals by way of case stated, the procedure under section 52 does not apply to a hearing in the District Court in respect of an indictable offence not being dealt with summarily.

355. Both the appeal by way of case stated and the consultative case stated procedures share a number of common features:

a) In *The D.P.P. v Dougan*,[265] Geoghegan J. observed that there was "absolutely no doubt that a District Court Judge is not entitled to state a case to the High Court on a question of the validity of a statutory provision having regard to the Constitution. The direct effect [of Art.34.3.2] prevents him deciding the question himself and he can obviously only state a case on questions which he himself would be entitled to decide independently of the case stated. The mere fact… that the High Court is given jurisdiction under the Constitution to determine a question of the constitutionality of a statutory provision does not mean that this can be done by way of case stated…" The Supreme Court has held more recently that the Circuit Court and by parity of reasoning the District Court, has no jurisdiction to entertain a submission that a statute passed prior to the coming into force of the Constitution is inconsistent with it. Implicitly the Circuit Judge had no power to state a case on the point;[266]

b) A case may be stated on a point of law which goes to the jurisdiction of the court,[267] questioning whether the court has the jurisdiction to hear the case in the first instance;

263 [1993]1 I.R. 426.

264 This occurred in the case of *The Attorney General (Lambe) v Fitzgerald* [1973] I.R. 195.

265 [1997] 1 I.L.R.M. 550.

266 *The People (D.P.P.) v M.S.* Supreme Court, unreported, 2nd April 2003.

267 *The D.P.P. v Nolan* [1990] 2 I.R. 526, at page 531.

c) A case stated can only arise in the context of the particular facts and the District Court may not ask the High Court to define generally and without reference to particular facts, the meaning of an expression from a statute;[268]

d) The Court is empowered to grant bail pending the case stated upon an accused entering into a recognisance or the court may commit an accused to prison;[269]

e) A party who wishes to apply to the court seeking a case to be stated to the High Court has 14 days from the date of determination of the case in which to do so. The District Court then has six months in which to formulate the questions of law and to transfer the matter to the High Court;[270] and

f) Neither form of case stated applies to proceedings under the *Malicious Injuries Act, 1981*: a case stated in proceedings under that Act is referred directly to the Supreme Court.[271]

356. Insofar as the procedure for appeal by way of a case stated is concerned, reservations have been expressed about the absence of sufficient monitoring arrangements, whether by way of rule of court or by practice in respect of what happens once leave has been given to appeal.

At present a party wishing to initiate an appeal by way of case stated must lodge notice of application for a case stated with the court and serve the same personally[272] upon all other parties to the proceedings within 14 days from the making of the determination at issue.[273] The appellant must also within that period enter into recognisances before a District Judge on terms to be determined by the judge.[274] If in custody, he may be released on such recognisances and on condition that the appellant prosecute the case stated without delay. He must submit to the High Court's judgment in the matter and he must pay any costs awarded by the High Court. Where leave is granted to appeal, the District Judge must prepare and sign the case stated within six months from the date of the application and he has discretion – with a view to securing agreement of the parties – to submit a draft of the case within two months of the application.[275] The District Court Clerk then forthwith notifies the parties and transmits the case to the High Court.[276] Upon receipt of the case in the High Court Central Office, the proper officer in that Office is required to set the case down for hearing but the case shall not appear in the list for hearing until ten days thereafter.[277]

357. The High Court has discretion to penalise undue delay in the prosecution of the appeal from this point by refusing to entertain the application when it comes before it. Where that Court is of opinion that after a long delay, to deal with the appeal would be prejudicial or unjust to the other party, it may refuse to deal with the appeal.[278] But experience would seem to suggest that there has been frequent failure to prosecute such appeals in a timely manner – without intervention from the Court.

358. The Working Group considers that this vacuum in procedure could best be addressed by provision for a review hearing in the High Court within 28 days

268 *O'Neill v Butler* [1979] I.L.R.M. 243.

269 District Court Rules 1997, Order 102, rule 9 (S.I. 93 of 1997).

270 District Court Rules 1997, Order 102, rules 2 and 5.

271 Section 18 of the 1981 Act.

272 *The D.P.P. (Gannon) v Conlon*, High Court, unreported, 20th December 2001.

273 Order 102, rule 8, District Court Rules.

274 Order 102, rule 9, District Court Rules.

275 Order 102, rule 12, District Court Rules.

276 Order 102, rule 14, District Court Rules.

277 Order 62, rule 4, Rules of the Superior Courts.

278 *The D.P.P. v Flahive* [1988] I.L.R.M. 133.

of the lodgement of the case stated, to enable the Court to assume more active supervision and that Order 62, rule 4 be amended accordingly. Furthermore, there is need for advance monitoring in the District Court. Sometimes the defendant, having complied with the 14-day time limit, has no incentive to pursue the matter. Order 102 of the District Court Rules should be amended by insertion of an appropriate rule providing for the matter to be listed for further consideration until such time as the Case Stated is signed and despatched.

Judicial Review

359. The remedy of judicial review has recently been described as "perhaps, the single greatest growth area in litigation."[279] Judicial review should not be regarded as an alternative to conducting an appeal or stating a case where either of those remedies would properly be available to an applicant. According to O'Hanlon J. in *Gill v Connellan*:[280]

> "An application for certiorari by way of judicial review is not to be regarded as a readily available alternative to an appeal by way of re-hearing to the Circuit Court – see *The State (Roche) v. Delap* [1980] I.R. 170. The ordinary remedy for a person who is dissatisfied with a District Court decision is to appeal to the Circuit Court where a complete re-hearing will take place. Alternatively if the facts of a case are not in issue but a point of law arises then an appeal by way of case stated to the High Court is appropriate."

360. Judicial review may be availed of only in circumstances where the applicant can establish "want of jurisdiction or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record."[281] By the same token, the existence of an appeal remedy does not in itself preclude the possibility of seeking judicial review.[282] According to Barron J. in *McGoldrick v An Bord Pleanála*:[283]

> "The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness, provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind".

361. Where judicial review would appear to be "singularly inappropriate as compared with an appeal," leave to seek review should be refused.[284] The Law Reform Commission, in its recent Consultation Paper on *Judicial Review Procedure*, noted that "[a]n analysis of the case law in this area over the last two decades reveals a remarkable divergence in attitudes towards the question of exhaustion of alternative remedies," but "it would appear that there is now a middle ground approach emerging in more recent times."[285] It identified three such divergent attitudes.

279 According to Mr. Justice Peter Kelly in his foreword to Conleth Bradley's book *Judicial Review* (Dublin: Round Hall Ltd., 2001), at page vii.

280 [1987] I.R. 541, at pages 547-548.

281 O'Hanlon J. in *Lennon v Clifford* [1992] 1 I.R. 382, at page 386; approved by Murphy J. in the Supreme Court [1996] 2 I.R. 590, at pages 593-594; subsequently affirmed by Geoghegan J. in *Buckley v Kirby* [2000] 3 I.R. 431, at page 434.

282 *Osborne v Hickey*, High Court, unreported, 2nd May 1990, *per* Hamilton P.

283 [1997] 1 I.R. 497, at page 509.

284 *Buckley v Kirby* [2000] 3 I.R. 431, at page 434.

285 Law Reform Commission, *Judicial Review Procedure* (LRC CP 20-2003), at page 43.

362. In *The State (Abenglen Properties Ltd.) v Dublin Corporation*[286] the court had to consider how it would exercise its discretion where there was a right of appeal or an alternative remedy. Henchy J. took the view that the *Planning Acts* constituted "a self-contained administrative code, with resort to the courts only in exceptional circumstances". Even if the court was satisfied that there were grounds for review, "I would, in the exercise of my discretion, refuse certiorari on the ground that Abenglen should have pursued the appellate procedure that was open to them under the Acts."[287]

363. In the same case, O'Higgins C.J. adopted a less strict approach. He stated:

> "It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."[288]

364. The third approach is that expressed by Finlay C.J. in *P. & F. Sharpe v Dublin City and County Manager*:[289]

> "It was contended by the respondents that having regard to the decision of this court in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, the developers, having lodged a notice of appeal to An Bord Pleanála against the purported decision of the county manager to refuse permission, should be confined to that remedy, and as a matter of discretion should be refused any relief by way of judicial review. I am satisfied that this contention must fail. The powers of An Bord Pleanála on the making of an appeal to it would be entirely confined to the consideration of the matters before it on the basis of the proper planning and development of the area and it would have no jurisdiction to consider the question of the validity, from a legal point of view, of the purported decision by the county manager. It would not, therefore, be just for the developers who are respondents in this appeal to be deprived of their right to have that decision quashed for want of validity."

286 [1984] I.R. 381.

287 *Ibid*, at page 404.

288 *Ibid*, at page 393. This is in line with the view expressed by Gannon J. in the earlier case of *The State (Litzouw) v Johnson* [1981] I.L.R.M. 273, at page 279: "The fact that the prosecutrix appealed to the Circuit Court against the order made by the District Justice has been argued as a reason for refusing, in the exercise of the judicial discretion, to make absolute the conditional order of *certiorari*. That fact of itself is not a sufficient reason for exercising the judicial discretion in that way even in a case where it could be shown that the prosecutrix appellant has failed to show the court what sort of defence could reasonably be made. The principal factor which would guide the court in the exercise of its discretion is the objective of achieving a just resolution of the matters at issue with minimal inconvenience consistent with regularity of judicial procedures."

289 [1989] I.R. 701, at page 721; applied by Barr J. in *Tennyson v Dun Laoghaire Corporation* [1991] 2 I.R. 527.

365. While Henchy J.'s view was followed in a number of decisions,[290] the 'middle ground' approach of O'Higgins C.J. "seems now to have prevailed."[291] The Law Reform Commission concludes:

> "… it is important not to overlook the fact that any hard line approach to the exhaustion of alternative remedies requirement will have the effect of blurring the distinction between an appeal on the merits and a review of the legality of a decision. In view of the fact that judicial review is the appropriate mechanism for controlling the legality of decisions made by administrative bodies and lower courts, it may be important to allow review to take place even where an alternative appeal procedure is open in order to ensure that confidence in the decision-making process is maintained. Hogan and Morgan[292] suggest that such approach could offer the necessary potential for reconciliation between the divergent dicta of *Abenglen* and *P. & F. Sharpe*, commenting that 'it may be that some consistency can be built upon a reasonable principle by considering, in the context of a given case and the alleged blemish, exactly how comprehensive and appropriate is the right of appeal which was provided'".[293]

366. Accordingly, it endorsed the recent trend of the courts in following the approach of O'Higgins C.J.

367. The Working Group does not see any justification for any substantive change to the judicial review remedy.

Provision of Reasons for Decisions

368. Concern has also been expressed at the lack of any clear rules governing the giving of reasons for custodial decisions. The District Court imposes sentences of imprisonment in less than two percent of cases.[294] Of those cases, a significant segment comprises sentences in excess of six months' imprisonment. Any sentence of imprisonment must be reasoned. In this regard, the statutory provisions governing the keeping of records by the District Court merit mention.

369. The Working Group had not initially considered that this issue fell within its Terms of Reference. It has discussed it in the light of the fact that the Law Reform Commission considered it as part of its recommendation on sentencing limits. It remains open to question whether this is a matter concerning the jurisdiction of the courts. It has not been possible to reach full agreement on this issue.

370. The District Court is by virtue of section 13 of the *Courts Act, 1971*, a court of record. Section 14 provides:

> "In any legal proceedings regard shall not be had to any record (other than an order which, when an order is required, shall be

290 *Nova Colour Graphic Supplies v Employment Appeals Tribunal* [1987] I.R. 426; *O'Connor v Kerry County Council* [1988] I.L.R.M. 660.

291 De Blacam, Mark, *Judicial Review* (Dublin: Butterworths, 2001), at page 234. See also *Gordon v Director of Public Prosecutions* [2003] 1 I.L.R.M. 81.

292 Hogan, Gerard and David Gwynn Morgan, *Administrative Law in Ireland* (3rd ed.) (Dublin: Round Hall Sweet & Maxwell, 1998) at page 739.

293 *Judicial Review Procedure*, n 285 *supra*, at pages 49-50.

294 Measured by reference to numbers of offences.

> drawn up by the district court clerk and signed by a justice or a copy thereof certified in accordance with rules of court) relating to a decision of a justice of the District Court in any case of summary jurisdiction."

371. The purpose of this provision was to substitute a formal order for the former judge's minute book. There is no provision in statute or rule of court regulating generally the reasons to be given by a District Judge or the form they are to take. But the question of the pronouncement of reasons for the decision itself is a different matter. There has been very considerable development in the law in recent years regarding the obligation of judicial and administrative tribunals to give reasons for decisions.

372. The Law Reform Commission has dealt with this issue in its *Report on Penalties for Minor Offences*.[295] The Commission recalled that, while it recommended in its Consultation Paper on the same subject[296] that there be a requirement to state reasons for sentencing decisions, it had not elaborated on the exact content of the reasons to be given. It recommended that wording along the following lines be adopted: "I impose a custodial sentence of… for the following reasons…" It noted that the reasons do not have to be lengthy or elaborate. At the same time, such a formula might simply generate terse responses such as "seriousness", "persistence", "last resort" etc. The reasons given could become reduced to the level of the formulaic, providing no real insight. Bearing this in mind, the Commission had recommended that brief reasons be given outlining the aggravating and mitigating factors influencing the decision with particular emphasis on why the non-custodial options available to the judge are not appropriate. He should list the factors which in his opinion render the offence one in respect of which a prison sentence is the most suitable punishment. The report recommends as follows:

> "Accordingly, the Commission adheres to its earlier recommendation that a District Court judge should be required to give concise, written reasons for any decision to impose a prison sentence rather than a non-custodial sentence. The Commission further recommends, as part of this requirement, that District Court judges should record the aggravating and mitigating factors which influenced the decision, with particular emphasis on why the non-custodial options available to the judge are not appropriate."

373. The Law Reform Commission drew attention to statutory regulation of this issue in England and Wales in the form of the *Powers of Criminal Courts (Sentencing) Act, 2000*. Section 79(4) of that Act provides that, with certain exceptions, where a court passes a custodial sentence, it shall:

> "(a) … state, in open court that it is of the opinion that either of… [two paragraphs relating to the justification of a custodial sentence] apply and why it is of that opinion; and
> (b) in any case, explain to the offender in open court and in

295 Report on *Penalties for Minor Offences*, n 17 *supra*.

296 Consultation Paper on *Penalties for Minor Offences*, n 84 *supra*.

> ordinary language why it is passing a custodial sentence on him."

374. In addition, the section provides that the court "shall cause a reason stated by it… to be specified in the warrant of commitment and to be entered in the register."

375. A fair judicial process must of course provide that a person affected by judicial decisions be made aware of the reasons which motivated the judge. Without reasons, a judicial decision fails to perform the function of a fair and objective adjudication on the disputed question.[297] The actual function of the reasons – as has been emphasised in the jurisprudence of the European Court of Human Rights[298] – is firstly, to enable the party affected to know and understand the basis upon which the matter has been decided so that he may be in as good a position as possible to form a judgment on whether to appeal and secondly, to enable the appeal court to perform its function of judging the legality of the decision.

376. It is appropriate to refer briefly to the cases in which the courts in this jurisdiction have dealt with the obligation of administrative bodies and courts to furnish reasons for their decisions.

377. Perhaps the leading case on the obligation of tribunals exercising quasi judicial powers to give reasons is *State (Creedon) v Criminal Injuries Compensation Tribunal,*[299] which has been followed in a number of cases. The tribunal had rejected the claim of the applicant, a widow, for compensation arising from the death of her husband. The reason given was that the Tribunal was not satisfied that the death occurred in the course of attempting to save human life, as alleged. But no explanation was given for rejecting the evidence. Finlay C.J. dealt with the general obligation to give reasons as follows:

> "I feel I should add that for a tribunal of this nature, even though it is not of statutory origin and is set up by an administrative decision by the Government, to reach a conclusion rejecting in full the claim of an applicant before it and not to give any reason for that rejection is not an acceptable and proper form of procedure.
> Once the Courts have a jurisdiction and if that jurisdiction is invoked, an obligation to enquire into and, if necessary, correct the decisions and activities of a tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the Courts should be able to ascertain the reasons by which the tribunal came to its determination. Apart from that, I am satisfied that the requirement which applies to this Tribunal, as it would to a court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of functions which are of a quasi judicial nature."

297 *O'Mahony v Judge Ballagh and the D.P.P.*, unreported, Supreme Court, 13th December 2001.

298 In *Van De Hurk v The Netherlands* (1994) 18 E.H.R.R. 481, the European Court stated that Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms obliges courts to give reasons but it does not require a detailed answer for every argument, nor does it require the European Court to examine whether arguments have been adequately met. However, in *Hiro Balani v Spain* (1994) 19 E.H.R.R. 566, the Court explained that it did oblige the court to give a "specific and express" answer where the submission, if successful, would be decisive to the outcome of the case. In *Georgiadis v Greece* (1997) 24 E.H.R.R. 606, the Court held that the extent of a court's duty to give reasons may vary, *inter alia*, according to the nature of the decision (see also *Karakasis v Greece* [Appl. No.38194/97]). The requirement, while not applying to jury trials, does apply to summary trials. According to the Court in *Hadjianastassiou v Greece* (1992) 16 E.H.R.R. 219, at paragraph 33, "the national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him."

299 [1988] I.R. 51.

378. In *International Fishing Vessels Ltd. v Minister for the Marine*,[300] Blayney J. in the High Court, dealt with the refusal of the Minister to give reasons for refusal to renew sea-fishing licenses. He cited the above judgment of Finlay C.J. and proceeded to explain the need for reasons as follows, at page 154:

> "It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed. A procedure which places an applicant at such a disadvantage could not in my opinion be termed a fair procedure, particularly where the decision which the applicant wishes to challenge is of such crucial importance to the applicant in its business."

379. He also said that the applicant might be able to meet the concerns of the Minister if he knew the reasons for the refusal.

380. Clearly if administrative bodies are bound to give reasons where they exercise judicial powers, it is obvious that the same applies to the judges themselves. *O'Mahony v Judge Thomas Ballagh and the Director of Public Prosecutions*[301] concerned the failure of the District Judge to give reasons for refusing a dismiss of a case at the end of the prosecution evidence. Murphy J., in the unanimous judgment of the court, said:

> "I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."

381. From the authorities cited, it is clear that the function of the reasons given for decisions is firstly, to inform the affected person so that he may be better able to judge whether he has grounds for appealing or challenging the decision. The second function is to enable a court to which the appeal or application for judicial review is brought to perform its function of assessing the validity of the decision. Insofar as any of these cases refer to the extent of the reasons, it is clear that they must be sufficient but that reasons stated in general and broad

300 [1989] I.R. 149.

301 Supreme Court, unreported, 13th December 2001.

terms will suffice. In the case of decisions of the District Court, Murphy J. took account of the practicality of giving reasons and recognised the undesirability of having to reserve decisions "even for a brief period."

382. In *Golding v Labour Court*,[302] in the High Court, Keane J. said:

> "[T]he determination of the Labour Court need not…take any particular form: what is essential is that the manner in which it is expressed leaves no room for doubt as to the reasons which led to the decision, thus ensuring that neither the appellate nor the supervisory jurisdiction of this court is frustrated by an inadequate indication of reasons."[303]

383. The extent of the required reasoning depends on the circumstances. Some statutes require reasons to be given. Some of the recent cases in the area of immigration and refugee law suggest that a very brief statement may be adequate.

384. In *Laurentiu v Minister for Justice*,[304] where the decision was in the following form:

> "I am directed by the Minister for Justice Equality and Law Reform to refer to your request for permission to remain in Ireland on behalf of the above-named and to inform you that having taken all the circumstances of his case into consideration including the points raised in your submission, it has been decided not to grant your client permission to remain".

385. Geoghegan J., in the High Court, held:

> "I do not think that there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds has been refused. The letter makes clear that all the points made on behalf of the Applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the first Respondent did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the first Respondent to take that view and no court can interfere with the decision in those circumstances."[305]

386. This view was approved unanimously by the Supreme Court in *P., L. and B. v Minister for Justice*,[306] where Hardiman J., having approved the approach of Geoghegan J., already cited, continued:

> "Where an administrative decision must address only a single issue, its formulation will often be succinct. Where a large number of persons apply, on individual facts, for the same relief, the nature of the authorities' consideration and the form of grant or refusal may be similar or identical. An adequate Statement of Reasons in one case may thus be equally adequate in others. This does not diminish the statements

302 [1994] E.L.R. 153.

303 [1994] E.L.R. 153, at page 159.

304 [1999] 4 I.R. 26.

305 [1999] 4 I.R. 26, at page 34.

306 [2002] 1 I.L.R.M. 16.

essential validity or convert it into a mere administrative formula."[307]

387. The extent of the District Court's obligation to give reasons has to be considered in context. In the case of the District Court, appeals are taken to the Circuit Court by way of rehearing. There is no particular need for the Circuit Court to know the reasons given by the District Court for imposing a custodial sentence. But affected persons undoubtedly have a right to the reasons in order to judge whether or not to make an appeal. They also have the right to seek judicial review of decisions of the District Court. Accordingly, it has been held that a party is entitled to expect the judge to pronounce a reasoned decision on any significant arguments advanced by him in the course of the trial.[308]

388. A decision on sentence is essentially a discretionary decision of the judge on the appropriate penalty to be imposed. So long as it is within the limits of the sentencing power of the District Court, it is unlikely to form the basis for judicial review. In any event, an appeal lies to the Circuit Court and judicial review is likely to be refused until the avenue of appeal has been exhausted.

389. In the opinion of the majority of the Working Group, the circumstances of summary trial in the District Court must be considered. The reason for a particular sentence will very often be apparent from the circumstances of the case itself. In effect, the parties will both know and understand the issues. It is not disputed that judges of the District Court are under a duty to give reasons for their decisions. Moreover, it is clear that the imposition, particularly of a custodial sentence calls for the giving of reasons. The District Court imposes custodial sentences in fewer than two per cent of cases.

390. It has been represented to the Working Group on behalf of the District Court judiciary that any obligation to furnish reasons in writing for every custodial sentence would be both onerous and time-consuming. Judges should pronounce their decisions in open court as at present and it is open to the parties to keep a written record. An express obligation to furnish written reasons is likely to open up a fruitful new field for judicial review.

391. The Working Group notes the undoubted obligation of all courts – including the District Court – to give clear and adequate reasons for their decisions. It has considered the recommendation of the Law Reform Commission. It has been informed that the implementation of an obligation to give written reasons for custodial decisions is not possible within the parameters of the existing work-load of the District Court. It would necessitate the making available of recording equipment in all courts. In the view of the Working Group, that would be desirable for many reasons.[309] But the information available to the Working Group does not suggest, however, that this is likely to occur in the foreseeable future. As an alternative, additional judicial resources would be necessary if every custodial sentence had to be justified

307 [2002] 1 I.L.R.M. 16, at page 45.

308 See *O'Mahony v Judge Ballagh and the D.P.P.*, discussed at paragraph 380.

309 Some judges have expressed concern that Judicial Review applications in the High Court receive widespread publicity based on a one-sided account of the proceedings which the judge does not have the opportunity to correct. If proceedings were recorded, this problem might be overcome.

by reasoning to the level required by the recommendation of the Law Reform Commission.

392. Having recognised the obligation of judges of all courts to furnish reasons for their decisions, the majority of the Working Group does not find it necessary to make a recommendation on whether these reasons should take a particular form or whether they should be in writing. A Minority Report on this issue has been entered by a number of members.

CHAPTER FOUR
Trial on Indictment

Introduction

The Regime Prior to 1922

393. By way of contrast with summary jurisdiction, the history of the trial of offences on indictment prior to 1922 is of comparatively limited value. It will be recalled that *The Courts of Justice Act, 1924* defined much of the jurisdiction of the newly established District Court by way of reference to the jurisdiction previously exercised by its predecessors, the courts of petty sessions. The Central Criminal Court and the Circuit Court, on the other hand, were given specific original jurisdiction, defined in terms of classes of offences.

394. Therefore, it is sufficient to recall merely the essential features of the former system which was abandoned after 1922. As will appear later, this system was also abandoned in England and Wales after the recommendations of the Beeching Report led to the establishment of the Crown Court. During British rule in Ireland, the Viceroy issued the Commissions of Assize for a particular circuit and specified period. Under the theory that all power resided in the sovereign, this was done in the name of the King.[310] There were two elements in the Commission: the Commission of "oyer and terminer" provided for cases to be presented by the Grand Jury for trial at the assizes; and the Commission of "general gaol delivery" which allowed the judges to order that all prisoners held in the town gaols be brought forward for trial.[311] The system of assize was originally established in Ireland during the 17th and 18th centuries. There were five circuits.[312] In principle, the court of assizes tried only the most serious cases. All treasons and felonies could be tried only there. It should be recalled that the notion of felony included quite petty larcenies.[313] The court of quarter sessions could only try less serious offences, i.e., those not triable at assizes although these would be too serious for summary trial.

The Post 1922 Regime

395. The trial of all indictable crime is shared between the Central Criminal Court – the High Court when exercising its criminal jurisdiction – and the Circuit Court. The Special Criminal Court also tries indictable crime, but its basis of jurisdiction is derived from the exceptional provision of Article 38.3 of the Constitution, from the Offences against the State Acts and from a declaration made by the government.

310 Garnham, n 28 *supra*.

311 Stannard, John E., *Northern Ireland Criminal Procedure – An Introduction* (Dublin: Round Hall Ltd., 2000).

312 Originally, Dublin had a different system. In reality, a system of more frequent commissions meant that the systems were essentially the same.

313 Garnham, n 28 *supra*, at page 80.

396. The jurisdiction of the Special Criminal Court has been the subject of specific examination recently[314] and the Working Group has taken the view that it would not be appropriate to re-visit the issues considered in the course of that exercise.

397. While the Central Criminal Court exercises a jurisdiction which extends nationwide and may sit anywhere within the State, it has to date sat only in Dublin. The Circuit Court exercises its jurisdiction geographically. It tries cases in circuits, including Dublin and is in constitutional terms a court of local and limited jurisdiction.

398. All indictable cases are returned by the District Court to the appropriate court for trial. In recent years, the Central Criminal Court has disposed of approximately 150 cases each year. The Circuit Court normally disposes of some 2,600 cases each year.

399. Cases currently tried in the Central Criminal Court concern exclusively murder, rape and related offences. Prosecutions for any of the small number of other types of offence[315] triable in that court are extremely rare. In former times, the Central Criminal Court could try a wider range of offences due to a system of transfer of trials from the Circuit Court. It acquired exclusive jurisdiction in respect of rape offences from the passing of the *Criminal Law (Rape) (Amendment) Act, 1990*. Prior to that date, rape cases were tried in the Circuit Court though they could be and were occasionally tried in the Central Criminal Court in accordance with the now defunct transfer mechanism.

400. The Working Group has examined the system of allocation of cases between these two courts and has come unanimously to the conclusion that it lacks coherence and logic. It is appropriate at this point to examine in turn the separate indictment jurisdictions of the Circuit Court and the Central Criminal Court.

The Circuit Court

401. The jurisdiction of the present Circuit Court may be traced to *The Courts of Justice, 1924* which established its predecessor. Section 37 of that Act provided that a "Circuit Court of Justice shall be constituted under this Act…" It also provided that the court "shall discharge within the several groups of counties specified in the Schedule… termed circuits… such duties as are by this Act imposed…" The jurisdictions of the new court – both civil and criminal – were set out in the 1924 Act in a compartmentalised fashion. By virtue of section 49 of the Act, the Circuit Court was to have the following jurisdiction in criminal matters: "jurisdiction in all felonies and misdemeanours save in the case of persons charged with murder, attempt to murder, or conspiracy to murder, high

314 See the *Report of the Committee to Review the Offences against the State Acts 1939-1998 and Related Matters* (Dublin: Government Publications Office, 2002).

315 Such as treason, genocide, piracy, certain offences under the *Offences against the State Act, 1939*, offences under the *Geneva Conventions Act, 1962*, as amended, offences under the *Criminal Justice (United Nations Convention against Torture) Act, 2000* and offences under the *Competition Act, 2002*.

treason, treason felony, or treasonable conspiracy, or piracy, including accessories before or after the fact."[316] Section 51 provided for the residual transfer of jurisdictions formerly exercised by Recorders, County Court judges and Chairmen of Courts of Quarter Session. The listed exceptions remained within the exclusive jurisdiction of the Central Criminal Court.

402. But under section 54 of the same Act – repealed in 1964 – either the Attorney General or the accused person was entitled on application to have any case, the maximum penalty for which exceeded one year's imprisonment or five years' penal servitude, sent forward to the short-lived Court of the High Court Circuit or to the Central Criminal Court. The Court of the High Court Circuit was the court of such judges as were previously named in Commissions of Assize. The *Courts of Justice Act, 1926* abolished the Court of the High Court Circuit. According to the Minister who introduced the Bill, quite a few cases were heard by the High Court on Circuit, being widely scattered throughout the country. It was his view that the inconvenience and expense was out of all proportion to the number of cases involved.[317] So from 1926 indictment jurisdiction was exercised by the Circuit Court of Justice and the Central Criminal Court. Any case attracting a term of imprisonment in excess of the specified periods was transferable as of right to the Central Criminal Court.

403. The Supreme Court of Saorstát Éireann in *Sligo Corporation v Gilbride and AG v Gilbride,*[318] spelled out the significance of the manner in which the Circuit Court had been established by statute. Kennedy C.J. considered at page 361, that the Act of 1924 had "set up an entirely new court" and stated :

> "The suggestion that the Circuit Court has merely the jurisdiction of the former County Court, extended as to quantum, is, in my opinion, entirely erroneous."[319]

404. Fitzgibbon J. observed to similar effect:

> "In my opinion the new Courts of local and limited jurisdiction established by the Courts of Justice Act under the powers conferred by Article 64 of the Constitution are not subject to the restrictions imposed by the Civil Bill Act or the County Officers and Courts Act upon the County Courts whose jurisdiction has been transferred to them. The only limitations upon the jurisdiction of the Circuit Court are those expressed or implied in the provisions of the Courts of Justice Act, and, subject to those limitations, the Circuit Court has within its locality all the jurisdiction of the High Court."[320]

405. These pronouncements should be considered in the light of the present Constitution and the legislation establishing the present Circuit Court. It is arguable that they apply with equal validity to the present Circuit Court and the Circuit Court judiciary has cited them to that effect in their submission to the Working Group.[321] Article 34.3 of the Constitution ordains that the High Court be a Court of First Instance with full original jurisdiction. Article 34.3. 4 goes on

316 Treason is now exhaustively defined by Article 39 of the Constitution.

317 *Dáil Debates*, Volume 13, 17th November 1925.

318 [1929] I.R. 351.

319 [1929] I.R. 351, at page 363.

320 [1929] I.R. 351, at page 368. It will be noted that the learned judge treated the Circuit Court as a court of "local and limited jurisdiction" within the terms of the Constitution of Saorstát Éireann, a point left undecided in the later case of *The State (Boyle) v Neylon*.

321 In *The State (Boyle) v Neylon* [1986] I.R. 551, Walsh J., giving the judgment of the court, stated that the "organisation and jurisdiction" of the former Circuit Courts was "virtually identical with the present one."

to provide "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law."

406. Section 4(1) of the *Courts (Establishment and Constitution) Act, 1961* provided that the Circuit Court should stand established. The Courts (Supplemental Provisions) Act, 1961 repealed and replaced the jurisdictional provisions of The Courts of Justice Act, 1924. In *The State (Boyle) v Neylon*[322] the Supreme Court rejected a challenge to the constitutionality of the mechanism for the transfer of trials within the Circuit Court. Walsh J., delivering the judgment of the court, having referred to Article 34 of the Constitution, stated:

> "The wording of Article 34, s.3, sub-s. 4 does not confine courts of first instance to the High Court and courts of local and limited jurisdiction, and the Oireachtas is free to set up as many courts of first instance as it sees fit, but is not free to bestow on them… the constitutional review function of the High Court or the Supreme Court… Therefore the Circuit Court as an institution can be set up without breaching any provision of Article 34 of the Constitution."[323]

407. This passage cannot be taken as a definitive statement that the Circuit Court is not a court of local and limited jurisdiction as it was common case between the parties that it was. Nonetheless, it lays down the important principle that there is no constitutional bar to the establishment of first instance courts other than the High Court, whose jurisdiction is not limited.[324]

408. The judgment of the court went on to state:

> "The Circuit Court is a single court for the whole State but its jurisdiction is exercised in accordance with statute on a local basis… it provided local and cheaper venues for litigants than would be the case if they had to go to the High Court. They would also in most cases be more convenient. It was left to the statute to decide how this would be achieved."[325]

409. Section 25(1) of the *Courts (Supplemental Provisions) Act, 1961* defined the jurisdiction of the Circuit Court to try indictable crime:

> "… the Circuit Court has and may exercise every jurisdiction as respects indictable offences for the time being vested in the Central Criminal Court…"

410. Section 25(2) created several exceptions to section 25(1), namely: treason; an offence under section 2 of the *Treason Act, 1939;* an offence under section 6 of the Offences against the State Act, 1939; murder; attempt to murder; conspiracy to murder; and piracy, including an offence by an accessory before or after the fact.[326] While section 25(1) confers on the Circuit Court all the jurisdiction "for the time being" of the Central Criminal Court and can be read as providing for concurrent exercise of jurisdiction between the Circuit Court and the Central

322 [1986] I.R. 551.

323 [1986] I.R. 551, at page 555.

324 There is a view that Article 34.3.4 allows only for courts that are both local and limited. The Irish text uses the expression "dlínse theoranta áitiúil." See Hogan, Gerard and Gerry Whyte, n 120 *supra*.

325 [1986] I.R. 551, at page 556.

326 See the section on the Central Criminal Court below for further offences subsequently excluded from the Circuit Court's trial jurisdiction.

Criminal Court, the statutory scheme does not allow the Central Criminal Court to exercise it.

411. The result of the limited range of offences assigned exclusively to the Central Criminal Court is that the offences with which the Circuit Court deals include manslaughter and all other serious offences against the person – except rape offences, as defined. Included in the list of these offences are those relating to incest, unlawful carnal knowledge, drugs, and property, firearms and explosives.

412. Section 25(3) deals with the local basis of jurisdiction, by specifying that it is to be "exercisable by the judge of the circuit in which the offence charged has been committed or in which the accused person has been arrested or resides."

413. The rules in respect of the transfer of cases for trial both within circuits and from lower to higher courts have been changed several times – in some cases quite radically. These rules are highly relevant to the system of allocation of jurisdiction. Under section 54 of *The Courts of Justice Act, 1924*, either the Attorney-General or the accused person was entitled on application to have cases regarding more serious offences sent forward to a court of the High Court Circuit – soon after abolished – or to the Central Criminal Court. This provision endured until 1964 when it was repealed and replaced in the manner about to be described. But section 26(1) of the *Courts (Supplemental Provisions) Act, 1961* gave power to a judge of the Circuit Court to transfer a trial from its primary place of jurisdiction on his circuit to any other place on that circuit. Any such decision which is taken on the application of the Attorney General[327] or of the accused is final and unappealable.

414. Section 6 of the *Courts Act, 1964* introduced a highly flexible transfer mechanism from the Circuit Court to the Central Criminal Court. At the same time as it repealed section 54 of the Act of 1924, it provided that a Circuit Court judge was bound to make such a transfer where either the Attorney General or the accused gave at least seven days notice. Where the period of notice given was less, he could do so at his discretion and his decision is also final and unappealable. This provision allowed many comparatively minor prosecutions such as petty burglaries or larcenies, to be tried in the Central Criminal Court. It was open to be abused and was abused. In its Sixth Interim Report, *The Criminal Jurisdiction of the High Court,*[328] the Committee on Court Practice and Procedure was contemplating a court with unrestricted jurisdiction in all cases triable on indictment and noted that in the period from 1960 to 1965, transfers from the Circuit Court in Dublin accounted for a large proportion of the work of the Central Criminal Court. The Committee recommended that transfers from the Circuit Court outside Dublin should be to the Dublin Circuit Court. The High Court should receive transfers only of cases originally returned for trial in the Dublin Circuit Court, unless a legal issue arose. In such a case, the Circuit Court judge should have discretion to transfer the case to the High Court.[329]

327 See the effect of the *Prosecution of Offences Act, 1974* on the Attorney General's functions in n 191 *supra*.

328 Committee on Court Practice and Procedure, *The Criminal Jurisdiction of the High Court*, Sixth Report (Dublin: Stationery Office, 1966).

329 *Ibid*, at paragraph 23.

415. Section 31 of the *Courts Act, 1981* repealed section 6 of the Act of 1964 and replaced it with an identical provision limiting the mechanism to cases of transfer from the Circuit Court sitting outside Dublin to the Circuit Court sitting in Dublin. Following this change, it was no longer possible to transfer a Circuit Court trial in any circumstances to the Central Criminal Court. In *Tormey v Ireland*[330] the constitutionality of this system was challenged as being incompatible with the original jurisdiction of the High Court. The Supreme Court rejected the claim. Henchy J. delivered the judgment of the Court. The Court accepted that a literal reading of Article 34.3.1 suggested that the accused was entitled to be tried in the High Court. It also accepted that the Circuit Court had exclusive jurisdiction to try most indictable offences. Nonetheless, this did not entirely defeat the jurisdiction of the High Court. Henchy J. observed:

> "… if there has been… a [statutory devolution of jurisdiction] on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court…"[331]

416. He commented further:

> "Apart from the fact that an accused person in such a case may, if convicted, seek leave to appeal to the Court of Criminal Appeal, he may in appropriate proceedings invoke the original jurisdiction of the High Court to prevent the trial being entered on or being conducted in violation of his fundamental rights."[332]

417. In *The State (Boyle) v Neylon,* discussed above, the Supreme Court rejected the complaint that the provision was unconstitutional on the basis that a transfer from between circuits meant that the court was not exercising a local jurisdiction. The judgment of the court stated:

> "It does not however follow that for a legitimate reason the Oireachtas may not provide that in certain cases another locality would be properly available for the trial of a case whether civil or criminal, as may be provided for by an Act of the Oireachtas. Experience has shown that justice itself would require a provision of this kind to avoid the risk of an injustice to one party or another by reason of local circumstances or conditions. The ability to transfer the trial of a case from one locality to another does not alter the essential local exercise of a jurisdiction of the Circuit Court."[333]

418. Section 31 of the *Courts Act, 1981* was repealed by section 32 of the *Courts and Court Officers Act, 1995* and replaced by a much more exacting provision for

330 [1985] I.R. 289.

331 [1985] I.R. 289, at pages 296-297.

332 [1985] I.R. 289, at page 297.

333 [1986] I.R. 551 at page 557.

transfer from a Circuit Court outside Dublin to the Dublin Circuit Court but only in cases where it would be "manifestly unjust not to do so." According to the Circuit Court Judiciary in their submission to the Working Group, "in reality… almost all serious crime committed within a circuit remains for trial in that circuit." The constitutionality of section 32 was questioned in *Todd v Murphy,*[334] on the basis that it permitted a local and limited jurisdiction court to make a decision that was final and unappealable. The Supreme Court held that there was no common law right of appeal available to the applicant.

419. In the result, there is no legal means whatever for the transfer of trials between the Circuit Court and the Central Criminal Court[335] and none for transfer between circuits, except an extremely restricted one for transfer to Dublin. There remains only the possibility of transfer within a circuit.

420. The State is divided into eight circuits for the purposes of Circuit Court business. There are 56 venues and 31 judges – including the President. Section 10 of the *Courts of Justice Act, 1947* provides that, "[to ensure] an equitable distribution of the work of the Circuit Court… and the prompt despatch of the business of the Circuit Court…," the President of the Circuit Court may, having consulted the assigned judge, fix from time to time the places and dates of sittings. In the Dublin Circuit Court, four judges are assigned full-time to trial of crime on indictment – with a further judge being involved full time in arraignments, procedural applications and sentencing. There is one assigned Circuit Court judge for each of the other circuits but with the exception of the Northern Circuit, each circuit is provided with an additional judge by way of support, as the burden of caseload dictates.

421. The allocation of judicial resources has reduced delays in fixing trial dates in Dublin from 12 to 18 months in 1999 to less than six weeks in 2002 – assuming the parties are ready to proceed. For the comparable period, cases outside Dublin are normally tried at the next session following the return for trial. Each Circuit Judge outside Dublin disposes of criminal cases as part of a mixed civil and criminal caseload.

The Central Criminal Court

422. The Central Criminal Court owes it origins to the High Court of Justice in Ireland, established by the *Supreme Court of Judicature Act (Ireland), 1877* and its successor, the High Court of Justice for Southern Ireland, which was established by the *Government of Ireland Act, 1920.* Initially, the Central Criminal Court was defined in section 3 of *The Courts of Justice Act, 1924,* as "the judge of the High Court, to whom is assigned[336] the duty of acting as such Court for the time being."

423. The matters excluded by sections 49 and 54 from the jurisdiction of the Circuit Court effectively defined the jurisdiction of the Central Criminal Court. Section

334 [1999] 2 I.R. 1.

335 Section 4P of the *Criminal Procedure Act, 1967*, as inserted by section 9 of the *Criminal Justice Act, 1999* provides for joining an offence returned for trial to the Circuit Court with a connected case already returned to the Central Criminal Court.

336 By the President of the High Court: see section 3 of the *Courts of Justice Act, 1926.*

6 of the *Courts of Justice Act, 1926* obliged the District Court to return for trial to the Circuit Court all offences within the jurisdiction of that court and in every other case, to the Central Criminal Court. Under section 5 of the same Act, the President of the High Court was to designate the times and places of sittings of the Central Criminal Court.

424. Article 34.3.1 of the Constitution invests the High Court with "full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." The Central Criminal Court is no more than the name of the High Court when it is sitting as a criminal court. Section 2 of the *Courts (Establishment and Constitution) Act, 1961* established the new High Court. Section 11 of the *Courts (Supplemental Provisions) Act, 1961,* provides that "when exercising the criminal jurisdiction with which it is invested" it is to be known as the Central Criminal Court.

425. Certain offences were reserved by virtue of section 25(2) of the *Courts (Supplemental Provisions) Act, 1961* to the exclusive jurisdiction of the Central Criminal Court. These are:

a) treason, which is defined by Article 39 of the Constitution and dealt with in the *Treason Act, 1939*, including encouragement or misprision of treason;
b) an offence under sections 6, 7 or 8 of the *Offences against the State Act, 1939*, which relate to usurpation of the functions of government or obstruction of government or the President;
c) murder, attempted murder and conspiracy to murder;
d) piracy; and
e) all offences of being an accessory before or after the fact.

