SCOTTISH LAW COMMISSION

RESPONSES TO

1993 REVIEW OF CRIMINAL EVIDENCE AND CRIMINAL PROCEDURE

PROGRAMMING OF BUSINESS IN THE SHERIFF COURTS

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Improving the Delivery of Justice in Scotland

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1993 REVIEW OF CRIMINAL EVIDENCE AND CRIMINAL PROCEDURE

Improving the Delivery of Justice in Scotland

Introduction

1. We share the serious concerns expressed in paragraphs 1 to 3 of the Review about the inordinate inconvenience to witnesses and waste of resources which result from the failure of trials to proceed in the criminal courts. We wholly agree that this has an adverse effect on the public's respect for the criminal justice system and that remedies are urgently required. We consider, however, that any reforms should be undertaken only after careful research, and should be founded on principle and workable in practice. Several of the proposals in the Review do not appear to us to satisfy these tests. They rather seem to have been devised without adequate information or a sufficient consideration of fundamental issues, such as the proper function of the judge in the criminal process and the extent of the legitimate rights of the accused.

2. This narrowness of approach is no doubt the result of the restricted terms of the remit, which is concerned only with "practical improvements in the effectiveness, efficiency and economy with which criminal business is processed" and makes no reference to matters of

principle.[1] The remit accordingly directs the Review to have regard to only one of the three classic models of the criminal process,[2] the "bureaucratic or administrative model". It is not immediately or expressly concerned with the "due process model", which requires that the system should promote the acquittal of the innocent and protect the accused from the power of the state, or with the "crime control model", which requires that the system must have regard to the need to convict the guilty. We can readily understand why the problems created by cancelled, adjourned and lengthy trials should have been perceived as essentially managerial in character, and we are convinced of the need to find effective solutions to these problems as soon as possible. We suggest, however, that it would be preferable for these problems to be considered in relation to all three models by a broadly based independent body with terms of reference entitling it to commission research and recommend extensive changes in the rules of evidence and procedure, especially pre-trial procedure. We indicate in the following paragraphs some of the questions which such a body might consider.[3] Its approach to such questions should be one of informed and principled pragmatism.

3. It seems to us that any review should examine the extent to which the problems created by cancelled, adjourned and lengthy trials may be related to the principles which underlie the present law and practice relative to pre-trial procedure. The relevant principles appear to be the following. The accused's rights include the right to be presumed innocent until proved guilty according to law; the right not to be compelled to testify against himself or to confess guilt; and the

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[1] Review, para 5.

[2] H L Packer, *The Limits of the Criminal Sanction* (1969), chap 8.

[3] See paras 3-6 below.

right to go to trial and examine, or have examined, the witnesses against him.[1] The judge is essentially a trial umpire who knows little or nothing of the pre-trial background to the case. It follows from these rights of the accused that he should not be placed under any pressure to admit guilt, or to provide proof of an element of the case against him by agreeing any of the prosecution evidence before the trial. It follows from the limited function of the judge that the responsibility for pre-trial preparation and for the presentation of the cases for the Crown and the defence at the trial lies entirely in the hands of the Crown and the defence. The judge has restricted pre-trial powers to direct the way in which certain evidence may be given,[2] to make orders for the recovery[3] or the inspection and examination[4] of documents and other property, and to conduct a preliminary[5] or intermediate[6] diet; but as a general rule he has no information about the evidence before the trial,[7] and it is an absolute rule that he has no control over the substance of the admissible evidence which is to

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[1] International Covenant on Civil and Political Rights, arts 14.2, 14.3.e, 14.3.g.

[2] Criminal Justice (Scotland) Act 1980, ss 32, 32A (witness abroad: letter of request or commission, television link in solemn proceedings); Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 56, Prisoners and Criminal Proceedings (Scotland) Act 1993, ss 33, 34 (child witness: television link, commission, screen).

[3] By commission and diligence (High Court only): *HMA v Ashrif* 1988 SLT 567.

[4] *Davies* 1973 SLT (Notes) 36 (inspection and examination of listed productions after service of indictment).

[5] Criminal Procedure (Scotland) Act 1975, s 76, as substituted and amended.

[6] *Ibid*, s 337A.

[7] Other than, in solemn procedure, copies of the indictment, any special defence and, on occasions, documentary productions.

be given and no power to order that any matter be admitted or agreed or that any evidence[1] or line of defence be disclosed before the trial.

4. These principles and rules appear to us to lie at the heart of our current pre-trial practices and procedures. It is not impossible, however, that research and mature consideration might result in justifiable proposals for their modification and restatement. An argument in support of such proposals might be made on the following lines. The traditional principles and rules were suited to the times in which they were developed, when trials were shorter, the penalty for murder was capital punishment and the system was weighted in favour of the Crown in so far as the accused could not give evidence and the defence was often in the hands of counsel and agents for the poor who had scant opportunity for adequate preparation and whose presentation of the case in court might be imperfect. In modern times, however, when trials are longer, the accused is a competent witness on his own behalf and the defence is, very properly, in the hands of skilful practitioners who are adequately funded, these principles and rules militate against the efficient preparation and presentation of the case and the most effective use of court time. Accordingly, the argument would continue, the time has come for a re-appraisal. The period between the institution of the proceedings and the trial should become an important stage in the criminal process, when issues are clarified and the scope and nature of the evidence to be led at the trial are decided.

