The Law Commission

(LAW COM No 277)

THE EFFECTIVE PROSECUTION OF MULTIPLE OFFENDING

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Lord High Chancellor by Command of Her Majesty
October 2002

Cm 5609

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Toulson, *Chairman*[1]
Professor Hugh Beale QC
Mr Stuart Bridge
Professor Martin Partington CBE
Judge Alan Wilkie QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

The terms of this report were agreed on 3 July 2002.

The text of this report is available on the Internet at:

http://www.lawcom.gov.uk

[1] At the date this report was signed, the Chairman of the Commission was the Right Honourable Lord Justice Carnwath CVO.

THE LAW COMMISSION

THE EFFECTIVE PROSECUTION OF MULTIPLE OFFENDING

CONTENTS

EXECUTIVE SUMMARY

1. This report makes recommendations for changes to criminal practice and procedure which will facilitate the more effective prosecution of those who have committed multiple offences. The "effective prosecution of multiple offending" project emerged from our work in Legislating the Criminal Code: Fraud and Deception (Consultation Paper No 155), consultation issues 10 and 11.[1]

2. The problems which we have sought to address here arise in cases where the offending conduct of the defendant is repeated many times – too many individual offences to be accommodated in a single trial.[2] Formerly, such offending was dealt with by way of an indictment charging offences which were regarded as specimens of a wider range of offending. This pragmatic arrangement was thrown into disarray by the decision of the Court of Appeal in *Kidd & ors*.[3] In that case Lord Bingham LCJ held that it offended a fundamental principle of sentencing for the defendant to be sentenced not only for the four specific offences of which he had been convicted after a trial, but also for others of which the four were specimen; offences of which the defendant had neither been convicted, nor to which he had pleaded guilty nor agreed to have taken into consideration.[4]

3. The logic and correctness in principle of this decision cannot be faulted and we do not seek to do so. The decision does, however, pose an intractable dilemma for prosecutors and the courts in cases such as multiple theft and multiple fraud. In essence it counterposes the inability of a court to deal with an indictment with hundreds of separate counts with the inability to sentence for the totality of offending in the absence of a decision on each instance of offending. The problem is an important one because the consequence of the impracticability of prosecuting the full extent of dishonest offending in such cases is that the vast majority of such offending will not be prosecuted and the offenders will escape appropriate sanction. We have been told that the practice of fraud squads faced with this problem is to charge merely a handful of offences, making no attempt to reflect the full criminality in any given case. Clearly this is not a desirable solution. From the judiciary, we have heard that the present law is found to be "pedantic and unworkable" and the senior judges whom we have consulted recognise that "very real inherent difficulties" exist.

[1] Fraud (2002) Law Com No 276, published in July 2002, dealt with most of the other issues raised in that Consultation Paper.

[2] At common law there are rules against the overloading of indictments. The courts recognise that too many counts in a trial cause great difficulties, *Novac* [1977] 65 Cr App R 107 at pp 118–19, *per* Bridge LJ, *Kellard* [1995] 2 Cr App R 134.

[3] [1998] 1 WLR 604. This case is also frequently referred to as *Canavan*.

[4] The outcome however was that the sentence remained unchanged. The court was not able to say that a sentence of 15 months' imprisonment was manifestly excessive for just those four offences committed by a man who grossly abused his position of trust. There had been no guilty plea to mitigate the sentence.

4. Under the present system (where there is a limit to the number of separate counts, each containing a single offence, that can be managed within a jury trial) it is not possible to give full respect to each of the following two fundamental principles. To some degree, one is bound to yield to the other. The principles are:

   (1) Defendants should only be sentenced for that which they have admitted, or which has been proved following a trial in which both sides can be examined on the evidence.

   (2) It should be possible to sentence for the totality of an individual's offending. Defendants should not escape just punishment because the procedure cannot accommodate this.

5. The legal system should operate so as to reflect in full each of these fundamental principles. The constraints that together prevent full recognition being given to both of these principles are three-fold:

   (1) the requirement that all issues that go to guilt must, if not admitted, be proved to a jury/magistrates;

   (2) the strict limitations to the inclusion of more than one offence in any single charge/count;

   (3) the limit to the number of separate counts or charges that can be managed within a trial.

6. It is perhaps not surprising that we have been unable to find any single solution to the complex problems faced. We are making three separate recommendations, each of which addresses one or more of these constraints:

   (1) We recommend the extension of the ambit of the offence of Fraudulent Trading in section 458 of the Companies Act 1985, to the non-corporate fraudulent trader. This would allow an individual to be prosecuted in a single count for the *activity of* fraudulent trading, although that activity may be made up of a number of otherwise discrete offences.

   (2) Where a defendant has been convicted in the Crown Court of a count citing conduct which under existing law may be regarded as a "continuous offence", we recommend the use of special verdicts as a means of better informing judges, for the purpose of sentencing, of the extent of offending of which the jury is sure.

   (3) Where there are allegations of repetitious offending which are not apt to be described as a continuous offence but which, prior to *Kidd*,[5] could have been dealt with by means of specimen counts we recommend a two stage trial procedure. The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts. In the event of conviction on one or more counts, the second stage of the trial may follow, in which the defendant would be tried by judge alone. The judge will, at that stage, determine questions of guilt in respect of any

[5] [1998] 1 WLR 604.

scheduled offences linked, at a pre-trial hearing, to a specimen count of which the defendant has been convicted.

7. The benefits of these recommendations are that

(1) the prosecution will be able to prosecute individual fraudulent traders for the full extent of their offending even where there is no conspiracy nor any involvement of a company in the trading.

(2) the prosecution will be able to make greater use in the Crown Court of the method of charging ongoing offending in a single count, known at present as the "continuous offence". Our recommendation for use of special verdicts where the indictment contains such a compound allegation would enable the trial judge to sentence with knowledge of the extent of guilt determined by the jury. The position of the judge would in this way be closer to that of the District Court judge in such cases, as demonstrated by the case of *Barton*.[6] The benefit to the defendant would be that the judge would discount for sentence any of the offences about which the jury was unable to agree his or her guilt.

(3) the two stage procedure would

(a) preserve jury trial in respect of core examples of the defendant's criminality;

(b) ensure that the jury trial is manageable and comprehensible;

(c) ensure that defendants would not be able to take advantage of the practical limits of trial by jury so as to go unpunished for a significant part of their offending;

(d) result in defendants only being sentenced for offences which have been proved to a court after a trial;

(e) be likely to encourage guilty defendants, either on initial arraignment or after conviction of a number of specimen counts, to plead guilty to or to admit any linked offences of which they are also guilty.[7]

(f) allow full expression of each of the competing requirements of justice identified earlier, in that —

(i) the defendant would be given a fair hearing, with an opportunity to present a defence in relation to any or all of the alleged offences;

(ii) the Crown would be able to seek verdicts of the court that would enable the judge to sentence the defendant for the full extent of his or her offending.

[6] [2001] EWHC Admin 223.

[7] In contrast to the present situation, where there is little incentive for a defendant to plead guilty to the full extent of offending (see discussion at paras 3.11 – 3.14 below re *Evans* [2001] 1 Cr App R (S) 144).

THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

THE EFFECTIVE PROSECUTION OF MULTIPLE OFFENDING

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I
INTRODUCTION

1.1 In April 1999 the Law Commission published a consultation paper entitled Legislating the Criminal Code: Fraud and Deception (Consultation Paper No 155). It was prompted by a reference from the Home Secretary who asked us to consider the law of fraud in general, and in particular the question "whether a general offence of fraud would improve the criminal law". A report dealing with most of the issues raised in that consultation paper was published on 30 July 2002. That report does not, however, address the issues raised in the latter section of Part VII of the consultation paper, relating to the effective prosecution of multiple offences of fraud.[1] We had invited views on the possible use of the concept of a single fraudulent scheme as a means of solving some of the problems which had recently emerged in trying and sentencing those whose fraudulent offending comprised the repeated commission of identical or similar offences on a scale which made it impossible for each offence to be the subject of a count on the same indictment or information. It is with those issues that we now deal, in this report.

1.2 We are conscious of our statutory duty to keep the law under review with a view to its systematic development and reform. We have, therefore, asked ourselves whether the problems identified in relation to the prosecution of multiple offences of fraud are faced in respect of any other types of multiple offending. We have concluded that some of these problems arise in a limited number of offences other than fraud. Consequently, we have decided to make recommendations which will address the problems which arise in respect of these offences.[2]

[1] Paras 7.60 – 7.74. See consultation issue no 10 in Part X of the Consultation Paper where we invited views on the following:

> [w]hether, where a single fraudulent scheme involves the commission of two or more deception offences, the carrying out of that scheme should be regarded as a single offence, and it should therefore be possible to charge it in a single count of an indictment (issue no 10).

[2] Offences such as theft, counterfeiting, corruption and internet child pornography encounter problems of the type addressed earlier in relation to fraud.

1.3 Our work on the effective prosecution of multiple offending has coincided with the publication of the Auld Review[3] of the operation of the criminal courts and the Government's response to it in the White Paper, Justice For All.[4] Any recommendations that we make must be capable of fitting in with the court system that is likely to operate in the near future. We intend to feed our recommendations directly into the Government's work to develop the White Paper into legislative form. In order to facilitate this and to avoid duplication of resources at this stage we do not, on this occasion, annexe a Draft Bill to this report.

1.4 In the Fraud Consultation Paper,[5] we suggested that it should be possible to make use of the concept of a scheme to prosecute repetitious fraudulent conduct *which would in any event be criminal* (under one or more of the existing deception offences). We suggested that it should be possible to charge a single criminal enterprise, involving the commission of two or more identical or similar offences, as one continuing offence, to be described as a "scheme". The whole enterprise would be regarded as constituting a single substantive offence.[6]

1.5 Although a majority of respondents to the Fraud Consultation Paper who addressed these issues were attracted by the idea of the development of an offence which would catch the fraudulent scheme, serious concerns about the practicality and likely effectiveness of this proposal were identified by both supporters and dissenters.

1.6 We were persuaded by these concerns to re-think our proposal. We consulted these respondents further, by means of an informal consultation document in July 2000. We asked whether one way ahead might be to construct an offence which caught "a course of conduct" or which penalised a certain "activity". Once again, we were persuaded by respondents that, save for certain context specific offences concerning social security benefits and fraudulent trading,[7] the problem cannot adequately be addressed in that way.[8]

1.7 We were forced to recognise that the nature of the problem is such that there is no single solution which will address all of the difficulties. We formulated two further proposals on which we consulted in our seminar paper in February 2002.

[3] Auld LJ, *Review of the Criminal Courts of England and Wales* (2001).

[4] CM 5563.

[5] Consultation Paper No 155.

[6] See n 1 above, for detail of these consultation issues.

[7] Existing activity offences may be found, for example, in the Social Security Administration Act 1992, s 111A(1) and in the Companies Act 1985, s 458.

[8] The difficulties with a course of conduct offence would be particularly acute where the conduct comprised a series of similar offences on which the judge would have to pass sentence. If all the jury had to be satisfied of to convict of the course of conduct offence was that the offending took place on, say, at least three occasions as part of a course of conduct, then the judge, in passing sentence, would be unaware of the view the jury had taken of the extent of the offending beyond the minimum of three.

The proposals presented in that paper were discussed at a Law Commission seminar[9] and were favourably received by many respondents. Arising from this most recent consultation, we make two new recommendations: these will be discussed under the headings "a compound allegation" and "a two stage trial procedure". In addition, we make a recommendation for the expansion of fraudulent trading to encompass the non-corporate fraudulent trader. In view of developments in social security legislation which have taken place, there is no need for us to make another recommendation, which we foreshadowed in earlier consultations, for a context specific "activity offence" in connection with fraudulent claims for benefit.[10] Thus, we are making three discrete recommendations which, depending on the context, will provide prosecutors with a series of new approaches to take when prosecuting multiple offences and which will, we believe, enable certain cases of multiple offending to proceed through trial to sentence more effectively than has, to date, been possible.

1.8 The structure of this report is as follows. We

- outline the nature of the problems faced in relation to the effective prosecution of multiple offences, in particular, offences of fraud and theft;[11]
- summarise the present law relevant to these problems;[12]
- consider the extent to which the decision in *Kidd* creates any significant practical difficulty in cases other than multiple fraud;[13]
- set out our solutions for dealing with the problems and make recommendations with our supporting arguments;[14]
- give our response to issues arising from our recommendations,[15] and
- set out our recommendations.[16]

[9] The seminar was attended by about forty delegates from bodies including the SFO, the CPS, the DTI, Customs and Excise, academia, the judiciary, the police, the Home Office, the Lord Chancellor's Department, the Magistrates' Association, the legal profession, the police and Justice. Others from these groups responded in writing.

[10] See para 5.6.

[11] See Part II.

[12] See Part III.

[13] See Part IV.

[14] See Parts V – VIII.

[15] See paras 7.71 – 7.84.

[16] See Part IX.

PART II
THE PROBLEMS

2.1 The problems we address in this report arise where the same type of offending conduct of the defendant is repeated many times – too many for each individual offence to be accommodated in a single trial.[1] One way which had, in the past, been found of coping with such serial offending was to identify a manageable number of "sample" counts. The trial proceeded upon the sample counts and, following verdicts of guilty, the judge sentenced on the footing that the counts upon which the defendant had been found guilty were samples of the much larger number of offences committed. The defendant could thus be sentenced to a term commensurate with the totality of the offending and not merely for that represented by the sample counts.

2.2 In this way, sentencing on findings of guilt on sample counts mirrors the approach of the court (still available) where it sentences on pleas of guilty to a sample selection of offences but where, in addition, the defendant asks to have the court take into consideration other offences, set out in a schedule, to which no plea is formally entered but which are admitted. This enables the defendant to wipe the slate clean. The court can sentence for the totality of the offending represented both by the guilty pleas and the offences taken into consideration. The police are helped with their clear up rates – a benefit to all.

2.3 The pragmatic arrangement of proceeding in a contested matter with sample counts was thrown into disarray by the decision of the Court of Appeal in *Kidd & ors.*[2] *Kidd* was a case involving a series of indecent assaults. The defendant was convicted on four counts and the judge treated these as sample or specimen counts for the purpose of sentencing for the entirety of the offending alleged.

2.4 Lord Bingham LCJ, in the Court of Appeal, took the position that it offended a fundamental legal principle for the defendant to be sentenced not only for the four specific offences of which he had been convicted after a trial, but also for others of which the four were specimens but of which he had been neither convicted, nor to which he had pleaded guilty nor agreed to have taken into consideration.[3]

[1] At common law there are rules against the overloading of indictments. The courts recognise that too many counts in a trial cause great difficulties, *Novac* [1977] 65 Cr App R 107, 118–19, *per* Bridge LJ, *Kellard* [1995] 2 Cr App R 134.

[2] [1998] 1 WLR 604. This case is also frequently referred to as *Canavan*.

[3] The outcome however was that the sentence remained unchanged. The court was not able to say that a sentence of 15 months' imprisonment was manifestly excessive for just those four offences committed by a man who grossly abused his position of trust. There had been no guilty plea to mitigate the sentence.

2.5 *Mills*[4] and *Bradshaw*,[5] both cases that were addressed in *Kidd*,[6] demonstrate the problem regarding effective prosecution where defendants engage in a large number of similar fraudulent transactions.

2.6 In *Mills*, a co-accused named Price had been

> convicted on a single count of corruptly accepting a sum of money of unspecified amount. The count was so framed because the prosecution were unable to specify what he had received and when. His own evidence made it plain that he had received cheques or £50 cash on numerous occasions, the total received being some £5,450. The judge at the trial, with the assent of the prosecution, took one £50 payment as a sample, but on conviction sentenced Price for receiving the aggregate sum of which he took the view the jury, by their verdict, had *inevitably* convicted him.[7] (emphasis added)

2.7 The Court of Appeal approved that course in its decision in *Mills*, but in *Kidd*, Lord Bingham LCJ said that

> if the single unamended count embraced a series of different payments on different dates it would appear to have infringed the rule that only one offence may be charged in each count of an indictment; if on the other hand, the single count was to be understood as charging a single receipt of £50, it is hard to see how Price was convicted of corruptly receiving any of the other payments, and since he did not admit any offences or ask for them to be taken into consideration the approved basis of sentence would seem hard to justify in principle.[8]

2.8 Similarly, in *Bradshaw*,[9] the defendant was convicted on five counts of theft from five specific investors, totalling £97,000. The overall loss caused by the scheme was £3 million. On appeal, Bradshaw complained that in sentencing him to six years' imprisonment the trial judge, though disclaiming any intention to do so, had sentenced on the basis of the overall deficiency. The Court of Appeal upheld the contention that guilty verdicts on the five counts would *necessarily* have involved guilty verdicts in relation to all the other victims had counts been present. In *Kidd*, however, the court differed from that conclusion, saying "we think it inconsistent with principle that a defendant should be sentenced for offences neither admitted nor proved by verdict".[10] Lord Bingham said that the court had "reached the correct conclusion in *Reg. v. Clark* [1996] 2 Cr. App. R.

[4] (1979) 68 Cr App R 154.

[5] [1997] Crim LR 239.

[6] [1998] 1 WLR 604 at pp 607–608.

[7] *Ibid* at p 607E–F.

[8] *Ibid* at p 607G.

[9] [1997] Crim LR 239.

[10] [1998] 1 WLR 604 at p 608G. See also *Rosenburg* [1999] 1 Cr App R (S) 365.

282",[11] when it had held that it was not open to a sentencer to sentence on the basis that the offence of which the defendant had been convicted was aggravated by unproved, separate and distinct offences.

2.9 The logic and correctness in principle of this decision cannot be faulted and we do not seek to do so. However, at a stroke it created major problems for dealing with much high volume offending. Lord Bingham pointed out that:

> Prosecuting authorities will wish, in the light of this decision and *Reg. v. Clark*, to include more counts in some indictments. We do not think this need be unduly burdensome or render the trial unmanageable. The indictment in *Reg. v. Kidd* provides a convenient example. It contained 18 counts alleging abuse of eight different girls. Most of the counts related to [a day during][12] a period of one or two calendar years.[13]

2.10 While this is unlikely to create an insurmountable problem in sexual offence cases, the decision creates obvious problems in cases of multiple theft and deception where the total sum obtained is highly relevant to sentence. In such cases, the decision in *Kidd*[14] precludes the use of trials based on sample offences followed by sentencing on the totality of offending. This has undercut the efficacy of a defendant asking for offences to be taken into consideration where the number involved could not sensibly be accommodated in a trial.[15]

2.11 It poses an intractable dilemma for prosecutors and the courts. In essence it counterposes the inability of a court to deal with an indictment with hundreds of separate counts with the inability to sentence for the totality of offending in the absence of a decision on each instance of offending. Thus, unless a defendant volunteers to be dealt with by pleading guilty and asking for a schedule of offences to be taken into consideration, a person whose offending involves the commission of hundreds of offences, each perhaps involving a small amount, but whose overall gain might be considerable, could never be sentenced to a term which reflected the true extent of their offending.[16] The defendant could only be sentenced to a term commensurate with the, perhaps relatively trivial, amount

[11] [1998] 1 WLR 604 at p 609E.

[12] Lord Bingham explained in the following paragraph of this report that the particulars of the offence specify that the assault took place "on a day between" 1 January 1999 and 31 December 1999. In view of this, the argument of appellant counsel that the count was intended to cover numerous assaults and offended against rule 4(2) of the Indictment Rules 1971 failed. It was in relation to sentence that the counts were treated as specimen counts.

[13] [1998] 1 WLR 604 at p 609F.

[14] [1998] 1 WLR 604.

[15] The way in which it did this is illustrated well by the case of *Evans* [1999] Crim LR 758, see para 3.12, below.

[16] The courts regard both the amount gained and the duration of the offending as highly relevant to the length of sentence.

involved in the offending with which the trial process could cope. For example, the Serious Fraud Office recently told us of a case of advance fee fraud, where

> the total amount involved is well over £1 million but where each victim parted with no more than £7,000. Neither conspiracy to defraud nor fraudulent trading are viable on the facts and we may not safely include more than ten individual counts on the indictment.[17]

2.12 The problem is an important one because the consequence of the impracticability of prosecuting the full extent of dishonest offending in such cases is that the vast majority of such offending is not prosecuted and the offender thus escapes appropriate sanction. This cannot be right. If it were feasible to have a trial on hundreds of counts there would be no problem. It is generally accepted that it is not. Where hundreds of individual thefts, deceptions and obtainings occur it is impracticable to present each and every one of them as a separate count in a jury trial[18] even though the prosecution will (and must) have all the evidence they need against the defendant.

2.13 Under the present system, where there is a limit to the number of separate counts, each containing a single offence, that can be managed within a jury trial, it is not possible to give full respect to each of the two fundamental principles set out below. To some degree, one is bound to yield to the other. The principles are:

(1) Defendants should only be sentenced for that which they have admitted, or which has been proved following a trial in which both sides can be examined on the evidence.

(2) It should be possible to sentence for the totality of an individual's offending. Defendants should not escape just punishment because the procedure cannot accommodate this.

2.14 In cases such as *Mills*[19] and *Bradshaw*,[20] it was the first of these principles which yielded to the second. Since the decision in *Kidd*,[21] that position is reversed. In our recommendations, we strive to give recognition to *both* of these principles. We do this by addressing the aspect of the present system which lies at the crux of this tension – the impracticality of having a manageable jury trial on sufficient separate counts to reflect the overall criminality of the defendant. Accordingly, in

[17] Other typical examples of repetitious offending where these difficulties in prosecuting have been faced are benefit fraud, non-corporate fraudulent trading and fraud by those who exploit other opportunities to defraud, such as by overcharging for NHS work or by making door to door visits for the purpose of a scam, counterfeiting and internet child pornography.

[18] See for example the judicial comments in *Evans* [1999] Crim LR 758, *per* Mantell LJ at pp 147 – 148.

[19] (1979) 68 Cr App R 154.

[20] [1997] Crim LR 239.

[21] [1998] 1 WLR 604.

formulating our new recommendations for more effective prosecution of multiple offences we have focused on different techniques to address this problem.

2.15 Our first recommendation, for a compound allegation, applies to those cases where the law already permits certain repeated offending to be tried as a single offence categorised as a single continuing transaction. This already enables certain limited categories of multiple offending to be dealt with in a single trial. Our recommendation would apply in the Crown Court and would enable the jury to inform the judge, for sentencing purposes, of its findings of the extent of the defendant's guilt where it has found him or her guilty of such a single count.

2.16 Our second recommendation, for a two stage trial procedure, recognises that there will be certain cases of multiple offending which cannot be encompassed in a single trial before a jury. Our recommendation combines familiar techniques of conducting a trial on sample counts and of judicial fact-finding for the purpose of sentencing. It adapts them so as to form a two stage trial process which will ensure that the defendant *will* be sentenced for the entirety of the proven wrongdoing but, *only* for those offences which have either been admitted or asked to be taken into consideration, or in relation to which there has been a conviction after trial.

2.17 Our third recommendation is to extend the ambit of the well established activity offence of fraudulent trading, contrary to section 458 of the Companies Act 1985, to cover non-corporate fraudulent traders.

2.18 These recommendations each give respect to the principle highlighted in *Kidd*,[22] that in order to sentence in accordance with first principles the judge must know what conduct forms the basis of the defendant's conviction or admission of guilt. The first recommendation gives the jury the task of indicating the extent of the defendant's guilt; the second ensures that the defendant will only be sentenced for those offences of which he or she has been convicted after a two stage trial, or which he or she has asked the court to take into consideration after a first stage trial on sample counts. The third recommendation gives the jury the task of deciding whether it is sure that the defendant committed the proscribed activity offence.

2.19 Before making good our recommendations in detail we will first outline the present law which has influenced our thinking and identify the types of offence in respect of which difficulties stemming from this tension are faced.

[22] [1998] 1 WLR 604.