426. Since 1961, certain other offences have been transferred to the exclusive jurisdiction of the Central Criminal Court. These are:

a) certain offences under the *Geneva Conventions Act, 1962* by virtue of section 3(4) of the same Act, as amended;[337]
b) offences under the *Genocide Act, 1973* by virtue of section 4(2) of the same Act;
c) rape, aggravated sexual assault and attempted aggravated sexual assault, as defined in the *Criminal Law (Rape) (Amendment) Act*, 1990, including rape under section 4 of the Act,[338] aggravated sexual assaults by virtue of section 10 of the same Act and offences of aiding, abetting, counselling or procuring, or incitement;
d) offences under the *Criminal Justice (United Nations Convention against Torture) Act, 2000* by virtue of section 5(4) of the same Act;
e) the offence of murder under section 2 of the *Criminal Justice (Safety of United Nations Workers) Act, 2000*, or an attempt or conspiracy to commit that offence by virtue of section 7 of that Act; and
f) offences under sections 6 and 7 of the *Competition Act, 2002* by virtue of section 11 of the same Act.

337 By the *Geneva Conventions (Amendment) Act, 1998*.

338 The Law Reform Commission had recommended such a transfer as it thought it should have a "realistic and comprehensive jurisdiction" and the offences reserved to it to try have left a "remarkable unbalanced court jurisdiction" between the Circuit and Central Criminal Courts, *Report on Rape and Allied Offences*, n 16 *supra*, at page 20. The Minister who introduced the transfer in 1991 stated that the reason such a transfer was being made was solely due to the gravity of the offences involved. However, views have also been expressed that this transfer was prompted by a concern with sentencing practice in the Circuit Court.

427. The history of the offences under the *Competition Act, 2002* is novel, recent and distinctive. The Act criminalised for the first time the principal categories of anti-competitive behaviour by undertakings in trade for goods or services. It is an offence, pursuant to section 6, to enter into or implement agreements, decisions or concerted practices tending to restrict or distort competition contrary to section 4 of the Act or to Article 81(1) of the Treaty Establishing the European Community. It is an offence, pursuant to section 7, to abuse a dominant position contrary to section 5 of the Act or to Article 82 of the Treaty. The offences are triable summarily with a maximum fine of €3,000 or a maximum term of imprisonment of six months – or on indictment, with special provisions for fines based on turnover and a term of imprisonment of up to five years for an individual. Section 11 provides that any trial on indictment is to be held in the Central Criminal Court.

428. The *Final Report of the Competition and Mergers Review Group,* published in March 2000,[339] had recommended that "any criminal prosecution on indictment for a breach of the Competition Acts should be returnable to the Central Criminal Court."[340] The Group recommended that, so far as possible, "[c]ompetition law cases should be heard by specialist judges of the High Court." It went on to state that the same arrangement should apply to a serious criminal prosecution. It envisaged that, within the administrative discretion of the President of the High Court, one of the specialist judges be "assigned to the Central Criminal Court."[341]

429. In a submission to the Chief Prosecution Solicitor made at the Working Group's suggestion, the Competition Authority supports the retention of this jurisdiction; it follows from the nature of cartels that offences are likely to be committed in a variety of different court areas within the State. Specialisation in the High Court should enable cases to be heard by judges with the greatest relevant expertise. This, the Authority says, is part of a Europe-wide development designed to improve the efficiency and consistency with which the courts deal with competition offences.

430. The Authority also points out that, pursuant to Article 35 of Council Regulation No 1 of 2003[342] the State has designated the High Court a "national competition authority..." The Regulation makes provision for the exchange of information to be made between national competition authorities and the European Commission in connection with proceedings before the courts.

431. In view of the novelty and complexity of this comparatively new area of the law and the fact that the Oireachtas has very recently decided to accept the recommendation of the *Competition and Mergers Review Group* aforementioned, the Working Group believes that any prosecutions on indictment for offences contrary to sections 6 or 7 of the *Competition Act, 2002* should, for the reasons discussed above, be tried in the Central Criminal Court.

339 Competition and Mergers Review Group, *Final Report of the Competition and Mergers Review Group* (Pn. 8487) (Dublin: Department of Enterprise, Trade and Employment, 2000); available at http://www.entemp.ie/publications.htm.

340 While it is unusual that an offence triable exclusively in the Central Criminal Court should also be triable summarily, it is, at present, possible for any such offence to be added to an indictment, where the Central Criminal Court has exclusive jurisdiction in respect of the principal offence.

341 *Ibid,* paragraph 4.4.26 of the Report.

342 Article 12, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*Official Journal* L 001, 04/01/2003 P. 1.)

432. The assignment of judges of the High Court to the trial of indictable crime in the Central Criminal Court has varied very largely in recent years. It is clear that a principal reason is the sheer pressure of work in all areas in the High Court, together with the fact that several members of the court have at any one time been called to perform heavy public responsibilities in presiding over commissions or tribunals of inquiry. Serious delays are endemic. The average waiting time for trial as at the end of 2001 was 16 months and this would appear to have increased since then. At the time of writing, this delay does not appear to be declining, in spite of the allocation of additional judges to the task. Normally three or four judges are assigned to that work.

433. The Central Criminal Court may sit outside Dublin but there is no record of this ever occurring. It has very recently been indicated that sittings of the court will take place in Limerick later this year, commencing with two trials in July 2003 because of the significant numbers of pending murder cases in that Court's list from the city and its environs.[343] In this connection, attention needs to be drawn to section 38(3) of the *Court Officers Act, 1926*, which provides that the County Registrar of the county, county borough or other area in which the Central Criminal Court is for the time being sitting, shall act as registrar to that court. Thus, the administrative support to the Central Criminal Court is currently provided by the Circuit Court. At present this is under review by the Courts Service.[344] Each County Registrar acting as registrar to the Central Criminal Court has custody of the records relating to indictments and trials of that Court which are returned or held within the County or County Borough concerned: Order 85, rule 6, Rules of the Superior Courts.

434. In practice, the entire caseload of the Central Criminal Court in recent years has consisted of murder and rape together with cognate and related offences. In 2001, the Central Criminal Court disposed of 98 rape and related cases and 34 murder and related cases. Of the former, 45 convictions for rape, attempted rape and aggravated sexual assault resulted – 33 of which followed a guilty plea.

435. Murder has for long been regarded as the most heinous offence in the criminal calendar. Until a date within living memory, it attracted the death penalty. The circumstances in which rape was assigned to the exclusive jurisdiction of the Central Criminal Court have a more recent history, which it is appropriate to trace at this point.

Assignment of Rape to the Central Criminal Court

436. During the 1980s, there was increasing public comment on the trial of sexual offences and in particular on the perceived leniency in sentencing practice. Public faith in the criminal justice system overall was shaken by the outcome of a

343 Comments of Mr. Justice Carney, quoted by RTÉ News on the 28th March 2003.

344 See also the recommendations of the Committee on Court Practice and Procedure, in its, Sixth Report, n 328 *supra*, regarding the transfer of staffing responsibilities to the High Court, at paragraph 20.

number of high profile cases. However, it must also be stressed that criticism was not directed solely at case outcomes but also at questions of a substantive nature, such as the definition of rape itself.[345] So for example, an amendment to the *Criminal Law (Rape) Act, 1981* was sought just seven years after it came into force[346] a fact recognised by several members of the Oireachtas in the parliamentary debates.

437. In its Consultation Paper of December 1987, the Law Reform Commission noted:[347]

> "Since the enactment of the Courts Act, 1981, the jurisdiction of the Central Criminal Court is effectively confined to cases of murder, attempted murder, treason and genocide. All other indictable crimes, including rape and sexual offences, are dealt with in the Circuit Court. At the same time, the civil jurisdiction of the Circuit Court has been substantially increased in the area of family law and certain statutory jurisdictions, such as appeals from the Unfair Dismissals Tribunal. This must inevitably lead to delays in dealing with rape cases which could be significantly reduced by transferring the jurisdiction to the Central Criminal Court. The prevalence of the crime, frequently accompanied by serious violence, also renders it desirable, in our view, that it should be tried exclusively in the Central Criminal Court and we think that this should also apply to the proposed new offence of aggravated sexual assault. We also consider that the Central Criminal Court should have exclusive jurisdiction in the sentencing of such offenders, even where they plead guilty in the District Court."

438. In response to the Consultation Paper, some members of the Circuit Court judiciary – arguing against removal of jurisdiction in rape from the Circuit Court – had submitted to the Commission that:

- Rape is by no means the only serious crime frequently attended by violence which is tried by the Circuit Court. On the contrary, all such crimes – with the exception of murder and murder related offences – are exclusively tried by the Circuit Court;
- The Central Criminal Court is not a suitable tribunal for dealing with such cases, having regard to the fact that the membership of the court changes frequently and that, on occasion, judges with little or no experience of criminal law preside at the trials;
- It is reasonable that an accused person should be entitled to be put "on his country," i.e. to be tried by a jury of his fellow citizens from the same neighbourhood;
- Contrary to what is suggested in the Consultation Paper, there is no serious delay in the hearing of rape cases in the Circuit Court; and
- Holding all rape trials in Dublin would result in additional costs and inconvenience.

345 See the Law Reform Commission's detailed consideration of the merits and demerits of broadening the definition of rape to include other degrading sexual assaults, or of creating new sexual assault offences and retaining the existing definition of rape: Law Reform Commission, *Consultation Paper on Rape* (LRC CP1-87). These issues were also discussed at length in both Houses of the Oireachtas.

346 The *Criminal Law (Rape) (Amendment) Bill, 1988* (Bill 36/88) was introduced in the Seanad on 25th November 1988.

347 *Consultation Paper on Rape*, n 345 *supra*, at page 74.

439. In its Report of May 1988,[348] the Commission, adhering to its original recommendation, addressed these points as follows:

> "The High Court, uniquely among the courts established under the Constitution, is invested by the Constitution with a full original jurisdiction in all matters, civil and criminal, and should have a realistic and comprehensive criminal jurisdiction… it cannot be regarded as a satisfactory situation that High Court Judges are confined in the practical administration of the criminal law to one range of offences alone [i.e. murder]...
>
> The Commission does not accept that the varying composition of the Central Criminal Court is a good reason for refusing to extend its present limited jurisdiction. If there were any force in this contention, the Central Criminal Court should logically not be entrusted with the trial of the most serious offences known to the law. One of the submissions made to us did indeed suggest that those offences should also be exclusively tried in the Circuit Court, but we do not believe that there is any widespread support for this view and in the opinion of the Commission it is not well founded.
>
> The essence of trial by jury, at least in the modern context, is, in the view of the Commission, the right of the citizen to be tried by 12 of his fellow citizens. We do not accept that the law should draw any distinction between residents in the greater Dublin area and other areas...
>
> …while we accept that the delays formerly experienced have been significantly reduced in recent years, we think that a strong case remains for relieving the Circuit Court of some at least of the very heavy burden of work to which the judges and practitioners are now subjected.
>
> There is undoubtedly some expense and inconvenience involved in having trials in Dublin rather than in other venues. But this already happens in a significant number of rape cases, because such trials are frequently transferred from the local venue to Dublin. We do not believe that the admitted expense and inconvenience involved in transferring the remaining comparatively small number of rape cases involved to Dublin outweigh the other considerations to which we have referred."[349]

440. The Commission viewed the transfer of rape offences as "part of the process of returning a wider criminal jurisdiction to the High Court."[350] It added that there was a strong case for transferring other serious crimes – including kidnapping, fraud and crimes involving the use of firearms or explosives and major drug offences. In respect of the latter view, the Minister for Justice was insistent that the move was proposed with the sole aim of attaching a badge of heinousness to these offences.[351]

348 *Report on Rape and Allied Offences*, n 16 *supra*.

349 *Ibid,* at pages 19-20.

350 *Report on Rape and Allied Offences*, n 16 *supra*, at page 20.

351 See 121 *Seanad Debates* 1480, 15th December 1988, *per* Minister for Justice, Mr. Gerry Collins T.D.

441. During the same period, the issue of sentencing practice came before the Supreme Court in *The People (D.P.P.) v Tiernan*,[352] which involved an appeal by a man who had been sentenced to 21 years' penal servitude for rape. The Attorney General had referred the matter,[353] certifying that the decision involved a point of law of exceptional public importance such that it was desirable in the public interest that an appeal should be taken to the Supreme Court. But the Supreme Court declined to issue such guidelines, stating that it dealt only with individual cases. But it did acknowledge that "many of the considerations… which arise for determination on this appeal will hopefully be of assistance to judges having responsibility to decide on sentences appropriate on convictions for rape."[354] The Court acknowledged the gravity of the offence, describing it as one of the most serious offences contained in the criminal law, and accordingly the appropriate sentence must always be "a substantial immediate term of detention or imprisonment."[355]

442. Although there have been some significant changes in circumstances in the intervening years, it is well to recall the principal arguments – some of them made in parliamentary debates – for and against the transfer of rape to the exclusive jurisdiction of the Central Criminal Court.

Summary of Arguments in Favour of the Transfer

443. Proponents of the transfer argued that it would ensure speedier trials and thus lessen the suffering of the victim. Moreover, the Central Criminal Court would provide consistency in personnel and consequently "consistency in the evolution of a pattern of sentencing."[356] As the Law Reform Commission stated, "High Court Judges have more opportunities for consulting with each other than Circuit Judges and the fact that they regularly sit on the Court of Criminal Appeal keeps them in touch with the level of sentencing generally."[357] It has been observed that the transfer is gradually having the desired effect.[358]

444. It was contended that the hearing of cases in the Central Criminal Court would preserve the complainant's anonymity more effectively. This would be particularly advantageous to a complainant living in a rural area.[359] It was argued that the overall scheme of the *Criminal Law (Rape) (Amendment) Bill, 1988* and notably the transfer proposal would lead to more successful prosecutions for rape and thereby encourage more victims to come forward.[360] According to Deputy Noel Dempsey, "the record of the Circuit Criminal Court... is not very encouraging… In the four year period… [1984-87] 82 cases came before the Circuit Court, provincial circuit, and convictions were obtained in ten of those. It is very significant that in some court districts no convictions were obtained in cases involving rape."[361]

Summary of Arguments against the Transfer

445. Without the appointment of additional High Court Judges to handle the increased workload, the move to Dublin would constitute "a cosmetic solution."[362] In that event, considerable delays could potentially result. Deputy

352 [1988] 1 I.R. 250.

353 Pursuant to the procedure set down in section 29 of *The Courts of Justice Act, 1924*.

354 [1988] 1 I.R. 250, at page 252, *per* Finlay C.J. delivering the majority judgment.

355 [1988] 1 I.R. 250, at page 253.

356 373 *Dáil Debates* 1191, 10th June 1987, *per* Mr. Mervyn Taylor T.D.

357 *Consultation Paper on Rape*, n 345 *supra*, at page 76.

358 O'Malley, Thomas, *Sexual Offences – Law, Policy and Punishment* (Dublin: Round Hall, Sweet & Maxwell, 1996) at page 209.

359 121 *Dáil Debates* 1523-1524, 15th December 1988, *per* Ms. Mary Wallace T.D.

360 394 *Dáil Debates* 2297, 30th January 1990, *per* Mr. Noel Dempsey T.D.

361 394 *Dáil Debates* 2301-2302, 30th January 1990, *per* Mr. Noel Dempsey T.D.

362 402 *Dáil Debates* 1835, 20th November 1990, *per* Mr. Jim O'Keeffe T.D. O'Malley notes that following the Act, one extra judge was in fact appointed, n 358 *supra*, at page 209.

O'Keeffe pointed out that the former Circuit Court President, Mr. Justice Roe, and the President of the High Court, Mr. Justice Hamilton, had both expressed strong opposition to the move on this ground.[363] Undue delays would be detrimental to both complainant and accused.[364] For a complainant, it would prolong her trauma. An accused faces the possibility of a prison sentence and in many instances may be in custody.[365] If he is ultimately acquitted, delay would mean he has already spent considerable time in custody pending trial.[366]

446. As has been mentioned, some Circuit Court Judges had argued that an accused should be entitled to be put "on his country." On a more philosophical but related point, Deputy Charles Flanagan observed that "at present… jury members are made up of people from within the offender's local community. The odium in which rape and sexual offences are held in society is clearly identifiable and defined within that locality… if we centralise it, will we reduce the odium in a local community towards a sexual offender?"[367] He warned that such a move could depersonalise the effect of the crime on society.[368]

447. In light of the fact that the majority of persons accused with offences of this type are on legal aid, the burden on the public finances would be substantially increased by the centralisation of trials in the High Court.[369] It was argued that there were perhaps areas of far greater need to which this money could be applied.[370] A number of parties felt that the holding of all rape trials in Dublin would involve considerable expense and inconvenience for witnesses, victims, family members and Gardaí and all involved in the prosecution.[371]

The Present System of Allocation of Indictable Crime in a Nutshell

448. The central elements in the present system can be summarised as follows. The trial of indictable crime is allocated exclusively either to the Circuit Court or the Central Criminal Court. Neither court can in any circumstances try a case allocated to the exclusive jurisdiction of the other.[372] Rules which existed in different forms from 1924 to 1981 for the transfer of cases from the Circuit Court to the Central Criminal Court have been repealed. The system operates according to the statutory denomination of the offence. It takes no account of the facts alleged in the case. It makes no allowance for differences in gravity or complexity or likely duration of individual cases. The Circuit Court exercises exclusive jurisdiction in respect of all cases of serious crime tried on indictment – excepting only the limited categories assigned exclusively to the Central Criminal Court. These cases include:

- every variety of offence against property, with no limit as to amount or value of property;
- every variety of offence against the person, including manslaughter,

363 *Dáil Debates, Ibid.*

364 402 *Dáil Debates* 1833, 20th November 1990, *per* Mr. Jim O'Keeffe T.D.

365 *Ibid.*

366 In the Dáil, Fine Gael opposed the transfer to the Central Criminal Court because of the fear of delays (when the Bill was debated in the Seanad all parties had been in favour). However, it withdrew its opposition in response to the Minister's assurances that the situation would be closely monitored to avoid that result: "I emphasise to Deputies – I understand their concerns about delays – that the matter will be kept under review by me in consultation with the President of the High Court and I will take whatever remedial action necessary in relation to the elimination of delays although I do not envisage them arising", 402 *Dáil Debates* 1840, 20th November 1990, *per* Minister for Justice, Mr. Ray Burke T.D.

367 402 *Dáil Debates* 1837-1838, 20th November 1988, *per* Mr. Charles Flanagan T.D.

368 *Ibid.*

369 402 *Dáil Debates* 1837, 20th November 1988, *per* Mr. Charles Flanagan T.D.

370 *Ibid.*

371 See Law Reform Commission's *Report on Rape and Allied Offences*, n 16 *supra,* at page 19; 402 *Dáil Debates* 1836-1837, 20th November 1990, *per* Mr. Charles Flanagan T.D. The counter argument was that the transfer of rape trials from the provincial circuit to Dublin Circuit Court was a frequent occurrence. See Law Reform Commission Report at page 19; 402 *Dáil Debates* 1840, 20th November 1990, *per* Minister for Justice, Mr. Ray Burke T.D. Note that the provision for transfer was narrowly restricted to cases of manifest injustice by section 32 of the *Courts and Court Officers Act, 1995.*

372 Subject to the special rule that a connected case can be sent from the Circuit Court to the Central Criminal Court pursuant to section 4P of the *Criminal Procedure Act, 1967* (as inserted by section 9 of the *Criminal Justice Act, 1999*).

intentional endangerment, false imprisonment, child abduction, syringe attacks etc.;

- every firearms or offensive weapons offence, including possession with intention to endanger life; and
- every offence against the *Misuse of Drugs Acts*, including drug trafficking.

449. It should also be noted that, although all rape offences and aggravated rape and cognate and participatory offences must by virtue of section 10 of the *Criminal Law (Rape) (Amendment) Act, 1990*, be tried in the Central Criminal Court, there are other serious sexual offences, which remain triable only in the Circuit Court. This applies to sexual assaults not involving serious violence. Such offences are frequently committed against minors – without meeting the conditions of section 10.

450. Since the assignment of exclusive jurisdiction in rape cases to the Central Criminal Court, important changes have occurred. The Central Criminal Court itself has established a consistent pattern in sentencing – recognising the exceptional seriousness of these offences to a degree that had not always been so in the past. Furthermore, the Director of Public Prosecutions may appeal to the Court of Criminal Appeal for the review of unduly lenient sentences – pursuant to section 2 of the *Criminal Justice Act, 1993* – thus further ensuring the consistency and appropriateness of sentences in this area.

451. The High Court – exercising its criminal jurisdiction – has no jurisdiction over the vast majority of serious criminal offences "but its full jurisdiction is there to be invoked – in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action – so as to ensure that the hearing and determination will be in accordance with law."[373] The fact that difficult or novel points of law are likely to arise does not allow for the trial of a case in the High Court. The aspiration expressed by the Law Reform Commission in 1987 that the assignment of rape trials to the exclusive jurisdiction of the Central Criminal Court would be a part of a more general return of jurisdiction to the High Court has not been pursued in any general way: the allocation exclusively to the Central Criminal Court of trial of offences under sections 6 and 7 of the *Competition Act, 2002* is very much an exception. More strikingly, the Law Reform Commission's expectation of more speedy trials of rape cases in the Central Criminal Court has not been fulfilled. The reverse has in fact occurred.

Options

452. The system of allocation so described patently lacks any coherent logical basis. The Working Group at an early stage of its deliberations formed a sub-group under the chairmanship of Mr. Justice Carney – to report on the approach to be

373 *Tormey v Ireland* [1985] I.R. 289, at pages 296-297.

adopted to indictable crime. It identified six possible jurisdictional models for the trial of crime on indictment, *viz.*:

- A National Criminal Court – or some similar title – which would be a unified court with jurisdiction over all offences currently within the jurisdiction of the Central Criminal Court and Circuit Court combined;
- Let the status quo remain but emphatically on the condition that there was an ongoing commitment to provide adequate resources to the Central Criminal Court so as to reduce waiting lists;
- Let the status quo remain and on the same condition but with the additional arrangement that the Central Criminal Court would go on circuit – more or less in the same manner as the High Court exercises certain civil jurisdiction on circuit;
- Confer jurisdiction over all indictable crime on the Circuit Court – thereby removing the need for the Central Criminal Court. This would be based on the argument that the Circuit Court already has jurisdiction over very serious criminal cases such as incest, manslaughter, complex fraud, money laundering and so forth. It could therefore deal with murder, rape and aggravated sexual assault;
- Re-arrange the allocation of jurisdiction. Under this option further jurisdiction might be allocated to the Central Criminal Court and possibly – though not necessarily – jurisdiction over some crimes might be re-allocated downwards from the Circuit Court;
- Let the status quo remain but introduce new arrangements for transferring cases in certain circumstances between the Central Criminal Court and the Circuit Court.

Views Exchanged

453. The Working Group had the benefit, in addition, of a wide range of views from members of the judiciary at every level. The Seminar – held on 20th July 2002 in Dublin Castle provided a forum for a very full and useful exchange of views between judiciary and practitioners. It also received written observations from the Circuit Court judiciary, from individual judges, and from the Director of Public Prosecutions.

454. In their submissions, the Circuit Court judiciary were opposed to adoption of a national criminal court on the model of the Crown Court in England and Wales, and Northern Ireland or similar. A view was also strongly expressed by another judge that rape trials should be re-transferred to the Circuit Court. In all discussions, it was generally accepted that the Circuit Court works well as a court exercising jurisdiction on a defined local geographical basis. It was not possible to envisage a system of allocation of criminal cases as part of a single national jurisdiction. Any proposal for a nationally-based criminal court would, in the views predominantly expressed, compromise this efficiency and would conflict with the exercise of the parallel civil jurisdiction of the court

455. In November, the Working Group organised a conference at the Conrad Hotel in Dublin which was open to a wider range of participants. Significantly, a number of representatives of organisations active in the area of advocacy and support for victims of crime – and in particular of sexual crime – attended. The Working Group wishes to place on record its particular appreciation of the contribution made by those representatives whose views are referred to later. The Working Group devoted an entire session of the conference to the trial of sexual crime and also learned at first hand of the practical operation of arrangements for its allocation at indictment level in England and Wales.

456. Ms. Muireann Ó Briain, Chief Executive of the Dublin Rape Crisis Centre, and Ms. Kate Mulkerrins of Rape Crisis Centres Ireland, addressed the conference. Ms. Ó Briain recalled that the Dublin Rape Crisis Centre had promoted the transfer of rape to the Central Criminal Court because of the extreme seriousness of the crime. She argued that it should be given the same status as the crime of murder because it removes the right of the victim to the application of his or her free will. Another reason for retaining the jurisdiction in the Central Criminal Court was that victims can have anonymity in Dublin which they cannot have on the circuits. Anonymity is preserved not only by withholding of names from the press but also by holding the trial in a venue where the victim will not be recognised by locals. Ms. Ó Briain made reference to the requirement in rape and sexual assault cases of additional facilities such as video-linked witness rooms for victims under the age of 17 or by the leave of the court. She expressed concern at what she said was the low level of convictions by juries in the Central Criminal Court.

457. Ms. Mulkerrins strongly supported retention of the Central Criminal Court's exclusive jurisdiction. She acknowledged that the current division of jurisdiction in sexual crime was arbitrary and incomprehensible and that the transfer of rape cases to the Central Criminal Court had led to greater delay and condemned the present delay of approximately 16 months but said that neither of these matters should lead to "downgrading" the jurisdiction.

458. A number of points were made in the ensuing discussion. Mr. Tom O'Malley said that the assignment of jurisdiction to the Central Criminal Court had produced significant gains in terms of coherence of sentencing for serious sexual crime, which should be preserved.

459. Asked how the problem of anonymity was dealt with in England, Sir Robin Auld said rape complainants had an entitlement to anonymity: if this was insufficient, the trial judge might decide to transfer the trial to another venue. Mr. Justice Pitchers of the English High Court said that criminal trials were normally held in the local Crown Court. He pointed out that the defendant's family had a right to be there and they would know the complainant's identity.

460. Mr. Justice Esmond Smyth, President of the Circuit Court, said that he would welcome a return to a system of comparable or concurrent jurisdiction which

had formerly existed by means of the now repealed transfer mechanism. He would not favour the introduction here of the type of "ticketing," operated in the Crown Court in England and Wales and described by the visiting judges of that jurisdiction. It would be seen as reflecting on individual judges.

461. Mr. Justice Geoghegan chaired the session regarding the trial of sexual crime. He stressed the need to respect the presumption of innocence and mentioned the danger of false complaints. A high level of acquittals in contested cases may arise from disputed facts about what are called date rapes. It may well be in the interests of victims to have concurrent jurisdiction which he favoured. But he said that the issue of anonymity was important.

462. Mr. Justice Carney favoured the retention of the Central Criminal Court's exclusive jurisdiction. It provided a central monitoring mechanism. He said that approximately 40 percent of defendants before that Court pleaded guilty, the rate of acquittal in contested cases being approximately 55 percent. He also referred to the phenomenon of so-called "date rape." He said that acquittals occur in such cases even when juries are composed evenly of the sexes. But he went on to express concern about the absence of any jurisdiction in the Central Criminal Court to try serious and complex fraud cases. He believed that the function of the Circuit Court should be to be a rapid finder of fact, and not an interpreter of statute. He favoured a national court for crime, populated by judges of all ranks where each judge is of the same status.

463. Mr. Justice O'Higgins spoke in favour of returning the trial of rape to the Circuit Court. It was not justified to say that rape is to be correlated with the seriousness of murder. The transfer – which took place in 1990 – was the result of a few bad cases. It had been effected "for pragmatic reasons and not for reasons of principle or sound administration." Circuit Court judges generally had more experience of criminal cases and consequently, trials were shorter and took place more quickly in the Circuit Court. Insofar as other crime was concerned, there was no evidence that Circuit Court judges were not competent to deal with complex fraud.

464. Mr. Patrick Gageby S.C. said that the allocation of jurisdiction to the Central Criminal Court was not logical. It was irrational that if the offence is rape, it should go to the Central Criminal Court but if it was an ordinary sexual assault, it should be tried in the Circuit Court. All rape cases were decided by 30 to 40 percent of the population on the electoral register from Dublin, which may affect the statistics.

Submissions

465. In a written observation, His Honour Judge Carroll Moran gave information about his experience as an additional judge sitting mainly on the Western Circuit. He said that based on his analysis of the year 2002, many accused got a trial within a year of commission of the offence and in most cases the interval

between return for trial by District Court and trial date had been "as short as it could possibly be." He expressed strong opposition to the notion of a national criminal court as running the risk of transferring the problems of the Central Criminal Court to the Circuit Court.

466. In a written submission, the Children at Risk in Ireland Foundation (CARI) strongly supported retention of the Central Criminal Court for rape cases – both by reason of the gravity of the offence and the objective of consistency. Other sexual offences should also be transferred there. Anonymity was much easier to preserve away from the locality. Local jury selection also posed difficulties for the complainant. In one case, the jury pool came exclusively from the electoral area of the complainants and the accused.

467. The Director of Public Prosecutions, in a written submission, argued for the creation of a three-tiered courts system. This would comprise: (a) a "minor first-instance court" with a summary criminal jurisdiction; (b) a first instance court with full originating jurisdiction, the criminal division of which would sit in various cities and towns and would try all crime on indictment; and (c) a final court of appeal. Alternatively, the two existing indictable crime jurisdictions could be amalgamated, with a decision being made in individual cases whether to assign them to a judge of the higher or lower court. The Director expressed satisfaction with the working of the Circuit Court. It had functioned extremely well in disposing of complex criminal cases – approximately two months for disposal from date of return for trial – and had an enormous level of expertise. In some instances High Court judges assigned to the Central Criminal Court had not the same level of expertise in criminal matters. He welcomed the more structured approach to the assignment of judges to the Central Criminal Court which was recently proposed by the President of the High Court.

468. The Director summed up the arguments for and against returning jurisdiction over rape to the Circuit Court. Briefly, the arguments in favour of return are that it would help clear the current backlog and it would facilitate witnesses, Gardaí and victims, by saving the latter the trauma of coming to Dublin. On the other hand, return of jurisdiction to the Circuit Court could undermine the perception of the seriousness of rape as an offence. This might result in reversion to the unsatisfactory sentencing previously observed in the Circuit Court and could jeopardise the anonymity of complainants.

469. The Director would favour research on the outcome of sexual crime cases in the Circuit Court before returning rape jurisdiction to that Court. But he felt that the need for consistency in sentencing jurisprudence in relation to rape did not justify retention of that jurisdiction in the Central Criminal Court given: (a) the changing composition of that court; (b) the role which clear sentencing guidelines could play in encouraging consistency; and (c) the facility of an appeal by the Director of Public Prosecutions against undue leniency of sentence.

The Work of the Central Criminal Court and the Circuit Court

470. The Working Group has no doubt that reliable statistical information is indispensable to the formation of any sensible policy with regard to criminal justice. It is true that there are some issues of principle, which go to the central core of criminal justice, such as the burden of proof being on the prosecution, the presumption of innocence and many aspects of the right to a fair trial. Decisions in respect of these matters are normally made from a standpoint of principle. But legislative change involves a complex interaction between the achievement of socio-political objectives and the protection of such fundamental values. The State must be in a position to make reasonably accurate predictions about the practical effects of any proposed changes.

471. It is only fair to recognise that the Courts Service – in its first two annual reports for 2000 in 2001 – has produced statistics to an extent never previously available for each court. These include figures for total turnover and a certain degree of breakdown. Regrettably, the Working Group has to report that the existing statistical information falls lamentably short of any reasonably desirable standard in the most fundamental respects. A wealth of statistical information has, for many years, been at the disposal of those charged officially with reporting on various aspects of the system of criminal justice in England and Wales. In this jurisdiction, no reasonably comparable body of information is available.

472. The first deficiency resides in the fact that much basic statistical material does not exist in any form. For example, there is no available breakdown of the number of Circuit Court cases into the important categories of offences triable only on indictment, either-way offences and hybrid offences. The Working Group has sought to fill this lacuna with the assistance of the Courts Service, by means of its own offence-based manual survey of figures for the first quarter of 2002.

473. The second problem is that such official statistics are frequently unreliable by reason of the absence of consistent recording practices. For example, there is no system at present for recording of the number of pleas of guilty as distinct from those found guilty after a contested hearing in the District Court. In the Circuit Court, it transpired at a late stage of the deliberations of the Working Group that certain officially maintained figures on this issue are highly unreliable due to a practice in that Court in Dublin of counting the number of not guilty pleas by reference to the number of days at trial of contested cases. So a three-day case would give rise to a record of three not guilty pleas, instead of one.

474. Nonetheless, the Working Group has tried to collate figures under a number of headings which it considers relevant. It has used both the official statistics and the results of the survey for the first quarter of 2002. It considers that it is obliged, notwithstanding the deficiencies, to make a realistic attempt to measure

and count the most material aspects of the system. Among these are the numbers of cases disposed of at each level of jurisdiction, their breakdown into offence categories, the number of cases which terminate in a guilty plea, the proportion of convictions from among cases in which the accused pleaded not guilty and the percentage lengths of imprisonment for various periods.

475. At the outset, it is appropriate to attempt a general outline of the statistical picture for each of the two courts which try indictable crime.

The Circuit Court

476. It is possible to count the total number of cases received by the Circuit Court in terms of the number of returns for trial received from the District Court. It will be recalled, of course, that statistics are kept in the District Court by reference to the number of offences. While no system of counting provides a universally useful measure of the caseload of a court for all purposes, this one is imperfect as it counts for example, every single summons or charge against one person – even arising out of one incident – as a different case. But each case returned for trial in the Circuit Court represents a single case even though it may comprise several counts – whether or not arising out of one incident. Nonetheless, it is a reasonable approach to counting.

477. On that basis, the number of cases received by the Circuit Court in recent years has been as follows:[374]

Table 4A

2000	2,324
2001	2,583

478. Although these figures do not necessarily represent the number of cases processed by the Circuit Court in each year, the Working Group is satisfied that they provide a sufficiently accurate picture of the annual caseload of the Circuit Court. The information consistently received by the Working Group points to no significant delays in the Circuit Court either in Dublin or outside. Generally the court processes the cases it receives. There is no backlog.

479. In terms of numbers both of cases and offences, the throughput of the Circuit Court is much smaller than that of the District Court. At the same time, it tries the great majority of serious criminal cases. It is also notable that only a comparatively small number of offences must be tried in the Circuit Court. On the one hand, the Central Criminal Court has exclusive jurisdiction in respect of the most serious offences. On the other, many offences over which the Circuit Court has jurisdiction may also be tried summarily.[375]

480. In the absence of any official breakdown of Circuit Court trials into the three relevant categories, the Working Group caused a manual extraction to be made

374 Details provided by the Courts Service.

375 Subject to the point that the scheme of allocation of offences is not logical or coherent.

of the entire Circuit Court caseload for the period 1st January to 31st March 2002. These figures appear in the table below. They count offences rather than defendants. During this period, 610 defendants appeared before the court of whom 66 had all charges against them withdrawn.

Table 4B: Profile of Offences: Based on 1st Quarter 2002

	Total		Dublin		Other	
Indictable only	158	7%	18	1.9%	140	10.6%
Triable at the accused's election	978	43.1%	407	42.8%	571	43.4%
Offences triable at election of DPP	1,045	46.1%	502	52.8%	543	41.3%
Summary offences	86	3.8%	24	2.5%	62	4.7%

481. These figures show that the great bulk – almost 90 percent – of all the offences tried in the Circuit Court in the first quarter of 2002 falls into either one or other of the elective categories. While it appears that this figure divides approximately evenly between either-way and hybrid offences, in reality almost all of these cases reach the Circuit Court by reason of the choice of the Director of Public Prosecutions or because the District Court has declined jurisdiction. As has been shown in the discussion of summary jurisdiction, the accused only rarely – certainly in less than 5 percent of cases – elects for trial on indictment.

482. Jackson and Doran have pointed out that – by way of contrast with the position in the District Court – it has been possible to derive some statistics about plea and conviction rates in the Circuit Court both from the available official statistics and from the sampling exercise carried out under the supervision of Jackson and Doran for the first quarter of 2002. A note of caution has already been sounded as to the reliability of the official statistics for not guilty pleas arising from a practice in Dublin of counting the number of not guilty pleas by reference to the number of days at trial of contested cases and so inadvertently inflating the number of such pleas. The table below in respect of 2001, has been presented by Jackson and Doran based on a manual re-checking of the Dublin Circuit Court trial records for that year undertaken with a view to eliminating the inaccuracies aforementioned. See Table 8B, Chapter 8 of Jackson and Doran's Report in Appendix V this Report.

Table 4C: Guilty plea rates in Circuit Court in 2001

	Total	Guilty	Not Guilty	Guilty pleas
Dublin	1,283	1,164	119	90.7%
Outside Dublin	1,224	1,039	185	84.9%
All venues	2,507	2,203	304	87.9%

483. As the table shows, the recorded rate of guilty pleas is extremely high – being of the order of 85 percent. As Jackson and Doran have observed, it is reasonably similar to the results of the sampling exercise – both in relation to the nationwide trend and to the higher percentage of guilty pleas in Dublin. The sample for the first quarter of 2002 carried out by Jackson and Doran relates to 1,609 offences. There was a plea of guilty in respect of 1,373 of these offences or 85.3 percent. Further, of the 580 defendants involved, 488 or 84.1 percent, pleaded guilty. It is interesting to note the apparent correspondence in the percentages whether the pleas are counted by offence or defendant. This suggests that any variation arising from changing numbers of offence alleged against different defendants tends to be cancelled out in larger figures.

484. Jackson and Doran have also reported on the rate of conviction in contested cases. They have presented the following table. See Table 8C, Chapter 8 of Jackson's and Doran's Report.

Table 4D: Conviction rates in the Circuit Court in 2001

	Not guilty pleas	Convicted	Not guilty pleas resulting in conviction
Dublin	119	42	35.3%
Outside Dublin	185	82	44.3%
All venues	304	124	40.8%

485. Jackson and Doran advise caution in the interpretation of the above table because they relate to one year only. The average conviction rate for all venues for 2001 is given as 40.8 percent. In the sampling exercise, which must also be regarded with caution given the limited nature of the sample, a plea of not guilty was entered in respect of 53 out of 951 offences dealt with in Dublin. There were convictions in respect of only 20 defendants or 38 percent. Outside Dublin the corresponding figures were 36 not guilty pleas out of 183 offences and a conviction rate in respect of 36 offences or 20 percent.

The Central Criminal Court

486. Jackson and Doran have observed that – in contrast to the possibility of overlapping of exercise of jurisdiction in respect of offences between the District Court and the Circuit Court – the Central Criminal Court has exclusive responsibility in respect of the offences of murder and rape and related offences. Consequently, it is less meaningful to make comparative analysis.

487. They also observe that the statistics in relation to the Central Criminal Court are fairly comprehensive and present a more reasonable foundation for analysis. The quality of statistical information regarding the Central Criminal Court is greatly superior to what is available either in respect of the District Court or the Circuit Court. The comparatively small number of cases handled by that court largely explains this. At the same time, much more detailed qualitative statistics are available – especially regarding the results in relation to individual types of offence.

488. The general picture of the work of the Central Criminal Court appears in the table below containing global figures for the court over the past four years. See Table 10A, Chapter 10 of Jackson's and Doran's Report.

Table 4E: Profile of cases disposed by Central Criminal Court 1998-2001

	1998	1999	2000	2001	Total
Murder and related cases	22	30	34	34	120
Rape and related cases	84	97	94	98	373
Total	106	127	128	132	493

489. In addition, Jackson and Doran have presented the following table containing an analysis of rates of pleas of guilty in the Central Criminal Court. See Table 10B, Chapter 10 of Jackson's and Doran's Report.

Table 4F: Pleas in cases disposed by Central Criminal Court 1998-2001

Offence	Disposal	1998	1999	2000	2001	Total
Murder and related	Pleaded guilty	8	12	5	8	33
	Tried	14	14	25	23	76
	Nolle prosequi	0	2	1	2	5
	Deceased	0	1	2	0	3
	Other	0	1	1	1	3
	Total	22	30	34	34	120
Rape and related	Pleaded guilty	51	63	53	50	217
	Tried	25	26	30	36	117
	Nolle prosequi	3	6	5	7	21
	Deceased	2	0	2	3	7
	Other	3	2	4	2	12
	Total	84	97	94	98	373

490. The Professors point out that it was possible to draw conclusions regarding rates of guilty pleas in the Central Criminal Court simply by calculating the number of guilty pleas as a percentage of the number of cases disposed of. For example the total plea rate in murder cases over the four years is 27.5 percent. But they note that this would be misleading in that a number of the guilty pleas were to an offence other than that of the primary offence of murder or rape. In order to gain a deeper understanding of these figures, it was necessary to subject the statistics to a more refined analysis. Out of 129 defendants charged with murder over the four years, only 11 pleaded guilty to murder or attempted murder – a plea rate of 8.5 percent. The low rate of pleas of guilty in murder cases is almost certainly due to the fact that there is a mandatory life imprisonment sentence. There is no incentive to plead guilty if there is no possibility of a discount on sentence.

491. Of the 379 defendants who were charged with rape, 217 – or 57.02 percent – pleaded guilty.

492. In respect of the conviction rates in respect of those defendants who pleaded not guilty, Jackson and Doran say that the exercise of analysis was not straightforward. The official statistics available did not sufficiently classify outcomes by reference to plea, a lacuna that needs to be addressed. They do not indicate the number of rape convictions that followed a plea of guilty or a plea of not guilty. Jackson and Doran also indicate the advantages of having available statistics both for those cases where there is a plea or a finding of guilt in respect

of the principal offence of rape and also in respect of one of the other offences on the indictment. In these circumstances, a further examination of the records of the Court was carried out under the Professors' supervision, which produced the following two tables. See Tables 10C and D, Chapter 10 of Jackson's and Doran's Report.

Table 4G: Conviction rates (primary offence); Central Criminal Court 1998-2001

		Defendants pleading not guilty to primary offence	Defendants convicted of primary offence at trial	Defendants convicted of primary offence	Defendants convicted of primary offence (1998-2001)
Murder/ attempted murder	**1998**	22	11	50%	41.1%
	1999	21	4	19%	
	2000	31	15	48.4%	
	2001	33	14	42.4%	
Rape/ attempted rape	**1998**	38	13	34.2%	26%
	1999	41	8	19.5%	
	2000	37	11	29.7%	
	2001	53	12	22.6%	
Total	**1998**	60	24	40%	31.9%
	1999	62	12	19.4%	
	2000	68	26	38.2%	
	2001	86	26	30.2%	

Table 4H: Conviction rates; Central Criminal Court 1998-2001

		Defendants pleading not guilty to primary offence	Defendants convicted of primary offence and/or other offence	Defendants convicted of primary offence and/or other offence	Defendants convicted of primary offence and/or other offence (1998-2001)
Murder/ attempted murder	**1998**	22	21	95.4%	90.7%
	1999	21	18	85.7%	
	2000	31	28	90.3%	
	2001	33	30	90.9%	
Rape/ attempted rape	**1998**	38	30	78.9%	71%
	1999	41	27	65.9%	
	2000	37	24	64.9%	
	2001	53	39	73.6%	
Total	**1998**	60	51	85%	78.6%
	1999	62	45	72.6%	
	2000	68	52	76.5%	
	2001	86	69	80.2%	

493. It will be noted from this further analysis that there are significant variations in the different rates from year to year. This is not surprising. The total numbers for any particular year are small. The crimes involved are at the extreme end of the scale of seriousness. The facts of individual cases will often have a special character.

