Chapter 1

Theoretical perspectives in criminal litigation

ABOUT THIS BOOK

This book offers a fairly detailed description of the system of criminal procedure in England and Wales. It also endeavours to explain how the system has come to be as it is. The book also provides some tools for critical analysis of the system, identifying possible shortcomings in the system.

In this first chapter, we look at some of the further reading that is available (both practitioner textbooks and texts and journals that are written from a more theoretical perspective) and at some websites that are of use to those interested in criminal justice. We then examine some of the theoretical perspectives that enable us to evaluate our criminal justice system.

1.1 SOURCES

First, we look at some of the sources that are available to those who want to find out more about the criminal justice system.

1.1.1 Practitioner texts

The main sources used by criminal practitioners are:

- *Blackstone’s Criminal Practice*: a one-volume book published annually by Oxford University Press, with supplements issued during the course of the year. It contains substantive criminal law as well as procedure, evidence and sentencing, and covers both the Crown Court and magistrates’ courts. There is a companion website at <http://www.oup.com/uk/>.
- *Archbold: Criminal Pleading Evidence and Practice*: a one-volume book published annually by Sweet & Maxwell, with supplements issued during the course of the year. It contains substantive criminal law as well as procedure, evidence and sentencing, but it only covers the Crown Court. There is also *Archbold Magistrates’ Courts Criminal Practice*, a one-volume work (again published annually), covering magistrates’ courts.
- *Stone’s Justices Manual*: a three-volume annual publication. It contains substantive
law (both criminal and civil) as well as procedure, evidence and sentencing, but it covers only the magistrates' courts.

- Thomas, D, *Current Sentencing Practice* (Sweet and Maxwell, looseleaf).

### 1.1.2 Academic textbooks

Academic textbooks which offer critical analysis of some of the issues raised by the English Criminal Justice System include:


### 1.1.3 Journals

Useful journals include:

- The *Criminal Law Review* (a very good source of articles, and commentaries on case law, on both substantive criminal law and evidence, procedure and sentencing, published by Sweet & Maxwell).
- The *Justice of the Peace* (which covers matters of interest to those who practice in the magistrates' courts, published by LexisNexis Butterworths).

### 1.1.4 Law reports

Cases of relevance to the criminal justice system often appear in the mainstream law reports, such as the official Law Reports and the Weekly Law Reports published by the Incorporated Council of Law Reporting, and the All England Law Reports published by LexisNexis Butterworths. However, there are also some law reports that cover specifically criminal cases, including:

- Criminal Appeal Reports (Cr App R).
- Criminal Appeal Reports (Sentencing) (Cr App R(S)).
- Justice of the Peace Reports (JP).

### 1.1.5 Websites

The internet contains a vast array of resources of interest to students of criminal justice. Some of the most useful websites of particular interest to anyone with an interest in the criminal justice system include the following:
• Many of the rules on criminal procedure can be found in the *Criminal Procedure Rules* and the *Consolidated Criminal Practice Direction* (the later is referred to in this book as the *Consolidated Practice Direction*). Both these sources are available at: <http://www.justice.gov.uk/criminal/procrules_fin/index.htm>.

• The Ministry of Justice is responsible for the courts, prisons, probation, criminal law and sentencing. It was created on 9 May 2007 and took over its responsibilities from the Department for Constitutional Affairs. Its home page is: <http://www.justice.gov.uk/index.htm>.

• The general Government website for matters relating to criminal justice is, aimed at people who are appearing in court (as defendants or witnesses) or who have been called for jury service, is: <http://www.cjsonline.gov.uk/index.html>.


• The Home Office (responsible for ‘leading a national effort to protect the public from terror, crime and anti-social behaviour’): <http://www.homeoffice.gov.uk/>.

• The section devoted to Crime and Victims is: <http://www.homeoffice.gov.uk/crime-victims/>.


• Her Majesty’s Courts Service: <http://www.hmcourts-service.gov.uk/>.


• Judicial Studies Board: <http://www.jsboard.co.uk/>.

• British and Irish Legal Information Institute (very useful for case law): <http://www.bailii.org/>.

• Andrew Keogh’s ‘CrimeLine’ (for practitioner-focussed updates on statutory and case law developments): <http://www.crimeline.info/>.

In this book reference will be made to two major reviews of criminal litigation that were published in 2001:

• The *Review of the Criminal Courts of England and Wales* by the Right Honourable Lord Justice Auld (September 2001)(the *Auld Review*), available at <http://www.criminal-courts-review.org.uk/>; and


Useful ‘portal’/‘gateway’ sites (containing links to useful web-based resources) include:

• Delia Venables: <http://www.venables.co.uk/> (for Crime, Police, Prisons, Magistrates see <http://www.venables.co.uk/sitesc.htm#crime>).

• Intute (formerly SOSIG): <http://www.intute.ac.uk/socialsciences/law> (for Criminal Justice, see <http://www.intute.ac.uk/socialsciences/cgi-bin/browse.pl?id=120527>); for Criminal Law and Procedure, see <http://www.intute.ac.uk/socialsciences/cgi-bin/browse.pl?id=120862>, and for Criminology, see <http://www.intute.ac.uk/socialsciences/cgi-bin/browse.pl?id=120855>).
1.2 EVALUATING THE CRIMINAL JUSTICE SYSTEM – AN INTRODUCTION TO THEORETICAL PERSPECTIVES

What should our criminal justice system be trying to achieve? In para 7 of Chapter 1 of his *Review of the Criminal Courts in England and Wales*, Lord Justice Auld refers to the two key ‘aims’ identified in the Government’s Paper, *Criminal Justice System: Strategic Plan 1999–2002*. Those aims are:

a reducing crime and the fear of crime and their social and economic costs; and
b dispensing justice fairly and efficiently to promote confidence in the law.

The second of those aims was said to give rise to a series of objectives:

- to ensure just processes and just and effective outcomes;
- to deal with cases throughout the criminal justice process with appropriate speed;
- to meet the needs of victims, witnesses and jurors within the system;
- to respect the rights of defendants and to treat them fairly;
- to promote confidence in the criminal justice system.

It is interesting to note that the third of these objectives refers to jurors but does not make any reference to the lay magistrates who deal with the vast majority (over 90 per cent) of criminal cases in England and Wales; these unpaid lay people are crucial to the functioning of our criminal justice system.

A similar set of priorities was put forward in *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs, 2005). Paragraph 4.1 says that:

> The Criminal Justice System (CJS) must be fair. It is based on the principle that the guilty must be convicted and the innocent acquitted. This requires:

- good investigation
- accurate charging
- effective prosecutions
- robust case management and
- effective defence services.

### 1.2.1 Devising theoretical models

How do we assess whether our system of criminal justice is ‘fit for purpose’? How do we decide whether proposals for reform are ‘good’ or ‘bad’ suggestions? One way is to devise a theoretical model (setting out what the system should be striving to achieve and how it should be going about it).

Herbert Packer, an American jurist, in ‘Two models of the criminal process’ ((1964) 113 U PAL Rev 1) and *The Limits of the Criminal Sanction* (Stanford University Press, 1968) proposed two models of criminal justice:

a the ‘crime control’ model: this has as its primary objective the repression of crime (in other words, the lowering of crime rates), achieved by the efficient apprehension and punishment of criminals; and
b the ‘due process’ model: this has as its primary objective procedural fairness (in other words, the protection of the rights of the accused), achieved by presenting formidable impediments to carrying the prosecution past each step in the legal process.

Packer makes it clear that neither model is presented as corresponding to reality or as representing the ideal criminal justice system. Rather, the two models offer a basis for examining how a criminal justice system might take account of the competing demands of different value systems which have differing (and inconsistent) priorities. In other words, these models offer a framework for examining the tensions between competing claims within a criminal justice system. Packer suggests that it may be worthwhile examining where, on the spectrum between the extremes represented by the two models, our present practices seem to fall, and what appears to be the direction and thrust of current trends within our system. Moreover, we can compare our own values with the values which underlie the two models.

1.2.1.1 ‘Crime control’

Packer (1968: 158) says of the ‘crime control’ model that the:

. . . value system that underlies the Crime Control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced – which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process – a general disregard for legal controls tends to develop . . . the crime control model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.

The two risks inherent in the failure to repress crime are:

a the risk that people will take the law into their own hands (in other words, becoming vigilantes), leading to public disorder (mob rule); and
b the risk that crime rates will increase further because people believe they will be able to get away with offending.

This model seeks a system that is efficient, in the sense of being able to apprehend, try, convict and sentence a high proportion of offenders whose offences become known. The system will thus be operating successfully (according to the values underpinning crime control) if there is a high rate of apprehension and conviction of offenders.

The crime control model places great emphasis on the investigative stage of the criminal process. To achieve a high rate of detection and convictions, speed is important (and this requires that the hands of the investigators and prosecutors are not unduly tied), as is finality (in the sense of minimising the occasions for challenge).

Packer suggests that the criminal process according to this model is seen as a ‘screening
process’, in which each successive stage (investigation, arrest, subsequent investigation, preparation for trial, trial or plea, conviction, sentence) involves ‘a series of routinised operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion’. For these purposes, Packer defines a successful conclusion as one that:

threw off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge.

This requires that, at the stage of the police investigation (and perhaps at the charge review and the evidence review by the prosecuting authority), those who are probably innocent are ‘screened out’ and those who are probably guilty are ‘passed quickly through the remaining stages of the process’.

Packer notes that this approach requires what he terms ‘a presumption of guilt’. This is because ‘the screening processes operated by police and prosecutors are reliable indicators of probable guilt’: once the police (and the prosecution) have determined to their own satisfaction that there is enough evidence of guilt to justify taking the case forward, ‘all subsequent activity directed toward him is based on the view that he is probably guilty’. However, it should be pointed out that the reliability of the view of the police officer or prosecutor may well be open to question: the instinct of the police officer or prosecutor may well be to look for further evidence that the suspect is guilty, rather than evidence that would exonerate the suspect. This is one of the tensions in the law relating to the disclosure of unused prosecution material (where the law requires the prosecution to retain, and then disclose to the defence, material which weakens the prosecution case or strengthens the defence case).

This ‘presumption of guilt’ stems from (possibly misplaced) confidence in the reliability of the fact-finding that takes place at the investigative stage (and the subsequent evidential review stage). According to the crime control model, if we can be confident in the accuracy of those initial stages, the remaining stages of the process can be relatively perfunctory. Indeed, the crime control model would suggest that the trial process is likely to be less capable of producing reliable fact-finding than the earlier investigative stages. On this basis, the criminal process must put special weight on the quality of that earlier fact-finding. This, in turn, makes it important to place as few restrictions as possible on the investigative process. If the early fact-finding stages are the most important, the corollary is that the subsequent stages are relatively unimportant and should therefore be truncated as much as possible. An effective investigation would ideally lead either to the exoneration of the suspect or the suspect confessing to the offence and then promptly entering a guilty plea (cf Sanders and Young (2007: 20).

Packer contrasts this de facto presumption of guilt with the (legal) presumption of innocence, which he defines as a direction to those involved in the process to ‘ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities’ or, put another way, to close their eyes to ‘the probability that, in the run of cases, the preliminary screening process operated by the police and the prosecuting officials contains adequate guarantees of reliable fact-finding’.

It might be thought that the crime control model would tolerate the conviction of the
innocent in a way that the due process model would not. However, if the system makes so many mistakes that public confidence is eroded, it would cease to be an effective system. The difference between crime control and due process (which we consider next) is that accuracy of outcome is a lower priority for crime control than it is for due process.

1.2.1.2 ‘Due process’

In contrast to the values of crime control, Packer says that according to ‘due process’ values, each successive stage of the criminal process ‘is designed to present formidable impediments to carrying the accused any further along in the process’. He makes it clear, however, that those who subscribe to due process values will not necessarily reject all of the foundations of crime control. Proponents of due process do not, for example, have to argue that it is not desirable to repress crime. However, the due process approach does aim to give maximum protection to the innocent, and so emphasises the importance of putting in place safeguards against errors.

The due process approach places much less faith in the reliability of the initial investigative stages of the process. It points out that witnesses can make mistakes, that confessions may be induced by various forms of coercion (whether intentional or not), and that the police are looking for evidence of guilt, not innocence. The due process model would argue additionally that the trial process itself may not lead to reliable fact-finding, and so there must be the possibility of further scrutiny (by ways of appeals) open to the accused (with the result that finality has a low priority in the due process model).

This takes us to questions of efficiency and resources; as Packer puts it: ‘how much reliability is compatible with efficiency?’ In other words: ‘how much weight is to be given to the competing demands of reliability (a high degree of probability in each case that factual guilt has been accurately determined) and efficiency (expeditious handling of the large numbers of cases that the process ingests)?’ The safeguards required by due process are expensive (for example in terms of court time) and there has to be a limit on what the State can afford to expend on criminal justice.

