Open Justice and the English Criminal Process

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Abstract

This thesis examines the concept of 'open justice' as it applies to the English criminal process. The conventional understanding of open justice requires merely that trial proceedings are open to the public and that those who attend are free to report to others what they have witnessed. This thesis seeks to demonstrate that the notion of open justice need not be so confined. The oversight of the criminal process provided by the courts, independent administrative bodies and the public, and the open manner in which such oversight is conducted, may be viewed as a more expansive conception of open justice. Such openness is argued to be required by the values of accountability, effective performance, rights protection, democracy and public confidence.

It will be demonstrated that the openness flowing from the oversight of the English criminal process provided by the courts, independent administrative bodies and the public, has developed considerably in recent years. There may though be scope for the development of further openness. Where appropriate, proposals designed to achieve such enhanced openness will be advanced.

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Contents

Key Abbreviations

AG	Attorney General
CCRC	Criminal Cases Review Commission
CPS	Crown Prosecution Service
CPT	Committee for the Prevention of Torture
DPP	Director of Public Prosecutions
HMIC	Her Majesty's Inspectorate of Constabulary
HMCPSI	Her Majesty's Crown Prosecution Service Inspectorate
HMICA	Her Majesty's Inspectorate of Court Administration
HMIP	Her Majesty's Inspectorate of Prisons
HMCS	Her Majesty's Courts Service
ICVs	Independent Custody Visitors
IPCC	Independent Police Complaints Commission
IMBs	Independent Monitoring Boards
LOs	Lay Observers
PPO	Prisons and Probation Ombudsman

Chapter 1

The concept of open justice

The concept of open justice is normally understood as requiring simply that the courts conduct their proceedings in public.[1] It is time to revisit this limited conception. This thesis examines the oversight of the criminal process provided by the courts, independent administrative bodies and the public. It will be argued that the values of accountability, effective performance, rights protection, democracy and public confidence, require that the criminal process is open to such oversight and that the oversight is conducted openly. This 'openness' may be viewed as a new, more expansive concept of open justice.

The development of this wider concept of open justice will be examined in relation to four areas of the criminal process, the police, the Crown Prosecution Service, the trial courts and the prison system. Whilst particular aspects of judicial, administrative and public scrutiny of these four areas have been examined in the past, they have tended to be considered in isolation. There is no comprehensive and contemporary examination of the oversight of each area provided by the courts, administrative bodies and the public.

It will be argued that developments in recent years have moved us towards a more expansive concept of open justice. There may, however, be scope for the development

[1] In the words of Lord Diplock in *Attorney General v Leveller Magazine Ltd* [1979] AC 440 (HL) at 449-450, 'As a general rule the English system of administering justice does require that it be done in public: *Scott v. Scott* [1913] A.C 417 … The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this'. See generally, J Jaconelli, *Open Justice, A critique of the public trial* (Oxford University Press, Oxford 2002).

of further openness. Where it appears that there is room for greater fulfilment of the values of accountability, effective performance, rights protection, democracy and confidence, proposals designed to achieve this will be advanced.

The values of accountability, effective performance, rights protection, democracy and confidence have been selected because, as will be detailed in this chapter, they are of fundamental importance to the criminal process. It is also the case that, as will be clear by the conclusion of this thesis, it is these values which have underpinned and motivated the move towards a more expansive concept of open justice which, it will be demonstrated, has occurred in recent years.

The police, the Crown Prosecution Service, the trial courts and the Prison System have been selected as the areas upon which this thesis will focus because they are arguably the most prominent aspects of the criminal process. They have also been selected because in these four areas, there has been a clear move towards a more expansive concept of open justice. That is not to say that there have not been similar developments in other areas such as, for example, the probation system. The concept of open justice examined in this thesis, and the values underpinning it, likely has wider applicability. Such areas may provide fertile ground for future study. Given, however, constraints of space, only the four selected areas are examined in this thesis.

1.1 The values of open justice

1.1.1 Accountability

It is essential that those responsible for administering the criminal justice system are held to account in the sense that poor or improper performance is penalised. As public servants, criminal justice professionals must be answerable for their exercise of public power and the expenditure of public resources. Moreover, it is vital for the maintenance of the rule of law in a liberal society that no public or private person is above the law, or seen to be so, in the sense that they can inflict harm without penalty. As well as being important in its own right, the promotion of accountability may also support the other open justice values. Accountability may provide a spur to more effective performance or discourage others from breaching rights. Seeing poor performance or impropriety punished may also help maintain public confidence in the criminal justice system.

It will be argued that the oversight of the criminal process provided by the courts, administrative bodies and the public, and the fact that such oversight is conducted openly, may provide such important accountability. This accountability may take the form of criminal sanction, financial punishment, or a public rebuke which might result in embarrassment and damage to reputation.

1.1.2 Effective performance

The stated purpose of the criminal justice system is 'to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent'.[2] The role of the police is to investigate crime, identify suspects, apprehend them and question them. In most cases the Crown Prosecution Service is responsible for deciding whether to prosecute on the basis of evidence gathered by the police and for conducting the prosecution. The trial courts are expected

[2] See: http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html.

to deliver justice effectively and efficiently, to convict the 'guilty', and to punish them appropriately. When someone is convicted and sent to prison, they pass into the care of the Prison Service. The Prison Service aims to hold prisoners in a safe, decent and healthy environment and to reduce reoffending.

The oversight provided by the courts, administrative bodies and the public may provide a check on ineffective or poor performance. It may also promote effective performance by, for example, identifying and encouraging examples of good practice or, in the case of public oversight, providing information which enables more effective performance. The fact that this oversight is conducted in an open manner may help produce more effective performance by providing extra pressure to ensure that recommendations for improvement are implemented. The accountability provided by such openness may also deter ineffective performance in the future thereby enhancing performance.

1.1.3 Rights protection

Individual and collective rights are the mainstays of liberal freedom under the rule of law. Without legally-enforceable rights protection, citizens would not be secure in their person or property. It follows that the contribution of open justice to rights protection is a matter of great importance.

The oversight provided by the courts, administrative bodies and the public may help protect the rights of both the public and those subject to the enforcement powers of the criminal justice system. The oversight mechanisms may examine alleged rights breaches brought to them and offer a ruling designed to ensure the rights in question are

respected in the future and redress is provided. They may also conduct investigations designed to uncover rights breaches.

The accountability these mechanisms can provide will help ensure that rights are respected in the future. Efforts to ensure effective performance may also coincide with efforts to protect rights. Acting, for instance, to ensure that prison service efforts to rehabilitate prisoners are satisfactory obviously protects the right to rehabilitation.[3] It also helps safeguard the public's right to life and security by lessening the chances of a released prisoner assaulting a member of the public.

1.1.4 Democracy

It will be argued that the notion of democracy requires that the criminal justice system is administered openly. By democracy, it is meant a political system which in some way involves the people in the administration of important matters of public policy. The operation of the criminal process is one of the most important matters of public policy.

In a developed democracy it is right that the public are able to receive information about the administration of the criminal justice system and how it is performing. Democracy requires that such information is made widely available. In the words of Palmer, 'access to information must be a prerequisite to the proper and effective functioning of a healthy democratic society'.[4] The criminal justice process must be sufficiently transparent to facilitate the most basic form of democratic participation; allowing

[3] Article 10(3) of the International Covenant on Civil and Political Rights provides: '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.

[4] S Palmer, 'Freedom of Information: The New Proposals' in Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, Oxford 2000) 253.

citizens to cast their ballot on a reasonably informed basis every four or five years. It is also the case that the criminal justice system is operated on behalf of the public, as such, they have a right to know how it is operating. Information is also required if the public are to play a useful and constructive role in the development of the criminal justice system.

The notion of democracy also requires that the public are able to play a role beyond receivers of information. In the words of Chomsky, '[a] society is democratic to the extent that its citizens play a meaningful role in managing public affairs'.[5] Not all members of the public will wish to be involved. Avenues should, though, be available to those who do wish to participate in the administration of the criminal justice system and efforts should be made to encourage participation by others. It is important that these avenues are not just for show. They must enable the values and knowledge of the community to impact upon the operation of the criminal justice system. This process must be open so that the wider public are made aware of such opportunities for participation and to help bolster confidence in the criminal process.

The importance of involving local communities and opening up the criminal justice system to the public is increasingly recognised by the Government. The report, *Justice for all* accepts that 'the criminal justice system simply cannot function without broad community involvement',[6] and demands that the criminal justice agencies work to better engage with local communities and respond to local concerns.[7]

[5] N Chomsky, Deterring Democracy (Verso, London 1991) 6.
[6] *Justice for All* (HMSO, London 2002) Cm 5563, para 7.38.
[7] *ibid.* para 7.10. See also, Office for Criminal Justice Reform, *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004-08* (HMSO, London 2004) Cm 6288, 23.

It should be noted, that the criminal justice agencies can only go so far in responding to community concerns. In relation to the police, for instance, the duty to provide effective policing may mean that particular concerns and demands for action cannot always be acted upon as they would limit effective performance. Similarly, where the public demands action which would breach rights it may not be appropriate to act on such views.

1.1.5 Confidence

The Government's *Justice for All* report states that, 'the criminal justice system exists to serve the public. It is vitally important that people understand and have confidence in the system'.[8] Oversight by the courts, administrative bodies and the public may, especially where such oversight is conducted publicly, enhance confidence in the criminal justice system.

The fact that the public will be able to see that there are mechanisms overseeing the operation of the criminal justice system and providing accountability for poor performance may enhance confidence. The oversight mechanisms may, on occasions, highlight good practice and offer praise. Public confidence will also be enhanced if the public can play a role in helping shape the operation of the criminal law. People are more likely to support the operation of the criminal justice system if they feel that they are a part of it. In the words of the Government's *Justice for All* report again, 'Good communication between the public and criminal justice agencies is essential if people

[8] Home Office, Lord Chancellor and Attorney General *Justice for All* (HMSO, London 2002) Cm 5563 para 7.1.

are to engage with the delivery of justice and have confidence in the capacity of the criminal justice system to provide an effective service to the community'.[9]

Confidence in the criminal justice system may also be undermined by open justice. Openness might, for example, lead to the exposure of inadequate performance or rights abuses. This is not, however, a valid argument against such oversight or against findings being revealed publicly. It is right that the truth is revealed and confidence undermined. Confidence based on a false impression is not appropriate. The fact that the oversight mechanisms have proved themselves successful at uncovering such impropriety or poor performance and exposing it publicly may provide a degree of reassurance to the public.

Open oversight may also bolster confidence in the system amongst those subject to the enforcement power of the criminal justice system. It is vital that such persons view the criminal justice system as fair and just and are not left holding a grudge that they have been treated unfairly by a biased system. They may be more likely to feel that they have been treated fairly if their treatment is overseen by clearly independent bodies and their fellow citizens.

1.2 The structure of this work

The extent to which the values of accountability, effective performance, rights protection, democracy and confidence are promoted by the oversight of the criminal process provided by the courts, independent administrative bodies and the public will be examined in relation to the police, the Crown Prosecution Service, the trial courts and

[9] *ibid.* para 7.2.

the prison system. Chapter 2 looks at the police, chapter 3, the Crown Prosecution Service, the trial courts are examined in chapter 4 and chapter 5 looks at the prison system. Where it appears that there is a need for a greater degree of openness to provide more appropriate satisfaction of the values of openness, proposals for achieving this will be advanced. In chapter 6 the material from these four chapters will be drawn together to provide an assessment of the openness of the key areas of the English criminal process.

Chapter 2

The Police

This chapter examines the importance of the police being subject to oversight by the courts, by independent administrative bodies and by the general public. It will be argued that such oversight, as has developed largely in recent times, and the open manner in which this oversight is conducted, promotes accountability, aids effective performance, bolsters rights protection, helps enable the transparency and citizen participation required in a democracy and promotes public confidence in the criminal justice system. Areas where the oversight fails to adequately fulfil these values will be identified and proposals designed to achieve a more appropriate level of openness advanced.

2.1 Judicial Scrutiny

There are five principal contexts in which the courts operate to oversee police policy and conduct. These are: judicial review hearings; during the trial process; via criminal prosecution of the police; at an inquest in the coroner's court; and where a civil action is brought.

2.1.1 Judicial Review

The possibility of police actions being scrutinised via judicial review first emerged in *R v Commissioner of Police of the Metropolis ex p Blackburn.*[1] Mr Blackburn applied for an order of mandamus directing the Commissioner to reverse a policy decision not to

[1] [1968] 2 QB 118 (CA). See also, *R v Commissioner of Police for the Metropolis ex p Blackburn (No 3)* [1973] QB 241 (CA).

attempt to enforce certain gaming legislation. In *obiter* statements[2] the Court of Appeal accepted that 'there are many fields in which [the chief officers of police] have a discretion with which the law will not interfere'.[3] This discretion is not, however, absolute. Denning LJ added, 'there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere'.[4]

The courts have intervened in a number of cases involving police policy decisions. This oversight may provide a check on police effectiveness. In *R v Oxford, ex p Levey*[5] the policy on the policing of the Toxteth area of Liverpool, which precluded police vehicles from patrolling under normal circumstances, was examined. It was alleged that this policy had turned Toxteth into a 'no-go' area for the police and a 'haven for criminals'. The Divisional Court ruled that the Chief Constable was justified in adopting such a policy: 'figures for [the] detection of crime showed that in relation to offences of burglary and violence the level of crime was being kept at a level below other areas in Liverpool'.[6] The police were consequently not 'neglecting their duty to keep the peace'.[7] The Court of Appeal supported this conclusion.[8]

The scrutiny of the police provided by judicial review may also provide protection for rights. In *R v Chief Constable of South Wales, ex p Merrick*[9] a challenge was brought to a police policy which prevented a solicitor meeting with the applicant. The court held that a person in the applicant's position had a right at common law to consult on request

[2] The Commissioner had undertaken to revoke the questioned policy decision by the time of the hearing.
[3] [1968] 2 QB 118 (CA) 136 (Lord Denning).
[4] *ibid.*
[5] The Times 18 December 1985 (QB); The Times 1 November 1986 (CA). Transcripts available on LexisNexis.
[6] The Times 18 December 1985 (QB).
[7] *ibid.*
[8] The Times 1 November 1986 (CA).
[9] [1994] 1 WLR 663 (QB).

with a solicitor as soon as was reasonably practical and that the policy was unlawful to the extent that it permitted the police to refuse access to a solicitor on the sole ground that the request was made after 10 a.m.

The fact that the public can see, in these occasional cases, that the police are required to justify their actions and that the courts provide a check on police effective performance and, more commonly, safeguard rights, may provide reassurance to the public. It illustrates powerfully that the police are not above the law. Having a court publicly condemn a policy as unlawful may also provide a degree of satisfaction to the person who has brought the claim. The public nature of the hearings might also aid rights protection. It increases the chances that other police forces with similar policies will rethink and modify those policies judged to be unlawful.

In examining challenges to police policies the courts have tended to defer to the discretion of the Chief Constable. Such an approach may limit the scope for bringing a judicial review challenge. Frequent judicial intervention into the realms of police policy might threaten effective police performance. The courts do not always have the necessary expertise to involve themselves in these matters. It is arguable though, that the courts ought to be more willing to oversee police actions than they have been in the past. Clayton and Tomlinson assert that the courts have declined 'to interfere with police discretion even in clearly meritorious cases'.[10] In, for example, *Kent v Metropolitan Police Commissioner*[11] a challenge was made to an order by the Commissioner which restricted the fundamental freedoms to demonstrate and protest on

[10] RC Clayton and H Tomlinson, *Civil Actions Against the Police* (3rd edn Sweet and Maxwell, London 2004) 16.
[11] The Times 15 May 1981 (CA). Transcript available on LexisNexis. See also, *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458 (CA).

matters of public concern. The width of the order troubled Lord Denning considerably and Sir Denys Buckley felt that the Commissioner's 'reasons for his order seemed meagre'.[12] Nonetheless, Lord Denning felt that 'it was a matter of the judgement of the Commissioner' and the court unanimously held the order valid.

It has been suggested that the implementation of the Human Rights Act 1998[13] and the growing impact of European Union law may produce more intensive scrutiny of police decisions.[14] Police policy must comply with a multitude of new rights and must do so in accordance with the 'proportionality' standard. As noted by Lord Steyn in *R(Daly) v Secretary of State for the Home Department,*[15] the 'intensity of review is somewhat greater under the proportionality approach'[16] than under the traditional Wednesbury standard.[17]

The first test of this new European influence came in *R v Chief Constable of Sussex, ex p International Trader's Ferry Limited.*[18] For several months the police provided cover, on five days a week, to enable ITF to pass through large demonstrations and transport live animals (veal calves) across the English Channel. When the Chief Constable decided that the financial and manpower resources required to accomplish this task were interfering with the efficient policing of the county he restricted the days on which ITF was permitted to sail. The domestic law challenge to this decision failed. The

[12] Though is should be noted that Lord Justice Ackner asserted that, 'there was clear evidence of a highly volatile, "tinder box" situation throughout all the Commissioner's area and that a month's respite from all marches in London was necessary to prevent serious public disorder'.
[13] The Human Rights Act 1998 (Commencement) Order 1998 SI 1998 / 2882; The Human Rights Act 1998 (Commencement No. 2) Order 2000 SI 2000 / 1851.
[14] See: N Walker, *Policing in a Changing Constitutional Order* (Sweet and Maxwell, London 2000) 129-132.
[15] [2001] 2 AC 532 (HL).
[16] *ibid.* 547.
[17] *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA).
[18] [1996] QB 197 (QB); [1998] QB 477 (CA); [1999] 2 AC 418 (HL).

alternative European argument which submitted that the decision breached Article 29 of the EC Treaty, as a measure having equivalent effect to a quantitative restriction on exports, and was not justified on grounds of public policy under Article 30 failed in the Court of Appeal and the House of Lords. Despite the final result 'the case at least hinted at the prospect that appeal to European principles could provide a more rigorous form of judicial review'.[19] The case succeeded at first instance in the Divisional Court, and the Court of Appeal and the House of Lords asked the type of proportionality questions not normally heard in applications for judicial review of police policy.[20]

The suggestion that the European approach may provide enhanced protection of rights is further evidenced by the case of *R (Laporte) v Chief Constable of Gloucestershire Constabulary.*[21] In this case a police decision to stop three coaches on their way to a demonstration at RAF Fairford and to forcibly return them to London was challenged. Relying, in part, on the right in Article 10 of the European Convention on Human Rights to freedom of expression and the Article 11 right to peaceful assembly, the House of Lords ruled that the police action represented a disproportionate restriction on the claimant's rights and was unlawful. Responding to this judgement Gloucestershire constabulary said that it would be reviewing its policies accordingly.[22]

2.1.2 The Trial Process

[19] N Walker, *Policing in a Changing Constitutional Order* (Sweet and Maxwell, London 2000) 131.
[20] *ibid.* 131. It is worth noting, though, that some commentators have suggested that the Court of Appeal and the House of Lords could, nonetheless, have provided more rigorous scrutiny. The way the proportionality test was applied arguably brought it inappropriately close to the domestic unreasonableness approach. See, E Baker, 'Policing, Protest Free Trade: Challenging Police Discretion Under Community Law' [2000] Crim LR 95; EM Szyszczak, 'Fundamental Values in the House of Lords' (2000) 25 EL Rev 443; C Barnard and I Hare, 'Police Discretion and the Rule of Law: Economic Community Rights versus Civil Rights' (2000) 63 MLR 581, 589-594.
[21] [2007] 2 AC 105 (HL).
[22] See, F Gibb, 'Police violated rights of antiwar protesters' *The Times* (14 December 2006).