PART III
PRESENT LAW

INTRODUCTION

3.1 In this part we summarise the present law and procedures which govern how repeated instances of offending may be prosecuted. The common law doctrine of "general deficiency" and the concept of the "single continuous offence" provide two methods, each one of limited application, for reflecting a large scale of offending within a single information or indictment. Otherwise, restrictions are imposed by the rule against duplicity and the common law principles against overloading the indictment. Without an indictment which reflects the full scale of offending with which the defendant ought to be charged, any convictions obtained may be insufficient to allow the judge to impose a sentence that is commensurate with the full scale of offending. In the final section of this part we examine the position in other common law countries, looking in particular at the sentencing principles applied and the use made of substantive offences for the effective prosecution of multiple offending.

THE INDICTMENT

Duplicity issues and overloading

3.2 Rule 4(2) of the Indictment Rules 1971 proscribes the allegation of more than one *offence*[1] within one count. In addition, indictments may not be overloaded beyond practical limits.[2] Although the rule against duplicity is applied in a practical rather than an analytical way,[3] these constraints lead to difficulties in the effective prosecution of certain multiple offences.

3.3 Two lines of authority have developed at common law which allow, in certain cases, a single count or information to be charged in relation to the aggregate activity[4] even though the evidence discloses that offending behaviour occurred on two or more occasions. These are, respectively, cases in which there is a "general deficiency" and cases which constitute a "continuous offence".

[1] On the question of what amounts to "an offence" see *DPP v Merriman* [1973] AC 584, *per* Lord Morris at p 593B–D: "If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling-house of B steals ten different chattels … it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act". The test given in *Blackstone's Criminal Practice* is "Can the separate acts attributed to the accused fairly be said to form a single activity or transaction?" (para D10.16).

[2] *Novac* [1977] 65 Cr App R 107 at pp 118–119, *per* Bridge LJ, *Kellard* [1995] 2 Cr App R 134.

[3] *DPP v Merriman* [1973] AC 584, *per* Lord Diplock, at p 607B–C.

[4] For example in cases of theft it is the aggregate property stolen; in cases of felling trees, the aggregate number of trees felled.

3.4 The concept of a "general deficiency" relates to cases in which the evidence does not disclose the precise dates and amounts of each individual transaction but where it is clear on the evidence that there has been a large amount of property taken.[5]

3.5 The concept of a continuous offence may be applied

> where the individual transactions are known but where there are many transactions of the same type, frequently individually of small value, against the same victim, and it is convenient in order to reflect the overall criminality to put them together in one information,[6] or one count, so that if the criminality can be proved, without prejudice to the defendant and having regard to the known defence, then the court will be in a position to sentence appropriately.[7]

3.6 The question whether certain acts constitute a single criminal enterprise is one of fact and degree. A recent example, which shows how far, in some cases, the concept of a continuous offence may reach, is *Barton*,[8] in which the Divisional Court upheld the conviction by a Stipendiary Magistrate.[9] The appellant had stolen a total of £1,338.23 on 94 occasions from the till at which she worked over the period of a year. The court recognised that each line in the schedule of offences could have been charged as a separate offence but the average value of each would have been about £15. Thus, had there been ten such informations, the value would have been under £200, which did not represent the overall criminality involving theft of a sum in excess of £1,300. Kennedy LJ said:

> Specimen counts or specimen informations are no longer a possibility, in the light of relatively recent decisions of this Court and of the Court of Appeal Criminal Division. To have 94 separate informations would have rightly been regarded as oppressive.[10] …

[5] For a more detailed exposition see *Arlidge and Parry on Fraud* (2nd ed 1996) p 523, see also *Barton* [2001] EWHC Admin 223.

[6] A common example is burglary. In a single count, the theft element of an offence, contrary to s 9(1)(b) of the Theft Act 1968, may relate to a series of items capable of being charged as separate thefts. The jury may convict of burglary even when they are not sure that every item in the list of allegedly stolen goods was stolen, it is sufficient if there is unanimity on at least one of them. The essence of the offence of burglary is the activity of trespass combined with the offence of theft, and as long as one theft has taken place the offence is complete. Further, the transaction being a single one, the count is not bad for duplicity. Regarding sentence, note *Brewster* [1998] 1 Cr App R (S) 181. This shows that the extent of the financial loss to the victim is not the primary consideration: "The loss of material possessions is … only part (and often a minor part) of the reason why domestic burglary is a serious offence" (at p 185).

[7] *Barton* [2001] EWHC Admin 223, para 6.

[8] *Barton* [2001] EWHC Admin 223.

[9] Now entitled a District Judge (Magistrates' Court).

[10] See commentary questioning this expression in Criminal Law Week, 2001, issue 26, p 3:

> It may be asked oppressive to whom? The court clerk, possibly, if bound to read out 94 informations, but this surely could be short-circuited; but not to the

> This is not a case where she had put forward a specific answer to some of the alleged takings and not to others, and that then specific answers needed to be considered separately. … The Magistrate was able to, and did in fact, give credit for the amount that he was not satisfied had been taken. So far as I can ascertain there was no discernible prejudice or unfairness to the appellant in regarding this as a continuous offence within the principles set out in the authorities to which I have referred.[11]

3.7 This is an important case for our deliberations. The high degree of repetition involved in the offending persuaded the court to regard it as a continuous single offence. In practical terms there was no difficulty in the sentencer sentencing the defendant for what the fact-finder had decided was the true extent of the offending. The Stipendiary Magistrate was able to combine these roles seamlessly. What we have considered is whether this approach would be appropriate in the Crown Court where the fact-finder and sentencer are not one and the same person. At the moment, the Crown Court judge would be left to second guess the extent of the offending of which the jury had been persuaded and that would not fully accord with principles enunciated in *Kidd*.[12]

3.8 More recently, in *Rowlands*[13] the defendant pleaded guilty to a charge of theft of a sum not exceeding £1.7 million. The theft by a bank employee had taken place over an 11 year period.[14] Had there been a trial in that case in which the defendant contested the whole allegation on the same basis, or contested particular sums as well as taking issue generally with the allegation of theft, the judge would have faced difficulty in sentencing due to the inscrutable nature of the verdict of the jury. We will return to consider this aspect of the case at paragraph 6.8 below.

> defendant who is in any event facing the totality of the allegation. It would seem that too much is made of the practical difficulties created by the decision in *Canavan [Kidd]*. In an age of word-processors, the production of 94 almost identical charges is not difficult. The more similar they are, the easier the exercise; the more dissimilar they are, the greater the need to have distinct charges for the greater the likelihood that different issues will arise.

[11] *Barton* [2001] EWHC Admin 223, paras 22–23, *per* Kennedy LJ.

[12] [1998] 1 WLR 604.

[13] *The Daily Telegraph*, 10 November 2001 (unreported).

[14] On numerous occasions, the defendant stole cash from the till and made a book entry showing that sum to have been paid to a worthy customer. No computer record was made. The debits were all put on the suspense account. (Suspense accounts are used by banks to gather money for a temporary purpose, in this instance it was money deducted from interest bearing accounts for payment to the Inland Revenue, who were paid at the end of the month leaving the account balance at zero.) At the end of any month the defendant wrote a cheque, or cheques, from the bank payable to the suspense account, crediting it with the necessary sum to bring the balance to zero. No audit that would have revealed this was carried out during this period and the offending continued undetected for an eleven year period.

3.9 We would regard the case of *Barton*[15] as stretching the concept of what constitutes a single continuous offence capable of being charged in a single count about as far as it can properly be taken. Indeed, the Divisional Court has recently certified that a point of law of general public importance arose in that case although, to date, no leave has, to our knowledge, been given for that appeal to be heard in the House of Lords.[16]

3.10 We are not tempted to regard the approach taken in *Barton*[17] as available in all circumstances in which the problems for sentencing posed by *Kidd*[18] might arise. It should be recognised that the exceptions to the duplicity rule are confined to the two circumstances referred to above. The strict limits to this exception to the general rule are not imposed as mere matters of technicality. Rather they are reflective of the principles enunciated in *Kidd*. Unless it is impossible for the Crown to particularise each offence but they can show a general deficiency, or the conduct can properly be regarded as a single continuous offence then the defendant is entitled to have each offence proved against him or her. The defendant is entitled to an opportunity to challenge the evidence in relation to each separate instance of alleged wrongdoing. Thus both the rule, the exceptions to it and the decision in *Kidd* reflect the principles that defendants should only be convicted of offences in respect of which guilt has been proved and, in turn, should only be sentenced for offences that have been proved or admitted.

The Evans[19] *conundrum*

3.11 The principles enunciated in *Kidd*[20] are:

> A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by

[15] [2001] EWHC Admin 223.

[16] On 1 March 2002, the Divisional Court (Kennedy LJ and Forbes J) certified the following question:

> Where a person faces prosecution in the Magistrates' Court for stealing sums of money from the same victim on a large number of separate occasions in an identical manner on each occasion over a long period of time without the possibility of advancing a different defence in respect of any occasion and there is evidence which enables the prosecution to give particulars of the amount and date of each theft is it permissible to charge all the thefts in a single information alleging theft of the total amount, or does Rule 12 of the Magistrates' Courts Rules 1981 demand that each separate theft should be the subject of a separate information?
>
> Is the position any different for a person facing prosecution in the Crown Court in similar circumstances?

[17] [2001] EWHC Admin 223.

[18] [1998] 1 WLR 604.

[19] [2000] 1 Cr App R (S) 144.

[20] [1998] 1 WLR 604.

> admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence …[21]

when combined with the rule against duplicity and the requirement that indictments should not be overloaded, create difficulties in the prosecution of particular multiple offences, in particular fraud, theft, and counterfeiting.[22] This is because, as already noted, the offending behaviour may relate to conduct which, on each single occasion, constitutes an identifiable offence concerning a relatively small value of property, but where its repetition on a large scale would lead to substantial loss or gain.

3.12 The case of *Evans*[23] illustrates this difficulty. Mantell LJ stated that:

> The prosecution had presented their case against her in 24 counts. We are told that, had every cheque which had been procured been included in this indictment as a separate offence, there would have been 200 counts or more. We cannot see any judge embarking upon a trial with a jury in those circumstances with any degree of enthusiasm and without firmly insisting that the number of counts be substantially reduced. Likewise, it might well be considered unacceptable to proceed on a number of separate indictments. Also, we regard it as unrealistic to expect any defendant who has contested a case of this nature, upon being convicted, to ask for offences to be taken into consideration which he has hitherto denied. The consequence may well be that a defendant who has pleaded guilty and confessed the full extent of his fraud may be treated more harshly than a defendant who has contested the matter but has only been convicted in respect of so-called specimen counts. We have no doubt that the anomaly will be exploited by those who otherwise have no answer to a multitude of charges … However it is not within the province of this Court and certainly not on this occasion to suggest

[21] [1998] 1 WLR 604 at p 607B, *per* Lord Bingham CJ.

[22] Lord Bingham thought that the problem could be avoided in the future by including more counts in the indictment (see para 2.9, above). In making those comments though, the LCJ was not specifically considering other types of cases, such as multiple fraud, theft or counterfeiting.

[23] [2000] 1 Cr App R (S) 144. The appellant, who had been convicted on sample counts alleging the obtaining of £2,807 in housing benefit fraud, was sentenced to three years' imprisonment on the basis of an overall fraud involving £25,000 over a period of four and a half years. Following *Kidd* [1998] 1 WLR 604, the appeal was allowed. On appeal the court limited sentence to that appropriate for a persistent and sophisticated fraud involving fraudulent documents in some quantity and the obtaining of £2,807. A sentence of two years' imprisonment was substituted. See also *Rosenburg* [1999] 1 Cr App R (S) 365 where, even though the facts of over 100 additional counts, not included in the indictment, were identical, except for the dates, and the jury would undoubtedly have convicted on the remaining charges had they been included, the appeal court held that it was wrong, in principle, to impose a sentence based on anything more than the criminality represented within the nine counts in the indictment.

> any solution … we simply remark that the position is far from satisfactory.[24]

3.13 The need for a solution to these problems is highlighted by consideration of two multiple offending cases which were decided before the decision in *Kidd*.[25] *Adewuyi*[26] concerned the dishonest obtaining of over £100,000 worth of welfare benefits during a period of nearly four years. Adewuyi was convicted after a two week trial on an indictment containing specimen counts and sentenced for the full extent of the alleged offending, to four years' imprisonment. In *Stewart*[27] the court dealt with nine different appeals, all involving multiple offences of obtaining benefit by deception or similar offences. Describing the range of appropriate sentences, the court identified at the top of the range those offenders who were professional fraudsters and had selected the welfare department as an easy target. The court also stressed the importance of the proper discount for a guilty plea always being given.[28]

3.14 Since *Evans*,[29] it is clear that in multiple fraud cases of this type, the defendant who pleads guilty to all of his or her offending is liable to a heavier sentence than one who goes to trial on a limited number of counts. This is contrary to basic principles of fairness and cannot be right. It emasculates a principal feature of sentencing and court procedure, that, as a starting point, there should be one third discount of sentence for a timely guilty plea.[30]

VERDICTS AND SENTENCE - THE ROLE OF THE JUDGE IN SENTENCING

3.15 The problem posed by the decision in *Kidd*[31] highlights the fundamental division between the fact-finding role of the jury, for the purpose of determining guilt, and that of the judge for the purpose of sentencing. Where there are disputed details of fact encompassed *within* a finding of guilt, the judge needs to form a view of those facts to determine the seriousness of the offence for the purpose of sentencing. In such cases the view, if any, of the jury on those facts in respect of which no verdict was required for the purpose of the conviction will be invisible

[24] [2000] 1 Cr App R (S) 144, *per* Mantell LJ at pp 147–148.

[25] [1998] 1 WLR 604.

[26] [1997] 1 Cr App R (S) 254.

[27] (1987) 9 Cr App R (S) 135.

[28] (1987) 9 Cr App R 135 at p 136.

[29] [2000] 1 Cr App R (S) 144.

[30] Note in *Barber, The Times*, 20 November 2001, the Court of Appeal held that in relation to offences that are triable either-way where a guilty plea was entered before venue was decided, a discount greater than one-third would often be appropriate.

[31] [1998] 1 WLR 604.

to the court. This was emphasised to us by Buxton LJ in his response to our informal consultation:[32]

> [T]he judge sentences on the basis of *his* view of the case, subject only to his not being able to act on a view that is inconsistent with the verdict of the jury. When, as in most instances, the jury's verdict is inscrutable in relation to, or irrelevant to, facts that are determinative of the level of sentence, the judge has a free hand. That can be illustrated from two types of case, (i) where the jury does not pass at all on sentence-related facts; and (ii) where the verdict, although based on sentence-related facts, is neutral between various versions of them. Examples follow:
>
> (1) The level of sentence for burglary depends importantly not so much on the amount stolen but on the perceived gravity of the act of invasion, as demonstrated by, eg, deliberately targetting elderly people living alone; threats to cause the householder to reveal where her money is; trashing the house. The jury will or at least should be told that they are not concerned with those parts of the allegations, but only with whether the offender entered the house as a trespasser and stole therein. On a guilty verdict the *judge* has to decide how much of the collaterals occurred and even, in a joint charge, who did what.
>
> The same is true of rape. Extra violence, humiliation, racist insult, will all if found add years to the sentence …
>
> (2) D is charged with possessing heroin. The amount possessed is crucial to the level of sentence. When his house is raided there are found two amounts: [one large, one small] … . The jury will be, or should be, directed that if they find D guilty as to *any part* of the total charged, then he is guilty on the whole count. After a guilty verdict the judge will have to decide … . Many years difference of sentence will hang on that decision; about which the jury have nothing to say.

3.16 The freedom of the judge from obligation to adopt the version of events favourable to the defendant where there are two conflicting accounts, either of which may be supported by the "inscrutable" verdict of the jury, was further emphasised by the High Court of Australia in *Cheung*.[33] The court expressly

[32] His view was that

> much of the concern presently expressed about difficulties of sentencing, and the conferring on the judge of too much power to determine the extent and gravity of the offence, is wholly artificial. That already occurs, without any objection, in relation to a wide variety of offences, and only comes to attention when the more or less arbitrary rules of duplicity intervene.

[33] 185 ALR 111 (2002). The defendant in this case was convicted in the Supreme Court of New South Wales of the federal offence of being knowingly concerned in the importation of a commercial quantity of heroin. He was given a life sentence with a non-parole period of 21 years and 11 months. It was not clear from the jury's verdict which of the two evidentiary bases advanced by the prosecution they accepted. The judge based his sentence on the version least favourable to the defendant, who consequently appealed to the High Court of Australia under two main heads. He argued that where it was unclear which version of events the jury had accepted, the judge was bound to adopt that most favourable

rejected the notions that the jury ought to be allowed to make decisions on every aspect of the case that may be relevant to sentence and that the judge was obliged to sentence on the basis of the version of the contested facts consistent with the verdict which is most favourable to the defendant. The court reiterated that sentencing must be "consistent with the verdict" that is to say, first, it must take into account the essential elements of the offence and accept that they have been made out; but second, consistent with *Kidd*,[34] the defendant must not be sentenced for something of which he or she has not been convicted or to which there is no plea of guilty.

The limits of the judge's creative role in sentencing

3.17 We should, however, remind ourselves of the limits of that "creative" role for the sentencer. Where a dispute of fact may properly be dealt with by the addition of a count on the indictment, such a count should be added.[35]

3.18 Whilst recognising the force of the points raised above by Buxton LJ, they must be reconciled with the underlying principle in *Kidd*,[36] that a defendant may only be sentenced for an offence that is either proved or admitted in court which we have placed at the core of our recommendations. To do otherwise would, as Henry LJ said in *Clark*:[37]

> allow him to sentence on the basis that unproved, separate and distinct offences 'aggravate' the offence of which he is convicted.[38]

3.19 Thus we must address the tension between the two competing fundamentals identified earlier – the principle that an offender cannot be sentenced for something unless he or she admits it or has had an opportunity to test the evidence in respect of that offending in court; and the need to sentence a defendant for the totality of offending.

to the defendant if the indictment could have been amended to allow the jury's view to be identified. He further argued that determination by the judge of factual matters for the purposes of sentence infringed his constitutional right to a jury trial. The court held that the judge is entitled to sentence on any factual basis that is not inconsistent with the jury's verdict. This does not constitute an infringement of the right to be tried by jury, but the prosecution should, however, endeavour to draft the indictment so as to "obtain the jury's view upon all issues of significance to sentence" (at p 124).

34 [1998] 1 WLR 604.

35 This point was made recently in *Eubank* [2001] Crim LR 495. The defendant had pleaded guilty to a single count of robbery. A *Newton* hearing was conducted to determine whether or not the defendant had a gun at the time of the robbery. The judge sentenced on the basis that the defendant was carrying at least an imitation gun. The Court of Appeal held that "[i]f the Crown were going to invite the judge to come to the conclusion that the offence was committed with a firearm, then the appropriate course was to include a count in the indictment to make the position clear" (at p 496).

36 [1998] 1 WLR 604.

37 [1996] 2 Cr App R (S) 351.

38 *Ibid* at p 356.

3.20 If you add to this the requirement that wherever there is a dispute as to the defendant's conduct, which amounts to a dispute whether the defendant committed an offence, the issue should be determined in a *manageable* criminal trial, the tangled and intractable nature of the problem becomes apparent.

3.21 This is not a mere problem of procedure. There are two serious principles of justice in apparent contradiction. How can it be possible to reconcile these seemingly diametrically opposed principles?

OTHER COMMON LAW JURISDICTIONS

3.22 We have considered the sentencing principles that apply in other Commonwealth jurisdictions to see if the *Kidd*[39] problem has been addressed in a way that would offer assistance to us. We have also looked at the use made in those countries of substantive offences, to that end. We have concluded that other Commonwealth jurisdictions do not appear to have addressed these issues in a way which would offer us a useful solution to the problems we are facing.

Sentencing principles

3.23 It is generally accepted across the common law jurisdictions that a defendant should not be sentenced for conduct that could have been charged as additional, or more serious, offences but has not been so charged. For example, in Canada, the policy is that

> a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, *and no more* (emphasis added).[40]

3.24 In Australia, the leading case is *De Simoni*[41] (heard in the High Court of Australia on appeal from the Supreme Court of Western Australia):

> [T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted.[42]

3.25 The court regarded the combined effect of two principles, namely the need to consider all the circumstances of the case and the need to ensure that the defendant is only sentenced for offences of which he or she has been convicted, as meaning that the judge cannot take into account "circumstances of aggravation which would have warranted a conviction for a more serious

[39] [1998] 1 WLR 604.

[40] A Manson, P Healy and G Trotter, *Sentencing and Penal Policy in Canada* (1st ed 2000) p 156.

[41] (1981) 147 CLR 383.

[42] *Ibid* at p 389.

offence".[43] In cases of multiple theft, multiple deception, sex offences, drug offences or possessing child pornography, a wider course of conduct will almost always be capable of being the subject of further counts, unless the offending is of a type that can, in the particular circumstances, be rolled up into a single count.

3.26 In the Queensland case of *D,*[44] in which the trial judge had sentenced on the basis of sexual abuse over a long period even though the conviction had only been obtained on a single count of indecent assault, the court held:

> A person who has only been convicted of an isolated offence is entitled to be punished as for an isolated offence, not on the basis that the only offence of which he or she has been convicted was not isolated but part of a pattern of conduct with which he or she has not been charged and of which he or she has not been convicted.[45]

3.27 While the Australian courts accept the principle that a person should not be sentenced for offences of which he or she has not been convicted, at the same time, they continue to make use of sample counts, both at state and federal level, which allow the judge to sentence on a wider basis than the convictions alone would allow. In sentencing, judges have traditionally been allowed to exercise a wide discretion, and the above underlying principle appears to have given way to pragmatism in the face of practical exigencies.

3.28 *De Simoni*[46] has not had the same effect in Australia as *Kidd*[47] has had in this country of bringing an end to the use of sample counts as a viable means of charging multiple offences, although it has highlighted the principle that defendants should not be sentenced for an offence of which they have not been convicted. One reason for this may be the slightly different way in which sample counts are used in Australia. There the approach to sample counts appears to be less formal than that formerly adopted in England and Wales, and the Australian system is often justified on the basis of consent. It is apparently "normally associated with guilty pleas",[48] and "the accused's express and unequivocal consent is required."[49] It is thought that if the defendant pleads guilty to counts he or she knows are representative of wider offending, he or she is impliedly admitting guilt of other offending behaviour which, it seems, may or may not be specified. The system is used to avoid overloading the indictment. This approach

[43] *Ibid*.

[44] [1996] 1 Qd R 363.

[45] [1996] 1 Qd R 363 at p 404.

[46] (1981) 147 CLR 383.

[47] [1998] 1 WLR 604.

[48] R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed 1999) p 131.

[49] R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed 1999) pp 131-132.

relies on the consent of the defendant, thus providing no solution in cases where the defendant is not prepared to admit guilt.

3.29 There is some divergence between Australian states as to the circumstances in which sample counts should be used. The Supreme Court of South Australia in *Reiner*[50] thought that cases involving multiple sex offences against the same victim were the most appropriate for the use of sample counts, distinguishing them from cases of dishonesty and cases involving multiple victims. However, the Victorian and Queensland courts have allowed cases of dishonesty and those involving multiple victims to be prosecuted using sample counts. The Queensland case of *Smee*[51] involved multiple dishonesty offences and the Victorian case of *Wright*[52] involved dishonesty offences against multiple victims.