494. The value of having the two tables is obvious. In the murder category, a conviction rate of 41.1 percent over the four years rises to 90.7 percent if account is taken of the power of the jury to bring in a guilty verdict in respect of one of the counts other than murder. In the rape category, the corresponding figures are 26 percent and 71 percent. So an acquittal on all counts occurs in only a minority of cases. Furthermore, for a comprehensive assessment, it is essential to take account of the guilty pleas already referred to. In the murder category, a low plea rate – 27.5 percent – is balanced by a high conviction rate of 90.7 percent including all offences); in the rape category, a higher plea rate – about 50 percent – is also balanced by a high conviction rate of 71 percent.

Comparisons with other Jurisdictions

495. As was envisaged in its Terms of Reference, the Working Group conducted research into the systems for allocation of the trial of indictable offences in a

number of other jurisdictions. It was possible to do this very effectively without travelling. Firstly, several distinguished members of the judiciary from the three neighbouring jurisdictions addressed our conference on this particular subject in November 2002. They included: Lord Justice Auld, a Lord Justice of Appeal and author of the Review of the Criminal Courts of England and Wales; Mr. Justice Christopher Pitchers, a judge of the High Court; Sir Gerald Gordon, formerly Sheriff of Glasgow and Strathkelvin and Professor of Scots Law at the University of Edinburgh and currently a temporary judge of the High Court of Justiciary; and Lord Justice McCollum, a Lord Justice of Appeal in Northern Ireland. Each of these guests delivered papers and engaged in the lively discussion and question and answer session which followed. Secondly, the Working Group, through its own research staff conducted documentary and internet research.

496. Our research was essentially concentrated on jurisdictions of the common law. It seemed obvious that only systems having the combination of jury and summary trial could be genuinely useful to our work. In this connection, the Working Group is especially appreciative of the special help of Sir Robin Auld who has recently conducted a wide-ranging inquiry into the criminal justice system of England and Wales. It is true that the absence of a written constitution in England and Wales calls for special caution in drawing conclusions from experience there. Nonetheless, the shared historical experience can be highly illuminating. It is also true that Sir Robin Auld's study covered many matters not directly relevant to jurisdiction – the central focus of this Report. We have tried to balance the sources of research with material from Australia, New Zealand and Canada which are common law jurisdictions with a written constitution. At the November conference, we also heard from Professor Mark Groenhuijsen of the University of Tilburg – also a judge in the Netherlands – to provide insights into trial processes in a civil law system.

England and Wales

497. The Crown Court merits particular consideration, because it endeavours to reconcile a circuit system with the High Court jurisdiction and because of the topicality here of the national criminal court model.

498. Since 1971[376], all trial on indictment is tried in the Crown Court.[377] Any High Court Judge, Circuit Judge, Recorder or Deputy Judge may sit in the Crown Court. Currently 107 High Court Judges, 621 Circuit Judges and 1,327 Recorders[378] are empowered to try cases at the Crown Court. The Crown Court is a single court, the work of which is distributed between six circuits.[379] It comprises 78 permanent and 15 satellite Crown Court centres. Sir Robin Auld has mentioned the strong endurance in England and Wales of the tradition of High Court Judges regularly covering the country on circuit. Two High Court Judges are assigned to each Circuit as Presiding Judges.[380] They are responsible for the administration and distribution of work on the Circuit.[381] A Circuit Judge is appointed as Resident Judge to each major Crown Court centre within a circuit. He is responsible for the allocation of business amongst the judges sitting at that

376 This Court was established by the *Courts Act, 1971* following the recommendations of the Beeching Report. It involved the abolition of the courts of quarter sessions and assizes.

377 Section 46(1) of the *Supreme Court Act, 1981* conferred exclusive jurisdiction on the Crown Court in respect of trial on indictment.

378 Recorders and Deputy Judges are part-time judicial appointments.

379 The six circuits are: Midland, North Eastern, Northern, South Eastern, Wales and Chester, and Western.

380 This role was created on foot of the recommendations of Lord Beeching (*Report of the Royal Commission on Assizes and Quarter Sessions 1966-1969* (Cmnd. 4153) (London: HMSO, 1970), at paragraphs 256-259), and was given a statutory basis in section 72 of the *Courts and Legal Services Act, 1990* (c.41).

381 The provisions relating to these judicial appointments are contained in section 72 of the *Courts and Legal Services Act, 1990* (c.41).

court.[382] When the Crown Court sits in London, it is known as the Central Criminal Court[383] with the proceedings taking place at the Old Bailey.[384]

499. The Head of the Crown Court is the Lord Chief Justice, who is responsible in consultation with the Lord Chancellor, for deployment and allocation of court business. He acts mainly through the two High Court judges sitting as Presiding Judges in each circuit and are responsible for administration and distribution of work on the circuit. The Senior Presiding Judge[385] and the Vice-President of the Queen's Bench Division perform much of the responsibility of the Lord Chief Justice for deployment of High Court Judges who try crime. They operate from London. Queen's Bench judges spend about half of their time on circuit. Practice Directions[386] are issued from time to time to assist the operation of the Court. The Presiding Judge – with the approval of the Senior Presiding Judge of the Circuit – also has responsibility for the issue of Practice Directions for the "just, speedy and economical disposal of the business of a circuit."[387]

500. The trial of cases in the Crown Court is divided into three tiers and reflects the seriousness of the offences tried. Each Court is designated as belonging to the first, second or third tier. Allocation of judges to tiers follows accordingly: the first tier will have a High Court Judge as the senior presiding judge while the third tier may have Circuit Judges or Recorders only.

501. The 2001 Practice Direction has categorised offences into four classes. The class into which an offence falls determines whether the case is to be sent to a Crown Court location where a High Court Judge presides or where a Circuit Judge who has specific approval from the Lord Chief Justice for certain offences sits:

- Class 1 offences: These are the most serious. They range from murder and genocide to misprision of treason and an offence under the *Official Secrets Acts*. They must be tried by a High Court Judge. But murder and its related offences may be released by the Presiding Judge for trial by a Deputy High Court Judge, a Circuit Judge or a Deputy Circuit Judge.
- Class 2 offences: These offences range from manslaughter and rape to piracy. They must also be tried by a High Court Judge unless released. However, rape or serious sexual offences of any Class may only be released to a judge who is ticketed or authorised to deal with such offences.[388] According to Mr. Justice Pitchers in his paper to the Working Group's November conference, the number of rape and serious sexual offences and the need to expedite their trial has led to two-thirds of Circuit Judges being so authorised.
- Class 3 offences: This class covers all offences triable only on indictment – falling outside Classes 1, 2 and 4 or serious fraud. These may be tried by any Judge of the Crown Court or a suitably trained Recorder.
- Class 4 offences: This covers a wide range of offences. The vast scope of this class – which includes all drugs offences and robberies, causing death by

382 In addition, there may be 'Responsible Judges', to whom the Resident Judge may delegate some of his functions as well as 'Liaison Judges' who are responsible for liaising between the Crown Court and the local Magistrates' Courts; see *Blackstone's Criminal Practice* (London: Blackstone Press Limited, 1998), at page 1005.

383 Section 8(3) of the *Supreme Court Act, 1981*.

384 The Central Criminal Court was originally established in 1834 (by 4 & 5 Will.V, c.36) to try treason, murder, felonies and misdemeanours committed in London and certain surrounding areas. Substantial change was effected by the *Central Criminal Court Act, 1856*, which permitted cases to be transferred to London to ensure a fair trial where local prejudice existed or where, it could offer an earlier trial date to prevent delay in waiting for the assizes to be held in a local area.

385 That is, the Senior Presiding Judge for England and Wales, appointed from among the Lord Justices of Appeal; see section 72(2) of the *Courts and Legal Services Act, 1990* (c. 41).

386 Practice Directions are made pursuant to section 75(1)(2) of the *Supreme Court Act, 1981*. The most recent is *Directions by the Lord Chief Justice for the Classification of the Business of the Crown Court and Allocation to Crown Court Centres*, 16th October 2001, available from http://www.courtservice.gov.uk/pds/crown/directions/htm.

387 *Ibid*, at paragraph 11.

388 In the case of rape 'tickets', it is a pre-condition of authorisation that the judge should attend two days special training by the Judicial Studies Board. Note that ticketing does not apply only to rape. Experienced judges may be authorised to try certain Class 1 and 2 cases (mainly murder and rape), and serious fraud (which comes mainly within Class 3).

dangerous driving, and arson or criminal damage with intent to endanger life – is such as to have necessitated some further guidance as to allocation. While they are triable by all four levels of judge under the latest Practice Direction, Presiding Judges may – with the approval of the Senior Presiding Judge – issue directions for their circuits as to the allocation of particular Class 4 offences. In addition, in cases of extremely serious either-way sexual offences, the Resident Judge may refer the case with his recommendations or other comments to the Presiding Judge for a decision on who will try it. The Presiding Judge decides whether the case should be tried by a High Court Judge, a named Circuit Judge or any judge authorised to deal with rape cases.

502. The Magistrates' Court has the power to transfer a case to any Crown Court in England and Wales.[389] When a case has been transferred, the Crown Court also has the power to alter the place of the trial under section 76(1) of the *Supreme Court Act, 1981*. So an application could be made to transfer a case to the Central Criminal Court, or to any other Crown Court.

503. Generally Magistrates' Courts, in committing an accused for trial, are obliged to specify the most convenient location of the Crown Court in respect of classes 1 and 2. These courts are identified by the Presiding Judges on each circuit. Where a Presiding Judge has specified that cases of rape, sexual intercourse with a girl under 13 years, incest with a girl under 13 years, or their cognate counterparts or class 3 cases may be dealt with at a Crown Court not having a resident High Court judge, the Magistrates' Court shall select the most convenient location according to statutory criteria. These include such issues as the convenience of the defence, the prosecution and the witnesses as well as the desirability of expediting the trial.[390]

504. Lord Justice Auld criticised the allocation system as "unduly bureaucratic and rigid" as a means of assessing the aptitude of judges. The issuing of a "ticket" may depend on the number of judges on the circuit already authorised to try the cases concerned. The system is also a potential cause of disaffection among the circuit judiciary given the informal way in which authorisations are made on the Presiding Judge's recommendation.[391] He recommended giving Resident Judges much greater responsibility for allocation of work to their judges, subject to overall supervision by the Presiding Judges and to regular appraisal of judges. The Judicial Studies Board training requirements for particular kinds of work were also considered.[392]

505. Lord Justice Auld also remarked that the requirement to provide High Court judges for the circuits caused difficulties between circuits as well as between circuits and the London courts – given the competing demands of civil and criminal appeal lists. Similar pressures arose from the civil list duties of Circuit Judges within their circuits. The particular features of a case may itself require spacious, specially equipped or secure facilities available at a particular court

389 Section 78(1) of the 1981 Act.

390 Section 7 of the *Magistrates Courts Act, 1980* and section 51(10), *Crime and Disorder Act, 1998*. There is also a Practice Direction.

391 *Review of the Criminal Courts of England and Wales Report* n 1 *supra*, at page 236.

392 *Ibid*, at page 237.

centre. The cases designated for trial by a High Court judge while on circuit must be fitted into that judge's circuit schedule. This can result in long delays in serious cases – a delay of over a year not being unusual in murder cases – and difficulty in matching cases of appropriate status or trial length to the High Court judge's availability.[393] He recommended that:

- all Crown Court cases should be tried by a Circuit Judge unless the Presiding Judge on referral felt it appropriate to a High Court judge;
- the criteria of whether the case is one of special complexity and/or seriousness and/or public importance requiring trial by a High Court judge, should apply to arrangements for reservation of cases to High Court judges;
- the system of tiers in the Crown Court by reference to staffing by judicial personnel should be abolished;
- the traditional circuit periods of High Court judges should cease and that a cases requiring trial by High Court judges be scheduled for specific times and locations.[394]

Northern Ireland

506. In one respect, the history of the development of criminal trial jurisdiction in Northern Ireland was different from that of England and Wales. The County Court, which had existed here also from its inception in 1846 up to 1922, originally exercised only civil jurisdiction.[395] In 1959, the County Court took over the criminal jurisdiction that had formerly been exercised by the quarter sessions. "This," according to Dr Stannard,[396] "included not only the hearing of appeals from Magistrates' Courts, but also the trial on indictment of all offences other than the most serious ones." In 1978, the Courts of Assize were abolished, the Crown Court was also established in Northern Ireland to which all the jurisdiction to try cases on indictment was transferred.

507. The Crown Court sits in nine towns in the Province. The judges who may preside include: a Lord Justice of Appeal; a High Court judge; or a County Court judge. The Lord Chief Justice is President of the Crown Court. A County Court judge presiding in the Crown Court is deemed to be a judge of the Supreme Court of Northern Ireland.[397] The Lord Chief Justice decides the allocation of judges to trials. A judge having at least the rank of a High Court judge normally tries the more serious offences.

508. The operation of the Crown Court in Northern Ireland was outlined by Lord Justice McCollum at the November 2002 conference of the Working Group. Lord Justice McCollum explained that the level of court which deals with a particular case is determined mainly by statute. This has the effect of classifying offences into four categories: summary only; indictable; offences triable in either the Magistrates' Court or the Crown Court; and offences triable only on indictment. The first category is generally confined to the Magistrates' Court, except where the offence carries a sentence of more than six months' imprisonment, in which case the accused has a right of election – unless it is one of the specified

393 *Ibid*, at pages 237-240.

394 *Ibid*, at pages 248-249.

395 For a history, see Stannard, n 311 *supra*, at page 3.

396 *Ibid*.

397 *Ibid*, at page 5.

exceptions.[398] Offences triable on indictment and listed in Schedule 2 to the *Magistrates Court (Northern Ireland) Order 1981* are triable summarily where both the prosecution and defence consent. The third category corresponds to our hybrid category, as these are statutory offences for which the prosecution decides the court of trial. Provision is made for scheduled or terrorist offences to be tried by Belfast Crown Court – subject to directions of the Lord Chancellor or the Lord Chief Justice.[399] In the case of non-scheduled offences, the Resident Magistrate committing a defendant for trial may specify a venue having regard to the convenience of the parties and witnesses, the expedition of the trial and any directions of the Lord Chancellor. The responsibility for making directions will fall to the Lord Chief Justice upon devolution.[400] It is also open to the defendant or prosecutor to apply to the court to vary the place of trial.

509. The Lord Chancellor may issue directions as to the level of judge or experience required before a judge may preside over trials of specified offences.[401] Those offences triable only by a High Court judge include murder, treason, genocide, piracy, offences under the *Official Secrets Acts* and the *Geneva Conventions Acts*. Offences of aiding, abetting, counselling or procuring any specified offences are normally tried by a High Court judge. But the Lord Chief Justice may direct that attempts, incitement or conspiracy be tried before a County Court judge. Rape is triable by a County Court judge provided the judge's name is included in a schedule to the Lord Chancellor's Directions – which is normally done following the County Court judge's appointment. In cases that can be tried in the Crown Court by either a High Court or a County Court judge prior to arraignment, the local Crown Court office will identify cases which may be appropriate for trial by a High Court judge. This decision is informed by experience but some guidance is provided by Practice Directions. On occasion, the County Court judge will intervene – either before or after arraignment – where an aspect of the case comes to light before him which causes him to review the situation. Cases are referred to a central log in Belfast Crown Court. In such cases, a case summary and trial papers are forwarded to the Lord Chief Justice's Office where the case is scrutinised and a recommendation is put to the Lord Chief Justice. The Lord Chief Justice will then review the case and make his direction.

510. Lord Justice McCollum listed the factors guiding allocation between High Court and County Court judges as the gravity of the offence, the complexity of the matter in respect of the facts or the law and whether the public interest required trial at the higher level.

Scotland

511. There are three courts of criminal jurisdiction in Scotland – the High Court of Justiciary,[402] the sheriff court and the district court. In allocating crime for trial, three main factors determine the trial venue, namely, the severity of the crime, the likely severity of the sentence to be imposed and the location of the alleged criminal act.

398 Section 29, *Magistrates Court (Northern Ireland) Order 1981*.

399 Section 74, *Terrorism Act, 2000*.

400 *Justice (Northern Ireland) Act, 2002*.

401 Section 47(2), *Judicature (Northern Ireland) Act, 1978*.

402 Known as the High Court.

512. Two courts – the sheriff court and the High Court of Justiciary – exercise indictment jurisdiction or solemn jurisdiction. Trial on indictment is by a jury of 15 persons. There are six sheriffdoms each headed by a Sheriff Principal, these being divided in turn into 49 Sheriff Districts. The sheriff court functions both as a court of summary jurisdiction and as an indictment court. It may try all crimes on indictment except murder, treason, rape and breach of duty by magistrates (section 3(6) *Criminal Procedure (Scotland) Act, 1995*). When sitting as a court of solemn jurisdiction, the sheriff court's sentencing power is limited to three years' imprisonment and can impose an unlimited fine for common law offences. Legislation for an increase in sentencing jurisdiction to five years has yet to be implemented. The territorial jurisdiction of the sheriff court is generally limited to any district within the sheriffdom pursuant to section 4 of 1995 Act. Where it considers its sentencing powers in a common law case to be insufficient, it may remit the case to the High Court of Justiciary for sentence provided for by section 195(2) of the 1995 Act.

513. The High Court of Justiciary – which may sit with two or more judges in important or difficult cases – has universal jurisdiction to try crimes committed within its territorial jurisdiction. The High Court may not have jurisdiction where jurisdiction is reserved by statute to some other court but this must be done expressly or by necessary implication.[403] Any offence triable on indictment may be tried by the High Court sitting at any place in Scotland.

514. An accused has no right to opt for jury trial in Scotland but nobody can be tried on indictment save by leave of the Lord Advocate, the head of the Crown Office. The procurator fiscal – there is one in each district, corresponding to a sheriff court district – initially decides whether a prosecution is to take place unless the matter is to be reported to the Crown Office. He also decides whether to proceed summarily or on indictment. The position of the procurator fiscal is distinctive. Not only is he a party to the proceedings but he is master of those proceedings, or, "[i]n Scottish terminology, he is 'master of the instance.'"[404] As Gane explains:

> "It is for the public prosecutor (and not the court) to decide what pleas of guilt to accept and it is for him to decide when to withdraw or abandon proceedings. At the end of the trial, even if a verdict of guilty has been returned, the court cannot impose any sentence on the accused unless the prosecutor moves the court to pronounce sentence."[405]

515. If the procurator fiscal decides for prosecution on indictment, he then chooses the indictment forum in which an offence is to be tried and when submitting a precognition or depositions to the Crown Office, he will recommend the sheriff court or High Court as forum. Sir Gerald Gordon, in a paper[406] delivered to the November 2002 conference stated:

> "The main deciding factor in choosing which court a case should be tried in is what the prosecution regard as the

403 *Robert Rowet* (1843) 1 Broun 540; *George Duncan* (1864) 4 Irvine 474.

404 Gane, Christopher, "Chapter 12 – Scotland", in Van Den Wyngaert, Christine (ed.) *Criminal Procedure Systems in the European Community* (London: Butterworths, 1993), at page 349.

405 *Noon v H.M. Advocate*, 1960 J.C. 52; Gane, *ibid*, at page 352.

406 Gordon, Sir Gerald, "Allocating crime for trial in Scotland", delivered to the Working Group's conference "Looking to the Future", held on 22-23 November 2002.

> appropriate penalty. The case will be sent to a court whose maximum powers are regarded as sufficient for the particular offence and accused… Within the very wide area… where there are no statutory restrictions, the choice of court becomes very much a matter of impression, sometimes assisted by policies laid down by Crown Office, or adopted by local fiscals… there is a policy of taking robberies from retail premises in the High Court, on the view that people who work in such places are particularly vulnerable and deserve the degree of protection which it is believed is provided by a High Court prosecution. Generally speaking, such cases do attract a sentence of at least four years' imprisonment. It may be that if High Court judges were regularly to pass lower sentences than this, the Crown would relax their policy, or it may be that they would feel that to continue taking such cases in the High Court was still a worthwhile public relations exercise… Child sexual abuse cases are normally taken in the High Court if they involve any sort of penetration, or a number of children, or the abuse has gone on over a long period. Lesser offences may be dealt with by the sheriff on indictment or even summarily.
>
> Culpable homicide is not in practice prosecuted in the sheriff court. Attempted murder is usually taken in the High Court as, indeed, is assault to the danger of life. Assaults by stabbing will be dealt with on indictment where there is any significant injury… an offence which would be taken in, say the sheriff court, in the case of a first offender, may be taken in the High Court if the offender has a bad record, and particularly if he has a previous analogous High Court conviction.
>
> None of this is at all precise… Experience gives one a feel, albeit a very rough feel, so to speak, for what is a summary or a solemn case and, perhaps more particularly, what is a High Court case. But, as I have indicated, the boundaries change over time: when I started over forty years ago housebreakings involving more than £100 in value went on indictment. Nowadays, even allowing for inflation, the threshold is higher, and theft by housebreaking hardly ever gets into the High Court. Where the case is one of fraud or embezzlement the sums involved usually have to be very high before the case will get to the High Court… There may also be questions of resources, of whether a case can be fitted into a suitable High Court sitting, of whether a High Court judge should be tied up for a long time in a complex fraud case. There is also a suspicion, prevalent of course in the sheriff court, that if the Crown case is not very strong it is more likely, other things being more or less equal, to be taken in the sheriff court."

516. If, as Lord Bonomy has recommended in his review of the practice and procedure of the High Court of Justiciary,[407] the legislation enacted to extend the sheriff court's sentencing power to five years is implemented, this would probably have a bearing on the prosecution's approach to allocation of indictments for trial.

407 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, page 78, at paragraph 13.17.

Western Australia

517. Indictment trial jurisdiction in Western Australia is vested in the District Court and Supreme Court. The court of petty sessions – being the summary trial forum – has a preliminary role in respect of indictment crime. The District Court exercises jurisdiction in all cases except those in which a sentence of life imprisonment can be imposed; these latter cases fall within the jurisdiction of the Supreme Court which has jurisdiction to try all indictment crime.

518. Where a person has been committed for trial or sentence to the Supreme Court or an indictment has been presented against a person in that court for an offence triable in that Court, the Chief Justice may refer the case for trial and sentence to a District Court Judge as if the case was initiated in the District Court. The Chief Justice may also refer classes of case for trial to the District Court.[408] This provision has been employed to assign to the District Court jurisdiction to try a range of sexual offences previously triable only in the Supreme Court. The Supreme Court's actual caseload now consists almost exclusively of murder – including offences associated therewith – and serious armed robbery cases.[409]

Victoria

519. In Victoria, the right to trial by jury is a purely statutory one[410] and is reserved under statute for indictable offences punishable by imprisonment of 12 months or more.[411] It is effectively triggered by a plea of not guilty on arraignment.[412]

520. The Magistrates' Court has jurisdiction over all summary criminal and traffic matters as well as a wide range of indictable offences. It also holds committal proceedings of indictable offences which are not dealt with summarily. The maximum fine which can be imposed is $24,000. The *Sentencing Act, 1991* amended the *Magistrates Court Act, 1991*, inserting a new section 53(1A), which significantly expanded the jurisdiction of the Magistrates' Court in respect of indictable offences. It provides that, in addition to the offences referred to in Schedule 4 of the 1989 Act, an indictable offence described as being level 5 or 6 or as being punishable by level 5 or 6 imprisonment or a fine or both, may be heard and determined summarily. This means that an indictable offence which is punishable by up to ten years' imprisonment, can by tried summarily with the defendant's consent.

521. The Law Reform Committee of Victoria has questioned the wisdom of this provision, stating:

> "[i]t may not be appropriate for some of these offences to be heard in the Magistrates' Court… [This] amendment has effectively placed largely in the hands of the parties the decision as to whether an offence punishable by ten years' imprisonment or less is appropriate to be determined at a summary hearing, subject only to a magisterial discretion to refuse the application."[413]

408 Section 42(2), *District Court of Western Australia Act, 1969*, as amended.

409 Information supplied to the Working Group by the Western Australia Department of Justice.

410 Sections 2 and 3 of the *Constitution Act, 1975 (Vic.)* and the *Imperial Acts Application Act, 1922*. There is no constitutional right to trial by jury, as there is under the Australian Federal Constitution in respect of the trial of federal offences charged on indictment.

411 Section 80 of the *Commonwealth of Australia Constitution Act, 1900* and section 4G of the *Crimes Act, 1914*.

412 Section 391 of the *Crimes Act, 1958*.

413 Law Reform Committee of Victoria, *Jury Service in Victoria – Issues Paper No. 2*, Chapter 2: "The availability of jury trial", (November 1995).

522. Indictable crimes are ordinarily tried by a judge and jury in either the County Court or the Supreme Court. There are four main sources of indictable offences:

- Most of the offences listed in the *Crimes Act, 1958* are indictable.
- The residual common law offences are all indictable.
- State offences are presumed to be indictable where they carry a maximum penalty of three years' imprisonment or more.[414]
- Indictable offences created by statutes other than the *Crimes Act, 1958*.

523. The County Court has jurisdiction over all indictable offences with the exception of treason, misprision of treason, murder and certain murder-related offences,[415] these latter offences being triable only in the Trial Division of the Supreme Court.[416] The Director of Public Prosecutions decides whether a person should be presented for trial in the County Court or the Supreme Court. Section 353 of the *Crimes Act, 1958* provides in sub-sections 7 and 8:

> "(7) If a person has been committed for trial in respect of an offence which may be tried in the County Court, the Director of Public Prosecutions or any Crown Prosecutor in the name of the Director of Public Prosecutions may make presentment at either the Supreme Court or the County Court.
> (8) In determining at which court to make presentment the Director of Public Prosecutions or a Crown Prosecutor must have regard to-
> (a) the complexity of the case; and
> (b) the seriousness of the alleged crime; and
> (c) any particular importance attaching to the case and;
> (d) any other consideration that he or she regards as relevant."

New Zealand

524. In New Zealand, offences are classified as either summary or indictable. Indictable offences are either triable on indictment only or are triable summarily.[417] The District Court exercises jurisdiction over both summary and indictable offences. In addition, the District Court can exercise indictment jurisdiction. The High Court is the superior indictment tribunal. Indictable offences are triable by a jury except when:

- they are punishable by three months' imprisonment or less;
- they are triable summarily;
- the defendant applies for trial by judge alone.[418]

525. Offences tried on indictment must proceed by way of a Preliminary Hearing. The procedure governing preliminary hearings is set out in the *Summary Proceedings Act, 1957-2000*. The procedure differs depending on the band or category to which the indictable offence belongs. There are three such bands in all. The District Court will deal with those offences in the lowest band – referred to in Schedule 1A, Part I of the *District Courts Act, 1947*. These include seditious offences, bribery, blasphemous libel, bestiality, aggravated robbery and arson.[419]

414 Taken from *Issues Paper No. 2, ibid.*

415 Section 36A, *County Court Act, 1958*.

416 Section 17, *Supreme Court Act, 1986*.

417 The indictable offences which are triable summarily are listed in the Schedule I, Part I to the *Summary Proceedings Act, 1957*.

418 Section 361B, *Crimes Act, 1961*.

419 See section 168A(1)(a), *Summary Proceedings Act, 1957* and section 28A(1)(d), *District Courts Act, 1947*.

526. Middle band offences comprise those offences listed in Schedule 1A, Part II of the *District Courts Act, 1947* and include such offences as sexual violation, kidnapping, wounding with intent and aggravated robbery. Following committal for trial, a High Court Judge will determine on the papers whether it is more appropriate for the trial to be held in the District Court. In so deciding, the Judge must have regard to the following matters:

a) The gravity of the offence charged;
b) The complexity of the issues likely to arise in the proceedings;
c) The desirability of the prompt disposal of trials; and
d) The interests of justice generally.[420]

527. If the Judge determines that the case is appropriate for trial in the District Court, he will transfer the case to the District Court. No party is entitled to be heard by, or to make submissions to the Judge under this section.[421]

528. The third band consists of the most serious indictable offences, namely offences for which the maximum penalty is imprisonment for life or imprisonment for a term of 14 years. They can only be tried by jury. These include murder, manslaughter, treason and other crimes against the state and piracy. Such offences are only triable in the High Court.

Canada

529. In contrast to the United States where criminal law is largely a matter of State law, criminal law in Canada is governed by Federal law – mainly by the Federal *Criminal Code*.[422] So in Canada, most criminal laws are uniform across the provinces but some offences, such as motor vehicle offences, may also fall under provincial jurisdiction.[423]

530. Essentially, there are four levels of courts in Canada. Those of relevance to indictment trial are the provincial courts and the provincial/territorial superior court. The provincial courts occupy the lowest tier of jurisdiction. They deal with most criminal offences and all preliminary enquiries. The provincial/territorial superior court's title varies across the jurisdictions, e.g. Superior Court of Justice, Supreme Court which not to be confused with the Supreme Court of Canada, High Court of Justice, and Court of Queen's Bench. But the court system is essentially the same across the country.

531. In Canada criminal offences are classified in one of three categories: summary conviction, indictable or hybrid offences, otherwise known as Crown electable offences. Summary conviction offences afford no right of election to an accused and must be tried in the provincial court.[424] Unless otherwise provided in statute, the maximum punishment which can be imposed in a summary prosecution is a fine of $2,000, six months' imprisonment or both.[425] Certain offences are reserved exclusively to the jurisdiction of the superior court, notably murder, accessory after the fact to murder and conspiracy to commit murder.[426] The

420 Section 168AA(3), *Summary Proceedings Acts, 1957-2000*.

421 Section 168AA(2), *Summary Proceedings Acts, 1957-2000*.

422 R.S.C. 1985, c. C-46. The Code was initially enacted in 1892 and has been amended many times since then. It was based upon the English draft criminal code written by Sir James Fitzjames Stephen, which was introduced as a Bill in 1878. It advanced as far as a Second Reading in the House of Commons, before being referred to a Royal Commission of which Stephen himself was a member. But it was never actually adopted.

423 There are now numerous Federal enactments, such as the *Controlled Drugs and Substances Act*, *1996* (c. 19), and the *Young Offenders Act* (R.S. 1985, c. Y-1), which contain criminal offences.

424 In relation to summary jurisdiction, see Part XXVII of the Code.

425 *A Compendium of Law and Judges*, Chapter 9 – "Criminal Law Proceedings in Superior Courts", available on the web site of the British Columbia Superior Courts: http://www.courts.gov.bc.ca/LegalCompendium/Chapter9.htm. Note that although the Compendium describes the law and judiciary of British Columbia, the chapters relating to the criminal law are relevant as the criminal law is largely governed by federal law.

426 Section 469 of the Code.

provincial court is given absolute jurisdiction to try certain offences, including summary conviction offences and theft of property valued under $5,000, possession of stolen property and various gaming offences.[427]

532. The accused has a right to elect the mode of trial if the Crown proceeds by indictment. If the prosecutor fails to elect, the case will proceed summarily. In the case of some indictable offences, the accused will have no election because the offence falls within the absolute jurisdiction of the provincial court.[428] The provision of the Code creating the offence specifies whether it will be tried on indictment, summarily or at the discretion of the prosecutor. For many indictable offences, the accused can elect for trial by a provincial court judge, by a superior court judge without a jury or by a court composed of a superior court judge and jury.[429] A person charged with murder must be tried by a superior court judge sitting alone or with a jury.[430] If there are multiple defendants, an election by one for trial by a superior court judge – either alone or with a jury – requires that all defendants must be tried in the same way unless charges against the various defendants are severed to allow them to be tried separately.

533. Section 554 of the Code provides that if an accused is charged with an offence not being one reserved to the superior court – or over which a provincial court judge has absolute jurisdiction – a provincial court judge may try the accused if the accused so elects. Unless there is a direct indictment, the accused is required at some point to make known which mode of trial he elects. This must be done before a provincial court judge.[431] Interestingly, section 561 provides:

> "(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
>
> a. at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;
>
> b. at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge; and
>
> c. on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.
>
> (2) An accused who elects to be tried by a provincial court judge may, not later than fourteen days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so thereafter with the written consent of the prosecutor."

534. It has been stated that these rights of election and re-election avoid the risk of the accused being trapped in an inflexible system.[432] If the accused does not elect when put to his election, the judge is required to hold a preliminary inquiry into the charge. Section 11 of the Canadian *Charter of Rights and Freedoms* guarantees

427 Section 553 of the Code.

428 Section 553 of the Code.

429 Section 553 of the Code provides: "The jurisdiction of a provincial court judge… to try an accused is absolute and does not depend on the consent of the accused where the accused is charged [with any of the offences specified in this section]."

430 See sections 468-469 of the Code.

431 See Part XVIII of the Code (Procedure on Preliminary Inquiry).

432 *Compendium of Law and Judges*, Chapter 9 – "Criminal Law Proceedings in Superior Courts", n 425 *supra*.

the right to jury trial to an accused charged with an offence for which a sentence of five years may be imposed.[433]

The Issues

535. The major task facing the Working Group in this area of criminal jurisdiction is to identify the optimal arrangements for allocation of trial of crime on indictment. This involves an examination of the case for a national criminal court which has received support in authoritative quarters in recent times. Such a model would approximate to that of the English Crown Court. If the national criminal court option is not found to be generally advantageous, is there a viable alternative?

536. A major consequential issue is whether the Central Criminal Court should retain its exclusive jurisdiction in murder and rape cases. Aspects of that exclusive jurisdiction also warrant examination on their own merits.

Some Points of Agreement

537. It has been possible to reach a certain level of consensus about the present system. It is generally agreed that it is not defensible. The reasons for this conclusion have already been explained. The Circuit Court has exclusive jurisdiction to try all cases of serious crime – except for murder and rape and connected offences.[434] Even in the case of sexual offences, which have undoubtedly been the subject of some public debate, there is general agreement within the Working Group that the division is illogical. Although the Central Criminal Court has exclusive jurisdiction in respect of rape offences, some other serious sexual cases are tried in the Circuit Court.

538. There is also a wide measure of agreement within the Working Group and – it is fair to say – among many members of the judiciary and practitioners in the area that the removal of all practical possibility for the transfer of cases except within a circuit, has resulted in an excessively rigid system. All former systems providing for realistic possibility of transfer of trials have been effectively abolished. No account can be taken of the facts, the law or other circumstances relevant to any particular case. Cases are assigned for trial according to their legal denomination alone.

539. Furthermore, the Working Group is satisfied from the submissions it received that there is a high level of general satisfaction with the operation of the Circuit Court where trials take place much more quickly than in the Central Criminal Court. This can be shown clearly from the available data. Trials generally take place in circuits outside Dublin and expeditiously. In Dublin, the interval is approximately six weeks. There are no doubt exceptions, but the general picture is of a jurisdiction operating expeditiously. Nor, in spite of concerns occasionally expressed regarding the ouster of the jurisdiction of the Central Criminal Court,

433 Section 11 provides: "Any person charged with an offence has the right… (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment…" Note that this right does not extend to cases proceeded with under the *Youth Offenders Act*, unless the charge is one of murder.

434 Leaving out of consideration the cases, such as treason, genocide etc., which do not normally arise.

was any dissatisfaction expressed with the quality of justice dispensed in the Circuit Court. A further relevant factor is the length of trials when they do take place. It is well known that comparable trials in the Circuit Court are very much shorter than those in the Central Criminal Court.

540. The normal period of delay between the return for trial in the Central Criminal Court and the trial is now approximately 14 months. It has remained at that unacceptable level for several years in spite of strenuous efforts both by the judge in charge of the Central Criminal Court and the President of the High Court. It is not envisaged that this period can be shortened significantly in the near future.

The Options Considered

541. The six options proposed by our own sub-group represent a convenient starting point for discussion of allocation of the trial of indictable crime. Some of the proposals are more general and far-reaching than others. They are:

- Option (a), involving establishment of a national criminal court;
- Option (d), conferring jurisdiction for all cases on the Circuit Court;
- Option (f), which contemplates new arrangements for transfer of cases between the Circuit Court and the Central Criminal Court.

542. Before returning to these, it is appropriate to consider briefly the other, less radical options.

Option (b): Retain the Present System with Additional Resources for the Central Criminal Court

543. The need for additional resources for the Central Criminal Court is not in doubt. Principally, this should consist of providing additional judges to dispose of the backlog of cases. This is not to overlook possible measures designed to expedite and shorten the length of trials by various means considered in the Chapter of this Report on Criminal Trial Process. But it is clear that the competing needs of the many different classes of civil work in the High Court seriously impede the capacity to provide adequate judicial resources for the Central Criminal Court. The President of the High Court has taken steps to address the current backlog by devoting several additional judges to the Central Criminal Court. At present four, and on occasion, five judges sit regularly in that court. But the average delay stands stubbornly and unacceptably at 14 months. This appears to flow from a number of causes. The number of cases reaching the court appears to be rising. The general pattern is of trials significantly longer than their nearest equivalent in the Circuit Court. Defendants on occasion get separate trials for different counts. Juries are discharged for various reasons so that the case has to be retried.

544. As an exceptional measure, the President of the High Court is proposing to assign a significantly increased number of judges to the court for the month of

September 2003 in an attempt to reduce the backlog. One administrative difficulty which arises is the fact that registrars of the Central Criminal Court are attached to the Circuit Court and are limited in number while High Court registrars who might be available are confined to civil work. The President can only provide judges to the extent that there are available registrars. This problem should be addressed as a matter of urgency. Other steps will be necessary. In its chapter on Criminal Trial Process, the Working Group makes a number of proposals designed to encourage more efficient preparation for trials, thus encouraging defendants to make earlier decisions with regard to pleas, and suggests other measures which should contribute to the more expeditious conduct of criminal trials.

Option (c): Retain the Existing System but Provide for the Central Criminal Court to Sit outside Dublin

545. There is no bar to the Central Criminal Court sitting outside Dublin; this can be done under existing powers. It has become a matter of public knowledge and debate during the deliberations of the Working Group that a very significant proportion of serious pending cases come from the Limerick area. We have already made reference[435] to the proposal to organise sittings of the Central Criminal Court in Limerick later this year over an extended period, beginning with some trials in July to deal with indictments returned to the Central Criminal Court from the Limerick area. But these will be new cases returned for trial in recent months so that the backlog of murder and rape cases will continue to be dealt with in Dublin. A principal argument in favour of such a move is the saving to be made in terms of Garda Síochána personnel and resources. While a number of serious cases are at trial consecutively in Dublin, many Garda personnel are often detained for long periods and at great expense in Dublin. If such trials were to be heard outside Dublin, it should be possible to make significant savings in terms of the travel and subsistence expenses of such witnesses. On the other hand, the option presents practical administrative problems and potential waste. The undoubted savings on Garda time and resources will – in the view of the Director of Public Prosecutions – be balanced if not outweighed by the additional expense, travel and subsistence costs to the Courts Service and the prosecution. The Director believes that case management or witness management measures might have addressed the problem more effectively. Garda witnesses should be scheduled in the same way as certain professional witnesses to save Garda time and resources. At present, the administration of the Central Criminal Court resides with the local County Registrar who is given custodial responsibility for the records of the Court.[436] Without centralising the administration of the Court – an issue which, it is understood, is under review at present – the holding of sittings of the Court outside Dublin would lead to a fragmentation of records of the Court. This would in itself be undesirable and would render the collation of statistics on caseload a more complicated exercise. More significantly perhaps, the current arrangements have the advantage that, in the event of the collapse of a trial unexpectedly, the High Court judge concerned may be immediately redeployed to High Court civil work until another criminal trial is ready for

435 At paragraph 433, page 107.

436 "Each County Registrar acting as registrar to the Central Criminal Court has custody of the records relating to indictments and trials of that Court which are returned or held within the County or County Borough concerned:" Order 85, rule 6, Rules of the Superior Courts.

insertion in the list. This would not be feasible were the Central Criminal Court sitting outside Dublin. Clearly, the President of the High Court – in consultation with the judge in charge of the Central Criminal Court – is well placed and to investigate this possibility and has authority to organise sittings in Limerick or elsewhere if the number of pending trials and the available resources justify it.

Option (e): Rearrange the Allocation of Jurisdiction

546. This option would retain the essence of the existing system – including the almost complete absence of any facility for the transfer of cases between jurisdictions. It assumes that it is appropriate to continue to attempt to define *a priori,* by reference only to their legal denominations, the offences whose trial is reserved to the Central Criminal Court. In practical terms, it can be reduced to the question of whether the current arrangements regarding the trial of murder and rape cases should be changed.

547. The Working Group does not consider that options (b), (c), or (e) address the fundamental defects of the current system. Commitment of additional resources to the Central Criminal Court, deployment of the Court outside Dublin or an adjustment of offence-based boundaries may generate benefits of a temporary or limited nature, but will not – in our view – provide a durable solution. Thus, we turn to consider the remaining principal options, which are founded upon a reappraisal of jurisdictional principles.

Option (a): A National Criminal Court

548. The notion of a national criminal court naturally poses itself as a possible response to the imperfections of the present system of allocation. In particular, it should make it possible to arrange a more logical scheme of allocation of cases by reference to practical and relevant criteria. A system akin that that of the Crown Court in operation both in England and Wales and in Northern Ireland since the abolition of the former system of assizes and quarter sessions, would involve a combination of the existing Circuit Court and Central Criminal Court. Theoretically, every case could then be allocated to a court which sits in the most convenient location to be tried by a of judge appropriate rank.

549. Since the establishment of the Working Group, the Programme for Government of June 2002 contains the following objective:

> "As part of a general reform of the courts system, the existing criminal jurisdiction of the Circuit Criminal Court and the Central Criminal Court will be merged in one nation-wide indictable crimes court of which all Circuit Court judges and High Court judges will be members."[437]

550. As already stated, the judges of the Circuit Court have indicated their strong opposition to the introduction of a national criminal court in this jurisdiction. They believe that it would put at risk the current smooth working of the Circuit Court.

437 *An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats*, June 2002, http://www.taoiseach.gov.ie/upload/publications/1480.rtf, at page 25.

551. The Working Group has studied the Crown Court model and possible variants thereof with the generous assistance and advice of senior members of the judiciary from England and Wales – as well as from Northern Ireland. But following a period of considered study and debate, it has concluded that a national criminal court is not the answer to the admittedly serious problems affecting the trial of crime on indictment in Ireland.

552. In the first instance, there are several reasons for believing that the Crown Court model would not be transposable to this jurisdiction. The Crown Court is – like the Circuit Court – a single national court composed of High Court (Queen's Bench) and County Court (Circuit) judges. Also like the Circuit Court, it is a court of local jurisdiction. The difference between the two is that High Court judges sit regularly as judges of the Crown Court. Judges normally based in London sit for extended periods at circuit locations all over England and Wales. A Queen's Bench judge spends approximately half of his time outside London.

