

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's Response to the Home Office White Paper "Justice for All".**

**October 2002**

*Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.*

## **Introduction**

Liberty welcomes the chance to respond to the Home Office publication 'Justice for All'. For the sake of simplicity we will follow the chapter format of the White Paper in our response. The numbering of paragraphs will correspond to that in the White Paper. This means that some paragraphs or chapters where we feel there is no need for additional comment will not be mentioned.

While we appreciate that the invitation to consult only focuses on a small number of specific points we do feel that 'Justice for All' raises important issues particularly in relation to evidential safeguards in chapter 4. Because of this we have considered many of these points in our response even though they were not specifically raised for consultation.

For simplicity and ease of reference we would draw attention to the following areas which we feel raise particular points of interest or concerns:

Page 5	Introduction
Page 6-8	Rights of Victims and witnesses
Page 9	Use of CCTV, police imposed bail conditions
Page 10	Presumptions of bail for drug users
Page 10-11	Disclosure
Page 12	Magistrates sentencing powers
Page 13-15	Trial by single judge in serious fraud and other complex cases
Page 15	Treatment of young defendants
Page 15-17	Credit for pleas
Page 17-20	Previous convictions and other misconduct
Page 20-22	Hearsay
Page 22-23	Double Jeopardy
Page 24	Punishment and Rehabilitation
Page 25-26	Domestic Violence

## Chapter 1 – The need for reform

1.01-1.10 The proposition of the White Paper is that;

*“.. the Criminal Justice System exists to fight crime and deliver fair, efficient and effective justice on behalf of victims, defendants and the community. It must convict the guilty, acquit the innocent, and in the penalties it imposes punish offenders and reduce re-offending.”*

Liberty's agrees with this principle but are concerned about the overall thrust of the paper. We accept the premise that taking away the protections offered to defendants may well convict more guilty people. However, it will also result in the conviction of a greater number of innocent people. The Prime Minister has stated recently that whilst adequate protections are in place to prevent defendants becoming the victims of miscarriages of justice, “... it is perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished”. We disagree. The biggest miscarriages of justice occur when the innocent are convicted. Protection against wrongful conviction is a cornerstone of the legal system.

Liberty does not see how the removal of protection from the tiny fraction of people charged with a crime who end up being acquitted - around 43,000 in a year – will be an effective way of combating crime levels. Most of the people acquitted are innocent. In 2001 five and a half million crimes were reported and of these nearly 77% - over 4 million - went undetected. The issues of police resourcing and crime investigation techniques are of far greater relevance. Unfortunately it is easier and cheaper to remove protections against wrongful conviction than it is to address these problems.

## Chapter 2 – A better deal for victims and witnesses

2.1 As has been mentioned in the introduction to this response and as the Home Secretary maintained in the House of Commons on the day of publication of the White Paper, the reforms in ‘Justice for All’ are designed to ‘rebalance’ the criminal justice system in favour of the victim.

However, considering the rights of victims and of defendants in terms of a balancing act is extremely misleading and inaccurate. Such an approach assumes that one must be weighted against the other until a fair level is struck. We disagree that increasing the rights of one group necessarily decreases the rights of the other and vice versa. There are many examples of rights which victims have called for, the provision of which would have no corresponding effect whatsoever upon those of defendants. The treatment of victims in terms of their right to information, for example, is commonly argued as being wholly inadequate. However, improving the provision of information for victims would have no knock-on effect on the right of the defendant to a fair trial.

A flaw with this approach, therefore, is that it blurs a crucial distinction. There is a fundamental difference between victims’ *rights* and victims’ *interests*, a factor which must underlie any proposals for change. Unfortunately, this is a distinction which the government, in its attempts to be seen as being tougher on criminals and defendants, has to a large extent obscured.

2.5 Granting the police the power to impose conditions on bail before charge may well provide greater protection for victims and witnesses and would possibly prevent offending. However, the existence of stringent judicial safeguards is crucial, in order to ensure that this power is only exercised in circumstances where it is considered absolutely necessary. This is discussed in more detail in our response to paragraph 3.37.

2.6 Liberty has serious misgivings about the adequacy of the inquest system as it currently operates, and we would welcome the government’s commitment to improvements in this area, and support a thorough review of the coroner’s service.

2.30 Many of the measures which are being implemented through the Youth Justice and Criminal Evidence Act 1999, are positive ways in which to make participation in the criminal justice system less daunting for vulnerable or intimidated witnesses. Requesting judges and barristers to remove their wigs and gowns would, for example, create a less threatening and intimidating court environment for a witness, whilst at the same time would have no derogatory effect upon the rights of the defendant on trial.