5. The re-appraisal might lead to the conclusion that the accused should no longer be a passive figure, endowed with rights but

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[1] Property which is the subject of an order for recovery or for inspection and examination may of course be tendered as evidence at the trial.

unencumbered by responsibilities: it should be his duty as a citizen not to withhold reasonable co-operation from the court, as the organiser of the time and duties of other citizens as jurors and witnesses, or from the Crown, as the prosecutor in the public interest. There should therefore be some limitation on his rights to reserve until the trial any defence other than a special defence and to withhold, without any explanation, the admission of facts of an apparently routine or uncontentious character. He might be required, for example, once the Crown had disclosed their case (as envisaged in chapter 8 of the Review), and once he had legal assistance, to disclose in general terms the nature of his defence, the principal matters upon which issue is taken and any points of law which are to be raised, and to provide a list of the authorities to be relied on. Such rules, it might be said, would qualify his rights to hear in court all the evidence against him and not to be required to assist the prosecution by making admissions. These qualifications, however, would relate only to routine or uncontentious evidence, and neither these qualifications nor the duty of disclosure would infringe his fundamental right to be presumed innocent until proved guilty. The rules could also be justified as being in the public interest. Pre-trial admissions and disclosures by the defence might shorten the trial. Disclosures by the defence might also lead to a just result: the adjustment of an acceptable plea, or the proper investigation of an unfounded defence and its exposure at the trial.

6. A further conclusion might be that the judge's duties should no longer be focussed only upon the conduct of the trial: there should be a departure from his traditional pre-trial stance of ignorance of and lack of involvement in the case, and he should be given a new range of duties relative to pre-trial case management. Before the intermediate or first diet he would consider any materials submitted

by the Crown and the defence. At the diet itself his primary concern would be to identify the live issues and eliminate from the forthcoming trial any superfluous oral evidence and the unnecessary proof of the contents of documents. Thus he would be entitled to rule on whether a particular prosecution witness or witnesses should be cited, and on whether any particular matters, such as statements in documents, should be agreed or treated as proved. He would be entitled to have sufficient information to enable him to estimate the probable length of the trial. He would continue to be entitled, as at present, to rule on any of the matters mentioned in section 76 of the Criminal Procedure (Scotland) Act 1975, as substituted and amended. These matters include, we believe, any question as to the admissibility of evidence and any other question of law relating to the case which could with advantage be resolved before the trial. In addition, the diet would have the advantage of bringing the prosecution and the defence together and might lead to the tendering of an acceptable plea. In any event, as at a preliminary diet at present, a plea would have to be stated at the conclusion of the diet.

7. While a scheme such as we have sketched in the foregoing paragraphs would be seen to have been derived from a conscious re-appraisal of fundamental principles, it would also have to be soundly based on research before it could be put forward as a constructive contribution to the solution of the problems created by cancelled, adjourned and lengthy trials. At present, however, the formulation of proposals for reform is hampered by a shortage of reliable information. The results of the commissioned research into the reasons for late guilty pleas are still awaited. Another difficulty is that it would not be possible to ascertain, without careful investigation, whether it would be practicable for the trial judge and the lawyers who would conduct the trial to be identified and to come together, adequately

instructed, at a first diet. If that were practicable, a pilot study might be necessary in order to determine whether a first diet procedure would serve a useful purpose in a sufficiently high proportion of cases to make its general introduction desirable. Such a study might suggest that a first diet would be justifiable only in solemn cases, or only in complex cases, or only where the court or the Crown or the defence required one.

8. The discussion in the preceding paragraphs leads us to offer two general comments on the proposals in the Review, especially those relative to intermediate or first diets and to sentence discounting. First, the Review in these areas seems to us to be breaking new ground without taking sufficient account of the extent to which its proposals would infringe the principles mentioned in paragraph 3 above. We have no doubt that the authors of the Review do not intend any infringement of these principles. It appears to us, however, that any reform should be securely founded on principle: either on an adherence to the traditional principles, or on an articulate statement of new principles. In the following paragraphs we shall try to explain our view that the Review's proposals, if implemented, would amount to a silent drift from traditional principles and an unsatisfactory blurring of the function of the judge and the rights of the accused.

9. Our second general comment is that further research appears to be necessary before any reforms are contemplated. We are glad to note that research has been commissioned into the reasons for late guilty pleas;[1] but we are concerned that there is no information about the effect of "sentence discounting" in encouraging early pleas.[2] There

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[1] Review, para 25.

[2] Review, para 116. See also para 44 below.

is no precise information which suggests that "a new form of disclosure of the prosecution case" would be helpful: it is thought that "it may assist" because at present accused persons "may claim not to have sufficient information"[1] - but do they in fact so claim, and if so, how often, and how truthfully? Again, there is no "comprehensive information on the precise length of trials".[2] We acknowledge that some of those whose co-operation in research would be required might provide information which could not be regarded as reliable. In the absence of information, however, reform can only be based on impression, speculation and anecdote. We would not be able to commend such an approach to the reform of the criminal justice system.

10. In the following paragraphs we consider the Review's proposals in the order in which they are discussed in the Consultation Paper accompanying the Review.

Intermediate diets and first diets[3]

11. We have no criticism of the terms of section 337A of the Criminal Procedure (Scotland) Act 1975. We have no difficulty in accepting that an intermediate diet held in terms of section 337A would be a convenient means of identifying any need for an adjournment. It would be possible to ascertain whether the accused was likely to appear for trial and, if the accused or his solicitor were prepared to answer the sheriff's questions, to find out whether the plea of guilty was to be adhered to, and the state of preparation of the

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[1] Review, para 73.

[2] Review, para 45.

[3] For convenience we refer only to intermediate diets. Our observations apply equally to first diets.

defence case. Since the intermediate diet would bring the prosecutor and the defence together, it could lead either to the agreement of evidence or to the tendering of an acceptable plea. An intermediate diet on these lines would resemble the "plea and directions hearing" which has been the subject of a pilot study in England.[1] The final report on that study should be relevant to the debate about pre-trial procedures in Scotland. We have serious reservations, however, about the way in which the Review proposes to develop the intermediate diet procedure. We doubt whether the proposals are founded on a sufficient appreciation of fundamental principles of criminal justice, as these have been hitherto understood in Scotland, in three areas of importance: the impartiality of the Bench, the relationship between the Bench and the Crown, and the rights of the accused.