553. So each Crown Court circuit has within it High Court and Circuit judges. Cases are allocated for trial between these judges according to complex, though highly flexible rules. The attraction of this system is that it should reconcile the rules allocating cases locally to the circuits and those for assignment of a trial judge of appropriate rank. The Senior Presiding Judge based in London or the Lord Chief Justice in Belfast assigns listed cases between judges.

554. No doubt it is possible to operate such a system in a country with a population of some 60 million which has several very large population centres outside London. It is much less clear that it would be possible to do so in Ireland where such a large proportion of the population resides in the capital. The Circuit Court sits continuously in Dublin. Outside Dublin, only Cork and Limerick and to some extent Galway are substantial urban centres exercising very substantial criminal jurisdiction for extended periods. Elsewhere, the court sits by rotation for short periods in the different circuit towns.

555. Reference has been made to the various reservations expressed by Lord Justice Auld, including the tensions between circuits and between circuits and London caused by staffing arrangements for High Court judges and the competing demands of civil lists. The particular features of a case may itself require special facilities as to space, equipment or security, only available at a particular court centre. The need to fit cases appropriate for trial by a High Court judge into that judge's circuit schedule has resulted in long delays in serious cases and difficulty in matching trials of appropriate status or length to the judge's availability. Furthermore, tension and even resentment has arisen from the need to designate or ticket selected judges for serious cases. The strong impression is of a system which, while attractive at first sight and in theory, in its practical operation generates significant difficulties in the optimal distribution of resources and leads to inefficiencies in the use of judicial time.

556. The Working Group believes that similar problems would be bound to arise here. It is already difficult for the President of the High Court to provide adequate judicial resources to staff the Central Criminal Court sitting in Dublin. That difficulty would be aggravated by any additional requirement to provide judges for the trial of cases outside Dublin. It is of course impossible to predict the likely offsetting effect of reduced numbers of cases in the Central Criminal Court but it is unlikely that a national court model would consume less High Court judicial resources and is – if anything – likely to consume more. The practical facilitating of High Court and Circuit Court trials in terms of court premises, staff and time would, we believe, be extremely difficult to reconcile. Competition for courtroom space and time would be inevitable on circuit. Waste of High Court judges' time would be likely to follow.

557. Moreover, it would be necessary to devise a new system of allocation of cases within such a court. The Circuit Court judiciary has suggested that it would be difficult to do so. If the national criminal court were to be truly national, it would have to have jurisdiction over all indictable crime.

558. Furthermore, the judges of such a court would have to be drawn from both the Circuit Court and the High Court. It would be necessary to devise rules or criteria for the allocation of certain cases or classes of case to Circuit Court judges and others to High Court judges or to leave the discretion with the presiding or senior judge. These elements all exist in the Crown Court. It would be a major innovation in this jurisdiction. Discounting for the sake of argument the other significant disadvantages of the model, it cannot be said that it could not be made to work but it is clear that the ticketing system in the Crown Court gives rise to some level of discontent. Inevitably, such a system would risk creating invidious distinctions between judges of the two courts who are required to share the caseload of the single new court. In the opinion of the Working Group, undesirable and unnecessary tension would be likely to follow as occurs in England and Wales. In addition, it would be necessary to determine where trials were to take place. It would have to be assumed that a High Court judge assigned to try a case would necessarily do so on circuit. This would, it seems to us, inevitably cause severe problems of accommodation in the provincial centre – to say nothing of the additional expense involved. Alternatively, if such cases were to be tried in Dublin, the result would be the Central Criminal Court under a different name.

559. The chief concern of the Working Group is that nothing should be done to disturb the efficient disposal of the criminal business currently dealt with in the Circuit Court. The Circuit Court judiciary has expressed legitimate concern that there would be a danger of visiting some of the problems of the Central Criminal Court upon that business. This jurisdiction has no prior experience of first instance criminal trial jurisdiction-sharing between judges of different courts. It is obvious that it would lead to problems of conflicting claims to judicial space and time as well as intra-judiciary tensions.

560. In the absence of any compelling arguments in its favour – and being satisfied as to the significant likely inefficiencies and waste attendant upon such a model – the Working Group does not recommend the establishment of a National Criminal Court.

561. The Working Group, having concluded that it should not recommend the establishment of a National Criminal Court for reasons relating to the necessary structure and operation of such a single integrated court, emphasises that this is not by any means to reject the desired objectives of a national criminal court, namely that there should be a flexible mechanism for allocation of cases to the court and venue best placed to assure fair and expeditious disposal of a case having regard to its particular attributes. In the view of the Working Group, much may be done by way of jurisdictional reform to secure these objectives. The priority should be to maintain the current efficiency of the Circuit Court while reforming those aspects of the system as a whole which are both inflexible and illogical and which contribute to such unacceptable trial delays in the Central Criminal Court.

Option (d): Confer Jurisdiction over all Indictable Crime on the Circuit Court, thereby removing the Need for the Central Criminal Court

562. This proposal could raise a constitutional issue, apart from any other consideration. It would empty the High Court of all criminal jurisdiction. Reference has already been made to the decision of the Supreme Court in *The State (Boyle) v Neylon*[438] to the effect that the Oireachtas is free to establish courts of first instance – other than the High Court and other than courts of local and limited jurisdiction. In addition, in *Tormey v Ireland*[439] that court held that the Oireachtas could constitutionally confer exclusive jurisdiction on a court of local and limited jurisdiction. But to deprive the High Court of all criminal jurisdiction would, in the view of the Working Group, be a questionable and unjustifiable frustration of the clear object of the Constitution in giving full original jurisdiction to the High Court in all matters, civil and criminal. Aside from this however, the Working Group is convinced that the Central Criminal Court has a key role to play in the trial of crime on indictment – given a proper mechanism for allocation of cases as between that Court and the Circuit Court – and that the complementarity thus achieved should address the anomalies and inefficiencies to be observed in the current operation of those jurisdictions.

Option (f): Let the Status Quo Remain but Introduce New Arrangements for Transferring Cases between the Central Criminal Court and the Circuit Court

563. This option is considered by the Working Group to offer the best possibility of achieving the objectives of flexibility in allocation and suitability of court and venue referred to earlier. Undoubtedly the devising of a viable mechanism, even apart from the choice of suitable criteria, for the transfer of a trial from one jurisdiction to another presents challenges. The Working

438 [1986] I.R. 551.

439 [1985] I.R. 289.

Group has considered a number of possible arrangements including those described in the accounts of comparable jurisdictions.

564. Provision could be made by means of a judicial or an administrative procedure, for either the court to which the case has been returned for trial or a designated independent court or judge to hear applications for transfer to another jurisdiction. In New Zealand for example, a High Court judge may – having considered the matter on paper – transfer a case back for trial to the District Court which is a court with power to try cases either summarily or on indictment. As has been indicated earlier in this Report, in this jurisdiction, decisions to grant or refuse an order of transfer – though judicial in character – have usually been final and unappealable. In *Todd v Murphy*[440] it was held that the Constitution did not guarantee any right of appeal from the decision of a judge on an application to transfer. So it should be possible to devise a simple unappealable procedure for transfer between courts.

565. In order to be efficient, any such mechanism would need to be subject to a strict time limit. For practical reasons, such an application should be made at an early stage after return for trial. Otherwise costs would be wastefully incurred in initiating the indictment – firstly by the state solicitor in the particular county and subsequently by the Chief Prosecution Solicitor.

566. Another feasible mechanism for such a system of transfer would be to empower the Director of Public Prosecutions – at the time a case is returned for trial – to designate the court of trial and order that the case be sent there. The *Offences against the State Act, 1939* conferred comparable power on the Attorney General – now the Director of Public Prosecutions – to have cases returned or transferred to the Special Criminal Court in place of the ordinary courts. The Director of Public Prosecutions is in possession of and fully apprised of all features of the case earlier than anyone else in the system. It is to be assumed that such a power would be used infrequently. But in certain types of cases it would be clear from the beginning whether there were grounds for trial in the Central Criminal Court rather than the Circuit Court. For example, this could arise in cases of obvious exceptional seriousness, complexity or length. But the Director has informed the Working Group that he would not wish to act as sole arbiter in such cases. He believes that the Court should make any such decision having heard the submissions of the Director.

567. A different but parallel mechanism could be envisaged for possible transfer of trial from the Central Criminal Court to the Circuit Court. Under the existing system of exclusive jurisdiction, murder and rape cases are returned for trial to the Central Criminal Court. If the Director of Public Prosecutions considered that any particular case was suitable for trial in the Circuit Court, he could be empowered to make an application to the court for its transfer on stated grounds. Provision should also be made in any such case, for the Director of

440 [1999] 2 I.R.1.

Public Prosecutions to consult the victim in all rape cases and to inform the court of her or his attitude to the application.

568. The Working Group has also given careful consideration to the possibility of conferring power on the judge in charge of the Central Criminal Court – or other designated judge, including the President of the High Court – to initiate a procedure for considering the transfer of a case from that court to the Central Criminal Court. At least in the situation of serious delay which prevails at present, such a power might be used to offer the accused, the prosecution and the complainant the possibility of an earlier trial in the Circuit Court.

569. We have already made reference, in considering the possibility of vesting sole and exclusive indictment jurisdiction in the Circuit Court, to the decisions of the Supreme Court in *The State (Boyle) v Neylon and Tormey v Ireland*.[441] The combined effect of those cases would appear to be that no constitutional obstacle arises to the assignment to the Circuit Court of all the categories of indictable crime which actually reach the courts. The Working Group recognises nonetheless, that there are serious objections to the trial of certain classes of case of the most serious kind in any court other than the High Court.

570. The Working Group agrees that in no circumstances should jurisdiction be conferred on the Circuit Court to try any of those special and rare cases of quintessential seriousness and importance which have traditionally been reserved to the Central Criminal Court. A prime example is the offence of treason which is defined by Article 39 of the Constitution and the *Treason Act*, 1939. The same should apply to offences of a treasonable character created by sections 6, 7 or 8 of the *Offences against the State Act, 1939.* For different reasons, relating not merely to the local nature of the Circuit Court's geographical jurisdiction but more pertinently to their intrinsic gravity, the offences under the *Geneva Conventions Act, 1962* and the *Genocide Act, 1973* already reserved to the Central Criminal Court should also remain exclusively assigned to that court. None of these offences has to date reached the Court. Nonetheless, in the event that they did arise, it seems to the Working Group that they should be automatically returnable to the Central Criminal Court. Offences of piracy scarcely warrant similar treatment.

571. All other indictable offences should, however, in the view of the Working Group be treated, for the purposes of jurisdiction, as forming part of one corpus of criminal offences. The Working Group has decided to recommend that the Circuit Court shall have concurrent jurisdiction with the Central Criminal Court in respect of the trial of all offences on indictment, other than those which it has recommended be retained within the exclusive jurisdiction of the Central Criminal Court. To that end, all cases – subject to the exceptions mentioned – should be returned for trial initially to the

441 [1985] I.R. 289.

Circuit Court in accordance with the existing rules on local jurisdiction. However, the existing exclusive jurisdiction of the Central Criminal Court in respect of murder and rape and cognate offences exists for good reason. Murder is still commonly regarded as the most serious of offences. This is reflected in the mandatory sentence of life imprisonment which it attracts. Similarly, society has gradually given proper recognition to the exceptional seriousness of the crime of rape and a number of similar offences.

572. The Working Group has considered at length the arguments advanced in favour of retaining rape offences within the exclusive jurisdiction of the Central Criminal Court because of their gravity. There is no doubt that many – probably most – such offences are appropriate for trial at the highest indictment level. However, the Working Group is not convinced that a blanket assignment of such cases to the Central Criminal Court serves either the general public interest in the prosecution of such offences or indeed, the interests of the victim. Quite aside from this consideration, reference has been made earlier in this Chapter to the opportunity now available under statute to the prosecution to appeal unduly lenient sentences – a factor which, coupled with the jurisprudence in this area, should address any concern which might remain regarding consistency in sentencing in such cases in the Circuit Court.

573. In recognition of the particular attributes of murder and rape and their cognate counterparts, it is proposed that, in all cases of a return for trial in which a charge for one of these offences has been included as a count in the indictment, on the return of the case to the Circuit Court there should be an immediate hearing, upon notice to the Director of Public Prosecutions and the accused, the Director representing the interests of the alleged victim (or in the case of murder, those having an interest by reason of a relationship with the deceased), at which each would be heard. The purpose of the hearing will be a consideration of whether the case should be transferred for trial to the Central Criminal Court or for trial to another Circuit. The judge, in considering the order to be made on such a hearing, would be required to have regard to the overriding interests of justice and without prejudice to the foregoing, should have regard in particular to the following:

a) the nature of the case and of facts alleged;
b) the degree of gravity or complexity of the case, having regard to those facts;
c) the views of the complainant – in the case of murder, the relatives of the deceased;
d) the convenience of the parties and of witnesses;
e) where appropriate, the need to preserve the anonymity of the complainant/accused having regard to sections 7 and 8, *Criminal Law (Rape) Act, 1981*, as amended by section 17(2), *Criminal Law (Rape) (Amendment) Act, 1990*;
f) any risk of prejudicial publicity;

g) any risk of intimidation of witnesses or jurors; and
h) the objective of an expeditious trial.

574. In other cases, either the Director of Public Prosecutions or the accused would also be entitled to apply to the court on notice – not later than 14 days following the return for trial – for an order transferring the case for trial to the Central Criminal Court. The judge considering such an application would be bound to have regard to the same criteria as mentioned in the paragraph immediately above.

575. The expectation would be that murder and rape cases would normally be transferred for trial to the Central Criminal Court. At the same time, it is contemplated that, in some cases even of murder, the circumstances would lead the prosecution, the defence and the relatives of the victim to accept that a trial in the Circuit Court might be more convenient and expeditious. In the case of rape offences, a primary consideration would be the need to preserve the anonymity of the complainant. But there might be cases where there was no serious concern about this issue or where steps – such as adjournment to a different circuit town – would sufficiently address the concern. In such cases, the interested parties would have the opportunity of weighing in the balance the chance of an earlier, more expeditious hearing.

576. The essence and practical effect of the proposal would be that all indictable cases, including both murder and rape cases could – subject to the procedures above – be tried as ordinary Circuit Court cases in accordance with the present rules for allocating jurisdiction. In murder and rape cases, a mandatory procedure would ensure that immediate consideration would have to be given to transfer to the Central Criminal Court. The criteria are designed to ensure that they would be transferred unless the circumstances and the views of all interested parties led to the conclusion that they should be tried in the Circuit Court. It would at the same time open up the possibility that the benefits, speed and convenience of an early trial on circuit would persuade those most closely affected to choose that option.

577. All cases would commence in the Circuit Court. That court has developed a very considerable expertise and experience in dealing with serious crime. Indeed, it has been pointed out to the Working Group that some judges assigned to the trial of indictable crime in the Central Criminal Court have less extensive experience of criminal cases than many members of the Circuit Court. The Working Group believes that a Circuit Judge would be eminently suited – both from criminal trial experience and from the range of crime coming within the purview of that Court – to the task of operating the allocation mechanism recommended by the Working Group.

CHAPTER FIVE

Criminal Appeals in Indictable Cases

Introduction

578. Appeals in all cases of conviction on indictment – whether in the Central Criminal Court or the Circuit Court – are made only to the Court of Criminal Appeal. These arrangements differ from those for appeals in civil proceedings from the High Court and Circuit Court, which are to the Supreme Court and High Court respectively. Article 34.4.3 of the Constitution provides that:

> "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

579. The right of appeal directly to the Supreme Court – formerly held to be available from the Central Criminal Court by virtue of that provision – was removed by section 11(1) of the *Criminal Procedure Act, 1993*.[442]

History and Establishment of the Court of Criminal Appeal

580. At common law, no appeal lay from conviction or sentence in criminal cases. Sir James Stephen remarked that "it is a characteristic feature in English criminal procedure that it admits of no appeal properly so called – either upon matters of fact or upon matters of law."[443] The judges developed a practice over the centuries of reserving difficult points of law for consideration by their brethren – including barristers. In earlier times, the questions were considered informally at Serjeants' Inn in London or a room at Westminster called the Exchequer Chamber and their decision on the question was respected by the courts. The Court of Crown Cases Reserved was established in 1848 to hear any question which a judge at trial might reserve to it.[444] It was not until 1907 with the enactment of the *Criminal Appeal Act*, that the first Court of Criminal Appeal was established in England. There was no Court of Criminal Appeal in Ireland until 1924.[445] The establishment of the Court of Criminal Appeal by the Courts of Justice Act, 1924 followed the proposal of the Judiciary Committee in 1923, known as the Glenavy Committee.[446] The Committee recommended the establishment of a Court of Criminal Appeal – consisting of at least two High

442 Save in respect of an appeal under section 34 of the *Criminal Procedure Act, 1967*, from a decision of the Central Criminal Court. Section 11(1) does not apply to a decision of the Central Criminal Court in so far as it relates to the validity of any law having regard to the provisions of the Constitution: section 11(2) of the 1993 Act.

443 Stephen, n 144 *supra*, at page 308.

444 Manchester, n 23 *supra*, at page 185.

445 For a more complete account of the history of criminal appeals, see the Consultation Paper of the Law Reform Commission on *Prosecution Appeals in Cases Brought on Indictment*, n 18 *supra*, Chapter 1.

446 See the *Report of the Judiciary Committee*, n 10 *supra*, at page 23.

Court judges and a Supreme Court judge – to preside over appeals in cases tried on indictment. It recommended that a certificate of appeal would have to be obtained from the trial judge and, if refused, an appeal from this refusal could be taken to the Court of Criminal Appeal. It proposed that leave could be granted by the Court of Criminal Appeal if it was of the opinion that a question of law was involved or that the trial was unsatisfactory. Finally, it was recommended that the appeal court would have the power to reverse the conviction or alter the sentence and make such order as to costs as would be necessary.

581. Section 8 of the *Courts of Justice Act,* 1924 provided that the Chief Justice might "from time to time, request any two ordinary judges of the High Court to sit with himself, or with a judge of the Supreme Court, as a Court of Criminal Appeal…" Sections 28 to 34 of that Act, as amended, continue to govern much of the substance and procedure for dealing with criminal appeals.

582. The present Court of Criminal Appeal was established by section 3 of the *Courts (Establishment and Constitution) Act,* 1961. Section 3(2) provides:

> "For the purpose of hearing and determining any particular appeal cognisable by the Court of Criminal Appeal, the Court of Criminal Appeal shall be summoned in accordance with directions to be given by the Chief Justice, and the Court shall be duly constituted if it consists of not less than three judges
>
> (a) of whom one shall be either –
> (i) the Chief Justice, or
> (ii) an ordinary judge of the Supreme Court nominated by the Chief Justice, and
> (b) of whom the other two shall be either –
> (i) two ordinary judges of the High Court nominated by the Chief Justice, or
> (ii) the President of the High Court, if nominated by the Chief Justice and willing to act, and one ordinary judge of the High Court nominated by the Chief Justice,
> but any other available judge or judges of the Supreme Court or the High Court may, at the request of the Chief Justice, attend as a member or members of the Court."

583. Section 12(1) of the *Courts (Supplemental Provisions) Act, 1961* provides that "… the Court of Criminal Appeal shall be a superior court of record and shall… have full power to determine any questions necessary to be determined for the purpose of doing justice in the case before it." Section 12(2) provided for the vesting in the Court of Criminal Appeal of all jurisdiction which was, immediately before the coming into force of that provision, vested in or capable of being exercised by the existing Court of Criminal Appeal. Section 48 applied a wide range of former enactments to the newly established courts. These included the provisions of the Act of 1924, as amended, in respect of criminal appeals.

584. In the mid-1990s, the Oireachtas adopted legislation providing for the abolition of the Court of Criminal Appeal. Section 3(2) of the *Courts and Court Officers Act, 1995* provided for the repeal of section 11 of the Criminal Procedure Act, 1993 and so the prohibition of appeal to the Supreme Court.[447] Section 4 of the Act would vest the appellate function of the Court of Criminal Appeal and of the Courts-Martial Appeals Court in the Supreme Court.

585. These provisions have never been brought into force. It is not clear whether there is any intention of doing so.

586. This Report, therefore, is concerned to examine the statutory system of criminal appeals established in 1924 and continued in 1961.

587. Under sections 31 and 63 of the Act of 1924, appeals from the Central Criminal Court and the Circuit Court respectively are taken to the Court of Criminal Appeal.

588. The rules constituting the Court of Criminal Appeal do not envisage judges being permanently assigned to the Court of Criminal Appeal. Under the Act of 1924 the Chief Justice was to request judges to sit with him "from time to time." The Act of 1961 speaks of the court being "duly constituted" if it consists of not less than three judges nominated pursuant to the section. Yet the changing composition of the Court is emphasised by the reference to "the purpose of hearing any particular appeal." In practice, the court consists of three judges, one of the Supreme Court and two from the High Court who are selected to hear particular lists of cases. Normally, a Court of three judges sits for one day only to deal with the list of cases for that day. From time to time, a Court is formed to sit for several days for a single longer appeal against conviction.

589. One judgment only is pronounced. Section 28 of *The* Courts of Justice Act, 1924 provides that "no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court."

590. In *The People (D.P.P.) v Conmey*,[448] it was argued that the establishment of the Court of Criminal Appeal was invalid having regard to the provisions of the Constitution, which does not provide for such a court or its judges. The Supreme Court held that section 3 of the *Courts (Supplemental Provisions) Act, 1961,* which established the court, was not invalid having regard to the provisions of the Constitution. Article 34.3 contemplates the establishment of courts of first instance other than the High Court and courts of appellate jurisdiction from decisions of such courts. The Court of Criminal Appeal, it was held, fulfilled such a function. However, the court also held that a right of appeal directly from the Central Criminal Court to the Supreme Court existed by virtue of Article 34.4.3 of the Constitution concurrently with the right of appeal to the Court of Criminal Appeal.[449] This right of appeal – which was capable of being excluded[450] – was abolished[451] by section 11 of the *Criminal Procedure Act, 1993.*

447 The right of direct appeal had arisen from the decision of the Supreme Court in *The People (D.P.P.) v Conmey* [1975] I.R. 341.

448 [1975] I.R. 341.

449 See also *The People (D.P.P.) v Lynch* [1982] I.R. 64; *The People (D.P.P.) v O'Shea* [1982] I.R. 384.

450 The appellate jurisdiction of the Supreme Court from all decisions of the High Court stipulated by Article 34.4.3 is stated to be "with such exceptions and subject to such regulations as may be prescribed by law…"

451 Except for appeals under section 34 of the *Criminal Procedure Act, 1967*.

The Nature and Extent of the Appeal Jurisdiction

591. The primary appellate jurisdiction of the Court of Criminal Appeal is that an appeal by a person convicted on indictment lies by virtue of sections 31 and 63 of the Act of 1924, against conviction and/or sentence to the Court of Criminal Appeal.[452] These sections do not circumscribe in any way the scope of the normal appeal. The grounds of appeal are as broad as the law permits. It may be inferred from the terms of section 32 of the Act of 1924 dealing with leave to appeal that one of the grounds may be that the trial was unsatisfactory.

592. Formerly, section 34 of the Act of 1924 and section 5(1)(a) of the *Courts of Justice Act, 1928*, regulated the jurisdiction of the Court on hearing an appeal. It might "… affirm or reverse the conviction, in whole or in part, and… remit, or… reduce, or… increase or otherwise vary the sentence, and generally… make such order… as may be necessary for the purpose of doing justice…" By the Act of 1928, "the court [might] notwithstanding that they are of opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred…"[453]

593. These provisions have been repealed and replaced by section 3(1) of the *Criminal Procedure Act, 1993*, which provides:

> "(1) On the hearing of an appeal against conviction of an offence the Court may –
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred), or
> (b) quash the conviction and make no further order, or
> (c) quash the conviction and order the applicant to be re-tried for the offence, or
> (d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence and that the jury must have been satisfied of facts which proved him guilty of the other offence –
> (i) substitute for the verdict a verdict of guilty of the other offence, and
> (ii) impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.
> (2) On the hearing of an appeal against sentence for an offence the Court may quash the sentence and in place of it impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial.
> (3) The Court, on the hearing of an appeal or, as the case may be, of an application for leave to appeal, against a conviction or sentence may – …
> (e) generally make such order as may be necessary for the purpose of doing justice in the case before the Court."

452 Sections 31 and 63 of *The Courts of Justice Act, 1924*; section 12 of the *Courts (Supplemental Provisions) Act, 1961*.

453 The further power to order costs to be paid to a successful appellant has been removed by section 8 of the *Criminal Justice (Legal Aid) Act, 1962* in all cases funded by legal aid.

594. Section 2 of the *Criminal Procedure Act, 1993* introduced an entirely new power to quash a conviction or review a sentence in cases of miscarriage of justice. It applies to any person convicted on indictment or, having signed a plea of guilty, who after an appeal to the Court of Criminal Appeal or an application for leave to appeal and subsequent retrial, "alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to that conviction or that the sentence imposed is excessive."[454] Section 3(2) of the Act provides that an application under section 2(1) of the Act is to "be treated for all purposes as an appeal to the Court…" Such appeals are infrequent and form a very small part of the caseload of the court. The numbers of such appeals received for each of the years 1998 to 2001 were respectively: zero, one, three and zero.

595. Finally, by virtue of section 2 of the *Criminal Justice Act, 1993*, the prosecution has been granted a right to apply for review of a sentence which the Director of Public Prosecutions believes was unduly lenient. Such applications have become a regular feature of the work of the court.

596. Decisions of the Court of Criminal Appeal are final.[455] But the Attorney General, the Director of Public Prosecutions or the Court itself may grant a certificate stating that "the decision involves a point of law which is of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." By virtue of section 29 of the *Courts of Justice Act, 1924*,[456] an appeal may then be taken to the Supreme Court. The wording of the section does not restrict the appeal to the certified point. In *The People (Attorney General) v Kennedy,*[457] the Supreme Court held that this procedure was not open to the prosecution, the wording of section 29 not being clear enough to establish such a right.

597. Where a certificate has been granted under section 29, it has been held that the appellant is not confined to arguing the certified point but may argue such other grounds of appeal as were argued before the Court of Criminal Appeal and may even apply for leave to add new grounds.[458]

Appeal Procedure

598. An appeal to the Court of Criminal Appeal, other than an application pursuant to section 2 of the *Criminal Procedure Act, 1993*,[459] is subject to the requirement of a certificate from the trial judge or on appeal, the Court of Criminal Appeal that the case is "a fit case for appeal".[460] Where the Court of Criminal Appeal has granted leave to appeal, no notice of appeal is necessary "but the notice of application for leave to appeal for leave shall… be deemed to be a notice of appeal."[461] Section 32 of *The Courts of Justice Act, 1924,* as amended by s. 3(6) of the *Criminal Procedure Act, 1993,* provides:

> "Leave to appeal shall be granted by the Court of Criminal Appeal in cases where the court is of the opinion that a

454 The principal decisions under this provision are: *The People (D.P.P.) v Meleady and another* [1995] 2 I.R. 517; *The People (D.P.P.) v Pringle* [1995] I.R. 547; *The People (D.P.P.) v McDonagh* [1996] 1 I.R. 305; *The People (D.P.P.) v Gannon* [1997] I.R. 340.

455 Section 29, *The Courts of Justice Act, 1924*.

456 Applied to appeals from the Special Criminal Court by section 44(2) of the *Offences against the State Act, 1939.*

457 [1945] I.R. 517.

458 *The People (Attorney General) v Giles* [1974] I.R. 422. The judgment of Walsh J. is based on a review of all the previous cases of appeal under the section. It also refers to the similar conclusion of the House of Lords in *Milne v Commissioner of Police for the City of London* [1940] A.C. 1.

459 This appears to follow from the terms of section 2(2) of the Act: "An application under subsection (1) [for review by the Court of Criminal Appeal of alleged miscarriage of justice or excessive sentence] shall be treated for all purposes as an appeal to the Court against the conviction or sentence."

460 Section 31, *The Courts of Justice Act, 1924*.

461 Order 86, rule 6, Rules of the Superior Courts.

question of law is involved, or where the trial appears to the court to have been unsatisfactory, or there appears to the court to be any other sufficient ground of appeal, and the court shall have power to make all consequential orders it may think fit, including an order admitting the appellant to bail pending the determination of his appeal or application for leave to appeal."

599. These provisions are applied to appeals from the Special Criminal Court by section 44 of the *Offences against the State Act, 1939*.

600. In practice, the Court of Criminal Appeal never conducts any distinct inquiry into whether leave to appeal should be granted. The court makes no distinction between an appeal, which arises in the rare cases where the trial judge grants leave, and an application for leave.[462]

601. Section 5 of the *Criminal Procedure Act, 1993* provides:

> "(1) If it appears to the registrar of the Court that a notice of an application for leave to appeal does not show any substantial ground of appeal or, in the case of an application under section 2, that the application does not disclose a prima facie case that a miscarriage of justice has occurred in relation to the conviction or that the sentence is excessive, he may, without calling for the report of the official stenographer, refer the application to the Court for summary determination; and where the case is so referred the Court may, if it considers that the application is frivolous or vexatious and can be determined without adjourning it for a full hearing, dismiss it summarily, without calling on anyone to attend the hearing or to appear on behalf of the prosecution.
> (2) The jurisdiction of the Court under subsection (1) may be exercised by a single judge of the Court and an appeal may be made to the Court by the convicted person against the summary determination of an application."

602. It is understood that this procedure has never been used. The reasons will emerge from a consideration of the procedures followed by the Court of Criminal Appeal and its registrar in the processing of appeals.

603. Order 86 of the Rules of the Superior Courts regulates procedural aspects of appeals. The time limit for lodging a notice of appeal or application for leave is 21 days from the grant or refusal of the certificate of leave to appeal.[463] The form in each case should, under the Rules, state the grounds of appeal or application for leave. In practice, the appellants or applicants send almost all notices of appeal or applications from prison.[464] They use the printed forms but they rarely formulate any recognisable, legally relevant grounds of appeal.

604. Upon receipt of notice of appeal or application for leave, the registrar of the Court of Criminal Appeal must notify the Chief Prosecution Solicitor, the proper officer of the court of trial and the Commissioner of An Garda Síochána. If the

462 Prior to the *Criminal Procedure Act, 1993*, there was no provision for the grant of bail pending the hearing of an application for leave to appeal. The amendment in section 3(6) of that Act of section 32 of the *Courts of Justice Act, 1924* corrected that omission. Prior to that date, there may, for that reason, have been some cases of consideration of the certificate.

463 Order 86, rules 4 and 5 and Appendix U, Forms 2 and 3, Rules of the Superior Courts. Rule 5 was amended by S.I. 265/93.

464 The Working Group is indebted to Ms. Geraldine Manners, the registrar to the Court of Criminal Appeal, for her generous help in explaining the working of the Court.

appellant or applicant is in prison or on bail, the registrar notifies the prison authorities.[465]

605. A proper transcript of the trial is indispensable for the hearing of an appeal. The Court of Criminal Appeal must, in cases where a certificate of leave to appeal has been granted, hear the appeal on "a record of the proceedings at the trial and on a transcript thereof *verified* by the judge before whom the case was tried…"[466] It is striking to find that even such a relatively recent provision – passed in 1997 – is based on the incorrect assumption that the court first considers, pursuant to section 32 of the Act of 1924, whether to grant leave to appeal.[467] If the court grants leave, the section assumes the appeal itself will be heard on the transcript. But there is no provision for a transcript on an application for leave to appeal. In theory, therefore, the court should hear applications for leave to appeal without any transcript. This is not, of course, the reality.[468] All applications for leave are taken as being, in effect, appeals for all procedural purposes, except that the formality of treating the application for leave as the hearing of the appeal is observed.[469]

606. Section 33 of the Act of 1924, as amended, requires the transcript to be verified by the trial judge. This gives rise to some concern. It was not contained, at least not in the same terms, in sections 33 and 97 of the Act of 1924 the provisions replaced by amendment in 1997. Those sections spoke of the "report of the official stenographer" to be certified by the judge. The "record" of the trial, which now has to be verified, includes "shorthand notes, or a disc, tape, soundtrack or other device in which information, sound or signals are embodied so as to be capable of being reproduced in legible or audible form."[470] If the section means that each transcript has to be laboriously checked and corrected by the trial judge, in addition to dealing with his ongoing cases, this is obviously an impossible and unnecessarily onerous provision. It is not easy to see why the judge, instead of certifying the report, as formerly, must now verify it. It may be that no change was intended. By contrast with the amended version of section 33 of the Act of 1924, Order 86, rule 14, of the Rules of the Superior Courts obliges the official stenographer to certify the shorthand note at the end of the trial and to have it "certified" by the trial judge. The Working Group understands that many judges interpret their obligation as being to certify that the transcript is indeed the record of the trial, but not to verify its contents. The Working Group believes that this approach is reasonable, but considers that any ambiguity arising should be removed by amendment of the 1997 Act so as to restrict clearly the function of the trial judge to identification of the transcript as being a record of the trial. Provision should also be made by statute obviating the requirement of certification in cases where the trial judge has retired or is deceased.

607. Since its establishment, the Court of Criminal Appeal has held that appellants or, more pertinently, applicants for leave to appeal may not await the transcript

465 Order 86, rule 7, Rules of the Superior Courts.

466 Section 33 of *The Courts of Justice Act, 1924*, as amended by section 7 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*.

467 For some comments on the discrepancy between the statutory provisions and the actual procedure of the Court of Criminal Appeal, see the unanimous judgment of the Supreme Court delivered by Geoghegan J. in *The People (D.P.P.) v Corbally* [2001] 1 I.R. 180.

468 Except in cases of applications for bail pending appeal. See *The People (D.P.P.) v Corbally* [2001] 1 I.R. 180.

469 Note that, section 32 of *The Courts of Justice Act, 1924*, as amended by section 3(6) of the *Criminal Procedure Act, 1993* provides that bail may be granted pending an application for leave to appeal.

470 Section 7(3)(a) of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*.

before formulating the grounds of appeal. This is in order to discourage the trawling of transcripts for grounds of appeal not apparent at the time of trial. In *The People (Attorney General) v Coughlan*,[471] Haugh J., speaking for the court, said:

> "The principles governing the grounds of application which may be argued and considered in this Court are well settled. They were laid down as far back as 1929 in the case of *Attorney General v Gilligan* which is unreported but is noted in the second edition of Sandes at page 180 as follows:
>
> 'The specific grounds of appeal must be stated in the notice of appeal. The Court of Criminal Appeal will not permit a defendant or his counsel after he has read through the transcript of evidence and made a meticulous scrutiny of it, then to formulate grounds of appeal.'"

608. The Rules of the Superior Courts regulate the provision of transcripts for appeals. Order 86, rule 14(4) provides for the registrar of the Court of Criminal Appeal to request the transcript from the official stenographer. A party to the appeal may obtain a copy of the transcript from the registrar. The registrar must supply the transcripts free of charge in accordance with Order 86, rule 17(2).)

609. Since many notices of application for leave to appeal against conviction do not, in practice, include properly formulated grounds of appeal, the registrar first seeks to have this omission remedied by communicating with the applicant or the solicitors on record at the time of trial. Convicted persons often wish to change solicitors for an appeal. All this necessarily takes time. Ultimately the registrar will arrange to have the appeal listed to explain delay. This usually leads either to the grounds being lodged or the appeal being abandoned. On occasion, an application for leave to appeal may be adjourned generally with liberty to re-enter in circumstances where the solicitor for the applicant is unable – for various reasons – to obtain instructions from the applicant.

610. It should be noted that there is no express provision in the Rules for the acceptance of a notice of application for leave to appeal without grounds or for steps to be taken to pursue their lodgement. The registrar and the judge in charge of the Court of Criminal Appeal quite properly take the form as lodged as constituting the notice of application. Nonetheless, it would be preferable to bring the rules into conformity with the practice. Although the general non-observance of the rules is undesirable, the Working Group acknowledges that the current practice in the Court of Criminal Appeal is inevitable, where the great majority of applicants submit their own applications from prison. The Rules, without altering the time limit for appealing, should make special provision for the late acceptance of grounds of appeal. A possible and practical approach would be to introduce a rule to the effect that, where the notice of appeal does not contain the grounds, the appeal will not be treated as effective and that no further steps shall be taken to process it until properly stated grounds are lodged.

471 Court of Criminal Appeal, 1 *Frewen* 325, 2nd February 1968.

611. Once the grounds have been lodged – but not before – the registrar requisitions the transcript from the Chief Stenographer. The note at every trial is taken by an expert stenographer. About three or four are employees of the Courts Service. The remaining ten are employed or engaged on a freelance basis by one of three private agencies.[472] Almost all the stenographers from these agencies use mechanical recording methods. When the registrar requisitions a transcript, it is necessary to convert the discs to a transcript in the form of legible text. It is not, of course, necessary in those cases to type the record as if it were shorthand – though corrections will have to be made before the transcript is acceptable.

612. It can often take four to six months before transcripts are sufficiently complete to enable the appeal to be listed. There are several possible causes of this delay. In some cases, the trial has taken a number of days. In others, there have been a number of brief hearings and adjournments, particularly on questions of sentence. In either of these situations, several stenographers may have been engaged in producing the transcripts for one case. This inevitably contributes to delay in collating them. Stenographers in the private sector also work at tribunals or disciplinary bodies, so that they cannot respond promptly to requests for transcripts transmitted from the Registrar via the Official Stenographer.

613. With the improved recording technology that is now employed, these delays are avoidable. This is a matter for better management of resources. We believe that the Courts Service should examine the contractual arrangements with agencies providing stenographic services, with a view to the introduction of required levels of performance. A substantial reduction in delays in providing transcripts should make the earlier hearing of appeals achievable.

614. When the transcript is ready, the registrar causes the appeal to be added to the list. That list is taken by the judge in charge of the Court of Criminal Appeal who assigns dates to appeals in chronological order. In some cases, priority may be accorded for special reasons, for example, where the case has already failed to reach hearing on an earlier date or where there are special factors justifying urgency.

615. At the time of the list to fix dates, the calendar of the Court of Criminal Appeal will normally be full for a period of at least a month. A risk attaches to reliance upon average figures for waiting periods; they may be distorted by individual instances of applications for leave not being pursued by the applicant concerned for several years. But it is understood that the current waiting period for applications for leave to appeal against conviction which are ready for hearing is within the range of 15 to 18 months.[473] The waiting period for applications in respect of sentence is approximately nine months. It should be noted that a priority hearing may be facilitated by the Court where a sufficient degree of urgency can be established.

472 Details supplied by the Courts Service's Directorate of Circuit and District Court Operations.

473 Information supplied by the registrar to the Court.

Statistical Profile of Appeals

616. Comparatively useful statistical data is available in respect of appeals handled by the Court of Criminal Appeal for the years 1998 to 2001. Jackson and Doran have analysed and reported on the figures. In addition, questions relating to the appellate structure were posed in the course of the limited opinion survey.

617. The following tables show the numbers of appeals, in three categories, respectively, received and disposed of by the Court of Criminal Appeal in each of the four years, 1998 to 2001. See Tables 11 A and B, Chapter 11 of Jackson and Doran's Report in Appendix V this Report.

Table 5A: Number of appeals received by the Court of Criminal Appeal 1998-2001

	1998	1999	2000	2001	Total
Conviction and sentence	28	39	35	43	145
Conviction only	12	20	35	34	101
Sentence only	155	159	150	183	647
Total	195	218	220	260	893

Table 5B: Number of appeals disposed of by the Court of Criminal Appeal 1998-2001

	1998	1999	2000	2001	Total
Conviction and sentence	24	28	28	31	111
Conviction only	13	20	21	10	64
Sentence only	123	101	181	147	552
Total	160	149	230	188	727

618. The number of pending appeals – in all categories – at the end of December 2002 was 402 cases.

619. Jackson and Doran have assisted the Working Group in the collection, interpretation and analysis of figures for the Central Criminal Court. The following remarks are made on the responsibility of the Working Group alone.

620. There is no study of the relationship between the underlying number of cases decided in courts of trial on indictment. It can only be said that the total number of appeals appears to represent less than ten per cent of the number of cases dealt with by the Circuit Court – some 2,600 annually – and the Central Criminal Court – around 150 each year. The figures studied elsewhere in this report

demonstrate that there is a high rate of pleas of guilty in the two relevant trial courts. This reduces the base of cases for appeals against conviction. The table shows that annually about 70 to 75 appeals against conviction are received and a somewhat smaller number are disposed of. There are about two to three times as many appeals against sentence only.

621. It is also important to consider not merely the number but the outcome of appeals to the Court of Criminal Appeal. The following table shows the outcome of all appeals combining appeals against conviction alone and against conviction and sentence. They are analysed by the court of origin – including the Special Criminal Court. The figures for the four years have been combined because the small numbers under individual headings might not be sufficiently reliable. At best, they provide a tentative picture of the outcome of conviction appeals. Clearly, only a minority of appeals – albeit a significant minority – is successful. Furthermore in the case of the 37 appeals against conviction, 25 resulted in an order for retrial. On the other hand, the total includes abandoned appeals – representing about one third of the total – which tends to exaggerate the proportion of successful appeals.

Table 5C: Outcome of appeals against conviction alone and against conviction and sentence by court of origin, 1998-2001

	Total appeals against conviction disposed of	Appeal against conviction allowed in full	Appeals against conviction allowed as % of total appeals disposed of
Circuit Court (Dublin)	59	6	10.2%
Circuit Court (Outside Dublin)	52	17	32.7%
Central Criminal Court	56	14	25%
Special Criminal Court	8	0	0%
Total	175	37	21.1%

622. Finally, the following table shows, again for the entire four-year period, the rate of success of appeals against sentence only.

Table 5D: Outcome of appeals against sentence only by court of origin, 1998-2001

	Total appeals against sentence disposed of	Appeal against sentence allowed	Appeals against sentence allowed as % of total appeals disposed of
Circuit Court (Dublin)	216	72	31.6%
Circuit Court (Outside Dublin)	258	58	22.5%
Central Criminal Court	72	18	25%
Special Criminal Court	6	1	16.7%
Total	552	149	27%

623. Overall, the rate of success in appeals against sentence is higher – but not dramatically so – than in the case of conviction appeals. Roughly half of appeals were abandoned or struck out – 254 out of 552 – which suggests a higher success rate. Overall, the rate for appeals from the Circuit Court and the Central Criminal Court is similar.

624. The following Table shows the numbers of applications for review of alleged leniency of sentence received by the court for the four years 1998 to 2001. The number of pending appeals – in all categories – as of the end of December 2002 was 402 cases.

Table 5E

Year	1998	1999	2000	2001
Number Received[474]	12	36	33	23
Allowed	7	11	18	8
Refused	11	7	4	9
Struck out or withdrawn	0	3	2	2

The Issues

625. The main purpose of appeals in criminal cases is to see that justice is done between the State and the individual who has been convicted of a criminal offence. In addition, decisions on appeals must identify and on occasion develop the legal principles to be applied in criminal cases generally. Hence it has been said that appeals have two purposes.[475] Lord Justice Auld says:

> "The first is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of engendering public confidence in the administration of justice by making those corrections and in clarifying and developing the law."