3.30 In *Wright*, the Full Court of Victoria said, in relation to the judge sentencing on the basis of 65 charges of obtaining credit by fraud:

> [I]n view of the agreement between the parties … whereby the applicant was to be presented only on ten counts as representative of all the counts upon which he was committed, no objection could properly have been taken to His Honour having regard to the amounts involved in the other charges.[53]

3.31 The system of allowing offences to be taken into consideration remains one means of allowing multiple offending to be properly sentenced and has the advantage, for the defendant, of placing a cap on the level of sentence, since any sentence must not exceed the maximum allowed for the main counts. It continues to be used in this country and abroad but its inherent disadvantage is that it depends on the defendant being prepared to plead guilty. The shortcomings of that have been demonstrated clearly in the case of *Evans*.[54]

3.32 The common law doctrine of general deficiency is restated in statutory provisions in New South Wales and South Australia.[55]

3.33 There is nothing in the Australian Model Criminal Code which appears to be directly targeted at the problem of how to deal with repetitious offending, although provision is made for the doctrine of general deficiency to be adopted when the prosecution are unable to identify precise sums in cases of repetitious theft or deception.

[50] (1974) 8 SASR 102 at p 116.

[51] (1985) 19 A Crim R 261.

[52] 13/5/74, cited in R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed 1999) p 132.

[53] 13/5/74 at p 9, cited in R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed 1999) p 132.

[54] Discussed at para 3.12, above.

[55] Crimes Act 1900 (New South Wales), s 161, Criminal Law Consolidation Act 1935 (South Australia), s 179.

Use of substantive offences as a means of prosecuting multiple offending

3.34 The Canadian Criminal Code makes use of the concept of a "false pretence" as a means of enabling some repeated fraud to be prosecuted as a single offence.[56] This would apply to those guilty of a single false pretence which led to the repetitious receipt of benefits. It does this by focusing on the false pretence as the vehicle of the fraud. Since the offence is established once the false pretence is made out, the amount obtained as a result of the false pretence can be regarded as an aggravating or mitigating factor. However, the case of *Smee*[57] involved multiple offences of false pretences, tried by way of sample count, so this provision does not provide an entire solution to the problem in these sorts of cases. Other examples of false pretences offences are found in New South Wales[58] and in South Australia.[59]

3.35 In Australia the Model Criminal Code Officers Committee (MCCOC)[60] has discussed the problem of repetitious fraud.[61] One means of dealing with an aspect of the problem was the offence of organised fraud which existed under Commonwealth law. The essence of the offence was that a person could be convicted of organised fraud if he or she engaged in three or more public frauds and derived substantial benefits:

> A person shall be taken to engage in organised fraud if, and only if, he or she engages, after the commencement of this Act, in acts or omissions:
>
> (a) that constitute three or more public fraud offences; and
>
> (b) from which the person derives substantial benefit.[62]

3.36 The MCCOC in considering the viability of this offence for inclusion in the model code emphasised that no attempt was made to define the expression "substantial benefit". This was, apparently, because the monetary amount of the fraud was not to be the key determinant of guilt. Rather it was one factor to be considered along with the persistence of the unlawful behaviour and the degree

[56] Canadian Criminal Code, s 362.

[57] (1985) 19 A Crim R 261.

[58] New South Wales Crimes Act 1900, s 179.

[59] South Australia Criminal Law Consolidation Act 1935, s 195.

[60] The Model Criminal Code Officers Committee was established by the Standing Committee of Attorneys-General (SCAG) to review all Commonwealth criminal law and develop a Model Criminal Code. It issues reports and discussion papers that may be enacted in Australia at Commonwealth and State level. Eventually it is hoped that the Model Criminal Code will be adopted in all jurisdictions, but this has not happened to date.

[61] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Final Report: Chapter 3, Theft, Fraud, Bribery and Related Offences*, December 1995.

[62] Proceeds of Crime Act 1987 s 83, as repealed.

of planning and organisation involved.[63] It was, in addition, pointed out that there would be problems defining the notion of "organisation" and in justifying what might be regarded as an arbitrary decision on how many offences would need to be proved in order to show organised fraud.

3.37 The MCCOC concluded that there already existed a broad discretion in sentencing and thought this to be the most appropriate way to deal with the element of substantial planning and organisation sometimes suggested as an additional element for an offence of organised fraud. Thus the main argument against the introduction of an offence of organised fraud was that there was no evidence that the existing law in Australia was unable to cope. The MCCOC also noted that section 83 of the Commonwealth Proceeds of Crime Act 1987,[64] which created the offence of organised fraud, had not been frequently used.[65] Taking into account the overwhelming number of submissions which it received opposing the creation of an organised fraud offence, the MCCOC concluded that the Model Criminal Code should not include an organised fraud offence.

Conclusion

3.38 We have not found any significant provision, practice, or procedure adopted in any of the other common law jurisdictions from which any solution to the problems that we seek to address in this report could be drawn.

[63] If the jury did not find the organised fraud offence proved, it was able to return an alternative verdict in relation to the public fraud offences.

[64] As repealed.

[65] It also noted the argument that there does not seem to be any reason in principle why organised fraud, rather than organisation to commit other types of offences (such as theft, drugs offences, prostitution offences and corruption) warranted a special offence.

PART IV
AMBIT OF PROBLEM

INTRODUCTION

4.1 The decision in *Kidd*[1] could, in theory, affect any type of case involving an offence which is capable of being committed repeatedly. In practice, however, the impact of the procedural limitations on prosecuting offences which have been committed repeatedly will vary between different offences and, consequentially, the decision in *Kidd* has had a greater impact on sentencing for some types of offending than for others.

4.2 Various factors can be identified which may affect the extent to which the *Kidd* principle is likely to be problematic. The type of evidence involved, the likelihood of being able to commit numerous offences without being caught, the propensity of the offence to be committed on a mass scale and the sentencing options available are all relevant.

EXAMPLES OF OFFENCES OTHER THAN THEFT/FRAUD WHERE THE *KIDD* APPROACH MAY CAUSE PROBLEMS

Drug dealing

4.3 This type of offence will frequently occur on a large number of occasions before the person is caught. On occasion, drugs offences appear to have raised problems of the type identified in *Kidd*.[2] However, in the reported cases the problem has been a failure on the part of the trial judge to direct the jury correctly, or to act consistently with the approach required by *Kidd* on sentencing, rather than any inherent difficulty in drafting an effective indictment that would allow a sentence which reflects, in full, the criminality of the defendant.

4.4 *Brown*,[3] for example, concerns a conviction for possessing a Class B drug with intent to supply (count 1) and a further conviction for being concerned in the supply of a Class B drug (count 3). The Court of Appeal stated that the important question of whether or not the offence in count three could be classed as an activity offence was not relevant to the appeal before them because the judge had clearly and specifically directed the jury that they need only be satisfied that the offence of supply had taken place on *one* occasion in order to convict. In view of that direction, the judge should not have sentenced on the basis of the "wider picture", but, in accordance with the decisions in *Kidd*[4] and

[1] [1998] 1 WLR 604.

[2] *Ibid*.

[3] [2000] 1 Cr App R (S) 300.

[4] [1998] 1 WLR 604.

Evans,[5] should have confined himself to the single occasion, on which the jury's conviction was based.

4.5 The inference which may be drawn from this judgment is that if the trial judge had not directed the jury that they need only be sure of one instance of the offending in order to convict, it is arguable that such drug dealing could be classed as an activity offence, and the problem of overloading the indictment with hundreds of counts reflecting every deal would not arise. *Khan*[6] is another drugs case, involving two co-defendants, both charged with possessing a Class A drug with intent to supply. The sentence was imposed before *Kidd* had been decided and the court, on appeal, stated that *Kidd* made it quite clear that the defendants should only have been sentenced for the specific offence of which they had been convicted, namely, possession of heroin worth £2,700.

Sex offences

4.6 The case of *Kidd*[7] was one involving sex offences. This type of offending will often occur in circumstances in which the principles in *Kidd* are apposite. They are offences of low 'visibility'. This sort of 'covert' offending is more likely to be able to continue over a long period of time without being detected. The offences may be less easy to detect because they are carried out in private and the offender is skilled in covering his or her tracks and dissuading the victim from complaining. Often such offences go unreported for a length of time. Children who are abused repeatedly by adults may suffer the abuse for years before reporting it. By way of contrast, for example, it is unlikely that a person will suddenly be discovered to have been committing public order offences over a long period without anyone having noticed.

4.7 Although, superficially, the case of *Kidd* may be thought to raise the same problem in sex offences as in multiple dishonesty offending, the drawing up of indictments and the conduct of trials in cases of serial child abuse present a very different set of problems.

4.8 In cases of multiple fraud there is invariably a great deal of evidence to support the extent of the offending with great particularity. The problem at trial is how to cope with, or best present, that amount of material. If each transaction had to be the subject of a separate decision by the jury it would require hundreds of separate counts.

4.9 In cases of sex abuse, the evidence will invariably be based on the recall of a victim, of events often many years before, which will be lacking in particularity as to dates, times and frequency of the offending. Indeed, where evidence in chief is presented through the medium of a video, there are practical, though not rigid, limits on the time during which a child may be interviewed, limiting the quantity

[5] [2000] 1 Cr App R (S) 144.

[6] [1998] Crim LR 830.

[7] [1998] 1 WLR 604.

of evidence which is likely to be available.[8] Thus, frequently, in order to tailor the offence to the available evidence, the indictment has to be drawn so as to cover a small number of occasions during a period of time, say a year, multiplied, perhaps, by the number of years during which the abuse has continued and by the number of children involved. Thus it is less likely in a trial of serial sex abuse that the evidence would require an indictment to be clogged up with a very large number of counts.

4.10 Moreover in sex offences there is much less likelihood of there being a problem in sentencing an offender to a level of sentence which is commensurate with the true extent of his or her offending. Because of the serious nature of each individual offence of child abuse, it will usually be possible to sentence a serial offender to a substantial sentence which reflects the extent of his or her offending, for which there is the evidence, after a trial which has been manageable.[9] It may be that it is for this reason that Lord Bingham in *Kidd*[10] was confident that the principle he was asserting would not give rise to serious problems for the courts in sentencing multiple offenders. In the sex offence cases which have been reported, such as *T*,[11] the problem is more that the principle in *Kidd* has been disregarded rather than that it has created any insurmountable problem. In *T,* difficulties were caused initially by inadequate drafting of the indictment and subsequently by the judge, who had taken into account, when determining sentence, offending beyond that of which the defendant had been convicted.[12]

[8] The one hour 'rule of thumb', which was added to the "Memorandum of Good Practice in Video Recorded Interviews With Child Witnesses For Criminal Proceedings" at the last minute, following the Orkney Inquiry, has now been abandoned. New guidance, "Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, Including Children", was issued on 24 January 2002. This allows the interviewer to decide how long the interview should last, based on a variety of factors. There is no longer any absolute length stipulated. The factors relate to developmental issues, age, the number of incidents to be described, how long it takes to establish rapport and how forthcoming the child is at interview.

[9] An additional issue to the need to be able to impose sentences that are commensurate with the defendant's criminality, in cases relating to numerous victims, such as the systematic abuse of children in care homes in North Wales, (*Lost in care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974,* HC 201 ("the Waterhouse Report")), is that individual victims may also wish to see perpetrators convicted for the offences carried out against them.

[10] [1998] 1 WLR 604.

[11] [1999] Crim LR 95.

[12] See also *BT* [2002] 2 Cr App R (S) 2 (5) where the indictment charged only one count of vaginal rape, one of anal rape and an indecent assault as "specimen counts" intended to reflect a course of conduct over a year, including almost daily rapes. Sentences of 13, 13 and 8 years' imprisonment, concurrent respectively on conviction were manifestly excessive; sentences of 9, 9 and 4 years' imprisonment were substituted. A defendant is not to be sentenced for any offence unless and until his guilt is proved [or admitted].

Child pornography

4.11 The Sentencing Advisory Panel published a consultation paper relating to the sentencing of offences involving child pornography in January 2002,[13] and invited views on "any ways in which the possession or distribution of a large volume of indecent images can be reflected in a single indictment".[14] It has recently issued Advice to the Court of Appeal, [15] following that consultation, and in it reiterated its view at the consultation stage that

> [a]lthough we do not consider the quantity of material to be one of the *primary* factors in determining the seriousness of an offence, it seems … self-evident that the amount of indecent material involved must have some effect on the seriousness of an offence. (emphasis in original)[16]

4.12 The Panel points out that determining what consitutes a large or small amount when defendants may possess hundreds or thousands of images is an imprecise task, and recognises the additional problem in prosecuting such offences raised by the decision in *Kidd*:[17]

> There is a more serious difficulty about the use of quantity as a criterion in a case where the defendant has been indicted on a small number of charges as sample counts representing a larger number of alleged offences. If … the defendant disputes the allegations which are not included as counts in the indictment, then the sentencer must pass sentence only on the basis of the specific counts in the indictment of which the defendant has been convicted (*R v Canavan; R v Kidd; R v Shaw* [1998] 1 Cr App R 79).[18]

4.13 The Panel suggests that one solution may be to treat the possession of one file containing numerous images as a single offence. This method would not, however, be available where the defendant is charged with making an indecent photograph,[19] since each act of downloading would have to be treated as a separate offence.

4.14 Thus, when compared with offences of theft and fraud, the volume of offending is perhaps less determinative in deciding the level of sentence. The Panel were

[13] Sentencing Advisory Panel Consultation Paper issued in January 2002. See "Sentencing of Offences Involving Child Pornography: A Consultation" (2002) vol 166, Justice of the Peace, 46.

[14] *Ibid*, para 44.

[15] Sentencing Advisory Panel, *Advice to the Court of Appeal (10): Offences involving Child Pornography* (2002).

[16] *Ibid*, para 41.

[17] [1998] 1 WLR 604.

[18] Sentencing Advisory Panel, *Advice to the Court of Appeal (10): Offences involving Child Pornography* (2002), para 42.

[19] Contrary to the Protection of Children Act 1978, s 1(1), as amended, see para 6.9 n 12, below.

represented at our recent seminar and in the Seminar Paper sent to them, we drew attention to the first of the two recommendations that we make in the latter part of this policy paper.[20] They now state in their Advice:

> It appears that the new procedures proposed by the Law Commission may also be applicable to child pornography offences, and we await the outcome of the Commission's work on this issue.[21]

Counterfeiting

4.15 The case of *Gorman*[22] shows the potential problems faced by prosecutors in counterfeiting cases. However, it also shows that, for the purposes of sentence, it may be possible, by careful drafting of the indictment, in such cases, to demonstrate sufficient "repetition of specific serious offences, as expressly found by the jury … over a significant period".[23] Although, when sentencing, the judge was not free to take into account the whole picture, which in that case involved one million CDs, nonetheless, the level of criminality shown by the indictment justified the sentence of 18 months' imprisonment imposed at the Crown Court.

OTHER MULTIPLE OFFENDING WHERE *KIDD* DOES NOT PRESENT A PROBLEM

4.16 There is scope in certain cases for a single count or information to be charged in relation to the aggregate activity, even though the evidence discloses that offending behaviour occurred on two or more occasions. This is possible at

[20] That is the proposal relating to "compound allegations". Although the seriousness of the child pornography offences reflects the social policy of indirectly aiming to protect vulnerable children who might become involved as victims were the child pornography market to continue, the offence itself is not committed *against those* children. The offence is against a society that wishes to protect children. At common law, the criteria for a continuous offence of theft or fraud require that there is a common victim of the offences. It may be that in relation to child pornography, there is an argument that this requirement should be varied to meet the different circumstances of that offence.

[21] Sentencing Advisory Panel, *Advice to the Court of Appeal (10): Offences involving Child Pornography* (2002) at para 43.

[22] 16 December 1997, 97/4529/X3 (unreported). The defendant admitted having been involved in the importation of about a million counterfeit and bootlegged compact discs and making a profit of £100,000. The full extent of this offending had not, however, been the subject of counts in the indictment. It was held by the Court of Appeal that in the light of *Kidd,* the trial judge "erred in taking into consideration offences which had not been either identified specifically on the indictment or admitted to in the appropriate way" (at p 15). Taking that wider picture into account, the judge had sentenced the defendant to a total of 18 months' imprisonment in respect of counts 1 - 8 of the indictment, counts 1 - 4 of which related to sending a forged licence (under which 24,000 discs had been supplied) and counts 5-8, to importing an infringing copy of a copyright work. The Court of Appeal held, however, that the total sentence of 18 months' imprisonment for the specific offences in counts 1- 8 (without reference to the wider picture), concurrent with other sentences that were not in issue, was not manifestly excessive.

[23] 16 December 1997, 97/4529/X3 (unreported) at p 15.

common law[24] and by virtue of certain statutory offences, such as fraudulent trading and the evasion of excise duty,[25] or harassment.[26] The fact that a single count may comprise this multiple activity provides a solution to the *Kidd*[27] problem in such cases.

4.17 In some other types of multiple offending, it is purely practical difficulties that prevent there being a problem. Motoring offences such as speeding, for example, may be committed regularly, but it is only when drivers are caught in the act that they are prosecuted.

CONCLUSION

4.18 Although, in theory, *Kidd*[28] could create problems in the prosecution of different types of offences, in practice, a number of factors limit its impact, and theft and fraud are likely to remain the main area in which it presents serious problems. There is a possible problem in relation to some of the offences under section 1(1) of the Protection of Children Act 1978 (as amended).[29] This would, however, be capable of being addressed were the offending involved regarded as capable of being categorised as a single continuing offence.

4.19 When the problem of being unable to impose a sentence that is appropriate for the overall offending does occur, it has an immediate impact on the perception that justice is being done in the instant case. In addition, it has a knock on effect. If the offender comes before the court again, the antecedent record of convictions and sentence will not adequately reflect the level of past offending.

[24] Where there has been a conspiracy to defraud, or theft where there has been a "general deficiency", or where the conduct constitutes a "continuous offence".

[25] See para 5.5, below.

[26] Protection from Harassment Act 1997, s 2.

[27] [1998] 1 WLR 604.

[28] [1998] 1 WLR 604.

[29] See para 6.9 n 12, below.

PART V
THE WAY FORWARD

ANALYSIS

5.1 The legal system should operate so as to reflect in full each of the fundamental principles identified earlier:

> Defendants should only be sentenced for that which they have admitted, or which has been proved following a trial, in which both sides can be examined on the evidence; and
>
> It should be possible to sentence for the totality of an individual's offending. Defendants should not escape just punishment because the our present law, practice and procedure does not make this possible.

5.2 The constraints that together prevent full recognition being given to both of these principles are three-fold:

(1) the requirement that all issues that go to guilt must, if not admitted, be proved to a jury/magistrates;

(2) the strict limitations to the inclusion of more than one offence in any single charge/count;

(3) the limit to the number of separate counts or charges that can be managed within a trial.

If a solution to this problem is to be found, it will need to address one or more of these constraints.

CONSULTATION

The Consultation Paper

5.3 Our approach in the Fraud Consultation Paper,[1] was to address the second of these constraints by suggesting a compendious offence that would make use of the concept of a "scheme" [2] to enable more than one instance of offending to be the subject of a single charge or count.[3] We have seen that although a majority of

[1] Consultation Paper No 155.

[2] See para 1.1, n 1 above, for detail of these consultation issues.

[3] Although as *Martin and White* [1998] 2 Cr App R 385 demonstrates, the fundamental principles of duplicity must still be complied with when charging a compendious offence, we thought that this might overcome some of the difficulties faced. In *Martin and White*, it was necessary to have two counts, one dealing with each of the two different methods used in the fraudulent evasion of duty contrary to s 170(2) of the Customs and Excise Management Act 1979. There were 27 transactions encompassed in count 1A (method A) and 227 transactions in count 1B (method B).

respondents who addressed this issue supported this approach, the serious concerns about the practicality and likely effectiveness of this proposal[4] identified by both supporters and dissenters led us to rethink the proposal. We considered three other options upon which we consulted informally in July 2000.

Informal consultation - July 2000

5.4 In the informal consultation paper we considered the possibility of a course of conduct offence. Respondents expressed concerns, which we accept, about that approach. Principally the concerns relate to the concept of a course of conduct. It was thought that this might be difficult to establish, could lead to vague and uncertain charging and lead to a defendant having to be acquitted in some cases where the jury are sure of some offences but not of others. In addition, without special measures, the judge might not to be able to determine the basis for sentencing from the verdict of the jury.

5.5 In the July 2000 paper we also examined further the scope for making use of a compendious offence, or activity offence. There are already a number of "compendious offences" on the statute books and we considered whether the creation of an additional compendious offence, or offences, could provide a solution to the multiple fraud conundrum. Compendious offences criminalise certain *activities*, with the result that the activity, rather than just any single instance of that activity, may be charged in a single count, without infringement of rule 4(2) of the Indictment Rules. Examples of compendious offences may be found in the Value Added Tax Act 1994,[5] the Financial Services Act 1986,[6] the Companies Act 1985[7] and the Customs and Excise Management Act 1979.[8]

[4] The Crown would still be faced with the risk of overloading an indictment, where a large number of deceptions are required to show the overall level of criminality. The wide scope of the concept of a "scheme" as an offence could lead to uncertainty for judge, jury and the defendant. The "scheme" offence would be very prone to the type of objections addressed in *Brown* (1983) 79 Cr App R 115; the concept of the scheme itself could be difficult to prove. There may be difficulties for the judge in determining the basis on which to sentence.

[5] Section 72(1):

> If any person is *knowingly concerned in*, or in the taking of steps with a view to, *the fraudulent evasion of VAT* by him or any other person, he shall be liable … . (emphasis added)

[6] Section 47(2):

> Any person who does any act or *engages in any course of conduct which* creates a false or misleading impression as to the market in or the price or value of any investments is guilty of an offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of … those investments. (emphasis added)

[7] Section 458:

> If any *business of a company is carried on with intent to defraud creditors* of the company or creditors of any other person, *or for any fraudulent purpose*, every person who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or a fine, or both … . (emphasis added)

5.6 There is also now a social security offence which incorporates a compendious element. Section 111A(1) of the Social Security Administration Act 1992[9] makes it an offence dishonestly to make a false statement or representation; or to produce or furnish any document which is false in a material particular, *with a view to obtaining any benefit* or other payment or advantage under the relevant social security legislation. Thus, it proscribes the doing of certain dishonest acts with a view to the activity of *obtaining a public benefit*. The maximum sentence for this offence is seven years' imprisonment, which suggests that the offence is designed to encompass cases where the act in question either has led, or would, if left undetected, have led to the obtaining of a significant sum.[10]

5.7 The DSS thus made use of a compendious type of offence in an effort to resolve some of the difficulties[11] faced in prosecuting multiple offences of benefit fraud. In the light of the development by the DSS of their own version of an activity offence we do not believe that it would be useful for us further to consider a variation on that theme and, accordingly, we propose to make no recommendation on this issue, save to indicate that we recognise that the offence which has now been developed is consistent with one of our general approaches, and that we agree that it provides a possible solution to this aspect of the problem.[12]

5.8 The inherent limitation of the concept of an activity offence is that there has to be a particular activity which would constitute the actus reus of the offence. Unless it is possible to identify a specific activity which should, of itself, constitute an

[8] Section 170(2) of the Customs and Excise Management Act 1979 provides, *inter alia*, that

> Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way *knowingly concerned in any fraudulent evasion* or attempt at evasion–
>
> (a) of any duty chargeable on the goods; …
>
> he shall be guilty of an offence under this section and may be [arrested]. (emphasis added)

[9] Created by the Social Security Administration (Fraud) Act 1997 s 13, as amended by the Child Support, Pensions and Social Security Act 2000, Sched 6, para 5.

[10] By analogy with the approach taken to the length of sentence in cases of theft and fraud committed by abuse of position of employment, considered in *Clark* [1998] 2 Cr App R 137 which reviewed the guidelines given in *Barrick* (1985) 7 Cr App R (S) 142. Generally appropriate levels were:

> under £17,500 - up to 21 months; between £17,500 and £100,000 - 2 to 3 years; between £100,000 and £250,000 - 3 to 4 years; £250,000 - £1 million - 5 to 9 years and for over £1 million, 10 years and upwards.