If a defendant pleads not guilty to a criminal charge and alleges that the police have behaved improperly this allegation may be examined during the trial process. If the police are found to have behaved so improperly that allowing the trial to continue would constitute an abuse of the court process the court may stay proceedings. If the impropriety relates to obtaining a particular piece of evidence it may be excluded from the trial. Staying proceedings or excluding a piece of evidence from the trial may 'punish' the police as it will prevent them from benefiting from the breach of the rules designed to regulate their conduct. Such oversight also helps protect the rights of those who come into contact with the police. Excluding evidence or staying the prosecution will go some way towards restoring the defendant to the position they would have been in had the police not acted improperly.

The fact that a decision to stay proceedings or to exclude evidence and the reasons for the decision will be made public, helps provide accountability for police impropriety exposed via the trial process. Where the police are judged to have behaved improperly they may be rebuked by the court which may produce media criticism and a degree of embarrassment. The public nature of the proceedings might also aid rights protection by helping deter other police forces from acting in a similar manner. Public confidence, a vital ingredient of effective police performance, might well be undermined by the exposure of police misconduct. If the public can see that the police are prevented from profiting from their misconduct this may, though, provide some measure of reassurance.

As well as providing support for judicial scrutiny and control of police misconduct the values of public confidence and effective performance also militate against an overly strict judicial approach. Effective police performance, in terms of catching and

convicting guilty offenders will be undermined if the courts always single-mindedly seek to act as the independent guardian of a suspect's rights. Confidence in the courts will be undermined if the public see 'criminals' going free because of police impropriety. The courts, in applying the abuse of process doctrine and considering the exclusion of evidence, have to balance these competing considerations.

The role the abuse of process doctrine[23] can play in holding the police to account and protecting rights is clear from the case of *R v Horseferry Road Magistrates' Court, ex p Bennett.*[24] In a departure from earlier authority,[25] the House of Lords ruled that the High Court had the power to inquire into the circumstances by which a person had been brought within the jurisdiction of the court. If satisfied there had been a breach of the extradition procedures or other irregularities, the prosecution could be stayed. In the words of Lord Griffiths, this involves the judiciary accepting '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'.[26] Lord Lowry stated that 'if proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future'.[27]

[23] See generally: ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press, Oxford 1993); R Pattenden, *Judicial Discretion and Criminal Litigation* (2nd edn Clarendon Press, Oxford 1990) 32-38.
[24] [1994] 1 AC 42 (HL). See similarly, *R v Mullen* [2000] QB 520 (CA).
[25] See generally ALT Choo, 'The Consequences of Illegal Extradition' [1992] Crim LR 490 and ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press, Oxford 1993) ch 4.
[26] [1994] 1 AC 42 (HL) 62.
[27] *ibid.* 77.

Section 76(2) of the Police and Criminal Evidence Act 1984 (PACE) requires the exclusion of confession evidence if it was obtained by oppression[28] or by anything said or done which was likely to render any resulting admission unreliable.[29] The potential of this section for holding the police to account and protecting rights is illustrated by the case of *R v Paris, Miller and Abdullahi.*[30] The Court of Appeal found that Miller's confession ought to have been excluded. The confession was made in an interview during which the police repeatedly shouted at the suspect to admit his guilt after he denied involvement over 300 times. After listening to the interview the Court commented:

> 'each member of this Court was horrified. Miller was bullied and hectored. The officers, particularly Detective Constable Greenwood, were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect'.[31]

This strong public rebuke of the police, particularly the naming of the 'guilty officer', provides an important degree of accountability. Such criticism may help increase the chances that similar misconduct will not be repeated in the future.

Section 78(1) PACE allows a court to exclude evidence if admitting it, 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. The cases of *R v Samuel*[32] and *R v Stagg*[33] demonstrate the police accountability and rights protection made possible by section 78(1). Samuel confessed to a crime in an interview conducted after his solicitor had been refused access. The

[28] s 76(2)(a).
[29] s 76(2)(b).
[30] (1993) 97 Cr App R 99 (CA).
[31] *ibid.* 103.
[32] [1988] QB 615 (CA).
[33] Unreported, Central Criminal Court, September 14, 1994. See, F Gibb, 'Judge attacks police over "murder trap"' *The Times* (15 September 1994); M Doherty, 'Watching the Detectives' (1994) NLJ 1525, 1525.

Court of Appeal held that the 'appellant was denied improperly one of the most important and fundamental rights of a citizen', and quashed his conviction. After *Samuel* the power to delay access to legal advice was apparently regarded as a 'dead letter' by detectives.[34] In *Stagg* an undercover operation was instigated in the hope of obtaining evidence linking the suspect to a murder. Declaring the evidence obtained inadmissible the trial judge, Mr Justice Ognall, said that the police behaviour betrayed 'not merely an excess of zeal, but a blatant attempt to incriminate a suspect by positive and deceptive conduct of the grossest kind'.[35]

It is clear therefore that the courts can provide occasional rights protection and a degree of accountability where the police have behaved improperly. It seems, however, that the Government is unhappy with the way the Court of Appeal has, in certain cases, struck the balance between rights protection and effective performance, the latter viewed in terms of convicting the guilty. In 2006 the Government announced that it intended to introduce legislation to ensure that persons convicted are not allowed to go free when the Court of Appeal is satisfied that they committed the offence regardless of how the conviction was obtained.[36] If this reform is introduced it will limit the extent to which the Court of Appeal can examine alleged police impropriety. The Court will only be able to examine such impropriety to the extent that it impacts upon innocence or guilt.

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[34] D Brown, *Investigating Burglary: The Effects of PACE* Home Office Research Study 123 (HMSO, London 1991) 76. See though: *Dunford* (1990) Cr App Rep 150 (CA) and *Oliphant* [1992] Crim LR 40 (CA).

[35] F Gibb, 'Judge attacks police over "murder trap"' *The Times* (15 September 1994).

[36] Office for Criminal Justice Reform, *Quashing Convictions - Report of a review by the Home Secretary, Lord Chancellor and Attorney General, A Consultation Paper* (2006). Although called a consultation paper the Home Secretary's foreword, at 3, makes it clear that the consultation is to be of limited scope, 'Whilst the Government is open to suggestions about how we achieve the aims, we are not consulting on the aims themselves or therefore on whether the law should be changed'. The paper is available at: http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3458.html

The Government argues that this change is necessary as quashing a conviction on purely procedural grounds where the Court has no doubt that the appellant is guilty is 'damaging to public confidence in the criminal justice system'.[37] Responses to this proposed change in the law have, however, been largely negative.[38] Allowing the police to profit from misconduct which they are able to cover up until after the trial is concluded may do equal damage to public confidence in the criminal justice system. It is vital that on occasions the Court of Appeal has the freedom to place the protection of rights over maintaining a conviction of an apparently guilty person. Such an outcome may be necessary to provide accountability for wrongdoing by the police and to deter misconduct in the future.

The Criminal Justice and Immigration Bill seeks to implement the Government's proposed change in the law. Clause 26 of the Bill will, if enacted, amend the grounds for allowing an appeal[39] to provide that a conviction is not unsafe if the Court of Appeal are satisfied that the appellant is guilty of the offence. The Government appears, however, to have reacted to the strong concerns expressed. Clause 26 makes it clear that even if the Court of Appeal are satisfied the offender is guilty of the offence, they can still allow the appeal against conviction if they think that it would be incompatible with the appellant's rights under the European Convention on Human Rights to dismiss the appeal.

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[37] *ibid.* 3.
[38] See, JR Spencer, 'Quashing Convictions, and Squashing the Court of Appeal' (2006) 170 JP 790; P Ferguson, 'Retrials and tribulations' (2006) 156 NLJ 1582; Liberty, *Liberty's response to the Office for Criminal Justice Reform: "Quashing Convictions"* (2006) available at: http://www.liberty-human-rights.org.uk/pdfs/policy06/quashing-convictions.pdf;
Justice, *Response to OCJR consultation Quashing Convictions: Report of a review by the Home Secretary, Lord Chancellor and Attorney General* (2006), available at: http://www.justice.org.uk/images/pdfs/quashingconvictions.pdf;
I Dennis, 'Convicting the guilty: Outcomes, Process and the Court of Appeal [2006] Crim LR 955.
[39] The Criminal Appeal Act 1968 provides that the Court of Appeal 'shall allow an appeal against conviction if they think that the conviction is unsafe', Criminal Appeal Act 1968 s 2(1).

It is, however, debateable whether this concession goes far enough to provide an adequate safeguard. There may well be cases in which police misconduct which has breached a suspect's rights is revealed but it does not amount to a breach of the European Convention on Human Rights. In October 2007 the Secretary of State for Justice and Lord Chancellor, Jack Straw, indicated that in the light of the almost unanimous criticism of the proposal he would comprehensively review the drafting of clause 26 and would table a replacement.[40] A broader, and more appropriate test could state that even if the Court of Appeal are satisfied that the offender is guilty of the offence they can still allow the appeal if they think that it would seriously undermine the proper administration of justice to allow the conviction to stand. It should, though, be noted that such a test would probably leave the current approach of the Court of Appeal unchanged. Introducing such a change would though have the small benefit of making it clear in statute to those agents of the state who may be tempted to bypass certain safeguards that the Court of Appeal has the power to quash a conviction where there has been serious misconduct by the investigating or prosecuting authorities, even though they are in no doubt about the appellant's guilt.

2.1.3 Criminal Prosecution

Each year a number of police officers are prosecuted for allegedly breaching the criminal law.[41] In recent years officers have been found guilty of assaulting suspects,[42]

[40] Hansard HC vol 464 col 66 (8 October 2007). At the time of writing the replacement has not yet been brought forward.
[41] Between, for example, 2000 and 2005, 174 Metropolitan police officers received a criminal record, 'Police: 74 Scotland Yard officers have criminal records' *The Guardian* (11 April 2006).
[42] In 1997 PC Paul Evans was found guilty of assault and of affray and jailed for six months, A Daniels, 'Six months for assault case PC' *The Guardian* (19 November 1997); In 2003 PC Matthew Dunn was found guilty of taking a running kick at a suspect and jailed for three months, 'PC who was filmed kicking suspect is jailed' *The Times* (15 February 2003).

corruption related offences,[43] manslaughter[44] and rape.[45] In *R v Dytham*[46] a policeman was convicted of the common law offence of misconduct in public office for failing to intervene in a fight in which a man died. Officers have also been convicted of this offence in cases involving less tragic facts.[47]

Criminal prosecution is centrally concerned with accountability. Those officers who have allegedly breached the criminal law are investigated and where found guilty, are sentenced. The openness of criminal trial proceedings may enhance the degree of accountability. Cases in which police officers are convicted of committing a criminal offence will receive a considerable amount of media coverage, more so than if an ordinary member of the public had committed the same offence. The greater the exposure the more damage that is likely to result to the individuals reputation. This reflects the fact that society expects higher standards from those with responsibility for enforcing the law. Such accountability may aid rights protection by deterring other police officers from breaking the criminal law. Public confidence in the police and the criminal justice system will be damaged where police officers are shown to have broken the law. But this does not provide a reason for not prosecuting. The police must be

[43] In 1996 Detective Constable John Donald was jailed for 11 years after admitting four corruption charges pertaining to the selling of operational secrets to those involved in organised crime. The Times newspaper described it as 'the worst-known case of corruption within police ranks for almost 20 years', R Duce, 'Bribes detective jailed for 11 years' *The Times* (29 June 1996); In 1997 PC Ronald Palumbo was jailed for his part in a plot to smuggle cannabis into Britain, '"Bent copper" is jailed for Pounds 2m cannabis plot' *The Times* (25 February 1997).

[44] In 1986 police sergeant Alwyn Sawyer was sent to jail for seven years after being found guilty of the manslaughter of a suspect held in the police custody cells, P Davenport, 'Policeman jailed for killing in cell' *The Times* (19 April 1986).

[45] In 2000 police sergeant Paul Banfield was sentenced to 18 years in prison for raping and indecently assaulting several women. Most of the assaults occurred whilst he was on duty, J Hartley-Brewer, 'Policeman gets 18 years for sex attacks: Women raped and assaulted in cells to satisfy "squalid sexual depravity"' *The Guardian* (22 June 2000).

[46] [1979] 1 QB 722 (CA).

[47] In 2005 PC James Ruddock pleaded guilty to misconduct in public office after admitting that he had sexual intercourse with a woman in her home when he should have been on patrol. In 2006 former PC Shajan Miah pleaded guilty to four counts of misconduct in public office after he had sexual intercourse with a woman in her home while on duty. See, D Clark, 'Officers Behaving Badly' (2006) 156 NLJ 969.

brought to book for their criminal conduct, regardless of the effect on public confidence. Furthermore, if the police have behaved criminally it is perhaps right that public confidence is threatened. The fact that the public can see the police being held to account for such conduct will go some way towards reassuring the public that no one is above the law which may help engender greater respect for the law.

Police officers have, however, tended not to be prosecuted for alleged criminal conduct. Where officers have been prosecuted, they have tended not to be convicted. It is possible that police officers have rarely been convicted of criminal offences, especially serious criminal offences, because they rarely break the law. Given certain inquest verdicts,[48] and the high number of successful civil actions against the police,[49] this suggestion seems rather implausible. The number of police officers held to account via criminal prosecution should probably be higher.

An inappropriately low rate of criminal prosecution may, in part, flow from inadequate investigations into alleged criminal conduct by the police. Until 1 April 2004 all investigations into police impropriety were conducted by the police themselves. On this date the new Independent Police Complaints Commission (IPCC) took control of the investigation process. The extent to which the IPCC has succeeded in producing more rigorous investigations of police misconduct will be examined below.[50] Inadequate prosecution figures may also be linked to poor practice by the Crown Prosecution Service (CPS). The extent to which oversight of the CPS has helped ensure that the potential benefits of the criminal prosecution of police officers are realised will be examined in chapter three.

[48] See section 2.1.4.
[49] See section 2.1.5.
[50] See section 2.2.3

The prospects of prosecuting the police where someone has died in police custody may also have been limited by the lack of a corporate manslaughter law. In July 2007 the Corporate Manslaughter and Corporate Homicide Act 2007 received Royal Assent. When it comes into force[51] this law will make it easier to prosecute for management failures leading to death. As the Act was going through Parliament the Government did their best to remove deaths in custody from its ambit. Considerable pressure was, however, brought to bear[52] and the Government eventually gave way.[53] The provisions relating to deaths in custody are not, though, to come into force at the same time as the rest of the Act.[54] The Government initially suggested that the law would be extended to cover deaths in custody within five to seven years.[55] Following further pressure they reduced this to a target of three years,[56] while warning that it might actually take five years.[57] It is to be hoped that the law is extended to cover deaths in custody within three years at the latest. Far too many people die in police custody each year without anyone

[51] It is due to come into force on 6 April 2008, Ministry of Justice, press release, 'Justice for corporate deaths: royal assent for Corporate Manslaughter and Corporate Homicide Act' (26 July 2007).
[52] The Home Affairs and Work and Pensions Committees concluded that 'there is no principled justification for excluding deaths in prisons or police custody from the ambit of the offence', Home Affairs and Work and Pensions Committees, *Draft Corporate Manslaughter Bill* (2005-06) HC 540-I para 227. The Joint Committee on Human Rights took the view that excluding deaths in custody from the scope of the new offence would give rise to a serious risk that the UK might be found to be in breach of its positive obligation to protect life under Article 2 ECHR, Joint Committee on Human Rights, *Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill* (2005-06) HL 246, HC 1625 para 1.43; Joint Committee on Human Rights, *Legislative Scrutiny: First Progress Report* (2006-07) HL 34, HC 263 para 2.13.
[53] Corporate Manslaughter and Corporate Homicide Act 2007 s 2(1)(d).
[54] *ibid.* s 27(2).
[55] In the words of the Secretary of State for Justice and Lord Chancellor, Jack Straw, 'A reasonable period for managing the extension of the offence would be, we believe, something between five and seven years', Hansard HC vol 463 col 333 (18 July 2007).
[56] Baroness Ashton of Upholland, the leader of the House of Lords, stated, 'Concerns have been raised that that sort of timetable does not provide the necessary impetus to take matters forward, and the Government are prepared to recognise and to respond to those concerns. For that reason, I give noble Lords an assurance that the sort of timetable that the Government will aim for will be the three-year period from commencement'. Hansard HL vol 694 col 556 (23 July 2007).
[57] In the words of Baroness Ashton again, 'The exact timetable must be subject to further evaluation in light of … developments. It may therefore look more like the five years that my right honourable friend the Secretary of State for Justice referred to', HL vol 694 col 557 (23 July 2007).

being held to account.[58] A speedy introduction of this extension and the resulting increased possibility of prosecution may help ensure greater efforts are made by the police to safeguard the right to life.

2.1.4 Inquests

Where a suspect dies in police custody or, as a result of police actions,[59] an inquest may be held.[60] The purpose of an inquest is to ascertain who the deceased was; and how, when and where they came to die.[61]

The fact that the circumstances of a death in a police station or following contact with the police may be examined by a court in public,[62] may provide reassurance to the public and the victims relatives that the matter will not be covered up and forgotten about. The public have a right to know how such a death came to occur. An inquest may also provide a degree of accountability in the sense that it may point the finger of blame. In a number of cases inquest juries have returned verdicts of unlawful killing where people have died in police custody.[63] Such verdicts, though bringing no 'punishment'

[58] In 2005/06 there were 28 deaths in or following police custody, IPCC, Deaths During or Following Police Contact: Statistics for England and Wales 2005/06 (2006) 6. This report and statistics for previous years are available at, http://www.ipcc.gov.uk/index/resources/research/reports_polcustody.htm. See also the statistics produced by Inquest available at, http://inquest.gn.apc.org/data_deaths_in_police_custody_pv.html.

[59] In 2005/06 there were a total of 118 deaths during or following police contact (including those in or following police custody), IPCC, Deaths During or Following Police Contact: Statistics for England and Wales 2005/06 (2006) 6. This report and statistics for previous years are available at, http://www.ipcc.gov.uk/index/resources/research/reports_polcustody.htm. See also the statistics produced by Inquest available at, http://inquest.gn.apc.org/data_deaths_in_police_custody_pv.html.

[60] Coroners Act 1988 s 8(1) requires a coroner to hold an inquest into a death where there is reasonable cause to suspect that the deceased died a violent or unnatural death or died a sudden death of which the cause is unknown.

[61] Coroners Act 1988 s 11(5)(b) and The Coroners Rules 1984 SI 1984 / 552 para 36.

[62] The Coroners Rules 1984 provide that subject to any national security concerns the inquest shall be held in public, The Coroners Rules 1984 SI 1984 / 552 para 17.