474 These will not necessarily be disposed of in the same year.

475 *Review of the Criminal Courts of England and Wales*, n 1 *supra,* at page 611, citing Lord Woolf's report, *Access to Justice*, (London: HMSO, 1996), at page 153.

626. In a thoughtful submission to the Working Group, the Director of Public Prosecutions has called attention to a widespread feeling that the latter purpose is not being fulfilled by the Court Of Criminal Appeal. Others have expressed the same opinion.

The Courts and Court Officers Act, 1995

627. The first major question addressed by the Working Group is whether it is desirable that action be taken to implement the provisions of sections 3(2) and 4 of the *Courts and Court Officers Act, 1995*. Effectively, these entail the abolition of the Court of Criminal Appeal and the vesting of the powers of that Court in the Supreme Court.

628. Several points could be made in favour of that proposal. Firstly, all points of law in criminal appeals would be taken in the highest court so that arguably, the secondary appeal function could be most readily performed. Secondly, it could facilitate an organisation of criminal appeals on a more coherent basis. But as the Director of Public Prosecutions has pointed out, the 1995 proposals appear to have been the product of one view from a debate about the future of the entire appellate system – civil as well as criminal. That view was that the Supreme Court would sit in chambers, handling civil and criminal cases. The increase in the number of members of the Supreme Court took place in the same context. The project for the establishment of a court of civil appeals has never borne fruit.

629. There are also weighty arguments against the abolition of the Court of Criminal Appeal. Statistics show that the great majority of appeals are fairly routine appeals against sentence only. As the Director of Public Prosecutions has said, they rarely raise issues of principle. The current composition – whatever its organisational problems – ensures that criminal appeals are heard by a member of the highest court in touch with the thinking of that court on a wide range of legal issues along with two judges from a first instance court. This is essentially the system of organisation of the Court of Appeal (Criminal Division) of England and Wales. The alternative system – where only Supreme Court judges would hear criminal appeals – would be open to the criticism that no member of the court had regular trial experience. Taking over the entire burden of the work of the Court of Criminal Appeal would inevitably have serious implications for the work of the Supreme Court itself. Instead of the present system of only one judge by rotation three judges would need to be available on all occasions when criminal work was being done. Finally the Director of Public Prosecutions, in his submissions to the Working Group, has taken a clear stand against the abolition of the court.

630. The Working Group does not recommend the abolition of the Court of Criminal Appeal. In fact it believes that the presence of the respective provisions on the statute book, when there is no current intention to implement them, risks creating confusion about the status and future of the court. If they are not going to be implemented, they should be repealed.

Composition and Organisation of the Court of Criminal Appeal

631. The next important question relates to the organisation of the court and its business. A court of three judges – constituted on an essentially *ad hoc* basis – sits for one day at a time, normally each Monday during the legal year. At the end of the longer legal terms, three or more differently constituted courts sometimes sit in one week. It should be noted that even sittings for a week or more are composed of a number of successive days. The court is composed differently on each of these days. Concern has been repeatedly expressed to the Working Group that the constantly changing composition of the Court of Criminal Appeal adversely affects the court's reputation for reliability and consistency. The Director of Public Prosecutions considers that the changing composition of the court "tends to inhibit the development of clear and consistent jurisprudence."

632. These issues are more practical than strictly jurisdictional. In much of what follows, there is discussion of ways in which the court could respond to the criticisms of its existing structure by improving its own organisation.

633. While being critical of the present *ad hoc* arrangements at the Court of Criminal Appeal, the Director of Public Prosecutions strongly favours its retention. He accepts that the volume of work would not justify a full-time court but proposes that the assignment of judges be on a less part-time basis. For example, a judge of the High or Supreme Court could spend one third or one half of their time in the Court of Criminal Appeal.

634. The judges assigned to the Court of Criminal Appeal naturally vary considerably in their knowledge and experience of the criminal law.

635. Even if its decisions are not in fact objectively inconsistent, the absence of consistent membership and leadership in the court gives to the public and the legal profession an appearance of lack of consistency in the jurisprudence of the court. With the exception of the Supreme Court, the Special Criminal Court and occasional divisional courts of the High Court – when ruling on certain constitutional issues – the Court of Criminal Appeal is the only court of collegiate character. It also delivers a single judgment. These matters may be contributory factors to the lack of appreciation of the jurisprudence of the court. The lack of consistency may be more apparent than real. It is regrettable that there is no current set of law reports dedicated to decisions of the Court of Criminal Appeal. The last issue of the *Frewen* series was for the years 1984 to 1989. The three volumes of *Frewen* cover all years from 1924 and constitute a very valuable resource. The appearance of occasional criminal appeal judgments in the Irish Reports is not an entirely satisfactory substitute. What is required is a set of reports bringing together all reported criminal appeal decisions. The Working Group is aware that the Courts Service is currently developing a database of reserved judgments of the Supreme Court and Court of Criminal

Appeal. This is expected to be available on the Courts Service website by the end of 2003.

636. One other point arises from the constantly changing composition but more precisely from the normal rule of one-day sittings. Under pressure of time to complete a heavy list and wishing to give prompt rulings, the court frequently delivers its judgments *ex tempore*. These are recorded and subsequently corrected and authenticated by the presiding judge. The Working Group has heard arguments in favour of the making available of these judgments also, even though it is generally acknowledged that such judgments, given the circumstances in which they are delivered, do not enjoy the same status as precedents as considered reserved judgments. It is intended that this database referred to in the preceding paragraph will in due course include ex tempore judgments.

637. It was argued in one submission that it should be possible for the Court of Criminal Appeal to include a Circuit Court judge in view of the fact that most appeals are taken from the Circuit Court. It has been pointed out that this is the position in England and Wales, though it is not clear whether a Circuit Judge will normally sit on appeal from a Crown Court conviction where the presiding judge has been a High Court judge. The Director of Public Prosecutions does not favour this proposal.

638. The Working Group accepts that the constantly changing composition of the Court of Criminal Appeal has an adverse impact on the public standing and the legal reputation of the Court of Criminal Appeal. Not all of the criticisms are well-founded. The Court of Criminal Appeal delivers more considered reserved judgments on important points of criminal law than it is given credit for. Nonetheless, it is clear that it is not possible for a court of constantly changing composition to examine and develop principles of criminal law with the level of consistency that should be present.

639. The Working Group proposes that a cadre of judges should be dedicated to hearing appeals in the Court of Criminal Appeal for a defined period. In order to achieve the desired objective of consistency, that period should be at least two years. It should include two Supreme Court and at least six High Court judges. This should not mean that those judges are entirely removed from the other work of the Supreme Court and High Court respectively. It will be important to strike a balance. The court, composed of one group of three judges drawn from the cadre, should sit for extended periods of perhaps two to three successive weeks to hear listed appeals.

640. One of the difficulties that might flow from that system would be that the availability of counsel practising regularly in the criminal courts might be affected by clashes between trials and appeals. It has long been established as a professional and ethical rule that counsel should remain available for the disposal of an appeal. Such clashes are in some cases, impossible to avoid. It should be

possible to resolve such clashes by careful advance consultation of all relevant interests. This could be done at the call of each list on the opening day of the sittings or even in advance.

641. It should be possible to implement the foregoing proposals within the terms of the existing legislation constituting the Court of Criminal Appeal. It is true that both the 1924 and the 1961 legislation appear to imply that a court will be assembled *ad hoc* to hear particular appeals as they arise. To that extent, it is desirable that the statutory foundation of the court be reconsidered. However, nothing in the wording of section 3(2) of the *Courts (Establishment and Constitution) Act, 1961* prevents the Chief Justice from making arrangements for the selection of a restricted number of judges to do the work of the Court of Criminal Appeal.

Certificates of Leave to Appeal

642. The Working Group has also examined the present rule requiring a certificate of leave to appeal as a condition of pursuing an appeal. The intention of the system is simple: it is necessary to have a certificate of leave to appeal either from the trial judge or – failing that – from the Court of Criminal Appeal itself. In reality, the almost universal practice at the level of the trial court is that counsel applies to the trial judge for leave to appeal so that the rule is complied with. In almost all cases, the trial judge simply refuses the application. Where this is reported, such a practice is inevitably confusing to the public. A non-legal reader of the press is likely to believe that this refusal has some actual effect. He may even believe that it is unfair that a convicted person has no right to appeal. On the other hand, it is not unknown for a trial judge to grant a certificate of leave to appeal; it is merely infrequent. Some judges, including one member of the Working Group, believes that the possibility of certifying can be valuable and should be retained.

643. But it is necessary to follow the matter through to the level of appeal. In almost all cases, there has been no certificate. So the form of the appeal is that it is an appeal against the refusal of the trial judge to grant a certificate. The Court of Criminal Appeal, unlike its counterpart of England and Wales, does not conduct any meaningful exercise of considering the application for leave. In that jurisdiction, leave is granted in only about a quarter of cases. The Court of Criminal Appeal simply hears the substantive appeal, describing the appellant as "the applicant." The terms of section 32 of the Act of 1924, as amended, appear to require the court to give some degree of substantive consideration to the merits of the appeal when hearing an application for leave. Where it allows the appeal, it adopts the fiction of treating the application for leave as the hearing of the appeal and allows the appeal after granting leave. The latter takes the form of a single statement at the end of the judgment. So there is no meaningful distinction between the application for leave and the hearing of the appeal. This anomaly even carried through to legislation enacted as recently as 1997, which provides for transcripts to be made available for the hearing of appeals – but not for applications for leave.

644. No leave is required for an application based on an allegation of miscarriage of justice, pursuant to section 2 of the *Criminal Procedure Act, 1993*. It is anomalous that leave is required in the ordinary case of a direct appeal upon conviction but not for an application made – potentially many years after conviction and even an earlier appeal, based on alleged new or newly-discovered facts.

645. Two solutions to this dilemma have been discussed. The entire leave requirement could be abolished. If it is an entire fiction, as it certainly is in the Court of Criminal Appeal itself, this solution seems compelling. Furthermore, that solution would be consistent with a suggestion that the European Convention on Human Rights, to which Ireland is an adherent requires that an appeal be available in the case of all criminal convictions.[476] An alternative possibility would be to give substance to the leave procedure. This would apply particularly to the procedure at the Court of Criminal Appeal itself. In the Court of Appeal (Criminal Division) for England and Wales, a single judge considers all leave applications on paper without a hearing. In cases of doubt, he may arrange for a court of three to hear the leave application. There seems to be no practical reason why that system could not be introduced in Irish law. It is less clear, however, whether it would have a practical value. On balance, the Working Group recommends that the requirement of leave to appeal be abolished. It does not conform to the reality of the conduct of cases in the Court of Criminal Appeal and performs no meaningful purpose.

646. The Working Group would, however, draw attention to the provisions of section 5 of the *Criminal Procedure Act, 1993*, quoted above. This procedure, if operated, would possibly enable a certain number of utterly frivolous or unmeritorious appeals to be disposed of at an early stage by a single judge. However, it appears never to have been used. It places an unfair onus on the registrar to initiate the procedure, without any advance judicial guidance. In practice, it has been explained that proper grounds are rarely formulated at the time of lodgement of the notice of appeal or application. Strictly speaking therefore, the registrar could resort to section 5 in almost every case. Clearly, that would deprive applicants or appellants of any actual appeal. Section 5 does not appear relevant to the system of appeals as it operates. It would be preferable to establish a system whereby the judge in charge of the lists would initiate the procedure, following the latter's consideration of the case list. The statute should be amended accordingly.

Appeals to the Supreme Court from the Court of Criminal Appeal

647. The Working Group has considered the effect of the decision in the case of *The People (Attorney General) v Kennedy*, namely that it is not open to the prosecution – now the Director of Public Prosecutions – to avail of section 29 of *The Courts of Justice Act, 1924* to have a point of law of exceptional public importance argued

476 In fact, a leave provision of the type in force in Irish and English law is probably not inconsistent with the Convention.

in the Supreme Court. It is notable that the right of a convicted person to pursue his appeal further is not conditional on the existence of an issue affecting him only. The expression exceptional public importance shows that there is a broader public dimension. It seems to the Working Group that it is clearly incorrect that a procedure for the clarification of the law in the general interest cannot be taken to the highest court by the State through the Director of Public Prosecutions. After all, the Director of Public Prosecutions represents the public interest.

648. The Working Group is of opinion that provision should be made for the Director of Public Prosecutions or the Attorney General to seek a certificate from the Court of Criminal Appeal to appeal to the Supreme Court on a point of law of exceptional public importance. One member of the Group raised the question of whether a decision of the Supreme Court favourable to the prosecution would unfairly cast doubt on an acquittal already ruled upon by the Court of Criminal Appeal. That is of course a possibility – just as it would be in the case of any later decision of a court suggesting that an earlier ruling favourable to the defence had been incorrect, and could also arise in the case of employment of the limited mechanism provided by the *Criminal Procedure Act, 1967*. However, since the justification for such a provision would be the clarification of the law in the public interest, the procedure should not put in jeopardy any decision in favour of the convicted person made by the Court of Criminal Appeal. In other words, it should be without prejudice to the decision of the Court of Criminal Appeal in the particular case. An alternative mechanism would be to establish a procedure along the lines of the English Attorney General's Reference. It should also be possible to limit indirect damage to the acquittal or other favourable ruling of the Court of Criminal Appeal by using numbers, initials or another mechanism to protect anonymity. Since the original accused person will no longer have a substantive interest, it also follows that the Court will need to appoint counsel to argue the point against the prosecution.

649. As has been noted, the long-established rule is that an appellant armed with a certificate of leave to appeal to the Supreme Court on a point of law of exceptional public importance is entitled on the hearing of the appeal to argue every point in the appeal, including points already rejected by the Court of Criminal Appeal. This is an anomaly, though a long-standing one. It seems to offer an appellant affected by an important point of law the facility of re-arguing points determined against him, a facility not available to other unsuccessful appellants. It is even possible for him to abandon the certified point and concentrate on the original appeal points. The Working Group has reached no firm view on this issue but takes the opportunity to draw attention to its anomalous character.

Sentencing Guidelines

650. One issue which emerged in the course of the Working Group's consideration of the appellate jurisdiction of the courts was the absence of clear and comprehensive guidelines on sentencing for trial courts. The area of sentencing policy is not itself within the Terms of Reference of the Working Group. But the Working Group does regard as a legitimate subject for consideration the merit or otherwise of a mechanism to facilitate the dissemination of authoritative precedent on sentencing ranges and criteria for particular offences. It is useful in this context to consider, firstly, the extent to which the decision of a court of first instance on sentence will be subject to intervention on appeal. Since appeals from the District Court are by way of full rehearing, and since the possibility of review of a District Judge's sentence would be very limited indeed, the concentration of jurisprudence is in the area of sentences at the indictment level.

Sentencing on Indictment

651. The grounds on which the Court of Criminal Appeal will interfere with a sentence are limited. The court will quash a sentence which is unlawful or imposed in excess of jurisdiction. But in practice sentences are seldom found to suffer from either of these defects. Otherwise, the court will intervene only when a sentence is wrong in principle.

652. The Supreme Court has emphasised the need to "distinguish between the function of the Court [of Criminal Appeal] in deciding whether or not a sentence is wrong in principle on the one hand and, if it is, in subsequently imposing an appropriate sentence."[477] In the latter event, the Court is empowered by section 3(2) of the *Criminal Procedure Act, 1993* to "impose such sentence or make such order as it considers appropriate, being a sentence or order which could have been imposed on the convicted person for the offence at the court of trial…"

653. It is necessary to establish an error in principle, irrespective of whether the appeal is brought by the sentenced person or by the Director of Public Prosecutions on the basis that the sentence is unduly lenient. The precise meaning of the term error in principle has never been subject to any detailed analysis. Granted, an error of principle can clearly be identified in certain circumstances, such as where the sentencing judge has failed to give any or adequate credit for a guilty plea or for the absence of previous convictions. It would also be wrong in principle to select a sentence on the assumption that the accused is guilty of an offence other than one of which he had been convicted, whether following a guilty plea or otherwise. A more difficult situation arises when an error of principle is cited on the basis that the sentence is too severe or – in the case of a prosecution appeal – too lenient.

654. The Supreme Court and the Court of Criminal Appeal have of course developed or endorsed quite a number of general sentencing principles over the years. For

477 *Per* Hardiman J., delivering the unanimous judgment of the Court, in *The State (D.P.P.) v Cunningham*, Supreme Court, unreported, 8th October 2002.

example, in *The People (D.P.P.) v M*,[478] the Supreme Court held that a sentence should be proportionate to the gravity of the offence and the personal circumstances of the offender. In *The People (D.P.P.) v Tiernan*,[479] the same court held that in the absence of exceptional circumstances, a person convicted of rape should receive an immediate and substantial custodial sentence. Certain other general principles are well established, such as the principle that a guilty plea should ordinarily attract a reduction in sentence – as should a previous good record. Statute has occasionally intervened to refine or supplement these principles. For example section 29 of the *Criminal Justice Act, 1999* provides that when sentencing a person who has pleaded guilty, a court shall take into account the stage at which the person indicated an intention to plead guilty. The same section provides that a court shall not be precluded from imposing the maximum sentence on a person who has pleaded guilty if it is satisfied that there are exceptional circumstances relating to the offence which warrant this course of action. Likewise, section 11 of the *Criminal Justice Act, 1984* provides that any sentence of imprisonment imposed for an offence committed while on bail must be ordered to run consecutively to any previous sentence.[480]

655. Therefore, a reasonably substantial body of sentencing jurisprudence has been developed. All of the guidance offered to date has been of a general nature. The appeal in *The People (D.P.P.) v Tiernan*[481] which came before the Supreme Court following certification by the Attorney General pursuant to section 29 of *The Courts of Justice Act, 1924,* involved a point of law of exceptional public importance. The Court was asked to consider the possibility of establishing sentencing guidelines for rape. Judgments of appeal courts in England and Wales and New Zealand were brought to the Court's attention. But the Court declined to offer specific guidance of this kind. It gave two reasons for not doing so. The first was that there did not appear to be any statistical information available on existing patterns of sentencing for rape and the second that it would be inappropriate to interfere with judicial sentencing discretion in this way

656. The question we now address is whether the time may be ripe to encourage the development of more specific guidelines of a quantitative nature. Throughout the common law world, different strategies have been adopted to structure judicial sentencing discretion. These vary from the United States Sentencing Guidelines (U.S.S.G.), which became operative in 1987 – and which are effectively mandatory – to the more flexible guidance offered by the Court of Appeal (Criminal Division) of England and Wales. At the heart of the U.S.S.G. is a sentencing grid which features a vertical axis comprising 43 offence levels and a horizontal axis with six criminal history categories. Where the two intersect, a permissible guideline range is indicated. Thus, a person whose offence was calculated as having a level of 27 and who had six prior felony convictions would have to get a prison sentence of 87-108 months. A sentencing judge who departed from this permitted range would be subject to appeal. This system has by all accounts generated considerable consistency in federal sentencing but it has certain

478 [1994] 3 I.R. 306.

479 [1988] I.R. 250.

480 See *The People (D.P.P.) v Robinson*, Court of Criminal Appeal, unreported, 20th December 2002.

481 [1988] I.R. 250.

drawbacks. Among these is the extent to which it transfers discretion from the judge to the prosecutor. The offence with which a person is charged effectively predetermines the sentence range which will eventually apply. The constitutionality of this scheme was upheld by the United States Supreme Court in *Mistretta v United States*.[482]

657. Few jurisdictions outside the United States have shown much enthusiasm for rigid guidelines similar to the U.S.S.G. The system most favoured elsewhere may be described as a tariff or starting point system whereby an appeal court indicates an appropriate starting point for a particular offence category. For example, a court might state that in the absence of exceptional circumstances, an offence of robbery committed in a shop by a person who used a weapon to force the victim to hand over money should ordinarily be X years' imprisonment following a contested trial. Deductions would then be permitted for a guilty plea and other mitigating factors while upward departures would be permitted for more aggravated versions of the offence. This is certainly a more flexible approach than some of the guideline systems introduced in the United States.

658. During the past 25 years or so, the Court of Appeal (Criminal Division) of England and Wales, has issued a series of so-called guideline judgments on a case-by-case basis, indicating in many instances appropriate starting points or tariffs for certain offence categories. In fact, as far back as 1967 in *R v Hodgson,*[483] the Court of Appeal dealt with the circumstances in which a discretionary life sentence might be imposed. Briefly, the circumstances included (i) where the offence or offences were serious enough to warrant a long sentence; (ii) where it appeared that the offender was a person of unstable character likely to commit such offences in the future; and (iii) where such offences if repeated might have specially injurious consequences for others – as in the case of sexual offences or crimes of violence. The guidance offered in this case was necessarily of a general nature. But in *R v Turner*[484] the Court, per Lawton L.J. offered what might be described as numerical guidance in relation to the sentencing of armed robbery. The court took as its starting point the sentence likely to be actually served for murder as 15 years. This was equivalent to a determinate sentence of 22.5 years when remission – then one-third – was taken into account. The Court then reasoned that other serious offences should ordinarily attract sentences of less than 22 years. A leading authority in the area, Professor Andrew Ashworth, who participated in the Working Group's conference in November 2002, describes this judgment as "one of the rare judicial attempts to reflect on the logic of the sentencing structure."[485]

659. After *Turner*, guideline judgments of this nature became more prevalent. Leading examples include *R v Aramah*[486] in relation to drug offences, *R v Billam*[487] for rape and *R v Brewster*[488] for burglary. Some of these gave quite specific guidance in terms of indicating appropriate starting points. In *Billam* for example, it was said that in a contested case of rape, the starting point should ordinarily be five years' imprisonment – with higher starting points at eight years, 15 years and life

482 488 U.S. 361 (1989).

483 (1967) 52 Cr. App. R. 113.

484 (1975) 61 Cr. App. R. 67.

485 Ashworth, Andrew, *Sentencing and Criminal Justice* (2nd ed.) (London: Butterworths, 1995), at page 100.

486 (1982) 4 Cr. App. R.(S) 407.

487 (1986) 82 Cr. App. R. 347.

488 (1980) 2 Cr. App. R.(S) 191.

imprisonment when certain aggravating factors were present. These guidelines were refined recently in *R v Millberry and others*[489] in response to advice from the Sentencing Advisory Panel, described below.

660. Not all guideline judgments of the English Court of Appeal adopt this quantitative approach. Some have offered guidance in more general terms concentrating on the factors that are to be treated as aggravating or mitigating and which should be taken into account when locating a specific offence in the hierarchy of gravity for the purpose of sentence. A good example can be found in *R v Brewster*[490] in which the court dealt with sentencing for domestic burglary. But rather than establish starting points, the court concentrated on pointing out the circumstances which are likely to render certain domestic burglaries more or less serious than others. We shall later be suggesting that Irish appeal courts – and especially the Court of Criminal Appeal – could make a useful beginning by offering more general guidance of this kind.

661. The *Crime and Disorder Act 1998* (UK) endorsed the practice of issuing guideline judgments. Section 80 of the Act specifically required the Court of Appeal (Criminal Division) to decide whether to frame guidelines or review existing ones in certain circumstances. Section 81 then made provision for the establishment of a Sentencing Advisory Panel to be constituted by the Lord Chancellor following consultation with the Home Secretary and the Lord Chief Justice. It has now been in operation for a number of years under the chairmanship of Professor Martin Wasik, a leading sentencing expert, and includes judges, practising lawyers, academics and others.[491] When the Court of Appeal proposes to frame or revise a guideline judgment, it must notify the Panel to this effect. Furthermore, the Panel itself may propose to the Court that guidelines be framed or revised for a particular category of offence and shall make such a proposal if directed to do so by the Home Secretary. The Panel must consult widely on the matter, formulate its own views and communicate them to the Court of Appeal. Already the Panel has made recommendations in relation to sentencing for rape,[492] offences relating to child pornography and other offences.

662. The *Criminal Justice Bill 2002* (UK) now proposes a further refinement of this system by introducing a Sentencing Council.[493] Clause 152 of the Bill proposes that this Council would operate under the chairmanship of the Lord Chief Justice. Only judges of the various courts, including lay justices, will be eligible for membership. The function of the Council will be to draw up sentencing guidelines as well as allocation guidelines, the latter being concerned with whether cases should allocated for trial in the Magistrates' Court or in the Crown Court. It is proposed that the Sentencing Advisory Panel will remain in existence. Its functions will include making recommendations to the Council for the framing or revision of guidelines in respect of particular categories of offence or offender, and in respect of other matters affecting sentence. If the Council itself proposes to frame or revise guidelines then, unless working within an urgent timeframe, it must notify the Panel. In turn, the Panel will consult on the matter and having

489 Court of Appeal (Criminal Division), 9th December 2002. See summary and comment in [2003] Crim. L.R. 207 *et seq.*

490 [1998] 1 Cr. App. R.(S) 181.

491 The Panel maintains a web site on which its consultation papers and other documents are to be found: http://www.sentencing-advisory-panel.gov.uk.

492 In response to which the Court issued its judgment in *R v Milberry,* n 489 *supra.*

493 The idea of having a sentencing council more or less along these lines had long been advocated by Ashworth. See his book, *Sentencing and Criminal Justice*, n 485 *supra*, pp. 343 *et seq*, and an article by him entitled *Sentencing and the Constitution* (1990) 1 King's College Law Journal 29.

formulated its own views, communicate them to the Council. Once guidelines are adopted by the Council, each court sentencing an offender or exercising another sentencing function must have regard to those guidelines.[494]

633. Guideline judgments expressed in quantitative terms, meaning those that stipulate specific starting points in terms of amount of fine or years' imprisonment, can give rise to certain difficulties. There is for example, the problem of how to weigh the various ingredients that contribute to the gravity of a specific offence. For example, the *Criminal Justice (Theft and Fraud Offences) Act, 2001* provides a maximum sentence of ten years' imprisonment following conviction on indictment for theft, which is defined as the dishonest appropriation of another's property without the consent of the owner and with the intention of depriving the owner of it. The value of property that may be stolen is potentially limitless and the offence may be committed in a wide range of circumstances. One obvious problem confronting any court or other body attempting to develop guidelines concerns the selection of appropriate indicia of gravity. The most obvious criterion might appear to be the value of the property stolen. Guideline sentences could then be indicated by reference to broad monetary bands. So for property valued at up to €10,000, X years' imprisonment might be indicated as a starting point. For property valued at between €10,000 and €50,000, Y years' imprisonment might be imposed and so forth. This of course assumes that property value is the most appropriate criterion. But other factors such as the identity of the victim, may be equally or more important. If one offender steals €10,000 from a bank and another steals €200 from an elderly person who had no other money whatever, which victim may be said to have suffered the most? Which offender is the more morally culpable? In light of these examples, it is clearly desirable that guidelines should be sufficiently sophisticated and flexible to take account of the variety of elements that point to the gravity of a particular offence.

664. The same problem arises in relation to drug offences where the tendency might be to develop guidelines based on the quantity or street value of the drug which the offender was found to possess or to be dealing in. In *Wong v The Queen*[495] the High Court of Australia strongly disapproved of guidelines for drug sentencing which were based solely on the weight of the drug involved. The Court of Criminal Appeal of New South Wales had taken the opportunity to establish guidelines for certain drug trafficking offences. Under the scheme proposed by the Court, the amount of the drug involved would determine the number of years' imprisonment to be imposed. The High Court of Australia, to which a further appeal was taken, described its misgivings about this approach in the following terms:[496]

> "The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often

494 Clause 156(1) of the Bill provides: "Every court must (a) in sentencing an offender, have regard to any guidelines which are relevant to the offender's case, and (b) in exercising any other function relating to the sentencing of offenders, have regard to any guidelines which are relevant to the exercise of the function."

495 [2001] H.C.A. 64.

496 *Wong v The Queen* [2001] H.C.A. 64, at paragraphs 77, 78 and 80.

there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from those the sentencing judge must distil an answer that reflects human behaviour in the time or monetary units of punishment.

Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible. Most importantly of all, numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending behaviour if every bit as diverse as is their personal history and circumstances.

If a table that is published is intended to found arguments in future cases that the discretion exercised in that future case miscarried, whatever may be the caveats that might be entered at the time of promulgating the table, it becomes, in fact, a rule of binding effect. Departure from that must be justified. Or as the Court of Criminal Appeal said here, departure will 'attract… close scrutiny'. The fixing of such a table begins to show signs of passing from being a decision settling a question which is raised by the matter, to a decision creating a new charter by reference to which further questions are to be decided. It at least begins to pass from the judicial to the legislative. If, by contrast, the table is not intended to have that effect, what is its purpose? Is it intended as no more than some warning about how the Court of Appeal *might* act in future cases? If it represents a departure from hitherto accepted levels of sentence, is it intended to have the effect of prospectively overruling past decisions of either the Court of Appeal or trial judges?"

665. The same considerations would obviously apply to any guidelines issued in Ireland. Problems of the kind identified by the High Court of Australia in *Wong* will almost inevitably arise when guidelines are framed in the context of a single appeal or even in an appeal in which a number of cases are joined together. It is desirable, to say the least, that there should be some statistical information available on existing sentencing patterns. Furthermore this information should be analysed in such a way as to permit conclusions to be drawn about the weight attributed by the courts to all relevant factors. It should also indicate the principal considerations that courts take into account when selecting sentence for particular categories of offence.

666. There can be little doubt that guidance which includes starting point or tariff sentences can generate more consistency in sentencing. It can also be sufficiently flexible to allow trial courts to depart from the recommended starting points in appropriate cases. But it would probably be unwise to attempt to develop such

starting points without a great deal more statistical data than we now possess about current sentencing practices. We would recommend therefore that appropriate steps be taken to begin the systematic collection of data on sentencing decisions in all the trial courts.

667. A further problem commonly arising in connection with guideline judgments concerns the extent to which they should be treated as binding on trial courts. In other words, should an apparently unwarranted departure from a recommended starting point be treated as an independent ground of appeal? This matter was debated at some length before the Supreme Court of Canada in *R v McDonnell*,[497] A majority of the court, per Sopinka J., took the view that departure from a recommended starting point should not in itself be treated as an appealable error. A minority, per McLachlin J. felt that it should be. The dilemma is a real one. On the one hand, guidelines are intended to furnish guidance and are intended to permit flexibility where it is called for. On the other, if they are to promote consistency, they are unlikely to be very effective unless they are routinely adhered to and unless there is some way of reviewing what appear to be unjustified departures. This is clearly a matter which would require further consideration in the event that guideline judgments of this kind were to be issued in Ireland.

668. These difficulties arise most obviously in the context of guideline judgments which purport to establish tariffs or starting points. But they should not deter the Court of Criminal Appeal and the Supreme Court from offering guidance of a more general nature. Appeal courts can perform a valuable role in terms of indicating factors which should be treated as aggravating or mitigating when selecting sentence for specific offences or certain categories of offender. They can also offer valuable guidance on the circumstances in which a custodial sentence as opposed to a monetary penalty or a community-based sanction will be appropriate. They could indeed indicate when a short custodial sentence which might be specified within a broad band – is more appropriate than a medium or long sentence. Finally, they could offer valuable guidance on establishing hierarchies of gravity for certain offences such as burglary or robbery indicating their view as to which variations of these offences should be treated as being more serious than others. Whenever the Court of Criminal Appeal proposes to offer general guidance of this nature it is desirable that a number of cases concerning the matter in question should be heard at or about the same time so as to provide a variety of factual contexts within which to consider the matter. In fact, we understand that the Court of Criminal Appeal has recently done this on at least one occasion in relation to sentencing for drug offences.

Sentencing in the District Court

669. The Court of Criminal Appeal deals only with appeals against sentence imposed following conviction on indictment. But as noted in earlier chapters of this Report, the vast bulk of criminal offences are in fact, dealt with in the District

497 [1997] 1 S.C.R. 948; 145 D.L.R. (4th) 577.

Court. A person convicted in the District Court may appeal against conviction, sentence or both to the Circuit Court. The District Court has a reasonably wide range of sentencing options at its disposal including fines, probation orders, community service orders, compensation orders and imprisonment. A large number of summary offences now carry the possibility of imprisonment. In light of the geographical organisation of the District Court, it is natural to expect that some variations will occur for example, in terms of the frequency with which imprisonment is imposed for certain offences or other levels of fine imposed for others. Consideration should therefore be given to the possibility of having general guidelines or principles to govern sentencing in the District Court. Guidance could be provided on the circumstances in which a custodial as opposed to a community-based measure or financial penalty should be imposed. Again, what is being proposed is guidance of a general nature as opposed to quantitative guidelines.

Conclusions on Sentencing Guidelines

670. The Working Group is of opinion that there is a need for some system of objective guidance for sentencing judges at all levels. The Working Group has not been able to study the matter in sufficient depth to enable it to make concrete recommendations. We take the opportunity of drawing attention to the possible options which exist to promote consistency in the approach of the courts to sentencing at first instance, bearing in mind the differences in the appellate arrangements for the indictment and summary jurisdictions. The solution could be found within the current arrangements, through effective dissemination within those jurisdictions of decisions which are regarded as being authoritative in nature. The selection on appeal of a potential benchmark case, or a group of such cases, for the purposes of a detailed judgment could be of considerable assistance to trial judges and would serve to elucidate for practitioners and the wider public the reasoning underlying sentencing generally. Borrowing from the experience of other jurisdictions as outlined above, another option would be to establish by statute a body having the function of providing guidelines on sentencing. The remit of such a body, as demonstrated by the respective models cited above, might be more prescriptive in nature, thus possibly encroaching upon judicial discretion, or it might be more flexible, establishing norms from which, having regard to the circumstances, a trial judge could depart. Membership of the body could be confined to members of the judiciary, or could include a wider representation from experts or representatives of interested agencies or other bodies. The Working Group suggests that the entire issue of sentencing and guidelines for sentencing warrants independent study.

Appeals by the Prosecution

671. It was a general principle of the common law that a decision of a court in favour of an accused person was final and unappealable. In particular, a not guilty verdict returned by a jury has at all times been considered sacrosanct. Any other view would be in conflict with the fundamental rule against double jeopardy. It is hardly surprising that there was not historically any prosecution right of appeal from the result of a criminal trial. Until well into the 19th century, even the defence had no general right of appeal from a conviction. Henchy J. expressed the modern position in Irish Law in *The People (Attorney General) v Crinnion:*[498]

> "Before the enactment of [section 34 of the *Criminal Procedure Act, 1967*], such a verdict of not guilty… was final and unimpeachable in every respect, whether the trial judge's direction leading to it was based on an appraisal of the facts… or on a decision on a question of law. In either case, the verdict was beyond the reach of further judicial inquiry no less than if it had been given by the jury at the end of a full trial without a direction from the judge."

672. There are nonetheless some important qualifications to any supposed universal rule that the prosecution cannot appeal.

673. As it happens, there is a rather wide provision for prosecution appeal from summary disposal.[499]

674. Since early in the period of more widely established summary jurisdiction, there has existed the appeal by way of case stated pursuant to section 2 of the *Summary Jurisdiction Act, 1857*.[500] Since the case must have been heard and determined, it is clear that all the evidence must have been heard and the decision pronounced. This constitutes a well known and regularly used means of having the legality of District Court decisions tested in the High Court. It appears to be valued and although there are some procedural problems with it the Working Group is not aware of any generalised discontent with this procedure.

675. Prosecution appeals are also, if unusually, available under section 310 of the *Fisheries (Consolidation) Act, 1959*, from the District Court to the Circuit Court. In *Considine v Shannon Regional Fisheries Board,*[501] the Supreme Court held this provision to be constitutional.

676. Under the *Criminal Procedure Act, 1967*,[502] an accused who has been sent forward for trial may apply to the trial court to dismiss one or more charges against him. The prosecution has the right to appeal to the Court of Criminal Appeal against any such dismissal within 21 days after the dismissal date. It is then open to the Court of Criminal Appeal to either affirm the trial court's decision or to quash it, in which case the trial of the accused may proceed as if the charge had never been dismissed.

498 [1976] I.R. 29, at page 33.

499 See the description of the appeal by way of case stated procedure as part of the consideration of summary jurisdiction – paragraph 349 *et seq*.

500 As extended by section 51 of the *Courts (Supplemental Provisions) Act, 1961*.

501 [1998] 1 I.L.R.M. 11.

502 Section 4E, as inserted by section 9 of the *Criminal Justice Act, 1999*.

677. More radically, a majority of the Supreme Court decided, in *The People (Director of Public Prosecutions) v O'Shea*[503] that the Constitution itself provided a right of appeal even from an acquittal. The Court held that Article 34.4.3, which confers a right of appeal to the Supreme Court "from all decisions of the High Court," should be given its literal meaning. According to Walsh J.:

> "Jury trial in criminal cases… is a most valuable safeguard for the liberties of the citizen. It must, therefore, be permitted to operate properly. It would be totally abhorrent if a conviction which had been obtained by improper means, such as the corruption or coercion of a jury, should be allowed to stand. It should be equally abhorrent if an acquittal obtained by the same methods should be allowed to stand. If attempts to sway the verdicts of jurors by intimidation or other corrupt means were allowed to go unchecked, they could eventually bring about the destruction of the jury system of trial. Persons who are tempted to do so would think twice about it if they were faced with the possibility that such efforts on their part could negative results which they had corruptly achieved. All prosecutions on indictment are, by virtue of the Constitution, brought in the name of the people and it is of fundamental importance to the people that the mode of trial prescribed by the Constitution should be free to operate, and be seen to operate, in a manner in which the law is respected and upheld. The examples of intimidation and corruption which I have taken are extreme examples, but it is necessary to take extreme examples to test the validity of the proposition that all acquittals by a jury in the High Court are unimpeachable."[504]

678. Unlike the specific statutory mode of reference of a point of law to the Supreme Court, this mode of appeal could put at risk the validity of the acquittal. A particularly unsatisfactory feature of this route of appeal was that it could only arise on appeal from the Central Criminal Court – being the High Court when exercising criminal jurisdiction. So it did not apply, in the absence of an express statutory provision, on the acquittal of a person in the Circuit Court. Consequently a person acquitted by the Circuit Court was free from the possibility that his acquittal could be put in doubt on appeal. But the same did not apply to a person acquitted in the Central Criminal Court. This possibility was removed by section 11 of the *Criminal Procedure Act,* 1993.

679. The only existing substantive provision for appeal from acquittal after trial on indictment is in section 34 of the *Criminal Procedure Act, 1967*. It permits an appeal on a point of law from a directed acquittal in either the Circuit or Central Criminal Courts. The section provides:

> "(1) Where, on a question of law, a verdict in favour of an accused person is found by direction of the trial judge, the Attorney General may, without prejudice to the verdict in favour of the accused, refer the question of law to the Supreme Court for determination.
> (2) The statement of the question to be referred to the

503 [1982] I.R. 384.

504 [1982] I.R. 384, at page 418.

Supreme Court shall be settled by the Attorney General after consultation with the judge by whom the direction was given and shall include any observations which the judge may wish to add.

(3) The Supreme Court shall assign counsel to argue in favour of the decision."

680. Professor Dermot Walsh has indicated the limitations of this procedure:

> "It would appear… that the determination must relate to a question of law on which the verdict of the jury was directed by the trial judge. It is doubtful whether it can be used to challenge a ruling which impacted upon the evidential content of the trial as distinct from the question whether on the evidence as it stood at the close of the case for the prosecution it was open to the court to acquit the accused."[505]

681. The Supreme Court held unanimously in *The People (Attorney General) v Crinnion,* that, because of the use of the words "… a verdict… found by direction of the trial judge," the procedure does not apply to decisions of courts sitting without a jury – specifically the Special Criminal Court. Henchy J. in the same case also expressed the opinion that it did not apply to "prior questions of law which, because of their effect on the evidential content of the trial, may have a bearing on that point of law."[506] So where a judge refuses to admit evidence, his decision on that point cannot form the subject matter of a reference under the section, in the event that the absence of that evidence means that there is insufficient evidence to go to the jury. In this, Henchy J. queried the correctness of the earlier decision in *The People (Attorney General) v Cummins.*[507] In addition, he commented adversely on the absence of any provision for representation of the person in whose favour the verdict was given in the preparation or prosecution of the post-conviction proceedings. He contrasted this position unfavourably with the corresponding provision for an Attorney General's Reference in England, where the *Criminal Justice Act, 1972* gives such a person a right to present argument at the hearing of the reference.

682. In May 2002, the Law Reform Commission published a Consultation Paper entitled *Prosecution Appeals in Cases brought on Indictment.* The Working Group is indebted to the Commission for its very detailed examination of this issue. The Commission classified possible approaches to prosecution under five headings. The fifth and last of these it describes as a comprehensive with prejudice model, i.e. an appeal against unreasonable jury verdicts or even de novo review of the evidence. The Working Group – like the Commission – would exclude this model from consideration. It would be fundamentally incompatible with the status of jury trial under the law and the Constitution. It would conflict with the rule of double jeopardy. There is no evidence of widespread discontent with jury verdicts. Indeed the very fact that occasional surprising verdicts of acquittal are given – not by judges but by juries – seems to make them acceptable as being the decision of a group of citizens drawn at random from the population.

505 Walsh, n 216 *supra,* at page 1202, paragraph 22-64.

506 *The People (Attorney General) v Crinnion* [1976] I.R. 29.

507 [1972] I.R. 312, where this point was not argued.

683. The Commission devised four remaining models. They happen to replicate the two points of distinction already highlighted in our review of the existing law. One form of appeal – such as that arising from the Supreme Court decision in O'Shea – puts the verdict itself in issue and is with prejudice so far as the acquitted person is concerned. The other – like the limited facility available under section 34 of the *Criminal Procedure Act, 1967* – is expressly made without prejudice to the acquittal. The other dividing line discussed in Crinnion is between decisions on points of law which lead to the ending of the prosecution – rulings referred to by the Commission as terminating rulings – and points of law in general. The following are the first four of the Commissions considered options:

Narrow Without Prejudice Model

684. This model represents an expansion on the procedure under section 34 of the 1967 Act. It would restrict without prejudice prosecution appeals to questions of law arising from terminating rulings,[508] whether arising pre-trial or during trial. This model offers two advantages: first, there would be little risk that an appeal would be oppressive to the acquitted person; and secondly, few procedural difficulties would arise. However, the narrowness of this route of appeal could in practice render many important rulings unappealable. In the rare cases where it would be possible for the prosecution to bring appeals, appellate courts could only correct errors of law in the abstract, potentially letting unjust verdicts stand. This could undermine public confidence in the criminal justice system – particularly if the public were to perceive that guilty persons were being wrongfully acquitted on a regular basis. This appeal model might also be objectionable to acquitted persons in that appellate courts could overrule the legal basis of acquittals while at the same time acquitted persons would have no further opportunity to clear their name. Finally, given that the appellate courts would be pronouncing on no more than moot points, it may be argued that the without prejudice appeal process would lack the force of urgency and reality necessary in judicial proceedings.