12. **The impartiality of the Bench.** According to the First Report on Court Programming (hereafter "the Court Programming Report") the rôle of the Bench at the intermediate diet is to ask the series of questions in the pro forma in Annex 2 at page 58 of that Report. To the asking of most (but not all)[2] of these questions no serious objection could be taken, provided that it was clearly understood that no one would be prejudiced by a refusal to answer. It appears to us, however, that the Review expects that the judge will not confine himself to asking these questions, and there must be serious doubt whether the proviso which we have just stated would be observed to any extent. The Review expects the judge to be "more proactive".[3] The word "proactive" seems to have been borrowed from the Court

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[1] See *Report of the Royal Commission on Criminal Justice* (1993, Cm 2263) (hereafter "*Royal Commission Report*"), chap 7, paras 12-13.

[2] See para 29 below.

[3] Review, para 107.

Programming Report, where it appears to be synonymous with "sufficiently interventionist".[1] It is repeatedly emphasised in the Review that the intermediate diet is to be "actively" or "effectively" "managed" by the judge.[2] He is to make "specific efforts to ensure that both parties have made reasonable efforts to agree evidence"[3] or have "addressed the issue and achieved the maximum agreement possible".[4] The scope for agreement of evidence is to be "actively explored and established".[5] The judge is to be trained to "take a strong line",[6] and is to be "rigorous ... in seeking answers".[7] A lay justice would "lack the skills necessary to challenge the expert prosecutor and defence agent".[8]

13. The ideal judge as portrayed in the Review would therefore be a domineering figure, making efforts to secure the pre-trial agreement of evidence not only by asking questions but by being rigorous in seeking answers and challenging those before him. It is difficult to accept the assurances given elsewhere in the Review that there would be no need for the judge to consider the evidence in order to secure agreement and that all that would be required would be "judicial

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[1] Court Programming Report, page 54 and para 4.5.

[2] Review, paras 56, 73, 75.

[3] Review, para 54.

[4] Review, para 158.

[5] Review, para 104.

[6] Review, para 81.

[7] Review, para 77.

[8] Review, para 158.

encouragement of the parties to make effective use of procedure".[1] That cannot be so, since the judge would have no means of knowing whether "reasonable efforts to agree evidence had been made"[2] or "the maximum agreement possible" had been achieved[3] unless he had some information as to the nature of the evidence; and the emphasis so enthusiastically and repeatedly placed on active management indicates that much more is to be expected of the judge than mere encouragement.

14. His proposed statutory duties are not to "encourage" but to "enquire whether a joint minute has been prepared", to "ascertain whether the prosecution and defence cases are fully prepared" and to "ascertain whether the Crown and Defence are in a position to agree and have agreed any of the evidence and can discharge any of the witnesses." He must also consider whether he is "satisfied that the case is fully prepared, and/or that evidence which will not be contested has been agreed." These duties are to be linked to a statutory duty on the prosecution and defence "to take all reasonable steps open to them to secure agreement before the intermediate diet on matters which might be agreed or admitted."[4] No doubt the judge could discharge his duty to "enquire" without receiving an answer, but a duty to "ascertain" necessarily involves not being content with a brief reply by the person addressed but the obtaining of all the information relevant to the matters to be ascertained: the nature of the evidence on which the prosecution and defence propose to rely; the extent to which it has

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[1] Review, para 107.

[2] Review, para 54.

[3] Review, para 158.

[4] Review, para 78.

been obtained by precognition, the acquisition of relevant documents or otherwise; the extent to which it will be contested; and the extent to which it might be agreed. Similarly, the judge could not determine whether the prosecution and defence had complied with their statutory duty relative to securing agreement unless he was given information as to the steps which had been taken and as to any opportunity afforded for steps which had not been taken. The Review accordingly stresses that the judge is to intervene, and there is to be an attempt to secure pre-trial agreement which is to be "concerted".[1] It is clear, therefore, that the Review does not share the opinion that "the judge best serves the administration of justice by preserving the judicial calm and the judicial demeanour, aloof and detached from the arena of contention".[2]

15. It is important to envisage how all this might appear to an accused. Suppose that an intermediate diet is held before a summary trial. The accused instructs, or is advised by, his solicitor that there should be no pre-trial agreement of evidence. At the intermediate diet the solicitor accordingly declines to answer some, at least, of the sheriff's questions. At the summary trial, the accused is convicted and receives a severe sentence. He could not be blamed for suspecting that the sheriff had accepted the evidence against him (and had rejected his own evidence, if he had given evidence) and had selected a severe sentence because of his displeasure at the attitude of the defence at the intermediate diet. We note that the last sentence of paragraph 81 indicates that ideally the same judge should preside both at the intermediate diet and at the trial diet.

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[1] Review, paras 164, 175.

[2] *Harris v Harris*, Court of Appeal, 8 April 1952, unreported, *per* Birkett LJ.