A good illustration of the conflict between crime control and due process is in the use (or exclusion) of evidence that was obtained improperly. The crime control would allow evidence to be used in a trial so long as it is relevant, because it has probative value; it does not matter how the evidence was obtained (even if it was obtained illegally). Due process, however, would exclude from the trial evidence that was not obtained properly, even if that evidence is highly relevant. Adherents of due process would justify this approach on the basis of the need to uphold the integrity, or moral legitimacy, of the system. This example perhaps also shows that the reality lies between the two extremes – in the UK, evidence that was obtained illegally may be admissible, but only if its probative value exceeds its prejudicial effect on the fairness of the trial of the accused.

The crime control model is not only more optimistic about the improbability of error in a significant number of cases, but is also, at least to an extent, more tolerant about the number of errors that it will put up with. The due process model insists on the prevention and elimination of mistakes to the greatest extent possible, whereas the crime control model accepts the probability of mistakes up to the level at which those mistakes interfere with the goal of repressing crime (either because too many guilty
people are escaping justice or because a general lack of confidence in the process leads to a decrease in the deterrent efficacy of the criminal law). As Packer says (1968: 165), the aim of due process ‘is at least as much to protect the factually innocent as it is to convict the factually guilty’.

The combination of stigma and loss of liberty that can result from conviction of a criminal offence is viewed by the due process model as very serious. For this reason, the due process model is prepared to accept a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing oppression of the individual by the State. Packer (1968:166) highlights the importance of the concept of ‘legal guilt’. He writes that:

According to this doctrine, a person is not to be held guilty of a crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect.

This requires, for example, that there must not be unacceptable delay (a concept that is given full expression in the European Convention on Human Rights: see, for example, Attorney General’s Reference (No 2 of 2001) [2003] UKHL 68; [2004] 2 AC 72); moreover, only an impartial tribunal can be trusted to make determinations of legal, as opposed to factual, guilt.

Packer goes on to note that by ‘forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome’. The key point is the proposition that ‘the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment’. This is exemplified by the fact that a conviction may be unsafe even if there is clear evidence showing the guilt of the accused (see the discussion in Chapter 13, when we examine the role of the Criminal Division of the Court of Appeal).

Packer notes that one of the hallmarks of due process is the notion that ‘there can be no equal justice where the kind of trial a man gets depends on the amount of money he has’. This concept is what the European Court of Human Rights refers to as ‘equality of arms’, and is seen as a fundamental characteristic of a fair trial under Art 6 of the European Convention. It follows that the State must institute a system of legal aid, and that a defendant whose defence is publicly funded should be in no worse a position than a defendant who is paying for his own defence.

As Sanders and Young (2007: 19) point out, neither of Packer’s models corresponds with reality, and neither was intended by Packer to be taken as an ideal. Rather they represent ‘extremes on a spectrum of possible ways of doing criminal justice’. They go on to observe (2007: 23) that the difference between the models is that they represent different points of view about what the limits of the powers of the State should be in upholding law and order. Or, as Ashworth and Redmayne put it (2005: 38), these two models ‘help in interpreting trends in criminal procedure . . . They are designed as
interpretive tools, to enable us to tell (for example) how far in a particular direction a
given criminal justice system tends’.

The two models essentially represent extremes but are marked by a very important
difference. The due process model requires individual liberties to be protected even at
the cost of guilty people sometimes going free, whereas the crime control model can
tolerate innocent people occasionally being mistakenly convicted. Of course, the crime
control model could not accept a large number of mistaken convictions (since that
would reduce confidence in the system, thereby diminishing its effectiveness).

1.2.1.3 A ‘rights-based’ approach

Ashworth and Redmayne summarise the two main goals of the criminal justice system
as ‘regulating the processes for bringing suspected offenders to trial so as to produce
accurate determinations, and . . . ensuring that fundamental rights are protected in
those processes’ (2005: 48, 55). It is worth noting that over 90 per cent of defendants
plead guilty, and so there is no trial. It may be, therefore, that the first of these two goals
needs to be re-worded to make it clear that it is an important goal of the system that
only those who are in fact guilty of an offence plead guilty to it if they forgo their right
to a trial to determine their guilt or innocence.

Ashworth and Redmayne adopt a ‘rights-based’ approach when evaluating the crim-
nal justice system. They would evaluate a justice system according to the extent to
which that system respects the rights of those involved in the system. They accept that
this approach requires more than simply devising a list of such rights, since ‘rights may
conflict with each other or with other social values. Some rights may also seem to be
more important, or weightier, than others’ (2005: 35). However, they make it clear that
they are not advocating a ‘balancing’ process in which some rights can be traded off
against others. What they advocate is carefully structured reasoning in order to justify
interference with rights (2005: 46). They commend what they describe as a ‘principled
approach’ to criminal justice. They say that the ‘purpose of the criminal process is to
bring about accurate determinations through fair procedures. The approach therefore
emphasises various rights and principles that ought to be safeguarded’ (2005: 375).

There are several international documents that attempt to set out key rights. In
Chapter 6 we examine, amongst other things, the United Nations Convention on the
Rights of the Child; this is an important document that is highly relevant to cases
involving young defendants (or young witnesses). There is also the 2000 EU Charter of
Fundamental Rights. However, the most important instrument has to be the European
Convention on Human Rights, which became fully part of our law through the Human
have effect under the Human Rights Act 1998 are set out in Sched 1. Those that are
relevant to criminal litigation and sentencing are:

**Article 2: Right to life**

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life
   intentionally save in the execution of a sentence of a court following his conviction of a
   crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article
   when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

**Article 3: Prohibition of torture**
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

**Article 4: Prohibition of slavery and forced labour**
1 No one shall be held in slavery or servitude.
2 No one shall be required to perform forced or compulsory labour.
3 For the purpose of this Article the term ‘forced or compulsory labour’ shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

**Article 5: Right to liberty and security**
1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of
Article 6: Right to a fair trial

1 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 by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

3 Everyone charged with a criminal offence has the following minimum rights:

   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7: No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8: Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.
There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 14: Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

**Article 18: Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

It is to be noted that much of the language is quite archaic. Moreover, the Convention is to be regarded as a ‘living instrument’. The decisions of the European Court of Human Rights (based in Strasbourg) are therefore very important in interpreting the Convention in today’s world. One of the challenges faced by the European Court is that the provisions of the Convention have to be applied both to ‘accusatorial’ systems such as ours and to ‘inquisitorial’ systems adopted elsewhere. In the inquisitorial system, the court takes an active role in fact-finding (and may, to a greater or lesser extent, even direct the conduct of the investigation); in the accusatorial system, the court essentially acts as a neutral umpire as the prosecutor presents the case against the accused and the defence advocate tries to highlight reasonable doubt in that case. It could be said that the accusatorial approach is not actually a quest for the truth: the court is not concerned with what actually happened, but whether it is satisfied so that it is sure that the case against the accused is proven. So far as the due process model is concerned, the defence advocate plays a role of central importance in protecting the interests of the accused; similarly, the court plays a vital role in excluding evidence that has been obtained improperly.

The European Court has emphasised the importance that there should be ‘equality of arms’ as between the prosecution and defence (see, for example, *Foucher v France* (1997) 25 EHRR 234) – in other words, there should be what might be called ‘a level playing field’.

The right to have a criminal charge adjudicated upon without undue delay is also an important one: delay is a common ground for seeking the dismissal of charges on the basis of abuse of process (see below).

Another significant document is the Charter of Fundamental Rights of the European Union (2000/C 364/01) (<http://www.europarl.europa.eu/charter/pdf/text_en.pdf>), which contains the following provisions in Chapter VI (‘Justice’):

**Article 47: Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

**Article 48: Presumption of innocence and right of defence**

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

**Article 49: Principles of legality and proportionality of criminal offences and penalties**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognized by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

**Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

It will be noted that there is considerable overlap with some of the provisions of the European Convention on Human Rights.

Ashworth and Redmayne make it clear that they are not suggesting that the European Convention on Human Rights is to be regarded as providing a complete solution. They note a number of omissions from the rights it creates – for example, ‘victims’ rights, protection for witnesses, special rights for young people and for women (whether as defendants, victims or witnesses), fault requirements for criminal convictions and so on’ (2005: 376). Thus, they note the need to go beyond the rights enshrined in the Convention (which focus very much on the rights of the defendant) and they write about the needs for the rights of the victim to be part of the equation (2005: 48ff). They are essentially suggesting that adherence (or non-adherence) to human rights provides a useful measure for judging whether or not a criminal justice system is achieving what it ought to achieve and is doing so by legitimate means.
1.2.1.4 *A ‘freedom-based’ approach*

Sanders and Young propose an alternative framework for evaluating criminal justice, namely ‘the enhancement of freedom’. They identify the key aims as follows (2007: 43):

- convicting the guilty;
- protecting the innocent from wrongful conviction;
- protecting victims;
- maintaining human rights: the protection of everyone (innocent and guilty) from arbitrary or oppressive treatment;
- maintaining order;
- securing public confidence in, and co-operation with, policing and prosecution;
- pursuing these goals efficiently and effectively without disproportionate cost and consequent harm to other public services.

They rightly note that few people would disagree with any of these aims, but people will differ on their relative priority.

They take as their starting point in devising a way to critique criminal justice the premise that the primary purpose of the system is ‘to protect and enhance freedom’ (2007: 44). They ‘see none of these objectives as goals in themselves’ but rather as ‘means to achieving the overriding goal of freedom’; allocating priority to conflicting goals is then achieved by prioritising ‘the goal that is likely to enhance freedom the most’ (ibid). Lest this approach be mis-used, they are at pains to emphasise that they ‘reject outright’ the simplistic utilitarian approach whereby ‘the freedom of the majority could “trump” the basic freedoms, or human rights, of an unpopular minority’ (2007: 45). The freedom model can thus be used as a basis for appraising proposals for reform, at least where those proposals include some extension of the coercive powers of the State – such enhancement of State powers should, they say, only be granted ‘if it is likely to enhance more freedom than it erodes’ (2007: 46).

1.2.1.5 *Competing interests in the criminal justice system: stakeholders*

We have seen that Packer’s two models are in some ways best regarded as descriptive rather than evaluative. In order to evaluate the efficacy of a criminal justice system, it is also necessary to examine the interests of all those with a stake in that system. Those ‘stakeholders’ include:

- the State itself, acting on behalf of society as a whole: a key purpose of the criminal law is to ensure that retribution for criminal conduct is meted out by the State, making it less likely that individuals, or their friends and family, will seek their own revenge against the perpetrator (in other words, reducing the risk of vigilantism);
- the victim (whose interests are now formally recognised through victim impact statements and who may want to see the perpetrator punished and may want to receive some sort of compensation for the harm suffered);
- the accused (whether an individual or a corporate body): the accused enjoys the right not to be wrongly convicted. This in turn encompasses three key rights:
  a the right not to be convicted if he is, in fact, innocent;
b the right not to be convicted (irrespective of whether or not he is, in fact, guilty) if the prosecution cannot prove their case against the accused beyond reasonable doubt; and
c the right not to be convicted through an unfair process (one aspect of which is the concept in the jurisprudence of the European Court of Human Rights that there should be ‘equality of arms’ between the accused and the prosecution);

- the family and friends of the accused (who will suffer wrongly if the accused is wrongly convicted);
- the family and friends of the victim (who want to ‘see justice done’);
- the police and prosecuting authorities (whose task could be made impossible by too many rules and regulations limiting what they can do in the investigation and prosecution of crime);
- the prosecuting lawyers (who, in the UK, are meant to be independent from the police but who must have a very close working relationship with the police if they are to perform their role effectively, and who are supposed to be ‘ministers of justice’, putting the facts fairly before the court rather than striving for a conviction at all costs);
- the defence lawyers (who have to represent clients whom they may well believe to be guilty);
- witnesses (some of whom run the risk of intimidation);
- the courts – the judges, magistrates and court staff (who cannot administer the law if cases are not disposed of efficiently and so take an excessive time to be resolved, leading to intolerable backlogs);
- jurors;
- the taxpayer, who ultimately pays for the criminal justice system (the police, the courts, the prosecuting authorities and publicly-funded defence work);
- the media (whose pronouncements often shape public opinion rather than report on public opinion);
- politicians (criminal justice has become a political issue, with the main parties eager to show that they are, to use an often-quoted phrase, ‘tough on crime and tough on the causes of crime’).