Broad Without Prejudice Model

685. This alternative without prejudice model would allow without prejudice prosecution appeals on questions of law and questions of mixed law and fact arising from terminating and non-terminating rulings[509] whether arising pre-trial or during trial. This essentially corresponds to the English Attorney General's Reference. To its merit, this model would eliminate the fine distinctions between terminating and non-terminating rulings, and between questions of law and questions of mixed law and fact. But it would retain the disadvantages associated with the narrow without-prejudice model.

Narrow With Prejudice Model

686. The narrow with prejudice model would restrict with prejudice prosecution appeals to questions of law arising from terminating rulings – whether arising pre-trial or during trial. This corresponds to the Canadian model of prosecution

508 The Commission defines a terminating ruling as a ruling which brings about the premature termination of a criminal proceeding.

509 A non-terminating ruling is one which permits the prosecution to continue, although with a weakened case.

appeal. It is also the model currently recommended by the Law Commission of England and Wales although the Law Commission would exclude appeals against certain pre-trial rulings. The major advantage of this model would be that it would permit appellate courts to overturn acquittals in order to achieve justice in the actual case – rather than simply to correct errors of law in the abstract and allowing a potentially unjust verdict to stand. By limiting this right to those rulings that have the greatest impact on the trial, namely terminating rulings, the model would arguably strike a balance between the need to achieve justice and the need to protect the accused from the risk of oppression. But such a scheme would be a radical innovation for this jurisdiction,[510] although such arrangements are not uncommon in other common law and civil law jurisdictions. It may be argued that a with prejudice appeal scheme would violate the double jeopardy principle and would be oppressive to acquitted persons. Furthermore, as with the narrow without prejudice model, difficulties may arise as to the fine distinctions between terminating and non-terminating rulings, and between questions of law and mixed law and fact.

Broad With Prejudice Model

687. The broad with prejudice model may be defined as one that would allow with prejudice prosecution appeals on questions of law and questions of mixed law and fact arising from terminating and non-terminating rulings. But appeals challenging the reasonableness of jury acquittals – although raising questions of mixed fact and law – are excluded from the ambit of this appeal model. In practice, this model is similar to the model operated in New Zealand. The advantage of adopting this model would be that it would eliminate the fine distinctions discussed above. It would give greater scope to an appeal court to intervene and order retrials in cases of unjust acquittals, regardless of the types of erroneous legal rulings that have brought about the verdicts. But the extension of the scope of with prejudice appeals to include non-terminating rulings might be said to undermine the integrity of the jury verdict. It would be difficult if not impossible to establish whether an alleged error at trial has influenced a jury decision to acquit. Alternative appeal procedures, which would eliminate the need for appellate courts to look behind the jury verdict, might introduce undue complexity and inefficiency into the process.

688. It is also helpful to consider the English model of the Attorney General's Reference. This scheme is similar, if somewhat broader in scope, to the reference procedure under section 34 of the 1967 Act. Under section 36 of the *Criminal Justice Act, 1972,* the Attorney General of England and Wales may appeal a point of law on a without prejudice basis to the Court of Appeal. By contrast with the Irish provision, this right extends to any question of law arising in an acquittal – not merely one which arises in the context of a directed acquittal.[511] The Court of Appeal must hear argument by or on behalf of the Attorney General before giving its opinion on the point referred. The person acquitted is accorded the right to have counsel present argument on his behalf. But it is explicit in the Act[512] that the acquittal cannot be overturned, even where the Court of Appeal

510 Although the Supreme Court, in a number of decisions commencing with *O'Shea*, recognised a constitutional right of appeal against acquittals, it was split as to whether retrials could be ordered.

511 See *The People (Attorney General) v Crinnion* [1976] I.R. 29, where Henchy J. summarised the differences between the Irish and English provisions: "This, unlike our Act, does not confine the reference to a case in which a verdict has been directed by the trial judge, or to the point of law which has directly resulted in the acquittal. The effect of sections 36 and 66 of that Act is that (a) the acquitted person is given the right to present an argument on the hearing of the reference; (b) if he appears by counsel, he shall be entitled to his costs out of central funds; and (c) the operation of the reference procedure is conditional on the existence of rules of court made with a view to preventing or restricting the disclosure of the identity of the acquitted person."

512 Section 36(7), *Criminal Justice Act, 1972*.

concludes that the trial judge was wrong and the facts were such that the accused should have been convicted. The procedure is governed by the Criminal Appeal (Reference of Points of Law) Rules.[513] The reference must be in writing and specify the point of law referred, give any facts of the case necessary for the proper consideration of the point of law, summarise the argument intended to be put to the court and specify the authorities relied on.[514] The court is under a duty to preserve the anonymity of the acquitted person – who becomes the respondent to the reference – unless he agrees to the use of his name in the proceedings.[515] When the Court of Appeal has given its opinion, it may refer the point to the House of Lords if it appears to the court that the point ought to be considered by the House.[516]

Conclusion on Prosecution Appeals

689. The most important point of distinction, in the view of the Law Commission, is that between with prejudice and without prejudice appeals. An appeal which put the acquittal at risk would encroach on the rule against double jeopardy. The Working Group is aware of discussion and even proposals in England for the creation of exceptions to this historic rule. It is clear from the various judgments of the Supreme Court, of which the quotation from Henchy J. in *Crinnion* is but one example, that any such change would be a major one. In any event, that is a question of substantive law which falls outside the Terms of Reference of the Working Group. For this reason firstly, the Working Group confines its consideration to the without prejudice model. There is no significant body of opinion to the effect that our courts are unduly favourable to the defence so as to create an urgent need for change that would encroach on traditional freedoms.

690. In fact, there already exists in the form of section 34 of the Act of 1967 a substantive, if limited, form of effective appeal to cover the situation of terminating rulings. The limitation is simply that the prosecution has no means of appealing or referring important points of law determined other than in the form of a directed verdict.

691. Nonetheless, it is unsatisfactory that there is no machinery at all for the prosecution to contest what it conceives to be an incorrect ruling on a point of law which arises in the course of a trial. The ways in which this can occur are many: rulings on the admissibility of evidence; rulings on the interpretation of police powers of detention; search or questioning; custody rules; bail; rulings on the admissibility of evidence or of lines of questioning; rulings on the constitutionality of police behaviour; rulings on the ingredients of an offence; and rulings in the judge's charge to the jury. In reality, many more such rulings on points of law occur in the course of a trial than on the direction of a verdict.

692. The Working Group is satisfied that there is a compelling case for extending the range of situations in which the prosecution can have a point decided at a higher level. In the first instance, this could be achieved by extending the

513 Statutory Instrument 1973 No. 1114.

514 Statutory Instrument 1973 No. 1114, rule 3.

515 Statutory Instrument 1973 No. 1114, rule 6.

516 Section 36(3), *Criminal Justice Act, 1972*.

range of points of law covered by section 34 of the Act of 1967. Except for the fact that it would be without prejudice to an acquitted person, the procedure would be similar to that under section 2 of the *Summary Jurisdiction Act, 1857*.[517]

693. If this procedure were to be extended, it would be desirable that the acquitted person have the right to have counsel appointed to present argument on his behalf, which is the case under the English Attorney General's Reference. Furthermore, his anonymity would also have to be maintained. This could be done, perhaps, by denoting the case by number, similar to the English system.

517 As extended by section 51 of the *Courts (Supplemental Provisions) Act, 1961*

CHAPTER SIX
The Criminal Trial Process

Background

Jurisdiction and Process

694. While the distribution of business among the courts is the primary focus of its remit, the Working Group has been conscious of the close link between issues of jurisdiction of the criminal courts and criminal process. Deficiencies in the operation of or interrelation between jurisdictions may stem from shortcomings in the procedural machinery. A process-related rather than a jurisdictional solution may well be the answer. A clear appreciation of the source of problems in the distribution of criminal cases between jurisdictions and their subsequent disposal is therefore of critical importance. The Working Group has not engaged in an exhaustive reappraisal of the entire area of criminal procedure. Instead it has sought to identify and focus upon those aspects of the trial process – including the preparatory stage. These aspects are capable of inhibiting effective disposal of cases whether within jurisdictions or in the interface between jurisdictions.

695. In its evaluation of the conduct of criminal proceedings, the Working Group sought to confine itself to the process subsequent to the issuing of the summons or preferment of the charge. Consideration of Garda and prosecution procedures was beyond the Group's Terms of Reference. However since it quickly became apparent that prosecution practice in the area of interviewing of suspects potentially had considerable implications for the length and manner of conduct of trials on indictment, the Working Group has felt it appropriate to make comment on this aspect of the investigative stage in the criminal process.

The Constitution and Due Process

696. Any assessment of the procedures applying to criminal proceedings up to and in the course of trial must be founded upon a shared view of the purpose of the criminal process and of the principles which underpin it. The main initial reference points are provided by the Constitution, notably by Article 34.1,[518] Article 38.1 and 38.5, Article 40 and by the fundamental attributes of the common law approach to criminal justice which we inherited and which have become anchored in our criminal justice system. Those attributes, as has been observed by an eminent authority on the Irish criminal process,[519] comprehend an adversarial and accusatorial approach to the prosecution of crime, where the

518 Which provides: "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

519 Walsh, n 216 *supra*, at pages 1-6.

State carries the onus of establishing the accused's guilt beyond reasonable doubt. Also of importance are the following: the central role of the jury – guided in applying the rules of evidence by the judge – in determining guilt or innocence in serious cases; the reliance upon oral procedures in the adducing and testing of the evidence; the making of submissions and the final presentations and charge to the jury; the independence of the judiciary, prosecution and police in carrying out their respective roles; and an attachment to fair procedures in determining the issue of guilt, expressed in the term "in due course of law."

697. While it has been noted that the Constitution's provisions on criminal justice appear "spare and minimalist,"[520] as Gannon J. observed in *The State (Healy) v Donohue*:[521]

> "The phrase 'in due course of law' in Article 38, s.1, carries with it a sufficient guide and direction for the Courts. It is a phrase of very wide import which includes in its scope not merely matters of constitutional jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function."

698. The courts have given concrete expression to the concept in a series of cases concerned with the presumption of innocence,[522] the right to silence,[523] the privilege against self-incrimination,[524] the right to legal aid in certain circumstances,[525] the right of an accused to confront a prosecution witness,[526] the right to a trial with reasonable expedition,[527] the right to the absence of prejudicial pre-trial publicity,[528] and the right to fair procedures with respect to the trial itself.[529]

699. The Working Group would emphasise that its examination of the area of criminal process leading up to and during the course of trial has to a critical extent been informed and governed by the constitutional precepts and fundamental attributes referred to.

Statistical Research and Inquiry

700. Comment is made elsewhere in this Report on the significance of the need for adequate data capture and statistical reporting arrangements during the course of individual cases. Nowhere would this be of greater value than in measurement of the expedition with which criminal cases are brought to trial following institution of proceedings, and of length of trials.

701. However as part of the statistical research project undertaken in respect of the three-month period of January to March 2002 with the advice and assistance of Jackson and Doran, the Working Group has recovered valuable information in

520 O'Mahony, Paul, "The Constitution and Criminal Justice" in O'Mahony, Paul (ed.) *Criminal Justice in Ireland* (Dublin: IPA, 2002), at page 75.

521 [1976] I.R. 325 at pages 335-336

522 *O'Leary v Attorney General* [1993] 1 I.R. 102.

523 *Heaney v Ireland* [1996] 1 I.R.580; *The People (D.P.P.) v Finnerty* [1999] 4 I.R. 364.

524 *Re National Irish Bank & Companies Act, 1990* [1999] 3 I.R. 145.

525 *State (Healy) v Donoghue & Ors* [1976] I.R. 325.

526 *Donnelly v Ireland* [1998] 1 I.R. 321.

527 *M(P) v Malone*, Supreme Court unreported, 7 June 2002; *PC v D.P.P.* [1999] 2 I.R. 25; *SF v D.P.P.* [1999] 3 I.R. 235; *J.L. v D.P.P.* [2000] 3 I.R. 122; *J. O'C. v D.P.P.* [2000] 3 I.R. 478.

528 *D v D.P.P.* [1994] 2 I.R. 465; *The People (D.P.P.) v Z* [1994] 2 I.R. 476.

529 *Doyle v D.P.P.* [1994] 2 I.R. 286; *Clune v The D.P.P. and Clifford* [1981] 1 I.L.R.M. 17.

respect of the volume and profile of caseloads at first instance in the summary and indictment jurisdictions and in respect of pleas, the latter being of particular significance to the area of indictment process.

702. The absence of reliable data on timescales for and within criminal proceedings precludes a precise quantification of the extent to which deficiencies in current criminal procedure cause unnecessary delays or unnecessarily lengthen trials. Notwithstanding this, the Working Group has sought to engage with the various participants in the administration of criminal justice with a view to identifying elements of the statutory regime or of its practical operation which give cause for concern. In particular, the Working Group devoted a section of a seminar organised in July 2002 for members of the judiciary and criminal practitioners to trial process issues. It also hosted a session of a conference arranged in November last for a wider audience to those issues. We have also had the benefit of collective submissions from the Circuit and District Court judiciary as well as individual submissions from judges of all of the first instance jurisdictions, from the Director of Public Prosecutions and from practitioners and other interested parties bearing upon the area. The November conference also afforded a valuable opportunity to learn at first hand of the experience of successive reforms of criminal procedure in the neighbouring common law jurisdictions and the divergence in authoritative opinion there as to the extent of their success.

703. A questionnaire prepared by Jackson and Doran and circulated by the Working Group in the Summer of last year to a total of 1,297 respondents – comprising members of the judiciary of the various jurisdictions, prosecution and defence counsel, solicitors, Director of Public Prosecutions' officers and senior Gardaí – elicited the preponderant view that in the preceding five years, delays had increased across all jurisdictions at first instance, both summary and indictable.

Summary Jurisdiction

704. The essence of a summary trial in the District Court has been aptly described by Gannon J. in *Clune v The D.P.P. and Clifford*[530] as follows:

> "A summary trial is a trial which could be undertaken with some degree of expedition and informality without departing from the principles of justice. The purpose of summary procedures for minor offences is to ensure that such offences are charged and tried as soon as reasonably possible after their alleged commission so that the recollection of witnesses may still be reasonably clear, that the attendance of witnesses and presentation of evidence may be procured and presented without great difficulty or complexity, and that there should be minimal delay in the disposal of the work load of minor offences."[531]

530 [1981] I.L.R.M. 17.

531 [1981] I.L.R.M. 17 at page 19.

705. The procedural rules for the trial of offences in summary manner before the District Court[532] are, understandably, not elaborate. Some distinction is made in the rules between the procedure on trial of offences which are summary only in nature, and the approach to indictable offences tried summarily. In the case of the former, Order 23 (Trial of Summary Offences) provides, in rule 1:

> "Where the accused, personally or by solicitor or counsel appears and admits the truth of the complaint made against him or her, the Court may if it sees no sufficient reason to the contrary, convict or make an order against him or her accordingly, but if the accused does not admit the truth of the complaint, the Court shall, subject to the provisions of rule 2 hereof [relating to cases where the accused does not appear and is not represented], proceed to hear and determine such complaint."

706. By contrast, Order 24 (Summary Trial and Preliminary Examination of Indictable Offences) provides in rule 1:

> "Where an accused person is before the Court charged with an indictable offence with which the Court has jurisdiction to deal summarily if the accused does not object, the Judge shall inform the accused of his or her right to be tried by a jury, and if the accused (inquiry having been made of him or her by the Judge) does not object to being tried summarily, and if, after hearing such facts as may be alleged in support of the charge, the Judge is of opinion that they constitute a minor offence fit to be so tried, the Judge shall take the accused's plea and try him or her summarily."

707. It will be noted that, in the case of a summary only offence, the District Court judge does not have to obtain from the accused a formal plea, whereas this is required in the case of an indictable offence tried summarily. Much of the practice in either category of offence tried summarily is within the discretion of the District Judge. In *The State (Healy) v Donoghue,*[533] O'Higgins C.J. emphasised the degree of seriousness of the offence as determining the rigour of the procedure to be employed:

> "There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him."[534]

708. Questions of the adequacy of procedures employed in the District Court in exercising its summary jurisdiction have arisen largely in the context of requests by accused persons for advance disclosure of material forming part of the prosecution's case. With some individual exceptions,[535] in cases tried summarily no general right exists under statute or rule of court on the accused's part to

532 Part II, District Court Rules, 1997 (S.I. No 93/1997).

533 [1976] I.R. 325.

534 [1976] I.R. 325 at page 350.

535 E.g. the requirement in section 19, *Road Traffic Act, 1994* of the Medical Bureau of Road Safety to furnish a certificate of analysis of a specimen of blood or urine, in cases of prosecutions under sections 49 and 50, *Road Traffic Act, 1961.*

advance disclosure of particulars of the evidence to be adduced by the prosecution. But this does not mean that the accused is deprived of due process. Firstly, the prosecution is obliged to conduct the prosecution fairly and in accordance with the requirements of constitutional justice.[536] Secondly, the court itself has a pivotal role in ensuring the fairness of the proceedings. In the leading case on the subject,[537] Denham J. set out the approach to be adopted by the District Court:

> "The District Court Judge has the duty of ensuring that justice, incorporating fundamental constitutional concepts of fair procedures, is delivered in court. In the absence of legislation the test for the District Court Judge to apply in each case is whether in the interests of justice on the facts of the particular case the accused should be furnished pre-trial with the statements on which the prosecution case will proceed. The procedures necessary to obtain justice will vary as the cases vary. Many very minor cases may not require that statements be furnished. It is neither for the accused nor his solicitor to determine the procedure of the District Court – that is for the District Court Judge. Thus, a request on behalf of or by an accused cannot be the determining factor in deciding whether or not statements should be furnished to an accused pre-trial. However, the presence or absence of a request may be a factor for the District Court Judge… The more serious cases, and the more complex cases, may require that copies of statements and other relevant documents be furnished in advance of the trial, to inform the accused of the accusation so that he may prepare his defence.
>
> Amongst the matters which a District Court Judge may find relevant when deciding whether or not constitutional justice requires statements or documents to be furnished include:
>
> (a) the seriousness of the charge;
> (b) the importance of the statements or documents;
> (c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;
> (d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused."[538]

709. The Working Group considers that this flexibility in approach permitted by the jurisprudence sufficiently elucidates the manner in which summary trial of offences should be conducted, and does not recommend any greater elaboration, whether by statute or rule of court, of the procedures in this area.

710. The Working Group would recommend that Order 23, rule 1 be amended so as to require the District Court expressly to ascertain the accused's plea in summary only cases, as provided for in Order 24, rule 1 in relation to indictable cases tried summarily.

536 *The People (D.P.P.) v Tuite* [1983] 2 *Frewen* 175 (McCarthy J. at pages 180-1) and in *The D.P.P. v Special Criminal Court* [1999] 1 I.R. 60, in which O'Flaherty J. observed of counsel for the prosecution: "Their task is not just to *secure* a conviction: rather they must always be ministers of justice" (at page 87).

537 *The D.P.P. v Doyle* [1994] 2 I.R. 286.

538 [1994] 2 I.R. 286 at page 302.

711. The estimated average waiting times published by the Courts Service in respect of criminal proceedings in the District Court in the years 2000 and 2001 are set out in Appendix IV. Increases in waiting periods – for example in the Dublin Metropolitan District Area from five months before hearing in 2000 to six months before hearing in 2001 – may be explicable in terms of increases in the criminal caseload.[539] But the Working Group is hesitant, in view of the absence of detailed statistical information, to draw broad conclusions about specific causes for delay. It is sufficient to say in this particular context that the current procedures under which cases are tried summarily – as opposed to resource issues at Garda or court level – do not appear to be a factor of significance in relation to court delay.

Indictment Jurisdiction

712. The process of preparation of proceedings for trial on indictment and the trial itself are inevitably more complex than in proceedings at summary level due to the serious nature of the offences and the involvement of the jury. Much attention has been given in other common law jurisdictions to ways of rendering both of these stages of the indictment proceedings more effective, to which reference will be made later.

The Old Regime: Preliminary Examination

713. By any measure, one of the most significant developments in the area of criminal procedure since the foundation of the State was the abolition, by virtue of the *Criminal Justice Act, 1999*, of the procedure for preliminary examination in respect of offences charged upon indictment. This procedure, which originated in the jurisdiction of Justices of the Peace to enquire independently into the case alleged against an accused before the latter might be committed for trial was reformulated by the *Criminal Procedure Act, 1967*.[540] The elements of the preliminary examination mechanism merit mentioning in some detail.

714. The preliminary examination involved a consideration by a judge of the District Court at a public hearing of a "book of evidence", consisting of the charges against the accused, any sworn information upon which they are based, a list of witnesses intended to be called at trial and statements of their evidence and any exhibits – together with any evidence given at the hearing, and submissions on behalf of the prosecution or accused. Further statements of witnesses already tendering evidence could be served on the accused by the prosecution.[541] The prosecution and accused were entitled to give evidence at the hearing and to require the attendance of any witness, whether included in the list of witnesses or not. Witnesses could be cross-examined and re-examined and all evidence at the hearing was to be taken down on deposition.

715. The judge was required, if of the opinion that there was a sufficient case to put the accused on trial for the offence charged, to send the accused forward for trial. If he believed that a sufficient case existed to put him on trial for an

539 In the same example, from a total of 125,715 in 2000 to 185,881 in 2001.

540 The *Indictable Offences (Ireland) Act, 1849* for the area outside Dublin and the *Petty Sessions (Ireland) Act, 1851* for Dublin.

541 Sections 6 and 7 of the *Criminal Procedure Act, 1967*, now repealed.

indictable offence other than that already charged, he had to cause the accused to be so charged. Where the judge was of opinion that the examination disclosed only a summary offence, and provided the Director of Public Prosecutions consented, he was required to cause the accused to be charged with the summary offence and to deal with the case accordingly. If not of the opinion that a sufficient case for trial of an indictable offence existed or that a summary offence was disclosed, the judge was required to discharge the accused of the offence the subject of the preliminary examination.[542] An accused was entitled to waive the requirement of a preliminary examination and elect to be sent forward for trial on a plea of not guilty, unless the prosecution required a witness to be examined at the examination.[543]

716. Where an accused was sent forward for trial, all persons having given evidence, whether by statement or on deposition at the examination, were required to attend and give evidence at the trial.[544] Other counts could be included in the indictment either in substitution for or in addition to those on the basis of which the accused had been sent forward.[545]

717. In *Costello v D.P.P.*,[546] the Supreme Court, declining to follow an earlier decision,[547] held that a District Court judge, in conducting a preliminary examination, was exercising the judicial power of the State as conferred by law. It also stated that a provision of a 1936 statute[548] which allowed the Director of Public Prosecutions[549] to direct that an accused be sent forward for trial on a charge for which a District Court judge had refused to send him forward, was unconstitutional.

718. It would appear that the preliminary examination procedure had been a source of concern in some quarters for some time. The procedure was chosen by the Committee on Court Practice and Procedure as its first subject for consideration following its establishment in 1962.[550] The Committee noted "widespread dissatisfaction with the present system which is unnecessarily cumbersome, expensive and time-consuming and which has remained virtually unaltered for over 100 years."[551] Nonetheless, the Committee recommended that the procedure be retained, with certain modifications. Included among the changes was the allowing of a waiver of the procedure at the instance of the accused, the furnishing of witness evidence on affidavit rather than by attendance and the mechanical recording of depositions.

719. The Committee again reported on the subject in 1997,[552] following a reference from the Minister for Justice. The Committee noted that the preliminary examination provided "an important – and potentially salutary – safeguard against possible errors on the part of the prosecution."[553] It was not satisfied that it was a significant cause of delay and was of the view that it ought not to be abolished in the absence of sound reasons of policy. The Committee recommended that sworn depositions be retained, but that witnesses should only be summonable to give evidence at the examination where the judge considered it to be necessary

542 Section 8 of the 1967 Act, now repealed.

543 Section 12 of the 1967 Act, now repealed.

544 Section 9 of the 1967 Act, now repealed.

545 Section 18 of the 1967 Act, now repealed. See also *O'Shea v D.P.P.* [1982] I.R. 384, in which the constitutionality of this provision was affirmed.

546 [1984] I.R. 436.

547 *The State (Shanahan) v A.G.* [1964] I.R. 239.

548 Section 62, *Courts of Justice Act, 1936*.

549 As successor to the prosecution functions of the Attorney General.

550 Committee on Court Practice and Procedure, *The Preliminary Investigation of Indictable Offences*, First Interim Report (Dublin: Stationery Office, 1963).

551 Paragraph 2 of the Report.

552 Committee on Court Practice and Procedure, *Preliminary Examination of Indictable Offences*, Twenty-Fourth Interim Report (Dublin: Stationery Office, 1997).

553 *Ibid*, paragraph 11.

in the interests of justice.[554] It also suggested that the taking of depositions in long hand be replaced by a stenographic note.[555]

The New Return for Trial Procedure

720. Notwithstanding these recommendations, the preliminary examination procedure was, subject to certain transitional provisions,[556] abolished on the coming into effect of the *Criminal Justice Act, 1999*. It was replaced[557] by a requirement that an accused before the District Court charged with an indictable offence be sent forward for trial by that Court with the consent of the prosecution unless he is being tried summarily, has pleaded guilty, or is unfit to plead. Where the accused is sent forward for trial, the prosecution has 42 days from the first appearance of the accused before the District Court within which to serve upon the accused the documentation comprising the book of evidence which previously would have formed the basis of the preliminary examination.[558] Formerly, while the *Criminal Procedure Act, 1967* laid down no time limit for the service of the documents specified in section 6(1) of the Act – *viz.* the book of evidence mentioned earlier – Order 24, rule 10(1) of the Rules of the District Court provided that this was to be done within 30 days of the first appearance of the accused before the Court. The Court had power to extend this time. The new period of 42 days may be extended by the District Court on an application made by the prosecution within that time and may be further extended without any limit being fixed as to the number of such extensions. The Court may only extend the period if it is satisfied both that there is good reason for the extension and that it would be in the interests of justice to do so.[559] At any time after service of the initial book of evidence, the prosecution may serve a supplemental book of evidence, including a list of additional witnesses and statement of their evidence, as well as a statement of any further evidence of witnesses contained in the initial book.[560] Either prosecutor or accused may, at any time after the latter has been sent forward for trial, apply to the trial court for an order requiring a person to appear before the District Court to give evidence either on sworn deposition or through a live television link.[561] The trial court may grant the order "if satisfied that it would be in the interests of justice to do so."[562]

721. The Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue T.D., explained the reasoning behind abolition of the procedure on the second reading of the Bill as follows:

> "The procedures surrounding preliminary examinations can be cumbersome, particularly when depositions have to be taken from witnesses. I am concerned that in some cases the procedure might be used as no more than a delaying tactic by people charged with serious offences. While preliminary examinations have existed in one form or another since the 17th century, developments in the law and practice have undermined the rationale behind them. In particular, the fact that a person cannot be tried on indictment without the involvement of the Director of Public Prosecutions deals sufficiently with the question of an

554 *Ibid*, paragraph 19.

555 *Ibid*, paragraph 18.

556 In section 23 of the *Criminal Justice Act, 1999*.

557 By substitution of new sections 4 and 4A to Q in the 1967 Act for the old section 4: sections 8 and 9, respectively, of the 1999 Act.

558 Section 4B(1) of the 1967 Act, as amended.

559 Section 4B(3) and (4) of the 1967 Act, as amended.

560 Section 4C(1) of the 1967 Act, as amended.

561 Section 4F(1) of the 1967 Act, as amended.

562 Section 4F(2) of the 1967 Act, as amended.

> independent element being involved in a person being tried on indictment.
> In the circumstances, and particularly in the context of reducing delays in bringing persons to trial, the Bill abolishes preliminary examinations. As a necessary safeguard, it provides for a new procedure under which an accused who is to be tried on indictment may apply to the trial court before the trial is commenced to dismiss the charge or charges on the basis that the prosecution case is insufficient to support a conviction by a jury."[563]

722. The new procedure to which the Minister referred was introduced by way of insertion of a new section 4E in the *Criminal Procedure Act, 1967*, providing for an entitlement on the part of an accused to apply for dismissal of one or more of the charges against him. If it appears to the court that a "sufficient case" does not exist to put the accused on trial for the charge concerned, the court is required to dismiss the charge. While the application must be made to the trial court,[564] it may be made "at any time after the accused has been sent forward for trial," subject to a requirement that the accused give 14 days notice to the prosecution[565] or such lesser notice as the court may require. While the section is silent as to the time within which the application is to be made, it has been observed that the implication in the wording of section 4E(4) is that the application requires to be made before the accused is put on trial.[566] The essence of the change is that the District Court no longer addresses the question of the existence of a sufficient case against the accused, who must initiate an equivalent investigation in the trial court.

723. The new return for trial procedure has been in operation for 20 months[567] and the Working Group is not conscious from its consultations that the new arrangements are a cause for broad-based concern thus far. But the County Registrars' Association drew attention to the delay occasioned by the new procedure to speedy processing of trials in the Circuit Court arising from the fact that evidence on sworn deposition continues to be taken in the District Court, on foot of an order made by the trial court. The Association indicated that this can result in the Circuit Court having to list cases twice before the trial can take place and this – combined with the difficulty in arranging for a District Court judge to take depositions at short notice – can result in delays in county circuits of at least three months. In the Dublin Metropolitan District, it may take as much as five months to obtain a date for the taking of depositions. The Association recommended that the taking of depositions be carried out before the County Registrar.

724. The need clearly exists to conduct an accurate assessment as to whether the new return for trial procedure as a whole has reduced, exacerbated or had any impact on unnecessary delays in the period between the first appearance of the accused before the District Court and the trial date. The 42-day period for service of the book of evidence and the provisions for extension, were designed to inject expedition into the preparation of the case by the prosecution, and to

563 *Dáil Debates*, Volume 492, 11th June 1998, *per* Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue T.D.

564 Section 4F(1) of the 1967 Act, as amended.

565 Section 4F(1) and (2) of the 1967 Act, as amended.

566 Walsh, n 216 *supra*, at page 692.

567 It was brought into effect on the 1st October, 2001 by the *Criminal Justice Act, 1999 (Part III) (Commencement) Order* (S.I. No. 193 of 2001).

facilitate the overseeing of progress to that end.[568] The monitoring over time of periods between the first hearing in the District Court and arraignment, and between arraignment and the trial date – should provide a rough indication of the efficacy of the new return for trial arrangements in controlling excessive pre-trial delays.

725. The 42-day period has given rise to some difficulty and contention. The Director of Public Prosecutions has informed the Working Group that some District Judges have expressed the view that the extension of the period from 30 to 42 days for service of the book of evidence implied that the prosecution should be expected to meet the extended time without the need for adjournments and extensions. From the range of views gathered by the Working Group, which include the experience of several of its members, the 42-day period is unrealistically short in a great many cases. Some judges dislike having to operate a system where the time limit is meaningless and automatically has to be extended. In some serious cases arrests are delayed so as to avoid the 42-day period commencing. The prosecution knows well in advance that the 42 days will not be enough. On the other hand, in simpler cases, the time may be adequate. Thus, a longer time should not be provided if it were going to be interpreted as relaxing the obligation on the prosecution to produce the book of evidence as expeditiously as possible.

726. The Working Group recommends that the existing 42-day period set for service of the book of evidence should be extended to 90 days. Section 4B(3) of the *Criminal Procedure Act, 1967*, as inserted by the *Criminal Justice Act, 1999*, should be amended by the substitution in sub-paragraph (a) for "there is good reason for doing so" of "there is good reason, in the special circumstances of the case, for doing so". It has been brought to the Working Group's attention that in a small number of cases, the prosecution will at all times have intended that the case be disposed of summarily so that no book of evidence has to be served, but is taken by surprise when the judge declines jurisdiction or the accused elects for jury trial. In the view of the Working Group, depending on the facts, such circumstances could amount to sufficient reason to extend the time. Nonetheless, the 90 days here proposed should continue to run from the date of first appearance in court.

727. The Working Group agrees with the County Registrars that the requirement that depositions be taken in the District Court is cumbersome and can contribute to significantly delaying proceedings. The taking of depositions is undoubtedly an administrative rather than a judicial function. However, the taking of depositions may be an occasion for requests for rulings in relation to evidence which would require to be dealt with by a judge. The Working Group recommends that section 4F of the 1967 Act be amended so as to provide that evidence directed to be taken under that section, whether by way of sworn deposition or by video-link, be taken before a judge of the court to which the return for trial has been made.

568 Curiously, no time limit seems to attach to the service of the supplemental book of evidence.

728. At the July seminar, pre-trial delay did not emerge as an issue as far as the Circuit Court was concerned. This was in contrast with the concern expressed generally by participants at the unacceptable length of trial waiting times in the Central Criminal Court, which sentiment reflects the estimates for trial waiting times disclosed in the Courts Service's Annual Report for 2001.[569]

729. The Central Criminal Court's caseload mainly comprises the trial of murder and rape and aggravated sexual assault cases, although other offence counts may be included on the indictment. New cases returned for trial are listed in a special list to fix dates on the last Thursday of every month, and are entered in the list of cases for trial at the rate of four cases per week. In allocating cases, an attempt is made to balance the caseload for each week, taking account of the expected duration of a case, so as to minimise the likelihood of an overrun into the next week. This is of considerable importance, given that cases which are not reached within the week allotted to them are remitted to the list to fix dates, thus being subjected to a further lengthy waiting period to trial. In extreme circumstances, and where a special application is made to the presiding judge, earlier trial dates may be given. Delays between arraignment and trial date in the Central Criminal Court are in large measure attributable to an expansion in that Court's caseload and constraints in the past on the judicial resources available to be assigned to the Court. Such delays currently stand at approximately 14 months. With a view to addressing these delays, the President of the High Court last year determined that, with effect from October 2002 and subject to availability of judicial resources, at least four High Court judges would be made available to the Central Criminal Court.

730. The disposal of criminal business in the Circuit Court differs as between Dublin and other circuits. In the capital, one judge is at present assigned full time to administer the criminal list, taking arraignments, hearing procedural applications and sentencing on pleas. Four judges are assigned on a daily basis to sit at trials. In their submission to the Working Group, the Circuit Court judiciary indicated that this allocation of resources has drastically reduced delays to trial, from an estimated waiting period of 12 to 18 months in 1999 to a matter of four to six weeks in 2002, assuming the parties are ready to proceed. Emphasis was placed on the benefits gained from assignment of judges to criminal trial work for relatively long uninterrupted periods of two years or more. This resulted both in more expeditious and efficient trial completions and in greater uniformity and predictability in the jurisprudence of the Court and its approach to sentencing. In circuits outside Dublin, criminal business forms part of a much wider caseload, embracing ordinary civil, licensing and family law cases, which are handled by the individual Circuit Judge. That judge is supported by an additional Circuit Judge where the volume of caseload warrants this. Trials take place generally in the sessions following those in which the return for trial was made. Delay would not appear to be a widespread problem in those circuits.

569 *Viz.* four to six weeks following readiness for trial for Dublin and the next session following return for trial for 15 of the 25 circuits outside Dublin, the remaining circuits having waiting periods from three months to a maximum of 12 months: *Courts Service Annual Report 2001*, at pages 128-129.

731. In the area of pre-trial preparation, no formal machinery exists either to identify the range of matters which may require to be dealt with before a case is ready for trial, or to monitor the pace at which these are being dealt with. The Working Group of the Standing Committee of Attorneys General of Australia, in its *Report on Criminal Trial Procedure* of September 1999, described the aim of pre-trial procedures as being "consistent with fairness to defendants, to narrow the issues in dispute, to facilitate the proof of matters not in dispute and to ensure that the trial will proceed with the least possible disruption…" To this might be added a further consideration. The making by the prosecution of the appropriate admissions, and in particular full compliance with its obligation in law to make disclosure at a sufficiently early point in the proceedings, affords an accused, assuming the latter will have the benefit of informed advice, an opportunity to enter a plea of guilt to a charge.

732. The discussions at the July seminar, material presented to the November conference and submissions received have identified opportunities for considerable improvement in the preparation of cases on indictment for trial or for disposal on a plea, and in the conduct of the trial itself. Of the large body of legislation on criminal law and procedure introduced in the past two decades several pieces of legislation were enacted modifying the law concerning adducing of evidence and revising the method by which an accused may be returned for trial on indictment. These developments have not been accompanied by provision for a procedural mechanism which would permit the relevant issues to be addressed in a structured and timely manner prior to the trial. A number of provisions having distinct implications for pre-trial preparation are worthy of mention.

Adducing of Evidence

733. An exception to the general proposition that an accused is not obliged to disclose details of his defence was introduced by section 20 of the *Criminal Justice Act, 1984*. Under that section, an accused tried on indictment is precluded, without leave of the court, from adducing evidence in support of an alibi where he has not given notice[570] of particulars of the alibi with the prescribed period.

734. Section 21 of the *Criminal Justice Act, 1984* introduced the possibility of admission of written evidence at trial on the same footing as oral evidence in the absence of an objection by the other party and provided that certain conditions as to verification and service[571] and as to content[572] were met. Provision is made for agreement by the parties at or before the hearing on the tendering of the statement[573] and for the making of an application "before the hearing" by any party for an order securing the attendance of the author of the statement to give evidence at trial.[574] The application may be entertained by any judge of the court in which the trial is to be held.[575]

570 Since the abolition of the preliminary examination procedure, the notice must be given in writing to the solicitor for the prosecution and the notice period is 14 days from the service on the accused of the book of evidence: section 16(3) of the *Criminal Justice Act, 1999*.

571 Set out in section 21(2) of the *Criminal Justice Act, 1984*.

572 Set out in section 21(4), *Criminal Justice Act, 1984*.

573 Section 21(3), *Criminal Justice Act, 1984*.

574 Section 21(5)(b), *Criminal Justice Act, 1984*.

575 Section 21(6), *Criminal Justice Act, 1984*.

735. Under section 22 of the same Act, either party can seek to have a fact admitted where there is conclusive oral evidence.[576] If made otherwise than in court, the admission must be in writing[577] and with the approval of the party's counsel or solicitor.578 Some other legislative changes have moved in the direction of streamlining formal proofs, subject to appropriate safeguards.[579]

736. In its Twenty-Fourth Interim Report,[580] the Committee on Court Practice and Procedure noted that section 21 was designed to encourage the reading of uncontested facts into the record so as to shorten the trial and to ensure that "the main focus of the trial would relate to the main issues in contest."[581] There appears, however, to be broad consensus as to a fairly general – though not total – failure to avail of the potential offered by sections 21 and 22. The Committee on Court Practice and Procedure noted that section 21 "has not been greatly used to date",[582] and the former Director of Public Prosecutions has observed that "much time and enormous expense is incurred by the necessity to call evidence which without any risk to the interests of justice could be admitted pursuant to Sections 21 and 22."[583]

737. Section 13 of the *Criminal Evidence Act, 1992* permits the giving of evidence by persons other than the accused[584] by way of a live television link in proceedings for sexual offences, offences involving violence and related offences.[585] Where the proceedings are being conducted in a court in which video-recording facilities are not in operation under the Act, an order may be made transferring the proceedings to a circuit in which such facilities are operational. This facility was extended to evidence to be given by a person other than the accused in any proceedings on indictment including an application to dismiss a charge[586] where the court is satisfied that they are likely to be in fear of or subject to intimidation in giving evidence otherwise.[587] Again, provision is made in such cases for the transfer of proceedings to another suitably equipped circuit, where the facilities are not available in the circuit to which the proceedings have been returned.[588]

Evidence by Video-Link

738. Much time in the course of trials is consumed in the giving by members of An Garda Síochána of evidence as to preservation of crime scenes often involving several Garda witnesses travelling to court from a distance and waiting for long periods in court. This could in many cases be avoided, without prejudice to the accused, by allowing for such evidence to be given remotely. Indeed there appears to be no reason to restrict the facility to Garda evidence *per se*. Certain expert evidence might also be suitable to be given remotely.

739. The Working Group considers that the existing facility for the giving of evidence by live television link should be extended, by leave of the court to which the return for trial has been made, to encompass the evidence of any witness other than the accused, provided that the accused consents and the

576 Section 22(2)(a), *Criminal Justice Act, 1984.*

577 Section 22(2)(b), *Criminal Justice Act, 1984.*

578 Section 22(2)(e), *Criminal Justice Act, 1984.*

579 See section 6 of the *Criminal Evidence Act, 1992* and section 30 of the *Criminal Justice Act, 1999.*

580 *Preliminary Examination of Indictable Offences*, n 550 *supra.*

581 *Ibid*, paragraph 21.

582 *Ibid*, paragraph 22.

583 Barnes, Eamonn, "Reflections on Twenty-Five Years as Ireland's First Director of Public Prosecutions," in O'Mahony, Paul (ed.) *Criminal Justice in Ireland* (Dublin: IPA, 2002), at page 97.

584 If the person is under 17 years of age, unless the court sees good reason to the contrary and with the leave of the court in any other case: section 13(1).

585 Evidence is to be given by this means "unless the court sees good reason to the contrary" in the case of persons under 17 years (section 13(1)(a)), and in any other case, where the court permits (section 13(1)(b)). Video recorded statements made by children under 14 years at interviews (section 16(10(b) of the 1992 Act) and by mentally handicapped persons (section 19 of the 1992 Act) were also rendered admissible.

586 See section 4E of the *Criminal Procedure Act, 1967*, referred to *infra.*

587 Section 39 of the *Criminal Justice Act, 1999.*

588 Section 39(4) of the *Criminal Justice Act, 1999.*

court is satisfied that it would not be contrary to the interests of justice for the evidence to be taken in that manner. Clearly, the extension of this facility has implications for investment by the Courts Service and possibly by the prosecuting authorities in audio-visual links and video-recording facilities. However, the Working Group is of the view that the costs of such investment are likely to be recouped to the Exchequer in the medium term from savings in travel and subsistence, quite apart from the burden on local availability of Garda resources which it would alleviate.

Prosecution Disclosure

740. Mention has already been made of the requirements of the *Criminal Justice Act, 1999* in relation to the furnishing by the prosecution of a book of evidence and of a supplement to that documentation.[589] Quite apart from this, the prosecution has a duty in law to disclose where possible any other material in its possession having the character of relevant evidence – often referred to as unused material – irrespective of whether the prosecution intends to adduce such evidence.[590] This obligation arises in Irish law from the constitutional right of an accused to fair procedures.[591] The point has been made that no regime – whether under statute or rule of court – has yet been established to give effect to this obligation of disclosure at the pre-trial stage.[592] For example, it has recently been held that the rules relating to discovery of documents in the Rules of the Superior Courts do not apply to criminal proceedings.[593]

Pleas

741. The principle that a defendant charged with an offence of a sexual nature should receive some credit in assessment of the sentence to be imposed where he has made a plea of guilty is now well established in the jurisprudence on sentencing in Ireland. The approach to be taken was explained by Finlay C.J. in the leading case, *The People (D.P.P.) v Tiernan*:[594]

> "A plea of guilty is a relevant factor to be considered in the imposition of sentence and may constitute, to a lesser or greater extent, in any form of offence, a mitigating circumstance. I have no doubt, however, that in the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination. Such an admission of guilt may, depending upon the circumstances under which it is made and the extent of the evidence apparent to an accused person as being available against him, also be taken in some circumstances as an indication of remorse and

589 See paragraph 720 *et seq.*

590 *The People (D.P.P.) v Tuite* [1983] 2 *Frewen* 175 (McCarthy J. at pages 180-181).