16. The Review's proposals accordingly seem to us to be likely to lead in some cases to the compromising of both the fact and the appearance of judicial impartiality. It would be preferable, in our view, for an independent body to take up the examination of the problems discussed by the Review, commission further research and face squarely the important question whether the time has not come for a radical statutory reformation of our pre-trial procedures on the basis of new principles, whereby the judge would be clearly and expressly given a new range of duties relative not only to the agreement of evidence but also to other issues. We refer to paragraphs 33 to 73 of Chapter 6 and paragraphs 2 to 36 of Chapter 7 of the Report of the Royal Commission on Criminal Justice, together with Professor Michael Zander's note of dissent, paragraphs 1 to 61, not as providing solutions for adoption in Scotland, but as examples of serious attempts to identify the relevant principles and address frankly the question of what pre-trial procedures should be established in order to secure the efficient preparation and presentation of the case and the most effective use of court time. A candid recommendation that the judge should be given all the information and powers necessary for these purposes, if supported by research and by clear argument that it was now necessary to devise a new philosophy of pre-trial procedure, would appear to us to be a clearly defined, positive and principled approach to reform. It would be preferable to an attempt by the Executive to improve matters indirectly by schooling the Judiciary in the exercise of powers of persuasion, by means of rigour, challenge and other techniques, when discharging the statutory duties envisaged in paragraph 78 of the Review.

17. **The Bench and the Crown.** The Review appears to us to overlook an important consideration when it refers to those who

appear at the intermediate diet as "the parties".[1] They should not be equiparated to the parties to a civil action, neither of whom is in any special position relative to the court. In criminal proceedings one of the "parties" is the Crown, the master of the instance. The Crown decides whether proceedings are to be instituted and if so on what charge and in which court, whether to accept a plea of guilty to a lesser charge than that libelled, whether to abandon proceedings and whether to move for sentence, all without any interference from the court. The High Court has frequently emphasised the breadth of the discretion vested in the Crown as public prosecutor.[2] In our view it would be at least unseemly, in the absence of radical statutory reform of pre-trial procedure, for a judge at an intermediate diet to question any decision of the public prosecutor as to whether it would be in the public interest to agree, or to decline to agree, any particular matter.

18. **The rights of the accused.** The Review acknowledges that accused persons have rights "to a fair trial" and "to have the case against them proved in court".[3] We consider, however, that the Review does not take sufficient account of the rights of the accused. On the other hand it makes the perfectly correct assumption that the primary object of getting the defence to agree evidence is to assist the prosecution. We refer to the following passages. In paragraph 51 the Review states:

> "Undoubtedly, there are cases in which the defence has an interest in refusing to agree any evidence, either because it intends to contest all the Crown evidence, or because it intends simply to insist on the Crown proving the whole case without any assistance from the accused."

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[1] eg Review, paras 54, 96.

[2] eg *McBain v Crichton* 1961 JC 25; *HMA v Cairns* 1967 JC 37.

[3] Review, paras 14, 88.

Paragraphs 82 and 83 are in these terms:

> "82. There will remain cases - hopefully few - where the defence deliberately and resolutely refuses to agree any evidence in advance, because it sees agreement as being against the accused's interest. The right to adopt such an approach flows from our adversarial system and it would be impossible to eliminate all such cases without changing the system itself.
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> 83. It would clearly be wrong to compel accused persons to agree evidence against themselves or to prevent them from requiring all the evidence against them to be heard in court ..."

19. The Review's recommendations, however, come very close to achieving the result it deplores in paragraph 83. The procedure is clearly intended to exert pressure on the defence to agree evidence. An accused person, or his legal adviser, who declines to agree evidence is to be obliged to withstand interrogation by a rigorous and challenging judge. Further, paragraph 79, having referred with approval to "effective" questioning by the judge, implies some obscure threat:

> "Although the defence could not of course be compelled to agree evidence, the reasons for any failure to agree would be exposed in court."

This appears to mean that the reasons would probably be discreditable. Would the judge be entitled to express disapproval? Would he be entitled to draw some inference adverse to the character of the accused or the integrity of his legal adviser from the failure of the defence to agree evidence? Is it to be assumed that it would be generally accepted that he would not be influenced by events at the intermediate diet when he was presiding at the trial?

20. It appears to be necessary to emphasise a few essential matters. First, an accused person does not simply have rights "to a fair trial"

and "to hear the case against him being proved in court".[1] For a statement of his rights we refer to article 14 of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party. The accused has, amongst other rights, "the right to be presumed innocent until proved guilty according to law"[2] and the right "not to be compelled to testify against himself or to confess guilt".[3] An accused person who agrees prosecution evidence before the trial is providing proof of an element of the case against him. It is, of course, sensible that he should be free to do so if he wishes. It would be at least distasteful, however, if he were to be pressurised by the judge into helping the prosecution by providing such proof.

21. It must also be emphasised that there are cases in which a responsible defence advocate or solicitor will have sound reasons for advising that no evidence should be agreed. We see no reason to suppose that such cases would be "hopefully few". Nor would we accept any criticism which may be implied in such expressions as "deliberately and resolutely" and "because it sees agreement as being against the accused's interest". It is the duty of the legal adviser to protect his client's interests, and to do so resolutely whenever resolution is required. We refer to paragraph 8.1.2 of the *Guide to the Professional Conduct of Advocates*:

> "He [the advocate] must at all times do, and be seen to do, his best for the client and he must be fearless in defending his client's interests, regardless of the consequences to himself (including, if necessary, incurring the displeasure of the bench)."

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[1] Review, paras 14, 88.

[2] Covenant, art 14.2.

[3] *Ibid*, art 14.3.g.

He also owes a duty to the court, to the members of his own profession and to the public; but none of these duties, as we understand them, obliges him to advise his client to supply proof of the case against him. We would find it particularly offensive if a responsible advocate or solicitor for an accused person who was in fact innocent was obliged to undergo hostile judicial interrogation, with the threat of judicial disapproval, if he declined to agree evidence.

22. There may well be reasonable grounds for suspecting that there are certain practitioners who withhold pre-trial agreements not out of concern for the interests of their clients but out of inertia or lack of adequate preparation or even out of a desire to prolong the proceedings and thus increase their fees.[1] We would suggest that such conduct might best be dealt with by a new statutory system of pre-trial procedure such as we have already figured in paragraphs 5 and 6 above whereby a judge who is fully informed as to the issues and the potential evidence is authorised to determine, having heard submissions from both sides, which matters are to be held to be proved for the purposes of the trial. A radical solution of that kind, which expressly changed the rules and qualified the traditional rights of the accused, might be preferable to the application of informal judicial pressure at an intermediate diet.