It is, of course, somewhat misleading to assess criminal justice issues through the eyes of groups of stakeholders, since all stakeholders in a particular group will not in fact all take the same view. For example, the taxpayer, who effectively funds the criminal justice system, may well want to have a system which is as cost-effective as possible, but different taxpayers would be willing to see different proportions of the State’s income through taxation being spent on criminal justice. Indeed, people may be in more than one category of stakeholder. An individual may, for example, be both a victim of crime and a (suspected) perpetrator of crime during the course of their lifetime. However, some generalisations are possible (and legitimate). For instance, it is not only the (innocent) suspect who has an interest in having a system that protects the innocent from wrongful conviction: the victim of an offence has an interest in the right person being convicted of that offence (if the wrong person is convicted, that means that the real perpetrator has gone unpunished).
1.2.1.6 Resolving the conflict

As Sanders and Young point out (2007: 8), ‘a compromise has to be struck between procedures which allow the effective prosecution of suspected offenders whilst reducing the risk of wrongful conviction to an acceptable level’. This does, however, beg the question what level of wrongful convictions is to be regarded as acceptable. It is sometimes said to be a founding maxim of English law that ‘it is better that ten guilty persons escape, than that one innocent suffer’. This is based on a dictum from William Blackstone’s *Commentaries on the Laws of England* 1765–69 (Book 4, Chapter 27). What level of error should be regarded as acceptable?

The question becomes even harder to answer when we extend it to take account not just of wrongful conviction (the conviction of someone who is in fact innocent) but also of the right not to be convicted by unfair means. As Taylor and Ormerod put it in ‘Mind the gaps: safety, fairness and moral legitimacy’ [2004] Crim LR 266:

> The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from conviction. There is an additional and onerous responsibility to maintain the moral integrity of the criminal process.

The tensions between the interests of particular stakeholders sometimes become even more apparent in the case of serious offences. The more serious the offence, the more important it is that the perpetrator is caught and punished (to deter that person – and others – from committing such offences and to give the public confidence that they are being protected by the law). However, the consequences of a wrongful conviction in such a case are particularly dire for the person suspected of the offence if he is innocent (given the likely sentence for a really serious offence and the effect on the reputation of the accused).

In *R v Ward* (1993) 96 Cr App R 1 at 52, Glidewell LJ, giving the judgment of the court, said that the trial process should be:

> . . . developed so as to reduce the risk of conviction of the innocent to an absolute minimum. At the same time we are very much alive to the fact that, although the avoidance of the conviction of the innocent must unquestionably be the primary consideration, the public interest would not be served by a multiplicity of rules which merely impede effective law enforcement.

It follows, as was said by Lord Bingham in *Brown v Stott* [2003] 1 AC 681 at 704, that ‘a fair balance [has to be struck] between the general interest of the community and the personal rights of the individual’.

One of the leading concepts in the jurisprudence of the European Court of Human Rights is that of ‘proportionality’: it is a legitimate aim to prevent crime, but measures to achieve this objective must be proportionate (in other words, no more than necessary to achieve the legitimate objective).

But what is proportionate? There are tensions or competing interests within the criminal justice system. On the one hand, the system should ensure that the guilty are convicted and the innocent are protected from wrongful conviction. However, if there are too many protections in place to make the conviction of the accused more difficult, it becomes more difficult to convict those who are guilty. These tensions are equally
present when the concept of human rights is applied: the accused (whether in fact innocent or guilty) should enjoy protection from arbitrary or oppressive treatment; on the other hand, the victim has rights too. This ambivalence also appears when one looks at the interests of the State. On the one hand, it is not in the interests of society to have a criminal justice system that allows improper treatment of those suspected of crime; on the other hand, if there are so many barriers to convicting defendants, more people who are in fact guilty will go free (reducing public confidence in the effectiveness of the criminal justice system to protect its members, leading to people being less willing to co-operate with the police and the prosecuting authorities, and increasing the risk of people taking the law into their own hands).

It also has to be borne in mind that criminal justice comes at a price. On one reading of the crime control model, the investigation by the police would be so effective that there would be little need for trials, since all of those (or virtually all of those) brought before the courts would be guilty. However, such thorough investigation would place an intolerable demand on the resources of the police. Likewise, if one were to go to the extreme version of the due process model, trials would take an inordinate length of time (because of the procedural protections which could be invoked) and could result in the cost of investigations being wasted because so many cases are thrown out on the basis of technicalities. Inevitably, there has to be compromise, since the goals of the criminal justice system have to be achieved without disproportionate cost. There is a finite amount of money available for public services: the more that is spent on the justice system, the less there is available for other important public services (education, health, etc.). It is for this reason that there has been a major drive for efficiency and cost effectiveness (for example, Martin Narey’s *Review of Delay in the Criminal Justice System* (Home Office, 1997) and the moves to curb the ever-growing cost of the criminal defence service contained in the Criminal Defence Service Act 2006).

### 1.2.1.7 Trying to achieve the balance: the Criminal Procedure Rules

Section 69 of the Courts Act 2003 makes provision for the creation of Criminal Procedure Rules (mirroring the Civil Procedure Rules). These rules govern the practice and procedure to be followed in the criminal courts. The Rules are made by a committee known as the Criminal Procedure Rules Committee. The membership of the Criminal Procedure Rules Committee is governed by s 70 of the 2003 Act. It comprises the Lord Chief Justice and a number of members appointed by the Lord Chancellor. Under s 70(2), the Committee must include judges of all levels (including High Court/Court of Appeal judges, Circuit Judges, a District Judge (magistrates’ courts), a lay justice, a justices’ clerk, criminal practitioners, a police representative, and representatives of voluntary organisations with a direct interest in the work of criminal courts).

Under s 69(4) of the Courts Act 2003, the power to make or alter Criminal Procedure Rules is to be exercised with a view to securing that:

a. the criminal justice system is accessible, fair and efficient; and
b. the rules are both simple and simply expressed.

The Rules apply to both the Crown Court and the magistrates’ courts, with the
intention of promoting greater integration of the courts and greater consistency of practice.

The Rules begin with an ‘overriding objective’, expressed in the following terms:

1.1 The overriding objective

(1) The overriding objective of this new code is that criminal cases be dealt with justly.

(2) Dealing with a criminal case justly includes—

(a) acquitting the innocent and convicting the guilty;
(b) dealing with the prosecution and the defence fairly;
(c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
(d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
(e) dealing with the case efficiently and expeditiously;
(f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
(g) dealing with the case in ways that take into account—
   (i) the gravity of the offence alleged,
   (ii) the complexity of what is in issue,
   (iii) the severity of the consequences for the defendant and others affected, and
   (iv) the needs of other cases.

1.2 The duty of the participants in a criminal case

(1) Each participant, in the conduct of each case, must—

(a) prepare and conduct the case in accordance with the overriding objective;
(b) comply with these Rules, practice directions and directions made by the court; and
(c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.

(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.

1.3 The application by the court of the overriding objective

The court must further the overriding objective in particular when—

(a) exercising any power given to it by legislation (including these Rules);
(b) applying any practice direction; or
(c) interpreting any rule or practice direction.

Philip Plowden in ‘Make do and mend, or a cultural evolution?’ (2005) 155 NLJ 328, makes the point that it is a matter of regret that the presumption of innocence is not made more explicit in the overriding objective. He also expresses concern at rule 1.1(2)(b), saying that this proposition
seems to propose an equality of interest between defence and prosecution that is alarming. In contrast to civil proceedings, the criminal justice system does not represent the state holding an arena between disputing parties, but is a context where the state and all its resources are ranged against the individual defendant.

It is also to be noted that rule 1.1(2)(d) is selective in the people listed. For example, it fails to include magistrates, despite the fact that the overwhelming majority of cases are dealt with in the magistrates’ court.

Plowden (ibid) expresses most concern at r 1.1(2)(g). He comments:

Even if the proposition is no more sinister than to suggest that the resources allocated to a matter may need to be greater where it is more complex or more serious, it is not drafted in this way. In its present wording it can equally be interpreted as permitting ‘justice on the cheap’ for matters where the penalty is low, or where courts are struggling to deal with many other cases, without taking into account the fundamental principle that the trial must be fair. This would have sat more happily as a separate principle, clearly subject to the overriding objective of dealing with cases justly. It is unattractive that this proposition should be enshrined as part of the overriding objective.

It is of course the case that there has to be some degree of proportionality, since it is not possible – given limited resources – to have an elaborate trial process for even the most minor of offences. However, it is important to underline that the basic requirements of fairness should apply to all trials, whatever the seriousness of the offence.


It is essential to appreciate that the purpose of Rule 1.2(1)(c) is to enable the court to control the preparation process and avoid ineffective and wasted hearings. When something goes wrong because of a failure of a defendant to co-operate with his or her solicitors the court should be aware of this and if the solicitor fails to keep the court informed, he or she risks breaching their duty to the court under the provisions of the Rules.

The Note goes on to state that:

. . . if a solicitor is aware of any significant failure (whether or not the defendant is responsible for that failure) to take any procedural step required by the CPR or any practice direction or any direction of the court, it is neither a breach of the defendant’s right to silence, nor legal professional privilege, for the solicitor to reveal that he or she has been unable to comply with the court’s order.

It would not involve a breach of legal professional privilege for the court to ask the defendant or his or her lawyer to reveal whether instructions have been given, for the purpose of allowing the court to ensure that the case is ready to proceed. It would be a breach, of course, for the court to ask what has been said between them. Courts should be aware that there are difficulties in asking a solicitor to confirm any more than this, for example, whether or not the solicitor has prepared a proof of evidence.
Particular difficulties will arise if a client changes his or her instructions in circumstances where it is proper for the solicitor to continue acting. If the change in instructions will cause delay, whilst the solicitor must inform the court of the likelihood of delay, privilege will prevent disclosure of the reason for it.

This Practice Note highlights the ‘divided loyalty’ faced by the advocate who owes duties both to the client and to the court.

In any event, it is clear that the courts are sometimes prepared to take a different approach to the interpretation of the rules of criminal procedure in light of the overriding objective. In R v Ashton [2006] EWCA Crim 794; [2007] 1 WLR 181, for example, the Court of Appeal held that, whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised (‘a procedural failure’), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is ‘no’, then the court should go on to consider the interests of justice generally, and particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue. The prevailing approach to litigation is to avoid determining cases on technicalities (when they do not result in real prejudice and injustice) but instead to ensure that they are decided fairly on their merits. This approach is reflected in the Criminal Procedure Rules and, in particular, the overriding objective. Accordingly, in the absence of a clear indication that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based on a wide assessment of the interests of justice, with particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice. If that risk is present, the court should then decide whether it is just to permit the proceedings to continue (per Fulford J, giving the judgment of the court, at paras 4 and 9). The consequence of this is that a number of earlier authorities had to be re-visited, since they would be decided differently using the approach laid down in Ashton (see paras 67–69 and 75–78).

The approach taken in Ashton was based on two earlier decisions: R v Sekhon [2002] EWCA Crim 2954, [2003] 1 WLR 1655 and R v Soneji [2005] UKHL 49, [2006] 1 AC 340. However, the impact of Ashton should not be over-estimated. In R v Clarke [2008] UKHL 8; [2008] 1 WLR 338, Lord Bingham of Cornhill (at para 20) said that the effect of the ‘sea-change’ brought about by that line of authority had been exaggerated, and that cases such as Ashton ‘do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect’. In all such cases, the key question is whether Parliament intended a particular procedural failure to nullify the subsequent proceedings.

1.2.1.8 Case management

One of the ways in which it is intended that effect should be given to the overriding objective is through proactive case management. Part 3 of the Criminal Procedure Rules provides as follows:
3.2 The duty of the court

(1) The court must further the overriding objective by actively managing the case.

(2) Active case management includes—

(a) the early identification of the real issues;
(b) the early identification of the needs of witnesses;
(c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
(d) monitoring the progress of the case and compliance with directions;
(e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
(f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
(g) encouraging the participants to co-operate in the progression of the case; and
(h) making use of technology.

(3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

3.3 The duty of the parties

Each party must—

(a) actively assist the court in fulfilling its duty under rule 3.2, without or if necessary with a direction; and
(b) apply for a direction if needed to further the overriding objective.

3.4 Case progression officers and their duties

(1) At the beginning of the case each party must, unless the court otherwise directs—

(a) nominate an individual responsible for progressing that case; and
(b) tell other parties and the court who he is and how to contact him.

(2) In fulfilling its duty under rule 3.2, the court must where appropriate—

(a) nominate a court officer responsible for progressing the case; and
(b) make sure the parties know who he is and how to contact him.

(3) In this Part a person nominated under this rule is called a case progression officer.

(4) A case progression officer must—

(a) monitor compliance with directions;
(b) make sure that the court is kept informed of events that may affect the progress of that case;
(c) make sure that he can be contacted promptly about the case during ordinary business hours;
(d) act promptly and reasonably in response to communications about the case; and
(e) if he will be unavailable, appoint a substitute to fulfil his duties and inform the other case progression officers.
3.5 The court’s case management powers

(1) In fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules.