However, allowing the witness to request that a screen be placed around the witness box, or providing the opportunity for witnesses to give evidence by pre-recorded video or by use of a live TV link, has serious implications. It is a principle of criminal law that a defendant has the right to face his or her accusers, and this is a principle which ought to be applied in the literal sense. When assessing witness evidence, it is not only the actual verbal answers provided that are of importance to the case, but also analysis of the way in which a witness responds to questioning.

We can certainly appreciate that there may be cases where protecting the identity of the witness is important. However, we have concerns that this may affect the defendant's right to a fair trial. This may thus give rise to Article 6 issues under the Human Rights Act, unless the use of such measures was carefully controlled and reserved for use in a very small proportion of specific cases.

2.35 We agree with the government's view that keeping victims informed of the progress of their case is one of the most important ways in building confidence in the criminal justice system, and welcome their desire to improve procedures in this area.

Victims have a right to be fully informed about the progress of any criminal proceedings and to be given advance notification of hearing dates, adjournments, and grants of bail to the defendant. Feeling ill-informed is a common source of frustration for victims. There are clear guidelines in place in the Victims' Charter to ensure they are kept fully updated. However, this process needs to flow more smoothly than it does at present.

2.41 We welcome moves to legislate to draw up a new Victim's Code of Practice, designed to build upon the commitments set out in the existing Victims' Charter. Victims who feel that

agencies have not fulfilled their obligations set out in the Code will have the opportunity to complain to the Parliamentary Ombudsman for Victims and Witnesses.

However, we would go further and call for the creation of legally enforceable rights to provide protection for the victims of crime. The Victims Charter is a well-intentioned document which seeks to address some of the issues and problems faced by victims of crime. However (as well intentioned as it may be) the strength of the Charter is severely limited due to the absence of a legislative framework.

2.45 The appointment of an Independent Commissioner to champion the interests of victims and witnesses, is a positive move. However, we would call for an increase in the ambit and scope of the Commissioner's responsibilities as they are outlined in the White Paper. The proposed tasks of the Commissioner are: to advise and make recommendations to the government, review existing practice and procedure, and to draw upon the views of relevant organisations which work directly with victims. However, we would encourage the role of the Commissioner to involve more direct interaction with victims, rather than being limited to involvement with organisations which do so.

There should, for example, be a person appointed by the state (such as a police liaison officer) whose role it is to keep victims and relatives informed about the investigation, who is able to answer any questions they may have, and who is able to represent the interests of the families during any investigations.

## Chapter 3 – Getting the process right at the start

3.10 Liberty's responses to the Home Office consultations on the Codes of Practice under the Police and Criminal Evidence Act 1984 have been submitted earlier this year.

3.13 References to the Home Office research into CCTV as being a useful crime deterrent are extremely misleading. The conclusion reached by the report was "Overall, it can be concluded that CCTV reduces crime to a small degree." The only place that CCTV was found to have any particular deterrent value was in car parks. More telling were the conclusions of a second report published at the same time yet not mentioned in "Justice for All".

This report on the impact of street lighting considered 13 schemes, and concluded that better illumination could be a cheap way of cutting illegal activity, especially in crime hotspots. In fact the conclusions were that street lighting is a far more effective tool of crime prevention than CCTV. It goes without saying that street lighting is also far cheaper than CCTV and does not raise any concerns about infringements of privacy.

3.31 We agree that it is appropriate for the CPS to have a greater responsibility in determining charge.

3.37 While we do not think that the imposition of bail conditions by the police raises any particular issues, it is important that safeguards are put in place. These would include giving the suspect the right to challenge the conditions in the magistrates' court prior to the date of first hearing. There is also a tendency for the police to force repeated returns to the police station under s.47 of the Police and Criminal Evidence Act 1984 while they amass evidence or consider charge. In some cases a suspect can be on bail for several months without being charged. It would be appropriate for the imposition of bail conditions to be reconsidered on each occasion the suspect returns and for a magistrate's authority to be required if the time period becomes excessive.

3.43 We are pleased to see it is accepted that there have been problems with the accuracy of data provided by the Police National Computer. Some statistics record an inaccuracy rate of up to 65 percent, which is clearly unacceptable. Inaccurate data which is shared with other

public or private bodies can have the undesirable effect of infecting multiple data sources. Sometimes it extremely difficult or impossible to trace the full extent of this knock on effect. Ensuring that data is accurate at source is therefore extremely important.