23. The solution proposed by the Review is that "the prosecution and defence could be put under a statutory duty to take all reasonable steps open to them to secure agreement before the intermediate diet on matters which might be agreed or admitted".[2] We have already

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[1] For an indication of a possible incentive to delay the tendering of a guilty plea by a legally aided accused see "A criminal waste of public funds" Scolag, 30 July 1993, pp 98-99.

[2] Review, para 78.

noted that the judge would require to consider relevant information in order to determine whether this duty had been fulfilled.[1] We doubt whether it is necessary to impose any such duty on the public prosecutor, or to subject his actions to the scrutiny of the court. The proposal also involves that the defence, in order to establish that "all reasonable steps" had been taken, might be obliged to reveal to the court not only communings between themselves and the prosecution but also advice given to and instructions received from the accused. In any event it would scarcely be possible to stigmatise as "unreasonable" a failure by the defence to take steps to secure agreement in a case where a responsible advocate or solicitor had advised, or the client had expressly instructed, that no agreements should be made. It is relevant to recall here the fate of the judicial examination procedure: the accused is very often advised not to answer the procurator fiscal's questions, with the result that in such cases the procedure is of little or no value.

24. If, however, a breach of the statutory duty could be established, what would be the sanction? It is proposed in paragraph 78 that the court, "if not satisfied that the case is fully prepared, and/or that evidence which will not be contested has been agreed, shall either discharge the trial diet or continue the intermediate diet". What is to happen if the court is still not so satisfied at the continued intermediate diet? The court could hardly order repeated continuations. Or is the breach of statutory duty to be a disciplinary matter, to be reported by the court to the Lord Advocate, or to the Dean of Faculty or the Law Society? Or is a breach by the defence to involve some financial penalty, after a report to the Scottish Legal Aid Board? The withdrawal of entitlement to legal aid from a "deliberately

[1] See para 14 above.

obstructive" accused, suggested in paragraph 4.14 of the Court Programming Report, would probably be appropriate in only a small number of cases. We note the Review's acceptance "that it may be very difficult to devise effective sanctions which did not run the risk of prejudicing the interests of justice".[1]

25. We entirely agree with that view. The difficulty of devising an effective sanction in the context of the present law and practice in criminal cases appears to us to be a fatal weakness in the proposals and to indicate the value of considering a reformation of the rules of pre-trial procedure such as we have indicated in paragraphs 4 to 7 above. Under a reformed system it might be provided that an accused who, after conviction, was held to have been "deliberately obstructive" would receive a more severe sentence than he would otherwise have done. Such a rule might be justified by an argument that every person, whether an accused person or not, has some minimal duty not to be deliberately obstructive in relation to the administration of justice. An accused person who has deliberately been as awkward as possible at every stage and has put not only the prosecution but ordinary members of the public to a great deal of trouble and expense which could easily have been avoided might be said to have behaved in a way which is unreasonably anti-social and should reasonably be penalised.

26. **Practical problems.** We now mention a few practical problems which appear to us to be involved in the Review's proposals as to intermediate diets. First, neither the Review nor the Court Programming Report seems to explain how the process of trying to secure agreement before the intermediate diet, referred to in

[1] Review, para 88.

paragraph 78 of the Review, should be initiated. We agree that it would be necessary for some negotiation to take place before the intermediate diet itself. We infer from paragraphs 4.10 and 4.11 of the Court Programming Report that in Dundee each intermediate diet lasted for an average of six minutes (50 or more cases in what we take to have been a five-hour sitting), which does not seem sufficient for a discussion *ab initio*. We would suggest that the responsibility for initiating the search for agreement prior to the intermediate diet should be laid clearly on either the Crown or the defence. In our recent *Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings* we recommended that the responsibility for initiating the procedure there described should lie with the prosecutor. We refer to the argument in support of that recommendation.[1]

27. Secondly, it seems desirable that those who should be present at the intermediate diet should be the trial judge and those who are to appear for the prosecution and the defence at the trial. We note that changes of judge or counsel or both have been held responsible for the ineffectiveness of pre-trial reviews in England and Wales, and that the Royal Commission found this a difficult problem.[2] We doubt whether continuity of legal representatives would be practicable in Scotland without significant changes in the working patterns of the profession. It is, we believe, most unusual for the identity of the procurator fiscal who is to conduct a prosecution to be known two or three weeks before the trial. Again, the advocate or solicitor for the defence who might appear at the intermediate diet might well not

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[1] (1992) Scot Law Com No 137 (hereafter "Report"), paras 4.25-4.28.

[2] *Royal Commission Report*, chap 7, paras 29-36, pp 107-109; Professor Zander's Note of Dissent, paras 43-50, pp 227-228.

appear at the trial. Given the present arrangements for the allocation of work to procurators fiscal and for the instruction of defence counsel and solicitors it is difficult to imagine that those appearing at the trial would generally have appeared at an intermediate diet. Before that diet, moreover, they should have taken steps to secure agreement (in accordance with the statutory duty proposed in paragraph 78 of the Review); and at the diet they should no doubt be fully instructed and sufficiently conversant with the case to make informed decisions and give the judge all the information he is entitled to require. We note that the object of the proposals is

> "to ensure that all case preparation is completed by the time of a diet approximately two weeks before the day set down for trial. Accordingly, the only work which would normally remain for a defence agent after that would be attendance at the trial diet."[1]

We regret that we are unable to imagine that this most desirable result would be achieved by the implementation of the proposals in the Review unless there was a revolution in the way in which cases are prepared at present. The strength of the legal profession's resistance to change should not be underestimated. We consider that further investigation is necessary in order to ascertain not only whether trial judges could be made available to preside at intermediate diets but also the extent to which the Crown Office, the Procurator Fiscal Service and both branches of the private legal profession would be willing and able to change their working patterns in order to make an intermediate diet procedure effective.