[11] In addition, the Social Security (Fraud) Act 2001 s 16 creates numerous specific offences, which proscribe, in effect, the knowing failure, by the claimant or another, to notify to a prescribed person of a material change in circumstance, either with or without dishonesty. By focusing on the element of "failure" to notify, these offences avoid some of the difficulties associated with proving the series of obtainings that might flow from that failure.

[12] To the extent that, in practice, it does not, the recommendations we make below, in Parts VI and VII, would be available in such cases.

offence, the concept can be of no use. We recognise that it is only in relation to context specific offences that the concept of an activity offence can be of any use. It is in the context of benefit claims that use of this concept is made in the above social security provisions.

5.9 We have identified one further context in which we believe an activity offence would provide an effective and appropriate solution to the problems under consideration. This concerns the non-corporate fraudulent trader in respect of whom we now recommend the extension of section 458 of the Companies Act 1985.[13]

Seminar paper and seminar held in February 2002

5.10 We recognised that it would not be possible to produce one solution which would address the problems associated with prosecuting multiple offending. We therefore formulated two further proposals upon which we consulted in February 2002. Those proposals broadly met with favour from respondents, although some concerns were expressed and we have addressed them in this paper. These proposals each address the procedures for prosecuting multiple offending rather than creating any further new forms of offence and, on that basis, we are now making two additional recommendations for reform.

5.11 The first addresses the duplicity rules and explores ways in which the approach of the court in *Barton*[14] might operate at the Crown Court so as to enable multiple offending to be contained within a single count. It takes the type of offending in *Barton* as representing the limit of the single continuous offence. In these cases, where the characterisation of the conduct as a single continuing offence makes it intrinsically likely that the person who has committed one of the offences has committed all the others, our recommendation is to try to replicate, in questions to be asked of the jury, the thought process which enabled the Stipendiary Magistrate in *Barton* to form a view of the extent of the offending for which the defendant is to be sentenced. This procedure will not be suitable where the repeated individual offences lack the necessary connection in time and place of commission or common purpose, so that they cannot fairly be recognised as forming part of the same transaction, or where the issues raised between prosecution and defence are sufficiently numerous and incident specific that it would not be in the interests of justice for the case to be considered as a single continuous offence. We describe the form of single offence to be used as a "compound allegation".

5.12 The second procedure would apply to multiple offending against the same *or different* victims but where the degree of similarity between instances of alleged offending is such that the offences may properly be linked to take advantage of the special procedure which we propose. This procedure involves a two stage trial, the first before a jury, the second before a single judge (presumptively the

[13] This is addressed in Part VIII of this report.

[14] [2001] EWHC Admin 223, see para 3.6, above.

first stage trial judge). It combines aspects of two familiar elements: "specimen counts" and "*Newton* hearings".[15]

5.13 Our procedural recommendations have been designed to apply to proceedings in the Crown Court. The compound allegation recommendation would be unnecessary in relation to summary proceedings because of the common identity of the fact-finder and the sentencer in such proceedings.

5.14 We formulated the two stage trial process for use in the Crown Court. It is in the Crown Court that the consequences of the court being confined to dealing with only a proportion of the defendant's offending will have the most serious effect. In the Magistrates' Courts, it will be the limited sentencing powers, presently of six months for one offence or twelve months in total, that will stop the magistrates from imposing a longer sentence rather than the inability for them to take into account the full scale of offending. Were the scale of offending to be such that a longer sentence should be imposed in the event of a conviction, the magistrates are empowered to commit the defendant to the Crown Court for trial. If the facts and circumstances are such that the Crown Court judge is satisfied at a pre-trial hearing that a two stage trial should follow, the two stage proceedings would take place in the Crown Court.

5.15 We will elaborate on each of these recommendations in the following three parts of this report.

Impact of our recommendations on resources

5.16 Our recommendations for revision of procedure in the Crown Court so that multiple offences can, as appropriate, be prosecuted by way of a compound allegation and by way of the two stage trial process would confer the benefits identified elsewhere in this report.[16] Some extra court time could be expected to be required for dealing with stage two proceedings. The extent of this would, however, be likely to be reduced by two factors. First is the expected incidence of guilty pleas at the end of the first stage of the two stage process, where guilty verdicts have been returned.[17] Second, the very existence of the two stage process might encourage defendants to plead early on to the full extent of their offending, asking that scheduled offences be taken into consideration in order to

[15] *Newton* (1983) 77 Cr App R 13 established that the judge can adopt the role of the jury in cases where the defendant pleads guilty to a charge, but disputes certain facts of the case, which would significantly affect his or her sentence. See also *Eubank* [2001] Crim LR 495 (discussed in para 3.17 n 35, above). The judge in a *Newton* hearing must direct his or her mind according to the same burden and standard of proof required in ordinary criminal trials (*McGrath and Casey* (1983) 5 Cr App R (S) 460, *Kerrigan* (1993) 14 Cr App R (S) 179).

[16] See para 7 of the Executive Summary, above and paras 6.43 – 6.44 and paras 7.98 – 7.102, below.

[17] There will be no second stage of proceedings in cases where there have been no convictions after the first stage of the trial.

obtain the maximum discount on sentence.[18] It is to be expected that some lengthier prison sentences would be imposed because the purpose of the two stage procedure is to enable the full extent of the defendant's offending to be placed before the court in cases where, at present, it is not possible to do this. It is not likely that the compound allegation recommendation would lengthen court proceedings by any significant amount. While the more effective process for sentencing might encourage the prosecution of continuous offences as such, the opportunity for jurors to specify instances of offending of which they are not sure might lead to shorter sentences in some cases.

[18] See para 7.102, below.

PART VI
COMPOUND ALLEGATIONS

CASES WHICH ARE SUITABLE TO BE TRIED BY WAY OF COMPOUND ALLEGATIONS

6.1 Where it is alleged that the same offence has been committed on a large number of occasions, usually against the same victim, in the same way and raising the same issues between prosecution and defence, it is invariably clear that once a person is guilty or not guilty of one he or she is going to be guilty or not guilty of all.[1] In such a case, and where, within the general uniformity, there may be a separate issue which affects a small number of the occasions, the totality of the alleged offending may be charged as a single continuing offence. This type of case was exemplified in *Barton*.[2] It is in relation to such patterns of offending that we make our recommendation relating to compound allegations.

6.2 The concept of a continuous offence has been developed at common law as a legitimate way, amongst others, of categorising a series of closely connected acts. The test for a single continuous offence, enunciated by the House of Lords,[3] is:

> Where a number of acts of a similar nature committed by one or more defendants [are] connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count an indictment.[4]

6.3 The doctrine of the continuous offence is long established. In the case of *Henwood*[5] D had been found in possession of, and charged in one count of stealing from his employer, a number of articles which he had stolen during the previous nine years. There was no evidence when they had been stolen or whether on one or several occasions. Bovill CJ pointed out that there was nothing in the case inconsistent with the articles having been taken all at the one time or in such a way as to form one continuous transaction but went on to say:

> Had there been evidence of distinct takings it would have made no difference, for the case would then have been similar to the taking of coal at different times in a mine (*R v. Bleasdale* (1848) 2 C&K 765), and the case of cutting trees at such times as to form one continuous

[1] This will, for example, be because the defence issue is identity, or that a defendant was being paid for services, or was not dishonest because his or her supervisor/employer had given permission so that if the jury disbelieves the defendant on that issue, the defendant would have no defence to any of the offences.

[2] [2001] EWHC Admin 223. See para 3.6, above.

[3] In *DPP v Merriman* [1973] AC 584.

[4] *Ibid* at p 607C.

[5] (1870) 11 Cox 526.

taking (*R v. Shepherd* (1868) 11 Cox 119), and to the taking of gas for a long time in succession (*R v. Firth* (1869) 11 Cox 234).[6]

6.4 More recently, the continuous offence principle was applied in *DPP v McCabe*.[7] McCabe had 76 library books at his home which he had taken from one or more of the 32 different branches of a county library. He was convicted of a single offence of theft in relation to those books.

6.5 The concept of a continuous offence has been described as a "legal fiction".[8] We would prefer rather to regard it as a proper description of conduct which can legitimately be analysed in two ways. A continuous activity can be perceived as the same conduct occurring on a series of separate occasions or as the same repeated conduct which, looked at in the round, may properly be regarded as one activity. Either analysis is legitimate. The perception of a number of nominally separate acts as part of a single transaction is no more artificial in the criminal context than, in commercial life, the making of regular payments under a mortgage, or pursuant to a lease, being regarded as part and parcel of a single continuing transaction.

6.6 The expression "continuous offence" is, perhaps, not the most helpful description. It suggests that the offence is committed without any interval and in that sense may confuse. We prefer the description "compound allegation". Nonetheless, we believe that the concept is both useful and legitimate. It is right that, where the defendant raises a common defence, the courts should be able to categorise such patterns of repeat offending in a special way so as to allow one count on an indictment to embrace the repeated behaviour. Although this approach will only be possible in a narrow range of cases, it provides a useful tool where it applies. For example it may apply to

(1) an employee fraud, by an employee who repeatedly purchases books on a library account and never enters them into the library system, but keeps the library books as personal books;

(2) false accounting and theft by an employee at a bank who repeatedly makes false entries in a certain account, whilst stealing an equivalent sum from that account;[9]

(3) NHS frauds, such as repeated spectacle orders for fictitious patients, dental work claims in respect of work not done;

(4) repeated, regular fraudulent claims for reimbursement of expenses by an employee by use of false receipts, for example, from a supplier of fuel.

6.7 We recommend a procedure for informing the sentencer in the Crown Court of the true extent of the guilt of a defendant who is found guilty by the jury of

[6] (1870) 11 Cox 526 at p 528.

[7] [1992] Crim L R 885.

[8] By Professor Sir John Smith in his role as consultant on the fraud project.

[9] See for example, the case of *Rowlands,* discussed at para 3.8.

compound allegation. It would only be used where the conditions recognised at present for the concept of the continuous offence exist. The conditions for its application, adapting *DPP v Merriman,*[10] are:

(1) two or more similar offences;

(2) connected by time and place of commission or common purpose (typically, the same act committed against the same victim), so that;

(3) they can fairly be recognised as forming part of the same transaction or criminal enterprise; and

(4) having regard to the allegations made and the defence put forward that, save for particular marginal issues, it may fairly be said to be an "all or nothing" case.

6.8 In *Barton,*[11] the fact that numerous transactions of the same type were committed against the same victim provided the crucial connecting factor. For cases of dishonesty that would, in our view, almost invariably be the case. In other types of case, however, identity of victim may not be a factor. Indeed the offences may not, in truth, have a direct victim. For example, in repetitious down-loading of pornographic images of different, anonymous, children, (charged as making an indecent photograph,) the "victim" is not directly the child in the photograph but it is an offence against public morality and children at large.

6.9 **In our view, offending, such as the down-loading of pornographic material involving children, in breach of the Protection of Children Act 1978,[12] which satisfies the conditions listed in paragraph 6.7, is capable under the present law of being charged by way of a compound allegation. If it is thought appropriate to crystallise these principles so as to make**

[10] [1973] AC 584.

[11] [2001] EWHC Admin 223.

[12] It is an offence for a person

> (a) to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child; or
>
> (b) to distribute or show such indecent photographs or pseudo-photographs; or
>
> (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
>
> (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs or intends to do so.
>
> (Protection of Children Act 1978, s 1(1), as amended by the Criminal Justice and Public Order Act 1994, s 84(2)(a)–(b) and s 168(3), Sched 11).
>
> In many cases the use of a compound allegation may not be necessary. Where for example the charge is one of possession, or possession with intent, it would be legitimate to plead all the images recovered at the same time from the same place in one count. The count would not be duplicitous, as it would allege one act of possession at a particular time and place, of a number of images.

them clearly applicable to offending other than theft or fraud it may be achieved by a change in the Indictment Rules.

EFFECTIVE COMMUNICATION OF JURY'S DECISION TO THE JUDGE

6.10 The problem in cases of multiple offending which are prosecuted in the Crown Court as a continuous transaction is how to establish accurately for sentencing purposes the extent of offending. For example, the case of *Rowlands*[13] was charged as "… between 1 day of January 1989 and the 1 day of June 2000, stole a sum not exceeding £1,775,782.55 …". It was treated as a continuous offence. The period covered by that single offence was so long (eleven years) that a guilty verdict could in theory have related to a figure as small as the lowest sum diverted in a month or as high as £1.7 million. Thus, if the defendant had pleaded not guilty and been convicted after trial, the judge would have had to second guess the extent of offending forming the basis of the jury's verdict so that the appropriate sentence could be imposed.

6.11 In our view, there should be a special procedure to enable the jury to inform the judge of the extent of the wrongdoing of which the defendant is guilty so as to enable the judge to sentence accurately. Such a case will have been identified at a pre-trial stage as appropriate for the use of a compound allegation. The criteria for such classification will mean that, for the bulk of the individual offences included in the compound allegation, a finding of guilt, or non-guilt, on one occasion will virtually inevitably result in a finding of guilt or non-guilt on all.

6.12 We recommend that, in such a case, the judge should sum the case up on the basis that the jury must consider all the evidence and decide first whether all (or at least 10) are sure that the defendant committed the alleged offence on at least one occasion identified within the count. If so, they would convict of that count.

6.13 The judge should explain to the jury that the nature of the offence is such that if the defendant is found by them to be guilty of one of the alleged occasions of offending, they will not then be asked to return a separate verdict on each of the others. They should, however, consider whether, on the basis of the evidence and arguments they have heard, there is any particular allegation, or group of allegations, making up the continuing offence, in respect of which they are unable to agree that they are sure of the guilt of the defendant. If so they will be asked to identify them. That is to say they will be asked to identify any allegation(s) of which they are not all (or at least 10) sure of guilt.

6.14 If it has been the case that, in the evidence, there were any occasions, or sets of occasions, of alleged offending where a specific issue has arisen which separates that, or them, from the generality, the judge may agree with counsel specifically to draw the jury's attention to those as matters which it may wish particularly to consider on this issue.[14]

[13] Brief facts of this case have been given above at para 3.8.

[14] After conviction on a compound allegation charge, and after the jury has given the judge any indication it wishes on the extent of offending encompassed within that count, a

The preliminary hearing

6.15 It will be important to ensure that the use of the compound allegation in the indictment is limited only to those cases where the allegations may properly be drawn up as a single continuing offence without breaking the rules on duplicity. The early identification of cases potentially suitable for this procedure will not prove a problem as there will be a number of occasions prior to the plea and directions hearing when the prosecution will be able to take stock to see whether the similarities in the offences and the issues involved are such as to make this procedure potentially appropriate. First, the repetitious nature of the offending will often be apparent from the investigation so as to raise the question in the prosecution's mind at an early stage, probably before arrest. Second, in most cases the defendant will have given his or her account in the course of the interview which will precede charge so as to enable the essential issues to be identified. Third, the disclosure requirements in the Criminal Procedure and Investigations Act 1996 make it unusual for the prosecution not to know at an early stage post charge, what are the essential features of the defence case sufficient for them to decide whether to frame the indictment as a compound allegation or as a series of specimen counts making use of the two stage procedure that we recommend,[15] or in the ordinary way.

6.16 For the purposes of a trial on indictment, the accused is required to provide a defence statement,[16] setting out the nature of the defence in general terms,[17] but in sufficient detail to enable "the prosecution [to] have the opportunity to investigate facts relied on by the opposite party and so to reduce the risk of a miscarriage of justice by wrongful conviction or wrongful acquittal".[18] Such a statement is required in Crown Court trials[19] where the prosecution have

> defendant may wish to have taken into consideration on sentence, a wider range of offending than was encompassed in the indictment. There is no reason why the existing practice of taking offences into consideration should not continue to be available to the defendant. This practice was described by Lord Goddard CJ in *Batchelor* (1952) 36 Cr App R 64 at
> pp 67–68, as
>
> > a convention under which, if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offence, the court can, if the prisoner admits the offences and asks that they should be taken into account, take them into account, which means that the court can give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment.

[15] See discussion in Part VII of this report.

[16] Such a statement is voluntary for a summary trial, Criminal Procedure and Investigations Act 1996, s 6.

[17] Criminal Procedure and Investigations Act 1996, s 5(6)(a).

[18] *Tibbs* [2000] 2 Cr App R 309 at p 315.

[19] The Criminal Procedure and Investigations Act 1996, s 5(1)(a) provides that a defence statement is compulsory in the circumstances set out in s 1(2), which govern the application of Part I. Read in conjunction with one another, these sections require a

themselves, in accordance with the statutory duty to do so, provided primary disclosure or a statement to the effect that there is no advance material to be disclosed.[20] A defence statement is compulsory unless the prosecution have failed to discharge these obligations and in practice, therefore, the accused will, in the vast majority of Crown Court trials, be required to reveal the nature of his or her defence in reasonable detail.[21] In practice, at the Crown Court, the defence statement will in the great majority of cases be served either before or on the occasion of the plea and directions hearing at which the court can make arrangements for a preliminary hearing at which argument may be heard about the appropriate form of indictment.

6.17 We recommend that, if the Crown were minded to draw the indictment so as to include a count or counts comprising a compound allegation, a ruling should be sought at a preliminary hearing on the appropriate form of the indictment. Depending on the seriousness, or length, or complexity of the matter, the preliminary hearing may well take the form of a preparatory hearing so as to attract a right of interlocutory appeal for either side in the light of a ruling by the judge. It would be open to the defence to argue that the indictment is bad for duplicity if they think that it is inappropriately drawn. The basis for the judge's ruling should be whether the offence may fairly be regarded as forming part of the same transaction or criminal enterprise, having regard to the identity of the victim, the repetitious modus operandi of the offence, the nature and variety of the issues between prosecution and defence[22] and whether it would be in the interests of justice for the case to proceed on such a form of indictment.[23]

Evidence

6.18 The evidence presented by the prosecution in support of a given compound allegation is likely to relate to *all* offending occasions encompassed within the

defence statement where a person has been committed for trial on an indictable matter, where a person is to be tried at the Crown Court by virtue of a notice of transfer under either the Criminal Justice Act 1987, s 4 or the Criminal Justice Act 1991, s 53 or where a summary matter is included within an indictment, or a bill of indictment charging a person with an indictable offence is preferred.

[20] The Criminal Procedure and Investigations Act 1996, s 3 stipulates that the prosecution must provide one or the other.

[21] Certain circumstances, set out within the Criminal Procedure and Investigations Act 1996, s 5(2) and (4) negate the obligations of the accused. These mainly relate to failures to comply with procedural requirements, for example, where the notice of transfer in a serious or complex fraud has not been complied with.

[22] The question for the court will be whether these demonstrate sufficient connection in time and place of commission or common purpose (see para 6.7 above).

[23] A CPS delegate raised the question of whether this procedure could easily apply to the offence of deception where the effect of the defendant's action on the mind of the victim is a factor. In our view, that would depend on the circumstances of any particular case. For example, the repeated presentation of a forged receipt for expenses, using a pad of receipts stolen from a service station, is no less susceptible than was *Barton* [2001] EWHC Admin 223 to this treatment. It should be a matter for the judge on applying an interests of justice test.

count which contains the compound allegation. Thus, our recommendation would not necessarily reduce the volume of evidence presented to the jury. We do not regard this as a shortcoming. If the compound allegation is used only where it should be, that is to say where each transaction is virtually identical, then, although the volume of evidence may be substantial, its repetitious nature will enable it to be presented in a manageable form. It will routinely be presented by one or a small number of witnesses producing evidence in the form of records which will, in themselves, be easy to present or which will be capable of being reduced to easily manageable schedule form.[24]

The burden of proof

6.19 The compound allegation proposal is designed to enable the jury to deal with the question of guilt where the conduct may properly be categorised as comprising a single offence, but in a way which makes transparent the basis upon which the court should sentence the person who has been found guilty of that offence. It makes transparent the thought processes which may currently be inferred when a fact-finder, be it District Judge (Magistrates' Court) or a bench of magistrates, currently sentences a person for a continuous offence or for a general deficiency offence.

6.20 Our recommendation does not involve a shift in the burden of proof. It will be for the Crown to prove that on at least one occasion the defendant committed the alleged offence. Whilst the defendant can be convicted of the count containing the compound allegation on this basis, the defendant cannot be sentenced for the full extent of offending alleged unless the further offending occasions have also been proved by the Crown so that the jury is sure. If one or more jurors (or up to three or more, after a majority direction) is not sure about any offending occasion then, under the special procedure, the judge would be so notified and it would not be taken into account for the purpose of sentence. Consequently, this proposal is very much to the defendant's advantage. The final outcome of the trial will be a sentence which will disregard those occasions of offending upon which there is a "failure to agree".

At the close of evidence

6.21 Upon consultation we were impressed with the view expressed by a number of respondents that it would be highly desirable for a jury in such a case to have a written, structured, "steps to verdict" set of directions. Whilst the precise questions would have to be discussed with counsel before the summing up, having regard to the particular facts of the case, we have set out below, the type of summing up we would expect, from which written questions could be extracted.

[24] This is to be contrasted with cases which would not be susceptible to either of our proposals where the evidence may well be diffuse, complex and difficult to reduce to a manageable form or proportions. It is in respect of trials of serious and complex fraud cases, where, in many instances neither of our proposals will be appropriate, that the Auld Review recommends removing juries entirely (Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) ch 5, paras 173-206). In the White Paper responding to Auld the Government appears minded to implement this recommendation though without the participation of "lay assessors", as the Auld Review has recommended.

Special verdicts and directions to the jury

Special verdict

6.22 The use by the courts of the special verdict, or the posing of questions to the jury, has not been encouraged in recent years. In our judgement, however, its use is entirely justifiable in appropriate circumstances to illuminate the otherwise opaque verdict of the jury, the better to inform the sentencer and thereby to enable an accurate sentence to be passed.

6.23 Sir Robin Auld, in the report of the Criminal Courts Review,[25] identified the need for a fundamental and practical review of the structure and necessary content of the summing up:

> with a view to shedding rather than incorporating the law and to framing simple factual questions that take it into account.[26]
>
> Under the simpler scheme that I have in mind, the judge's prime function would be to put a series of written factual questions to the jury, the answers to which could logically lead only to a verdict of guilty or not guilty … Each question would be tailored to the law as the judge knows it to be and to the issues and evidence in the case.[27]

6.24 Although the Government has not accepted this particular recommendation, the difference between his recommendation and ours is that we would ask questions of the jury to illuminate the verdict of guilty in order to aid sentencing, not to expose the thinking of the jury which has led to the verdict. In order to explain how the taking of a verdict might work, we will go step by step through the possible decisions to which the jury might come in the normal course of events. We will then see how the additional questions that the jury may have to answer for this special verdict would fit in.

6.25 As in any trial the jury must reach its verdict either unanimously or by "a majority" (ie normally at least 10:2 after a minimum period of deliberation without unanimity). Thus, in order to convict, all (or at least 10) must be sure of guilt. In order to acquit, all (or at least 10) must be less than sure of guilt. If at the end of their deliberations the position is that there is no agreement, either unanimous or of at least 10, either to convict or acquit, then there will be a "failure to agree" or "a hung jury" and the jury will be discharged. There may, or may not, be a re-trial with a different jury.

6.26 In the case of the compound allegation the jury will be considering (i) a verdict of guilty or not guilty on one count relating to a number of occasions of offending, and (ii) in the event of a verdict of guilty, whether there are any occasions upon which it is unable to agree that the defendant committed an offence. The prosecution will, in addition to the indictment, have provided the

[25] Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) ch 11.

[26] *Ibid*, para 49.

[27] *Ibid*, para 50.

jury with a schedule to use when considering its verdict and, if appropriate, the supplemental question. The judge may have agreed with counsel to draw to the attention of the jury specific occasion(s) of offending, in relation to which a particular issue was taken at trial. Thus, the judge, where appropriate, will have explained to the jury which of the listed offences it may consider are principal contenders for it to indicate that it is unable to agree on the defendant's guilt notwithstanding its verdict of guilty on the compound allegation count in the indictment.