3.45 The removal of the presumption of bail for offenders testing positive for class A drugs who refuse treatment may well raise issues under Article 5 of the Human Rights Act 1998, the Right to Liberty and Security of Person. It does not fit into one of the permitted exemptions under Article 5 (c). Although detention of drug addicts is permitted under Article 5 (e) the detention must be ‘lawful’ and we would dispute that this would be the case. However we do not propose to go into further detail about our concerns without more information about how the presumption of bail would be modified.

3.52 Liberty is extremely concerned at the increased requirement for a defendant to assist the prosecution in its presentation of the case against him through increasing obligations of defence disclosure. If there are to be grounds for widening the matters on which inference may be drawn, it should also be a requirement that the judge gives permission to avoid the jury drawing unfair inference in situations where discrepancies occur. The effect of this will be to make it unlikely that defendants will be able introduce a material fact that may have been omitted for good reason without the truthfulness of that fact being presented as *prima facie* questionable.

There may be good reasons for omitting a fact. Memory is not perfect and no one can remember all the facts relating to their case. A fact which may not have been considered important may become more relevant under examination in chief, cross-examination or following the evidence of another witness. Simply to say that any inconsistency can be seized upon by the prosecution without judicial discretion will make the existence of possibly irrelevant discrepancies gain disproportionate importance.

3.58 We would agree that the principle of rewarding good case preparation, presentation and disposal is sound. However, we are concerned by the approach taken in the White Paper. It indicates that there “should be appropriate financial incentives and sanctions to encourage the defence...to play a proper part in the process of their case going through the criminal justice system.” This has been suggested as fining solicitors because their cases ‘take too long’. This raises a number of obvious questions. The difficulties of ensuring that fines are

only levied for genuine time-wasting, rather than thorough and professional work on a case, are obvious. And there is a risk that solicitors who have been fined before may be more inclined to suggest clients plead, rather than face a further penalty.

It is also, of course, an approach that cheerfully hammers at defence lawyers, ignoring the fact that by no means all the delays in the criminal justice system are down to the defence. The system needs streamlining in numerous other ways to help cases be brought more promptly (a point made forcefully by both Brooke LJ and the Audit Commission recently in relation to IT inadequacies).

It should also be emphasised that solicitors and barristers acting in criminal cases are under different duties to those acting in civil cases. Instructions come from the client and, unless those instructions would cause a conflict with professional duties, the representative is obliged to follow them. For example in a civil case the representative is obliged to inform the Legal Services Commission if they feel the client's certificate should be revoked. In criminal cases what the White Paper identifies as 'time wasting' is more likely to be the fulfilment of professional obligation.

## Chapter 4 - Delivering Justice

- 4.5 The comments in this paragraph again go to the heart of why we think the focus of “Justice for All” is misguided and inaccurate. The inconsistency of reasoning can be summarised by focusing on one section of this paragraph:

*“...there is a strong sense of public frustration at the way in which the (criminal justice) process operates and at its outcomes. This can be heightened by high profile individual cases which leave a strong sense of dissatisfaction; or it may centre on overall failings, such as delays, or the unacceptably low proportion of offences for which offenders are brought to justice. We want less evidence to be withheld from court, on the principle that evidence should be admissible unless there are good reasons to the contrary.”*

How would delays be resolved by allowing evidence of previous misconduct to be heard by a jury or by magistrates? What significant difference would such disclosure make to crime clear up rates? There is no logical connection. However, as it is far cheaper to remove the rights of those who plead ‘not guilty’ than it is to provide adequate police resourcing the removal of defendants’ protections has been identified as a panacea for all ills.

- 4.19 The proposal to double the sentencing power of magistrates to twelve months represents a very substantial increase indeed. As experience shows that the magistrates’ courts often tend to use their sentencing power to the maximum, the consequence will be to increase substantially the number of people in our already over-crowded prisons. Government research has also demonstrated wide regional variations in magistrates’ sentencing. It is important to aim for greater clarity in magistrates’ sentencing as the extension of sentencing powers gives rise to greater opportunity for discrepancy.

Whilst we welcome the fact that the government is preserving the right of a defendant to elect the mode of trial in either way cases, we do not see a need to extend magistrates’ powers. We also believe that the provision to extend sentencing power to eighteen months without the need for primary legislation is wholly unacceptable.