28. Thirdly, the Review envisages that a very substantial improvement in the administration of justice would be secured if the practice of efficient management of intermediate diets "could be made

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[1] Review, para 162.

universal".[1] Further, "sheriffs should receive training on the effective management of the process". If intermediate and first diets "are to have the desired effect, all judges, including temporary appointments, would need to take a strong and consistent line in managing the process ...".[2] We regret that we do not consider it realistic to expect about 100 full-time sheriffs and over 100 temporary sheriffs, of varied ability, experience and temperament, to take a "consistent line", however carefully they were "trained".

29. Fourthly, we do not think that it would be appropriate for the judge to ask question 14 in the questionnaire in the Court Programming Report: "Are there likely to be any areas of special difficulty at the trial?"[3] This question might seem to require the disclosure to the court in the presence of the prosecution of a line of defence or a ground of objection to evidence which according to the present rules of law and practice the defence are entitled not to reveal until the trial is under way. Pre-trial disclosure by the defence is a difficult issue which in our view should be carefully considered before these rules are modified. Judicial interrogation at the intermediate diet might have the result of depriving the defence of the advantage of testing the credibility of a witness in cross-examination at the trial by producing a document which has not been lodged and putting its contents to him: a stratagem which is widely regarded, rightly or wrongly, as legitimate and valuable.[4]

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[1] Review, para 76.

[2] Review, para 81.

[3] Court Programming Report, Annex 2, p 58.

[4] cf *Paterson & Sons (Camp Coffee) v Kit Coffee Co Ltd* (1908) 16 SLT 180.

Disclosure of prosecution case

30. We have already noted in paragraph 2 above that there is no basis in research for the view that disclosure of the prosecution case would lead to earlier pleas or to the agreement of evidence. We agree that the practical difficulties involved in disclosure, referred to in paragraphs 93 and 94 of the Review, are substantial. We also note that an "effective" intermediate or first diet would be required.[1] In view of these difficulties and the absence of any clear prospect of benefit we would not be inclined to recommend any further exploration of this proposal. If, however, the Crown wish to pursue it, we would have no objection.

Agreed adjournments

31. We approve of the proposal in paragraph 40 of the Review that in summary procedure the judge should grant an adjournment in chambers on the basis of a written application where that course is agreed.

Agreement of evidence

32. We agree that "the existing procedure for minutes of agreement and admission would be quite satisfactory if there were to be a routine pre-trial hearing (an intermediate or first diet) at which the scope for agreement of evidence was actively explored and established".[2] We also agree that suggestions based on written statements do not offer any advantages in such circumstances.

33. We do not agree, however, that our own proposal of a statement of facts not in dispute offers no advantages in such

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[1] Review, para 95.

[2] Review, para 104.

circumstances. When we wrote our Report we were aware of the provisions of clause 38 of the Prisoners and Criminal Proceedings (Scotland) Bill, as it then was, as to preliminary diets in solemn procedure, and we were also aware that consideration was being given to the extent to which effective use might be made of intermediate diets in summary procedure.[1] We therefore suggested that the timetable for service of the copy statement might be adjusted to take account of preliminary and intermediate diets.[2]

34. We consider that a statement of undisputed facts would be a convenient means of intimation by the procurator fiscal to the defence of the matters that he sought to have agreed, if it were provided that any counter-notice had to be served within a specified period from the date of service of the copy of the statement of facts. The copy of the statement of facts could be served sufficiently far in advance of the intermediate diet to enable the court to see whether the defence had served a counter-notice and to explore the possibility of entering into a binding minute of admission or joint minute of agreement.

35. Our proposals also appear to us to have the advantage that they meet a case where there are certain matters which the accused cannot admit or agree since they are outwith his knowledge, but which he is not concerned to dispute. In a case of housebreaking, for example, where goods have been recovered by the police and are alleged by the householder to be the stolen property, an accused who has pleaded not guilty and is in fact not guilty will be in no position to know whether these goods had been stolen from the house or not. In such a case it might be appropriate for the accused not to challenge a

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[1] Report, para 4.19 and page 45, fn 6.

[2] Report, para 4.36.

listing of the goods as the stolen property in a statement of facts, although he could not make a formal admission that they had been stolen.

36. We are inclined to suggest that our recommendations as to proof of undisputed facts might be implemented in relation to solemn procedure. The commitment of the prosecution's resources would be much less than would be required if the procedure were introduced in both solemn and summary cases. The procedure might be extended to summary cases if, after an experimental period, it proved to be advantageous.

Sanctions

37. We refer to paragraph 25 above.

Written evidence

38. **Evidence by certificate.** We approve of the recommendations in paragraph 59 of the Review. We have no further suggestions for categories of evidence which might be suitable for presentation by certificate.

39. **Signed witness statements.** As the Review notes, in our recent Report we examined and rejected a proposal that proof by written statements should be introduced.[1] In recommending the introduction of such a procedure the Review does not take account of the substantial practical difficulties to which we drew attention in paragraph 4.14 of our Report.[2] In a later chapter, however, the

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[1] Review, para 65; Report, paras 4.11-4.14.

[2] We would add that some witnesses might be unwilling to sign their statements and could not be legally compelled to do so.