(2) In particular, the court may—

(a) nominate a judge, magistrate, justices’ clerk or assistant to a justices’ clerk to manage the case;
(b) give a direction on its own initiative or on application by a party;
(c) ask or allow a party to propose a direction;
(d) for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means;
(e) give a direction without a hearing;
(f) fix, postpone, bring forward, extend or cancel a hearing;
(g) shorten or extend (even after it has expired) a time limit fixed by a direction;
(h) require that issues in the case should be determined separately, and decide in what order they will be determined; and
(i) specify the consequences of failing to comply with a direction.

(3) A magistrates’ court may give a direction that will apply in the Crown Court if the case is to continue there.

(4) The Crown Court may give a direction that will apply in a magistrates’ court if the case is to continue there.

(5) Any power to give a direction under this Part includes a power to vary or revoke that direction.

(6) If a party fails to comply with a rule or a direction, the court may—

(a) fix, postpone, bring forward, extend, cancel or adjourn a hearing;
(b) exercise its powers to make a costs order; and
(c) impose such other sanction as may be appropriate.

[Rules 3.6 and 3.7 deal with applications to vary directions and agreement to vary time limits fixed by directions respectively.]

3.8 Case preparation and progression

(1) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.

(2) At every hearing the court must, where relevant—

(a) if the defendant is absent, decide whether to proceed nonetheless;
(b) take the defendant’s plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty;
(c) set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial or (in the Crown Court) the appeal;
(d) in giving directions, ensure continuity in relation to the court and to the parties’ representatives where that is appropriate and practicable; and
(e) where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action.

(3) In order to prepare for a trial in the Crown Court, the court must conduct a plea and case management hearing unless the circumstances make that unnecessary.

3.9 Readiness for trial or appeal

(1) This rule applies to a party’s preparation for trial or (in the Crown Court) appeal, and in this rule and rule 3.10 trial includes any hearing at which evidence will be introduced.

(2) In fulfilling his duty under rule 3.3, each party must—

(a) comply with directions given by the court;
(b) take every reasonable step to make sure his witnesses will attend when they are needed;
(c) make appropriate arrangements to present any written or other material; and
(d) promptly inform the court and the other parties of anything that may—

(i) affect the date or duration of the trial or appeal, or
(ii) significantly affect the progress of the case in any other way.

(3) The court may require a party to give a certificate of readiness.

3.10 Conduct of a trial or an appeal

In order to manage a trial or (in the Crown Court) an appeal—

(a) the court must establish, with the active assistance of the parties, what disputed issues they intend to explore; and

(b) the court may require a party to identify—

(i) which witnesses that party wants to give oral evidence,
(ii) the order in which that party wants those witnesses to give their evidence,
(iii) whether that party requires an order compelling the attendance of a witness,
(iv) what arrangements are desirable to facilitate the giving of evidence by a witness,
(v) what arrangements are desirable to facilitate the participation of any other person, including the defendant,
(vi) what written evidence that party intends to introduce,
(vii) what other material, if any, that person intends to make available to the court in the presentation of the case,
(viii) whether that party intends to raise any point of law that could affect the conduct of the trial or appeal, and
(ix) what timetable that party proposes and expects to follow.

Rules 3.5 and 3.10 were amended by the Criminal Procedure Rules Committee following the case of R (Kelly) v Warley Magistrates’ Court [2007] EWHC 1836 (Admin), in which the Administrative Court had held that the absence of any appropriate sanction within Pt 3, as it was then drafted, rendered ineffectual the particular case management direction that was in issue in that case. Pt 3 was amended to make explicit the court’s powers to impose sanctions.
The concept of robust case management was not a new one. In *R v Jisl* [2004] EWCA Crim 696, Judge LJ said, at para 114:

> The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day’s stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

At para 116, his Lordship concludes that, ‘Active, hands-on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge’s duty’.

This was a point emphasised by Judge LJ in the earlier case of *R v Chaaban* [2003] EWCA Crim 1012, where his Lordship said:

> [35] . . . The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but it is not limited to, the interests of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness), to the jury, or if the jury has not been sworn, to jurors in waiting. Finally, the judge should not overlook the community’s interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.

> [36] Virtually any adjournment produces inconvenience for someone. What used to be described as an adjournment culture, if it ever existed, is a thing of the past. Adjournments have to be justified. If at all possible, they must be avoided. Proper case preparation is required from both sides. When asked to consider an adjournment, the judge must closely scrutinise the application, and, unless satisfied that it is indeed necessary and justified, should refuse it. . . .

> [37] . . . as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.
In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary evenhandedness and flexibility as the interests of justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does.

Philip Plowden in ‘Case management and the Criminal Procedure Rules’ (2005) 155 NLJ 416, says of the requirement that there should be an early identification of the issue in the case:

Many will find less palatable the proposition that a defendant can therefore be required to indicate, in advance, the detail of what he disputes about the prosecution case. It is true that the criminal trial is ‘not a game under which a guilty defendant should be provided with a sporting chance’, but if there is a meaningful presumption of innocence, it is hard to see why the defendant should be required to assist the prosecution to prepare their case and to convict him.

He concludes that ‘there can be no principled objection to the efficient management of cases by the court, provided that the pressure to progress the case never undermines the need for a fair trial’ but that ‘if the case management provisions of the Criminal Procedure Rules are to succeed in their objective, they will need to show their requirements take account of the realities of criminal practice’. He points out that delay can arise because of parties other than the defence and prosecution – there may, for example, be delay in obtaining necessary evidence.

R (Robinson) v Sutton Coldfield Magistrates’ Court [2006] EWHC 307 (Admin); [2006] 4 All ER 1029 concerned failure to comply with time limits under the Rules and the granting by the court of an extension of time. The court rejected the argument that the discretion to extend time should be fettered by a requirement that the time should only be extended in exceptional circumstances, but went on to rule that ‘any application for an extension will be closely scrutinised by the court’ (per Owen J at para 16).

1.2.1.9 Code of practice for victims

One of the themes of Government pronouncements on the criminal justice system in recent years has been the need to shift the balance so that the focus is not just on the rights of the accused but also the needs of others – most importantly, the victim – are taken properly into account.

Section 32 of the Domestic Violence, Crime and Victims Act 2004 makes provision for the publication of a Code of Practice for victims. It provides as follows:

(1) The Secretary of State must issue a code of practice as to the services to be provided to a victim of criminal conduct by persons appearing to him to have functions relating to—

(a) victims of criminal conduct, or
(b) any aspect of the criminal justice system.
(3) The code may include provision requiring or permitting the services which are to be provided to a victim to be provided to one or more others—
   (a) instead of the victim (for example where the victim has died);
   (b) as well as the victim.

(4) The code may make different provision for different purposes, including different provision for—
   (a) different descriptions of victims;
   (b) persons who have different functions or descriptions of functions;
   (c) different areas.

(5) The code may not require anything to be done by—
   (a) a person acting in a judicial capacity;
   (b) a person acting in the discharge of a function of a member of the Crown Prosecution Service which involves the exercise of a discretion.

(6) In determining whether a person is a victim of criminal conduct for the purposes of this section, it is immaterial that no person has been charged with or convicted of an offence in respect of the conduct.

... Under s 34(2):

... the code is admissible in evidence in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings.

The Code was duly published in 2005 and is available at <http://www.homeoffice.gov.uk/documents/victims-code-of-practice>

1.3 ABUSE OF PROCESS

The values of the criminal justice system come into sharp focus in any consideration of ‘abuse of process’. Where proceedings would amount to an abuse of process, the court may order that those proceedings be stayed, the effect of which is that the case against the accused is stopped.

In R v Beckford [1996] 1 Cr App R 94, Neill LJ said (at 100) that the constitutional principle which underlies the jurisdiction to stay proceedings is that ‘the courts have the power and the duty to protect the law by protecting its own purposes and functions’. His Lordship quoted the words of Lord Devlin in Connelly v DPP [1964] AC 1254 at 1354, that the courts have ‘an inescapable duty to secure fair treatment for those who come or are brought before them’.

In Horseferry Road Magistrates’ Court, ex p Bennett [1994] 1 AC 42, there was no suggestion that the accused could not have a fair trial. However, it was held that the court nonetheless had power to stay the proceedings. Lord Griffiths (at 61–2) said:
If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law . . . I have no doubt that the judiciary should accept this responsibility in the field of criminal law.

In *DPP v Humphreys* [1977] AC 1, Lord Salmon (at 46) commented that a judge does not have:

any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is . . . of great constitutional importance and should be jealously preserved.

In *Beckford*, Neill LJ (at 101) identified two types of case which are likely to amount to an abuse of process:

a cases where the court concludes that the defendant cannot receive a fair trial; and
b cases where the court concludes that it would be unfair for the defendant to be tried.

In *Derby Crown Court, ex p Brooks* (1985) 80 Cr App R 164, Sir Roger Ormrod said (at 168–9) that:

The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either:

(a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or

(b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution . . .

The first of these categories focuses on the trial process; the latter is applicable where the accused should not be standing trial at all (irrespective of the fairness of the actual trial).

In abuse of process cases, two key questions usually have to be addressed:

1 to what extent is the accused prejudiced?
2 to what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators or the prosecution?
There is no exhaustive list of matters which are capable of amounting to abuse of process but it is possible to derive some broad categories from the case law. Important examples include:

- lengthy delay which causes prejudice to the accused;
- failure to honour an undertaking given to the accused;
- failing to secure evidence or destroying evidence;
- tactical manipulation or misuse of procedures in order to deprive the accused of some protection provided by the law, or taking unfair advantage of a technicality;
- entrapment;
- abuse of executive power.

It should be noted that it is not an abuse of process to prosecute someone where the evidence against them is weak, and so a judge has no power to prevent the prosecution from presenting their evidence merely on the basis that he considers a conviction unlikely (Attorney General’s Ref (No 2 of 2000) [2001] 1 Cr App R 36).

It should also be borne in mind that, although much of the case law on abuse of process comes from cases tried in the Crown Court, abuse of process arguments can also be raised in a magistrates’ court. However, in Horseferry Road Magistrates’ Court, ex p Bennett [1994] 1 AC 42, the House of Lords ruled that the jurisdiction exercised by magistrates to protect the court’s process from abuse is confined strictly to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing (such as delay or unfair manipulation of court procedures). It does not extend to a wider supervisory jurisdiction to uphold the rule of law. The rationale behind this distinction is that supervision of the use of executive power is a responsibility that is properly vested in the High Court. It follows that where such an issue arises in a magistrates’ court, the proper course is for the magistrates to adjourn the matter so that an application can be made to the Divisional Court (or at least to send the case to the Crown Court for trial if the offence is not triable only in the magistrates’ court). In R (Salubi) v Bow Street Magistrates’ Court [2002] 1 WLR 3073, the Divisional Court reiterated that a magistrates’ court’s power to stay criminal proceedings for abuse of process is strictly confined to matters directly affecting the fairness of a trial before it and that this power should be exercised sparingly.

Where the defence argue that the prosecution is an abuse of process, they bear the burden of establishing abuse, on the balance of probabilities (Telford Justices ex p Badhan [1991] 2 QB 78). It should be noted, however, that in R v S [2006] EWCA Crim 756, Rose LJ observed (at para 20) that:

> the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment rather than on any conclusion as to fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process.

It is submitted that this comment should be taken as applying to abuse of process applications generally (i.e. it should not be limited to those where delay is an issue), since the balancing of competing interests is at the heart of abuse claims. Nonetheless,
it is clear that there is, in effect, a presumption that the trial should go ahead unless there is a compelling reason for stopping it from taking place.

In very rare cases, the court may intervene to prevent an abuse of process before a suspect has been formally charged. However, the court will order that a police investigation be discontinued, on the basis that there is no prospect of an eventual prosecution, only in the most exceptional cases. Where there were unquestionably reasonable grounds initially to suspect a person under investigation, the Court should be very slow to second-guess the police in deciding at what point he can be dismissed from the enquiry; to hold otherwise would involve an unwelcome blurring of the separate roles of Court and prosecutor/investigator (R C v Chief Constable of ‘A’ [2006] EWHC 2352 (Admin), per Underhill J at para 32).

We will now look in a little more detail at some of the broad categories of abuse of process, so that we can consider the themes that emerge from the case law.

1.3.1 Delay

Deliberate delay is likely to be held to amount to an abuse of process. For example, in Brentford Justices, ex p Wong [1981] QB 445, proceedings (for careless driving) were commenced (just) within the six-month period permitted for summary offences by s 127 of the Magistrates’ Courts Act 1980 but the summons was not served until three months later. The prosecutor accepted that the delay was because he had not then reached a firm decision on whether to take proceedings, and he was trying to keep his options open. The Divisional Court held that the case could properly be regarded as one where the proceedings should be stayed.