- 4.23 The proposal to allow magistrates to hear of previous convictions when determining venue for contested cases raises issues about fairness of trial that are discussed at length further on and in detail in our response to the separate consultation on previous misconduct. However, it is worth mentioning that this will mean that magistrates who have determined that their powers are sufficient will have heard of the defendant's previous convictions even if they decide after further consideration that they are not relevant. As it is proposed that nearly all convictions be heard in any event this may not have any further impact in the magistrates' court. However, it will provide further incentive for the defendant to elect trial in the crown court where there is less chance that the jury will be aware of previous convictions. Crown court trials are more costly and take longer than those in the magistrates. Apart from in those situations where already permitted we would not wish for magistrates to be aware of previous convictions prior to sentence.
- 4.24 We support the proposal that magistrates should no longer be able to commit cases they have heard to the Crown Court for sentence. Once the magistrates have accepted jurisdiction it is counterproductive to allow defendants to plead or are found guilty to be committed to the Crown Court to face longer sentences.
- 4.27 Liberty accepts that there are arguments in favour of allowing defendants the right to elect trial by judge alone. However, we believe that the great benefit of trial by jury is its openness. The defendant's case is heard by twelve independent members of the public and justice can be seen to be done. Our concern (stated in the section on serious fraud trials) is of a risk of popular perception that certain defendants who choose trial before a single judge may be dealt with in a different manner to other defendants.
- 4.28 Liberty believes that the best way to dispose of a case is to have the fact finding undertaken by a jury. If there are complex issues involved in a case then it is the job of the defence and prosecution to make the issues understandable for a jury. There is also the danger that while there is an incentive at present to simplify the issues for the jury and to keep trials as short as possible, if advocates were dealing solely with a professional tribunal that incentive may not be there resulting in longer and costlier case. The experience in civil fraud trials seems to indicate that this is a very real danger.

Some observers argue that serious fraud prosecutions very rarely fail because of a jury not understanding the issues. However this is likely to be the argument of the prosecution (it is easier to say the trial failed because the jury did not understand than to accept the case simply was not proved).

We understand that there are arguments that lay people do not have sufficient understanding of the complex issues involved in serious fraud cases. To take away jury trial from serious fraud cases would set it apart from normal criminal procedure – and make it appear more like a regulatory or professional disciplinary tribunal. Importantly, public perception is that white-collar crime (a large part of serious fraud) should not be treated as different from other offences. It is the ‘trial by ones peers’ aspect of jury trial that is important for this perception. Whatever crime has been committed, whoever the defendant is or how powerful they are, they still can be judged by a cross section of the public. Even if a trial with no jury were conducted properly, there would be a feeling that having no jury bestowed a benefit on the defendant.

The use of a single judge a fact finder will also give rise to another, more practical, concern. If it is established on appeal that a witness was lying or that evidence was false and the judge gave credit and weight to the account then it will seriously undermine the credibility of that judge. In the future they will be thought of as flawed or unable to consider evidence properly even if there was good reason for the mistake being made. One of the reasons why a jury is important is that the judge is protected from considering questions of fact that can often be extremely difficult to evaluate.

- 4.31 Our comments on serious and complex fraud cases also apply to other complex and lengthy trials. We believe that jury trial is the best way of dealing with a case. It is also worth pointing out that justice should not only be done but should also be seen to be done. Even if there were compelling arguments for removing juries in these cases they will be outweighed by the need for the public to have confidence that all defendants are treated in the same manner. These changes will frequently affect high profile cases where the focus will be on the defendant rather than the complexity of the charges faced or the length of time proceedings against them are likely to take. Because of this, if certain types of defendant do not have to go before a jury it will be seen as preferential treatment.

- 4.32 Liberty does not accept the argument put forward in the White Paper that fear of jury intimidation in some cases is sufficient to warrant trial by judge alone. If there is concern about this it is an argument for ensuring that juries are properly protected rather than a convincing reason to remove them. If twelve jurors who are kept away from the rest of the public for the duration of a trial can be subjected to intimidation, can the same thing not happen to a single judge who is not subjected to the same restrictions?
- 4.34 Liberty agrees with the general principle that young defendants should be kept out of the Crown Court where possible. However, a young defendant may wish their case to be heard by a jury in the Crown Court. There should be the opportunity for the defendant to elect Crown Court trial in those cases that would previously have been heard by the Crown Court prior to the introduction of strengthened youth courts.

We accept that there are some situations in which a judge may feel that it is appropriate for the Crown Court to exercise discretion in retaining serious cases involving 16 and 17 year olds. If the Court does decide to exercise this discretion, the reasons should be given in open court and the defence should be offered the opportunity to make representations.

In situations where there is an adult co-accused we agree that the best option is to allow the Crown Court discretion in deciding the venue, having regard to the circumstances of the case including the maturity and responsibility of the young co-defendant.