Review draws attention to some of these difficulties when justifying its rejection of a suggestion that witness statements might be served on the defence and a presumption created that the evidence contained in the statements is proved unless the defence objects. The Review states, at paragraphs 102 and 103:

> "... There are two weaknesses in this suggestion. Firstly, witness statements are not produced in a form which could be evidence if agreed. Witness statements are simply records by the police of what witnesses told them: they have not been seen and endorsed by the witnesses themselves.
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> 103. That is essentially why we have minutes of agreement, and the suggested alternative statement of facts. Of course, it would be possible to change the procedures, at some cost, to make the agreement of witness statements possible by obtaining signed statements from the witnesses and serving them on the defence. But the more fundamental weakness is that a presumption of agreement subject to counter-notice follows the same principle as the SLC proposal and is subject to the same objection. The defence may object as a matter of routine, unless there is an intervention by the court to ensure that agreement has been explicitly considered. On the other hand if there is to be such an intervention, as this Report proposes, there is no need to make a presumption that the statements are proved."

40. "Obtaining signed statements from witnesses and serving them on the defence," which would involve changing the procedures "at some cost", would also be necessary if signed witness statements were to be introduced as proposed by the Review in Chapter 5. This is made clear in paragraph 4.14 of our Report, but is not acknowledged in Chapter 5. Again, there is a counter-notice procedure in section 9 of the Criminal Justice Act 1967 which is mentioned in our Report but not in Chapter 5. We are also puzzled that the fact that the statement in the document might be contradicted at the trial, which is seen as a defect in the recommendations in Part IV of our Report, is not given

any weight in the assessment of the section 9 procedure, to which the same objection applies.

41. Accordingly we are not convinced that the Review's recommendation in favour of signed witness statements has been sufficiently considered. In addition, we ourselves would not be disposed to make any recommendation for procedural reform on the slender basis that "discussion with the Crown Prosecution Service suggests" that it has advantages.[1] The nature of the conditions governing the admissibility of the statement and the extent to which strict compliance with them should be required[2] are matters which would have to be carefully considered. Further, it is not clear to us whether it is proposed that section 9 should be copied to the extent that the court should have a discretion to require the witness to attend and give evidence.[3] In any event it is clear that appropriate rules for the preparation of witness statements, comparable to the English Practice Direction,[4] would have to be devised. We would suggest that further thought be given to this proposal before a decision is taken to devote resources to the composition, editing and service of witness statements.

More proactive management of cases

42. We refer to paragraphs 11 to 29 above.

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[1] Review, para 66.

[2] cf *Paterson v DPP* [1990] RTR 329; [1990] Crim L R 651.

[3] 1967 Act, s 9(4)(b).

[4] [1986] 1 WLR 805; [1986] 2 All ER 511.

Sentence discounting

43. We consider that "the current legal position", which is accurately described in paragraph 111 of the Review, is satisfactory. It is important to observe that in *Strawhorn v McLeod*[1] the Court proscribed only a practice of sentence discounting and did not prohibit a judge from exercising a proper discretion to take a guilty plea into account in mitigation of sentence in particular cases. Examples of such cases are those in which the accused has admitted his guilt from the time of his apprehension and has shown contrition or consideration for his victim by some genuine demonstration of remorse or by sparing his victim the ordeal of giving evidence. An early admission of guilt made in such circumstances seems to us to be very different in quality from a plea of guilty tendered at a later stage in the criminal process in the calculated expectation of a lighter sentence in return for saving the expense and inconvenience of a trial.

44. We are opposed to the introduction of a practice of sentence discounting on grounds which are both principled and pragmatic. The pragmatic ground may be shortly stated. As the Review admits, "there is no information about how effective discounting is in encouraging early pleas."[2] The Report of the Royal Commission on Criminal Justice likewise offers no data in support of a sentence discount system. The proposed introduction of such a system is therefore frankly based on speculation. The "rationale for sentence discounting" which the Review offers is as follows:

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[1] 1987 SCCR 413.

[2] Review, para 116.

> "... there may be some accused persons who have not yet decided to plead guilty but who, if aware that doing so would reduce their sentence, might indeed plead guilty before the trial diet."[1]

45. The principled objection may be best understood by substituting for the first words of that quotation the words "there may be some *innocent* accused persons who have not yet decided to plead guilty ...". The Report of the Royal Commission states:

> "Provided that the defendant is in fact guilty and has received competent legal advice about his or her position, there can be no serious objection to a system of inducements designed to encourage him or her so to plead. Such a system is, however, sometimes held to encourage defendants who are not guilty of the offence charged to plead guilty to it nevertheless. One reason for this is that some defendants may believe that they are likely to be convicted and that, if they are, they will receive a custodial sentence if found guilty after a contested trial but will avoid such a sentence if they plead guilty. This risk cannot be wholly avoided and, although there can be no certainty as to the precise numbers (see next paragraph) it would be naive to suppose that innocent persons never plead guilty because of the prospect of the sentence discount."[2]

46. The next paragraph of the Report founds on a survey of cases in the Crown Court which has been severely criticised and has been said to demonstrate, amongst other things, that guilty pleas may be extracted from unwilling defendants by sentence promises or threats; that there is a significant problem, exacerbated by the sentencing discount, of "inconsistent pleading", that is, of defendants pleading guilty although privately not admitting or even denying guilt to their barristers; and that possibly innocent defendants are inadequately

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[1] Review, para 29.