6.27 At the end of their deliberations:

(1) In order to convict of the count containing the compound allegation, all (or at least 10) of the jury must agree that they are sure that the defendant committed the alleged offending on at least one (the same) occasion.

(2) In order to acquit, all (or at least 10) of the jury must agree that they are less than sure that the defendant committed the alleged offence on any occasion at all. In practice, as these are going to be "all or nothing" cases, this would not be as daunting an undertaking as it might, at first blush, appear.

(3) If the position is that the jury is unable to attain the level of agreement either to convict or acquit, then there will be a hung jury and (possibly) a retrial.

(4) If, but only if, the jury has convicted in accordance with paragraph (1) above then the special verdict procedure we propose for the compound allegation will come into play. The jury will be asked, for sentencing purposes, to clarify the extent of that offending by identifying any occasion(s) of alleged offending where it is unable, by a sufficient majority, to agree that it is sure of guilt. Any occasion so identified will be discounted by the judge in measuring the appropriate sentence.

6.28 It is important to emphasise that at this stage the jury is not being asked whether it would acquit the defendant in respect of those other occasions. That would require unanimity (or at least 10 to agree) that they were less than sure of guilt. What the judge will be asking is whether, and if so upon which occasions, the jury has failed to reach a sufficient level of agreement to convict. The defendant will not be sentenced for offending which includes these offending occasions because he or she will not be regarded as having been convicted of them.

6.29 Thus, the defendant will have the benefit of having the sentencer discount alleged occasions of offending in respect of which the jury would have been unable to base a conviction because of a failure to agree. If, contrary to the characterisation of the case, as all or nothing, the jury were to conclude that it was sure of guilt only on one occasion then it would so inform the judge who would sentence accordingly.

Directions to the jury

6.30 The jury direction will need to include a *Brown* direction,[28] to avoid any complications arising as to whether all, or a sufficient majority of the jury, was agreed about guilt of at least one particular offending occasion.

6.31 We will now provide, as an illustration, a possible formulation of a direction of the type that the judge would be expected to give in a compound allegation case. We take a case where a defendant has pleaded not guilty to a compound allegation of theft. The circumstances of the offence are that the defendant, the Financial Director of a company, was alleged to have falsely inflated his expenses claim by sums in the order of £600 each month, for a period of six years. The total loss to the company was some £43,000. The expenses related to hotel accommodation charges that the Crown say were not incurred by him because during these periods the defendant occupied a flat that he owned. The defence was that he was entitled, as a "perk", to claim hotel expenses even though he had never incurred them. As a side issue, in the course of his evidence, the defendant also claimed that for three months of the relevant period he had been off from work on sick leave and therefore was unable to have made the claims which were apparently revealed by the records. Thus there is a single "all or nothing issue" in respect of all the claims he made but there is, in addition, a small subset of issues in respect of the problematic three months of his absence from work through illness.

6.32 In summing up such a case, the judge might direct the jury on the following lines:

> Members of the jury, the offence in count one is known as a "compound allegation". Although you might think the facts relate to the large number of alleged occasions of theft identified in the schedule, the law permits them to be charged as one single offence of theft. This is because the alleged victim, the company, is identical and the method of alleged offending on each occasion is identical. In the circumstances the law treats it as an allegation of one offence of theft committed over a period of time.
>
> It is a necessary condition of its being treated as one offence that the main issues raised by the prosecution and defence are identical for each alleged occasion, so that you might well think that a decision that the defendant is not guilty on one occasion would necessarily involve a decision that he is not guilty on all of them and, conversely, that a decision that he is guilty on one occasion would involve a decision that he is guilty on all. In other words it is, in this sense, "all or nothing".

[28] (1983) 79 Cr App R 115. It is a fundamental principle that a jury must agree that every ingredient necessary to constitute the offence has been established. This will require in the case of a compound allegation either unanimity or a relevant majority of the jury agreeing that the defendant is guilty of the same instance of offending.

In this case the main issues common to each alleged occasion of theft which make it in that sense "all or nothing" are

(1) whether monthly claims were lodged by the defendant in relation to accommodation charges described as having been incurred by the defendant at the Executive Hotel;

(2) whether, as the Crown say, the Executive Hotel is correct in saying that the defendant never visited or stayed at that establishment during that period and that the defendant was never asked to pay nor did he ever pay any sum to the hotel;

(3) whether, as the Crown say, during this period the defendant was the owner of a flat that he occupied during the monthly business trips and so had no need to stay at the Executive Hotel;

(4) whether the defendant may be right when he says that he was entitled to claim these hotel expenses as a "perk" even though he never stayed there and did not make any payments to the hotel.

In this case there are certain particular alleged occasions where specific and different issues have been raised and which, you may think, prevent those particular occasions from being simply "all or nothing". I will identify these in due course.

Because this count is placed before you as a compound allegation, as I have described, I will ask you, when you retire, initially to consider only one question on this particular count, namely, are you sure that the defendant has committed the alleged offence of theft on at least one - the same - occasion. If so, you will convict the defendant of this count.[29] This is a decision upon which you must all (or at least 10 of you) agree.

Conversely, in order to acquit the defendant of this count you must all (or at least 10 of you) agree that you are less than sure of the defendant's guilt on each of the occasions on which it is alleged he committed the offence of theft. Although this may seem to be a daunting requirement, you must bear in mind always what I have said to you that in this case a decision on one of the alleged occasions of theft contained in this compound allegation as "all or nothing" will, in effect, be a decision on each of them.

Were you to convict, and in order to assist me in sentencing, you would, after announcing your verdict, then be asked to tell me if there were any particular occasions of alleged theft where you have been unable to agree that the defendant is guilty.

[29] Normally the instruction that the jury must reach a unanimous decision on guilt or acquittal (averting, in certain circumstances, to the possibility of a majority direction) will be given at the *end* of the summing up. In compound allegation cases it might be appropriate, as we have done, to indicate at this stage that their decision on guilt or acquittal must be unanimous. This will enable the judge to distinguish for the jury the decision on guilt from the special approach to an indication for the purpose of sentencing.

> If, therefore, you decide to convict the defendant of this count, you should go on to consider whether, notwithstanding the fact that you have found the defendant guilty, there are any particular alleged occasions where you are not able to agree that you are sure of his guilt so as to inform me when I ask you.
>
> In particular, and to help you in this task, I now call to your attention the side issue I have already mentioned in respect of particular occasions of alleged theft which, it has been suggested are not simply "all or nothing".
>
> The defendant has produced medical evidence showing that for a period of three months, whilst recuperating from an operation, he was unable to travel. The defendant states that he was away from work during that period and denies having presented any accommodation claims relating to that period. You have to decide whether you are sure that the claims that the Crown say were lodged by the defendant relating to that period were in fact lodged and by him. If you are sure, your verdict of guilty will, no doubt, extend to that period of offending. If you are not sure, or you are unable to agree what is your view of these occasions, you must inform me of that so as to clarify the extent of his guilt after returning your initial verdict.

ARTICLE 6 OF THE ECHR

6.33 Article 6(2) provides:

> Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

6.34 We have taken care to ensure that our recommendation will respect this right. The structure of the compound allegation procedure is that the Crown will bear the burden of proving the defendant's guilt of the compound allegation. The verdict will be that on a date or dates between two specified dates, the defendant, for example, stole not less than £X and not more than £Y.[30] The procedure will ensure that the jury illuminates this finding by being asked whether there are any of the alleged occasions upon which the Crown has failed to discharge its burden of proof. Furthermore, the jury will have its attention drawn to any specific occasion, or series of occasions where, in accordance with the evidence, such a separate issue might arise.

6.35 Professor Elliot in his seminar response was in no doubt that our proposal would, in relation to one compound offence, satisfy Article 6(2). He explained that:

> If the jury find that the D committed the offence on one occasion, it will follow that they are satisfied that he committed it on all the

[30] In such an example X would relate to the least amount stolen on one occasion that was known, and Y to the total. This is different from the general deficiency where the only sum known with certainty is the total sum because the prosecution is unable to identify any particular occasion upon which any particular amount is stolen.

> occasions specified, other than those on which they say they are not satisfied. The judge can safely sentence for the whole alleged wrongdoing, as has been the position for years. The only change, which is an improvement, is that the jury are able to tell the judge what he must *not* sentence for. … I do not think that it can seriously be suggested that the scheme would offend Article 6(2) of the Convention and the presumption of innocence.

6.36 The use of the compound allegation will only arise where the trial judge is satisfied that the connection between the occasions of offending is such that it is a prima facie inference that if a person is guilty of one he or she will be guilty of all,[31] but the Crown will remain burdened with proving guilt of the one offence.[32] Where there is evidence to suggest that there are any particular offending occasions upon which a different conclusion might be reached, the jury will be directed to address those occasions specifically as well as considering whether there are any others where the Crown has not established guilt. The closest the procedure would come to infringing the presumption is that the sentencer will be able to sentence on the basis that if there is a verdict of guilty and no indication otherwise, then the judge can sentence on the basis that the defendant is guilty of all the alleged offending. This is and has been the position for many years where there has been a general deficiency or where there has been a single continuous offence. Our recommendation would improve the position of the defendant by enabling him or her to have the advantage of the jury telling the sentencer not to sentence on the basis of the entirety of the allegation but only on part of it. In effect we are replicating in overt form in the Crown Court the kind of process which informed the sentence of the Stipendiary Magistrate in *Barton*.[33]

METHOD OF INTRODUCING THIS CHANGE OF PROCEDURE

6.37 Under section 84 of the Supreme Court Act 1981, rules of court may be made by way of secondary legislation for the purpose of regulating and prescribing the practice and procedure to be followed in the Crown Court and the Criminal Division of the Court of Appeal.[34] The question which is the most suitable method of effecting a change in the law in any given case, be it by way of a

[31] For example where the issue is dishonesty and the jury does not accept the defendant's explanation of why the conduct was claimed to be honest.

[32] To date, the courts have recognised that, in sentencing a defendant who has been convicted of a *single* continuous offence, *all* the continuous offending included within that single offence can properly be taken into consideration, if that is the sentencer's view of the facts, because it is all within the ambit of the finding of guilt. To do so is not regarded as sentencing a defendant for an offence of which he or she has neither been convicted nor has asked to have taken into consideration. We are aware that on 1 March 2002 the High Court certified that there was a point of law of general public importance in *Barton v DPP* [2001] EWHC Admin 223. However, the High Court refused leave to appeal to the House of Lords. To date, we are not aware of any application to the House of Lords having been made for leave to appeal.

[33] [2001] EWHC Admin 223.

[34] Section 86 of the Act vests these powers in a rule committee. The Crown Court Rules 1982 (SI 1982/1109, as amended) were issued pursuant to these provisions.

Practice Direction, rules of court, or primary legislation, is a subject which we do not explore in this paper.[35] However, we would be surprised if it was thought that these recommended changes in practice and procedure in the Crown Court would require primary legislation.

SHOULD INDICTMENTS BE ALLOWED TO CONTAIN AN UNLIMITED NUMBER OF COUNTS?

6.38 We have considered whether, as an alternative approach to that of the compound allegation, it would be preferable to allow indictments to be drawn without limiting the number of counts so as to include perhaps hundreds of occasions of individual offending. That might be a more direct means of addressing the problem than making use of the developed case law relating to the concept of the 'continuous offence' as a basis for our recommended compound allegation procedure. It has been suggested that in the age of word processors, there may be no need for the courts to be constrained by rules relating to overloading which developed in a different age. That would have the attraction of providing a direct approach to ascertaining accurately the level of offending which the prosecution has established to the required standard. It would, however, give rise to a different problem. The judge in summing up would need to direct the jury separately to the evidence on each of potentially hundreds of offences, a task which anyone with experience of summing cases up would recognise as being daunting, not to say impossible. The jury, a lay body with no particular expertise in organising material, or taking collective decisions, would then be asked to make hundreds of separate decisions.

6.39 It might be thought that these problems could be overcome by the various techniques now available to enable juries in serious fraud cases to have presented to them masses of documentary evidence and to receive directions on diffuse and complex transactions sufficient to enable them confidently to address the questions of guilt. The difference between that type of case and the ones which we are considering is the much smaller number of counts and decisions required of the jury even in a lengthy, serious and complex fraud case. We have to recognise, in making our recommendations, that the courts are firm in their view, based on long experience, that in practice, a trial of a large number of separate counts of anything much over about 30, is untenable. This view is based on the established opinion of the courts not only that the jury, comprising twelve randomly selected people, is not a body that is able to make a larger number of

[35] For an example in which each of this range of options has been used in connection with one issue, consider the law and practice relating to the giving of witness evidence by way of a video. This is governed by the Youth Justice and Criminal Evidence Act 1999, ss 16-17, 24 and 27-8, the Crown Court Rules 1982, as amended by SI 1997/701, and by a Practice Direction [1992] 1 WLR 839. Although these provisions deal with different aspects of the procedure, it is not absolutely clear, particularly between primary and secondary legislation, which type of provision would be used for which particular purpose. The Practice Direction is, however, more obviously concerned with uncontroversial aspects of this type of procedure, for example, what to do when the equipment breaks down, how video evidence should be played and that it should be edited in accordance with the directions of the judge.

separate decisions, but also that it is beyond the practical competence of prosecution, defence and the judge to present such a number of individual decisions to the jury so as to enable them sensibly to deal with them.[36] Thus, whilst it might in theory be possible to suggest that trials *could* be organised so that jury members could be expected to apply their minds to a larger number of individual separate decisions, in practice we have no doubt that such a proposal would be rejected as unrealistic by the bodies which have experience of, and responsibility for the conduct of such trials.

6.40 We have also considered whether, in the case of an indictment setting out numerous offences that are sufficiently closely linked so that they fall within the "single continuous offence" concept, the jury could be directed to say whether it found the defendant guilty of, for example theft, and whether that was on each of the occasions listed or whether, on some of the occasions, the defendant was found not guilty. This would avoid the need for the jury to recite solemnly, 52 times, for example, that it found the defendant guilty of the offence of theft. An alternative approach would be for the jury to say that the defendant was found guilty of theft on all the dates shown, except for specific instances which it identifies.

6.41 We are concerned that this suggestion might go further than is appropriate in inviting decisions of the jury based on an assumption of guilt. It would be envisaged that the judge would tell the jury that, because of the all or nothing nature of the offending, they should not worry about taking *substantive* decisions on each of the individual counts, because guilt of one will mean guilt of them all, save for any specifically separate issue that might be raised. Nonetheless the judge would still require them, in one form or another, to return separate verdicts (of guilty) in relation to each count even though they may not have specifically considered them. If that were to be our recommendation, we fear that it would be liable to be criticised as an apparently explicit derogation from the presumption of innocence.

6.42 There is room for disagreement on whether our minimalist approach of giving effect to the existing law is correct. A third option would be to change the Indictment Rules to permit more than one offence to be charged in a single count upon which a single verdict can be returned. This would only apply in very limited circumstances, namely where two or more similar offences, connected by time and place of commission or common purpose so that they can fairly be recognised as forming part of the same transaction or criminal enterprise, are alleged, and any defence raised makes it an "all or nothing" case. We have raised this possibility in paragraph 6.9, above. In our view the present law can be used without the need to change the Indictment Rules but doing so is an alternative route.

6.43 The approach we recommend is, we think, more consistent with principle and practicality. It will result in a single verdict. If guilty, this will reflect the reality

[36] "To have 94 separate informations would have rightly been regarded as oppressive", *per* Kennedy LJ in *Barton* [2001] EWHC Admin 223, para 22.

that the jury are sure that the defendant is certainly guilty of, at least, one offence. The remaining question will be about sentence. The advantage of our proposal over the present situation is that the judge, when sentencing, will know, from the jury, if there are any particular matters for which the defendant should not be sentenced. The defendant will not have to be found "not guilty" to have the advantage of not being sentenced for such alleged offences. Mere jury disagreement will suffice. Further, the jury will be better equipped to apply its mind to the genuine potential exceptions to the general conclusion rather than being swamped with the task of coping with the large number of undifferentiated offending occasions which may result in the true exceptions being overlooked or ignored.

CONCLUSION

6.44 The consensus of views received favoured our proposal for a compound allegation procedure which we now recommend.[37] As we have explained above at paragraph 6.18 this proposal is not intended to solve the difficulties that arise in voluminous and complex cases. It is intended to improve the present procedure for prosecuting repeated offending that can be categorised as a continuous offence. This procedure would be an improvement on the present position because it would enable a judge in the Crown Court to understand more fully the meaning of a guilty verdict. It would also complement our recommendation for a two stage trial procedure for use in certain cases which would not fall within the "compound allegation". The existence of both procedures would mean that defendants who have been charged with multiple offences, which are neither complex nor unduly voluminous, could have their guilt or innocence of the full extent of their alleged multiple offending determined by a jury to the maximum extent possible, thereby diminishing to the minimum extent necessary the use, under our two stage trial procedure, of a fact-finder other than a jury.[38]

RECOMMENDATION

6.45 **Where a defendant has been convicted in the Crown Court of conduct which under existing law may be regarded as a "continuous offence", we recommend the use of a special verdict as a means of enabling judges to be better informed about the extent of offending of which the jury is sure.**

[37] In addition, the scheme for returning verdicts envisaged by Lord Justice Auld would fit well with our proposal for compound allegation(s). Indeed, the Justices' Clerks' Society responded that

> [t]he Society has little difficulty with this proposal. The approach suggested at 1.55 [of the Seminar Paper, relating to compound allegations] would seem to the Society to be the correct approach in such cases. The link with the scheme envisaged in the Auld [review] is timely and well made.

[38] The recommendation for a two stage trial procedure is addressed in detail in Part VII.

PART VII
TWO STAGE TRIAL PROCESS

INTRODUCTION

7.1 We propose a two stage trial process for certain cases of multiple offending[1] which are not susceptible to being regarded as a single continuing offence but which, due to the number of counts or other complicating factors, would result in an unmanageable trial before a jury.

7.2 In essence, the scheme borrows elements from two familiar procedures – the trial of a sample count and the *Newton* hearing. It combines them in a process in which the jury trial (during the first stage of proceedings) is a definitive element. At the end of a two stage trial, the judge can sentence the offender for the full extent of criminal activity, which will have been established by a separate decision on guilt on each alleged offence, after a trial at which the prosecution case and evidence has been tested.

7.3 The first stage of this procedure would be a conventional jury trial on an indictment containing charges chosen to show samples of the offending.[2] The second stage would take place *only* in the event of a guilty verdict on one or more counts tried before the jury. The trial judge will have made a ruling at the end of stage one on the further disposal of the case. Any second stage of the trial would be by judge alone.

7.4 At stage two, the judge would decide on the guilt or innocence of the defendant in respect only of offences linked to those upon which the jury has convicted. Those linked offences will have been pre-selected and placed in a schedule attached to the indictment. The schedule would reflect the full extent of alleged offending. The offences in the schedule will be listed, as appropriate, in groups and each group linked with a specified sample count in the indictment. For example, the first fifteen offences in the schedule might be linked to count one, the next ten, or so, linked to count two, and so on.[3]

7.5 After hearing evidence and argument the judge would decide whether or not the defendant is guilty of any, some, or all of the scheduled offences.[4] It is of crucial importance to emphasise that the judge at the second stage will not be bound by

[1] See para 7.6, below.

[2] We envisage that the charges chosen for inclusion in the indictment would be comparable to those chosen in the pre-*Kidd* days for inclusion as "sample" or "specimen" counts.

[3] Talk of dispensing with juries altogether in serious and complex fraud trials has long been prevalent; see, eg, the report of the Roskill Committee, *Fraud Trials Committee Report* (1986) and Auld LJ, *Review of the Criminal Courts of England and Wales* (2001) ch 5, paras 173-206.

[4] A finding of guilt after stage two of the trial would count as a conviction for the purposes of the Company Directors' Disqualification Act 1986 s 2.

the conviction of the jury at stage one[5] but will be free to come to his or her own view of the evidence, even if that conclusion may be thought to be inconsistent with that of the jury with which, on occasions, the judge will undoubtedly find him or herself in disagreement.[6] There will be no presumption of, or necessary expectation of, further findings of guilt. The judge will, of course, be aware of the conviction and may well be aware of the evidence. This is not a cause for concern because, as we explain below, a case will only be ruled as suitable for this procedure if the evidence on, and conviction of, the specimen and linked offences would be cross-admissible before any tribunal of fact.

7.6 It is also important to emphasise that we only intend this method of trial to be available for use in cases of repeated similar offending which, prior to *Kidd*,[7] would have attracted the use of the specimen count procedure. Thus, although it will be available for use in certain cases which would attract the sobriquet of "serious fraud" and will also be capable of being used in non "serious" fraud and other cases, it will not be available for use in all cases of "serious fraud".

PREPARATORY HEARING

7.7 Before the two stage process can be invoked, there would need to be a preparatory hearing at which the trial judge would decide whether or not this procedure should be used. The judge would have to be satisfied of three matters. First, that the number of counts which would otherwise have to be included in the indictment, in order for the defendant to be sentenced appropriately if convicted, would be so large that a manageable jury trial would not be possible. Second, that sample counts and linked offences can be established such that the evidence on and/or conviction of each sample count would be admissible on each of the offences in the schedule that are linked to that sample count and vice versa.[8] Third, that it would be in the interests of justice for the defendant to be tried under the two stage procedure. One of the matters which will inform the question of the interests of justice is whether it is a case which, prior to *Kidd*,[9] could have been dealt with by way of sample count. Issues of cross-admissibility would be determined by reference to the law of evidence, either as it is presently[10]

[5] Although that conviction will, in accordance with s 74(3) of the Police and Criminal Evidence Act 1984, be proof of guilt unless the contrary is proved. This is discussed below at paras 7.60 – 7.62.

[6] See below at paras 7.63 – 7.75.

[7] [1998] 1 WLR 604.

[8] One seminar delegate raised the question of whether it might not suffice if all the offences could, in theory, be joined in the same indictment under the terms of rule 9 of the Indictment Rules 1971. However, the point about our proposal is that we are dealing with repeated instances of the same type of behaviour possibly applied to different victims. We believe that if the similar fact connection were to be lost there is a danger that the proposal would extend beyond the limited area in which it is intended to work.

[9] [1998] 1 WLR 604.

[10] Note the leading case is *DPP v P* [1991] 2 AC 447, in which Lord Mackay LC held, at p 460.

or as it would be pursuant to the changes recommended by the Law Commission, contained in the Criminal Evidence Bill or any variation on that theme.[11]

7.8 The type of case that we would regard as suited to this procedure is where it would be unthinkable that any judge would order separate trials in relation to the activity covered in the schedule for any reason other than overloading of the indictment, or where it would be inconceivable that a judge might direct a jury that they should disregard the evidence relating to the sample offence when considering liability in respect of the linked offences in the schedule. The specimen count on the indictment ought to be a true sample of the linked offences. The two stage process is intended for use in respect of cases of frequently repeated offending of a similar nature, rather than wide ranging, complex and factually differentiated cases. It will thus only be used in those cases where the similarity between the specimen and the linked charges is such that the evidence will be susceptible to being presented in schedule form, or given by a small number of witnesses or, if given by a number of individuals, gone through relatively rapidly. We will now explain the procedure that we envisage, in more detail.

STAGE ONE PROCEDURE

7.9 The defendant would be arraigned on an indictment containing the sample counts. If sufficient not guilty pleas are entered so that the prosecution seek trial there would be a trial on the indictment. Evidence in respect of alleged linked offences may be adduced as part of the prosecution case if the law of evidence would so permit in the same way as arose where trials were conducted on sample counts pre-*Kidd*,[12] but there would be no call for the jury to return a verdict on any but the sample offences included in counts in the indictment.

> … the essential feature of evidence which is to be admitted is that its probative force … is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.