591 *The People (D.P.P.) v Tuite* [1983] 2 *Frewen* 175 (*per* McCarthy J. at pages 180-181).

592 Mullan, Gráinne, "The Duty to Disclose in Criminal Prosecutions", Bar Review, January/February 2000, at page 174.

593 See *D.P.P. v Sweeney*, Supreme Court, unreported, 09/10/2001; *H(D) v Groarke* [2002] I.E.S.C. 44 (31st July 2002).

594 [1988] I.R. 250, at page 255. See also *The People (D.P.P.) v M* [1994] 3 I.R. 306, *per* Denham J. at page 319.

therefore as a ground for a judge imposing sentence to have some expectation that if eventually restored to society, even after a lengthy sentence, the accused may possibly be rehabilitated into it."

742. More generally a court is now required – when deciding on the sentence for a person convicted for any offence not carrying a fixed – to take into account the point in the proceedings at which an intention to make a plea was disclosed, as well as the circumstances in which the plea was given.[595]

743. The Courts Service's annual statistics on pleas in the Circuit Court at national level and in Dublin would not appear to be soundly based and the Working Group has decided not to rely upon them. The Working Group carried out a manual examination of cases disposed of in the Circuit Court in the period from the 1st January to the 31st March 2002 which covered 2,267 counts on indictment. This exercise disclosed that of 2,267 counts on indictments returned, 1,373 – or 60.6 percent – of those counts generated a guilty plea prior to or in the course of trial; 236 – or 10.4 percent – elicited a final not guilty plea, the remaining counts not having been disposed of for various reasons, e.g., *nolle prosequis*. While there are risks inherent in extrapolating a trend from such a short period, this high rate of pleas does accord with the Working Group's impression of the general experience of practitioners in the area. Within the sample, it has been possible to determine the point at which pleas have been made viz. at arraignment; on a mention date prior to the trial date; on the trial date; or on a change of plea during the course of the trial date itself. The figures are as follows:

Table 6A: Stage at which Guilty Pleas were made in the Circuit Court nationwide January to March 2002[596]

Total number of counts	Total Guilty Pleas	Arraignment	Mention date	Other	Trial date	In course of trial
2,267	1,393	1,105 (79.3%)	8 (0.6%)	25 (1.8%)	133 (9.6%)	122 (8.8%)

744. The high proportion of pleas on counts at arraignment stage recorded during this limited period – over 79 percent – compared with those on the trial date – 9.6 percent – would suggest that the phenomenon of cracked trials – i.e. cases which collapse on the trial date as a result of a plea – may be less prevalent in Ireland than in neighbouring jurisdictions.[597]

745. While the principles informing sentencing of offenders are clearly beyond the scope of the Working Group's remit, we consider it desirable both in the interests of accused and of the expeditious disposal of the business of the courts at indictment level that pre-trial procedures should as far as possible facilitate the making of a plea by an accused at the earliest opportunity.

595 Section 29, *Criminal Justice Act, 1999.*

596 Note that these figures relate to pleas on counts, whereas those in Table 4C relate to indictments for the whole of 2001.

597 60.5 percent of trials cracked in this way in the Crown Court in England and Wales in 2001 (Lord Chancellor's Department: *Judicial Statistics Annual Report,* 2001), at page 68.

The Pre-Trial Hearing

746. From the views expressed to the Working Group, it is clear that support exists for a pre-trial mechanism to facilitate clarification and resolution of problems which might affect the trial. The Working Group is aware that the assignment in the Circuit Court in Dublin of a judge to deal with arraignments, applications and pleas in a dedicated list may provide the occasion for filtering out of cases which will not result in a contest and for the resolution of other pre-trial issues. However this object can be frustrated by the fact that counsel for the accused often may not be sufficiently instructed to make an informed assessment of the case against their client at that stage.

Other Jurisdictions

747. In the absence of an established tradition in this jurisdiction of pre-trial preparation arrangements, much may be learned from models in other jurisdictions. The Working Group has examined the experience of a number of jurisdictions in use of preliminary hearings in criminal proceedings. Opinion is by no means unanimous either as to the efficacy of pre-trial regimes or as to the matters which should properly be the subject of pre-trial directions.

England and Wales

748. Practice rules for pre-trial reviews – or Plea and Directions Hearings – having no statutory basis were introduced in the Central Criminal Court in England in 1977. They were later adapted for the Crown Court – taking both non-statutory[598] and statutory[599] form. Directions by the judge at the non-statutory hearing are non-binding while those given at the statutory hearings will bind the parties.

749. The Magistrates' Court commits the defendant to appear in the Crown Court on a specific date fixed in liaison with the Crown Court listing officer for an initial Plea and Directions Hearing. At the hearing, pleas are taken and, in contested cases, the prosecution and defence are expected to assist the judge in identifying the key issues and to provide other information required for the proper listing of the case. The purpose of the hearing is to ensure that all necessary steps have been taken in preparation for trial and to provide sufficient information for a trial date to be arranged. It is expected that the advocate briefed in the case will appear in the hearing wherever practicable. At least 14 days' notice of the hearing is required unless the parties agree to shorter notice. The hearing must be held within six weeks of committal in respect of a defendant who is on bail, and four weeks where the defendant is in custody.

750. A defendant who wishes to plead guilty is obliged to make that intention known at the earliest possible stage to the Probation Service, the prosecution and the

598 *Practice Direction: Crown Court (Plea and Directions Hearings)* [1995] 1 WLR 1318. High Court Judges, Circuit Judges and Recorders sit in the Crown Court, and certain classes of case are triable by Circuit Judges only where they have been licensed to do so.

599 Under Parts III and IV of the *Criminal Procedure and Investigations Act, 1996*. Preparatory hearings are also provided for in serious or complex fraud cases, under sections 7-10 of the *Criminal Justice Act, 1987*.

court, when the case will be adjourned for sentencing by an appropriate judge of the Crown Court. The defence is required to supply to the prosecution and the court a full list of the prosecution witnesses they require to attend at the trial at least 14 days prior to the hearing or within three working days of the notice of the hearing where it is fixed less than 17 days ahead. In more lengthy cases, the prosecution is obliged to prepare a case summary for use by the judge at the hearing with a view to helping estimate the length of the trial. The defendant is required to be present at the Plea and Directions Hearing, which must be conducted by the trial judge. But in more complex cases, the hearing is presided over by a High Court Judge or by a Circuit Judge.[600]

751. A majority of the Runciman Commission which reported in 1993[601] favoured the introduction of pre-trial procedures "for the purpose of clarifying and defining the issues in advance of the jury's being empanelled," involving, in less complex cases, an exchange of papers between the parties.[602] In more complex cases, the parties or a judge could require that a preparatory hearing take place and such hearings should be needed in longer cases.[603] The hearing should take place before empanelment of the jury but should form part of the trial. Rulings made thereat should dispose of the issues concerned and bind the trial judge. Sanctions in costs or disciplinary measures should attend breach of the pre-trial procedures. The dissentient Commissioner, Professor Michael Zander, disputed the feasibility and value of an arrangement which depended on voluntary exchange of questionnaires backed by sanctions, considering that it would in fact complicate and add to the cost of the trial process. He felt that a short early Pleas and Directions Hearing would suffice as pre-trial procedure in most cases. He was particularly unconvinced of the efficacy of sanctions – whether in the form of costs penalties or professional censure.[604]

752. In his *Review of the Criminal Courts of England and Wales*, Sir Robin Auld noted that the Plea and Directions Hearing had been subject to much experimentation and adaptation. He said that views were mixed as to their value, their success often being dependant on the attitude of the local judiciary and the "local culture" of criminal court practitioners.[605] Lord Justice Auld was sceptical of the need for automatic pre-trial hearings in all cases. Instead, he recommended a system based on cooperation between the parties based on timetables adopted at national level – varied to suit case category. A pre-trial hearing should take place only where the parties considered it necessary for the timely and otherwise efficient preparation for, and conduct of, the trial. By a pre-trial assessment date the parties should send a check-list to the court by way of reporting on progress and the state of readiness of the case, seeking written directions where appropriate. Where a pre-trial hearing did take place, the court should be empowered to give binding directions. In the event of non-compliance, the court should impose sanctions in the form of reprimands conveyed to the practitioner's professional body or of orders as to costs.

600 *Directions by the Lord Chief Justice for the Classification of the Business of the Crown Court and Allocation to Crown Court Centres*, n 386 *supra.*

601 The Royal Commission on Criminal Justice, *Report,* n 198 *supra.* Professor Michael Zander dissented from the recommendations on pre-trial procedures: see his Note of Dissent at pages 221-235 of the Report.

602 *Ibid,* Chapter 7, paragraph 4.

603 Five days was suggested as an initial criterion: *Ibid,* Chapter 7, paragraph 17.

604 See, in particular, paragraphs 29-38 of Professor Zander's Note of Dissent, at pages 225-227 of the Report.

605 *Review of the Criminal Courts of England and Wales Report* n 1 *supra,* Chapter 10, paragraph 209. The further recommendations of Lord Justice Auld here cited are summarised at pages 492-494 of that Chapter.

753. Professor Zander, in a paper presented to the Working Group's conference in November 2002, made it clear that he did not share Sir Robin's scepticism regarding the merit of automatic pre-trial hearings. Professor Zander doubted whether the parties would be able to deal with the issues as efficiently or quickly if left to their own devices. He cited the advantages of the Plea and Directions Hearing (PDH) thus:

> "(1) All parties (prosecuting and defence counsel, defence solicitors, Crown Prosecution Service and defendant) are required to come to court on a fixed date. This seems to work satisfactorily. It requires very little chasing. They come.
>
> (2) The defendant has an early opportunity to discuss his plea in person with a barrister. Often it is not the barrister who would ultimately conduct his trial if there were one, but it is a barrister. This is a considerable advantage – especially if, as will commonly be the case, he has previously only discussed his case with a solicitor's clerk.
>
> (3) The PDH is a convenient opportunity for the two opposing counsel to confer to see whether there is any basis for a plea (or charge) bargain where the prosecution drops more serious charges and the defendant thereupon pleads guilty. At present this opportunity does not usually present itself before the day of trial. The effect of bringing it forward should be to reduce the number of last minute guilty pleas on the day of trial (cracked trials). The experiment with the pilot study on PDHs known as Recommendation 92 suggests that this is happening.
>
> (4) If it appears that the case is to go forward as a contest, the barrister would normally have an opportunity at the PDH to consider what further steps need to be taken by his instructing solicitors to get the case ready for trial. Sometimes he would communicate such views informally and orally to the representative of the solicitors' firm present at the PDH. Sometimes he would write them down there and then by 'endorsing' them on his brief. Sometimes he would send the solicitors a more formal and extended 'advice on evidence' from chambers…
>
> (5) The PDH pilot scheme includes provision for a detailed questionnaire, the answers to which are checked through at the PDH in court *by the judge himself* on the basis of responses given by counsel. The fact that the questions are put by a judge is critical. Counsel having to attend and answer a judge is more likely to produce answers than merely having to exchange forms. Knowledge that counsel has to answer the judge is also apt to have the effect of concentrating the mind of instructing solicitors on all the matters in issue.
>
> (6) The involvement of a judge in a hearing in every case may at first sight seem to be a waste of resources. But it is probably, on balance both cost and benefit effective in that it should achieve various important objectives which either would not

otherwise be achieved at all, or if at all, to a lesser extent or with even greater costs:

- The PDH is usually brief – typically between 5 and 30 minutes.
- It serves multiple purposes, including actual disposal of as many as half of all cases and, potentially, better preparation of a considerable number that end as contests.
- It provides a prospect that pre-trial information about the case, important to permit accurate listing, will actually be forthcoming – and at a very early stage."[606]

Scotland

754. In Scotland, proceedings on indictment are known as "solemn procedure" and may, with some exceptions, be prosecuted in the sheriff court or the High Court of Justiciary, the former tribunal having a sentencing jurisdiction limited at present to three years. After an accused has been arrested, his first court appearance is in private before a sheriff on petition.[607] Usually, the prosecutor – the procurator fiscal – will avail of his right to judicially examine[608] the accused at his first appearance on petition.[609] The accused may be questioned by the prosecutor, the questioning being limited to whether the accused admits or denies the charge and the nature of his defence. It is open to the accused to decline to answer a question but at the subsequent trial on that charge his refusal to answer may be commented on by the prosecutor, the presiding judge or any co-accused. Such comments are limited to material averred to by the accused. Normally the accused is committed for further examination at the first appearance. A second appearance usually brings the initiating sheriff court procedure to an end.

755. The 80-day rule requires the service of the indictment, listing the charges, witnesses and productions[610] for the case, upon an accused person in custody within 80 days of his committal for trial.[611] If an indictment is not served within that time, the accused is entitled to be released from custody. This rule ensures the speedy preparation of a case and its bringing to trial. It has been described as "the real jewel in the crown [of the Scottish legal system]."[612] The trial of an accused must commence within 110 days of his full committal. Otherwise he must be liberated and discharged from any indictment in respect of the offence and he cannot in future be proceeded against in respect of that offence. Following the completion of the initiating proceedings in the sheriff court, the next stage will be the service of the indictment together with a notice intimating a hearing called the trial hearing – the "trial diet."[613]

756. If the case is to be tried in the High Court, a preliminary diet[614] may be held between the date of service of the indictment and the trial diet. This can only be done if one of the parties initiates this procedure by giving written notice to the court and to the other parties that one or more of four conditions applies.[615] These are:

- that he intends to raise a matter relating to the competency or relevancy

606 The Royal Commission on Criminal Justice, *Report*, n 198 *supra*, at pages 229-232.

607 This initial court appearance is known also as the "first calling."

608 Section 35, *Criminal Procedure (Scotland) Act, 1995*.

609 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at page 16.

610 I.e. articles or documents produced as evidence in the court.

611 Section 65(4), *Criminal Procedure (Scotland) Act, 1995*.

612 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at page 50.

613 *Ibid*, at page 16.

614 Section 72, *Criminal Procedure (Scotland) Act, 1995*.

615 Section 72, *Criminal Procedure (Scotland) Act, 1995*.

of the indictment, or object on specified grounds to the validity of the citation against him;

- that he intends to submit a plea in bar of trial, to apply for separation or conjunction of other charges or trials, to raise a preliminary objection to a special capacity in terms of section 255 of the 1995 Act or to apply under section 278(2) of the 1995 Act for part of the transcript of the judicial examination not to be read to the jury;
- that there are documents the truth of the contents of which ought to be admitted or that there is any other matter which in his view ought to be agreed; and
- that there is some other point which could in his opinion be resolved with advantage before the trial.

757. However, it has been suggested that this is not the norm, as "the majority of cases disappear from court with committal and resurface in the High Court at the trial diet."[616] Following committal, the procurator fiscal will prepare the case and at an early stage give a provisional list of witnesses to the accused's solicitor to enable him to prepare the defence case. The procurator fiscal should continue to assist the accused's solicitor by providing him with details of relevant evidence as it becomes available. The indictment must then be served on the accused calling upon him to appear at a trial diet within 29 days.[617]

758. Where trial is in the sheriff court, a procedural hearing – called a first diet – is mandatory. It is required to take place not less than 15 clear days after service of the indictment and not less than ten clear days before the trial diet. At the first diet, the accused is required to state how he pleads to the indictment.[618] The purpose of the first diet is to enable the court to ascertain whether the case is likely to proceed to trial on the date assigned as the trial diet and more particularly, the state of preparation of the prosecutor and the accused with respect to their cases and the extent to which the parties have complied with their duty to reach agreement on evidence.[619] Moreover, if the accused intends to raise a special defence[620] he is required at the first diet to give notice of the plea to the Crown and any co-accused.[621]

759. Prior to 1980, the first diet was compulsory in both the High Court and the sheriff court.[622] It was abolished in 1980 but in 1995 it was reinstated in the sheriff court. The reason it was not re-introduced to the High Court was "because unexpected adjournments were a problem in the sheriff court but not the High Court at that time, and because of the earlier experience that nothing was achieved in High Court cases by such diets. The first diet was held in the sheriff court and, if anything of significance arose at the diet, that matter was simply adjourned for determination at the trial diet in the High Court."[623] The main advantage of the first diet is said to be that it can help prevent delay. This is because it leads to some guilty pleas being tendered and to the identification of cases which would not proceed because of difficulties relating to the attendance of witnesses or the accused.[624]

616 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at page 16.

617 Section 66(6)(b), *Criminal Procedure (Scotland) Act, 1995*.

618 Section 71(6), *Criminal Procedure (Scotland) Act, 1995*.

619 This duty is imposed under section 257(1) of the 1995 Act. Note that this duty applies only where the accused is legally represented and that there is no penalty for failure to meet the duty. However, "it may be that a court will take into account the extent to which it has been fulfilled in deciding any motion for adjournment": Brown, Alistair N., *Criminal Evidence and Procedure: An Introduction* (Edinburgh: T&T Clark, 1996), at page 90.

620 There are four such special defences: alibi, incrimination (i.e. blaming another person for the crime), insanity and self-defence.

621 Section 78, *Criminal Procedure (Scotland) Act, 1995*. In a High Court case, the notice must be given not less than ten clear days before the trial.

622 Section 75, *Criminal Procedure (Scotland) Act, 1975* (c. 21).

623 Section 105, *Criminal Procedure (Scotland) Act 1975*; *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at page 33.

624 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at page 32.

760. In his recent review of the procedure of the High Court of Justiciary, Lord Bonomy recommended[625] the revival of the preliminary diet as a mandatory rather than an optional procedure in cases heard before that Court. Lord Bonomy observed:

> "The impact of such a preliminary or first diet could, however, be quite different if that diet were to be held in the High Court, and were to be recognised as the point at which pleas of guilty should be tendered and pleas in bar of trial and other preliminary points should be taken and dealt with. While some pleas of guilty will always be tendered at the very last minute, it should be possible to create circumstances in which it will be accepted that the preliminary diet is where the cases not going to trial should be dealt with. Were that to happen, then the Court should be left with a manageable number of cases to allocate to trial. The conundrum is how to create circumstances in which more cases will be disposed of prior to the trial diet, and indeed how to create a culture to aim for that."[626]

761. Lord Bonomy proposed that the relevant legislation[627] be amended to make it clear that guilty pleas tendered at an early stage in the proceedings would generally result in a lesser sentence and that guilty pleas tendered at the trial diet would not. He recommended that the preliminary diet could be dispensed with where the parties are agreed that a trial is necessary and can satisfy the Court on the issues that have to be addressed in advance of the hearing. To enable the defence to adequately prepare its case, he proposed establishing a rule requiring the intimation of all material to be used by the Crown at the trial. He suggested that a deadline be established a number of days prior to the preliminary diet after which the Crown is precluded from intimating or lodging additional witnesses or productions – except on cause shown to the satisfaction of the court. The Crown should identify all evidence which it considers is unlikely to be disputed. This should be intimated to the defence in a notice of uncontroversial evidence not later than 14 days prior to the preliminary diet. A similar onus should rest on the defence, but with a limit of seven rather than 14 days. This same deadline would apply to the requirement on the defence to prepare a note discussing the line of defence and identifying matters which require attention for the purposes of the trial, this note forming the basis for final defence preparation for the trial.

762. In order to encourage a culture of cooperation between the parties, Lord Bonomy recommended that there should be a mandatory meeting in the week prior to the preliminary diet – to discuss issues which require resolution if the case is to be disposed of – or a trial diet assigned at the preliminary diet. To ensure compliance with this obligation, the outcome of the meeting should be recorded and a record thereof produced to the court. The object to be achieved was to ensure that the preliminary diet is the latest stage for dealing with preliminary and procedural matters. So all applications to be considered at the preliminary diet should be made not later than seven days – or whatever shorter

625 For the summary of his recommendations, see pages 116-124 of the Review.

626 *Improving Practice – The 2002 Review of Practice and Procedure of the High Court of Justiciary*, n 96 *supra*, at pages 33-34.

627 Section 196(1) of the *Criminal Procedure (Scotland) Act, 1995.*

period considered appropriate – before the preliminary diet. Lord Bonomy also saw the preliminary diet as a solution to the problem of delay caused by issues over the admissibility of evidence having to be dealt with in the course of the trial. An accused who is ready to proceed to trial shortly after the indictment is served should be entitled to apply to the Court to accelerate the preliminary diet in order to obtain an early trial diet.

Australia

763. Criminal law and procedure save that relating to federal offences is a matter for individual States and Territories. Perhaps the earliest example of a comprehensive regime of pre-trial preparation is that introduced in South Australia in 1992.[628] A directions hearing is held where, on arraignment, guilt is contested or in the event of a plea, the facts relevant to sentence are disputed. The court at that hearing[629] or on an adjournment may: give directions and set time limits for steps in the proceeding; set or alter the date for the commencement of the trial; record the entry of a *nolle prosequi* except where the accused person requests that it be entered in open Court; hear and determine applications for the issuing of a subpoena for documents returnable before the commencement of the trial, order the inspection of documents produced on subpoena prior to the commencement of the trial; and give directions for the taking of evidence outside the State and in respect of any other matter concerning the conduct of the case and of the trial.[630]

764. Prior to trial, a conference can be convened, either by the judge assigned to manage the list, the judge hearing the arraignment or the judge assigned for the trial on the application of a party or of the judge's own motion. A pre-trial conference must be attended by counsel briefed to appear at the trial and if the attendance of any party's counsel is not practicable, by that party's solicitor. The person committed for trial must also be in attendance. It must be held not later than 24 hours before the trial date unless, in the opinion of the judge, it is just and expedient to hold the conference at a later time. At the pre-trial conference the judge "shall discuss with counsel and any unrepresented party such matters with respect to the trial of the person committed for trial which the Judge considers necessary to ensure that the trial will be conducted in an expeditious and fair manner."[631] Nothing said by or on behalf of a person committed for trial at a pre-trial conference and no failure by a person committed for trial or his solicitor or counsel to answer a question at a pre-trial conference may be used in any subsequent trial or shall be made the subject of any comment at that trial.[632] Where the parties agree, the judge may direct that for the purposes of the trial:

a) a specified fact may be proved in a specified manner which is not in accordance with the rules of evidence;
b) a specified fact is to be treated as admitted or established without proof;
c) a specified exhibit is to be admitted in evidence without proof of its authenticity;

628 Supreme Court Criminal Rules, 1992. A more recent example is that in operation in Victoria under the *Crimes (Criminal Trials) Act, 1999*, which provides for initial and subsequent directions hearings.

629 The hearing is in chambers unless any application under (d) is contested, when the hearing is in public

630 Rule 6.07, Supreme Court Criminal Rules, 1992.

631 Rule 7.07, Supreme Court Criminal Rules, 1992.

632 Rule 7.08, Supreme Court Criminal Rules, 1992.

(d) specified evidence may be read or a specified statement may be tendered without a witness being called; and

(e) with respect to any specified matter or topic the usual and regular course of practice and procedure at the trial may be modified or varied in order to facilitate proof of facts.

765. The Working Group on Criminal Trial Procedure of the Standing Committee of Attorneys General of Australia observed of the South Australia regime that "while it has improved the efficiency of the listing and trial processes, in 1993 a judge of the Supreme Court observed that the procedure had nevertheless fallen a little short of achieving its aims."[633]

766. Issues of effectiveness and expedition in the criminal trial process have been studied quite extensively at national level in Australia. In their Report, the Attorneys General's Working Group sought "in the context of the adversarial system and upon the fundamental premise that an accused is not to be compelled to answer questions or assist the prosecution in proving its case" to "identify practical areas of reform which offer the greatest potential to reduce criminal trial delay while not impacting unfairly upon the right of every defendant to a fair trial."

767. They identified the need for early and complete prosecution disclosure as an essential feature of the system and recommended statutory recognition of the duty of disclosure resting upon both prosecutors and investigators. They considered that one of the most effective means of reducing the cost of the administration of criminal justice would be to identify pleas of guilty at the earliest possible opportunity To that end, the Attorneys General's Working Group recommended a change to a more solution-oriented approach to the provision of legal aid. Such provision would include specific grants for pre-trial dispute resolution and capped grants of aid for trials, and the furnishing to defendants of a tangible and publicly identified discount for early pleas of guilty.

768. In relation to pre-trial procedures, the Attorneys General's Working Group made recommendations designed to identify facts and issues that are not in dispute and, in specific areas, to identify in advance of the trial the particular defence to be relied upon. The prosecution should be required to serve on the accused a final case statement, accompanied by a notice of pre-trial admissions. After this, it should not be permitted to adduce additional evidence unless a reasonable explanation is provided as to why earlier disclosure was not made or if the interests of justice otherwise require that the prosecution be permitted to lead the evidence. Following the filing and serving of the final case statement and notice of pre-trial admissions, a defendant should be required to file and serve a response indicating which of the evidence in the notice of pre-trial admissions and any additional matters is agreed to be admitted without further proof. The defendant would also be required to furnish copies of any expert reports intended to be relied upon and to give notice as to whether any of a number of

633 Standing Committee of Attorneys General, *Working Group on Criminal Trial Procedure: Report* (September 1999), at page 41. The report is available at: http://www.law.gov.au/agd/Department/Publications/publications/pubs.htm.

specific defences – such as self-defence, substantial impairment of mental responsibility, automatism – were relied upon, or whether issues were being taken with certain kinds of technical evidence.

769. The Attorneys General's Working Group sought to encourage compliance with the pre-trial regime by recommending a combination of incentives and sanctions. Where a defendant fully cooperated and was convicted, he should be entitled to a discount on sentence within the discretion of the trial judge. If he declined to identify a specific defence relied upon at trial, he should only be permitted to lead the evidence if a reasonable explanation for the failure to identify the defence during the pre-trial process is given.

770. The Attorneys General's Working Group's recommendations have been the subject of criticism on the basis that they were more suited to complex trials and because they were more bureaucratic and potentially costly in complex trials. It was also claimed that insofar as defence disclosure was concerned, they were inconsistent with the fundamental premise that an accused should not be compelled to answer questions or assist the prosecution in the proving of its case.[634]

Pre-Trial Procedures on Indictment: Conclusions

771. Differences in the constitutional and legal order, in resourcing arrangements and in "local culture" as Lord Justice Auld put it, all have a bearing on the properties of the model most likely to work in a given jurisdiction. The constitutionally embedded principles of due process to which attention was drawn at the beginning of this Chapter have above all, defined the Working Group's approach to a likely procedural solution.

772. The Royal Commission on Criminal Justice,[635] the Auld Review and the Working Group of the Australian Attorneys-General all felt it appropriate to recommend or endorse legislation expanding upon defence obligations of disclosure, coupled with the availability of sanctions to a greater or lesser degree, to encourage compliance. Matters such as the substantive rights guaranteed to an accused do not in any event, fall within the ambit of an examination of jurisdiction. Quite apart from this consideration, however, the Working Group did not see a basis for contemplating alteration of the present constitutionally ordained balance between the rights of the accused and the legitimate interests of the prosecution in criminal proceedings. Accordingly, we did not entertain the proposition that any change be made to the current extent of the disclosure obligations of the defence, which are at present effectively limited to alibi defence[636] and, in the case of the offence of membership of an unlawful organisation, notification of supporting

634 See Glynn, A.J., "Pre-trial procedures", a paper presented to the Criminal Trial Reform conference of the Australian Institute of Judicial Administration at Melbourne, 24th - 25th March, 2000. The conference papers are available at http://www.aija.org.au/ctrprog.htm.

635 Professor Zander dissenting.

636 Section 20, *Criminal Justice Act, 1984*.

witnesses.[637] By the same token, the Working Group does not consider that a pre-trial hearing mechanism should be accompanied by a facility for the court to impose sanctions or penalties for failure to cooperate with the aims of the mechanism. The introduction of sanctions designed to pressure an accused or his legal representative to reach agreement with the prosecution on an issue or to comply with a timetable would very likely operate to redraw the balance adversely for the accused.

773. On the other hand, as has been seen, statute[638] already opens the way for an accused to benefit from an early plea of guilty. Aside from this, it has been represented to the Working Group that early guilty pleas are significantly influenced by the degree of disclosure by the prosecution of the nature and extent of the evidence against the accused. The pre-trial hearing should improve the conditions necessary for the defence to make an informed assessment of the arguments for and against an early plea.

774. A pre-trial procedure has the potential to reduce the need for determination in the course of trial, by way of a *voir dire*, of issues of admissibility of certain categories of evidence. Clearly, some admissibility issues may arise during, or may appropriately only be resolved at the trial itself. Others such as the determination of the validity of a warrant or other legal instrument, or of evidence within a chain, may be disposable in advance of trial, and a pre-trial hearing should provide an effective vehicle for this.

775. The Working Group would recommend that a Preliminary Hearing be introduced in all cases on arraignment with the following functions:

- to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations;
- to identify areas in which evidence should be agreed or admitted under the *Criminal Justice Act, 1984*, sections 21 (proof by written statement) and 22 (proof by formal admission), including admission of expert reports;
- to identify any evidence which might require to be taken by video-link and to make arrangements for the taking of such evidence;
- to ascertain any other arrangements, whether for information and communications technology, interpreters, or otherwise, which may require to be made for the trial;
- to enable the determination of those types of issue of admissibility of evidence which by their nature are capable of being dealt with prior to trial;
- to receive and deal with a plea or fix a hearing for sentencing;
- to identify any issue of fitness to plead which may arise; and
- to enable the court to establish the likely length of the trial.

776. The above list is not intended to be exhaustive. Other applications, (e.g. for a stay or dismissal, transfer of trial venue, for separate trials or for transfer

637 Section 3, *Offences against the State (Amendment) Act, 1998.*

638 Section 29, *Criminal Justice Act, 1999.*

of an indictment from one indictment jurisdiction to another) may be made at any stage up to and including trial. The Preliminary Hearing would, however, serve as a means of concentrating the efforts of prosecution and accused in resolving those issues which it would be proper and feasible to finalise in advance of trial. An example of such a matter is the taking of depositions to which the County Registrars' Association has drawn attention. Identifying the need for the taking of depositions at such a hearing sufficiently in advance of the trial date should assist in avoiding postponement of the trial.

777. The Working Group is of the view that co-operation by an accused, having received legal advice, with the objectives of the Preliminary Hearing should be recognised in law as a factor to which the trial court may give consideration when imposing sentence in the event of a conviction, in the same way as it may take into account the stage at which a plea of guilty is made.

778. The Preliminary Hearing should be introduced on a pilot basis in one court of the Circuit Court in Dublin, in one Circuit of that Court outside Dublin, and in one court of the Central Criminal Court. For purposes of continuity and to assist in monitoring of the pilots, it is important that specific judges and court registrars be assigned to each pilot. The pilot exercises should involve the logging of data on the actual timescales for specific stages of the pre-trial process, on the frequency of adjournments, and on the level of costs incurred.

779. The Preliminary Hearing should take place at an early stage after arraignment, ideally within two weeks thereafter. While desirable, it may not be practical to expect that the hearing be before the trial judge. Furthermore, in view of the limited judicial resources in circuits outside Dublin, and the different listing arrangements for trials on those circuits, it is acknowledged that it may not be feasible to hold preliminary hearings outside Dublin. However, the holding of the Preliminary Hearing within a short period of arraignment is considered essential in order to generate the benefits of early identification of issues. Quite apart from this, the fixing of such a hearing close to the trial date would be counterproductive, in that it would encourage the deferring to the later hearing of pleas which currently are made at arraignment stage. Working Group suggests that the timing of the hearing in the Circuit Court and Central Criminal Court should for the duration of the pilot exercises be fixed by practice direction by the President of the Circuit Court for that court and by the President of the High Court in consultation with the judge in charge of the list in the Central Criminal Court, for the latter court. The pilots should identify the optimal date for the hearing which should be fixed, whether by rule of court or further practice direction, for the longer term.

780. The fullest cooperation from both branches of the legal profession will be essential to the success of the pilots. Also of significance will be the function of the judiciary in demonstrating the value of, and encouraging commitment to the project. In this latter regard, there may well be a role for the Judicial Studies Institute in providing training and inviting judges from neighbouring jurisdictions to impart their experience in operating pre-trial regimes in criminal cases. The retention of suitably specialised staff from one of the University Law Faculties to conduct and report on the monitoring exercise should be considered with a view to ensuring an expert and objective evaluation of the exercise.

781. Insofar as the participation of practitioners is concerned, it is important that the hearing be attended by counsel who will be (a) familiar with the case; (b) scheduled to attend the trial and (c) sufficiently instructed in the matter as to indicate the client's position, including the making of a plea. This in itself presupposes that counsel will have had an opportunity to be briefed on the case by the instructing solicitor. In the case of legally aided accused, this would require that legal aid arrangements would permit the payment of an appropriate fee to counsel for the hearing. Provision under the criminal legal aid scheme to involve counsel prior to briefing for hearing would enable evaluation of the case and facilitate an early plea where appropriate. While this may be seen as generating additional expense to the Exchequer, the Working Group is of the view that the possible savings from avoidance of collapsed or prolonged trials justify the expense.

Electronic Recording of Interviews

782. While statistics on the subject are unavailable, it is apparent to the Working Group that issues of admissibility of evidence generated in the course of police interviews of suspects represent a quite significant source of applications for a *voir dire* in the course of trials on indictment. The determination of such issues involves the hearing of argument in the absence of the jury over periods which may run into several days, with consequent disruption of the trial schedule, extra costs, time and inconvenience.

783. Experience elsewhere suggests that the incidence of the *voir dire* is substantially reduced, if not virtually eliminated, by the introduction and conduct of video-recorded interviewing of suspects and associated individuals. In November 1989, the Minister for Justice established a Committee to Enquire into Certain Aspects of Criminal Procedure, chaired by His Honour Judge Frank Martin, the Terms of Reference of which included the following:[639]

> "Given that uncorroborated inculpatory admissions made by an accused to An Garda Síochána can be sufficient evidence to ground a conviction, to examine whether additional safeguards are needed to ensure that such admissions are properly

639 Second head of the Terms of Reference.

obtained and recorded and to make recommendations accordingly".

784. In considering experience in other common law jurisdictions, the Committee noted that a Canadian pilot project in audio-visual recording of interviews caused the need for a trial within a trial entirely to disappear.[640] In the United Kingdom, the Philips Royal Commission in 1981 proposed a very limited experiment. A much larger experiment in 1984 appeared to be very successful.[641] From 1992, tape-recording became compulsory for all interviews with persons charged with offences that can be tried on indictment. It is not required for interviews with suspects in summary only cases but in practice such interviews are usually also tape-recorded.

785. The Martin Committee reported in March 1990, recommending that the questioning of suspects take place before an audio-visual recording device. The Committee further recommended that a pilot scheme be initiated in selected Garda stations with a view to implementation. The Committee recommended that a comprehensive set of rules for the conduct of interviews recorded in such a manner, as well as for the retention and production in court of the recordings, be drawn up.[642] The Committee also noted that "special considerations may apply in cases of organised crime and offences committed by terrorists and that these may require special treatment or special provisions."[643]

786. In light of the Martin Committee Report, the Government approved "the introduction, on a pilot basis in selected Garda stations, of both audio and audio-visual recording of the questioning of suspects, subject to such special arrangements as may be necessary in respect of cases of organised crime and offences committed by terrorists." In March 1993, it established a Steering Committee for that purpose under the chairmanship of His Honour Judge Esmond Smyth. That Committee has furnished two detailed Interim Reports, the second of which, following the conduct of pilot schemes in selected Garda stations in Dublin, recommended commencement of a national scheme for the electronic recording of Garda questioning of detained persons. It recommended that it should operate in accordance with the provisions of the *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997* and should apply wherever persons are detained under section 4 of the *Criminal Justice Act, 1984;* section 30 of the *Offences against the State Act, 1939,* as amended; section 2 of the *Criminal Justice (Drug Trafficking) Act, 1996;* or section 2 of the latter Act as modified by section 4(3). This was subject to an amendment being made to the 1997 Regulations to allow for off-camera interviews in order to secure confidential information in situations where lives are at grave risk and where such information might not be forthcoming when electronic recording is being used. The Committee recommended retention of the requirement under the Judges' Rules to maintain a contemporaneous note of any statement made by a detained person in the context of a national scheme of audio or video recording.

640 Martin Committee Report, *Report of the Committee to Enquire into Certain Aspects of Criminal Procedure*, (Department of Justice: 1990), at page 35.

641 According to Professor Zander, who dealt with this topic in his paper to the November conference of the Working Group.

642 At pages 33-39 of the Report.

643 *Ibid*, at page 39.

787. The Committee noted that the pilot project had focused exclusively on the impact of recording in Garda Síochána stations. It also noted that no analysis of its effect at court level had been undertaken due to the small number of pilot scheme cases appearing to date before the courts. The Committee considered it important that the experience of tape-recorded evidence at court be assessed, directed in particular to the following issues:

- whether electronic recording affects decisions to prosecute such cases;
- whether tapes – all or part – are played in court, and, if so, at which party's request;
- whether tapes – all or part – are played for the trial judge only, as part of a trial within a trial;
- whether questions are raised about the adequacy of contemporaneous notes of Garda interviews, in the context of the availability of an electronic recording;
- whether transcripts are required to be provided to the accused, the defence, the Director of Public Prosecutions, or the court;
- whether admissions are made off-tape – for instance on the way to the Garda station and whether this has an effect on the acceptance or validity of taped evidence;
- whether the issue of the chain of custody arose in court; and
- whether electronic recording affects the rate of conviction, compared to rates of conviction in cases without the involvement of electronic recordings.

788. The present position is that a target for deployment of audio-visual devices in 150 stations was set for July 2002. It is understood that as of March 2003 some of 225 rooms in 128 stations have been equipped with the devices, of which 222 rooms are in use. This approximates to a level of deployment considered to be optimal. Approximately 9,000 Gardaí have been trained to conduct questioning using the devices.[644]

789. The Working Group considers that the active utilisation of electronic recording by audio-visual means should be promoted in the interviewing of all suspects, at the least in cases of offences triable on indictment. The Working Group understands that research into recording of interviews in England did show that too many police interviews were poorly prepared and ineptly handled,[645] and emphasises the importance of adequately resourced training in the proper use of equipment and presentation of the record of the interview.

Rules of Criminal Procedure

790. In the course of its consideration of the criminal justice module – and in particular the area of trial process – the Working Group has been conscious of the absence of a comprehensive code of procedure for the initiation and conduct

644 Source: Department of Justice, Equality and Law Reform.

645 Baldwin, J., *Video Taping Police Interviews with Suspects – an Evaluation* (Home Office Police Research Series, Paper No. 1, 1992).

of criminal proceedings. Such provisions as to criminal procedure as exist are largely a product of primary legislation, much of which has been mentioned in this Report. This problem is not unique to Ireland. In his Review of the Criminal Courts, Lord Justice Auld recommended the consolidation of the primary and secondary legislation as well as the significant common law rules governing criminal procedure. He also recommended the drafting by a new Criminal Procedure Rules Committee of a single code of criminal procedure.

791. The Working Group is aware that the Committee on Court Practice and Procedure is at present considering the future shape and functions of the courts rules-making committees and does not wish to encroach upon those deliberations. However, the Working Group is convinced of the need for a comprehensive and coherent code of rules of criminal procedure, an object which could be achieved under the existing rules-making arrangements by appropriate liaison between the three jurisdiction-based rules committees of the courts.

CHAPTER SEVEN

Statistics

Introduction

792. While some of the conclusions arrived at by the Working Group in this Report are necessarily an exercise in value judgement, the Working Group has sought to base its reasoning on actual information retrieved from the operation of the criminal courts. It has also tried to take account of the views of those working in the area day to day. The results of the statistical research and inquiry carried out by the Working Group are referred to throughout this Report as appropriate. But the process of eliciting such information, and the significance of statistics in any process of continuing appraisal of the operation of those courts, are of sufficient importance as to merit separate comment.

Present Arrangements

793. The extent and manner of collecting statistics relating to criminal proceedings vary as between the several court jurisdictions.

The District Court

794. The District Court's operations are divided geographically into 24 Districts,[646] subdivided into Areas, of which there are 202, served by a total of 42 Offices or Clerkships. The Dublin Metropolitan District comprises one Area. Outside Dublin, a District Court Office may administer the business of several Areas belonging to different Districts. For example, District No. 16 – North Wicklow and North Kildare – is served by two Offices covering five Areas. Each Office is responsible for making statistical returns in respect of the individual Areas for which it is responsible. Until 1999, statistics were collated centrally by reference to the Office concerned, rather than the Areas or Districts. Since then, the criterion for collation at central level has been the Area.

795. Statistics on cases are recorded by case outcome or result. In addition to four result types for summary cases and indictable cases tried summarily: *viz.* Imprisonment/Detention; Fines; Community Service and Other – Probation, etc.), figures for numbers of returns for trial made and informations refused in indictable cases are recorded. At present, the only information related to a defendant/accused is that recording committals of or refusals to commit juvenile offenders. A significant limitation of the system is that it records by result only and does not record the number of cases initiated and pending.

646 One District Judge is allocated to each District, with the exception of the Dublin Metropolitan District – covering almost the entire county of Dublin, and extending to Leixlip and Balbriggan – to which 15 are assigned, Cork City – to which three are assigned – and Cork County – to which two are assigned.

796. The present computerisation arrangements in the District Court are somewhat complicated. With the exception of Dublin and Limerick, District Court Offices have operated an automated Fines and Warrants System, which records the results of summonses and charge sheets, and produces fine notices and warrants. Each summons is recorded as a separate case. So the issuing to a single defendant in one road traffic incident of several summonses will give rise to several cases – although all summonses may be disposed of at the same hearing. While the system does not generate the four result types for summons cases referred to above under categories of offence, it is possible to extract a breakdown of results by offence, as it employs the same offence codes used by An Garda Síochána.

797. In 1999, a new Criminal Case Tracking System (C.C.T.S.) was deployed and is currently operational in the Dublin Metropolitan and Limerick District Court offices – which together account for approximately one half of District Court business. The C.C.T.S. is an Oracle Relational Database and is designed to utilise modern database capabilities and to allow the Courts Service to achieve a centralised and uniform collection of data on criminal cases. This system is expected to undergo continuous development in the light of changing business needs. It is intended that the Fines and Warrants System in the country offices will eventually be replaced and its functionality integrated into C.C.T.S. The system does not incorporate a management information application. Statistical information is retrieved by writing and sending a query to the system's database using separate (S.Q.L.-based) interrogation software. Utilising this method, an extensive range of data – including offence categories, locations and dates of offence – is capable of being extracted from C.C.T.S. using this method. Information retrieved from C.C.T.S. is also result-based.