[63] In November 1991 an inquest jury ruled that Oliver Pryce was unlawfully killed. He died as he was being held in a headlock, 'Man who died in police van unlawfully killed, says jury' *The Guardian* (30 November 1991); In November 1995 an inquest jury returned a verdict of unlawful killing on Richard O'Brien. He suffocated to death after being handcuffed face down. The post-mortem discovered 31 separate injuries on his body including multiple cuts, bruises to his face and broken ribs, O Bowcott,

beyond public condemnation, are clearly valued by the relatives of a victim. Following unlawful killing verdicts Richard O'Brien's wife, and Christopher Alder's sister, both expressed the view that 'justice has been done'. [64]

Inquests can also provide a degree of rights protection for future cases as coroners can make recommendations designed to ensure similar deaths are avoided.[65] In a number of cases where people have died following contact with the police coroners have made recommendations.[66] The fact that such recommendations are made publicly may provide reassurance to the public. In some cases it does seem that the recommendations may have had a positive impact.[67] There are suggestions, though, that often the

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'Handcuffed man unlawfully killed' *The Guardian* (11 November 1995); In January 1996 an inquest jury returned a verdict of unlawful killing on Shiji Lapite. He was put in a neck hold and died of asphyxiation, V Chaudhary and O Bowcott, 'Asylum seeker "unlawfully killed" by police' *The Guardian* (26 January 1996); In October 1997 an inquest jury ruled that Ibrahima Sey had been killed unlawfully, O Bowcott, S Naidoo and D Campbell, 'Police CS spray victim unlawfully killed' *The Guardian* (3 October 1997); In August 2000 an inquest jury ruled that Christopher Alder had been killed unlawfully. He died with his hands cuffed behind his back and his trousers around his ankles in a police custody suite. For 12 minutes, as Mr Alder lay dying, five police officers failed to go to his aid, M Wainwright, 'Police cell death ruled unlawful' *The Guardian* (25 August 2000).

[64] O Bowcott, 'Handcuffed man unlawfully killed' *The Guardian* (11 November 1995); M Wainwright, 'Police cell death ruled unlawful' *The Guardian* (25 August 2000).

[65] The Coroners Rules 1984 SI 1984 / 552 para 43.

[66] At the end of Richard O'Briens inquest the Coroner condemned police training in restraint techniques as 'appalling' and made a number of recommendations designed to ensure suspects were restrained in a safer manner, O Bowcott, 'Handcuffed man unlawfully killed' *The Guardian* (11 November 1995); The Coroner at Shiji Lapite's inquest called on the police to speed up warnings to officers on the dangers of using neck holds while restraining suspects, V Chaudhary and O Bowcott, 'Asylum seeker "unlawfully killed" by police' *The Guardian* (26 January 1996); Brian Douglas died after being struck by a police baton. At the inquest the Coroner called for better training in the use of the batons, D Campbell and O Bowcott, 'Baton Death verdict "unjust," Police "need better training"' *The Guardian* (9 August 1996); The coroner at Ibrahima Sey's inquest said that he would write to Chief Constables to express concern about methods of restraint and to ask them to remind officers about the dangers of positional asphyxia, O Bowcott, S Naidoo and D Campbell, 'Police CS spray victim unlawfully killed' *The Guardian* (3 October 1997).

[67] The points and recommendations made by the Coroner at Ibrahima Sey's inquest were considered by the Metropolitan Police, the Association of Chief Police Officers, and the Home Office. Guidelines produced by the Metropolitan Police on the issue of restraint, in line with the recommendations made by the Coroner, were incorporated into the Metropolitan Police officer training manual. A training video on the condition of acute exhaustive mania or excited delirium which followed the criteria commended by the Coroner was also made available to all police forces. See: CPT, *Response of the United Kingdom Government to the report of the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1997* (2000) para 51-52.

recommendations are not acted upon.[68] The fact that there is so little information publicly available on whether the recommendations are acted on or not is inadequate. The coroners system should be capable of providing reassurance to the public that action is being taken to ensure that people do not die in police custody in similar circumstances in the future and that lessons have been learnt.

It is important therefore that efforts are being made to ensure coroner's recommendations are acted upon and to provide greater transparency in relation to this process. Following much pressure for reform[69] the Government issued a Draft Coroners Bill in June 2006.[70] This Bill was criticised for not making any provision to help ensure that coroners recommendations were acted upon.[71] The Government has promised that the Bill will be amended to give coroners stronger powers to ensure that lessons are learned.[72] Coroners will be able to require organisations to respond to their reports and to say what action they will take. The Chief Coroner to be appointed under the new system, will monitor the reports made and responses received, and an annual report of these responses will be laid before the House of Commons. The Government intends to propose a Coroners Bill in the 2007-08 session of Parliament.[73] It is to be hoped that the amended Bill will contain these promised amendments.

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[68] In January 2007, the then Constitutional Affairs Minister, Harriet Harman stated that, 'Currently, too often, coroners' findings are not acted on', DCA, press release, 'Coroners get more powers to help prevent future deaths' (30 January 2007).
[69] See, for example, Amnesty International, *United Kingdom, Deaths in Custody: Lack of Police Accountability* (24 May 2002) AI-Index EUR 45/042/2000; Liberty, *Deaths in Custody – Reform and Redress* (2003).
[70] Coroner Reform: The Government's Draft Bill, Improving death investigation in England and Wales (HMSO, London 2006) Cm 6849.
[71] Inquest, *Inquest's response to the draft Coroners Reform Bill* (2006) 6-7. Available at, http://inquest.gn.apc.org/policy.html#reform.
[72] Department of Constitutional Affairs, press release, 'Coroners get more powers to help prevent future deaths' (30 January 2007).
[73] Office of the Leader of the House of Commons, The Governance of Britain – The Government's Draft Legislative Programme (2007) Cm 7175.

2.1.5 Civil Actions

Police activity may be subject to judicial scrutiny if a civil action is brought by a complainant seeking damages for wrongful action.[74] The most commonly utilised tort claims are assault, false imprisonment, malicious prosecution, wrongful arrest, and negligence. Civil actions came to be regarded as one of the best ways to hold the police to account and to receive redress for police misconduct.[75]

If a civil action is contested the police are required to come before the court to try and justify their conduct. If judgment goes against the police they will be penalised. Individual officers may be publicly criticised and the Police Service may suffer financially. Damages awarded in a civil action are primarily intended to compensate the claimant for harm suffered. In particularly egregious cases where the police conduct has been 'oppressive, arbitrary or unconstitutional'[76] exemplary damages may be awarded. Such damages are designed to punish the police. Successful civil actions brought against the police tend to receive considerable media attention. Such coverage may help deter other police officers from acting improperly. The fact that the public can see that allegations are heard before a court and redress is provided where the police have breached rights may provide reassurance.

An examination of some of the most high-profile civil actions illustrates their effectiveness in this respect. In 1994 the High Court ruled that Derek Treadaway had been assaulted by officers of the West Midlands serious crime squad. The judge, Mr Justice McKinnon, commented that 'what happened to him amounted to nothing less

[74] See generally: RC Clayton and H Tomlinson, *Civil Actions Against the Police* (3rd edn Sweet and Maxwell, London 2004); J Harrison and S Cragg, *Police Misconduct: Legal Remedies* (3rd edn Legal Action Group, London 1995)
[75] R Reiner, *The Politics of the Police* (3rd edn Oxford University Press, Oxford 2000) 187-88.
[76] *Rookes v Barnard* [1964] AC 1129 (HL).

than torture'. Treadaway was awarded £2,500 compensatory damages, £7,500 aggravated damages and £40,000 exemplary damages.[77] In 2003 Sylbert Farquharson who had been assaulted, falsely imprisoned and maliciously prosecuted was awarded £250,000.[78] The judge said Mr Farquharson had been 'subjected to explicit racist abuse in the street and a particularly vicious and cowardly form of racist abuse at the police station'. The police officers responsible had 'felt obliged to invent an account of events which they knew to be untrue in order to justify their actions'.

One limitation on the oversight possible via civil actions concerns the approach the courts have taken in the area of negligence. In *Hill v Chief Constable of West Yorkshire*[79] the House of Lords ruled that as a matter of public policy, the police were immune from actions for negligence in respect of their activities in the investigations and suppression of crime. In *Osman v Ferguson*[80] this public policy immunity was the sole basis for denying liability. Such a blanket immunity for the police is inappropriate.[81] It prevents the police being held to account for their poor performance and rules out redress for those who have suffered harm as a result of police incompetence. It also stops closed investigations being opened up to external judicial scrutiny to see whether any lessons could be learned for the future which might feed into more effective police performance.

[77] 'Entitlement to exemplary damages' *The Times* (25 October 1994).
[78] C. Dyer, 'Vicious racism costs Met pounds 250,000: Respectable family man abused, assaulted and falsely accused' *The Guardian* (1 February 2003).
[79] [1989] AC 53 (HL).
[80] [1993] 4 All ER 344 (CA). See also: *Alexandrou v Oxford* [1993] 4 All ER 382 (CA); *Ancell v McDermott* [1993] 4 All ER 355 (CA).
[81] See: LCH. Hoyano, 'Policing Flawed Police Investigations: Unravelling the Blanket' (1999) 62 MLR 912, 931-934; J Steele and DS Cowan, 'The Negligent Pursuit of Public Duty – a Police Immunity' [1994] PL 4-11.

Following *Hill* and *Osman* the courts moved towards a slightly less restrictive approach. In *Swinney v Chief Constable of Northumbria Police*[82] it was emphasised that there are considerations of public policy weighing in favour of liability and the imposition of a duty of care which must also be taken into account. Public policy 'must be assessed in the round'.[83] The European Court of Human Rights in *Osman v United Kingdom*[84] and *Z v United Kingdom*[85] helped cement this balancing approach.[86] Although a duty of care could be imposed it remained difficult to succeed on a negligence claim against the police.[87]

The introduction of the Human Rights Act 1998 may have enhanced the extent to which the courts are prepared to oversee police action in such cases. In *Van Colle v Chief Constable of the Hertfordshire Police*[88] the Court of Appeal ruled that that the police had failed to take appropriate action to protect a vulnerable prosecution witness when they should have known there was a risk to his life. As such, they had acted incompatibly with Article 2 of the European Convention on Human Rights and the deceased's parents were awarded £25,000. Following this judgement many police forces have apparently begun re-writing their witness protection policies.[89] It also

[82] [1996] 3 All ER 449 (CA).
[83] *ibid.* 484 (Hirst LJ)
[84] (App no 23452/94) (2000) 29 EHRR 245.
[85] (App no 29392/95) (2002) 34 EHRR 3.
[86] In *Osman* the ECtHR found that the blanket police immunity applied in *Osman* breached Article 6 of the European Convention on Human Rights because the competing public interests in favour of liability had not been considered. In *Z* the ECtHR accepted that its reasoning in the *Osman* judgment was based on a misunderstanding of the law of negligence. The ECtHR was satisfied that the competing considerations of public policy could be properly and fairly discussed in interlocutory hearings. It is clear from *Z* that the courts must continue to weigh in the balance such competing considerations. See further: M Kunnecke, 'Scrutiny: The Impact of the Decision by the European Court of Human Rights in Z v UK on the Development of the Liability of Public Bodies in the UK' (2002) 8 EPL 25.
[87] See, *Swinney v Chief Constable of Northumbria Police (No 2)* (1999) The Times 25 May.
[88] [2007] 1 WLR 1821 (CA).
[89] S O'Neill, 'Police lose fight over witness murder' *The Times* (April 25 2007).

appears that there are at least three other cases in which similar actions may be brought.[90]

The police often negotiate a settlement rather than contesting a civil action in court.[91] Settlements may not involve the same degree of accountability as an open hearing as they often go undisclosed. One of the most controversial examples of a settlement being kept secret occurred in the case of Kevin Taylor. After much probing by journalists and MPs it emerged that he had been paid a total of £2.3 million by the Greater Manchester police.[92] It is strongly arguable that such settlements ought to be disclosed in accordance with the principles of democratic accountability. The secrecy surrounding settlements was criticised by the Home Affairs Select Committee: 'It is a fundamental tenet of public life that sums paid out by public bodies – particularly very large sums – should in principle be disclosable'.[93] The public 'have a right to know what has happened so that they can come to their own view as to how their police force has acted'.[94] It recommended that steps 'be taken to ensure that disclosure becomes the standard practice'.[95] Settlements continue, however, to go undisclosed.[96]

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[90] D Rose, 'My sister was killed while the police did nothing' *The Observer* (11 March 2007).
[91] In October 2006 Michael O'Brien and Ellis Sherwood received £300,000 and £200,000 in settlement for false imprisonment and malicious prosecution. The police did not accept liability or any wrongdoing, nor did they apologise, V Dodd, 'Cardiff Three get £500,000 but no apology from police: Force settles case over malicious prosecution Men jailed for murder they did not commit' *The Guardian* (12 October 2006); Winston Silcott received £50,000 in settlement of his claim for malicious prosecution, M Wells, 'Met confirms £50,000 payout to Silcott' *The Guardian* (13 November 1999); In June 1991 South Yorkshire police agreed to pay £425,000 compensation to 39 former striking miners who alleged assault, wrongful arrest, malicious prosecution and false imprisonment arising out of a confrontation between police and pickets in 1984. The settlement was made 'without prejudice', S Milne, 'Police to pay pounds 425,000 to 39 arrested in miners' strike' *The Guardian* (20 June 1991).
[92] D Campbell, 'MPs back public's right to know after secret pounds 10m police payout; Malicious prosecution settlement over 'shoot-to-kill', Stalker case the most costly ever' *The Guardian* (3 September 1998). See similarly, C Dyer, 'Police settle in race bias case' *The Guardian* (March 17 1995)
[93] Home Affairs Select Committee, *The Confidentiality of Police Settlements of Civil Claims* (1997-98) HC 894 para 16.
[94] *ibid.* para 22.
[95] *ibid.* para 30.
[96] See, for example, H Carter, 'Payout to father after armed police raid home' *The Guardian* (19 August 2003).

2.2 Administrative Scrutiny

The police are overseen by two main administrative bodies: Her Majesty's Inspectorate of Constabulary and the Independent Police Complaints Commission. The oversight provided by these two bodies and the extent to which it promotes accountability, effective performance, rights protection, democracy and public confidence represents the main focus of this section. It is though firstly, also noted, that there are a number of bodies which provide more occasional or ad hoc oversight.

2.2.1 Ad hoc oversight

Inquiries have, on occasions, been established by the Government to investigate police actions during particularly controversial incidents. In, for example, 1981 Lord Scarman examined the serious clashes between the police and the public in Brixton on 10 to 12 April 1981.[97] The MacPherson inquiry looked at the police investigation into the murder of Stephen Lawrence.[98] More recently, the Bichard inquiry, examined the child protection procedures in Humberside Police and Cambridgeshire Constabulary following the murders of Jessica Chapman and Holly Wells.[99] The serious failings of the police in these particular incidents required an independent and open examination of what had gone wrong. It is arguable that the public would not have had confidence in anything less than a fully independent report which was published in full. The reports made recommendations for more effective police performance and recommendations designed to ensure greater protection for rights. They also provided accountability by publicly criticising poor performance by the police. In the case of the Bichard inquiry

[97] Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981).
[98] Sir William MacPherson, *The Stephen Lawrence Inquiry* (HMSO, London 1999) Cm 4262-I.
[99] Sir Michael Bichard, *The Bichard Inquiry Report* (The Stationery Office, London 2004) HC 653.

part of this accountability took the form of the suspension and early retirement of the Chief Constable of Humberside.[100]

The Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, usually referred to as the 'Committee for the Prevention of Torture', or simply the 'CPT', began work in 1989.[101] It is composed of persons known for their competence in the field of human rights[102] and is charged with examining, through visits, 'the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment'.[103] It enjoys 'unlimited access to any place where persons are deprived of their liberty',[104] and on a number of occasions has visited police stations in England and Wales.

The CPT has helped uncover and expose inappropriate conditions within police stations and the improper treatment of detainees. In some cases this has produced improvement, or at least action designed to bring about improvement. During, for example, its second periodic visit to the United Kingdom in May 1994 the CPT's delegation found evidence that prisoners held at the main Bridewell police station in Liverpool had been

[100] The Chief Constable David Westwood was initially suspended then allowed to resume his duties after agreeing to retire early, see, *R (on the application of the Secretary of State for the Home Department) v Humberside Police Authority* The Times 9 July 2004, transcript available on LexisNexis; I Herbert, 'Humberside police chief to return – and then retire' (September 11 2004).
[101] Article 1 of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provided for the establishment of the CPT. The convention was opened for signature on November 26, 1987 and entered into force on February 1, 1989 following the 7 ratifications required by Article 19. Ratification details available at: http://www.cpt.coe.int/en/about.htm
[102] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 Article 4.
[103] *ibid.* Article 1.
[104] *ibid.* Article 8(2)(c).

mistreated.[105] The material conditions in which prisoners were being held were condemned as appalling.[106] During the meeting held with the United Kingdom authorities at the end of the visit, the CPT's delegation made immediate observations[107] on these matters.[108] Following this communication all prisoners held at the Main Bridewell on behalf of the Prison Service were transferred to Liverpool Prison and the Director General of the Prison Service wrote to all police forces holding Prison Service inmates asking that they seek to avoid holding prisoners three to a single cell.[109] In the report of their third periodic visit in February 2001 the CPT expressed concern that the cells in Cardiff central police station were dirty and poorly ventilated.[110] The Government accepted that conditions in police detention facilities in Wales were not up to the desired standard and gave details of efforts being undertaken to improve matters.[111]

The fact that the CPT's reports of its findings and recommendations and the Government's responses are published may help publicise any improper conditions.[112]

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[105] CPT, *Report to the United Kingdom Government on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 31 May 1994* (1996) paras 18-22.
[106] *ibid.* para 26.
[107] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 Article 8(5) provides that, 'If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned'.
[108] CPT, *Report to the United Kingdom Government on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 15 to 31 May 1994* (1996) para 362.
[109] *ibid.* para 363.
[110] CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) 6.
[111] CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) paras 13-17.
[112] The CPT will publish its report and the response of the state authorities when requested to do so by that party, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 Article 11(2). Reports are available at, http://www.cpt.coe.int/en/states/gbr.htm. On only one occasion has the United Kingdom not permitted a full report to be published. It requested that certain passages of professional legal advice from the Solicitors Department of the Metropolitan Police be omitted from the published version of the CPT's ad hoc visit to the United Kingdom in 1997 for reasons

Such accountability may encourage efforts to provide greater protection for the rights at stake. It is also important in a democracy that this information is made publicly available. The public have a right to know about the conditions within their police stations. The fact that the public can see that there is a body which every so often inspects police cells and works to improve conditions may provide a degree of reassurance.

There is room for improving this degree of openness. The Government tends not to respond very promptly to the CPT's reports and the CPT's reports are not published until the Government has produced its response. As a result CPT reports of visits are not made publicly available until some time after the visit was conducted.[113] There is certainly a need for the Government to respond more quickly. There is also a case to be made for amending the CPT reporting system so that their report is released when it is complete and the Government's report is released when that is produced. This would present the public with information that was more likely to be current when published. It might also place greater pressure on the Government to act on recommendations more swiftly.

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of legal professional privilege, see, CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000).

[113] In relation to the CPT's visit from 15 to 31 May 1994, their report was produced and transmitted to the UK Government on 10 January 1995, CPT, *Report to the United Kingdom Government on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 15 to 31 May 1994*, (1996) 9. The Government's final response and the CPT's report were not published until 5 March 1996. Following the CPT's visit from 4 to 16 February 2001, their report was sent to the UK Government on 25 July 2001, CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) 5. The response of the UK Government was produced in March 2002, CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) 4. It seems, therefore, that it is normally at least a year before the CPT's report and the Government response is published; see the details of publications and publication dates available at, http://www.cpt.coe.int/en/states/gbr.htm.