The "striking similarity" test used in *Boardman* [1975] AC 421 was stated to be only one of the ways in which the enhanced relevance required of similar fact evidence may be found. It was said that to regard "striking similarity" as an essential qualification for the admissibility of similar fact evidence is "to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it" (*DPP v P* [1991] 2 AC 447 at p 460).

For a summary of the existing law, see Part II of our report Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

[11] This Bill is annexed to our report, Evidence of Bad Character in Criminal Proceedings, *ibid*. In relation to similar fact evidence, the recommendations in the report reflect the approach taken in *DPP v P* [1991] 2 AC 447, combined with an interests of justice test, in which the potential prejudice to the defendant must be weighed against the probative value. The evidence will be admissible if it is *required* in the interests of justice.

[12] [1998] 1 WLR 604.

THE OUTCOME OF STAGE ONE PROCEEDINGS

7.10 At the conclusion of the first trial the judge would be required to consider the future of *all* the alleged offences that are linked to the counts on the indictment. This will be so regardless of whether the trial on those sample counts resulted in an acquittal or a conviction.

Acquittal on a sample count

7.11 Following an acquittal on a sample count there would be a presumption in favour of a directed acquittal on the linked counts.[13] We say that this should be a presumption rather than an invariable rule because it is possible that, in certain cases, an acquittal on a sample count may be returned without a true investigation of the facts. This may occur, for example, if a Crown witness is unable to attend stage one proceedings due to serious ill health but the prosecution "limp on" without that witness, perhaps never even establishing a case to answer. It should, therefore, be open to the prosecution in such cases to seek to persuade the judge that, in the particular, *exceptional* circumstances, justice requires that the Crown should be free, at some future date, to seek leave to proceed with a new prosecution (not the second stage of the two stage trial)[14] on some or all of the allegations linked to the sample count upon which there has been an acquittal. The trial judge should not, however, be permitted to allow the prosecution to proceed with a *new* prosecution on linked allegations on the basis that he or she considers that the acquittal by the jury was perverse or erroneous. *Express provision should be made to this effect.*[15]

7.12 Where the judge is persuaded that the presumption in favour of a directed acquittal has been rebutted by the prosecution, then there will be an order that the case lie on the file on the usual terms.[16] In this way the defendant who has been acquitted of the sample offence but is not thereby given the benefit of a directed acquittal on the linked offences has two safeguards. First there must be "exceptional circumstances" at the time of the trial for the presumption to be

[13] The reason for this is that if the prosecution has decided to avail itself of this procedure, and the court has agreed that the offences are so similar that they may be properly linked such that a finding of guilt by jury on one leads to the burden for the defendant of consideration of guilt on the others by a judge alone, then it must logically follow that, upon an acquittal by the jury, the defendant should be entitled to the parallel "knock on benefit" of that verdict on the linked matters.

[14] The reason that this would be a new prosecution, not simple inclusion as scheduled offences within the stage two procedure, is that, as there has been no finding of guilt on the sample count in the indictment tried by the jury, the pre-condition for stage two proceedings has not arisen.

[15] For example the judge might think that the jury was gullible in accepting a version of events or explanation put forward by the defendant. That would not be a sufficient reason to refuse to acquit on linked offences.

[16] That is, not to be proceeded with without the leave of the court. In the ordinary course of events, it would be unusual for subsequent proceedings to be commenced in respect of an offence which has been ordered by the court to remain on the file. Should leave be sought, where to proceed would be oppressive, there is a judicial discretion to refuse leave to proceed with a prosecution. See *Riebold* [1967] 1 WLR 674.

rebutted and second when the Crown is in a position to proceed, it must go to court to seek leave to proceed.

7.13 The power of the judge to order that an offence should lie on the file on the usual terms gives rise to a collateral issue relating to the compatibility of such an order with Articles 5 and 6 of the ECHR. This matter is discussed separately below, at paragraph 7.90 *et seq*.

Conviction on a sample count

7.14 In order for there to be any question of stage two of the trial taking place there must have been a conviction on a specimen count(s) to which other alleged offences are linked in the schedule. Once there has been a conviction on one or more sample counts, the second stage proceedings would normally take place in relation to the linked offences in the schedule. The defendant should, however, first be given an opportunity to change his or her plea in respect of the linked offences. There would be no second stage of the trial if the defendant pleaded guilty to all the linked offences, or to sufficient for the prosecution to wish to offer no further evidence. In such a case the court would proceed to sentence the defendant for all the matters upon which he or she had been convicted or which had been admitted. The defendant would, of course, be entitled to some credit in sentence for the pleas of guilty but less than if they had been at an earlier stage.[17]

7.15 There would be no requirement that the judge should, at the end of stage one, give any early indication of sentence on the matters for which the defendant has been convicted. The procedure is intended to involve one trial process in two stages, not two trials. Any "interim" sentence might be misleading.[18] Save for the purpose considered in paragraph 7.16 *et seq* below, we would not expect the trial judge to articulate either a preliminary sentence or a sentence in event of plea. The sentence imposed at the end of both stages will be sufficiently transparent if it is broken down at that stage.

Should the trial judge have the power to overrule a prosecution wish to proceed to the second stage?

7.16 At the end of the first stage of proceedings the judge may take the view that the outcome of stage two would not make any significant difference to the sentence to be imposed. This may be because either:

(1) the appropriate sentence for the offences of which the defendant has been convicted, and/or to which the defendant has pleaded guilty, (such

[17] Criminal Justice and Public Order Act 1994 s 48 (s 152 of the Powers of Criminal Courts (Sentencing) Act 2000) requires a court when determining the appropriate sentence to pass on an offender to take into account the stage in the proceedings at which the offender indicated his intention to plead guilty and the circumstances in which that indication was given. See also *Barber, The Times* 20 November 2001.

[18] Apart from in cases where the judge believes that he or she has adequate powers of sentencing at the end of stage one, a preliminary sentence at that stage would have no bearing on the final sentence.

offences may include those in the schedule admitted by the defendant) would not differ significantly from the sentence that would be imposed following guilty verdicts on any remaining scheduled offences; or

(2) the judge has taken a view on the merits of the case, notwithstanding the conviction verdict of the jury, which would lead to verdicts of not guilty on the remaining scheduled offences if he or she were to try them to a conclusion.

Ruling based on adequacy of sentencing powers

7.17 At the seminar we held, the consensus of views on this issue was, given that the sole object of the second stage was to enable the judge to impose the appropriate sentence, that the judge should have the power to prevent the second stage from going ahead where there are already sufficient convictions to permit an appropriate sentence to be passed. We agree that where the judge is of the view that the pleas offered by the defendant at this stage are sufficient to impose a sentence that would reflect the totality of offending, but the prosecution wish to pursue the remaining offences, the judge should have power to refuse to allow the prosecution to insist on a second trial. In such a case the judge should be able to order that the remaining offences lie on the file on the usual terms, unless to do so would be unduly harsh or oppressive, in which case verdicts of not guilty should be entered. In the light of the fact that these will be offences linked to offences for which the defendant has already been convicted by a jury after a trial, we anticipate that it would only be in a wholly exceptional case that a directed verdict of "not guilty" would follow a decision that there be no second stage trial. If, after hearing argument from the prosecution, the judge rules that the case should not proceed to the second stage, the judge should make it clear in court that it would not in his or her view make any significant difference to the level of sentence and the defendant should be informed of that reason.

7.18 Presently the court does not have the power to prevent the prosecution presenting a case to the jury.[19] Our proposal would increase the power of the judge at the expense of the prosecution. We do not expect that this situation, in which judge and prosecution are at odds on what should be the future conduct of the prosecution, will arise frequently. The two stage procedure will only be invoked in cases where the number of alleged offences will be more than can be accommodated on a manageable indictment. Thus, one would expect that in such a case the judge's powers of sentencing on the sample counts alone would be unlikely to be sufficient to reflect the appropriate sentence for the entirety of the alleged wrongdoing. Nonetheless it could arise, for example, in a case where the indictment consisted of a mixture of ordinary counts and sample counts with linked offences. In such a case, were the convictions obtained both on the sample and ordinary counts between them sufficient for the purposes of sentence, the judge may decide that there would be no significantly increased sentence even were there to be convictions on the scheduled offences linked to sample counts

[19] *A-G Reference (No.2 of 2000)* [2001] 1 Cr App R 503.

for which verdicts of guilty had been returned. Alternatively, the defendant may at the end of stage one have pleaded guilty to sufficient of the linked offences for the judge to be able to impose an adequate sentence.

7.19 We expect that the prosecution would not usually seek to proceed with further counts if assured by the judge that sufficient convictions and/or admissions had been obtained for the purposes of sentence. Even were the prosecution to disagree with the judge on this issue, they might well, in most cases, give way graciously rather than insist on seeking to proceed against the wishes of the trial judge.

7.20 What persuades us that the judge should have the power to overrule the wishes of the prosecution in such a case is that to enable the prosecution to proceed with a second stage trial would, in such circumstances, be a waste of court time and expense. We believe that power should be vested in the judge to prevail on this issue when satisfied that, were the Crown to contest any remaining offences in the schedule, the outcome, whatever it might be, would make no significant difference to the level of sentence. In this regard, the power we propose is akin to the power of the judge to decline to accede to a request for a *Newton* hearing to determine the basis of a plea of guilty for the purpose of measuring sentence.[20]

Ruling based on merits

7.21 An additional reason for declining to proceed with stage two of proceedings would be that the judge has, by the end of the first stage trial, formed a firm view, adverse to the prosecution, of the evidence crucial to the remaining scheduled offences. If, in light of that view, the judge realises that there would be little prospect of a guilty verdict being reached at the end of the second stage of proceedings, he or she should be able to decline to proceed with stage two.[21]

7.22 At present, in cases where the Crown wishes to offer evidence but the judge does not wish the case to proceed, *A-G Reference (No 2 of 2000)*[22] makes it clear that, other than in cases which are oppressive or vexatious or an abuse of process of the court, the prosecution has a right to present its case. The Crown must be free to present its case, and the jury to form their view.

7.23 There are two fundamental differences between our second stage proceedings and the trial proceedings in *A-G Reference (No 2 of 2000)*.[23] First, under our scheme the judge is the fact-finder and second the Crown will already have

[20] See *Hall* (1984) 6 Cr App R (S) 321: "Where there is a difference between the version of the facts put forward by the prosecution and that put forward by the defence, it is not necessary for the sentencer to determine which view of the facts is correct if the difference would not materially affect the sentence" (Editor's note).

[21] We consider below, at paras 7.69 – 7.75, the significance of a finding by the judge that is inconsistent with the verdict of the jury.

[22] [2001] 1 Cr App R 503.

[23] *Ibid*.

obtained a conviction before a jury, so the decision of the judge would not prevent the prosecution from having had any trial at all before a jury.

7.24 Our recommendation would not in reality encroach upon the prosecution's right to present their case to the jury. Although the second stage trial would not be heard by a jury, it would relate to offences which under present procedures would have been too numerous for the prosecution to put before a jury. In a case where the judge has already decided that the case ought not to proceed because he or she would be minded to acquit the defendant of outstanding matters, there would be no point in the prosecution presenting its case to the judge.

What powers should the judge have regarding linked offences not proceeded with?

7.25 Following conviction on sample counts the judge might not proceed to stage two for the range of reasons discussed. The defendant may have offered sufficient pleas for the Crown to be content not to proceed on the outstanding contested matters. The judge may have indicated that the matters in respect of which guilt has been established confer sufficient sentencing powers to reflect the totality of the offending without the need for findings on all matters. The judge may have indicated a view of the merits which means that a second stage trial is unlikely to result in verdicts which will require any significantly different sentence.

7.26 The options are that the judge: a) be obliged to direct a verdict of not guilty be entered on the contested matters included in the schedule; b) be obliged to order that those remaining offences lie on file on the usual terms, or c) be free to choose the most appropriate order, depending on the circumstances of the case.

7.27 We have concluded that there should be a presumption that such offences remain on the file. This would safeguard the position of the Crown in the event of a successful appeal against conviction on one or more of the sample counts.[24] The judge ought, however, to be given a limited power to direct verdicts of not guilty on the remaining matters, even if the prosecution wish to proceed on them. Currently this power only exists where a defendant pleads not guilty to a charge on indictment and the prosecution offer no evidence,[25] or the judge withdraws the case from the jury as a result of a ruling of no case to answer or orders a stay for abuse of process. We propose a limited extension of judicial power, to allow the judge to direct that verdicts of not guilty be entered, if it is considered that to allow the counts to lie on file would be unduly harsh or oppressive to the defendant (though not necessarily an abuse of process).

[24] This contrasts with the presumption of an ordered not guilty verdict we recommend in respect of scheduled offences that are linked to counts in respect of which the defendant has been acquitted. Our reasons for this difference appear in n 13, above.

[25] See s 17 of the Criminal Justice Act 1967. Any direction given that does not accord with the provisions of this section will be a nullity (*Griffiths* (1981) 72 Cr App R 307). If however the prosecution do wish to present their case to the jury, they are entitled to do so, even if the judge does not believe the case has sufficient merit (*A-G Reference (No 2 0f 2000)* [2001] 1 Cr App R 501).

7.28 Where a judge rules against a prosecution wish to proceed with stage two on the basis of his or her firm view, adverse to the prosecution, of the evidence crucial to the remaining scheduled offences, that ruling would be based on the judge's *personal* view of the evidence of some witnesses, but without there having been any trial of those remaining scheduled offences. Given that the jury was entitled to, and did, convict on that evidence, it would hardly ever be the case that it would be proper for the judge to do other than order the remaining cases to lie on the file.[26]

Ruling not to proceed with stage two – implication on confiscation powers

7.29 We were concerned lest a judge's ruling against proceeding with stage two of the trial might hamper the prosecution in any application they may make for a confiscation order against the defendant. These are regarded as civil orders which can only be made pursuant to a criminal conviction. Where a defendant has been convicted of at least two offences during a relevant period,[27] section 72AA of the Criminal Justice Act 1988,[28] permits the court to make assumptions for the purpose of determining whether a defendant has benefited from relevant criminal conduct and the value of the benefit. The court may assume that property belonging to the defendant represents the proceeds of his or her wrongdoing, unless demonstrated otherwise. Thus, relevant convictions at stage one would suffice to trigger the assumption.[29]

Should the trial judge have a power at the end of stage one proceedings to certify that the case is fit for appeal?

7.30 We have considered whether, at the end of the first stage of proceedings, the trial judge should have power to certify that he or she is satisfied that there is a ground of appeal which has a substantial chance of success and on that basis adjourn the question of a stage two trial on the linked offences until after any appeal on the jury conviction has been heard. We believe that the judge should have such a power. Otherwise, the situation could arise where the judge is aware of the fact that there is a very strong ground of appeal, but have to waste time

[26] See para 7.21, above. This approach accords due respect to the verdict of the jury which the judge, in allowing the case to be considered by them, has implicitly accepted they were entitled to reach notwithstanding that he or she has formed a view of the evidence which might have led him or her to a contrary decision. It must, of course, be remembered that the judge has not had the advantage of the process of argument or reasoning which informed the jury's collective decision.

[27] Relevant period is defined in s 72AA(7)(b) as meaning "the period of six years ending when the proceedings in question were instituted against the defendant".

[28] Inserted by the Proceeds of Crime Act 1995, s 2.

[29] The Privy Council has held in *McIntosh v Lord Advocate* [2001] 2 All ER 638 that since the defendant has already been convicted to a criminal standard, and the order is imposed pursuant to that conviction without any further charges being brought, the order is a legitimate part of the sentencing process. As the provisions are designed to prevent a person from profiting from their wrongdoing, it is a regarded as a proportionate response.

and resources continuing with the balance of proceedings in the knowledge that this will, in due course, be subject to an appeal. It would be a matter for the discretion of the judge in the particular case whether to proceed to stage two or adjourn consideration of stage two pending the outcome of the appeal.

Should the Crown have a right of appeal against a judge's ruling that the trial will not proceed to stage two?

7.31 Some respondents to our proposals, including the DPP, believed that the Crown should have a right of appeal against a ruling that a case should not continue to stage two. At first blush we were inclined to agree. This would chime with the inability of the judge to overrule a Crown choice to proceed with a jury trial. On reflection, however, we do not think that there should be a right of appeal, as such.[30]

7.32 If the reason for the ruling is that the judge would not have convicted on the outstanding linked matters then there should be no right of appeal because the view of the judge is a view on the facts. The Crown should not be able to appeal on the basis of a finding of fact, whether that is a decision of a judge or of the jury.

7.33 If the judge was wrong in making the assessment that a proper sentence for the outstanding matters would not be significantly greater than for the offences convicted by a jury then the true analysis is that he or she will have passed a sentence which, the prosecution will wish to argue, is unduly low for the extent of the offending alleged even though it may have been proper for the offending the jury found proved. The problem is that the prosecution will not, in such a case, be mounting an appeal against the sentence actually passed for the proved offences as constituting an unduly lenient sentence pursuant to the Attorney General's reference procedure. Rather, any prosecution right of appeal could only be on the footing that *if* the judge were to have found the defendant guilty of the linked offences after a second stage trial, then the sentence he or she has actually passed, *if it had been passed then*, would be unduly low for the extent of the offending found proved at that stage.

7.34 We believe that the double contingent reasoning required of the Court of Appeal in such a case is highly unattractive and that in this situation the judgment of the trial judge on such a matter should be final just as it is at present where he or she refuses to hold a *Newton* hearing. Without the introduction of the two stage trial procedure, the Crown would not, in practice, have been able to put the bulk of the scheduled offences before the court anyway and so their position is not in fact adversely affected compared with their present position.

[30] In theory, an order to lie on the file might result in an application subsequently for leave to proceed on a second trial on the remaining counts. It is inconceivable however that leave might be granted on the ground that the judge hearing the application was of the view that the first trial judge's ruling was wrong.

Discount for guilty plea

7.35 If the defendant entered a plea of guilty at, or before, the start of the jury trial, there would be the usual entitlement to discount in sentence for that plea. The defendant would also have an opportunity to ask the court to take into consideration, for the purpose of sentence, the linked offences in the schedule and the discount would extend to the overall sentence.

7.36 If the defendant pleaded guilty to the linked offences *after* trial by jury on the sample counts, he or she would still be entitled to some discount in sentence for that plea. The extent of this would be a matter for the judge having regard to the weight of the evidence and the stage at which the plea has been entered. In cases where there is overwhelming evidence of the offences in the schedule and the defendant has, after trial, been convicted of the sample offences, any credit for plea at that stage would be reduced to account for those factors. The judge would be entitled to regard the weight of evidence against a defendant on the scheduled offences as increased by the fact that there have been convictions on offences tried before the jury, where the evidence in respect of those offences was admissible in respect of linked offences in the schedule. Nevertheless, it is vital that there remains some incentive to a defendant not to insist on continuing to the second stage of the trial where he or she is guilty of the linked offences but was not prepared to admit them before the jury trial.

SECOND STAGE OF TWO STAGE PROCEDURE

Safeguards

7.37 There will need to be safeguards to ensure that the two stage procedure will work fairly. In particular, we regard the following three requirements as pre-requisites.

(i) Requirement of evidence based on similar fact evidence

7.38 We have already seen that no offence will be allowed to be included in the schedule, linked to a sample count in the indictment, unless evidence relating to the sample count would be admissible on a trial of the linked offences and vice versa.[31]

(ii) Rules of evidence and procedure

7.39 These proceedings will involve the determination of issues of fact which might lead to further convictions. Accordingly, the rules of evidence and procedure in the trial before the judge will be equivalent to those which apply in a jury trial.[32]

[31] See para 7.7, above.

[32] It may be, however, that some rules, which exist solely due to the presence of a jury, will be redundant or in need of modification, if there is no jury sitting. For example there would be no need to send the jury out while a *voire dire* is conducted and no need for the judge to issue directions to the jury. This issue was highlighted in a study of the Diplock courts in Northern Ireland, in which the judge sits without a jury. "Certain rules of

(iii) Reasoned rulings and verdicts

7.40 It will be necessary for the judge to give reasoned decisions whenever a ruling is required. These will normally be at the end of the preparatory hearing, when rulings will be made on the proper form of trial, the content of the indictment of sample counts and the schedule of linked offences; at the end of the first stage of the trial, when rulings will be made on the future course of proceedings; at the end of the second stage of the trial, when the judge will make reasoned findings of fact and conclusions about guilt or innocence in respect of each offence; and finally, after mitigation, the sentencing remarks.

7.41 The jurisprudence of the European Court of Human Rights makes clear the importance of reasoned decisions. The decision in *Murray*[33] emphasises that in judge alone trials this is particularly important. The judge's reasoning should be transparent to ensure open justice and for the purposes of any appeal.

7.42 The judge's reasons would not normally be expected to make any but passing reference to the verdict of the jury, unless there is some overriding reason why the judge should allude more substantively to the original verdict. It ought to be made clear in the reasons that the decision of the judge is independent of the jury verdict and that the linked counts have been the subject of separate scrutiny. This issue is discussed in more detail below.[34]

Who should preside over the court in the second stage of proceedings?

Should it be the same judge as presided at the first stage or a different judge?

7.43 We are of the view that the second stage of the trial should usually be presided over by the judge who presided over the first stage. There is good reason to suppose that this would be advantageous. The judge will already have heard the evidence on the sample counts, and perhaps much of the evidence concerning the linked offences, so the second stage of the trial would be shorter and require less repetition by witnesses of their evidence than if there were a new judge at that stage. Moreover there are no reasons to suppose that it would normally be disadvantageous to the defendant. The first stage judge is not a party to any finding of guilt by the jury at stage one and so should not for that reason be disqualified by any perception of bias.[35] Moreover, any judge at stage two would

evidence and procedure are so closely bound up with the institution of the jury that their effect is diminished in its absence." J Jackson and S Doran, *Judge without a Jury* (1995) p 255.

[33] *Murray v UK* [1995] 19 EHRR 193.

[34] At paras 7.63 – 7.75.

[35] According to *Morel v France*, discussed below at para 7.47 – 7.51, the role of the judge in different sets or stages of proceedings ought to be taken into account in assessing whether or not a perception of bias is objectively justified. Occupying distinct roles reduces the extent to which the judge can be considered biased.

become aware of the fact of the conviction on the sample count at stage one, so the fact that the first trial judge is aware of that, should not be a disqualification.

7.44 An issue may be raised whether the defendant may be disadvantaged by the experience of the judge during the first stage of proceedings, because it might give rise to prejudice at the second stage. Even if there were no question of actual bias, there might be the appearance of bias.[36]

7.45 The use of the same judge for both stages of the trial procedure is not crucial to our thinking. We do not propose that it be compulsory. Indeed there may be occasions when it will not be possible, because of practical time-tabling matters, for the same judge to preside over both stages of proceedings. Thus the judge for stage two could be a different judge although, as we have indicated above, there would be disadvantages relating to the need to re-present some of the evidence if that were the case.

7.46 It might be thought that it would always be advantageous to a defendant to have a different judge at stage two from the one who has presided over a stage one trial at which there was a conviction. That, however, would be a superficial view and it need not invariably be the case. The finding of guilt by the jury might have followed a trial in which the judge was manifestly and impeccably fair, or even expressed some misgivings about the prosecution case, having perhaps appeared to have "summed up for an acquittal" though leaving it to the jury; or the judge for the first stage may have the reputation of being a less harsh sentencer than the likely alternative. Each case will be different. Further, under the rules of evidence, the new judge at the second stage of the trial would be entitled to hear evidence relating to linked offences in the indictment,[37] including the facts and/or evidence of any linked conviction(s), so any perceived advantage of a new trial judge at stage two may well be illusory.