798. Quarterly returns are made on (a) the number of defendants granted bail and (b) the amounts of bail fixed.

799. Information on the length of time taken between the issue of proceedings or – in the case of a charge sheet – first court appearance and the hearing is not at present provided from automated records. The extent of case information gathered in the District Court is at present under review by the District and Circuit Courts Directorate of the Courts Service. It is considering expanding the categories of results generated and breaking them down by reference to general offence categories, pleas and trials. An analysis of the imprisonment results by length of sentence and the fines results by amount of fine is also being considered. Information on timeframes from commencement of proceedings until first listing and from first listing to disposal will be recorded. These plans are contingent on the sourcing of a management information application for the system.

The Circuit Court

800. The Circuit Court records criminal cases by reference to indictment rather than the number of counts comprised in an indictment. Unlike the District Court, provision is made for cases brought forward and new cases received in the relevant period. Bench warrants executed are counted as a separate case. Cases are categorised as (i) new cases sent forward for trial; (ii) trials received on transfer (Dublin only); (iii) cases brought back for review; (iv) cases adjourned for sentencing and (v) appeals from the District Court. The results of cases are broken down as between (a) full jury trial (conviction/acquittal/conviction recorded but adjourned for sentencing); (b) change of plea to guilty plea at or during trial and (c) guilty plea in District Court or at arraignment.

801. Cases are not broken down by reference to offence. But at the request of the Department of Justice, Equality and Law Reform, records are kept in relation to serious drug supply offences under the *Misuse of Drugs Acts 1977* and *1984*. A record of convictions of particular defendants for sexual offences is now required to be maintained.

802. Estimates of waiting periods between the time cases are ready to proceed to trial and listing for trial, and of waiting periods between lodgement of appeals and listing for hearing, are recorded for each quarter.

803. All Circuit Court statistics are collected manually and it is not therefore possible to drill down into the information available by means of an interrogation tool. The Dublin Circuit Criminal Office is developing a Lotus Notes-based case listing system as an interim measure pending deployment of a tailor-made criminal case tracking system for that Court. But the management information retrieval capability of the former is likely to be quite limited.

The Central Criminal Court

804. This Court maintains the most comprehensive statistics on criminal proceedings. Although the Central Criminal Court office does not have a computerised case tracking system, a case by case record of the bill of indictment, defendant, charge, sentence on individual counts in the indictment and date of sentence is recorded on computer. Annual statistics, broken down between (a) murder and (b) rape and sexual assault cases, are returned. They show (a) cases outstanding at the beginning of the year; (b) cases received during the year; and (c) cases completed during the year.

805. Detailed annual statistics on manner of case disposal and case results are maintained, broken down as between murder and rape/sexual assault cases, categorised initially as (a) Guilty pleas; (b) Trials; (c) Nolle Prosequi entered; (d) Defendant deceased; and (e) Other. The results are further broken down by individual offence convicted, *Nolle Prosequi* entered, acquittal, and sentence (life; ten years or over; five years and over but less than ten; two years and over but less than five; detention at the pleasure of the Government, and other).

806. An indication of the waiting period for the trial of a case in the Central Criminal Court at any point in time is provided by the trial date given for the last case assigned for trial.

The Court of Criminal Appeal

807. Cases are categorised by (a) appeals (broken down as between the Special Criminal Court, the Central Criminal Court, the Dublin Circuit Court and other Circuit Courts, appeals on certificate under section 31 of *The Courts of Justice Act, 1924*,[647] appeals against alleged undue leniency of sentence under the *Criminal Justice Act, 1993* and appeals on grounds of miscarriage of justice or excessive sentence under the *Criminal Procedure Act, 1993*) and (b) other applications broken down as between applications for leave to appeal refusal of certificate; applications to extend time for appeal; applications for bail; other interlocutory applications; and applications for certificate under section 29 of the 1924 Act.[648]

808. Case results are categorised by (a) appeals and (b) applications for leave to appeal. Case results are not broken down by reference to the trial court. Appeal results are broken down into:

(i) conviction and sentence quashed; and
  (a) appellant released,
  (b) retrial ordered;
(ii) conviction affirmed but sentence varied;
(iii) appeal withdrawn; and
(iv) appeal dismissed.

809. Results of applications for leave to appeal, which are invariably treated as a hearing of the appeal, are broken down into:

(i) conviction and sentence quashed, and
  (a) appellant released,
  (b) retrial ordered;
(ii) conviction quashed and fine set aside;
(iii) conviction affirmed but sentence varied;
(iv) order varied;
(v) application withdrawn;
(vi) application refused; and
(vii) application struck out.

810. Results of other applications are recorded as being granted or refused. A significant limitation arises from the fact that results are not recorded by reference to the trial court from which the appeal originated. The Office of the Court of Criminal Appeal does not have a computerised case-tracking system. All statistics are collated manually.

811. Indicative time scales can be given for waiting times to appeal or review hearing as at a particular date

647 Which category appears to encompass the previous category of appeals from the Central Criminal Court.

648 I.e. for leave to appeal to the Supreme Court.

Research and Inquiry

812. The Working Group took the view at the outset that it would be essential to the effectiveness of its inquiry to obtain an accurate statistical profile of the volume and disposal of cases in the various court jurisdictions. The information sought would also require as far as possible to be relevant to the criteria of fairness, expedition and economy contained in the Terms of Reference. It was apparent that the existing body of statistical information – even assuming its accuracy – would not suffice to meet this requirement. It was also recognised that raw data might not ultimately be available to provide answers to the questions which should be addressed, and that statistics alone might not – in any event – be capable of providing answers. The Working Group considered therefore, that the statistical inquiry should be complemented by a questionnaire-based survey of a range of participants in the criminal justice system.

813. By way of a public tendering exercise, the Working Group sought to recruit suitably qualified experts to carry out the statistical survey exercises, and in particular to provide:

(a) advice and assistance in the formulation by the Working Group of detailed lines of inquiry into the manner of operation of the various court jurisdictions dealing with criminal matters, both at first instance and on appeal;
(b) Arising from the lines of inquiry formulated in accordance with (a):
  (i) drafting of queries to be addressed to the databases maintained by the Courts Service in respect of criminal cases in the various court jurisdictions, or, where required, of other agencies concerned with the administration of criminal justice;
  (ii) drafting of queries to be employed in retrieval of information on such cases from manual case files, charge sheets and other court records, or, where required, from the other agencies referred in the preceding paragraph hereof;
(c) advice and assistance in the preparation of questionnaires to be addressed to participants in the system of administration of justice, including judiciary, prosecution lawyers, defence lawyers, An Garda Síochána, and such other respondents as the successful tenderer might advise be selected;
(d) advice and assistance on the appropriate methodology to be employed in conducting statistical research and inquiry in respect of the various court jurisdictions dealing with criminal matters, including, where appropriate, selection of representative pilot sites and sampling techniques;
(e) advice and assistance on compliance with best practice in the retrieval and collation of information whether from databases, manual records or questionnaires, and;
(f) analysis and evaluation of the information thus retrieved and collated.

814. Professors John Jackson and Sean Doran of the Institute of Criminology and Criminal Justice, Queen's University, Belfast, were selected to provide the services concerned. The Professors are experts of international repute on criminal justice systems.

815. In liaison with the Courts Service operational directorate concerned, a number of District Court sites were selected which were considered to be broadly representative of five District Court business areas, at Dublin Metropolitan Area, City, County Town, Rural Town and Village level. The sites selected – Dublin Metropolitan District including Chancery Street Courts and Cloverhill, Limerick City, Wexford, Athlone, Tubbercurry and Swinford – were chosen to reflect the following criteria:

- District Court Areas have caseloads ranging from a few hundred cases per annum up to several thousand each year in some Areas. Sites with small, medium and large caseloads were required;
- A representative geographical spread would be required;
- Sites would require to dispose of staffing resources such as would ensure the collection of statistics in an effective and accurate manner; and
- The workload of each chosen Area would be broadly representative of the workload of District Court Areas.

816. The month of February was chosen as a statistical basis for the Dublin and Limerick sites and the period from the 1st January 2002 to the 31st March 2002 was selected for the remaining sites.

817. In the Circuit Court, a data extraction exercise was carried out in respect of cases disposed of and timing of pleas for the period from the 1st January 2002 to the 31st March 2002. In addition, the cases from the District Court sample were tracked through to the Circuit Court, and outcomes recorded. A manual examination of cases disposed of in the Dublin Circuit Court in 2001 was conducted to remedy inaccuracies in the published statistics identified in the course of the inquiry.

818. Statistics on cases disposed of in the Central Criminal Court were procured for the years 1998 to 2001, inclusive.

819. Details of trial lengths within ranges were compiled for the Circuit Court and Central Criminal Court for 2001, enabling comparisons to be made as between those courts.

820. Court of Criminal Appeal statistics on appeals and reviews for the years 1998 to 2001 were obtained.

821. In the survey exercise, questionnaires were distributed to 1,297 respondents, of whom 407 responses were received. This represented an overall response rate of 31.4 percent.

822. The full text of the Professors' Report, entitled *A Study of the Jurisdiction of the Criminal Courts in Ireland*, is contained in Appendix V, separately paginated.

Criteria for Measurement

823. The full utilisation of the potential of the C.C.T.S. and its further deployment nationwide will be an essential tool in the capture of the necessary data at the various stages of processing of cases up to and including trial. No less important however, will be the establishment of a list of criteria as to the data requiring to be captured and of protocols which would ensure accuracy in its retrieval. The statistical research exercise conducted by the Working Group has demonstrated a pressing need for the formulation of common measurement criteria on caseloads, to enable accurate comparisons of the processing of and outcomes in respect of cases as between jurisdictions, and the tracking of cases sent forward from the District Court for disposal in the indictment jurisdictions.

824. The current unit of measurement of caseload in the District Court is the offence, whereas that used in the Circuit Court is the indictment. Jackson and Doran have adverted to the absence of a common criterion for measurement of case disposals as being a significant limitation upon their ability to identify and analyse comprehensively case disposal trends in the Circuit and District Court jurisdictions in particular (Chapter 9.25 of their Report). The Working Group appreciates the difficulties inherent in choice of a defendant-based criterion for measurement, in view of the absence of unique identification arrangements for individuals and the possibility that an individual may face charges ranging across the offence categories, which may be disposed of variously in a summary manner or on indictment. An offence-based approach to measurement can give a distorted impression of workloads – especially in the summary jurisdiction, where it is normal practice to issue a summons or charge sheet in respect of each offence. As Jackson and Doran have indicated, a case-based measurement would provide the most effective means of assessing the manner in which caseloads are processed within a jurisdiction.

825. Verified statistical information of a qualitative kind on the actual conduct of criminal proceedings is conspicuously lacking in the Irish Courts system at present. As has been mentioned, details of waiting times published by the Courts Service for the District Court and Circuit Court[649] are based on estimates, and however well-founded those estimates no systematic arrangements exist by which accurate average waiting periods can be established based on data on timeframes inputted. The duration of the Working Group's deliberations would not have afforded the possibility of producing reliable information over a sustained period of time on pre-trial and trial delays in proceedings.[650]

826. The capture of information on the salient event dates within criminal proceedings in the case tracking system is an essential tool in measuring the efficacy of or

649 See Appendices V and VI, Courts Service Annual Report, 2001.

650 A study of individual cases coming before Limerick Circuit Court in a three month period in 1998 was initiated by the Centre for Criminal Justice, University of Limerick, involving a comprehensive analysis of the investigative, pre-trial and trial stages. As of May 2003 it is understood that this has yet to be completed.

identifying delays and weaknesses in procedures. In the District Court, such events would likely include in the case of summary offences: individual adjournments; date of entry of plea; trial date and date of disposal. For indictable offences triable summarily, they would include, additionally: the issuance or refusal of prosecution consent to summary disposal; refusal of jurisdiction by the District Judge; and indeed return for trial on indictment as the case may be. In the case of indictable only offences, the date of first appearance adjournments and the return for trial would require to be captured. Some of these events are already capable of entry as optional fields in the case-tracking system. In cases on indictment generally, the date of service of the book of evidence and of any supplementary evidence should also be recorded. The recording of the reason for an adjournment from a set of standard options would be informative as to the cause of delay.

827. The Working Group is also aware that the Courts Service is concerned that qualitative information retrieval of the kind referred to above should be provided from its case-tracking systems. This will require the mapping of each relevant procedural step in the proceedings. This process of event-capturing presupposes of course that clear, adequate and accurate records are maintained in and out of court of the various stages in the proceedings. It also assumes that this may be achieved by a combination of user interface design and an emphasis in training and managing staff on the need for accuracy in capturing data.

Operational Responsibilities

828. The Courts Service has itself acknowledged the need for a more comprehensive range of statistics on the caseload of the various court jurisdictions – not merely to meet operational information needs but with a view to addressing as far as practicable the legitimate information requirements of other bodies for which the Courts Service may be the only source of such information. In March 2002 the Chief Executive Officer, Mr. P.J. Fitzpatrick, established a Statistics Committee composed of senior Courts Service personnel from operational and support areas. Its purpose was to expand the range of data which should be captured within the C.C.T.S., determining the protocols which would be required to facilitate accurate retrieval of data, and assessing the implications this would have for the Courts Service's information technology arrangements. The Working Group welcomes this development and trusts that the necessary resources will be made available to ensure the success of this endeavour.

829. A task of no less importance for the Courts Service however, will be to inculcate at operational levels a commitment to accuracy in the recording of statistics. The Working Group wishes to record its appreciation of the considerable assistance afforded during the last year by the Director of Circuit and District Court Operations and his staff. The support of the staff of the Courts Service I.C.T. department in the assembling and collation of data for the purpose of the

statistical inquiry carried out by Jackson and Doran is also appreciated.

830. Reference was made earlier in this chapter[651] to difficulties regarding the accuracy of statistics published in relation to the criminal caseload of the Dublin Circuit Court which necessitated a manual review and revision of those statistics. It may be that given the pressures of dealing with the daily caseload the meticulous recording of information in reports of case results can slip down the order of operational priorities.

831. However, it should be a key responsibility of line managers at operational level to ensure, both by training and through periodic verification and review, that the practice of recording of statistics by staff is consistent, comprehensive and accurate. Line managers should be accountable for the quality and timely production of statistics generated by their offices or units to their respective Directors of Operations. The Working Group notes the personal interest taken by the Chief Executive Officer of the Courts Service in this issue, which is indeed of sufficient importance to merit that it should ultimately be overseen by the Chief Executive Officer.

Cooperation with other Agencies and Interests

832. More recently, the Minister for Justice, Equality and Law Reform established an inter-agency Expert Group on Crime Statistics to make recommendations on the collation and presentation of information relating to reported crime. The Courts Service is represented on this Group. While the main focus of the Group is on crime statistics collated by An Garda Síochána, it is envisaged that the Courts Service will in the future be in a position to provide enhanced statistics to the key stakeholders within the criminal justice system and the wider research community through interrogation of the C.C.T.S. In the course of its deliberations, the Working Group was conscious of the considerable interest on the part of interest groups and academics in the statistics emanating from the Courts Service.

833. In England and Wales, the Home Office has a dedicated Research and Planning Unit, which engages in research projects and publishes results on a continual basis. Research is conducted by universities. As a result, the various investigating groups, committees or Royal Commissions have had access to a rich seam of data which has assisted or complemented the research they have commissioned. Although not all research material is useful or even reliable, good statistics are an essential basis for making policy decisions. The Working Group on a Courts Commission in its Sixth Report noted that "policy reform, research, accountability and provision of adequate services cannot take place without accurate statistics from the courts on a regular basis."[652]

651 At paragraph 819.

652 Working Group on a Courts Commission, *Conclusion,* Sixth Report (November 1998), at page 73.

834. Changes should not be made to the legal system without an essential body of predictive information. Resolution of debate on key issues of expedition, fairness and economy in the functioning of the courts will often rest upon interpretation of statistical information, and it is therefore essential that the Courts Service, as the sole custodian in many cases of the data, maintains its awareness through liaison with other agencies, interest groups and research institutions of the areas in which data needs to be captured and retrieved.

Dissenting Statement

The Director of Public Prosecutions welcomes the Report of the Working Group which provides a detailed, comprehensive and well-researched analysis of many aspects of the criminal justice system. He fully supports the intent behind most of the recommendations, while not necessarily endorsing each and every detail of the Report.

There is one major issue in the Report on which the Director thinks it necessary to record a dissent. This concerns the recommendation regarding the extension of the right of the defendant to elect for trial by judge and jury.

The Director welcomes the identification in the Report of the need for adequate pre-trial procedures. There is no difference in principle as between the majority and the Director concerning the fundamental importance of this issue. However we do have some concerns as to the likelihood of the procedure which is actually proposed operating effectively. We do not share the optimism of the other members of the Working Group in this regard. We regard the majority's proposal as too weak and as falling short of what is required. We believe that a bolder and more effective solution should be adopted.

Summary Jurisdiction

Right of Defendant to Elect for Trial by Judge and Jury in all Indictable Cases

Recommendation at Paragraph 312

The Director of Public Prosecutions is not in agreement with the proposal of the Working Group that in all cases where the law provides for trial either in a summary manner or on indictment an accused person should be entitled to opt for trial by judge and jury. A right of election for trial by judge and jury in all cases involving hybrid offences is neither necessary nor desirable. Having regard to the levels of satisfaction among practitioners with the system as it now stands, evidenced by the Working Group's own research, we can see no compelling justification for such a radical recommendation.

Furthermore, the Director has concerns about the practical effects of implementing this proposal. Insufficient research has been carried out into the practical implications of extending this right across the full range of hybrid offences. While accepting that the current research shows that the tendency for defendants to elect for trial by judge and jury is quite low, the enlarging of this right across the full range of offences must have an implication for the numbers of cases being dealt with on indictment. No exercise to attempt to calculate the potential impact has been carried out. In this regard we believe that the statement elsewhere in the Report[653] that changes should not be made to the legal system without a minimal body of predictive information, is the correct approach to take.

653 At page 25.

In particular, insufficient research has been carried out into offences outside the area which was the traditional subject of the criminal law, particularly regulatory offences covering such matters as company law, competition law, or environmental law.

The law at present draws a distinction between offences where the choice of venue is with the Director of Public Prosecutions and offences where the accused has a right to be tried by a judge and jury regardless of the Director's views. In this dissenting statement we refer for convenience to the first category as hybrid offences and to the second category as either-way offences although these terms are often used as synonyms.

The Working Group's proposal is supported by the following argument:

> "It seems to the Working Group that the inconsistency so described offends against basic principles of fairness and justice. Accused persons should be treated equally by the criminal justice system. Put otherwise, they may be treated differently only on the basis of objective and rational criteria. Where a decision has to be made as to whether a case is to be tried summarily or by a jury, a fundamental constitutional rule is at issue. All accused persons are entitled to rely on the same rights. Assuming that there should be a consistent rule, the question is which of the alternative systems corresponds most closely with the interests of fairness and justice. This is not to forget the criteria of efficiency and economy, but fairness and justice are the prime considerations." (At paragraph 309 of the Report)

We do not believe these arguments are well founded. In the first place, the Constitution guarantees trial by jury *save in the case of minor offences* (italics added). The Working Group – in paragraph 315 – when discussing the constitutional right to trial by jury, ignores the fact that the Constitution expressly permits summary trial for minor offences. The Report is written as though trial by jury were the constitutionally preferred system and summary trial for minor offences a slightly suspect procedure with a dubious constitutional pedigree.

A constitutional issue would arise from the guarantee of trial by jury if the system permitted non-minor offences to be tried summarily. The present system contains a triple safeguard against this happening. Firstly, the Director, as the Working Group acknowledges, must and will act constitutionally by choosing summary trial only for minor offences. Secondly, the District Court judge may not consent to summary trial, unless the offence is minor. Thirdly, the judge's decision is subject to judicial review. This is so regardless of whether the offence is hybrid or either-way.

The Working Group argues that the present arrangements offend against the principle of equal treatment before the law. But the constitutional guarantee of equal treatment is of equality between persons, that two persons similarly placed will be treated the same. The present system meets that criterion. Each person, charged with any particular

offence is treated according to the same principles as any other person charged with the same offence. For example, every person charged with theft is entitled to trial by jury. No person charged with simple assault under section 2 of the *Non-Fatal Offences against the Person Act, 1997* is so entitled. Every person charged under section 3 of the same Act will have the quality of the offence as minor or non-minor assessed by the prosecutor, by the District Court judge, and by any judge conducting a judicial review, according to criteria which are the same for every person.

There is no constitutional principle which requires that an offence of one particular kind must be treated in the same manner as an offence of a different kind. The words of Chief Justice Ó Dálaigh in *The State (Hartley) v Governor of Mountjoy Prison*,[654] rejecting the argument that it was an unconstitutional discrimination for the State to have different extradition arrangements with different countries, are directly in point:

> "A diversity of arrangements does not effect discrimination between citizens in their legal rights. Their legal rights are the same in the same circumstances. This in fact is equality before the law and not inequality…"

While there may be a degree of illogicality in the allocation of certain offences to one category rather than the other, it is not in itself anomalous to have different categories and different procedures for each category. The moral quality of some offences is such that even a minor infringement may have serious consequences for a defendant. Theft and fraud, for example, always entitle an accused to a jury trial, even where the amount stolen is small. It is suggested that such an approach can be justified because of the stigma which attaches to any person who is found to be a thief. It does not follow from the existence of such a right in relation to theft and fraud offences that a similar right needs to be extended to every other hybrid offence.

It may be that there are some hybrid offences where it is considered that the accused ought to have a right to jury trial but under the present law does not. If so, the law can easily be changed to bring this about by a simple addition to the First Schedule to the *Criminal Justice Act, 1951* which would change the offence in question from a hybrid to an either-way offence. Indeed, this can be done by Ministerial order.

In the Director's view any change in the law should be evaluated by reference to the nature of the offence in question, including its moral quality. The "one-size fits all" approach advocated by the Working Group is inappropriate. It is neither necessary nor desirable to give the right to trial by jury in every case where an offence may be tried either summarily or on indictment. It would make no sense, for example, that a company charged with failure to file its annual report on time, which is triable either summarily or on indictment, should have the right to insist on a trial by jury, particularly when the only punishment which can be imposed on a company regardless of the venue of trial is a fine.

The operation of the *Casual Trading Act, 1980* is an illustration of the potential difficulties of the Working Group's recommendation being adopted. That Act had to be amended

654 Supreme Court, unreported, 21st December 1967.

when it became unworkable due to defendants electing for trial by judge and jury in what were clearly very trivial cases.

The discussion of the James Committee at paragraph 266 and the quotation from its report regarding regulatory offences offers a possible solution to the issue of the defendant's right to trial by judge and jury:

> "As a result the scheduled offences tend to be concerned with behaviour that is inherently criminal while the hybrid had been more regulatory in character. As a result therefore the scheduled offences tend to be more serious than the hybrid offences although this is by no means an invariable rule…"

We wonder why it would not be possible to leave the hybrid system in place for the great bulk of regulatory offences thus allowing the prosecutor (and of course the judge) the option to proceed on indictment in serious cases without clogging up the system unnecessarily with a multitude of minor cases.

While the preference of the Director would be to leave the present system as it is, subject to the examination of whether certain existing hybrid offences should attract the right to jury trial, he has suggested to the Working Group that a less drastic solution to the problem identified by the majority of the Group might be to confer the right to trial by judge and jury upon all defendants who face charges for hybrid offences where the penalty on summary conviction facing the accused is at least six months' imprisonment. This would automatically exclude the lesser statutory offences, together with all offences, which exist particularly in the regulatory area, where only a monetary penalty is prescribed, including offences when only a corporate defendant is concerned and where, therefore, no penalty of imprisonment can be imposed. Naturally appropriate research would require to be carried out as to the implications of this proposal. However, such a solution would be less drastic than that proposed by the Working Group and would further reduce the risk of offending the Constitution in any particular case by permitting any non-minor offences to be tried summarily.

Acceptance of the Working Group's proposal would create an anomaly far more serious than any which exists at present. Implementation of the proposal would give the accused a right to trial on indictment in relation to hybrid offences even if the only penalty which can be imposed is a fine. However, in the case of many purely summary offences the District Court would still be able to sentence a convicted person to 12 months imprisonment without any entitlement to trial by a judge and jury. There can be no basis of principle for creating such an anomalous result.

Recommendation at Paragraph 322

The Director also has a concern with the way in which the Report proposes in paragraph 322 to extend the right to trial by jury to all persons charged with a hybrid offence. At present, in cases where the accused has a right to jury trial, the scheme under section 2 of the 1951 Act requires that in order for a summary trial to take place

three conditions must be met. The District Court must be of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily. The accused must be informed of his right to be tried with a jury and must not object to being tried summarily. Thirdly, the Director of Public Prosecutions must consent to summary disposal.

The Act is silent as to the order in which it is ascertained whether these three conditions are met. In practice this gives a degree of flexibility to the court. It is accepted that it would make no sense for the court to embark on an inquiry into the minor nature of an offence where either an accused or the Director objects to summary disposal. In many cases the prosecutor will, if asked, be able to signify the Director's consent at the outset because the minor and relatively routine nature of the case means it is within the scope of a general consent issued by the Director. But in other cases which may be on or near the borderline it may make little sense to require the Director to give careful consideration to the question where the accused in any event is going to exercise the right to jury trial. There will also be cases in which the judge, at the outset, indicates a view that the offence is not a minor one, though clearly the court should not express a final decision on that point before hearing the parties if they wish to make submissions.

The present procedure under section 2 of the 1951 Act has the merits both of flexibility and control by the judge over what procedure to adopt. We are unaware of any desire to change it. If, therefore, it is intended to extend the right to trial by jury we see no reason why the section 2 procedure could not simply be extended across the board. The proposal in paragraph 322 of the Report to require the Director first to indicate his attitude in every case is unduly prescriptive, rigid and unnecessary and would not represent any improvement over the current section 2 procedures. In cases where the accused in any event intends to avail of the right to trial by jury the procedure proposed in paragraph 322 will merely waste the time and resources both of the District Court and the Office of the Director of Public Prosecutions.

Pre-Trial Procedures

The Director welcomes the recognition in the Report of the Working Group that a formal mechanism of pre-trial procedures is vital and long overdue. However he is not convinced that the full potential for such a mechanism will be realised on foot of the Group's recommendations which in some respects are unduly timid. It appears that its successful operation will be reliant on full cooperation from both prosecution and defence. As is noted in the Report, even existing statutory mechanisms such as section 21 of the *Criminal Justice Act, 1984*, are rarely utilised because there is neither an incentive nor an obligation on the defence to do so.

As to the issue of the "constitutionally-ordained balance between the rights of the accused and the legitimate interests of the prosecution in criminal proceedings", the Director accepts that the interests of the prosecution may not be advanced at the expense of the constitutional rights of the accused. But what are the rights of the accused? The accused is entitled to a fair trial in accordance with law. The Director does

not believe that the current arrangements for criminal trials are either constitutionally-ordained or incapable of change provided the rights of the accused to a fair trial are respected.

The Director is not therefore convinced that the Constitution precludes a thoroughgoing and radical review of current arrangements. He does not agree with the Working Group's refusal on constitutional grounds to entertain the proposition that there should be any change to the extent of disclosure requirements on the defence. It is already the rule that advance notice of an alibi is required. Other jurisdictions which recognise the fundamental rights of accused persons to a fair trial have found it possible to impose disclosure requirements on the defence. For example, in Scotland the defence is required to give notice of special defences ten days before the trial. As well as the defence of alibi, these include the defences of insanity, self-defence, incrimination of another, incrimination of a co-accused, automatism and coercion or duress. The defence in Scotland is also required to give notice of witnesses and evidence it proposes to call prior to trial. What provision of the Constitution of Ireland would prevent such a rule were it thought desirable? Why should not the defence be required to give notice of its intention to raise these issues at a pre-trial hearing? Surely the right of the defence to ambush the prosecution cannot be regarded as a constitutional imperative.

Naturally any change to the disclosure obligations of the defence, which are effectively limited to the alibi defence, would have to be evaluated in the light of the need for balance and fairness. By the same token a facility for the court to impose sanctions or penalties for failure to cooperate with the aims of a pre-trial mechanism would require to be carefully evaluated. To say this is not, however, to adopt the approach of refusing to consider the matter at all.

The Director accepts that these questions may go beyond the ambit of the Working Group's remit and raise questions which are not merely jurisdictional but are concerned with substantive rights. He feels, however, that the opportunity to consider the issue of pre-trial procedures in detail should not be lost. While it may well be outside the scope of the Group's necessarily broad remit to engage in a detailed examination of how the full potential of a pre-trial procedure could be achieved, he suggests that the whole question of pre-trial procedures in indictable cases might usefully be subject to further and more detailed consideration by another body. For example, the question might appropriately be examined by a small expert working group appointed by the Minister for Justice, Equality and Law Reform.

While acknowledging that the recommendation as currently framed makes provision for a pilot scheme, the Director is concerned that without further detailed scrutiny there is a serious risk that such procedures could be introduced without prior anticipation of all the possible pitfalls and delays. The Director fully accepts that it would be impossible for the Working Group, within the scope of its broad Terms of Reference, to try and anticipate all these factors or to carry out the necessary detailed appraisal.

The Director strongly believes that a system which would impose discipline on the approach the defence adopts by preventing it from making last-minute applications which could have been made much earlier would not prejudice the legitimate rights of the defence. Trial dates are regularly lost because the defence only addresses its mind to the issues in a case late in the day. This, combined with the reluctance of trial judges to be perceived as in any way impeding the tactical opportunities open to the defence, creates delays in the system and opportunities for defendants who seek to postpone the day of reckoning. A properly functioning system could, and should, avoid these delays without any unfairness to the legitimate rights of defendants.

The system proposed by the Working Group is a system without any sanction which relies upon the "cooperation of all parties". Such a system is likely to fail. Defence legal advisors will continue to advise their clients on the basis of maximum exploitation of the system. Why should they not if the system allows them to do so? The carrot of a reduction of sentence in the event of conviction will not be sufficient where many defendants are engaged in a strategy to avoid conviction or to postpone trial at all costs. The Director would be willing to cooperate with a pre-trial procedure laid down by the courts, but such a system should operate on the basis of reciprocity by the defence. Pre-trial procedures should not be viewed merely as a way of further regimenting the prosecution. It would be unfortunate if the only party ultimately expected to comply with court directions was the prosecution.

Claire Loftus, Chief Prosecution Solicitor[655]

655 Nominee of the Director of Public Prosecutions to the Working Group.

Minority Report

On the Question of the Giving of Written Reasons for Custodial Sentences

The Working Group is unanimous in its view that custodial sentences must be reasoned and that these reasons must be stated in open court. The only issue that arises is with regard to the recording of these reasons. The Working Group examined the requirement that reasons be given in judicial decisions. These arguments may be reiterated as follows:

- The public has an interest in knowing the reasons behind sentencing decisions.
- Public confidence in the criminal justice system would be enhanced by the introduction of such a reform.
- There is ample evidence that a duty to give reasons encourages more considered legal decisions.[656]
- The *Freedom of Information Act, 1997* imposes an extensive duty on "public bodies" to give reasons in making certain decisions. Whilst the Act does not extend to Courts the requirement is even more urgent where the liberty of the citizen is at stake.
- The *European Convention on Human Rights and Fundamental Freedoms* provides for the right to a fair trial in Article 6(1). The primary reasons given by the European Court for the obligation to give reasons for decisions are to enable the accused to usefully exercise the right of appeal available to him and also because the defendant and the wider public have an interest in knowing the grounds of any judgement.
- The Supreme Court has been unequivocal in its view that District Judges must give reasons for decisions and a good summary of the jurisprudence in this area is cited in the Majority Report.
- The *Criminal Justice Act, 1991* (consolidated in section 79 of the *Powers of Criminal Courts (Sentencing) Act, 2000)* requires magistrates in England and Wales to identify in open court the criteria on which a custodial sentence is based. The Court records these reasons in duplicate.

The minority is aware of the additional burden that could be placed on the District Courts by the requirement to give written reasons for custodial sentences. Such a requirement will undoubtedly have implications in the additional court time and the administrative burden that will arise. The minority is of the view that not enough research has been done to make any definitive findings with regard to the extent of this additional burden. They would, however, consider that the requirement that decisions are seen to be fair and reasonable, particularly where an individual's liberty is at stake, is sufficiently strong for the minority to be unwilling to sacrifice it for the sake of speed or administrative convenience. The minority does not believe that the reasons should

656 Law Reform Commission, *Report on Penalties for Minor Offences* (LRC 69-2003).

be extensive but recommends that brief reasons should be given outlining the aggravating and mitigating factors influencing the decision with particular emphasis where appropriate, on why the non-custodial options available to the judge were not appropriate.

Once the desirability of giving written reasons is accepted, as it is, then it seems entirely appropriate that those reasons ought to be recorded in some fashion. Given that installing recording equipment in every District Court is not an immediate possibility, it would seem to the minority that the District Judge should keep a written record.

The minority would recommend that the written reasons for imposing the sentence should be recorded at the foot of the charge sheet or summons either on the charge sheet itself or on a separate sheet which would be appended with the charge sheet to the warrant.

The Honourable Mr. Justice Declan Budd, His Honour Judge Patrick McCartan, Mr. Michael Durack S.C., Mr. James McGuill and Professor Finbarr McAuley

The Working Group on the Jurisdiction of the Courts

Report – The Criminal Jurisdiction of the Courts

Dated this 13th day of May, 2003

The Hon. Mr. Justice Nial Fennelly **Chairman**

The Hon. Mr. Justice Declan Budd**

The Hon. Mr. Justice Paul Carney

His Hon. Judge Patrick McCartan**

His Hon. Judge Peter Smithwick

Judge Michael Reilly

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Ms. Claire Loftus *

Ms. Caitlín Ní Fhlaitheartaigh B.L.

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Mr. Liam Convey

* **Subject to Dissenting Statement**

** **Subject to Minority Report**

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Ashworth, Andrew, "Sentencing and other sanctions for crime in England & Wales, with particular reference to sentencing guidelines"
Connolly, Geraldine, "Presentation on behalf of the Dublin Rape Crisis Centre on the trial of sexual crime"
Darbyshire, Penny, "The role of the jury"
Gordon, Sir Gerald, "Allocating crime for trial in Scotland"
Groenhuijsen, Marc, "Trial of crime in Continental systems"
Lord Justice Auld, "Criminal Justice Reform in England & Wales"
Lord Justice McCollum, "The Distribution of Business in the Criminal Justice System of Northern Ireland"

McGovern, Lillian, "Trial venue and process; the victim and the accused"
Mulkerrins, Kate, "Presentation on behalf of the Rape Crisis Network Ireland on the trial of sexual crime"
O'Briain, Muireann, "Presentation on behalf of the Dublin Rape Crisis Centre on the trial of sexual crime"
O'Donnell, Ian, "An overview of sexual crime in Ireland with reference to statistical information available"
O'Malley, Thomas, "Sentencing values and sentencing structures"
Pitchers, Mr. Justice Christopher, "Allocating Crime for Trial in England and Wales"
Zander, Michael, "Some Observations from an Outsider" [on preparing the criminal case for trial (recording of interviews; pre-trial disclosure; plea and directions hearings)]

APPENDIX I

Terms of Reference and Composition of Working Group

Terms of Reference

I. To examine the existing jurisdiction of the courts of Ireland and make recommendations as to any changes which, in the opinion of the Working Group, are desirable in the interests of the fair, expeditious and economic administration of justice, including proposals for the establishment of new courts jurisdictions, whether appellate or first instance, for determining the appropriate number of judges for each jurisdiction and the supporting staffs required in such jurisdictions and for alterations in the quantitative or geographical limitations of existing jurisdictions;

II. With a view to (I), to conduct research into:-
   (a) The manner in which the courts of Ireland have operated since their establishment in 1924 and are likely to continue operating in the future on the assumption that the existing structures remain unchanged;
   (b) The manner in which the administration of justice is conducted in other jurisdictions to the extent that the Working Group considers such research might be helpful:

III. To make such further recommendations as to changes in the law which, in the opinion of the Working Group, are desirable in order to secure the fairer, more expeditious and more economic administration of justice;

IV. To make such interim reports as it considers appropriate.

Composition

The Chairman of the Working Group is Mr. Justice Nial Fennelly of the Supreme Court.
The membership for the first module shall be:
The Chairman;
One ordinary judge nominated by the President of each jurisdiction;
One representative of the bar and one representative of the solicitors profession nominated by the Bar Council and the Law Society of Ireland;
A representative of the Courts Service nominated by the staff;

A representative officer from both the Department of Justice, Equality and Law Reform and the Department of Finance nominated by the relevant Ministers;
An officer of the office of the Attorney General nominated by the Attorney General;
An officer of the Director of Public Prosecutions nominated by the Director;
The President of the Law Reform Commission or a member of the Commission nominated by the President;
Two members from the Faculty of Law of the six universities in Ireland, one from the Dublin based universities and one from the universities outside Dublin, to be nominated by the chairman of the Working Group;
A representative of Victim Support.
A representative of the National Crime Council

The second module, on the civil law, will not include an officer of the Director of Public Prosecutions or nominees of Victim Support and the National Crime Council. It will include in addition to the members of the first module
An officer from the Department of Enterprise, Trade and Employment nominated by the Minister;
A representative nominated by both IBEC and ICTU.

The President of each jurisdiction, the Bar Council, the Law Society of Ireland, the President of the Law Reform Commission and the chairman of the Working Group shall be at liberty to nominate different representatives to sit on the Working Group for the second module. The membership of the Working Group for the third module shall be those members common to the first and second modules, with the relevant bodies being entitled to nominate different persons to sit on the Working Group for the third module.

APPENDIX II

List of Submissions

1. Adapt House, Limerick
2. Association of District Judges
3. C.A.R.I. Foundation (Children at Risk in Ireland)
4. Circuit Court Judiciary
5. Convey, Liam J, Registrar Central Criminal Court
6. County Registrars Association (Ref. Patricia Casey)
7. County Registrars Association (Ref. Tommy Owens)
8. Crowley, Brian
9. Cullinane, John A
10. Director of Public Prosecutions and Chief Prosecution Solicitor
11. Foetal Alcohol Support Ireland
12. Irish Translators and Interpreters Association
13. Lee, Carmelita
14. Leonard, Judge Clare
15. Moran, His Honour Judge Carroll
16. Morgan McManus Solicitors
17. O'Higgins, The Hon Mr. Justice Kevin
18. O'Laoire, Carolyn
19. Play Therapy Ireland
20. Rape Crisis Network Ireland
21. Robinson, Dick, Regional Manager, Courts Service
22. Séamus Mallon & Co. Solicitors
23. South Eastern Health Board Community Child Centre, Waterford
24. St. Louise's Unit and St. Clare's Unit, Our Lady's Hospital, Crumlin
25. Staff, Directorate of Circuit and District Courts Operations
26. Women's Aid

APPENDIX III

Conference Agenda

Programme

Friday 22nd November 2002

9.00 am	Welcoming remarks by Chairman, Working Group Address by the Hon. Mr. Justice Ronan Keane, Chief Justice
9.15 am	Summary of Working Group's Terms of Reference and activities to date by Chairman
9.45 am	Profs. John Jackson and Sean Doran, Queen's University Belfast: Presentation of Statistical Research and Inquiry results
11.00 am	FIRST SESSION CRIMINAL TRIALS – FIXING THE JURISDICTION Chair: The Hon. Mr. Justice Francis D. Murphy Speakers: The Right Hon. Lord Justice Auld: Criminal Justice Reform in England & Wales The Right Hon. Lord Justice McCollum: Allocating crime for trial in Northern Ireland Sir Gerald Gordon CBE, Q.C.: Allocating crime for trial in Scotland The Right Hon. Mr. Justice Christopher Pitchers: Allocating crime for trial in England & Wales, with particular reference to sexual crime
2.00 pm	QUESTION & ANSWER SESSION
2.30 pm	SECOND SESSION THE CRIMINAL TRIAL PROCESS Chair: Professor Dermot Walsh Speakers: Prof. Michael Zander: Preparing the criminal case for trial (recording of interviews; pre-trial disclosure; plea and directions hearings) Dr. Penny Darbyshire, Kingston University London: The role of the jury Prof. Marc Groenhuijsen, University of Tilburg: Trial of crime in Continental systems

4.15 pm Prof. Andrew Ashworth, University of Oxford: Sentencing and other sanctions for crime in England & Wales, with particular reference to sentencing guidelines*

4.45 pm QUESTION & ANSWER SESSION

5.00 pm Closing remarks for the day by Chairman, Working Group

* This address relates to the Fourth Session (Sanctions for Criminal Offences) scheduled for Saturday, the 23rd. Due to personal commitments, Prof. Ashworth was unable to attend that session.

Saturday 23rd November 2002

9.00 am Welcoming address by Chairman, Working Group

9.15 am THIRD SESSION
THE TRIAL OF SEXUAL CRIME
Chair: The Hon. Mr. Justice Hugh Geoghegan

Speakers:
Dr. Ian O Donnell, Institute of Criminology, Faculty of Law, UCD: An overview of sexual crime in Ireland with reference to statistical information available.
Lillian McGovern, C.E.O., Victim Support: Trial venue and process; the victim and the accused
Muireann O'Briain, C.E.O., Rape Crisis Centre and
Geraldine Connolly, Head of Clinical Services,
Rape Crisis Centre }
Kate Mulkerrins, Rape Crisis Network Ireland: }

11.30 am FOURTH SESSION
SANCTIONS FOR CRIMINAL OFFENCES
Chair: As for Third Session

Speakers:
Dr. Tom O'Malley, Law Faculty, National University of Ireland, Galway: Sentencing and other sanctions for crime in Ireland
*Prof. Andrew Ashworth, University of Oxford: Sentencing and other sanctions for crime in England & Wales, with particular reference to sentencing guidelines

12.30 pm QUESTION & ANSWER SESSION

*Professor Ashworth delivered his address on Friday 22nd November – Second session

APPENDIX IV

Estimated Waiting Periods – District Court

Court	2000	2001
Dublin Metropolitan District		
Custody Courts, Chancery Street	5 months before hearing	6 months before hearing
Summons Courts	7 months before hearing	4 months from summons application to first court appearance
Kilmainham	2 months before hearing	4 months from first appearance after charge to hearing
Tallaght	2 months before hearing (charge sheets) 5 months before hearing (summonses)	3 months from first appearance after charge to hearing (charge sheets) 6 months from receipt of application for summons to hearing
Swords	No delay before hearing (charge sheets) 7 months before hearing (summonses)	No delay before hearing (charge sheets) 2-3 months from receipt of application for summons to hearing
Dún Laoghaire	3 months before hearing	2 months before hearing from first appearance in court 2 months before hearing from first appearance in court (summonses)
Cork	4 months before hearing (summonses) 3 months before hearing (charge sheets)	3 months before hearing from first court appearance 4 months before hearing from first appearance (summonses)
Other Provincial Districts	In general, no delay in hearing criminal cases. Where cases cannot be heard in scheduled sittings, special sittings are arranged to deal with same.	In general, no delay in hearing criminal cases. Where cases cannot be heard in scheduled sittings, special sittings are arranged to deal with same.