Other bodies which provide occasional administrative oversight include the National Audit Office which has examined, for example, the speed efficiency and effectiveness with which the Metropolitan Police Service responds to telephone calls from the public. Their report identified a number of areas where further improvements could be made.[114] The Commission for Racial Equality has also provided oversight.[115] In 2005 it published the final report of its formal investigation of the Police Service in England and Wales.[116]

2.2.2 Her Majesty's Inspectorate of Constabulary

Established in 1856,[117] Her Majesty's Inspectorate of Constabulary (HMIC) aims to promote the efficiency and effectiveness of policing and law enforcement in England and Wales through the assessment and inspection of the police.[118]

Inspection and assessment by HMIC uncovers poor practice, advocates corrective action, and identifies examples of good practice, which may be spread throughout the Police Service. According to HMIC's own self-evaluation, 'the inspectorate … has undeniably contributed greatly to improvements in policing'.[119] Thematic inspections

[114] National Audit Office, *Metropolitan Police Service: Responding to calls from the public* (1994-1995) HC 753.
[115] It should be noted that the CRE is to be merged into the Commission for Equality and Human Rights. This new body is due to begin operating in October 2007. See, http://www.cehr.org.uk/ and the Equality Act 2006.
[116] Commission for Racial Equality, *The Police Service in England and Wales, Final report of a formal investigation by the Commission for Racial Equality* (2005).
[117] The first Her Majesty's Inspectors of Constabulary were appointed under the provisions of the County and Borough Police Act 1856. See further: *The History of Her Majesty's Inspectorate of Constabulary: The first 150 years, 1856 to 2006* (2006). Available at: http://inspectorates.homeoffice.gov.uk/hmic/about-us/
[118] Police Act 1996 s 54.
[119] *The History of Her Majesty's Inspectorate of Constabulary: The first 150 years, 1856 to 2006* (2006) 116.

have, 'proved key in identifying critical issues and sticking points and in offering solutions for moving the Police Service forward'[120]

The fact that HMIC reports are published provides an important source of accountability.[121] This publicity may help bring about improved performance by embarrassing poorly performing police forces into making increased efforts to rectify problems. Democracy also requires that the public are able to access information about how their local police force is performing should they be interested. The public are entitled to know if they are receiving value for money. The scrutiny provided by HMIC may also bolster public confidence in the Police Service. The fact that there is an independent body responsible for ensuring the police perform effectively, and which the public can see working to fulfil this duty and to provide accountability for poor performance, provides reassurance. Public confidence is also safeguarded by the fact that HMIC can investigate particular aspects of police performance which impact on public confidence such as questions of integrity and the scope and prevalence of police corruption.[122] Ensuring the public have confidence in the police aids effective police performance.

The main inspection methodology now deployed by HMIC is the Baseline Assessment. This approach assesses 27 police functions and activities and seeks to monitor change in each force against a baseline of performance identified in spring 2004. It enables HMIC to maximise their resources to improve performance by ensuring attention is directed where most needed. The Baseline Assessment methodology is also effective at holding

[120] HMIC, *Report of Her Majesty's Chief Inspector of Constabulary: 2004-2005* (HMSO, London 2006) HC 842, 73.
[121] Police Act 1996 s 55. The reports are available at: http://inspectorates.homeoffice.gov.uk/hmic/inspect_reports1/
[122] See, for example, HMIC, *Police integrity: securing and maintaining public confidence* (1999).

the police to account publicly and informing the public how the police are performing. The police are given a grading of excellent, good, fair, or poor for each of the 27 functions and activities assessed. In many cases a 'direction of travel' grade of, improved, stable or deteriorated, is also given. Such an explicit grading process is clear and easily understandable by the public.

Concern with the baseline inspection methodology arises over the extent to which it relies on police self-assessment. Higher-performing police forces are subject to 'no routine HMIC oversight'. They will instead conduct 'full self-assessment'.[123] Forces with more mixed Baseline Assessment performance results attract a 'light touch' inspection regime. They complete a full baseline self-assessment and HMIC then determines which functions and services should be subject to on-site validation.[124] Self-assessment and references to an 'inspection break',[125] or 'inspection holiday',[126] seems dubious. It may mean that poor police performance goes unchallenged. Close scrutiny of prison service statistical returns by Her Majesty's Inspectorate of Prisons has regularly exposed inadequate prison conditions disguised by misleading figures.[127] Police self assessments may be equally misleading. Public confidence demands that the inspectorate actually inspects. At least a random sample of police force self-assessment figures should be subject to on-site validation by HMIC.

[123] HMIC, *Report of Her Majesty's Chief Inspector of Constabulary: 2004-2005* (HMSO, London 2006) HC 842, 65.
[124] *ibid.* 65.
[125] *ibid.* 65.
[126] HMIC, Explanatory Notes on Baseline Assessments of Professional Standards 2004/05, Part B, 2.3.
[127] See section, 5.2.2.

Apart from taking the extreme step of asserting that a police force was not efficient or effective, which in turn could affect central Government's award of the police grant,[128] the reports of HMIC formerly lacked any effective sanction to enforce the recommendations made. As HMIC concede, 'this rendered their involvement less effective than it might have been because it was open to individual forces to react slowly or perhaps not at all, to the recommendations'.[129] New powers have been introduced. If HMIC concludes that a force, or any part of it, is not efficient or effective, or that it will cease to be so unless remedial measures are taken, the Home Secretary can direct a police authority to take specified remedial measures.[130]

Her Majesty's Chief Inspector of Constabulary is keen to stress that he is 'independent both of the Home Office and of the Police Service'.[131] It is though the case that HMCIC is a former senior police officer and HMIC's inspection staff are almost entirely provided by police forces on a secondment basis.[132] This provides HMIC with up-to-date policing experience which may aid their oversight.[133] It may, though, pose threats to the independence and impartiality of the inspectorate. It certainly gives rise to a perception of a lack of independence. This perception problem is not helped by HMIC references in their reports to 'our operational colleagues'.[134] This close collegial relationship may have contributed to the overly trusting approach reflected in the Baseline Assessment methodology.

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[128] HMIC declared Derbyshire police force inefficient in 1992: *The History of Her Majesty's Inspectorate of Constabulary: The first 150 years, 1856 to 2006* (2006) 117.
[129] Sir Michael Bichard, *The Bichard Inquiry Report* (The Stationery Office, London 2004) HC 653, para 3.31.
[130] Police Act 1996 s 41A, inserted by the Police Reform Act 2002 s 5.
[131] HMIC, *Report of Her Majesty's Chief Inspector of Constabulary: 2004-2005* (HMSO, London 2006) HC 842, 69.
[132] *ibid.* 71.
[133] *ibid.* 71.
[134] *ibid.* 40.

There is one HMIC inspector from a non-police background, holding responsibility for inspecting police personnel, training and diversity.[135] The appointment of such a lay person enhances HMIC claims to independence and offers a fresh non-police perspective, broadening HMIC expertise. The lay inspector is, though, confined to examining somewhat marginal issues in terms of traditional police culture.[136] There is certainly considerable scope for enhancing the lay inspectors role. It is also arguable that the lay element within HMIC should be radically increased. In particular, the Chief Inspector of Constabulary ought not to be a former policeman. Though Her Majesty' Inspectorate of Prisons is more focused on the protection of rights than HMIC,[137] it would be unimaginable for the Chief Inspector of Prisons to be a former prison governor. Public confidence in HMIC might be enhanced if it were likewise headed by a respected 'outsider'.

2.2.3 The Independent Police Complaints Commission

The police complaints system was first established by the Police Act 1964.[138] This initial incarnation failed, however, to provide adequate police accountability, rights protection, or attract public confidence. It was founded on the notion of police officers investigating fellow officers. Yet it is perhaps unrealistic to expect police officers to investigate each other rigorously. To use the police family analogy, asking police to investigate their colleagues is akin to asking brothers and sisters to investigate each other or their parents.[139] Sanders and Young suggest that police officers will tend to find that there is insufficient evidence to proceed with disciplinary proceedings or a criminal

[135] *ibid.* 71.
[136] G Hughes, R Mears and C Winch, 'An Inspector Calls? Regulation and Accountability in Three Public Services', (1997) 25 Pol'y & Pol 299, 305.
[137] See section, 5.2.2.
[138] s 49.
[139] C Lewis, *Complaints Against Police: The Politics of Reform* (Hawkins Press, Sydney 1999) 29.

prosecution since much police misconduct 'is part of everyday policing, is consistent with police working rules and will have been engaged in by themselves and / or their close colleagues'.[140] This lack of perceived independence undermined confidence in the system. Exoneration of officers almost inevitably fanned suspicions of a 'cover-up'.[141]

The Police Act 1976 introduced a degree of independent scrutiny in the form of the Police Complaints Board (PCB). This civilian watchdog had responsibility for examining investigation reports and the power to recommend that disciplinary charges be brought. The introduction of the PCB failed, however, to produce a significantly more effective complaints mechanism. Between 1976 and 1985 it questioned police conclusions in only 210 cases from more than 50,000 examined, in most instances eventually accepting the original police decision.[142] Not surprisingly it was 'widely perceived as virtually toothless',[143] and lacked public confidence.[144] Following pressure for more rigorous and independent scrutiny,[145] the Police and Criminal Evidence Act 1984 replaced the PCB with the Police Complaints Authority (PCA).[146] The PCA had the power to supervise certain investigations. Nonetheless, the adequacy, effectiveness and independence of the system continued to be questioned.[147]

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[140] A Sanders and R Young, *Criminal Justice* (3rd edn Butterworths, London 2007) 615.
[141] M Maguire and C Corbett, *A study of the Police Complaints System* (HMSO, London 1991) 8.
[142] *ibid.*
[143] *ibid.*
[144] See, DC Brown, *Police Complaints Procedure* (HMSO, London 1987); M Tuck and P Southgate, *Ethnic Minorities, Crime and Policing* (HMSO, London 1981).
[145] See, Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981) para 5.43, 7.11-29, 8.61.
[146] Part IX.
[147] See generally, M Maguire and C Corbett, *A study of the Police Complaints System* (HMSO, London 1991). Criticism of the police complaints system reached a crescendo in the late 1990s: Home Affairs Select Committee, *Police Disciplinary and Complaints Procedure* (1997-98) HC 258-I; Sir William MacPherson, *The Stephen Lawrence Inquiry* (HMSO, London 1999) Cm 4262-I, recommendation 58; J Harrison and M Cunneen, *An Independent Police Complaints Commission* (Liberty, London 2000); CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000) paras 9-58.

Following further officially-commissioned research,[148] the Police Reform Act 2002[149] established the Independent Police Complaints Commission (IPCC). This new system, which came into operation on 1 April 2004, represents a major step forwards. Accessibility to the complaints system is enhanced, making it easier for the public to register complaints.[150] This is an important development given the evidence that ethnic minority groups are reluctant to complain at a police station,[151] and indications that the police may dissuade potential complainants from going ahead with their complaint.[152] Whilst the police still investigate the majority of complaints themselves, there is a right of appeal to the IPCC,[153] and the IPCC is specifically empowered to take an overview role of the whole complaints system. Crucially, for public confidence in the system, the IPCC has the power either to manage an investigation or to conduct an independent investigation with its own staff. In its first 12 months of operation the IPCC took on 31 independent investigations and 126 managed investigations.[154] By its third year of operations the number of independent and managed investigations commenced had risen to 64 and 176.[155] The fact that these figures will be falling in future years as the

[148] See: KPMG, *Feasibility of an Independent System for Investigating Complaints Against the Police,* Police Research Series paper 124 (2000); Complaints Against the Police: A Consultation Paper (2000), available at: http://www.homeoffice.gov.uk/docs/complain.html; Complaints Against the Police, Framework for a New System, (2000). Available at: http://www.homeoffice.gov.uk/documents/comp-against-pol/.
[149] Part 2.
[150] The IPCC has, for example, established a Telephone Complaints Centre to enable the public to lodge complaints directly. In 2006/07 the TCC received 10,297 complaints, IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 39.
[151] M Docking and T Bucke, *Confidence in the police complaints system: a survey of the general population* (IPCC Research and Statistics Series: Paper 2) 12. Available at: http://www.ipcc.gov.uk/confidence_survey.pdf.
[152] Almost two out of five Metropolitan police officers failed a secret Scotland yard 'mystery shopper' test of their attitude to complaints about racism. Officers posing as members of the public went to police stations all over London to make complaints about alleged racist behaviour by the police. In nearly 40 per cent of cases, the complainants were fobbed off and ignored, K Hyder and R Cowan, 'Two out of five Met officers were deaf to racism claims' *The Guardian* (29 November 2004).
[153] In 2004/05 there were 1,033 appeals to the IPCC. By 2006/07 this figure had risen to 3,347, IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 38.
[154] IPCC, *Annual Report and Accounts 2004/05* (The Stationery Office, Norwich 2005) 10.
[155] IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 36.

IPCC has determined that it only has the capacity to undertake about 50 independent and 120 managed investigations in any one year[156] may give rise to concern. Such investigations are key to public confidence in the oversight of the police provided by the IPCC.

The IPCC is certainly more open than previous incarnations of the complaints system which may go to enhance the degree of accountability it provides and bolster public confidence. At the end of an investigation, the IPCC will, for example, publish its investigation report.[157] These reports may criticise the failings of the police thereby providing a degree of accountability.[158] The fact that this enables the public to see that the IPCC is effective at uncovering failings and is not afraid to offer criticism will enhance confidence in its work and independence. The IPCC also produces reports on particular aspects of police activity providing the type of transparency required in a democracy. It issues, for instance, an annual statistical report on deaths during or following police contact.[159] This report also details the work of the IPCC to reduce such deaths. Partly, perhaps, as a result of such openness there seems to be greater public confidence that the IPCC offers an impartial mechanism than there was in the operation of the PCA.[160] Public confidence in the police complaints system will lead to greater trust in the Police Service as a whole which, in turn, should increase the overall effectiveness of the Police Service in crime fighting and maintaining public order.

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[156] *ibid.* 37.
[157] Reports available at, http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports.htm.
[158] See, for example, the Tania Moore investigation report which concluded that the Derbyshire police response was abysmal. It detailed the failings of six, albeit unnamed, police officers.
[159] Available at, http://www.ipcc.gov.uk/index/resources/research/reports_polcustody.htm.
[160] The IPCC found that, 'Two-thirds of those who had heard of the IPCC believed that it dealt with complaints impartially', M Docking and T Bucke, *Confidence in the police complaints system: a survey of the general population* (IPCC Research and Statistics Series: Paper 2) 20. In 1996 the percentage found to believe the PCA to be impartial was 37 per cent, *Police Complaints Authority, Annual Report, 1995/6* (The Stationery Office, London 1996).

There is though, as the IPCC acknowledges, scope for greater openness.[161] One particular area where there is room for improvement concerns the secrecy of disciplinary hearings. Since 2004 the IPCC has had the power to decide, in the public interest, that a particular disciplinary hearing should take place in public.[162] In a number of cases it is arguable that the IPCC ought to have ordered a public hearing. In one recent disciplinary hearing a police officer was sacked, another demoted and four others reprimanded for their 'abysmal' failure to protect a woman who was threatened for a year and then murdered. The proceedings were held in secret and the officers were not named. In the words of the victim's family lawyer, Peter Mahy, 'it is unsatisfactory in this day and age that these disciplinary proceedings against the police were heard in private behind closed doors'.[163] Such proceedings should most certainly have been held in public in order to maintain public confidence, promote better individual accountability and democratic public scrutiny.

In February 2007 the IPCC, for the first time, utilised its powers to direct a force to hold a misconduct hearing in public.[164] It is likely that such public hearings will continue to be the exception; they may though become more regular now that the first such hearing has been held and given the IPCC's desires for greater transparency in the complaints process. This would represent an important step towards greater accountability. The

[161] In his foreword to the 2006/07 annual report the Chair of the IPCC, Nick Hardwick states, 'five years on from the Police Reform Act 2002, we have launched a 'stock take' of the complaints system. More needs to be done to make it more transparent', IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 5. The IPCC's aims for the future include increasing the transparency of the complaints system and increasing the accountability of the police to the public via greater openness, IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 41.

[162] The Police (Conduct) Regulations 2004 SI 2004 / 645, Regulation 30(5). See also, Criteria for holding police disciplinary hearings in public. Available at: http://www.ipcc.gov.uk/criteria_for_website.pdf.

[163] M Wainwright, 'Officer sacked over showjumper's death: Woman was murdered after year of threats: IPCC finds police force response was "abysmal"' *The Guardian* (2 November 2006).

[164] IPCC, press release, 'Warwickshire Police to hold first misconduct hearing in public' (27 February 2007). The hearing is scheduled to commence on 5 November 2007, IPCC, press release, 'Colette Lynch: Announcement of Warwickshire Police Misconduct Hearing in Public' (4 October 2007).

resulting adverse publicity is arguably part of the punishment. Such openness might also help ensure public confidence.

2.3 Public Scrutiny

The general public may provide oversight of the police as a result of the publication of reports by the police and via community consultation efforts. Scrutiny, which may be categorised as public, is also provided by Members of Parliament, by police authorities, via the Independent Custody Visiting system, and by the media. These mechanisms, by which selected members of the public provide oversight, help open up police performance to the wider public.

2.3.1 The publication of police reports and community engagement efforts

At the end of each year every Chief Constable must publish a report on the policing during that year of the area for which his force is maintained.[165] Some police forces have also begun to publish regular statistical reports detailing their performance.[166] As argued in relation to the publication of HMIC reports, it is important in a democracy, and to provide reassurance to the public, that information detailing police performance is made available.

Since 2004-05 the Home Office has published the Police Performance Assessment Framework (PPAF).[167] Under the PPAF police forces are assessed in seven key performance areas. This assessment provides clear accountability and transparency as it

[165] Police Act 1996 s 22. These reports are normally made available on police websites. These sites are accessible via, http://www.police.uk/forces.htm.
[166] See, for example, the reports made available by Nottinghamshire Police at, http://www.nottinghamshire.police.uk/library/statistics/title/1/.
[167] Available at, http://police.homeoffice.gov.uk/performance-and-measurement/performance-assessment.

allows members of the public to view the performance of their local police force and forces are given a simple and clear grade of 'excellent', 'good', 'fair' or 'poor'. Accountability is enhanced by the fact that the media tend to compile the assessment data to produce a league table.[168] Thus allowing the 'worst performing' police force's to be 'named and shamed'. In 2005-06, Humberside, Northamptonshire and Nottinghamshire were named as the three-worst performing police forces for the second year running. Such public embarrassment may help push the police to make increased efforts to improve their performance. Though Humberside, Northamptonshire and Nottinghamshire had also been named as the three worst performers in 2004-05 their performance had improved by 2005-06. It is conceivable that the adverse publicity helped spur this improvement.