- 4.41 Liberty does not accept the rationale behind offering extra credit for early guilty pleas. We believe that very few solicitors encourage defendants to plead not guilty in an attempt to delay proceedings, for two reasons. Firstly, if unsuccessful they lose any opportunity to plead mitigation on the facts of the case. Secondly, solicitors and barristers are officers of the court, to engage in tactics such as this when they know their client is guilty of the offence they have been charged with is effectively suggesting that solicitors are content to waste the courts time. This may happen on rare occasion but to suggest that it is a widespread and commonplace practice is unreasonable.

Notwithstanding this, defendants are entitled to know the likely consequences of their decisions and we agree it is therefore desirable for the courts to inform defendants of the potential sentences that would be imposed following a guilty plea or a guilty verdict. We

consider that the system should operate in a more transparent and structured manner than the current ad-hoc arrangements where defendants are forced to rely on the informed guesswork of their lawyers.

We appreciate that these proposals look attractive to government as a means of achieving earlier guilty pleas and thereby speedy and economical proceedings.

However, there are genuine dangers here. In particular we are concerned that such a system may have the effect of encouraging innocent defendants to improperly plead guilty to charges on the basis of lower likely sentence, or of punishing a defendant who properly puts the prosecution to proof of their case. While we consider it desirable in the interests of open justice for there to be a formalised and open system for early indication of plea, there are distinct limits within which such a system can operate, and safeguards which are required. In addition any reduction in sentence has to still reflect the gravity of the offence.

We suggest that any package of proposals must include the following safeguards:

The extent of the discount should be apparent but limited. While a guilty plea undoubtedly results in substantial savings to the public purse, it is relevant to sentencing only to the extent that it indicates the defendant's remorse. It constitutes only one part of the sentencing equation and should not dominate the system of sentencing. Other factors such as rehabilitation, punishment, containment etc. are also of importance and in individual cases may outweigh the discount criteria. Therefore while guidelines are welcome, flexibility in the sentencing process to take account of other factors must also continue to exist. Reductions in excess of one third or so in our view are likely to distort the sentencing framework and should not be available.

Defendants must be able to decide on their pleas to differing level of charge based on a clear understanding of the evidence they face. No pressure of any sort should be placed on defendants to enter their plea until they have been served with the prosecution case papers, have had an opportunity to review prosecution unused material and have had a reasonable opportunity to obtain legal advice.

Before entering a guilty plea the trial judge should satisfy him/herself that the defendant has understood the nature of the case he faces and has been advised about the strength of the evidence and possible defences. The defendant's lawyer should confirm in open court that the defendant has been fully and properly advised.

It is well understood that in long and complex cases, such as fraud trials, judges are often willing to countenance effective discounts of 50 percent for guilty pleas. Doubling the sentence for pleading not guilty is likely to produce an unacceptable pressure to plead guilty. An innocent defendant who is told that a sentence following a trial may lead to a 4 year prison sentence and a guilty plea would result in a 2 year sentence may find the pressure to plead guilty to be irresistible. If such a defendant is a remand prisoner there is every chance they will have served any sentence before the trial was heard. Even if acquitted he would have served the equivalent of the "guilty" sentence on remand.

Liberty believes there is need for understanding and clarity in sentencing. When a period of imprisonment is passed it is unlikely that the person convicted will spend the duration of their sentence in custody due to parole, licence and so on. However, this leads to a popular perception of defendants 'getting off' and of the criminal justice system being 'soft on criminals'. The real problem is a lack of clarity. It should be made clear at the time of sentencing and, if possible, more generally how sentencing works.

- 4.51 The proposal to disclose previous convictions ignores the fact that any case relying on previous convictions is likely to be weak; and threatens to create a 'usual suspects' approach. Juries should decide in each case whether there is sufficient evidence to establish the guilt of the accused – that they committed this offence, this time - beyond reasonable doubt. If details of a defendant's previous convictions are introduced, this will almost inevitably lead juries to convict where there is insufficient evidence to meet this standard, on the basis that their previous history makes them 'more likely' to be guilty. There is a danger that any person who has their previous convictions disclosed in circumstances that go beyond the current position would not have a fair trial. It does not establish that they are the person who committed the offence but that they are the type of person who is more likely to commit such offences. The White Paper states (p.131) that,

*“those that find themselves in prison are 13 times as likely to have been in care as a child, 13 times as likely to be unemployed, 10 times as likely to have been a regular truant, two and a half times as likely to have a family member convicted of a criminal offence and six times as likely to have been a young parent.”*

All these factors suggest a propensity for criminal behaviour and yet would not be suggested as relevant for ascertaining a person’s guilt in a particular case. Why therefore should the existence of previous convictions?