Where the delay is inadvertent, the proceedings may nevertheless be stayed if there has been inordinate or unconscionable delay due to the prosecution’s inefficiency, and prejudice to the defence from the delay is either proved or to be inferred (per Lloyd LJ in Gateshead Justices ex p Smith (1985) 149 JP 681). In Grays Justices, ex p Graham [1982] QB 1239, it was held that, although delay alone could be sufficient to justify a stay of proceedings, if sufficiently prolonged, some other impropriety is generally required. The test to be applied is whether the delay in bringing the proceedings is of such magnitude as to render them vexatious and an abuse of the court’s process. At p 1248, May LJ said, ‘we do not think that this court should create any form of artificial limitation period for criminal proceedings where it cannot truly be said that the due process of the criminal courts is being used improperly to harass a defendant’. In summary, then, the delay must cause prejudice to the accused, and the delay must be unjustified.

In Bow Street Stipendiary Magistrate, ex p DPP (1990) 91 Cr App R 283 at 296–7, Watkins LJ made it clear that, to amount to an abuse of process, delay has to produce ‘genuine prejudice and unfairness’. In some cases, however, prejudice would be presumed from substantial delay and the prosecution will have to rebut that inference of prejudice. At p 300, his Lordship reiterated that it is ‘perfectly proper, according to circumstances, to infer prejudice from the mere passage of time’, and added that such an ‘inference is more easily drawn when dealing with a single brief but confused event which must depend on the recollections of those involved’. Similarly, in Telford Justices, ex p Badhan [1991] 2 QB 78, the Court of Appeal said that, whilst it is for the accused to show on the balance of probabilities that a fair trial is now impossible, where the period
of delay is long, it can be legitimate for the court to infer prejudice without proof of specific prejudice.

In Bell v DPP of Jamaica [1985] AC 937, the Privy Council laid down guidelines for determining whether delay would deprive the accused of a fair trial. The relevant factors were said to be:

- the length of delay;
- the prosecution’s reasons to justify the delay;
- the accused’s efforts to assert his rights; and
- the prejudice caused to the accused.

In Attorney General’s Ref (No 1 of 1990) [1992] QB 630, Lord Lane CJ said (at 643):

> Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances... In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.

> ...no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.

The same approach was adopted by the House of Lords in Attorney General’s Ref (No 2 of 2001) [2004] 2 AC 72. In that case, their Lordships had to consider (inter alia) whether criminal proceedings might be stayed on the ground that there had been a breach of the reasonable time requirement imposed by Art 6(1) of the European Convention on Human Rights in circumstances where the accused could not demonstrate that any prejudice had arisen from the delay. Lord Bingham, at para 24, said:

> If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant’s Convention right under article 6(1). For such breach there must be afforded such remedy as may (Article 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be
appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant’s Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant’s Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

It follows that a stay should not be ordered if the defendant’s right to a fair trial can be protected in some other way, such as excluding particular items of evidence, or directing the jury about the problems caused to the defence by the delay.

In *Dyer v Watson* [2004] 1 AC 379, Lord Bingham said that the ‘threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed’ (para 52). His Lordship went on to say that, if the period which has elapsed is one which, on its face and without more, gives ground for real concern, it is necessary for the court to look into the detailed facts and circumstances of the particular case (ibid). His Lordship then listed the factors to be taken into account:

- the complexity of the case (the more complex a case, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing);
- the conduct of the defendant (a defendant cannot properly complain of delay which he has caused);
- the manner in which the case has been dealt with by the administrative and judicial authorities (i.e. the prosecution and the court).

There is no general obligation on a prosecutor to act with all due expedition and diligence, but a marked lack of expedition, if unjustified, would point towards a breach of the reasonable time requirement (para 55).

More recently, the Court of Appeal, in *R v S* [2006] EWCA Crim 756; (2006) 170 JP 434, Rose LJ (at para 21) summarised the position as follows:

(i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
(ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;
(iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
(iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;

(v) if, having considered all these factors, a judge’s assessment is that a fair trial will be possible, a stay should not be granted.

The possibility of giving the defendant some other redress for the delay must not be overlooked. In Spiers (Prosecutor Fiscal) v Ruddy [2007] UKPC D2, Lord Bingham of Cornhill said (at para 16) that in cases where there has, or may have been such delay in the conduct of proceedings as to breach a party’s right to trial within a reasonable time but where the fairness of the trial has not been or will not be compromised . . . such delay does not give rise to a continuing breach which cannot be cured save by a discontinuation of proceedings. It gives rise to a breach which can be cured, even where it cannot be prevented, by expedition, reduction of sentence or compensation, provided always that the breach, where it occurs, is publicly acknowledged and addressed.

In the Crown Court, where there has been delay in bringing the prosecution, specimen direction number 37 (issued by the Judicial Studies Board) suggests that the trial judge should point out to the jury that, because they are concerned with events which are said to have taken place a long time ago, they must appreciate that there may be a danger of real prejudice to the accused and this possibility must be borne in mind when considering whether the case against him has been proved. The jury should be directed that they should ‘make allowances for the fact that, from the defendant’s point of view, the longer the time since an alleged incident, the more difficult it may be for him to answer it’ and that (even if they believe that the delay is understandable) if they decide that, because of the delay, the accused has been placed at a real disadvantage in putting forward his case, they must take that into account in his favour when deciding if the prosecution has made them sure of his guilt. An important question is therefore whether, in the particular circumstances of the case, such a warning is adequate to negate the prejudice that the accused would otherwise suffer because of the delay.

Cases involving sexual offences, such as child abuse cases, may be regarded as an exceptional category in their own right. It is often the case that such allegations emerge a long time after the alleged abuse took place. The view generally taken by the courts is that the unfairness can be minimised by a direction to the jury to take proper account of the fact that the accused was handicapped in defending the case because of the length of time which has elapsed since the alleged offence was committed. Any residual prejudice is regarded as outweighed by the importance of prosecuting such serious offences. See, for example, R v E [2004] 2 Cr App R 621, where the Court of Appeal dismissed an appeal against conviction on the basis that the appellant was not put in an impossible position to defend himself; the Court said that juries should be trusted to make allowances not only for the lapse of time but also for the difficulties faced by the accused.

In R v Smolinski [2004] EWCA Crim 1270; [2004] 2 Cr App R 40, Lord Woolf CJ (at paras 8 and 9) pointed out that in cases of alleged sexual offences, it is sometimes very
difficult for young children to speak about such matters and therefore it is only many
years later that the offences come to light. However, when a long time has elapsed,
careful consideration must be given by the prosecution as to whether it is right to bring
the prosecution at all. If, having considered the evidence to be called, and the witnesses
having been interviewed on behalf of the prosecution, a decision is reached by the
prosecuting authorities that the case should proceed, then unless the case is exceptional,
an abuse of process application will be unsuccessful. If an application is to be made to a
judge, the best time for doing so is after any evidence has been called and for the judge
then, having scrutinised the evidence with particular care, to come to a conclusion
whether or not it is safe for the matter to be left to the jury. A similar point about the
timing of applications based on abuse of process was made by Hooper LJ in R v Burke
[2005] EWCA Crim 29 (at para 32):

Prior to the start of the case it will often be difficult, if not impossible, to determine whether
a defendant can have a fair trial because of the delay coupled with the destruction of
documents and the unavailability of witnesses. Issues which might seem very important
before the trial may become unimportant or of less importance as a result of developments
during the trial, including the evidence of the complainant and of other witnesses including
the defendant should he choose to give evidence. Issues which seemed unimportant before
the trial may become very important.

John Jackson and Jenny Johnstone, in ‘The reasonable time requirement: an independ-
ent and meaningful right?’ [2005] Crim LR 3 argue that the House of Lords in Attorney
General’s Reference (No 2 of 2001) was too restrictive in its ruling that it would only be
appropriate in very exceptional cases to grant a stay of proceedings after a breach of
the Convention right to be brought to trial within a reasonable time. They argue that, in
the absence of any other readily available remedy, this means that the right is not as
meaningful as it should be. Their criticisms are based on three principal grounds:

i although their Lordships conceded that there could be exceptional situations
where the sheer length of the proceedings may justify a stay, they did not place
enough emphasis on the fact that an unreasonable delay may cause such prejudice
to the accused that the only appropriate response in this situation is to stay the
proceedings;

ii the need for criminal proceedings to be brought to final determination cannot
be separated from the need to bring about this finality within a reasonable time,
since there will be circumstances when delay will make it impossible to achieve
finality; and

iii there is also a case for not holding a trial where it is no longer fair on the
participants to require them to recount events and account for actions so far in
the past.

1.3.2 Failing to obtain, losing or destroying evidence

The leading authority on such cases is R (Ebrahim) v Feltham Magistrates’ Court [2001]
EWHC Admin 130; [2001] 1 WLR 1293. Brooke LJ said (at para 74) that the starting
point must be whether there was a duty on the investigator to obtain or retain the
material in question. If there was a duty, and that duty has been breached, a stay will be granted only if the accused has suffered 'serious prejudice' as a result of the failure to obtain the evidence, or by its loss or destruction. Brooke LJ said that there has to be either an element of bad faith, or at the very least some serious fault, on the part of the police or the prosecution authorities, for this ground of challenge to succeed (para 23). It follows that a stay will, unless there has been bad faith on the part of the prosecution, only be granted where the accused could not have a fair trial. At para 25 Brooke LJ said:

Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.

(ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

At para 27, his Lordship went on:

It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.

Other cases illustrate how the courts apply these principles. For example, in R v Medway [2000] 1 Cr App R (S) 191, the accused was convicted of robbery. It was alleged that he robbed an elderly lady of her handbag. A closed-circuit television camera was operating in the area, but the police, having looked at the film, decided that it contained nothing of value. The tape was destroyed. The trial judge refused to stay the trial as an abuse of process. The Court of Appeal dismissed the appeal, saying that there was nothing to show that the absence of the tape made the conviction unsafe. An accused could be disadvantaged in a case where evidence had been tampered with, lost or destroyed, but it was only in exceptional circumstances (for example, where such interference was malicious) that a stay was justified. The clear implication is that a defendant is disadvantaged only if the absence of the evidence might have made a difference to the outcome of the trial.

In R v Dobson [2001] EWCA Crim 1606, the Court of Appeal considered the position where police had failed to obtain CCTV footage which might have been relevant to the accused’s defence of alibi. Potter LJ (at para 34) said that, in determining whether there was an abuse of process, it was appropriate to consider:
What was the duty of police in the circumstances?

Did the police fail in their duty in not obtaining and retaining the relevant video tape footage?

If so, was the prejudice suffered ‘serious prejudice to the extent that no fair trial could be held’ in the light of such failure?

Separately from (3), did the police failure constitute such bad behaviour, in the sense of bad faith or serious fault, as to render it unfair that the defendant should be tried at all?

In the present case, the police should have looked at the CCTV footage, and had failed in their duty to do so. However, the prejudice was not serious because it was uncertain whether the footage would have assisted the defence, and the accused could have requested it or sought other evidence to support his alibi. There was no question of malice or intentional omission, as opposed to oversight, on behalf of the police. The judge was therefore right to conclude that a fair trial was possible.

In *Khalid Ali v Crown Prosecution Service, West Midlands* [2007] EWCA Crim 691, the Court of Appeal emphasised that, in such cases, the mere fact that missing material might have assisted the defence will not necessarily lead to a stay. In considering whether or not to order a stay, the court will have regard to whether there is sufficiently credible evidence, apart from the missing evidence, leaving the defence to exploit the gaps left by the missing evidence. Moses LJ (at para 30) said that the ‘rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing’.

A similar approach was taken in *DPP v Cooper* [2008] EWHC 507 (Admin), where the prosecution case was that bank notes in the accused’s possession had tested positive for the presence of heroin. The forensic test had been video-taped. However, the video had been lost. Moreover, the defence were unable to carry out their own independent tests on the bank notes because they had been tested using a spray that would make subsequent testing impossible. The defence therefore submitted that they had been denied access to material which was clearly relevant to the issues in the case, and that a fair trial could not take place as they had been denied the ability to rebut the expert evidence of the prosecution as a result of a failure on the part of the police to preserve evidence until the conclusion of the proceedings. The Administrative Court held that the proceedings did not constitute an abuse of process. At para 9, Silber J pointed out that the defendant still had adequate means to challenge the prosecution case, since the forensic scientist who conducted the tests on the bank notes could have been questioned about the way she conducted those tests and how she had reached her results; moreover, the magistrates or jury would have been able to make adequate allowance for the fact that the defendant had not been able to see a video of the tests being carried out or to carry out their own tests.