The public are able to play a role in the development of local policing policy via consultation efforts carried out by the police and police authorities.[169] There are a number of statutory requirements on the police and police authorities to consult with the local community.[170] Interaction between the police and the public, or police authorities and the public, may help produce more effective police performance by ensuring those responsible for setting police priorities are better informed as to local circumstances and concerns. In the words of the Government's white paper, *Building Communities,*

[168] See, W Woodward, 'Police assessments show improvements needed' *The Guardian* (October 25 2006).
[169] On police authorities see further section 2.3.3.
[170] The Police Act 1996 s 96 requires that police authorities must make arrangements, after consulting the Chief Constable, for obtaining the views of local people about matters concerning the policing of the community. This requirement, originally enacted as Police and Criminal Evidence Act 1984 s 106, flowed from Lord Scarman's recommendation that statutory liaison committees, or other appropriate consultative machinery, be established, Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981), para 5.55-5.71. The police authority, before determining local policing objectives must consider any views obtained via such consultation, Police Act 1996 s 7(3). Likewise, the Chief Constable, in preparing his draft three year strategy plan for the policing of the area must have regard to the views obtained, Police Act 1996 s 6A(3), as inserted by the Police Reform Act 2002.

Beating Crime:[171] 'Local communities are often best placed to find the most appropriate and long-term solutions to problems of crime and anti-social behaviour'.[172] Community engagement also enhances police performance by breaking down barriers between the police and the public. It is also arguably appropriate in a democracy that there are opportunities for the public to make their views known and to influence their local police force. It seems that there is certainly a public appetite for such involvement.[173] Involving local people and explaining matters to them may also bolster community confidence in the police and provide reassurance.[174] It will of course not always be possible to act on the public's views. Views expressed may impact on rights protection or might threaten effective performance if carried out. It is though, important that there are opportunities for engagement and where the police feel they are not able to adopt a policy advocated by the consultees they can explain why, thus reducing dissatisfaction.

The consultative mechanisms deployed in the early years of this decade enjoyed some success in enabling the views of the public to impact upon the police. In relation, for example, to the police authority consultative attempts the views obtained were reported to have influenced the development of police policy[175] and had helped produce more effective police performance by identifying areas of poor performance.[176] Police performance may also have benefited as consultation efforts had, in a number of cases,

[171] Home Office, *Building Communities, Beating Crime: A better police service for the 21st century* (Home Office, 2004) Cm 6360.
[172] *ibid.* para 3.3.
[173] A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003) 8.
[174] In the words of Lord Scarman: 'If a rift is not to develop between the police and the public as a whole it is in my view essential that a means be devised of enabling the community to be heard not only in the development of policing policy but in the planning of many, though not all, operations against crime', Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981), para 5.56.
[175] Most police authorities surveyed by Myhill et al. thought that consultation had some influence on the policing plan, A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003), 32
[176] *ibid.* 33. The need to improve call-handling was, for instance, raised via the consultative efforts of six authorities. Authorities had, as a result, focused on achieving improvements in this area.

helped produce improved police community relations[177] and led to intelligence information being provided to the police.[178]

Traditionally the main consultation methodology relied upon has been Police Community Consultative Groups (PCCG). They are often, however, poorly attended, attendees are not normally representative of the whole community - they tend to be white, middle class and aged over 40 - and meetings are generally dominated by the police.[179] Given such problems more innovative and inclusive techniques have gradually been adopted. Efforts employed have included market research methods such as surveys, focus groups, citizens' panels and juries, and electronic methods including e-mail, and interactive web-based forums.[180] These methods have proven more effective than PCCG-style meetings at reaching certain parts of the community, including young people and the socially excluded. Myhill et al. found however, that 'the extent to which authorities had embraced alternative methods was very variable'.[181] The fact that the public seemed unaware that they had a say in the development of police policy decisions[182] also indicates a need to raise the profile of the consultation efforts.

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[177] *ibid.* 33-34.
[178] *ibid.* 35.
[179] *ibid.* 22; T Newburn, T Jones, *Consultation by Crime and Disorder Partnerships, Police Research Series, Paper* 148 (Home Office, 2002) 47-48; R Elliott, J Nicholls, 'Its Good to Talk: lessons in public consultation and feedback' (Home Office, Police Research Series, Paper 22, 1996).
[180] A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003), 24-28; T Newburn, T Jones, *Consultation by Crime and Disorder Partnerships, Police Research Series, Paper* 148 (Home Office, 2002) 27-34. As an example of more innovative methods South Yorkshire Police and South Yorkshire Police Authority jointly undertake a variety of satisfaction questionnaires, including the twice yearly 'police Talk' which is sent to a random, representative sample of South Yorkshire residents and ongoing user satisfaction surveys with people who have received a service from the police. Focus groups usually comprising 8-15 people are also conducted. For details see, http://www.southyorks.police.uk/about_us/consultation.php.
[181] A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003), 31.
[182] *ibid.* 8.

There have been particular problems with efforts to consult with so called hard-to-hear minority groups.[183] The extent to which police authorities had successfully engaged such sections of society was found, in 2003, to be very mixed.[184] Research published in 2005 found that there had been some significant improvements since 2000 in relation to the development of police structures for consulting with local black and minority ethnic communities.[185] There did though still remain room for further improvement. There were well documented difficulties associated with membership and representation and in some areas consultation was used primarily as a means of getting police messages across to the public.[186]

It seems that the Government recognises the need to enhance police community consultation. The 2004 white paper, *Building Communities, Beating Crime*, states, 'the Government will continue to invest in research and support forces to identify principles of good practice on engaging more effectively with communities'[187] In 2006 the Government funded three demonstration sites in Merseyside,[188] Cheshire[189] and Northumbria[190] to test ways of engaging more effectively with communities. It is to be hoped that these efforts lead to the development of more effective police consultation methods.

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[183] See further, T Jones, T Newburn, *Widening Access: Improving police relations with hard to reach groups, Police Research Series, Paper 138* (Home Office, 2001).
[184] A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003), 28-31.
[185] J Foster, T Newburn and A Souhami, *Assessing the impact of the Stephen Lawrence Inquiry* (Home Office, Research Study 294, 2005) 51-52.
[186] *ibid.* 53-54.
[187] Home Office, *Building Communities, Beating Crime: A better police service for the 21st century* (Home Office, 2004) Cm 6360 para 3.54.
[188] A Myhill, R Clarke, Community engagement in policing: case-study evaluation of a demonstration project in Merseyside (2006), available at: http://www.apa.police.uk/APA/Publications/.
[189] A Myhill, K Rudat, Community engagement in policing: case-study evaluation of a demonstration project in Cheshire (2006), available at: http://www.apa.police.uk/APA/Publications/.
[190] A Myhill, C Cowley, Community engagement in policing: case-study evaluation of a demonstration project in Northumbria (2006), available at: http://www.apa.police.uk/APA/Publications/.

2.3.2 The Home Secretary and Parliament

Introduced by the Police Act 1964, the tripartite structure of police governance makes the Home Secretary, police authorities and Chief Constables jointly responsible for controlling the police. The Home Secretary has the duty to promote the efficiency and effectiveness of the police.[191] In pursuance of this he may determine objectives for the police,[192] and issue codes of practice.[193] Each year the Home Secretary must also prepare a national policing plan setting out the strategic policing priorities and any objectives determined.[194] These objectives, codes of practice and the national policing plan must all be laid before Parliament and Members of Parliament may ask questions of Home Office ministers.[195] The Home Secretary also has the power to require the retirement, resignation, or suspension of a Chief Constable.[196] If exercising this power the Home Secretary would be expected to come before the House of Commons to explain why it was necessary and to take questions on the matter. This occurred, for example, when the then Home Secretary David Blunkett chose to suspend the Chief Constable of Humberside, David Westwood, in 2004.[197] The fact that Parliament may provide such oversight provides a safeguard against the improper removal of a Chief Constable by the Home Secretary.

Parliament can also provide more direct scrutiny of the police. This flows from the work of the parliamentary select committees, in particular, the House of Commons Home

[191] Police Act 1996 s 36.
[192] Police Act 1996 s 37.
[193] Police Act 1996 s 39A, inserted by the Police Reform Act 2002 s 2.
[194] Police Act 1996 s 36A, inserted by the Police Reform Act 2002 s 1.
[195] See, for example, the scrutiny of the Code of Practice on Police use of Firearms and Less Lethal Weapons (2003). This Code of Practice has been the subject of two parliamentary questions: Hansard HC vol 422 col 1164W (18 June 2004); Hansard HC vol 437 col 1034W (19 October 2005).
[196] Police Act 1996 s 42, substituted by the Police Reform Act 2002 s 33.
[197] Hansard HC vol 422 cols 1185-1201 (22 June 2004).

Affairs Committee and the Joint Committee on Human Rights.[198] These committees examine, on an occasional basis, particular aspects of police performance. Representatives of the police will be questioned, inspections may be conducted and recommendations for improvement will be made.

In, for example, the 2001-02 parliamentary session the Home Affairs Committee examined the conduct of investigations into pasts cases of abuse in children's homes.[199] This investigation aimed to provide enhanced rights protection for suspects. The report produced by the Committee addressed the rules that should cover such investigations to help guard against miscarriages in the future. In the 2004-05 parliamentary session the Joint Committee on Human Rights examined the causes of deaths in custody, and considered what might be done to better protect the right to life.[200] Following a number of bomb attacks on London in July 2005, and the shooting of Jean Charles De Menezes, the Home Affairs Committee questioned Sir Ian Blair, the Metropolitan Police Commissioner, and Andy Hayman, the Assistant Commissioner on Specialist Operations.[201] This examination encompassed matters relating to effective police performance, in particular, the actions and readiness of the police to combat future attacks. It also focussed on the policy for tackling suspected 'suicide bombers' and considered whether this offered adequate protection for the right to life. Public

[198] For general discussion of the JCHR see, JL Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4 ICON 1; F Klug and H Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the role of Parliament in Human Rights Compliance' (2007) 3 EHRLR 231.
[199] Home Affairs Committee, *The Conduct of Investigations into Past Cases of Abuse in Children's Homes* (2001-02) HC 836-I.
[200] Joint Committee on Human Rights, *Deaths in Custody* (2004-05) HL 15-I, HC 137-I. See also, Joint Committee on Human Rights, *Deaths in Custody: Further Developments* (2006-07) HL 59, HC 364.
[201] Home Affairs Committee, Counter-Terrorism and Community Relations in the aftermath of the London bombings, (2005-06) HC 462-i. Available at: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/cmhaff.htm

questioning on such matters in the formal setting of Parliament may have provided important public reassurance.

2.3.3 Police Authorities

Police authorities, made up of members of the local community, were first established for all police areas, with the exception of London, by the Police Act 1964.[202] The oversight of the police provided by these authorities was, though, fairly limited and subject to much criticism. In the words of Reiner,

> 'the police authorities paid the piper (or more precisely shared policing costs with central Government) but did not call any tunes … most police authorities did not even use the limited powers envisaged by the Act, deferring normally to the chief constable's "professional' expertise"'.[203]

The weakness of the police authorities was especially evident during the national miner's strike of 1984.[204] This inadequate role led to pressure for reform[205] and since 1994 a number of Acts of Parliament[206] have brought about significant changes to the composition and powers of police authorities. In 2000 a Metropolitan Police Authority was finally established to oversee the policing of London.[207]

It is the duty of every police authority to 'secure the maintenance of an efficient and effective police force for its area' and to hold the Chief Constable of that force to

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[202] For further discussion of the governance structure prior to 1964 see, L Lustgarten, *The Governance of Police* (Sweet and Maxwell, London 1986) ch 2.
[203] R Reiner, *The Politics of the Police* (3rd edn Oxford University Press, Oxford 2000) 189. See further: S Spencer, *Called to Account: The Case for Police Accountability in England and Wales* (National Council for Civil Liberties, 1985).
[204] See, L Lustgarten, *The Governance of Police* (Sweet and Maxwell, London 1986) ch 8.
[205] See, for example, a Bill introduced into the House of Commons in November 1979 by six Labour MPs which proposed that police authorities be made responsible for determining the general policing policies in their area, Labour Campaign for Criminal Justice, *Democracy and the Police: A background paper prepared for the meeting of Labour Members of Police Authorities on 13 September 1980* (1980).
[206] The Police and Magistrates' Courts Act 1994; Police Act 1996; and the Police Reform Act 2002.
[207] London Authority Act 1999 Part VI.

account for the exercise of his functions and those of persons under his direction and control.[208] The police authority must issue a local policing plan every year setting out the proposed arrangements for the policing of the area.[209] In carrying out his functions, every Chief Constable must have regard to the local policing plan.[210] The fact that local people with a broad range of experience may play such a role may aid effective police performance. It is also arguably important on the basis of democracy that members of the public are able to be so involved.

It seems, however, that the input of the police authority on the policing plan might be fairly limited. A draft of the plan is prepared by the Chief Constable and before issuing a plan which differs from the draft a police authority must consult with the Chief Constable.[211] Jones and Newburn found, in 1997, that police authorities tended to take a back seat in the drafting of their local policing plan. The authorities with the greatest involvement could be characterised as no more than 'junior partners'.[212] If the police authorities are still playing such a restricted role it might be appropriate if efforts are made to enhance their involvement. Removing the Chief Constable's initiative and providing for joint production of the draft plan could go someway towards achieving this.[213]

At the end of each financial year every police authority is required to publish a report on the policing of their area. This annual report must include an assessment of the extent to

[208] Police Act 1996 s 6, as amended by Police and Justice Act 2006 s 2 and sch 2 para 7.
[209] Police Act 1996 s 8. The plan will include a statement of the authority's priorities for the year, details of financial resources, particulars of any objectives for the policing of the area and performance targets.
[210] Police Act 1996 s 10.
[211] Police Act 1996 s 8.
[212] T Jones and T Newburn, *Policing after the Act, Police Governance after the Police and Magistrates' Courts Act 1994* (Policy Studies Institute, London 1997) 79-84, and 93.
[213] N Walker, *Policing in a Changing Constitutional Order* (Sweet and Maxwell, London 2000) 147.

which things have been done in accordance with the local policing plan.[214] The publication of this report may provide a degree of accountability. If the local police force has failed to perform effectively the authority may offer public criticism.

It is important that the local policing plan and the annual report are widely publicised on the basis of democracy. The public have a right to this information. The role of the police authorities in overseeing the police may also provide reassurance to the public. This will only be the case if the public are made aware of the police authority's role. Criticism by the police authority is also more likely to embarrass the police if it is publicised.

Research published in 2003 found, however, that the public had a very low awareness of police authorities.[215] The few individuals that had heard of police authorities generally did not know who they were or what they did. Many members of the public were sceptical about the effectiveness of authorities, not least because of their low public profile, with many believing that they would have known about them if they were doing a good job. It was discovered that police authorities devoted relatively few resources to publicity.[216] Three police authorities used, for example, no publicity methods at all.[217] About half of the police authorities issued press notices detailing the outcome of meetings but only a small minority always did so.[218] Eight authorities said that the policing plan was not publicised in any medium.[219]

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[214] Police Act 1996 s 9.
[215] A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement, Home Office Online Report 37/03* (2003), 8-9.
[216] *ibid.* 10.
[217] *ibid.* 11.
[218] *ibid.* 11.
[219] *ibid.* 11.

It seems that efforts have been made in recent years to enhance the profile of police authorities. Many authorities have now developed clearly set out and informative websites. Since 1 April 2006 every police authority has been required to issue a report on matters relating to the policing of the area for the year. This local policing summary must be sent to each person liable to pay tax in the area.[220] This is likely to have a big impact in raising awareness. The Metropolitan Police Authority, established in 2000, has proved particularly effective at maintaining a high public profile. Its combative examinations of the Commissioner of the Metropolitan Police take place in public and have attracted considerable media attention.[221] The reporting of these examinations may help greatly to provide reassurance to the public and a degree of accountability. It is to be hoped that other police authorities begin to look and learn from this example.

2.3.4 Independent Custody Visiting

Lord Scarman, in his report into the Brixton disorders, recommended a statutory system of inspection and supervision of the interrogation and detention of suspects in police stations, by persons other than police officers.[222] Pilot lay visiting schemes were first established in 1983 and three years later the Home Office encouraged their establishment by all police authorities.[223] Home Office guidance issued in 2001,[224] renamed the visiting scheme as Independent Custody Visiting (ICV). Some twenty-one

[220] Police Act 1996 s 8A, inserted by the Serious Organised Crime and Police Act 2005 s 157. Brought into force on 1 April 2006 by The Serious Organised Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order 2005 SI 2005 / 1521.
[221] See, for example, V Dodd, 'Met chief is mauled by watchdog over de Menezes killing' *The Guardian* (7 September 2007).
[222] Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981) paras 7.7 – 7.10.
[223] Home Office Circular 12 / 1986.
[224] Home Office Circular 15 / 2001.

years after Lord Scarman's recommendation the Police Reform Act 2002 provided a statutory basis.[225]

ICV provides, first and foremost, protection for the rights of those detained by the police. ICVs 'attend police stations to check on the treatment of detainees and the conditions in which they are held and that their rights and entitlements are being observed'.[226] Visits will be unannounced and may be made at any time.[227] At the end of each visit the ICVs will report their findings,[228] and systems must be in place to ensure findings are acted upon.[229] Lord Scarman, speaking in 1996, stated that the vigil provided by custody visitors 'has assisted in improving the living conditions of those detained'.[230] In 2006, Ian Smith, the chief executive of the Independent Custody Visiting Association,[231] stated that the oversight provided had made a significant impact on conditions of detention: 'New custody suites, with input in the design from custody visitors, have improved the welfare of both detainees and custody staff. Better provision of food, hygiene and medical facilities has all been as a direct result of the role of custody visitors'.[232] It is arguably right, in a democracy, that there are opportunities for

[225] s 51. See also the Code of Practice on Independent Custody Visiting (2003), issued as required by s 51(6), and the more detailed National Standards for Independent Custody Visiting (2003). These are available at:
http://www.icva.org.uk/site/training/training_students/responsibilities/index.htm.
[226] Code of Practice on Independent Custody Visiting (2003) para 2.
[227] National Standards for Independent Custody Visiting (2003) 14.
[228] Code of Practice on Independent Custody Visiting (2003) para 58.
[229] *ibid.* para 60.
[230] Lord Scarman, '15 years on – a special contribution' (1996) 3 *Visiting Times.* Reproduced at (2003) 9(1) *Visiting Times* 9.
[231] The Independent Custody Visiting Association was established as the National Association for Lay Visiting in 1993. This body provides administrative support and guidance to Independent Custody Visitors. See: http://www.icva.org.uk/
[232] An A-Z of ICVA, A speech by I Smith (2006) 7. Available at:
http://www.icva.org.uk/site/downloads/A-Z_icva.doc.
See, for example, the role played by ICVs in producing improved conditions in the police cells in Bristol's Bridewell police station. In 1997 the cells and conditions were described by one ICV as like 'something out of Dickens'. By December 2001, the cells had been redecorated, the rat poison removed, graffiti routinely painted over, a microwave used to heat detainees' meals and washing and toilet facilities made more private. It was suggested that this improvement occurred partly as a result of the pressure applied by the ICVs: R Prasad, 'Eyes on rights; Custody visitors aim to ensure the welfare of people

citizens to participate in this manner and to influence the conditions within police stations. It helps ensure that conditions accord with the views of the wider public as to what is appropriate.

The extent to which ICV may help ensure rights are protected may be undermined by the frequency of their visits. Research by Weatheritt and Vieira published in 1998, found that a significant number of police stations were visited either rarely or not at all.[233] ICV guidance was strengthened in 2003 to try and ensure more frequent visiting.[234] It is difficult, however, to assess whether this has led to a more appropriate degree of oversight given the limited information available about ICV practice.