[36] *Gough* [1993] AC 646 held that the test on the question of bias should be whether or not there is a real danger of bias having regard to the circumstances of the case deemed relevant by the court; there is no need to prove that the tribunal was in fact biased. However, in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, the court held that the Strasbourg jurisprudence necessitates a "modest adjustment" (at p 726H) to the test laid down in *Gough*: "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased" (at p 727A). This modified test was approved by the House of Lords in *Porter and another v Magill* [2002] 2 WLR 37, although the deletion of "or a real danger" was advocated, on the grounds that it served no useful purpose and is not used within the Strasbourg jurisprudence. Thus, the test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (at p 84A–B).

[37] It will be recalled that a prerequisite to the commencement of two stage proceedings would be a preparatory hearing at which the judge would have to be satisfied that:

> the sample counts and linked offences can be established such that the evidence on each sample count would be admissible on each of the offences in the schedule linked to that sample count and vice versa. (See para 7.7, above).

7.47 The question of the propriety of having the same judge at different stages of proceedings has been litigated in the ECtHR. *Morel v France*[38] concerned the same judge sitting in different capacities in two sets of insolvency proceedings involving the affairs of the applicant. The applicant complained that the judge was biased against him in the second set of proceedings, owing to his previous involvement in the case.

7.48 The court held that there had been no violation of Article 6(1), based on two tests for assessing impartiality:[39]

> [T]he first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect … . [As to the first test] the personal impartiality of a judge must be presumed until there is proof to the contrary.[40]

7.49 In considering whether or not the second test is met, the court concluded that the domestic court should consider if there are any "ascertainable facts which may raise doubts as to [the bench's] impartiality … even appearances may be of some importance".[41] The standpoint of the applicant was said to be an important factor, but it should not be decisive and the fear must be "objectively justified".[42]

7.50 The function of the judge in the different sets of proceedings was said to be highly relevant to the question of impartiality. The ECtHR concluded that as the judge had been making decisions in a "different sphere",[43] in the second set of proceedings, any doubts the applicant may have had as to his impartiality were not objectively justified, although it did accept that the doubts may have been quite real in the mind of the applicant. The making of pre-trial decisions, carrying out preliminary analyses of information, or having "detailed knowledge"[44] of the case, does not necessarily mean that the judge can be considered prejudiced. The "scope and nature of the measures taken by the judge before the trial"[45] must be taken into account.

7.51 Under our recommendations, in the first stage of the trial the judge's role would be confined to the making of rulings on law and procedure, and summing the case up to the jury. The jury would make findings of fact. At the second stage, the judge would make findings of fact. Thus, the judge would occupy a different

[38] 6 June 2000, Strasbourg Judgment, Application No 34130/96.

[39] The court relied on *Gautrin v France* [1999] 28 EHRR 196 as authority for the tests.

[40] *Morel v France,* 6 June 2000, Strasbourg Judgment, Application No 34130/96 at para 40.

[41] *Ibid,* at para 42.

[42] *Ibid*.

[43] *Ibid,* at para 45.

[44] *Ibid*.

[45] *Ibid*.

role at each stage. In the second stage of our proposed procedure, the judge could be said merely to have "detailed knowledge"[46] of the case. The judge in *Morel v France* was aware of past decisions that were not favourable to the defendant, some of which, moreover, had been taken by himself. The judge at the first stage of our proposed procedure ought not, therefore, to be disqualified by reason of a perception of potential bias, merely by virtue of having presided over the first stage. There should, however, be the scope to introduce a new judge at the second stage if a successful argument of actual, or perception of, bias is brought.

7.52 We have concluded that there should be a presumption that the judge presiding at the first stage of the trial should conduct the second stage, subject to an "interests of justice" based power in the judge to withdraw and order that a different judge try the second stage trial where the well established rule concerning the perception of bias would be one of the explicit grounds for his or her removal.[47]

Should the judge sit alone for the second stage of the trial or would it be necessary for that judge to sit with assessors?

7.53 A further question is whether the judge should sit alone for the second stage of the trial or whether it would be necessary for that judge to sit with, for example, assessors. Strong support for the judge to sit alone was expressed within the written responses and this proposal was uncontroversial at the seminar we held for these matters to be discussed.

7.54 We can see no good reason for requiring the judge to sit with assessors. First, if the sample count is appropriate for determination by a non-specialist jury, there is no reason to suppose that a judge would need specialist assistance at the second stage. Second, unlike the proposal in the Auld Report for an intermediary tier, or for the trial of serious fraud offences, each of which propose a lay element finding facts alongside the judge, there will already have been a trial with a decision taken by a jury of lay people as a trigger for this second stage. Third, it is already the case that many decisions on guilt or non-guilt are made in the Magistrates' Court by District Judges, professional judges sitting on their own. Fourth, the procedure is modelled on the *Newton* hearing for which there has never been any suggestion that the judge has needed any lay assistance in making findings of fact.

7.55 If the judge were to sit alone in the second stage of proceedings there would be striking similarities between this role and that of the judge in a *Newton* hearing, in that the judge would be required to make findings of fact relevant to sentence after the defendant has been convicted of one or more offences. Of course under this procedure the judge's findings of fact at the second stage will go to whether the defendant is guilty or not guilty of specific offences, rather than solely to the

[46] *Ibid*.

[47] See n 36, above.

manner in which a proven offence was committed. On the other hand the factual decisions which the trial judge may presently make under the *Newton* hearing procedure on sentence may have a significance for sentence at least as great if not more so than those envisaged in this procedure.

7.56 The recommendations made in the Auld Report envisage that defendants should, with the consent of the court after hearing from both sides, be free to opt for trial by judge alone.[48] Under our recommendation, there would be no option for the defendant to have a jury during the second stage of proceedings. On the other hand the defendant would already have had a jury trial on the sample count to which these offences had been properly linked. Summarising the advantages of giving *a defendant* a right to "jury waiver", Auld LJ said:

> In short, trial by judge alone, if the defendants wish it, has a potential for providing a simpler, more efficient, fairer and more open form of procedure than is now available in many jury trials, with the added advantage of a fully reasoned judgment.[49]

7.57 Finally, were there to be a requirement that the judge sitting in the second stage be accompanied, that would remove the possibility of the judge who presided over the jury trial presiding at the second stage of proceedings because otherwise that judge would be hearing a trial as part of a panel of fact-finders where he or she is the only one that had heard the first stage. Thus the advantages of having the same judge conducting both stages of the trial would be lost.

7.58 It is our clear view that there is no need for the judge at the second stage to sit with lay assessors, whether expert or otherwise. The Government in its White Paper, Justice for All,[50] responding to the Auld and Halliday reports has concluded firmly that where, for various reasons, jury trial is not to be retained, trial will involve judge alone without assessors.[51] Our conclusion for the second stage trial by judge alone following a first stage jury trial, therefore, fits in with the likely format for non-jury trials in other circumstances.

Reference at the second stage to evidence adduced at the first

7.59 If the second stage trial is conducted by the first stage trial judge, it is inevitable that consideration will have to be given to the question of what evidence or which witnesses will need be called or recalled at the second stage. As it is a single trial in two stages, normally before the same judge, there will usually be no need for evidence to be repeated. It may be, however, that witnesses will need to be recalled to give further evidence in chief or to be subject to further cross-

[48] Subject to any overriding judgment from the judge that the public interest requires a jury. See Auld LJ, *Review of the Criminal Courts of England and Wales* (2001), ch 5, paras 110–118.

[49] Auld LJ, *Review of the Criminal Courts of England and Wales* (2001), ch 5, para 117.

[50] CM 5563.

[51] *Ibid*, para 4.30.

examination on the issues which may need to be ventilated at the second stage but which have not been at the first. These are matters of trial management which we expect the judge to discuss with the parties at the end of the first stage trial and to take appropriate decisions upon, in the interests of justice. As the pre-trial hearing will have identified as linked cases only offences in respect of which the evidence is cross-admissible we can see no problem with evidence being relied on at the second stage which has been adduced at the first stage. Further, as indicated above, we are not concerned that the judge may be required to make decisions that involve consideration of evidence given at the earlier stage. During the first stage, findings of fact will have been a matter for the jury, during the second, they will be a matter for the judge.

Relevance of first stage convictions in second stage proceedings

7.60 The usual rules regarding the evidence of a conviction are that the conviction is proof of guilt unless the contrary is proved.[52] It is a pre-condition of the operation of the two stage trial procedure that there is a preliminary ruling that evidence in relation to the sample offence is admissible on the linked offences. It therefore follows that it is inevitable that the prosecution would wish the judge presiding at stage two to be aware of the finding of guilt in respect of the stage one trial, and there is no reason why the judge should not be so aware. Indeed we envisage that the judge at stage two will often be the trial judge from stage one, although not necessarily so.

7.61 The fact that there is only one trial, falling into two procedural stages, raises the question whether it might be incongruous that there is only a presumption that evidence of conviction is proof of guilt. Professor Sir John Smith responded on this question that it would be "surely unthinkable that the single trial should present contradictory answers - D did commit the offence and he did not. Should not the presumption be conclusive in this case?"

7.62 This argument depends for its force on it being incongruous for the presumption of guilt by reason of proof of conviction to be rebuttable. We do not believe that it is. At the second stage of the trial the defendant might be able to present new evidence in respect of the count for which he or she was convicted at stage one, which overwhelmingly rebuts the presumption that he or she committed the offences on which the jury convicted at stage one.[53] In these circumstances there is, in our view, nothing wrong in having a rule that the presumption is rebuttable rather than conclusive. We address below the possible consequence of such an eventuality.[54]

[52] Police and Criminal Evidence Act 1984, s 74(3).

[53] It would be open to the defendant to seek leave to appeal and leave to adduce such evidence as fresh evidence in an appeal against the convictions at stage one.

[54] Paras 7.63 – 7.75.

Would the judge at the second stage be free to make his or her own decisions?

7.63 We now consider the freedom we intend the second stage trial judge to have to come to his or her own view of the evidence in respect of the linked charges. This is an important question upon which we seek to make our views as clear as can be, lest it be thought implicit in our recommendation that the second stage trial might proceed on a presumption, or an assumption, that the defendant will be convicted unless he or she produces some new evidence or argument.

7.64 Questions were raised upon consultation whether the judge may feel obliged to make decisions in accordance with the verdict of the jury, unless some clear new point or development emerges. The logical conclusion of this line of reasoning was the suggestion by Professor Sir John Smith that a conviction at the first stage should give rise to an irrebuttable presumption of guilt of the first stage offence thus tying the hands of the judge at the second stage. We have rejected this suggestion for the reasons set out above.[55]

7.65 We wish to make it clear that the judge must be free to come to his or her own decision on the guilt of the defendant on the linked matters. The judge is not obliged to decide these matters in a way which follows the jury's decision on the specimen count. The judge may well in fact share the view of the jury on the evidence given at the first stage of the trial and may retain that view at the end of the further evidence and argument. Indeed, in cases where the evidence is compelling we would expect realistic defendants and their advisors to understand the likelihood of the judge sharing the view of the jury and to take the opportunity of pleading guilty to sufficient offences in the schedule so as to make the second stage of the trial unnecessary.

7.66 However, where the question of guilt depends on the credibility of witnesses the judge may not share the view of the jury and should be free, indeed should be obliged, to reflect that different view in his or her decisions. This is no more than a reflection of the fact that different people may reasonably come to a different view, particularly where the issues involve assessment of credibility.

7.67 There is nothing particularly unusual about the situation we envisage in which a trial judge may disagree with a conviction by a jury. Any regular practitioner in the criminal courts will have experience of cases in which the judge has "summed up for an acquittal" but the jury has convicted. There is nothing inherently illogical in such a situation. One of the two bases on which a case may be withdrawn by a judge from a jury is the ground that no jury properly directed could properly convict on the evidence.[56] The implication is that cases are left to juries where reasonable fact-finders, whether jury or judge, might either convict or acquit. Thus there is no reason to suppose that a trial by a judge on the same

[55] Para 7.62.

[56] *Galbraith* [1981] 1 WLR 1039.

evidence, or involving the same issues, would inevitably lead to the same result as trial by jury.

7.68 We have already indicated that where, at the end of the first stage of the trial, the judge is of the view that he or she would be unlikely to convict the defendant of the linked offences then, in deference to the verdict of the jury, the judge would be able to decline to proceed to a second stage trial on the ground that it was unlikely that any significantly higher punishment would be imposed at the end of that stage. Indeed we would expect most judges to take such a course in such a case. In that event there would be no question of there being inconsistent verdicts; there would only be one verdict, that of the jury, on offences which would then be the subject of an appropriate sentence. Where there is to be a second stage however, it is vital for the legitimacy of our recommendation that, consistent with the principles identified in *Kidd*,[57] the second stage cannot be regarded as a rubber-stamping exercise.

Inconsistent verdicts

7.69 In the event that the judge, at the second stage, having heard all the evidence, were to return a different verdict from that of the jury at the first stage, there might, conceivably, be an appeal by the defendant against the first stage verdict on the grounds that this inconsistent verdict of guilty is unsafe. Whether that were so would depend on the reasons for the different verdict. The general rule is that where the jury convict on one count but acquit on another, the Court of Appeal will quash the conviction on grounds of inconsistency "if, and only if, the conclusion reached by the jury is one at which no reasonable jury who had applied their minds properly to the facts … could arrive".[58]

7.70 The court elaborated:

> [T]he fact that two verdicts were shown to be logically inconsistent might not by itself be a reason for quashing a verdict unless the only explanation for the inconsistency must or might be that the jury was confused and/or adopted the wrong approach, thus making the verdict complained of unsafe.[59]

7.71 In *Bell*[60] the Court of Appeal emphasised:

> [I]t was axiomatic that, generally speaking, logical inconsistency was an essential prerequisite for success on this ground *(Durante* 56 Cr. App. R. 708). It was only after logical inconsistency had been demonstrated that the Court would look to see whether or not there was a sensible explanation for the inconsistency … the Court in

[57] [1998] 1 WLR 604.

[58] *McCluskey* (1994) 98 Cr App R 216, *per* Henry J at p 220.

[59] *Ibid*, at p 220.

[60] May 15, 1997, CA, 6 *Archbold News* 2.

> *Cilgam*[61] explicitly rejected the submission that where a complainant's credibility is in issue and her evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts on other counts.[62]

7.72 Such authority as there is suggests that these principles should apply whether or not the inconsistent verdicts were reached by the same fact-finding body.[63] They recognise the possibility of inconsistent verdicts co-existing provided that the inconsistency is not evidence of confusion or a wrong approach having been taken by the decision makers rendering the verdict unsafe. In an appeal on this basis after a two stage trial, the Court of Appeal would be assisted on that issue, as they are not now, by having the stage two trial judge's reasons in which he or she would undoubtedly be expected to indicate why a different decision has been reached from that of the jury. In so doing, no doubt a view would be expressed on the extent to which the judge was comfortable with the co-existence of the two verdicts or felt that the decision at the second stage trial effectively undermined the jury's verdict.[64]

7.73 The verdicts under our procedure would emanate from two different sources. At present where an indictment has been severed and separate trials have been ordered on any count or counts, the verdicts will be returned by different juries. This will also be the case where persons concerned in a single offence are tried separately. The Court of Appeal[65] recognises that:

> [A]s long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another. Such a result may be due to differences in the evidence presented at the two trials or simply to the different views which the juries separately take of the witnesses.[66]

[61] [1994] Crim LR 861.

[62] May 15, 1997, CA, 6 *Archbold News* 2.

[63] See dicta in *Andrews-Weatherfoil Ltd* (1972) 56 Cr App R 31, *per* Eveleigh J at pp 40–41 and paras 7.73 – 7.74, below.

[64] Although the views of the trial judge as to the merits of a conviction are not generally regarded as relevant to the issues before the Court of Appeal (*Jones (JH)* [1998] 2 Cr App R 53), where an appeal is based on alleged inconsistency of verdicts, the Court of Appeal has been willing to have regard to such views. In *Rigby* 29 July, 1997 CA, 9 *Archbold News* 2:

> Although a most unusual step, the sending of the memorandum was very helpful and entirely right. Not only did the Court take the same view as the judge, but it would have been quite wrong in such circumstances to depart from the clear view expressed by the very experienced trial judge.

[65] *Andrews-Weatherfoil Ltd* (1972) 56 Cr App R 31.

[66] *Ibid*, *per* Eveleigh J at p 40.

7.74 That of itself will not make a guilty verdict unsafe. The court in *Andrews-Weatherfoil Ltd*[67] further stated:

> When inconsistent verdicts are returned by the same jury, the position is usually more simple. If the inconsistency shows that that single jury was confused, or self-contradictory, its conclusions are unsatisfactory[68] or unsafe and neither verdict is reliable. Very often, however, an apparent inconsistency reflects no more than the jury's strict adherence to the judge's direction that they must consider each case separately and that the evidence against one may not be admissible against the other: for example, where there is a signed confession. So too, where the verdicts are returned by different juries, the inconsistency does not, of itself, indicate that the jury which returned the verdict was confused or misled or reached an incorrect conclusion on the evidence before it.[69] The verdict "Not Guilty" includes "Not Proven". We do not therefore accept [the appellant's] submission that inconsistent verdicts from different juries *ipso facto* render the Guilty verdict unsafe. If, as will usually be the case, the evidence at the two trials was significantly different, this not only explains the different verdicts but also defeats the claim that inconsistency alone renders the Guilty verdict unsafe.[70]

7.75 Thus, the possibility that the judge might reach a different decision at the end of stage two from that of the jury does not in any way invalidate the two stage trial procedure any more than it invalidates the process of, on occasions, having successive trials. The important point is that the second stage trial will be a genuine trial the outcome of which will by no means be preordained by presumption or expectation.

[67] *Ibid*.

[68] The Criminal Appeal Act 1968 s 13(1) now provides that subject to the provisions of that section, the Court of Appeal "shall allow an appeal under section 12 of this Act if they think that the verdict is *unsafe*; and shall dismiss such an appeal in any other case" (emphasis added). Prior to amendment in 1995, s 13 made more detailed provision as to when the Court of Appeal should allow an appeal and this included cases where the court is of the opinion "that the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or *unsatisfactory*" (emphasis added).

[69] By way of contrast, inconsistent verdicts based on the same identification evidence of the defendant given at two successive trials may show that an incorrect conclusion may have been reached by the first jury. See *Andrews* (1967) 51 Cr App R 42 and *Warner* (1966) 50 Cr App R 291. In each of these cases the convictions were quashed.

[70] *Andrews-Weatherfoil Ltd* (1972) 56 Cr App R 31, *per* Eveleigh J at pp 40–41. The court continued: "If the difference in the evidence consists of additional material favourable to the accused being called at the second trial, the first accused should seek to call that evidence in this Court [the Court of Appeal] and not rely merely on the inconsistent verdicts." *per* Eveleigh J at 41.

Dispensing with jury trial in respect of some of the charges

7.76 This recommendation may give rise to concern at the prospect of a defendant not having an opportunity for jury trial in respect of all charges that are faced. As far as the European Convention on Human Rights is concerned, non-jury trials are not a problem. We note that in *Kidd*,[71] when Lord Bingham rejected the argument that "in light of the jury's verdict, [the trial judge] can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the instances specified in individual counts",[72] he continued:

> [T]his, as it was put in *Huchison* [1972] 1 W.L.R. 398, 400 is to "deprive the appellant of his right to trial by jury in respect of the other alleged offences." Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle.[73]

7.77 We read this as being an observation that the process there described resulted in the person being sentenced for offences in respect of which there had been no trial at all rather than as a criticism of trial by judge alone. The same criticism could not be made of our recommendation because the defendant would only be sentenced for offences which had been the subject of a trial before a properly constituted body. The proposed two stage procedure requires everything to be proved to the criminal standard in a trial before sentence can be passed. Moreover, the procedure still provides a pivotal role for trial by jury. There is a presumption that an acquittal by a jury of one or more counts will lead to an acquittal on scheduled offences linked to such count(s).[74] Conviction by a jury is an absolute pre-condition of the "judge alone" stage of proceedings. We therefore see no problem with compliance with the ECHR nor with falling foul of the principles enunciated in the case of *Kidd*.[75]

7.78 Although we do not see any potential for non-compliance with the ECHR, we do accept that the proposed procedure would entail a limited encroachment upon the present right to be tried by jury. In light of this, we have considered whether our recommendations constitute a proportionate response to the difficulties posed in effectively prosecuting multiple offences. The approach taken in *R v A*[76] to proportionality was to adopt that taken in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,*[77] in which the court asked: (i) whether the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measures designed to meet the legislative

[71] [1998] 1 WLR 604.

[72] *Ibid,* at p 607C.

[73] *Ibid,* at p 607D.

[74] See paras 7.11 – 7.12, above.

[75] [1998] 1 WLR 604.

[76] [2001] 2 WLR 1546.

[77] [1999] 1 AC 69.

objective are rationally connected to it; and (iii) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. Applying these criteria we believe that our recommendations, whether taken in combination or each on their own,[78] satisfy the requirements.

7.79 In a case of multiple offending, where there is ample convincing evidence against the defendant of the whole scale of offending, but where a large number of counts would be required to represent it, we believe that it is legitimate for society to demand that these offenders are properly prosecuted and sentenced for the full extent of their offending. If jury trial on each of the alleged offences is practically impossible, the stark choice may be between abandoning the goal of proper sanction for wrongdoing in such cases, or making a limited inroad into the role of the jury.

Abolition of jury trial by stealth

7.80 Concern that our proposals represented a "slightly more Machiavellian way of dispensing with jury trial" was raised in a consultation response. We do not see our recommendations as an attempt to remove the right to jury trial by the back door. On the contrary, our proposals would preserve jury trial in some cases of serious fraud where currently, pursuant to the policy of the Government expressed in the White Paper, Justice for All,[79] there might be no jury trial. Under our proposals there is no reason whatever why, in a case of repetitious dishonest offending, the same number of counts as are tried at present by a jury should not continue to be so tried. The limit to the counts to be tried by a jury will, as now, be the number of specimen counts with which a jury can sensibly cope. We do not envisage that any count need be tried at the second stage by judge alone which would presently be the subject of a jury trial. On the contrary, our intention is that the defendant will, under our scheme, have to submit to a trial for offences which he or she may have committed, whereas now, because of the impact of *Kidd*, the defendant escapes being put at risk of prosecution for those offences at all.

7.81 The current proposals for removing jury trial relate to "serious fraud" offences. Some of the cases of repetitious multiple offending which would be susceptible to our two stage procedure may well fall within the description of "serious fraud". Thus, adoption of our proposals for the two stage trial of multiple offending would preserve a central and manageable element of jury involvement for some of the cases which otherwise might be tried without any jury involvement. Of course our scheme would not touch those cases of "serious fraud" which are not

[78] In our view, the best solution to the problems would be for both of our recommendations to be taken forward to work in tandem. Should one or other not be taken forward that should not prevent the other from working effectively. Any concern that the two stage procedure might not be a proportionate response to the difficulties presented, where, for example, the case is not in itself intrinsically complex, could be met by the judge at the preparatory hearing in ruling that any particular case should not proceed under the two stage procedure, because to do so would not be in the interests of justice.

[79] CM 5563.

susceptible to the specimen count approach. Nonetheless our proposal would provide a manageable alternative mode of trial for at least some cases of serious fraud.

Conviction by a single judge

7.82 There is no long standing or universal principle prohibiting a defendant from being sentenced for what a single judge has found against him or her. There are many examples of that happening at present. For example, individual District Judges (Magistrates' Court) sentence every day in the Magistrates' Courts on the basis of their findings of guilt; for very different reasons judges without juries convict of very serious offences in Northern Ireland; single judges in criminal courts and in civil courts can imprison people for contempt of court on the basis of their findings of guilt either when controlling conduct in their courts or when dealing with parties for non-compliance with court orders; single judges can pass "significantly different" sentences on the basis of their conclusions on disputed matters of fact after *Newton* hearings; single judges in cases such as burglary, rape, or multi-handed prosecutions pass sentence at the end of the trial, on the basis of their view of the facts following an "inscrutable" jury verdict of guilt where there have been issues in dispute within the parameters of the jury's verdict.