### 1.3.3 Going back on a promise

In *R v Croydon Justices, ex p Dean* [1993] QB 769, the Divisional Court held that, where the police give a person an undertaking, promise or representation that he will not be charged in exchange for his co-operation, it may amount to an abuse of process if he is subsequently prosecuted. In such circumstances, it is not necessary for the accused to show that there was bad faith on the part of the police.
An example of a prosecution change of mind amounting to an abuse of process is *R v Bloomfield* [1997] 1 Cr App R 135. The defendant was charged with possession of a Class A controlled drug. At a preliminary hearing, prosecuting counsel indicated to the defence that the Crown wished to offer no evidence because it was accepted that the accused had been the victim of a set-up. Owing to the presence in court of certain people, it would have been embarrassing to the police and prosecution if no evidence had been offered that day, so counsel spoke to the judge in his room. An order was then made in open court to adjourn the case and re-list it ‘for mention’. The Crown Prosecution Service (CPS) subsequently arranged a conference with new prosecuting counsel and informed the defence that there had been a change of plan and that the Crown intended to continue the prosecution against the defendant. An application at the trial to stay the proceedings as an abuse of process failed. However, it was held by the Court of Appeal that allowing the prosecution to go ahead amounted to an abuse of process since, whether or not there was prejudice to the accused, it would bring the administration of justice into disrepute if the Crown were permitted to revoke its original decision. The concept of ‘bringing the administration of justice’ into disrepute is an important one in the field of abuse of process.

Similarly, *R (H) v Guildford Youth Court* [2008] EWHC 506 (Admin) concerned a juvenile accused of assault. Before he was interviewed by the police, it was intimated to his solicitor that it was possible that the case would be dealt with by way of a final warning as a way of resolving the matter. The juvenile admitted the offence and was bailed to an ‘intervention clinic’, when it was indicated that the matter would be dealt with by way of a final warning. The CPS subsequently decided that a prosecution would be appropriate, and the juvenile was charged. Silber J, at para 16, ruled that ‘the fact that a promise was made by an officer of the State, namely the police officer who was in charge at that stage deciding whether or not to prosecute, is something that there is a clear public interest in upholding’. The proceedings should therefore have been stayed as an abuse of process.

Another example is *Jones v Whalley* [2006] UKHL 41; [2007] 1 AC 63, where a private prosecution was held to be an abuse of process because the accused had previously been cautioned by the police for the offence in question, and the terms of the caution had said, expressly, that he would not have to go before a criminal court in connection with the matter. The House of Lords observed that allowing private prosecutions to proceed, despite an assurance that the offender would not have to go to court, would tend to undermine the system of cautions. It should be noted that the abuse complained of in this case was not abuse going to the fairness of the trial (since evidence of the accused’s admission to the offence, and of the caution administered by the police, could have been excluded), but went to the fairness of trying the accused at all.

Giving an indication that the case will be dropped does not necessarily mean that it will be an abuse of process for the prosecution to have a change of mind. In *R v Mulla* [2003] EWCA Crim 1881; [2004] 1 Cr App R 6, the defendant was charged with causing death by dangerous driving. On the first day of the trial, the prosecution indicated that they would be willing to accept a plea of guilty to the lesser charge of careless driving. The judge was unhappy with this and invited the prosecutor to reconsider. Later that day, having reconsidered the matter, the prosecution indicated that they had decided to proceed with the original charge of causing death by dangerous driving. The Court of
Appeal held that this did not amount to an abuse of process. This was not a case in which the accused’s hopes were raised, later to be dashed, since he knew from the beginning of the proceedings in court that the judge did not approve of the course which the prosecution were proposing to take. The court said that factors to be considered include what view is expressed by the judge when the prosecution gives its indication, the period of time over which the prosecution reconsiders the matter before they change their mind, whether or not the accused’s hopes have been inappropriately raised, and whether there has been, by reason of the change of course by the prosecution, any prejudice to the defence (per Rose LJ at para 22).

In *R v Abu Hamza* [2006] EWCA Crim 2918; [2007] QB 659, Lord Phillips CJ (at para 54) said that where a person has been told he will not be prosecuted for an offence:

> it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation.

Lord Phillips added (at para 50) that:

> it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.

A similar approach was taken in *DPP v B* [2008] EWHC 201 (Admin), where the accused was originally charged with a single charge of sexual assault. However, when he appeared before the Crown Court, the judge considered that the single count failed to reflect the criminality which was alleged against the accused, the complainant having alleged that she had been sexually abused by the accused over a period of years. The prosecution subsequently sought to bring 17 charges of sexual assault against the accused, to reflect the years over which the sexual abuse had allegedly occurred. The Divisional Court held that this did not amount to an abuse of process. Latham LJ pointed out (at para 10) that proceedings should be stayed for abuse of process only ‘in very exceptional circumstances, where it can properly be said that the consequence would be injustice, or where the circumstances giving rise to the proceedings in respect of which the application is made offend one’s sense of justice overall’. His Lordship (at para 12) accepted that the accused was clearly at risk of a substantially greater sentence than he would have been under the original charge, but said that this was not unjust, since the accused was not going to be exposed to any sentence other than the proper sentence that should be imposed for the offences which were established (whether through guilty pleas or following trial) against him.

### 1.3.4 Manipulation of procedure

An example of manipulation of procedure is where a charge alleging a summary offence is replaced with one alleging an indictable offence, or vice versa. Paragraph 7.3
of the Code for Crown Prosecutors (see below) makes it clear that the charge should not be changed simply because of the decision made as to trial venue. In *R v Canterbury and St Augustine Justices, ex p Klisiak* [1982] QB 398, it was said that the court should interfere with the prosecution decision as to what offences to proceed with only ‘in the most obvious circumstances which disclose blatant injustice’ (per Lord Lane CJ at p 411). Thus, it has to be clear that the change in the charge is not a bona fide result of a re-assessment of the appropriateness of the original charge. As it was put in *R v Sheffield Justices, ex p DPP* [1993] Crim LR 136, it is only appropriate to interfere where the court concludes that the prosecution were acting in bad faith (deliberately manipulating the system to deprive an accused of his rights).

1.3.5 Entrapment

The leading authority on entrapment is *R v Looseley* [2001] UKHL 53; [2001] 1 WLR 2060. The House of Lords held that, although entrapment is not a substantive defence in English law, where an accused can show entrapment, the court should normally stay the proceedings, since a prosecution founded on entrapment would be an abuse of the court’s process. Lord Nicholls of Birkenhead (at para 19) said:

> Police conduct which brings about, to use the catchphrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience . . . In a very broad sense of the word, such a prosecution would not be fair.

However, his Lordship continued (at para 21):

> If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent.

At para 23, his Lordship says that:

> a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime . . . The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime.

As Lord Hutton put it, at para 101, particular emphasis is placed on the need:

> to consider whether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity.
to commit a similar crime, and when he freely took advantage of the opportunity presented
to him by the officer.

It follows that if a person freely takes advantage of an opportunity to break the law
given to him by a police officer, the police officer is not to be regarded as inciting or
instigating the crime.

Ultimately, however, as Lord Nicholls points out at para 25:

... the overall consideration is always whether the conduct of the police or other law
enforcement agency was so seriously improper as to bring the administration of justice into
disrepute.

His Lordship goes on to enumerate some of the factors to which the court must have
regard when applying this test (paras 26–29):

*The nature of the offence.* The use of pro-active techniques is more needed and, hence, more
appropriate, in some circumstances than others. The secrecy and difficulty of detection,
and the manner in which the particular criminal activity is carried on, are relevant
considerations.

*The reason for the particular police operation.* It goes without saying that the police must act
in good faith and not, for example, as part of a malicious vendetta against an individual or
group of individuals. Having reasonable grounds for suspicion is one way good faith may be
established, but having grounds for suspicion of a particular individual is not always essential.
Sometimes suspicion may be centred on a particular place, such as a particular public house.
Sometimes random testing may be the only practicable way of policing a particular trading
activity.

*The nature and extent of police participation in the crime.* The greater the inducement held
out by the police, and the more forceful or persistent the police overtures, the more readily
may a court conclude that the police overstepped the boundary: their conduct might well
have brought about commission of a crime by a person who would normally avoid crime of
that kind. In assessing the weight to be attached to the police inducement, regard is to be had
to the defendant’s circumstances, including his vulnerability. This is not because the stand-
ards of acceptable behaviour are variable. Rather, this is a recognition that what may be a
significant inducement to one person may not be so to another. For the police to behave as
would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the
defendant will not normally be regarded as objectionable.

*The defendant’s criminal record.* The defendant’s criminal record is unlikely to be relevant
unless it can be linked to other factors grounding reasonable suspicion that the defendant is
currently engaged in criminal activity . . .

The House of Lords also noted that there is no appreciable difference between the
requirements of Art 6 of the European Convention on Human Rights (having
regard to relevant decisions of the European Court of Human Rights, such as *Teixeira
1.3.6 Abuse of executive power

Abuse of executive power is a further (indeed extreme) example of matters which may bring the administration of justice into disrepute. In *R v Horseferry Road Magistrates’ Court, ex p Bennett* [1994] 1 AC 42, the accused had been brought back forcibly to the UK in disregard of the extradition procedures that were available. This was held to amount to an abuse of process even though a fair trial was possible. The point was that the accused should not have been before the court in the first place. Similarly, in *R v Mullen* [2000] QB 520, the security services and police had procured the defendant’s unlawful deportation from Zimbabwe. The Court of Appeal ruled that, even if no complaint can be made as to the fairness of the trial itself, unconscionable conduct on the part of the authorities in bringing the accused before the court may amount to an abuse of process. This will be the case ‘where it would be offensive to justice and propriety to try the defendant at all’ (per Rose LJ at p 537). Thus, a conviction may be regarded as unsafe on the basis that the trial on which it was founded was an abuse of process.

The same approach had been adopted by the House of Lords in *R v Latif* [1996] 1 WLR 104. The defendant was convicted of being knowingly concerned in the importation into the UK of heroin which had been brought into the country by an undercover customs officer. The House of Lords held that whether the proceedings should have been stayed on the ground of abuse was a matter of discretion for the judge, who had to decide whether the matters said to constitute abuse of process amounted to what Lord Steyn described (at p 112) as an ‘affront to the public conscience’. His Lordship added (at p 113) that this requires the judge to:

> balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

Closely related to abuse of executive power are cases where the investigators have behaved in a way that is wholly improper. A good example is *R v Grant* [2005] EWCA Crim 1089; [2006] QB 60, where the police unlawfully intercepted and recorded privileged conversations between the suspect and his legal advisor. No useful evidence was gathered in this way, and so there was nothing to exclude under s 78 of the Police and Criminal Evidence Act 1984. Laws LJ (at para 54) said that the court was:

> . . . in no doubt but that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person’s right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court.

His Lordship concluded (at para 57) that the deliberate interference with the suspect’s right to the confidence of privileged communications with his solicitor ‘seriously undermines the rule of law and justifies a stay on grounds of abuse of process, notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of police officers’ unlawful conduct’.
1.4 ETHICS AND CRIMINAL JUSTICE: A SELECTION OF MATERIALS

For a discussion of ethical issues that arise in criminal cases, see:


The journal *Legal Ethics* (Hart Publishing <http://www.hartjournals.co.uk/le/>) contains interesting articles on the ethical dimensions of the practice of law. For example, see:

- John Jackson, ‘The Ethical Implications of the Enhanced Role of the Public Prosecutor’ (2006) 9 *Legal Ethics* 35 (exploring the ethical implications that arise from the enhanced role being given to public prosecutors in England and Wales in advising on criminal investigation, directing charges and in diversion and advocacy. Jackson argues that in order to develop ethical principles that take full account of these expanding activities, there is a need for a clearer delineation of their professional role within the criminal justice system. It is argued that as part of their prime concern to protect the well-being of the community, prosecutors should play a greater role in fostering restorative justice).
- Ed Cape, ‘Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers’ (2006) 9 *Legal Ethics* 56 (considering the ethical obligations of criminal defence lawyers in the context of significant change to the criminal process in England and Wales. Cape argues that since coming to power in 1997 the Labour Government has been engaged in a programme of changing the criminal justice system from one based upon the principle of fair trial rights to one based on ‘managerialist’ values. He argues that defence lawyers are increasingly being prevented from acting in the best interests of their clients and that professional conduct rules fail adequately to articulate and prioritise the relationship between the lawyer’s obligation to the client and to the court, with the result that lawyers are left to resolve ethical dilemmas created or exacerbated by the transformation of the criminal process without adequate ethical guidance. He proposes that the legal professions should challenge the Government’s plans to transform the criminal process, and re-fashion professional conduct rules around human rights values).
- Lee Bridges, ‘The Ethics of Representation on Guilty Pleas’ (2006) 9 *Legal Ethics* 80 (addressing what should be the ethical stance of criminal defence lawyers when representing clients on guilty pleas. Bridges considers whether there are circumstances in which a defence lawyer should withdraw from representation rather than continue to act for a client who intends to plead guilty. He notes that ethical discussion tend to focus on two issues which arise in relation to the client who intends to plead not guilty: how far the lawyer can go ethically in advising such a client to change his plea to guilty, especially where the prospects of acquittal are poor and in a situation where conviction following trial is likely to result in a more...
severe sentence; and what ethical limitations are placed on the lawyer in continuing
to represent a client where that client tells the lawyer that he is in fact guilty but
wishes to proceed on the basis of a not guilty plea. Bridges addresses what should
be the ethical stance of the defence lawyer in the opposite situation, where the
client privately claims to be innocent (and the lawyer may well believe that he or she
is innocent and that there is a good chance of acquittal) but states an intention to
plead guilty, possibly because of pressure from within the criminal justice system
(e.g. in order to be eligible for a lesser sentence than if convicted following a not
guilty plea) or from external factors).