A reluctance on the part of detainees to talk to ICVs might also restrict oversight. Weatheritt and Vieira noted that the way the escorting police officer introduced the ICVs to detainees could affect the take up rate.[235] They recommended that the guidance on the escorting officer's introduction be amended to place an onus on the police to introduce lay visitors in such a way as to encourage detainees to see them.[236] Despite this change ICVs continued to find an extremely low rate of take up.[237] In March 2005 the Hampshire ICVs launched a trial during which the ICVs introduced themselves.

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detained by the police. But will the independence of these volunteers be lost amid Government plans to improve the service?' *The Guardian* (December 19 2001).

[233] M Weatheritt and C Vieira, *Lay visiting to police stations*, *Home Office Research Study 188* (Home Office, London 1998) 13-15.

[234] the National Standards state, 'establishing and maintaining a programme of frequent visits is fundamental to the effectiveness of the system', and 'it is unlikely that visits less frequent than once a month can ever be justified … Busy stations with a steady throughput of detainees will generally warrant visits at least once a week', National Standards for Independent Custody Visiting (2003) 13.

[235] M Weatheritt and C Vieira, *Lay visiting to police stations, Home Office Research Study 188* (Home Office, London 1998) 30.

[236] *ibid.* 30. Enacting this recommendation the National Standards state, 'the escorting officer's introduction is a very important factor bearing on the effectiveness of the whole system of independent custody visiting and he or she should introduce the visitors in a positive way which will encourage the detainee to speak to them', National Standards for Independent Custody Visiting (2003) 15.

[237] In, for example, Hampshire, the ICVs frequently found a 100 per cent refusal rate in smaller police stations. In larger busier custody suites the take up figure was more variable but at its highest reached only 70 per cent, J Bennett, 'The Portsmouth Trial', (2005) 11(2) *Visiting Times* 5.

After four months of the trial the take up figure had risen to almost 100 per cent. Only one detainee had decided not to talk to the ICVs in that period.[238] Following the success of this initiative other police authorities were reported to be considering trying it.[239] If ICVs introducing themselves continues to prove as successful as initial indicators suggest this practice should perhaps be incorporated into the Code of Practice so as to become standard procedure.

The fact that independent members of the public[240] are entitled to enter police stations and check on conditions may provide 'reassurance to the community at large'.[241] For the community to be so reassured the ICV system must, however, make efforts to publicise itself. The public will not be reassured by the ICVs oversight if they are unaware of its existence. Publicly highlighting concerns about the conditions within police stations may also aid rights protection by helping bring pressure to bear on the police to improve conditions. A high public profile might also aid rights protection by encouraging more people to volunteer as ICVs thereby enabling more frequent visits.

Ian Smith stated in 2006 that, 'in the 1980s, there was mistrust and lack of confidence in policing; custody visiting has gone a long way to reassure the public that the 'blood on the walls' no longer happens'.[242] It is, however, debateable whether custody visiting has

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[238] *ibid.* 6.
[239] In 2006 it was reported that Cleveland and Merseyside police authorities were thinking of adopting this practice, (2006) 13(2) *Visiting Times* 11.
[240] The importance of the visitors being 'independent' is recognised in the Code of Practice. Serving police officers are, for example, barred from becoming independent custody visitors, Code of Practice on Independent Custody Visiting (2003) paras 16 and 18.
[241] *ibid.* para 2. This point was also recognised by Lord Scarman, 'I suggest that, if it were known that members of police committees (outside London) and of the statutory liaison (or consultative) committees, whose establishment I recommend both in London and outside, had the right to visit police stations at any time and the duty to report upon what they observed, the effect would be salutary'. Lord Scarman, *The Scarman Report: The Brixton Disorders 10-12 April 1981* (HMSO, London 1981) para 7.9.
[242] Speech by Ian Smith, Chief Executive of ICVA (2006) 7. Available at: http://www.icva.org.uk/site/downloads/A-Z_icva.doc.

really had such an impact in terms of reassuring the public. Weatheritt and Vieira found in 1998 that the possible community reassurance provided by ICV was being undermined or even negated by the fact that it was so little known.[243] The National Standards for custody visiting were amended in 2003 to stress the importance of publicity: 'an essential purpose of independent custody visiting is to strengthen public confidence in procedures at police stations and that implies the need for publicity'.[244] It does appear that efforts have been made in recent years to raise the profile of ICV. The Independent Custody Visiting Association has developed a website which explains who ICVs are and what they do.[245] Available on the website are the ICVA Annual Reports and the ICV magazine Visiting Times. Some ICV panels have also issued annual reports detailing their performance over the year.[246] There are also instances of ICVs attempting to publicise their role via local media. This is done most frequently to try and attract new members.[247] On occasions, it has also helped highlight ICV findings of poor conditions within police stations.[248]

Despite such developments it is arguable that ICVs could make greater efforts still to raise their profile and provide more information about their work to the public. Independent Monitoring Boards provide similar oversight to ICVs in relation to the prison system.[249] At the end of each year every IMB issues an annual report detailing

[243] M Weatheritt and C Vieira, *Lay visiting to police stations, Home Office Research Study 188* (Home Office, London 1998) 28.
[244] National Standards for Independent Custody Visiting, 23.
[245] http://www.icva.org.uk/.
[246] See, for example, Essex Police Authority, Independent Custody Visiting Scheme, Annual Report 2006/07 (2007). Available at: http://www.essex.police.uk/authority/pubs.php.
[247] See, 'Call for police station monitors' *The Bolton News* (16 January 2007); 'Volunteers needed for police checks' *Ripley and Heanor News* (21 June 2007); 'New campaign to recruit custody visitors' *Bucks Herald* (30 August 2007); H Lewis, 'Spend time behind bars… to help the police' *York Press* (3 September 2007).
[248] See, N Fahy, 'Police cells are inadequate' *Richmond and Twickenham Times* (31 December 2006)
[249] See further, section 5.3.3.

their findings and performance.[250] There is no reason why all ICV panels should not be required to issue annual reports. The fact that some panels have produced such reports illustrates that they are perfectly capable of completing this task. As well as being made available on police authority websites these reports should be made available on the ICVA website to provide a central resource of information. Chief Constables should be required to respond publicly and in writing to these annual reports to help ensure ICVs recommendations are acted upon.

2.3.5 The Media

As touched upon throughout this chapter, the media provides important coverage of the police oversight mechanisms. In particular, it reports on court proceedings in which police conduct is examined; it has reported on criticisms made by Her Majesty's Inspectorate of Constabulary and the Independent Police Complaints Commission; and it has used the Police Performance Assessment Framework to develop league tables of police performance. The extent to which such oversight mechanisms promote accountability for poor performance, provide the kind of transparency required in a democracy and help maintain public confidence rests largely on media coverage. It is via this coverage that the vast majority of the population will learn, if at all, about the work of these oversight mechanisms.

The media may also provide their own direct scrutiny of the police which helps expose police impropriety. In, for example, October 2003, the BBC's undercover investigation, 'The Secret Policeman' exposed racist attitudes among a number of trainee police

[250] Available at, http://www.imb.gov.uk/annual-reports/.

officers.[251] Ten police officers resigned following the broadcast, four received written warnings and 8 received formal advice from a senior officer.[252] In 2004 the BBC obtained and broadcast leaked closed-circuit television footage of Christopher Alder dying on the floor of Hull police station.[253] The Home Secretary intervened hours before the broadcast to ask the IPCC to review the circumstances surrounding the death[254] and in 2006 the IPCC issued a highly critical report.[255] In March 2007 the Guardian newspaper broadcast CCTV footage of a 19 year old woman Toni Comer being repeatedly punched by a policeman while two other officers held her down.[256] Media scrutiny of the police may also help ensure transparency. In the summer of 2007 the BBC made a request to all police forces under the Freedom of Information Act for details on how much money had been paid to police informers.[257]

When the media do expose apparently improper behaviour the Home Office and the police have often been quick to attack the media. Before 'The Secret Policeman' had been shown the then Home Secretary, David Blunkett, criticised the 'intent to create, not report a story' and labelled it a 'stunt to get attention'.[258] The police reacted by arresting the undercover journalist on suspicion of obtaining his wages by deception and

[251] H Carter, 'Four police suspended in race bias row' *The Guardian* (October 21 2003).
[252] IJ Griffiths, 'Police discipline 12 after racism expose' *The Guardian* (March 5 2005).
[253] R Cowan, 'TV to show dying minutes of man in custody: Family backs broadcast of CCTV footage revealing how ex-paratrooper choked on the floor as police did nothing to help' *The Guardian* (April 14 2004).
[254] R Ford, 'Custody death review ordered' *The Times* (April 15 2004).
[255] IPCC, *Report, dated 27 February 2006, of the Review into the events leading up to and following the death of Christopher Alder on 1st April 1998* (The Stationery Office, London 2006) HC 971-I.
[256] D Campbell and E Allison, 'Four men, five punches and a boot: A 19-year-old woman is arrested: Guardian obtains footage of Sheffield police incident' *The Guardian* (8 March 2007).
[257] C Summers, 'Call to reveal cost of informers' *BBC News* (July 23 2007). Available at, http://news.bbc.co.uk/1/hi/uk/6220727.stm. It should be noted that seven forces failed to comply with this request claiming that such information was exempt under the Freedom of Information Act 2000.
[258] A Barnett, 'Klan stunt' filmed at police school: Blunkett accuses BBC of creating its own news' *The Observer* (October 19 2003).

of damaging police property by hiding a camera in a police vest.[259] The police also lobbied the BBC at a 'very senior level' to try to prevent transmission of the documentary.[260] Such an attitude may discourage or deter media oversight of the police.

It would be preferable if the Home Office and the police recognise the important role the media can play in holding the police to account and were more welcoming of such oversight. They certainly should not be doing everything in their power to discourage it. As noted by Reid, 'bullying those alleging police misconduct does not help encourage the highest standards of behaviour'.[261] David Blunkett did belatedly recognise the importance of the content of 'The Secret Policeman', apologising and retracting his original comments in the days following its broadcast.[262] It is unlikely though, that this signals a sea change in attitude to investigative media scrutiny of the police. The first instinct of the Home Office and the police is likely, in such cases, to continue to be to attack the messenger if the message reported is embarrassing. The media just have to continue to do the best they can to expose police impropriety and to ignore such unwarranted attacks when they come.

2.4 Conclusion: The Openness of the Police

The oversight of the police provided by the courts, independent administrative bodies and the public, and the open manner in which such oversight is conducted, has

[259] 'Undercover BBC reporter arrested' *The Sunday Times* (August 17, 2003). The Crown Prosecution Service later decided that there was insufficient evidence to prosecute, H Carter, 'BBC racism expose case dropped' *The Guardian* (November 5 2003).
[260] M Wells, 'BBC lawyer attacks 'biased' Hutton report: Legal adviser claims police tried to stop racism expose' *The Guardian* (July 7 2004).
[261] K Reid, 'The Home Secretary and Improved Accountability of the Police' (2005) 69(3) J Crim L 232, 247.
[262] A Travis, 'Blunkett apologises for slating BBC film: Home Secretary says he was wrong to call racist police expose a stunt' *The Guardian* (October 25 2003).

developed considerably in recent years. This openness clearly helps promote accountability, aids effective performance, provides protection for rights, enables the type of transparency and opportunities for citizen participation required in a democracy and helps bolster public confidence in the criminal justice system.

Accountability is provided most clearly by the oversight mechanisms where the police are convicted of breaking the criminal law. A degree of accountability may also be provided via the bringing of a civil action. If such an action is successful the police may be penalised financially via the awarding of exemplary damages. The police disciplinary system overseen by the IPCC may also present a route to police accountability.

Alongside such tangible punishment the openness of the oversight mechanisms helps provide accountability. The publicising of a sentence imposed by the courts or a financial penalty, or simply the reporting of criticisms offered by the courts, by HMIC, by the IPCC, or by ICVs may provide a degree of accountability in the sense that it may embarrass the police and damage their reputation. Such accountability may deter the police from engaging in similar misconduct or poor performance in the future.

The oversight mechanisms may also help produce more effective police performance. HMIC works most obviously to this purpose and has enjoyed considerable success in raising police standards. The fact that its reports are published may help ensure that performance improves in line with its recommendations. The scrutiny provided by police authorities and via consultative mechanisms may also help boost police

performance by enabling local community knowledge to feed into the development of policing policy.

A number of the oversight mechanisms help provide a degree of rights protection. In particular, civil actions have provided financial redress to those who have had their rights infringed. The staying of a prosecution or the exclusion of evidence at trial restores the defendant to the position they would have been in had they not had their rights breached. On occasions judicial review has resulted in police policies which are ruled to breach rights being rethought. In a number of cases coroners have made recommendations designed to promote better protection for the right to life. There are some examples of such recommendations helping to modify police practice. The CPT, on its occasional visits to the United Kingdom has helped ensure that the rights of persons detained within police stations are respected. Some of the public scrutiny mechanisms have also provided important rights protection. Most importantly, Independent Custody Visitors have helped improve the conditions within police custody.

In a democracy it is right that the public have information about the performance of their police force and the conditions within police stations. A number of the oversight mechanisms help provide the public with such information by publishing their findings or, in the case of the courts, by holding their examinations of the police in public. Democracy also requires that members of the public play a direct role in scrutinising and influencing the development of police policy. Such participatory democracy flows most clearly from the role of the police authorities; the public consultation efforts made by the police and police authorities; and from the ICV system.

For the police to perform effectively it is vital that they enjoy public confidence. Confidence may be enhanced if the public are able to see that there are a number of mechanisms working to ensure that the police behave themselves and attain high standards of performance. On the other hand, exposure of police impropriety by these mechanisms may undermine confidence. The fact that the scrutiny mechanisms show themselves to be effective at exposing such misconduct and holding the police to account may, though, provide a degree of reassurance.

It is clear that the oversight provided by the courts, independent administrative bodies and the public, and the open manner in which such oversight is conducted, goes to support the values of openness detailed in chapter one. It is also the case that this openness has developed considerably in recent years. The introduction of the Human Rights Act has, for example, produced greater judicial oversight of the police via judicial review actions and civil actions. The establishment of the IPCC in 2004 finally introduced a truly independent element into the police disciplinary system which seems to have helped raise public confidence. Efforts have also been made in recent years to enhance the oversight provided by police authorities and ICVs and to raise their public profiles. It does seem, though, that there remains scope for the development of further openness to provide greater satisfaction of the values of accountability, effective performance, rights protection, democracy and confidence.

Police officers have tended not to be prosecuted for their allegedly criminal conduct. The Corporate Manslaughter and Corporate Homicide Act 2007 may help produce greater police accountability via the criminal process for deaths in police custody. The current gap between the number of people dying in police custody and the police not

being held to account may damage public confidence. It is to be hoped that this new offence of corporate manslaughter is extended to cover deaths in police custody as soon as possible. An increased threat of criminal sanction may help ensure that the police do everything possible to safeguard the right to life.

It is, at present, unclear whether recommendations made by coroners designed to ensure similar deaths are avoided in the future are acted upon by the police. To help reduce the number of deaths it is important that efforts are made to ensure that the police act on such recommendations. It is also vital that the public can see that the police have responded positively and that lessons have been learnt. It seems that the Draft Coroners Bill, when it is reintroduced in the 2007-08 parliamentary session, will help ensure that coroner's recommendations impact on police practice and will introduce more openness to this process so that the public can see that this is so.

In many civil actions the police may agree an out of court settlement. The details of such settlements ought to be disclosed. If the police have behaved improperly or negligently it is right that the full details of their behaviour are exposed and open to public criticism. Democracy also requires that such settlements are disclosed. The public have a right to know if their money is being squandered by the police. It should be standard practice for the police to make a statement detailing the amount paid in such settlements.

There is also scope for enhancing the degree of openness flowing from the administrative oversight mechanisms. The Committee for the Prevention of Torture provides important occasional insight into the conditions within police stations. The

rights protection it provides and the extent to which it provides transparency as to the conditions within police stations could, however, be raised. If the CPT were to publish its reports when they were completed this would provide a more current portrayal of conditions within police custody suites. At present the reports are not published until the Government response is received which tends to take upwards of a year. Publishing the report as soon as it is completed might also place greater pressure on the Government to tackle any problems identified.

HMIC has recently adopted a baseline inspection methodology which involves no routine inspection and full self assessment for the better performing police forces. This degree of oversight is inadequate. Public confidence requires that the inspectorate actually inspects. This level of inspection also makes it difficult for HMIC to give an accurate and up to date portrayal of police performance. At the very least a random sample of police force self-assessment figures should be subject to on-site validation. Public confidence in HMIC might also be enhanced if it were made more independent. Her Majesty's Chief Inspector of Constabulary is, at present, a former senior police officer and HMIC's inspection staff are almost entirely provided by police forces on a secondment basis. The lay element ought to be significantly increased. The appointment of a respected outsider as Chief Inspector would have most impact in this respect.

The IPCC has had the power to order that police disciplinary hearings take place in public since 2004. There have been a number of cases in which public hearings ought to have been held. Such hearings might promote accountability and help reassure the public that misconduct is not being swept under the carpet. The IPCC has, however, only recently used this power for the first time. It is to be hoped that the IPCC will be

less reluctant to order such hearings in the future. Concern with the complaints system also arises over the fact that the IPCC is intending to reduce the number of independent and managed investigations it conducts. Such investigations are key to public confidence in the police disciplinary system. Action ought to be taken by the Government to ensure that the IPCC is able to maintain the current level of managed and independent investigations.

The efforts made by the police and police authorities to consult with the public have improved in recent years. There is, though, it seems room for further improvement. The research examined has indicated that there remain problems with consulting with so called 'hard to hear' groups. There is also scope for raising the profile of the consultation efforts. In 2003 members of the public seemed largely unaware of police consultation efforts. The Government does at least appear to recognise the need for further improvement and is making efforts to trial more innovative and inclusive consultation methods.

The public appear to have only a limited awareness of police authorities and their role. For the involvement of local community representatives to provide reassurance the public need to be informed about the work of police authorities. A higher public profile may also mean that criticism by the authorities carries more weight. Some efforts have been made in recent years to raise the profile of police authorities. These include, for example, the requirement from 1 April 2006, that police authorities send an annual report to all taxpayers within their area. There is certainly, though, room for further improvement.

The fact that selected members of the public can visit police stations to check on detention conditions may provide further reassurance to the public. To provide such reassurance the public must though be made aware of the ICV system. It is also important on the basis of democracy that ICVs publicise their work and findings. The public have a right to know about conditions within police cells. Some efforts have been made in recent years to raise the profile of independent custody visiting. A central website has been developed, some ICVs have produced annual reports and efforts to gain media coverage have enjoyed some success. There is certainly though scope for more extensive efforts. In particular, at the end of each year every ICV panel should be required to produce an annual report detailing their work and performance. Such reports should be published and made available on the relevant police authority website and on the ICVA site. Chief Constables should give a written response to these reports and the response should be published.