If there are aspects of a defendant’s character that are demonstrably relevant to the current case, if there are strikingly similar facts to a previous conviction or if a defendant with convictions suggests they are of good character, then the prosecution can already argue that previous convictions should be disclosed. In fact, Liberty believes that many prosecutors (and politicians) are not fully aware of the number of situations where they are already permitted to adduce evidence of previous misconduct. However, the presumption should remain against this happening.

Once someone has been convicted of an offence they will always be more likely to be convicted on future occasions. It will also make it more tempting for weaker cases to be presented to the court by the CPS and the police on the basis that evidence of previous misconduct is likely to secure a conviction. This will create a ‘usual suspects’ charter.

Disclosure of “other misconduct” and the use of the phrase ‘anything suggesting a criminal tendency’ could refer to adducing evidence of previous acquittals. If there is no conviction to show a court, the fact that there have been previous charges or even previous arrests, are the obvious ways to imply that someone is not of an entirely wholesome character. As with disclosure of previous convictions it will mean that a defendant will not have a fair trial but is even more difficult to justify. The approach taken is to potentially allow anything, however irrelevant to a particular case, which suggests that a person may be involved with offending to be heard by a court. It implies that a jury or magistrates’ bench who acquitted ‘got it wrong’.

Liberty has met with Lord Falconer to discuss our views on detailed proposals for the adducing of previous convictions and other misconduct to be put before the court. We have

also written a paper relating to this which is available from Liberty and is added as an appendix to this submission. As well as the arguments of principle mentioned above, there are strong practical concerns about the way in which the proposals will impact on the day to day running of the magistrates' and crown courts which can be briefly mentioned here.

One of the main stated aims of the government's criminal justice proposals is to speed up the process so that cases are determined more rapidly. If the presumption over the admissibility of previous convictions changes, so that they are adduced before trial as a matter of course and it is for the defence to establish that they should not be permitted, it will result in major delays to the court process. The proposals are aimed at crown court proceedings and frequently refer to the 'judge' and 'jury'. However a very high proportion of defendants pleading 'not guilty' have their cases heard in the Magistrates Court. As magistrates are arbiters of both law and fact, any trial in the magistrates' court would, in the vast majority of either way trials where the defendant has previous convictions, result in an application for the case to be heard in the crown court.

This is because if the case were heard by the magistrates they would be put in the position of hearing of the previous convictions before deciding whether disclosure is more prejudicial than probative. If it is, they will then have to forget they are aware of those convictions when considering whether the prosecution has established guilt. This is a wholly artificial situation. As a consequence, defendants with previous convictions in either way offences will be far more likely to elect trial in the crown court as there will at least be a possibility of the jury not being aware of their previous convictions. It could be argued that a similar situation exists under s.76 and s.78 of the Police and Criminal Evidence Act 1984 which deals with the admissibility of confession evidence. However PACE applications are relatively few and would have a minor impact on the running of the magistrates' court. It is worth noting that knowing that an application under PACE was likely to be an issue would be a strong factor in deciding to elect for a case to be heard in the Crown Court.

Further delay will also be caused in both Magistrates' and Crown Courts as defence solicitors and barristers will feel obliged in most cases to object to a prosecution application for previous convictions to be admitted. If they feel there is any chance of success they will be obligated to apply and they may well be expressly instructed by their client to do so. As caselaw develops it is certain there will be often considerable legal argument put forward by

both sides over the admissibility of previous convictions which will use up a large amount of court time.

- 4.60 Liberty agrees that there is a clear need for rationalisation and codification of the present rules on hearsay evidence.

We note that the existing rules on hearsay evidence, complex as they may be, have evolved in large part to protect the interest of defendants in obtaining a fair trial. Any future reforms must continue to provide vigilant protection of that interest and in particular ensure that the rules on hearsay do not compromise the defendant's unqualified right to a fair trial.

Liberty accepts that in certain circumstances there may be arguments for admitting cogent and reliable evidence which would presently be excluded as inadmissible hearsay. The present rules sometimes lead to unfairness for defendants as well as the victims of crime, for instance by excluding evidence which shows that someone else has confessed to a crime.

However, we remain convinced that in *most* cases the best evidence is evidence given in open court, in the presence of the accused and the fact-finders, and subjected to full cross-examination. We therefore believe that an exclusionary general rule, formulated with appropriate and well-defined exceptions, continues to be the best and only acceptable approach to ensuring fairness in criminal trials.