It is also instructive to look at s 3 of the Bar’s Code of Conduct (available on the
website of the Bar Standards Board at <http://www.barstandardsboard.org.uk/stand-
ardsandguidance/codeofconduct/>), part of which deals with criminal cases. It deals
with the duties of prosecuting and defence counsel, and so far as the latter is concerned
addresses such issues as what to do if a client says that he is innocent but wants to plead
guilty anyway, and what counsel should do if a client confesses his guilt to counsel (see
 ss 11.5 and 12). The Code provides as follows:

Standards Applicable in Criminal Cases

10 Responsibilities of Prosecuting Counsel

10.1 Prosecuting counsel should not attempt to obtain a conviction by all means at
his command. He should not regard himself as appearing for a party. He should lay
before the Court fairly and impartially the whole of the facts which comprise the case
for the prosecution and should assist the Court on all matters of law applicable to
the case.

10.2 Prosecuting counsel should bear in mind at all times whilst he is instructed:

(i) that he is responsible for the presentation and general conduct of the case;
(ii) that he should use his best endeavours to ensure that all evidence or material that
ought properly to be made available is either presented by the prosecution or
disclosed to the defence.

10.3 Prosecuting counsel should, when instructions are delivered to him, read them expeditiously and, where instructed to do so, advise or confer on all aspects of the case well
before its commencement.

10.4 In relation to cases tried in the Crown Court, prosecuting counsel:

(a) should ensure, if he is instructed to settle an indictment, that he does so promptly
and within due time, and should bear in mind the desirability of not overloading an
indictment with either too many defendants or too many counts, in order to
present the prosecution case as simply and as concisely as possible;
(b) should ask, if the indictment is being settled by some other person, to see a copy of
the indictment and should then check it;
(c) should decide whether any additional evidence is required and, if it is, should advise
in writing and set out precisely what additional evidence is required with a view to
serving it on the defence as soon as possible;
(d) should consider whether all witness statements in the possession of the
prosecution have been properly served on the defendant in accordance with the Attorney General’s Guidelines;

(e) should eliminate all unnecessary material in the case so as to ensure an efficient and fair trial, and in particular should consider the need for particular witnesses and exhibits and draft appropriate admissions for service on the defence;

10.6 Prosecuting counsel should . . . have regard to the following recommendations of the Farquharson Committee [The Farquharson Guidelines, The Role and Responsibilities of the Prosecution Advocate <http://www.cps.gov.uk/Publications/prosecution/farqbooklet.html>]:

(a) Where counsel has taken a decision on a matter of policy with which his professional client has not agreed, it would be appropriate for him to submit to the Attorney General a written report of all the circumstances, including his reasons for disagreeing with those who instructed him;

(b) When counsel has had an opportunity to prepare his brief and to confer with those instructing him, but at the last moment before trial unexpectedly advises that the case should not proceed or that pleas to lesser offences should be accepted, and his professional client does not accept such advice, counsel should apply for an adjournment if instructed to do so;

(c) Subject to the above, it is for prosecuting counsel to decide whether to offer no evidence on a particular count or on the indictment as a whole and whether to accept pleas to a lesser count or counts.

10.7 It is the duty of prosecuting counsel to assist the Court at the conclusion of the summing-up by drawing attention to any apparent errors or omissions of fact or law.

10.8 In relation to sentence, prosecuting counsel:

(a) should not attempt by advocacy to influence the Court with regard to sentence: if, however, a defendant is unrepresented it is proper to inform the Court of any mitigating circumstances about which counsel is instructed;

(b) should be in a position to assist the Court if requested as to any statutory provisions relevant to the offence or the offender and as to any relevant guidelines as to sentence laid down by the Court of Appeal;

(c) should bring any such matters as are referred to in (b) above to the attention of the Court if in the opinion of prosecuting counsel the Court has erred;

(d) should bring to the attention of the Court any appropriate compensation, forfeiture and restitution matters which may arise on conviction, for example pursuant to sections 35–42 of the Powers of Criminal Courts Act 1973 and the Drug Trafficking Offences Act 1986;

(e) should draw the attention of the defence to any assertion of material fact made in mitigation which the prosecution believes to be untrue: if the defence persist in that assertion, prosecuting counsel should invite the Court to consider requiring the issue to be determined by the calling of evidence in accordance with the decision of the Court of Appeal in R v Newton (1983) 77 Crim App R 13.
11 Responsibilities of Defence Counsel

11.1 When defending a client on a criminal charge, a barrister must endeavour to protect his client from conviction except by a competent tribunal and upon legally admissible evidence sufficient to support a conviction for the offence charged.

11.2 A barrister acting for the defence:

(a) should satisfy himself, if he is briefed to represent more than one defendant, that no conflict of interest is likely to arise;

(b) should arrange a conference and if necessary a series of conferences with his professional and lay clients;

(c) should consider whether any enquiries or further enquiries are necessary and, if so, should advise in writing as soon as possible;

(d) should consider whether any witnesses for the defence are required and, if so, which;

(e) should consider whether a Notice of Alibi is required and, if so, should draft an appropriate notice;

(f) should consider whether it would be appropriate to call expert evidence for the defence and, if so, have regard to the rules of the Crown Court in relation to notifying the prosecution of the contents of the evidence to be given;

(g) should ensure that he has sufficient instructions for the purpose of deciding which prosecution witnesses should be cross-examined, and should then ensure that no other witnesses remain fully bound at the request of the defendant and request his professional client to inform the Crown Prosecution Service of those who can be conditionally bound;

(h) should consider whether any admissions can be made with a view to saving time and expense at trial, with the aim of admitting as much evidence as can properly be admitted in accordance with the barrister’s duty to his client;

(i) should consider what admissions can properly be requested from the prosecution;

(j) should decide what exhibits, if any, which have not been or cannot be copied he wishes to examine, and should ensure that appropriate arrangements are made to examine them as promptly as possible so that there is no undue delay in the trial;

(k) should as to anything which he is instructed to submit in mitigation which casts aspersions on the conduct or character of a victim or witness in the case, notify the prosecution in advance so as to give prosecuting Counsel sufficient opportunity to consider his position under paragraph 10.8(e).

11.3 A barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client’s.

11.4 A barrister acting for a defendant should advise his client as to whether or not to give evidence in his own defence but the decision must be taken by the client himself.

11.5 Where a defendant tells his counsel that he did not commit the offence with which he is charged but nevertheless insists on pleading guilty to it for reasons of his own, counsel should:

(a) advise the defendant that, if he is not guilty, he should plead not guilty but that the
decision is one for the defendant; counsel must continue to represent him but only after he has advised what the consequences will be and that what can be submitted in mitigation can only be on the basis that the client is guilty.

(b) explore with the defendant why he wishes to plead guilty to a charge which he says he did not commit and whether any steps could be taken which would enable him to enter a plea of not guilty in accordance with his profession of innocence.

11.5.2 If the client maintains his wish to plead guilty, he should be further advised:

(a) what the consequences will be, in particular in gaining or adding to a criminal record and that it is unlikely that a conviction based on such a plea would be overturned on appeal;

(b) that what can be submitted on his behalf in mitigation can only be on the basis that he is guilty and will otherwise be strictly limited so that, for instance, counsel will not be able to assert that the defendant has shown remorse through his guilty plea.

11.5.3 If, following all of the above advice, the defendant persists in his decision to plead guilty:

(a) counsel may continue to represent him if he is satisfied that it is proper to do so;

(b) before a plea of guilty is entered counsel or a representative of his professional client who is present should record in writing the reasons for the plea;

(c) the defendant should be invited to endorse a declaration that he has given unequivocal instructions of his own free will that he intends to plead guilty even though he maintains that he did not commit the offence(s) and that he understands the advice given by counsel and in particular the restrictions placed on counsel in mitigating and the consequences to himself; the defendant should also be advised that he is under no obligation to sign; and

(d) if no such declaration is signed, counsel should make a contemporaneous note of his advice.

12 Confessions of Guilt

12.1 In considering the duty of counsel retained to defend a person charged with an offence who confesses to his counsel that he did commit the offence charged, it is essential to bear the following points clearly in mind:

(a) that every punishable crime is a breach of common or statute law committed by a person of sound mind and understanding;

(b) that the issue in a criminal trial is always whether the defendant is guilty of the offence charged, never whether he is innocent;

(c) that the burden of proof rests on the prosecution.

12.2 It follows that the mere fact that a person charged with a crime has confessed to his counsel that he did commit the offence charged is no bar to that barrister appearing or continuing to appear in his defence, nor indeed does such a confession release the barrister from his imperative duty to do all that he honourably can for his client.

12.3 Such a confession, however, imposes very strict limitations on the conduct of the defence. [A] barrister must not assert as true that which he knows to be false. He must not connive at, much less attempt to substantiate, a fraud.

12.4 While, therefore, it would be right to take any objections to the competency of the
Court, to the form of the indictment, to the admissibility of any evidence or to the evidence admitted, it would be wrong to suggest that some other person had committed the offence charged, or to call any evidence which the barrister must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi. In other words, a barrister must not (whether by calling the defendant or otherwise) set up an affirmative case inconsistent with the confession made to him.

12.5 A more difficult question is within what limits may counsel attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount to proof that the defendant is guilty of the offence charged. Further than this he ought not to go.

12.6 The foregoing is based on the assumption that the defendant has made a clear confession that he did commit the offence charged, and does not profess to deal with the very difficult questions which may present themselves to a barrister when a series of inconsistent statements are made to him by the defendant before or during the proceedings; nor does it deal with the questions which may arise where statements are made by the defendant which point almost irresistibly to the conclusion that the defendant is guilty but do not amount to a clear confession. Statements of this kind may inhibit the defence, but questions arising on them can only be answered after careful consideration of the actual circumstances of the particular case.

13 General

13.1 Both prosecuting and defence counsel:

(a) should ensure that the listing officer receives in good time their best estimate of the likely length of the trial (including whether or not there is to be a plea of guilty) and should ensure that the listing officer is given early notice of any change of such estimate or possible adjournment;

(b) should take all reasonable and practicable steps to ensure that the case is properly prepared and ready for trial by the time that it is first listed;

(c) should ensure that arrangements have been made in adequate time for witnesses to attend Court as and when required and should plan, so far as possible, for sufficient witnesses to be available to occupy the full Court day;

(d) should, if a witness (for example a doctor) can only attend Court at a certain time during the trial without great inconvenience to himself, try to arrange for that witness to be accommodated by raising the matter with the trial Judge and with his opponent;

13.2 If properly remunerated . . ., the barrister originally briefed in a case should attend all plea and directions hearings. If this is not possible, he must take all reasonable steps to ensure that the barrister who does appear is conversant with the case and is prepared to make informed decisions affecting the trial.

...
15 Attendance of Counsel at Court

15.3.1 If during the course of a criminal trial and prior to final sentence the defendant voluntarily absconds and the barrister’s professional client, in accordance with the ruling of the Law Society, withdraws from the case, then the barrister too should withdraw. If the trial judge requests the barrister to remain to assist the Court, the barrister has an absolute discretion whether to do so or not. If he does remain, he should act on the basis that his instructions are withdrawn and he will not be entitled to use any material contained in his brief save for such part as has already been established in evidence before the Court. He should request the trial judge to instruct the jury that this is the basis on which he is prepared to assist the Court.

15.3.2 If for any reason the barrister’s professional client does not withdraw from the case, the barrister retains an absolute discretion whether to continue to act. If he does continue, he should conduct the case as if his client were still present in Court but had decided not to give evidence and on the basis of any instruction he has received. He will be free to use any material contained in his brief and may cross-examine witnesses called for the prosecution and call witnesses for the defence.