If enacted these proposals would go some way towards helping produce more appropriate satisfaction of the values of openness. It is pleasing that there seems a reasonable chance that a number of them will be realised. The Government has promised to extend the new corporate manslaughter law to cover deaths in custody as soon as possible. They have also agreed that the Draft Coroners Bill will be amended to produce more effective rights protection and greater openness around this process. It is hoped that they fulfil these promises. The importance of raising the profile of police authorities and improving the consultation efforts has also been recognised by the Government and efforts are being made to this end. The IPCC does appear to be moving, albeit slowly, towards requiring certain police disciplinary hearings to be conducted publicly. Other proposals, including, for example, the suggestion that HMIC

be made more independent and that ICVs be required to produce annual reports could be implemented easily and with little extra cost. Such proposals are certainly worthy of further consideration.

Other proposals would be harder to implement. Acting to ensure that HMIC is able to provide a more appropriate level of scrutiny and to ensure that the IPCC is able to continue to conduct managed and independent investigations where it feels they are required, would require the provision of extra resources. It may be unlikely that such resources will be provided. The values of openness certainly though require that HMIC and the IPCC push as hard as they can for such extra resources to be found.

Chapter 3

The Crown Prosecution Service

This chapter examines the importance of the Crown Prosecution Service (CPS) being overseen by the courts, independent administrative bodies and the general public and of such oversight being conducted openly. Established in 1985,[1] the CPS determines criminal charges in all but minor routine offences.[2] It will be argued that the oversight provided by the courts, administrative bodies and the public provides accountability, aids effective performance, helps safeguard rights, provides the kind of transparency and opportunities for citizen participation required in a democracy and helps maintain public confidence in the CPS. Where it appears that there is scope for enhancing the degree of openness to ensure greater fulfilment of these values, proposals designed to achieve this will be advanced.

3.1 Judicial scrutiny

[1] Prosecution of Offences Act 1985 s 1. The CPS was established in line with the recommendations of the Royal Commission on Criminal Procedure, *The Royal Commission on Criminal Procedure* (Her Majesty's Stationery Office, London 1981) Cmnd 8092, ch 7. For early reflection on the advent of the CPS see, KW Lidstone, 'The Reformed Prosecution Process in England: A Radical Reform?' (1987) 11 Crim LJ 296; F Bennion, 'The New Prosecution Arrangements (1) The Crown Prosecution Service' [1986] Crim LR 3.

[2] Originally, the CPS took over the conduct of criminal proceedings instituted by the police and had the power to discontinue such proceedings, Prosecution of Offences Act 1985 s 3(2)(a) and s 23. The Prosecution of Offences Act 1985 places duties on the Director of Public Prosecutions (DPP). As the DPP is head of the CPS and he acts through the CPS, the duties are effectively placed on the CPS. Implementing the recommendations made by Lord Justice Auld in his review of the criminal courts, Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001), 412, the Criminal Justice Act 2003 expanded the role of the CPS to include responsibility for determining the charges in all but minor, routine offences, Criminal Justice Act 2003 s 28 and sch 2. For analysis of this reform see, ID Brownlee, 'The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System' [2004] Crim LR 896. By 3 April 2006 all 42 CPS Areas had been approved onto the statutory charging scheme, HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 33.

The courts provide important oversight of the CPS via judicial review applications. CPS decisions and conduct may also be examined during the trial process.

3.1.1 Judicial review of a decision not to prosecute

The courts, via judicial review challenges, have provided important oversight of CPS decisions not to prosecute.[3] In *R v DPP ex p C,*[4] Kennedy LJ, drawing on previous authority,[5] ruled that the Divisional Court had the power to review a decision not to prosecute, but that the power is one to be sparingly exercised.[6] The court will intervene only if it is demonstrated that the decision was arrived at because of some unlawful policy, because the Director of Public Prosecutions (DPP) failed to act in accordance with the Code for Crown Prosecutors,[7] or because the decision was perverse.[8]

The examination of the CPS reasoning made possible by a judicial review challenge might expose errors by the CPS in the decision making process. It might contribute to more effective performance by ensuring that the decision is re-considered. The ever

[3] There has been no successful judicial review of a decision to prosecute and the scope for such a challenge is severely restricted. It was suggested in *R v Chief Constable of the Kent County Constabulary ex p L* [1993] 1 All ER 756 (QB) and in *R v IRC ex p Mead* [1993] 1 All ER 772 (QB), that decisions to prosecute might be reviewable. In, however, *R v DPP ex p Kebilene,* [2000] 2 AC 326 (HL) the House of Lords ruled that criminal proceedings should not be delayed by collateral challenges given the availability of remedies within the criminal process. In the words of Lord Steyn at 371, 'absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review'. In *R (Pepushi) v Crown Prosecution Service,* The Times 21 May 2004 (QB), Thomas LJ emphasised that 'the proper course to follow was to take the point in accordance with the procedures of the criminal courts'.

[4] [1995] 1 Cr App R 136 (QB).

[5] *Metropolitan Police Commissioners ex p Blackburn* [1968] 2 QB 118 (CA); *R v Race Relations Board ex p Selvarajan* [1975] 1 WLR 1686 (CA); *General Council of the Bar ex p Percival* [1991] 1 QB 212 (QB). For analysis of the early case law see, P Osborne, 'Judicial Review of Prosecutors Discretion: The Ascent to Full Reviewability' (1992) 43 NILQ 178; C Hilson, 'Discretion to Prosecute and Judicial Review' [1993] Crim LR 739.

[6] [1995] 1 Cr App R 136 (QB) 139-140.

[7] A prosecution decision must be taken in accordance with the evidential and public interest tests set down in the Code for Crown Prosecutors. The Code, issued by the DPP as required by the Prosecution of Offences Act 1985 s 10, is available at: http://www.cps.gov.uk/victims_witnesses/code.html.

[8] *ibid.* 141. On the facts the court ruled that the decision not to prosecute the applicant's husband for the offence of buggery had not been made in accordance with the CPS Code. The decision was set aside and the matter sent back to the DPP for reconsideration, *ibid.* 144.

present possibility of a judicial review challenge at some point in the future may also act as a continual spur to effective CPS performance. More effective CPS decision making enhances rights protection; ensuring that those who ought to be prosecuted for allegedly breaching rights are prosecuted. The fact that judicial review challenges are conducted publicly may help provide reassurance to the public. They will be able to see that the courts provide a check on the CPS to ensure that it is performing effectively. Such openness may also enhance the accountability provided by judicial review oversight. If the court rules that the CPS has made a mistake and ought to reconsider the decision this is embarrassing for the CPS personnel involved in the decision.

Judicial scrutiny of a decision not to prosecute has proved particularly important in cases involving alleged criminal conduct by those responsible for exercising aspects of the coercive power of the state. In July 1997 challenges were brought to the decisions not to prosecute the police officers identified as responsible for 'unlawfully killing' Richard O'Brien[9] and Shiji Lapite,[10] and for 'torturing' Derek Treadaway.[11] As the High Court was about to begin hearing the applications, the DPP admitted that in deciding not to prosecute two police officers over the death of Lapite there had been an error of law and key evidence had been ignored.[12] A day later it was conceded that the decision not to prosecute five police officers over the death of O'Brien was flawed.[13]

[9] In November 1995 an inquest jury returned a verdict of unlawful killing on O'Brien, O Bowcott, 'Handcuffed man unlawfully killed' *The Guardian* (November 11 1995). The purpose of an inquest is to establish the facts surrounding a suspicious death rather than to attribute blame. The criminal standard of proof applies in inquest proceedings though and in this case and in that of Lapite it was made clear to the jury that they could only return a verdict of unlawful killing if they were satisfied that the matter had been proved 'beyond a reasonable doubt'.

[10] In January 1996 an inquest jury ruled that Lapite had been unlawfully killed, V Chaudhary and O Bowcott, 'Asylum seeker "unlawfully killed" by police' *The Guardian* (26 January 1996).

[11] On the conclusion of his successful civil action against the police, Mr Justice McKinnon was satisfied to a high degree of probability that 'what happened to him amounted to nothing less than torture', 'Entitlement to exemplary damages' *The Times* (25 October 1994).

[12] C Dyer, 'DPP admits death case error' *The Guardian* (July 24 1997).

[13] R Ford, 'Second death in custody reviewed by DPP' *The Times* (July 25 1997).

The DPP agreed to reconsider both decisions. In the case of Treadaway, the only one of the three challenges to proceed to a full hearing, Lord Justice Rose ruled that Treadaway's successful civil action had not received the very careful analysis it deserved. He ordered that the decision not to prosecute four police officers, for assault and for attempting to pervert the course of justice, be reconsidered.[14]

The exposure of these errors produced a degree of accountability with much public criticism directed towards the CPS and the DPP.[15] It also prompted action designed to improve CPS performance. Pending the outcome of an inquiry by Judge Gerald Butler,[16] the DPP, Dame Barbara Mills, accepted fetters on her right to take the prosecution decision in death in custody cases and in cases involving serious assault allegations against police officers. She was required to take independent advice from Treasury Counsel,[17] and if she disagreed with the advice, to consult the Attorney General and the Solicitor General.[18]

The Lapite, O'Brien and Treadaway decisions were reconsidered under these interim safeguard arrangements. In the cases of Lapite and Treadaway the non-prosecution decisions were reaffirmed.[19] In the O'Brien case three police officers were, however, charged with manslaughter,[20] though they were later acquitted.[21] The fact that two of the

[14] *R v DPP ex p Treadaway,* The Times 31 October 1997 (QB).
[15] See, for example, P Foot, 'Barbara Mills should resign as DPP' *The Guardian* (July 28 1997); R Syal, 'Labour puts pressure on Mills to quit' *The Sunday Times* (August 10 1997).
[16] See section 3.2.1.
[17] Treasury Counsel are appointed by the Attorney General to advise on, and if necessary, conduct, on behalf of the CPS, prosecutions in important and complex cases, see, http://www.cps.gov.uk/legal/section15/chapter_m.html.
[18] C Dyer, 'DPP agrees to cede powers' *The Guardian* (August 1 1997).
[19] S Tendler, 'Police will not be held for unlawful killing says CPS' *The Times* (June 5 1998).
[20] C Dyer and O Bowcott, 'Police officers face trial over death in custody' *The Guardian* (February 12 1998). See further, D Coles and F Murphy, 'Richard O'Brien: another death in police custody' [1999] (November) Legal Action 6.
[21] D Pallister, 'Police officers cleared of manslaughter' *The Guardian* (July 30 1999).

decisions were reaffirmed and the third resulted in an acquittal does not detract from the fact that the original decisions were vitiated by serious error. Judicial oversight helped expose such error and, it is hoped, ensured that the decisions when reconsidered were not so flawed.

The Butler Inquiry reported in 1999.[22] Accepting all of its recommendations, including the requirement that Treasury Counsel continue to play a central role in the prosecution decision in such cases,[23] David Calvert Smith, Dame Barbara Mills' replacement as DPP, stated that there were now, 'arrangements in place to ensure that these particularly sensitive cases are dealt with to a high standard'.[24]

The case of *R v DPP ex p Manning*[25] suggests, however, that judicial review will continue to provide a necessary safeguard. The decision not to prosecute a number of prison officers following the death of a prisoner, Alton Manning, was reviewed by the CPS under the interim safeguard arrangements[26] and, following an inquest verdict of unlawful killing,[27] in consultation with Senior Treasury Counsel.[28] Lord Bingham ruled, nonetheless, that in taking the decision there were five matters 'which should have been taken into account', which were not,[29] and that a test higher than that laid down in the

[22] His Honour G Butler QC, *Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters* (The Stationery Office, London 1999).
[23] *ibid.* 54.
[24] CPS, press release, 'Butler report into CPS decision making', (11 August 1999).
[25] [2000] 3 WLR 463 (QB). See further, M Burton, 'Reviewing Crown Prosecution Service Decisions not to prosecute' [2001] Crim LR 374. See also possibly the case of Jean Charles de Menezes in which a challenge to the decision not to prosecute any police officers in relation to his death failed in the High Court, *R (on the application of da Silva) v DPP* [2006] All ER (D) 215 (Dec); [2006] EWHC 3204 (QB). This challenge may be examined by the House of Lords, S Tendler 'Law Lords may rule on shooting' *The Times* (January 20 2007).
[26] See *R v DPP ex p Manning* [2000] 3 WLR 463 (QB) 467-468.
[27] S Hall 'Jail officers suspended over death' *The Guardian* (March 26 1998).
[28] See *R v DPP ex p Manning* [2000] 3 WLR 463 (QB) 468-472, and A Travis, 'No charges to follow death of black remand inmate' *The Guardian* (February 24 1999).
[29] *R v DPP ex p Manning* [2000] 3 WLR 463 (QB) 480.

Crown Prosecution Code had been applied.[30] The decision was quashed and the DPP ordered to reconsider the matter.[31] As noted by Burton, 'the High Court did not comment on the effectiveness of the safeguard arrangements but one implication of their decision must be that they failed'.[32]

A second area where judicial oversight has played an important role concerns decisions not to prosecute employers where an employee is killed while at work. In *R v DPP and others, ex p Jones,*[33] a challenge was brought to the decision not to prosecute a company called Euromin, or its managing director Mr Martell, for manslaughter following the death of Simon Jones. The court found, in the words of Buxton LJ, that 'the relevant law had not been properly addressed in this case'.[34] In addition, the CPS statement explaining the decision left several unanswered questions which meant that the court was unable to say that the decision was not irrational.[35] The DPP was ordered to reconsider the matter and Mr Martell and Euromin were later charged with manslaughter by gross negligence.[36]

In *R (on the application of Dennis) v DPP,*[37] the CPS decided not to prosecute following an inquest verdict that an employee, Daniel Dennis, had been unlawfully killed. On judicial review of this decision the Divisional Court ruled that the CPS had not dealt with the real thrust of the case and had not given clear reasons as to why the

[30] *ibid.* 480.
[31] Having reconsidered the decision the CPS decided not to prosecute, V Dodd 'CPS again bars prosecution over death in prison' *The Guardian* (June 2 2001).
[32] M Burton, 'Reviewing Crown Prosecution Service Decisions not to prosecute' [2001] Crim LR 374, 376.
[33] [2000] IRLR 373 (QB).
[34] *ibid.* 377.
[35] *ibid.* 379.
[36] S Milne, 'Dock manager to be tried for manslaughter' *The Guardian* (December 20 2000). Both Euromin and Mr Martell were found not guilty by majority verdicts, L Brooks, 'Alarm as employer cleared in death case' *The Guardian* (November 30 2001).
[37] [2006] EWHC 3211 (Admin); [2007] All ER (D) 43 (Jan) (QB).

inquest jury's verdict should not have led to a prosecution. Those failures provided a basis on which it was right to refer the matter back to the CPS for reconsideration. It was seriously arguable that a different decision might be reached once they were taken into account. In October 2007 the CPS announced that the owner of the company, Roy Clarke, was to be charged with manslaughter.[38]

From this journey through the case law it is clear that in cases involving the coercive power of the state and cases where employees have allegedly died as a result of the negligence of their employer the courts have provided important oversight of CPS decisions not to prosecute. This scrutiny has helped protect rights and produce more effective CPS performance by ensuring that flawed decisions are identified and reconsidered. It has also provided a degree of CPS accountability. It should be acknowledged that this oversight has only had an impact in a tiny proportion of the total number of cases which the CPS handles each year.[39] However, the types of cases in which the courts have quashed CPS decisions not to prosecute are much less common[40] and, particularly in the case of those involving the coercive power of the state, are crucial to public confidence in the CPS.

The exposure of error in the decision making process which has occurred as a result of the judicial review oversight may undermine public confidence in the CPS. Evidence of the lasting damage done to the reputation of the CPS by the Lapite, O'Brien and

[38] 'Roof death boss to be charged' *BBC News* (October 17 2007), available at: http://news.bbc.co.uk/1/hi/wales/7048770.stm.
[39] In, for example, 2006-07 the CPS took pre-charge decisions in 584,216 cases, CPS, *Annual Report and Resource Accounts 2006 – 07* (2007) 6.
[40] There were 185 fatal injuries to employees in 2006/07, Health and Safety Commission, National Statistics, *Statistics of Fatal Injuries 2006/07* (2007) 14; In 2005/06 there were 118 deaths during or following police contact, IPCC, *Deaths During or Following Police Contact: Statistics for England and Wales 2005/06* (2006) 16. None of those 118 were judged at inquest to have been unlawfully killed, 23.

Manning cases, is arguably found in the statement by the family of Roger Sylvester. Following the decision that no police officers involved in his death would be prosecuted they suggested that the CPS had, 'yet to prove its willingness or ability to allow justice to be done in cases of deaths in custody'.[41] The fact that public confidence may be undermined by the exposure of CPS poor performance does not, though, provide an argument against judicial review scrutiny. It is appropriate that public confidence is undermined if the CPS is producing flawed decisions. Furthermore, that there is a scrutiny mechanism which can at least help expose such error and ensure that decisions are reconsidered, may provide a degree of reassurance to some. This is especially so, where, as in O'Brien, the CPS later change their prosecution decision.

3.1.2 Judicial scrutiny within the trial process

At pre-trial hearings and at trial the court may examine CPS decisions and conduct. If, for example, there is insufficient evidence to support a prosecution the court may terminate the case. A case may also be terminated if, because of the way the CPS has behaved, it would not be in the public interest to allow the case to proceed.

Stopping such prosecutions helps protect the innocent from wrongful conviction. It also ensures that defendants are not subject to unnecessary stress and, if they are held on remand, the loss of liberty involved in the trial process beyond the point at which it becomes clear they should not be placed on trial. Stopping an inappropriate prosecution as early as possible contributes to the effective performance of the criminal justice system by ensuring that valuable resources are not wasted. Terminating an inappropriate prosecution, particularly one which it would be unfair to allow to proceed, also helps

[41] L Smith, 'CPS drops prosecution over death in custody: Anger from family of depressive who died after restraint by police' *The Guardian* (June 17 2005).

maintain public confidence in the criminal justice system. The public will see that the courts are acting as a check on the CPS. Where the courts intervene to terminate an inappropriate prosecution this provides a degree of CPS accountability. It is embarrassing for the CPS to have a prosecution terminated, especially if the judge publicly criticises the conduct of the prosecution or CPS decision making. Such accountability may provide a spur to improved performance.