In our view, the most forceful justification for the hearsay rules is that they allow defendants to challenge the facts asserted by a witness through direct cross-examination. Evidence which has been permitted without challenge but is disputed is inevitably less reliable for that reason. In concrete terms, our view is that the prejudice caused by such material inevitably will outweigh its probative value, be it considered by lay magistrates, juries, or professional judges.

The view expressed in the Auld Review of the criminal courts is that jurors may be more competent than we give them credit for in assessing the weight of the evidence. Unfortunately this provides little reassurance to defendants who are convicted substantially on the basis of hearsay evidence. Moreover, as juries give no reasons for their findings no

one will ever know whether they have indeed understood the principles by which weight should be accorded to different kinds of evidence.

The hearsay rules also ensure that the evidence is given in the presence of the fact-finder, who is thereby able to consider the demeanour of the witness and thereby to form a view of his credibility. We accept that it is not always possible to assess credibility merely by reference to a witness's demeanour, but it is our firm view and experience that in very many cases, fact-finders are substantially assisted in forming a view of a witness's evidence by observing the way in which evidence is given.

Although not referred to in the White Paper we would draw careful attention to Article 6(3)(d) of the European Convention. This provides that everyone charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. So far as it relates to the evidence of witnesses who do not give oral evidence at trial, the basic approach to hearsay in the Convention cases is that 'all the evidence must *in principle* be produced in the presence of the accused at a public hearing with a view to adversarial argument'.

We do recognise that the right to confront one's accuser under Article 6 is not an absolute requirement but forms an essential part of any assessment of the overall fairness of the proceedings. In determining whether a defendant was afforded a fair trial other relevant considerations will include the reasons for a witness's non-attendance and the importance of the hearsay evidence in the proceedings as a whole. It is, of course, essential, that any codification of the law of evidence takes into account the existing ECHR case law on the use of hearsay.

Hearsay was considered by in detail both by the Law Commission and in the Auld review and Liberty prefers the following specific features of the Law Commission's proposals.

A new Criminal Evidence Code should *retain* the general rule against hearsay, subject to specified exceptions drawing primarily on those exceptions to the rule which already exist.

The availability of a 'safety valve' (a discretionary power to admit otherwise inadmissible hearsay) would address the needs of both prosecution and defence to rely on evidence which, whilst technically inadmissible, deserves to be admitted in the interests of justice. In our view, if it were to be introduced, such a rule would only be appropriate if it were defined by clear reference to the principles of ensuring a fair trial as established in the Article 6 caselaw. As far as defendants are concerned, this would reflect an emerging willingness by the appellate courts to quash a conviction as unsafe if a defendant, subjected to the harsh operation of the hearsay rules, is denied a fair trial.

- 4.63 If the rule against double jeopardy is removed it will destroy the element of finality in the system and increase the chances of innocent people being convicted. People who have been arrested and prosecuted, and who will often have been locked up in prison for months before they face trial, should be free once they have been acquitted by a jury. It cannot be right to force them to go through this all over again.

There are a handful of cases that are used to justify this change. But even these few more often make a compelling case for better criminal investigation and prosecution. Changing the law to remove the 'double jeopardy' protection looks an attractive answer in extreme cases, but it would have far wider, disturbing consequences for many people caught up in other investigations.

If the rule is relaxed it is very unlikely that someone prosecuted again will receive a fair trial. It is highly unlikely (especially in high profile cases) that a jury will not be aware of the fact that it is a retrial and that a court has already decided that there is 'compelling' new evidence. Even if it is not the prosecution will have a huge advantage in knowing exactly what the defence witnesses and defendant will say having been through one trial and will be able to prepare accordingly.

The rule against double jeopardy prevents oppressive repeat prosecutions. We doubt that giving the police and prosecution the option of a 'second go' at defendants will do anything to tackle the issues of quality investigation in the first place or ensure the absolute diligence that serious crimes should demand of them. Indeed, it raises the possibility that police officers' certainty that they are right will allow them to pursue an innocent person beyond their acquittal, rather than focusing on a full investigation to find the real culprit. If the bar

is relaxed it will allow the state the opportunity to try time and again to get a popular result against an unpopular defendant.

An argument put forward to support the removal of the double jeopardy rule is that it would allow the retrial of the men suspected of killing Stephen Lawrence. However, the fundamental problem with the investigation was the appalling manner in which it was carried out with evidence being lost and strong leads being ignored. It is unlikely that even with the abolition of this rule these suspects can ever be tried again fairly and it is likely that any trial will be stopped by the judge as an abuse of process.