16 Appeals

16.2 If his client pleads guilty or is convicted, defence counsel should see his client after he has been sentenced in the presence of his professional client or his representative. He should then proceed as follows:

(a) if he is satisfied that there are no reasonable grounds of appeal he should so advise orally and certify in writing . . . No further advice is necessary unless it is reasonable for a written advice to be given because the client reasonably requires it or because it is necessary e.g. in the light of the circumstances of the conviction, any particular difficulties at trial, the length and nature of the sentence passed, the effect thereof on the defendant or the lack of impact which oral advice given immediately after the trial may have on the particular defendant’s mind.

(b) if he is satisfied that there are more reasonable grounds of appeal or if his view is a provisional one or if he requires more time to consider the prospects of a successful appeal he should so advise orally and certify in writing . . . Counsel should then furnish written advice to the professional client as soon as he can and in any event within 14 days.

16.3 Counsel should not settle grounds of appeal unless he considers that such grounds are properly arguable, and in that event he should provide a reasoned written opinion in support of such grounds.

16.4 In certain cases counsel may not be able to perfect grounds of appeal without a transcript or other further information. In this event the grounds of appeal should be accompanied by a note to the Registrar setting out the matters on which assistance is required. Once such transcript or other information is available, counsel should ensure that the grounds of appeal are perfected by the inclusion of all necessary references.

16.5 Grounds of Appeal must be settled with sufficient particularity to enable the Registrar and subsequently the Court to identify clearly the matters relied upon.
16.6 If at any stage counsel is of the view that the appeal should be abandoned, he should at once set out his reasons in writing and send them to his professional client.

So far as solicitors are concerned, it is worth noting the ‘core duties’ identified in the Solicitors’ Code of Conduct:

1.01 Justice and the rule of law
You must uphold the rule of law and the proper administration of justice.

1.02 Integrity
You must act with integrity.

1.03 Independence
You must not allow your independence to be compromised.

1.04 Best interests of clients
You must act in the best interests of each client.

1.05 Standard of service
You must provide a good standard of service to your clients.

1.06 Public confidence
You must not behave in a way that is likely to diminish the trust the public places in you or the profession.

In March 2008, the Law Society issued a Practice Note, Criminal Procedure Rules: impact on solicitors’ duties to the client. The Note observed that:

The role of the solicitor when acting on behalf of a client who is actually or potentially the subject of criminal proceedings can be a complex one. As a lawyer the solicitor owes professional duties to his or her client, as well as – as one of its officers – to the court. On occasions these various duties may conflict with each other.

Whilst the court is entitled to expect the solicitor to act towards it with integrity, neither misleading nor deceiving it, the court should not demand that the solicitor in so acting should breach professional duties owed by the solicitor towards his or her client(s). Indeed, as explained below, the solicitor’s proper discharge of the duty to their client should not cause him or her to be accused of being in breach of their duty to the court.

Reference should also be made to the Code for Crown Prosecutors, which is available on the CPS website (<http://www.cps.gov.uk/publications/docs/code2004english.pdf>). Paragraph 1.1 of the Code makes the point that ‘fair and effective prosecution is essential to the maintenance of law and order’ and notes that ‘even in a small case a prosecution has serious implications for all involved – victims, witnesses and defendants. It goes on to explain that the purpose of the Code is to enable Crown Prosecutors to make ‘fair and consistent decisions about prosecutions’. The main provisions of the Code are as follows:
2 GENERAL PRINCIPLES

2.2 Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.

2.3 It is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offence. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

2.4 Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation.

2.5 It is the duty of Crown Prosecutors to review, advise on and prosecute cases, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with, in accordance with the principles set out in this Code.

3 THE DECISION TO PROSECUTE

3.1 In most cases, Crown Prosecutors are responsible for deciding whether a person should be charged with a criminal offence, and if so, what that offence should be. Crown Prosecutors make these decisions in accordance with this Code and the Director’s Guidance on Charging. In those cases where the police determine the charge, which are usually more minor and routine cases, they apply the same provisions.

3.2 Crown Prosecutors make charging decisions in accordance with the Full Code Test (see section 5 below), other than in those limited circumstances where the Threshold Test applies (see section 6 below).

3.3 The Threshold Test applies where the case is one in which it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.

3.4 Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the case must be reviewed in accordance with the Full Code Test as soon as reasonably practicable, taking into account the progress of the investigation.

4 REVIEW

4.1 Each case the Crown Prosecution Service receives from the police is reviewed to make sure that it is right to proceed with a prosecution. Unless the Threshold Test applies, the Crown Prosecution Service will only start or continue with a prosecution when the case has passed both stages of the Full Code Test.

4.2 Review is a continuing process and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should talk to the police first if they are thinking about changing the charges or stopping the case. Crown Prosecutors should
also tell the police if they believe that some additional evidence may strengthen the case. This gives the police the chance to provide more information that may affect the decision.

4.3 The Crown Prosecution Service and the police work closely together, but the final responsibility for the decision whether or not a charge or a case should go ahead rests with the Crown Prosecution Service.

5 THE FULL CODE TEST

5.1 The Full Code Test has two stages. The first stage is consideration of the evidence. If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest.

THE EVIDENTIAL STAGE

5.2 Crown Prosecutors must be satisfied that there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.3 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant’s guilt.

5.4 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the evidence be used in court?  
Is the evidence reliable?

a  Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial.  
For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

b  Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant’s age, intelligence or level of understanding?

c  What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?

d  If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

e  Is the witness’s background likely to weaken the prosecution case? For example,
does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?

f  Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

5.5 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

THE PUBLIC INTEREST STAGE

5.6 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: ‘It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution.’ (House of Commons Debates, volume 483, column 681, 29 January 1951.)

5.7 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution (see section 8 below).

5.8 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution

5.9 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

a  a conviction is likely to result in a significant sentence;

b  a conviction is likely to result in a confiscation or any other order;

c  a weapon was used or violence was threatened during the commission of the offence;

d  the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);

e  the defendant was in a position of authority or trust;

f  the evidence shows that the defendant was a ringleader or an organiser of the offence;

g  there is evidence that the offence was premeditated;
h. there is evidence that the offence was carried out by a group;

i. the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;

j. the offence was committed in the presence of, or in close proximity to, a child;

k. the offence was motivated by any form of discrimination against the victim’s ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;

l. there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;

m. the defendant’s previous convictions or cautions are relevant to the present offence;

n. the defendant is alleged to have committed the offence while under an order of the court;

o. there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;

p. the offence, although not serious in itself, is widespread in the area where it was committed; or

q. a prosecution would have a significant positive impact on maintaining community confidence.

Some common public interest factors against prosecution

5.10 A prosecution is less likely to be needed if:

a. the court is likely to impose a nominal penalty;

b. the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offence requires a prosecution or the defendant withdraws consent to have an offence taken into consideration during sentencing;

c. the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

d. the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;

e. there has been a long delay between the offence taking place and the date of the trial, unless:
   • the offence is serious;
   • the delay has been caused in part by the defendant;
   • the offence has only recently come to light; or
   • the complexity of the offence has meant that there has been a long investigation;

f. a prosecution is likely to have a bad effect on the victim’s physical or mental health, always bearing in mind the seriousness of the offence;

g. the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where
necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;

h the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation);

or

i details may be made public that could harm sources of information, international relations or national security.

5.11 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

5.12 The Crown Prosecution Service does not act for victims or the families of victims in the same way as solicitors act for their clients. Crown Prosecutors act on behalf of the public and not just in the interests of any particular individual. However, when considering the public interest, Crown Prosecutors should always take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim’s family.

5.13 It is important that a victim is told about a decision which makes a significant difference to the case in which they are involved. Crown Prosecutors should ensure that they follow any agreed procedures.

6 THE THRESHOLD TEST

6.1 The Threshold Test requires Crown Prosecutors to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect.

6.2 The Threshold Test is applied to those cases in which it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available.

6.3 There are statutory limits that restrict the time a suspect may remain in police custody before a decision has to be made whether to charge or release the suspect. There will be cases where the suspect in custody presents a substantial bail risk if released, but much of the evidence may not be available at the time the charging decision has to be made. Crown Prosecutors will apply the Threshold Test to such cases for a limited period.

6.4 The evidential decision in each case will require consideration of a number of factors including:

- the evidence available at the time;
- the likelihood and nature of further evidence being obtained;
- the reasonableness for believing that evidence will become available;
- the time it will take to gather that evidence and the steps being taken to do so;
- the impact the expected evidence will have on the case;
- the charges that the evidence will support.
6.5 The public interest means the same as under the Full Code Test, but will be based on the information available at the time of charge which will often be limited.

6.6 A decision to charge and withhold bail must be kept under review. The evidence gathered must be regularly assessed to ensure the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as reasonably practicable.

7 SELECTION OF CHARGES

7.1 Crown Prosecutors should select charges which:

a. reflect the seriousness and extent of the offending;

b. give the court adequate powers to sentence and impose appropriate post-conviction orders; and

c. enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice.

7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

8 DIVERSION FROM PROSECUTION ADULTS

8.1 When deciding whether a case should be prosecuted in the courts, Crown Prosecutors should consider the alternatives to prosecution. Where appropriate, the availability of suitable rehabilitative, reparative or restorative justice processes can be considered.

8.2 Alternatives to prosecution for adult suspects include a simple caution and a conditional caution.

Simple caution

8.3 A simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines. Where it is felt that such a caution is appropriate, Crown Prosecutors must inform the police so they can caution the suspect. If the caution is not administered, because the suspect refuses to accept it, a Crown Prosecutor may review the case again.

Conditional caution

8.4 A conditional caution may be appropriate where a Crown Prosecutor considers that while the public interest justifies a prosecution, the interests of the suspect, victim and community may be better served by the suspect complying with suitable conditions aimed at rehabilitation or reparation. These may include restorative processes.

8.5 Crown Prosecutors must be satisfied that there is sufficient evidence for a realistic prospect of conviction and that the public interest would justify a prosecution should the offer of a conditional caution be refused or the offender fail to comply with the agreed conditions of the caution.
8.6 In reaching their decision, Crown Prosecutors should follow the Conditional Cautions Code of Practice and any guidance on conditional cautioning issued or approved by the Director of Public Prosecutions.

8.7 Where Crown Prosecutors consider a conditional caution to be appropriate, they must inform the police, or other authority responsible for administering the conditional caution, as well as providing an indication of the appropriate conditions so that the conditional caution can be administered.

YOUTHS

8.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. However Crown Prosecutors should not avoid prosecuting simply because of the defendant’s age. The seriousness of the offence or the youth’s past behaviour is very important.

8.9 Cases involving youths are usually only referred to the Crown Prosecution Service for prosecution if the youth has already received a reprimand and final warning, unless the offence is so serious that either of these were appropriate or the youth does not admit committing the offence. Reprimands and final warnings are intended to prevent re-offending and the fact that a further offence has occurred indicates that attempts to divert the youth from the court system have not been effective. So the public interest will usually require a prosecution in such cases, unless there are clear public interest factors against prosecution.

9 MODE OF TRIAL

9.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option and the defendant does not indicate a guilty plea. Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

9.2 Speed must never be the only reason for asking for a case to stay in the magistrates’ courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

10 ACCEPTING GUILTY PLEAS

10.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant’s plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features.

Crown Prosecutors must never accept a guilty plea just because it is convenient.

10.2 In considering whether the pleas offered are acceptable, Crown Prosecutors should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim’s family, are taken into account when deciding whether it is in the public interest to accept the plea. However, the decision rests with the Crown Prosecutor.
10.3 It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.

10.4 Where a defendant has previously indicated that he or she will ask the court to take an offence into consideration when sentencing, but then declines to admit that offence at court, Crown Prosecutors will consider whether a prosecution is required for that offence. Crown Prosecutors should explain to the defence advocate and the court that the prosecution of that offence may be subject to further review.

10.5 Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, Crown Prosecutors must bear in mind the fact that ancillary orders can be made with some offences but not with others.

11 PROSECUTORS’ ROLE IN SENTENCING

11.1 Crown Prosecutors should draw the court’s attention to:

- any aggravating or mitigating factors disclosed by the prosecution case;
- any victim personal statement;
- where appropriate, evidence of the impact of the offending on a community;
- any statutory provisions or sentencing guidelines which may assist;
- any relevant statutory provisions relating to ancillary orders (such as anti-social behaviour orders).

11.2 The Crown Prosecutor should challenge any assertion made by the defence in mitigation that is inaccurate, misleading or derogatory. If the defence persist in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly.

12 RE-STARTING A PROSECUTION

12.1 People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.

12.2 These reasons include:

a. rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;

b. cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again; and
c. cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

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