7.83 Until 1998 and the decision in *Kidd*,[80] the position was that a single judge sentenced a defendant in sample count cases without any trial of the facts of the other offences, of which the counts on the indictment were a sample. Although contrary to principle, this was not, apparently, something which in practice, caused any great universal concern. Thus, what we are proposing is not the overturning of some long established and invariable prohibition upon a judge imposing a sentence based on judicial fact-finding. Under our scheme the single judge would only have a fact-finding role to play once the jury has found the defendant guilty. The judge would not be bound to accept the verdict of the jury on matters that are the subject of the second stage of the trial and the judge would have to give reasons for his or her decisions.

7.84 Judges are already required to apply the highest standards of accuracy and impartiality and are already subject to critical scrutiny by the Court of Appeal. The safety of a conviction by a jury depends on and is, on appeal, overwhelmingly likely to be judged by reference to the accuracy of the summing up of the trial judge on matters of law and the fairness of his or her treatment of the evidence in the course of the summing up.

7.85 For the above reasons, we are satisfied that convictions on the linked offences by a single judge would not infringe any fundamental principles of fairness and are part of a proportionate response to the problem posed.

[80] [1998] 1 WLR 604.

Would the two stage procedure reduce the time taken to deal with a case?

7.86 Some respondents expressed doubt about the potential for this recommendation to reduce the time taken to deal with cases and to make them less unwieldy.

7.87 Were this proposal to be intended to apply to all complex and serious frauds then this would be a valid concern. It is, however, limited in its scope only to apply in those cases of repetitive offending which, but for the ruling in *Kidd*,[81] would have been appropriate for being dealt with by means of an indictment containing "specimen counts". Those were cases where the degree of similarity between the specimen counts which were the subject of trial and the other instances of offending, for the entirety of which the convicted defendant would be sentenced, was such that the trial judge could comfortably rely on the verdict of the jury as an indicator that the defendant was guilty of all the alleged offending.

7.88 If the two stage process is used only where it is intended, that is in cases of multiply repeated offending of a similar nature, and is not applied to wide ranging, highly complex and factually differentiated cases, it will only be used in those cases where the similarity between the specimen and the linked charges is such that the evidence will be susceptible to being presented in schedule form, or given by a small number of witnesses or, if given by a number of individuals, gone through relatively rapidly.

7.89 In our view, if our proposal is appropriately used, it is unlikely that trial judges will be mired in extensive second stage trial hearings. Further, the availability of this procedure will, we believe, result in fewer contested trials than at present. As we have explained, for this type of offending there is at present a positive incentive to take advantage of the shortcomings of the system by contesting matters which can only proceed on a few counts rather than pleading guilty and asking for the full extent of the offending to be "taken into consideration".[82] Our scheme would remove that incentive.

Lying on the file: ECHR issues

7.90 Under our recommendation the power of the judge to order that scheduled offences should remain on the file will differ depending on whether there has been a conviction on the relevant sample count or an acquittal. Where there has been an acquittal on a sample count, there is a presumption that the judge will direct that verdicts of not guilty be recorded on the linked offences but *in exceptional circumstances* the judge may direct that an offence should lie on the file on the usual terms.[83] Where there has been a conviction on a sample count the judge may, in limited circumstances, decline to proceed to stage two. In such a case there would be a presumption that such offences remain on the file but the

[81] [1998] 1 WLR 604.

[82] See the discussion of the "*Evans* conundrum" at paras 3.11 – 3.14, above.

[83] See paras 7.11 – 7.13, above

judge would have a limited power to direct that verdicts of not guilty be entered on the remaining matters.[84]

7.91 In *ex parte Raymond,*[85] the court likened the process of allowing counts to remain on the file to an adjournment over which the judge has the final say.

> It starts off by having the same effect as an order for an adjournment but an adjournment which it is accepted may never result in a trial.[86]

7.92 Article 6(1) stipulates that defendants must be tried within a reasonable time.[87] This guarantee is intended to protect defendants from the burden of over-lengthy, unresolved proceedings. The practice of allowing counts to remain on the file in certain circumstances, may be thought to conflict with this principle.

7.93 It has been argued that if charges are to remain on the file for an unspecified time, the defendant will not have the "fair and public hearing within a reasonable time", to which Article 6(1) says he is entitled in the determination of any criminal charge against him. Such an analysis has been rejected by the Commission, which has found that once charges have been placed on the file, not to be proceeded with without leave of the court, the time requirements of Article 6(1) cease to apply.[88]

7.94 In *Roy and Alice Fletcher v United Kingdom*[89] the applicants had both been convicted of murder. Charges of arson, which were intrinsically linked to the murder charges, were allowed to remain on the file. The applicants sought prosecution on these offences, arguing that leaving the charges on the file constituted a violation of Article 6(1), and that they were entitled to the verdict of a jury on the remaining charges. The Commission held that

> it is established practice in English law that a second indictment left on the file is never proceeded with so long as the conviction on the charge of murder remains undisturbed … there is thus in fact no criminal charge against the Applicants which requires to be determined and … there is thus no violation of Article 6 of the Convention.[90]

[84] See paras 7.25 – 7.28, above.

[85] (1986) 83 Cr App R 94.

[86] *Ibid,* at p 98.

[87] Article 6(1) provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time …

[88] Article 6(1) similarly ceases to apply once a *nolle prosequi* has been entered (*Orchin v United Kingdom* (1983) 34 DR 5).

[89] 19 December 1967, Collection of Decisions, No 25, 76.

[90] *Ibid* at p 86.

7.95 This principle was restated in *X v UK*.[91] The applicant had been convicted of one serious offence and was unhappy that four remaining offences were allowed to remain on the file, since he considered that an acquittal on these would prove his innocence of the count of which he had been convicted. The Commission held that

> the charges which 'lie upon' the applicant's file are no longer outstanding. The applicant no longer risks prosecution on these offences and, accordingly, he is not subject to any further criminal charges whose determination must be effected within a reasonable time in accordance with Art. 6(1) of the Convention.[92]

7.96 In *FL v United Kingdom*,[93] the applicant sought to argue that to allow charges to lie on the file constituted a breach of Article 5(3) which requires an accused person to be brought promptly before a judge.[94] The Commission, though declaring the application inadmissible as the applicant had failed to exhaust domestic remedies,[95] did address the complaints raised and reiterated the position in relation to counts left on the file, referring to its case law on Article 6(1).

> the established practice in English law of not proceeding with other charges so long as the first conviction remains undisturbed, coupled with the judicial control over any further proceedings, means that in fact the accused is no longer faced with any criminal charges which require determination.[96]

7.97 If in any case it appears that, for a particular reason extraneous to the trial process, there may be a breach of Article 6, where linked offences continue to remain on the file indefinitely then, as occurred in *Johnston and others*[97] and in

[91] (1983) 5 EHRR 508.

[92] *Ibid* at p 509.

[93] 17 May 1990, Application No. 16006/90.

[94] "Everyone arrested or detained in accordance with the provisions of paragraph 1.c. [the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence …] of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

[95] The applicant had been convicted of one specimen count of indecent assault, and five remaining counts of incest had been allowed to lie on the file. The defendant sought leave to appeal against the decision of the trial judge to allow the charges to remain on the file and was refused. He took his case to Strasbourg.

[96] 17 May 1990, Application No. 16006/90, The Law, para 2.

[97] 20 October 2000 (Blackfriars Crown Court) HH J Samuels, QC (unreported). The defendants complained that as a result of counts of dishonesty that had been stayed as an abuse of process and remained on file, "they had been unable to apply, variously, for a liquor licence, employment and professional indemnity insurance cover" (as summarised in J Hall, "Ordering Counts to Lie on the File" (2002) 7 *Archbold News* 5, p 6.)

Smith (Richard),[98] the Crown Court can be invited to revisit the order. At such a hearing the judge would be free to exercise the powers described earlier,[99] to order that, in an appropriate case, verdicts of not guilty be entered.

BENEFITS OF TWO STAGE PROCESS

7.98 We set ourselves the task of devising a procedure which would resolve, as best we could, an intractable problem. We envisage a number of advantages to adopting the two stage process:

(1) It would preserve jury trial in respect of core examples of the defendant's criminality.

(2) It would ensure that the jury trial is manageable and comprehensible.

(3) It would ensure that defendants would not be able to take advantage of the practical limits of trial by jury so as to go unpunished for a significant part of their offending.

(4) Defendants would only be sentenced for offences which have been proved to a court after a trial.

7.99 The two stage procedure would allow full expression of each of the competing requirements of justice identified earlier: (i) the need for a defendant to be sentenced only for offences that are admitted or of which the defendant has been convicted after having had the opportunity to challenge the evidence; and (ii) the need for defendants to be tried and sentenced for the full extent of their criminality.

7.100 Under this procedure, the defendant would be given a fair hearing, with an opportunity to present a defence in relation to any or all of the alleged offences. The Crown will be able to seek verdicts of the court that will enable the judge to sentence the defendant for the full extent of his or her offending.

7.101 In our view, this recommendation reflects the strength of the pre-*Kidd*[100] solution to the problem[101] but, at the same time, safeguards the interests of the defendant by correcting the defect of that process whereby the defendant used to be

[98] 22 March 2002 (Winchester Crown Court) HH J Brodrick (unreported). The defendant, who had been sentenced to imprisonment for other serious offences, believed that two counts of manslaughter which had been left on the file "had hindered his progress towards release on parole" (as summarised in J Hall, "Ordering Counts to Lie on the File" (2002) 7 *Archbold News* 5, p 6.)

[99] At para 7.27, following conviction on sample counts, if it is considered that to continue "to allow the counts to lie on file would be unduly harsh or oppressive to the defendant" the judge could direct verdicts of not guilty; and at para 7.11, following an acquittal on a sample count, when there would be a presumption in favour of a directed acquittal on the linked counts.

[100] [1998] 1 WLR 604.

[101] Two judicial consultees have, in their responses to us, advocated a form of reversion to sample counts.

sentenced for the totality of the asserted offending though only convicted on specimen counts. The sentence would reflect only that conduct which the prosecution has proved to the jury and, thereafter, to the judge.

7.102 Finally, in our view this system would be likely to encourage guilty defendants, either on initial arraignment or after conviction of a number of sample offences, to plead guilty to or to admit any linked offences of which they are also guilty.[102]

CONCLUSION

7.103 Our "compound allegation" recommendation has been designed to maximise the effective involvement of the jury in determining guilt in cases of multiple offending where this is possible. Where the nature of a case is such that this approach would not be suitable, we regard the proposed two stage procedure as satisfying the requirements of justice and the best way forward.

RECOMMENDATION FOR A TWO STAGE TRIAL PROCEDURE

7.104 **Where there are allegations of repetitious offending which are not apt to be described as a continuous offence but which, prior to *Kidd*,[103] could have been dealt with by means of specimen counts we recommend a two stage trial procedure, as follows:**

(1) The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts.

(2) In the event of conviction on one or more counts, the second stage of the trial may follow, at which the defendant would be tried by judge alone.

(3) The judge will, at that stage, determine questions of guilt in respect of any scheduled offences linked at a pre-trial hearing to a specimen count of which the defendant has been convicted.

[102] Regarding the merits of such a system, George Staple QC, former Director of the Serious Fraud Office, writing in *Amicus Curiae,* Issue 29, July 2000, 9–14, about major fraud and in particular the issue of plea bargaining, said:

> It is by avoiding the contested trial, with all that that implies in terms of expense and consumption of time and manpower, that a plea of guilty represents the single most effective means of shortening the process. … A system is therefore required which would encourage guilty defendants to plead guilty, while at the same time protecting them from improper pressure to do so (at p 14).

[103] [1998] 1 WLR 604.

PART VIII
FRAUDULENT TRADING

8.1 Fraudulent trading by an individual may involve numerous separate deceptions against numerous victims. Where fraudulent trading is carried out by a company, prosecution for a single offence under section 458 of the Companies Act 1985 may be possible. This avoids the difficulties that would arise otherwise where separate specific counts are needed for each individual offence.

8.2 The extension of the current provisions relating to fraudulent trading by companies to non-corporate fraudulent traders, irrespective of whether they are in any relationship as a partner or otherwise, would, in our view, be a logical and useful step in allowing certain multiple offences of fraud to be prosecuted within a single count.

THE PRESENT LAW

8.3 Section 458 of the Companies Act 1985 provides:

> If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or a fine, or both.
>
> This applies whether or not the company has been, or is in the course of being, wound up.

The offence is punishable on conviction on indictment with seven years' imprisonment.[1]

8.4 The reference to a "company" means a company incorporated in England and Wales or in Scotland.[2] It does not include a company incorporated elsewhere, even if it trades here, and even if it is registered here as an overseas company. For the purposes of section 458, however, a company also includes a limited liability partnership[3] or a European Economic Interest Grouping,[4] and a parallel offence is committed where the business in question is that of an open-ended investment company.[5]

1 Companies Act 1985, Sched 24. On summary conviction it carries six months' imprisonment or a fine of the statutory maximum or both.

2 Companies Act 1985, s 745.

3 Limited Liability Partnership Regulations 2001 (SI 2001 No 1090) reg 4.

4 European Economic Interest Grouping Regulations 1989 (SI 1989 No 638) reg 18.

5 Open-Ended Investment Companies Regulations 2001 (SI 2001 No 1228) reg 64.

8.5 In *Kemp,*[6] the Court of Appeal referred to Professor Glanville Williams' comments that this offence is doubly anomalous because

> (1) it does not extend to partnership or individual traders; (2) in theory it is totally unlimited as to the types of fraud though in practice it probably adds nothing to the rest of the criminal law.[7]

8.6 The court then explained that

> while each individual transaction in this carbon paper fraud could perfectly well have been the subject of a separate count, prosecutors in order to avoid multiplicity of counts often use this procedure without distinguishing whether the defrauded were creditors or not. Now if this course is permissible under the section which is for decision in this case, it is clearly a much less cumbersome procedure and much easier for the jury if indictments may be so drafted.[8]

8.7 Due to the limited application of this provision, there is an illogical dichotomy between the fraudster who chooses to operate by means of a £10 shelf company which is no more than his alter ego and a mechanism for fraud and, on the other hand, the fraudster whose conduct is the same as the first but who either does not feel the need for such a device, or who seeks to give the appearance that he is trading through a company but does not go through any of the formalities of acquiring one. Similarly, the fact that a company is registered in, for example, the Isle of Man and doing business in London would place any fraudulent trading by that company outside the control of section 458.

EXTENDING SECTION 458 OF THE COMPANIES ACT 1985

8.8 In 1982 the Cork Committee[9] recommended that the offence of fraudulent trading, created by section 458 of the Companies Act 1985, be extended to apply to individuals. The Company Law Review Steering Group also addressed the issue of whether or not the section should be extended to non-corporate traders and offered their strong support for any changes that would allow individuals and partnerships to be prosecuted under the provision.

8.9 We considered the issue in Working Paper No 104 on Conspiracy to Defraud, and invited views on whether, in principle, the offence of fraudulent trading should be limited to companies. The working paper acknowledged the differences between companies with limited liability and individuals or partnerships, who cannot limit their liability, but pointed out that the detriment that may be caused to others is the same whether or not a company is involved.

6 [1988] QB 645.

7 *Ibid* at p 652G–H.

8 [1988] QB 645 at pp 652H–653A.

9 *Insolvency Law and Practice: Report of the Review Committee,* Cmnd 8558 (1982) para 1890.

8.10 The respondents to the paper who offered their support for the idea of extending the offence were similarly persuaded by the position of the victim in these situations. The status of the trader is of little relevance to the person who has suffered a loss as a result of fraudulent trading. The large majority of those who considered this issue were in favour of extending the offence to cover individuals and partnerships, but a minority took the opposite view. They reasoned, conversely, that the differences between the status of companies and non-corporate traders are sufficiently important to justify restricting the ambit of the offence to companies. One respondent thought that the creation of a general deception offence would cover the sorts of situations in which fraudulent trading is not carried out by a company.

8.11 In our view it is anomalous and illogical that fraudulent trading should be an offence where it is done through the medium of a British company, a limited liability partnership, a European Economic Interest Grouping or an open-ended investment company but not where the individual who is trading fraudulently does not do so through the medium of such a body. We therefore recommend that the offence should be extended so as to apply to individuals irrespective of whether the enterprise in question is a company incorporated in Great Britain,[10] a company incorporated elsewhere, a partnership or a sole trader.

8.12 We think this objective can be most simply achieved by amending section 458, rather than repealing it and replacing it with a wider provision outside the Companies Act.

8.13 This extension of the scope of the offence is the *only* change that we recommend. It is not our intention that the words "any fraudulent purpose" should be redefined in accordance with our recommended new fraud offence. Neither do we recommend that fraudulent trading should be brought within Part I of the Criminal Justice Act 1993, which extends the jurisdiction of the English courts over certain fraud offences committed abroad.[11]

[10] For the purposes of section 458, this includes limited liability partnerships, European Economic Interest Groupings or open-ended investment companies.

[11] Law Commission recommendations led to the implementation of the Part which classifies certain fraud offences as "Class A" offences. By way of exception to the general rule, these offences may in certain circumstances be indictable in England and Wales even if the conduct constituting them is completed outside the jurisdiction. We did not think that fraudulent trading was suitable for inclusion as a Class A offence, since the

> rule is based on the occurrence in England and Wales of at least one of the events required for conviction, notwithstanding that other events took place elsewhere. The conduct proscribed by section 458, however, does not appear to be susceptible of such a division: it is difficult, for example, to envisage what would constitute knowingly being a party *in part* to particular acts of fraudulent trading. Our second reason concerns the context of the section. By contrast with the listed offences, this provision (like its predecessors) forms part of the body of legislation relating to the carrying on of business by English or Scottish companies. In our view, it would not be desirable to consider the jurisdictional rules relating to the offence under section 458 in isolation from other offences in

8.14 Also, we do not recommend any change to the related *civil* provisions. In particular, we do not recommend

(1) that, on the bankruptcy of an individual, there should be power (by analogy with section 213 of the Insolvency Act 1986) to order another person to contribute to the bankrupt's assets on the ground that that person has knowingly been party to the carrying on of business by the bankrupt for a fraudulent purpose, and is therefore guilty of the offence as extended; nor

(2) that there should be power under the Company Directors Disqualification Act 1986 to make a disqualification order against a person convicted of knowingly being party to the carrying on of business for a fraudulent purpose by a foreign company, a partnership or a sole trader.

RECOMMENDATION

8.15 **We recommend that section 458 of the Companies Act 1985 be extended to non-corporate traders.**

that area of the law (Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180, para 3.14).

The second reason arguably loses some of its force now that we recommend applying the offence to all fraudulent businesses, whether corporate or not; but the first reason continues to apply, and indeed gains force from the decision in *Miles* [1992] Crim LR 657 that a person cannot be party to the carrying on of a business unless he is himself carrying on the business.

PART IX
OUR RECOMMENDATIONS

In this Part we set out our recommendations, with reference to the paragraphs of the report where they appear.

SPECIAL VERDICTS FOR CONTINUOUS OFFENCES

1. Where a defendant has been convicted in the Crown Court of conduct which under existing law may be regarded as a "continuous offence", we recommend the use of a special verdict as a means of enabling judges to be better informed about the extent of offending of which the jury is sure.

(paragraph 6.45)

2. In our view, offending, such as the down-loading of pornographic material involving children, in breach of the Protection of Children Act 1978, which satisfies the conditions listed in paragraph 6.7 of this report, is capable under the present law of being charged by way of a compound allegation. If it is thought appropriate to crystallise these principles so as to make them clearly applicable to offending other than theft or fraud it may be achieved by a change in the Indictment Rules.

(paragraph 6.9)

TWO STAGE TRIAL PROCEDURE

3. Where there are allegations of repetitious offending which are not apt to be described as a continuous offence but which, prior to *Kidd*,[1] could have been dealt with by means of specimen counts we recommend a two stage trial procedure, as follows:

   (1) The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts.

   (2) In the event of conviction on one or more counts, the second stage of the trial may follow, at which the defendant would be tried by judge alone.

   (3) The judge will, at that stage, determine questions of guilt in respect of any scheduled offences linked at a pre-trial hearing to a specimen count of which the defendant has been convicted.

(paragraph 7.104)

[1] [1998] 1 WLR 604.

EXTENSION OF FRAUDULENT TRADING

4. We recommend that section 458 of the Companies Act 1985 be extended to non-corporate traders.

(paragraph 8.15)

(*Signed*) ROBERT CARNWATH, *Chairman*,[2]
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*
3 July 2002

[2] At the date this report was signed, the Chairman of the Commission was the Right Honourable Lord Justice Carnwath CVO.

APPENDIX A
CONSULTATION SCHEDULE

March 1999	Legislating the Criminal Code Fraud and Deception: Consultation Paper No 155.	Consultation Issues 10 and 11: Effective prosecution.
July 2000	The Law Commission Fraud and Deception: further proposals from the Criminal Law Team.[1]	Paragraphs 48–141: Charging more than one obtaining in one count.
February 2002	The Law Commission Seminar[2] Effective prosecution of multiple offences: background and proposals for debate.	Consultations issues 1–5, listed in the Annex.

[1] This paper was distributed to those respondents to Consultation Paper No 155 whose responses addressed consultation issues 10 and/or 11.

[2] Participants (by attendance and in written form) included representatives from academia, the Serious Fraud Office, the Crown Prosecution Service, the Home Office, the DTI, HM Customs and Excise, Her Majesty's Council of Circuit Judges, the Law Society, the Magistrates' Association, the Law Officers, practitioners, Justice, others who had responded to our previous consultation papers and the Sentencing Advisory Panel who themselves had recently published a consultation paper relating to the sentencing of offences involving child pornography (see "Sentencing of Offences Involving Child Pornography: A Consultation" (2002) vol 166, Justice of the Peace, 46).

APPENDIX B
PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 155 ISSUES 10 AND 11 AND ON OUR INFORMAL CONSULTATION IN JULY 2000

Judges and judicial bodies

Mr Justice Bell
Lord Justice Brooke
Lord Justice Buxton
Judge Denison QC, Common Serjeant of London
Judge Edwards QC
Lord Hope
Judge Sir Rhys Davies QC, Honorary Recorder of Manchester
Mr Justice Hughes
Magistrates' Association
Northern Ireland judiciary
Mr Justice Penry-Davey
Mr Justice Poole
Judge J W Rant
Mr Justice Silber
Joint Council of HM Stipendary Magistrates (Legal Committee)
Lord Justice Swinton Thomas
Judge J J Wait
Lord Woolf

Government departments and public bodies

Crown Prosecution Service
Department of Social Security
Department of Trade and Industry
Directorate of Counter Fraud Services of the National Health Service
HM Treasury
Inland Revenue (Solicitor's Office)
Office of the Judge Advocate General
Police Federation of England and Wales
Royal Ulster Constabulary
Serious Fraud Office

Practitioners

M J Devaney
Godfrey Lyne
Norman Marsh QC
Flora Page (Thanki Novy Taube)

Professional organisations

The Association for Payment Clearing Services
British Bankers' Association
Council of Mortgage Lenders
Criminal Bar Association
Financial Law Panel
Fraud Advisory Panel
General Council of the Bar
The Institute of Legal Executives
Justices' Clerks' Society
The Law Society of England and Wales (Criminal Law Committee)
London Criminal Courts Solicitors' Association
The Newspaper Society
North Eastern Circuit
South Eastern Circuit
Wales and Chester Circuit

Academics

Professor D W Elliott (University of Newcastle)
P R Glazebrook (Jesus College, Cambridge)
Jeremy Horder
David Ormerod (University of Nottingham)
Professor John Smith
Professor G R Sullivan (University of Durham)
Richard Tur (Oriel College, Oxford)

Others

Lord Davidson
The Law Reform Commission of Hong Kong
Liberty (interest group)