Notwithstanding that we are opposed to any change in the bar we would take issue with the proposal to make any alteration retrospective. No doubt there are specific high profile cases the Home Secretary has in mind. If there were any removal of the bar and there were retrospective re-trials the effect would be even more prejudicial to a fair trial than described above. What is being said is 'We are so certain that you are guilty that the law has been changed to bring you to justice'. Quite simply no one can have a fair trial in these circumstances, as every jury will be aware of the circumstances which lead to the re-trial.

The White Paper puts forward a number of safeguards to limit the reduction of the bar. We maintain that the only watertight safeguard is the rule itself.

- 4.67 We accept the point made that a defendant has a right of appeal at the end of a trial against both conviction and sentence while the prosecution has no equivalent right of appeal against legal decisions by the trial judge. Because of this we do not object in principle to the extension of a prosecution right of appeal where the judge makes a ruling effectively terminating the prosecution case. However this should only be to clarify a point of law and not to convict the defendant in that case. It should also be noted that the separate consultation paper, which considers admissibility of previous misconduct, rejects the Law Commission's proposals in 'Evidence of Bad Character in Criminal Proceedings' (Report 273). The Law Commission recommended that evidence which is contaminated by improperly admitted evidence of previous convictions should result in a judges direction to acquit. If the prosecution were granted a right of appeal as proposed in the White Paper then it would be possible to follow the Law Commission's recommendation and allow the prosecution the right to appeal if they believe the judge misdirected the jury

## Chapter 6 - Punishment and Rehabilitation

6.32 Liberty has discussed the proposals for reform of the Rehabilitation of Offenders Act with the National Association for the Care and Rehabilitation of Offenders (NACRO) who have particular interest and expertise in this area. We felt that we had nothing further to add to the comments they were proposing to make to the consultation document 'Breaking the Circle' and would not therefore be making a separate submission.

We would however congratulate the Government on taking a progressive view on rehabilitation and proposing to change requirements on disclosure of spent convictions so that those who have committed crimes in the past face less onerous duties. We would go further by suggesting that there could be provision for old convictions that are not relevant to employment to become spent for those professions that are currently exempt from the 1974 act (such as teaching or social work). The current law means that applicants for posts in these exempt professions must reveal any conviction they have. While there are some convictions that should always be disclosed for members of the exempt professions, minor offences which have no bearing on employment should become exempt after a specified period.

## Chapter 8 - fighting and reducing crime

8.4 Liberty agrees that issues surrounding domestic violence are a matter of concern and shares the Government's concerns that many women and children suffer extreme trauma as a consequence. We agree with many of the proposals put forward, particularly increasing safe accommodation, developing health care initiatives, appropriate response from the police and CPS and the promotion of education and training.

However, the section on 'improving the interface between the civil law and the criminal law' does raise some particular concerns. We do not object in principle to the extension of restraining orders although we would need to see the detail of what is being proposed.

Making the breaching of a non-molestation order a criminal offence would be an inappropriate mixing of criminal and civil law. Under the order, criminal penalties would be triggered by conduct that would not otherwise be criminal.

The standard of proof required in the civil court to establish that the conduct requiring a non-molestation order occurred is that of a balance of probabilities. If the order is breached a crime is committed. However, the only time a criminal standard of proof will be applied is in establishing whether breach took place. This will often involve an act that would not in itself be criminal. We believe this mix of criminal and civil standards of proof is the continuation of a trend established with the creation of Anti-Social Behaviour Orders Disorder Act 1998. It appears that the government wishes to eventually criminalise any breach of a civil order.

A far better approach would be to ensure that adequate support, attention and priority are given to cases where there has been an allegation of domestic violence to ensure that the guilty perpetrator can be convicted. There is a tendency on the part of the police to try to persuade victims of criminal domestic violence to seek remedy in the civil courts. If sufficient attention is paid to ensuring that prosecutions can be successfully carried out then it should not be necessary to do this.

We are concerned by proposals concerning anonymity for witnesses. As mentioned elsewhere it is important that the defendant and his representative are able to examine witnesses properly. Unless there is very good reason this should always be in open court with the witness in plain view. If there were evidence to show that victims are more willing to come forward if they are promised anonymity then we would be willing to reconsider our objection.

We would be interested to see in greater detail what is being proposed in relation to better liaison between civil and criminal courts before making detailed comment. If it is being suggested that the framework for communication of matters such as the existence of bail conditions imposed by the magistrates which may be relevant to ongoing civil proceedings be improved then this is a logistical matter that raises no particular concerns. However if 'better liaison' is taken to mean changing rules of admissibility and evidence then it may raise concerns.

**Gareth Crossman**

**Liberty**

**October 2002**