[2] *Royal Commission Report*, chap 7, para 42, page 110.

protected by their barristers from tendering inappropriate pleas.[1] The Report itself acknowledges, in a later paragraph:

> "... we agree that to face defendants with a choice between what they might get on an immediate plea of guilty and what they might get if found guilty by the jury does amount to unacceptable pressure."[2]

We therefore find it difficult to understand the Royal Commission's view:

> "Against the risk that defendants may be tempted to plead guilty to charges of which they are not guilty must be weighed the benefits to the system and to defendants of encouraging those who are in fact guilty to plead guilty. We believe that the system of sentence discounts should remain."[3]

This part of the Commission's Report has been incisively criticised on the ground that it contains no principled examination of the rights and wrongs of the sentence discount.[4]

47. It appears to us that there may be some justification for a similar criticism of Chapter 11 of the Review. The discussion of principle in paragraphs 112 and 113 does not seem to us to be adequate. It is necessary either to recognise, or deliberately and justifiably to qualify, the accused's rights to be presumed innocent until proved guilty according to law and to go to trial and examine, or have examined, the witnesses against him.[5] If these rights are to remain

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[1] M McConville and L Bridges, "Pleading guilty whilst maintaining innocence" (1993) 143 NLJ 160 at page 161.

[2] *Royal Commission Report*, chap 7, para 50, page 113.

[3] *Ibid*, para 45, page 111.

[4] A Ashworth, "The Royal Commission on Criminal Justice: (3) Plea, venue and discontinuance" [1993] Crim L R 830 at pages 836-839.

[5] International Covenant on Civil and Political Rights, arts 14.2, 14.3.e.

unqualified, it cannot be acceptable that a person with these rights who is found guilty after trial should be punished more severely simply because he had not pled guilty.[1]

48. It should also be noted that in some cases an accused person may be justifiably uncertain whether he is innocent or guilty.

> "He may not remember the incident properly or at all. He may be mentally handicapped. He may have been drunk, or himself received a blow which affects his memory or he may not be able psychologically to relive the incident. He may have thought, wrongly it may turn out, that he was acting in self-defence."[2]

The witnesses who incriminate him on precognition may be mistaken or lying. It does not seem at all justifiable to face such an accused with a choice between a particular sentence if he pleads guilty before the trial and a heavier sentence if he is convicted.

49. The Consultation Paper raises the question whether sentence discounting could be introduced in Scotland in such a way that it served the wider public interest in reducing late cancellation of trials while continuing to provide a high standard of justice for individual accused persons.[3] We have no difficulty in answering that question in the negative.

50. Paragraph 21 of the Consultation Paper invites views on the practical implications of introducing a system of sentence discounting.

(i) We do not understand how a judge could give any commitment or indication as to sentence before the accused had admitted

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[1] C G B Nicholson, *Sentencing* (1st ed, 1981), page 219.

[2] The Bar Council's Response to the Royal Commission on Criminal Justice, para 18.

[3] Consultation Paper, para 20.

guilt, the circumstances of the case had been fully presented by the Crown and all the information relative to mitigation had been placed before him.

(ii) We are opposed to the involvement of prosecutors in sentencing. In view of their rôle in our adversarial system of criminal justice it would not be reasonable to expect them always to be able to take a balanced and detached view of the matter.

(iii) It does not appear to us to be possible to specify "the degree of discounting" to any extent in a satisfactory statutory provision.

(iv) Discounting "against a system of sentencing guidelines" would not be practicable, in our view, because of the essentially flexible nature of guidelines. In any event it appears from the Report of the Royal Commission that, notwithstanding the existence of guidelines which provide for sentence discount on an informal basis, the incidence of "cracked" trials is still regarded as too high.[1]

(v) We agree with the suggestion in paragraph 141 that in practice discounting would have to be limited to custodial sentences, fines and community service orders. Generally, however, there would be no means of knowing, until the judge had all the relevant information, whether he would select one of these disposals. The resources which would have to be devoted to sentence discounting in summary cases would be enormous. If it is considered to be justifiable at all, it should be limited to solemn procedure on practical grounds.

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[1] *Royal Commission Report*, chap 7, para 48, page 112.

51. The Consultation Paper asks for views on any other aspects of sentence discounting. We would draw attention to the difficulty of ensuring that any guilty plea was tendered by the accused voluntarily and was consistent with the facts as the accused truly understood them. We would have no confidence in formalised exchanges between the accused and the judge about the accused's awareness of his rights and such matters as the absence of force, coercion and improper influence. Any later allegation by the accused that he had been subjected to improper pressure to plead guilty would be difficult to refute.

District courts

52. It appears to us that the Review's proposals as to agreed adjournments and as to evidence by certificate could appropriately be extended to the district courts. We seriously doubt whether there is any reasonable prospect that effective intermediate diets would be held in the district court.[1] The proposals as to disclosure of the prosecution case and as to the agreement of evidence depend on there being an effective intermediate diet.

Legal aid

53. We note that consultation paper is to be issued.

Conclusion

54. In the absence of statistical information we are unable to comment on the resource implications or estimated savings relative to the implementation of the Review's proposals.

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[1] Review, paras 158-160.

SCOTTISH LAW COMMISSION

RESPONSE

to

FIRST REPORT

by

THE STEERING GROUP AND WORKING GROUP ON COURT PROGRAMMING

Subject to the qualification which we make in the next paragraph, we welcome the recommendations in this Report. They appear to us to be practical and sensible, and some of them, such as those on the reduction of waiting time (para 4.28 ff) and the abolition of the concepts of court sessions and vacations (para 6.2 ff) are long overdue.

2. We have reservations, however, about the use of intermediate diets. We have expressed these reservations in paragraphs 5 to 23 of our response to the 1993 Review of Criminal Evidence and Criminal Procedure, to which we refer.

3. We note that the Groups intend to undertake further work and issue a second Report. We would suggest as a topic for study the holding of court sittings in the evenings or on Saturdays. Many of those on whose co-operation our system of justice depends find it inconvenient to attend court during ordinary working hours, and it is important that it should be made as easy as possible for them to attend. We appreciate that only certain classes of business might be considered appropriate for evening or Saturday sittings.