Until recently, at proceedings held to determine whether the accused should be committed to the Crown Court for trial, the magistrates' courts could examine the evidence and discharge the accused where the evidence was deemed insufficient.[42] This scrutiny led to the filtering out of some weak cases.[43] The overall effectiveness of committal proceedings at weeding out weak cases was, however, questioned[44] and committal proceedings have been abolished.[45] It is suggested that there is, as a result, 'a risk of an increase in frivolous and vexatious charges being brought'.[46]

At trial the judge may, however, direct that the defendant be acquitted if the prosecution evidence, taken at its highest, is insufficient to support a conviction.[47] Whilst abolishing committal proceedings for indictable only offences, the Crime and Disorder Act 1998 also enabled a defendant, whose case is transferred to the Crown Court, to apply to have

[42] Magistrates Court Act 1980 s 6(1), as amended by Criminal Procedure and Investigations Act 1996 s 47 and sch 1.
[43] C Furniss and ID Brownlee, 'Committed to Committals' [1997] Crim LR 3, 15.
[44] *ibid.* 5. It was also argued that abolishing committal proceedings would speed up the trial process, S O'Doherty, 'Indictable only offences – the new approach' (2000) 150 NLJ 1891.
[45] The Crime and Disorder Act 1998 s 51, provides that an accused charged with an indictable only offence shall be sent forthwith to the Crown Court for trial. The Criminal Justice Act 2003 s 41 and sch 3, extends this procedure to offences triable either way. These provisions came into force on 4 April 2005, The Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 SI 2005 / 950.
[46] L McGowan, 'Prosecution Interviews of Witnesses: What More Will Be Sacrificed to "Narrow the Justice Gap"?' (2006) 70 J Crim Law 351, 354.
[47] *R v Galbraith* [1981] 1 WLR 1039 (CA) 1042.

the charges dismissed.[48] The charges will be dismissed if the evidence against the applicant would not be sufficient for a jury properly to convict.[49]

The power to dismiss charges and direct an acquittal provides an important safeguard against the continuance of inappropriate prosecutions. In 2005 12 per cent of the 66 per cent of defendants who pleaded not guilty at the Crown Court were acquitted on the direction of the judge.[50] Where the weakness of a case may have been foreseeable, and may even have been foreseen by the CPS,[51] the decision to continue the prosecution may produce strong judicial criticism,[52] and even financial punishment.[53] There is evidence that such criticism is felt by the CPS.[54] The CPS also makes efforts to learn from directed acquittals and improve performance.[55]

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[48] Crime and Disorder Act 1998 sch 3, para 2(1). See also, the Crime and Disorder Act 1998 (Dismissal of Charges Sent) Rules 1998, SI 1998/3048.
[49] Crime and Disorder Act 1998 sch 3, para 2(2). In determining this question the court will apply the *Galbraith* test, *R v Galbraith* [1981] 1 WLR 1039 (CA) 1042.
[50] Department for Constitutional Affairs, *Judicial Statistics (Revised), England and Wales, for the year 2005*, (The Stationery Office, London 2006) Cm 6903, 89.
[51] See further, BP Block, 'Ordered and Directed Acquittals in the Crown Court: A Time of Change' [1993] Crim LR 95; BP Block, C Corbett & J Peay, *The Royal Commission on Criminal Justice: Ordered and Directed Acquittals in the Crown Court* (Her Majesty's Stationery Office, London 1993); J Baldwin, 'Understanding Judge Ordered and Directed Acquittals in the Crown Court' [1997] Crim LR 536.
[52] In, for example, October 2006, Judge Mushtaq Khokar directed an acquittal of two supermarket workers charged with the theft of fried chicken thighs worth less than £2. At the start of the trial the judge suggested that there was insufficient evidence and urged the prosecution to reconsider their decision to bring the case. After the trial had begun, the judge directed an acquittal and criticised the CPS for not heeding his advice and avoiding much of the £30,000 costs, R Jenkins, '£1.84 chicken lunch that cost taxpayers £30,000' *The Times* (October 7 2006).
[53] In February 2006, Judge Elgan Edwards directed an acquittal after three days of evidence and ruled that the case 'should never have been prosecuted'. He ordered the CPS to pay the more than £100,000 costs involved in bringing the case, M Horsnell, 'McCartney brother cleared of groping' *The Times* (February 25 2006).
[54] Sir Ivan Lawrence QC revealed shortly after his retirement as a Recorder that judges had been asked to be more understanding of 'bungling' CPS officials: 'It got so bad that notes were coming round saying, "we would be grateful if judges didn't criticise the CPS in open court." They were feeling demoralised because they were always being criticised', quoted in, J O'Reilly and J Calvert, 'The secret witness' *The Sunday Times* (April 28, 2002).
[55] The CPS IT case management system, COMPASS, allows the reasons for judge directed acquittals in individual cases to be jointly assessed for training needs and other joint strategies to improve performance and reduce avoidable case failure, 'CPS on case by 2005' (2003) 100 (15) Law Soc Gaz 11.

A prosecution may also be terminated where there is sufficient evidence to support the charge but it would not be in the public interest to allow the case to proceed. The courts are able to terminate such prosecutions by exercising their judicial discretion, affirmed by the House of Lords in *Connelly v DPP*,[56] to stay criminal proceedings as an abuse of the process of the court.[57] Stays have been ordered in a wide range of circumstances where it is felt that the behaviour of the CPS makes it inappropriate for the prosecution to be allowed to continue.

Cases have, for example, been stayed where the prosecution has breached a promise they have made to a defendant. This principle was first set down in the case of *R v Croydon Justices ex p Dean.*[58] Allowing the prosecution to go back on their word may disadvantage the defendant. It is also important that the criminal justice system is perceived as being fair and legitimate. This impression may be threatened if the

[56] [1964] AC 1254 (HL). Lord Reid at 1296 stated, 'there must always be a residual discretion to prevent anything which savours of abuse of process'. In the words of Lord Devlin at 1354, 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused'. See also, *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 (HL), Lord Salmon, at 528, 'if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious … the judge has the power to intervene'. Lord Salmon at 528, went on to express, 'no concluded view whether courts of inferior jurisdiction possess similar powers'. In *R v Brentford Justices, ex p Wong* [1981] QB 445 (QB) Donaldson LJ stated at 887, 'I think that it is open to justices to conclude that it is an abuse of the process of the court'. This appears to be the first reported case in which it was ruled that justices had the power to stay a summary trial on the ground of abuse of process. In *R v Telford Justices, ex p Badhan* [1991] 2 QB 78 (QB), Mann LJ, reading the judgment of the court, concluded at 90, having examined a number of arguably supporting authorities, that 'justices sitting to inquire into an offence as examining justices do have, as part of their inherent jurisdiction, the power to refuse to undertake the inquiry on the ground that it would be an abuse of process to do so … it is the duty of any court, be that court superior or inferior, to protect its process from abuse'.

[57] See generally, A Shepstone, 'The doctrine of abuse of process' (1993) 143 NLJ 1757; ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press, Oxford 1993); ALT Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] Crim LR 864; D Corker and D Young, *Abuse of Process in Criminal Proceedings* (2nd edn Tottel publishing, Haywards Heath 2003).

[58] [1993] QB 769 (QB). In the words of Staughton LJ at 778, 'the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process'.

prosecution is able to promise one thing and do another. The principle established in *Dean* has been applied to the CPS in a number of cases.[59]

Prosecutions have been stayed on the basis that they have placed the accused in double jeopardy.[60] It is important that someone who has been prosecuted is not prosecuted again for the same matter.[61] In the words of Choo, 'to put a person in double jeopardy may increase the chances of his or her being convicted even though innocent, and would also undermine the moral integrity of the criminal process'.[62]

Adequate disclosure to the defence of the evidence gathered in a criminal investigation is a vital component of the right to a fair trial.[63] In several high profile miscarriages of

[59] In, for example, *R v Thomas* [1995] Crim LR 938 (Crown Ct), the defendant pleaded not guilty to offences of section 18 wounding, actual bodily harm, and affray, but guilty to a section 20 charge of assault. He did so on the basis that the prosecution had indicated acceptance of the lesser plea. The CPS later changed their mind and pressed for a full trial. The judge, David Morris, agreed that the case should be stayed. The defendant did an action to his prejudice as a result of the correspondence from the CPS indicating acceptance of the lesser plea and officials of the state should be held to their promises. See also, *R v Wyatt* 28 January 1997, transcript available on LexisNexis (CA); *R v Bloomfield* [1997] 1 Cr App R 135 (CA).

[60] In, for example, *R v Beedie* [1998] QB 356 (CA), the defendant was the landlord of a property where a young woman died of carbon monoxide poisoning caused by the use of a defective gas fire. He was prosecuted by the Health and Safety executive and in June 1994 pleaded guilty to those charges. Proceedings were also taken against him by the local authority and in July 1994 he pleaded guilty. At an inquest into the death the Coroner required the defendant to give evidence indicating that since he had already been prosecuted he could suffer no prejudice by answering questions tending to incriminate him. After a verdict of unlawful killing was returned the police notified the CPS about the case and in March 1995 the defendant was charged with manslaughter. The Court of Appeal ruled that proceedings should have been stayed as 'the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions'. See also, *R v Cwmbran Justices ex p Pope* (1979) 143 JP 638 (QB); *R v Horsham Justices ex p Reeves* (1980) 75 Cr App R 236; *R v Forest of Dean Justices, ex p Farley* [1990] Crim LR 568 (QB); *R v Phipps* [2005] EWCA Crim 33; [2005] All ER (D) 88 (Jan) (CA).

[61] In the words of Lord Devlin in *Connelly v DPP* [1964] AC 1254 (HL at 1359-1360, 'as a general rule a judge should stay an indictment … when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a serious of offences of the same or a similar character as the offences charged in the previous indictment'. This principle is though subject to certain statutory exceptions. See the Criminal Justice Act 2003 part 10, which allows for the retrial of serious offences.

[62] ALT Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] Crim LR 864, 866.

[63] The disclosure regime was placed on a statutory basis by the Criminal Procedure and Investigations Act 1996. The statutory requirements are supplemented by a code of practice issued under Criminal Procedure and Investigations Act 1996 s 23. For the latest version of the code, issued in April 2005, see SI 2005/985. See also the Attorney General's guidelines on disclosure (2005), available at: http://www.1s1o.gov.uk/guidelines.htm. On disclosure see generally, D Corker, *Disclosure in Criminal*

justice exposed in the early nineties, the failure by the prosecution to disclose evidence was an important factor.[64] Judicial oversight may help ensure that the prosecution fulfils its disclosure duties and the defendant's right to a fair trial is protected.[65] On certain occasions the courts have gone as far as to stay cases where the prosecution has failed to comply with repeated disclosure directions.[66]

It is important that someone charged with a criminal offence is brought to trial quickly. A delay may impinge on the fairness of the trial as memories begin to fade and witnesses become difficult to trace. In some cases an accused will be held on remand and deprived of their liberty pending trial. The prospect of a trial will also cause considerable stress and uncertainty for defendants, their families, and victims.[67] If the poor performance of the CPS results in such delay as to mean that a fair trial cannot be held,[68] the prosecution may be stayed as an abuse of process.[69]

Proceedings (Sweet & Maxwell, London 1996); R Leng, 'The exchange of information and disclosure' in M McConville and G Wilson, *The Handbook of the Criminal Justice Process* (Oxford University Press, Oxford 2002) 205.

[64] In 1992 Stefan Kiszko's murder conviction was quashed by the Court of Appeal after he had spent 16 years in prison. Scientific evidence available at the time of his trial which proved he had not killed Lesley Molseed was not passed onto defence lawyers, D Campbell, 'Man cleared after 16 years in jail' *The Guardian* (February 19, 1992); In 1993 the Court of Appeal quashed the convictions of Judith Ward for causing explosions and murder. The failure to disclose evidence, some in the possession of the police, some in the possession of scientists and some in the possession of the DPP meant that there were material irregularities at her trial, *R v Ward* [1993] 2 All ER 577 (CA); The murder convictions of the Taylor sisters were deemed unsafe and unsatisfactory in 1993, partly as a result of the failure of the police to disclose the previous inconsistent statement of the main identification witness for the prosecution, *R v Taylor and Taylor* (1994) 98 Cr App R 361 (CA).

[65] If the accused has reasonable cause to believe that there is prosecution material which has not been disclosed, but which ought to have been, he may apply to the court for an order requiring disclosure, Criminal Procedure and Investigations Act 1996 s 8(2).

[66] This occurred in the case of *DPP v Ayres* [2004] EWHC 2553; [2004] All ER (D) 266 (Oct) (DC).

[67] The importance of trial without delay is recognised in the European convention on human rights: Article 5(3) states that an accused, 'shall be entitled to trial within a reasonable time or to release pending trial'. Article 6(1) provides that, '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'.

[68] *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 (CA) per Lord Lane CJ at 644. This approach was affirmed by the House of Lords in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 (HL).

[69] In *R v Bow Street Stipendiary Magistrate ex p DPP* and *R v Bow Street Stipendiary Magistrate ex p Cherry,* (1990) 91 Cr App R 283 (DC), there was considerable delay in commencing proceedings against a number of police officers. This was due largely to a decision by the CPS not to proceed against any

Where there is delay in the run up to the trial the courts may also provide protection for rights, and a spur to more effective CPS performance, by declining to grant an extension to a custody time limit.[70] This they may do if the poor performance of the prosecution has delayed the start of the trial.[71] In, for example, 2002, Judge Michael Commbe refused to extend a custody time limit and released two persons on bail who were charged with manslaughter, making threats to kill and aggravated burglary. He criticised the CPS for a series of lamentable blunders and called the handling of the case a fiasco.[72]

3.2 Administrative Scrutiny

Administrative scrutiny of the CPS has been provided, on an ad hoc basis, by independent inquiries established by the Attorney General; by the Council of Europe's Committee for the Prevention of Torture; by the Commission for Racial Equality and by

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officer until a decision was made against all of them. In both cases the prosecutions were stayed due to the prejudice suffered by the accused.

[70] The Prosecution of Offences Act 1985 s 22, as amended by the Crime and Disorder Act 1998 and the Criminal Justice Act 2003, gave the Home Secretary the power to make regulations specifying the maximum periods which an accused may spend in custody between the various pre-trial stages. See, Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, as amended. If a time limit expires and the prosecution has not been granted an extension the accused will be granted bail, Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, as amended, reg 6. Note though that the Criminal Justice and Public Order Act 1994 s 25 makes an exception where the accused is charged with murder or rape and they have a previous conviction for such an offence. On custody time limits, see generally, C Corbett and Y Korn, 'Custody Time limits in Serious and Complex Cases: Will they work in Practice?' [1987] Crim LR 737; A Samuels, 'Custody Time Limits' [1997] Crim LR 260; J Burrow, 'Pre-committed custody time limits' (1999) 149 NLJ 330; K Parsons, 'Custody time limits – an overview' (1999) 143 Solicitors Journal 1110.

[71] The Prosecution of Offences Act 1985 s 22(3) states that to gain an extension the prosecution must show that the need for the extension is due to some 'good and sufficient cause' and they have 'acted with all due diligence and expedition'. In *R v Leeds Crown Court, ex p Bagoutie,* The Times 31 May 1999 (QB), Lord Bingham ruled that the prosecution should not be refused an extension unless its lack of due diligence and expedition had in fact delayed the trial date. Lord Bingham's full quotes may be found in the speech of Lord Woolf CJ in *R (on the application of Gibson) v Winchester Crown Court* [2004] 1 WLR 1623 (QB) 1632-1634. Lord Woolf CJ endorsed this approach at 1635, 'I have no doubt that the correct approach is that which was indicated by Lord Bingham CJ, the approach which has been followed in many cases since *R v Leeds Crown Court, ex p Bagoutie'.* See also, *R v Crown Court at Manchester, ex p McDonald* [1999] 1 WLR 841 (QB).

[72] M Horsnell, 'Blunders set suspects free' *The Times* (March 15 2002).

the National Audit Office. Ever present and more systemic oversight is provided by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI).

This administrative oversight may help improve CPS performance by uncovering areas of poor performance and making recommendations for improvement. The fact that the reports of both the ad hoc administrative inquiries and HMCPSI are published may also aid effective performance. Such openness may provide a degree of accountability which might spur the CPS to make enhanced efforts to improve performance. This openness may also provide reassurance to the public. It will help show that there are bodies working to oversee the CPS and to ensure that it performs effectively. It is also arguable that in a democracy the public have a right to receive the kind of information on CPS performance which these administrative oversight mechanisms can provide.

There is currently no administrative scrutiny mechanism with the power to influence individual prosecution decisions. It will be argued in the final part of this section that such a body ought to be developed to scrutinise certain prosecution decisions.

3.2.1 Ad hoc scrutiny

The CPS has been examined by a number of specially established inquiries. The Glidewell review, which began work in 1997 under the chairmanship of Sir Iain Glidewell, was tasked with considering what changes were necessary to the CPS to provide 'more effective and efficient prosecution of crime'.[73] It made seventy-five

[73] The Attorney General gave details of the review and its terms of reference in a written answer to Parliament, Hansard HC vol 295 col WA533-534 (12 June 1997).

recommendations,[74] sixty-four of which were accepted in part or in principle, or implemented.[75]

The Butler Inquiry, established following the cases of *Lapite, O'Brien* and *Treadaway,* concluded that the CPS system for taking prosecution decisions in death in custody cases and in cases involving serious assault allegations against police officers was 'inefficient and fundamentally unsound'.[76] It recommended that Treasury Counsel should continue to play a central role in the prosecution decision,[77] and that enhanced CPS training was required.[78] The CPS accepted all of its recommendations.[79] The Glidewell and Butler reports also helped produce the particular measure of accountability called for in the immediate aftermath of the *Lapite*, *O'Brien*, and *Treadaway* cases, the replacement of the DPP, Dame Barbara Mills.[80]

The Council of Europe's Committee for the Prevention of Torture tends to concentrate on examining places of detention. In 1997 though, in the light of the *Lapite*, *O'Brien*, and *Treadaway* cases, it conducted an ad hoc visit to check on the existence of effective mechanisms to address police misconduct.[81] During this visit the CPT met with the DPP,[82] and was granted unrestricted access to all of the files which it requested from the

[74] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 17-25. For analysis see, A Ashworth, 'Review of the Crown Prosecution Service' [1998] Crim LR 517.
[75] See, the Government's final response to the recommendations contained in the Glidewell report, Hansard HC vol 334 col WA10-15 (28 June 1999).
[76] His Honour G Butler QC, *Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters* (The Stationery Office, London 1999) 39.
[77] *ibid.* 54.
[78] *ibid.* 54.
[79] CPS, press release, 'Butler report into CPS decision making', (11 August 1999).
[80] C Dyer and A Perkins, 'DPP bows out after Whitehall pressure' *The Guardian* (May 21 1998).
[81] 'Custody Deaths provoke European inquiry' *The Guardian* (September 8 1997).
[82] CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000) para 5.

CPS.[83] Its report expressed concern that the CPS might be applying an unduly high threshold when considering whether there was sufficient evidence to justify bringing criminal proceedings against police officers.[84]

In January 2000, following the threat of a formal investigation by the Commission for Racial Equality (CRE), Sylvia Denman was asked by the CPS to undertake an inquiry into race discrimination in the CPS. Her report concluded that institutional racism 'has been, and continues to be, at work in the CPS'.[85] On the same day as this report was published the CRE's report of their formal investigation into the CPS branch in Croydon, an investigation sparked by Denman's interim report, revealed that staff were separated on racial lines and the level of organisational and management failure was such as to meet the test for institutional racism set down by the Lawrence inquiry report.[86] The CPS promised to take forward all the recommendations from these investigations.[87] In 2002, in view of the progress made in addressing issues raised by the Denman inquiry, the CRE lifted its threat of formal investigation and entered into a monitoring partnership with the CPS.[88] Welcoming the partnership the DPP stated that 'All the recommendations in the Denman report have now been implemented and the proportion of CPS staff from minority ethnic groups has risen to 12 per cent (more than the national average)'.[89]

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[83] *ibid.* para 8.
[84] *ibid.* para 50.
[85] S Denman, *Race Discrimination in the Crown Prosecution Service - Final Report* (Crown Prosecution Service, London 2001).
[86] Commission for Racial Equality, *The Crown Prosecution Service, Croydon Branch: Report of a Formal Investigation* (Commission for Racial Equality, London 2001) 6. Available at, http://www.cre.gov.uk/publs/cat_fi.html.
[87] CPS, press release, 'Final Denman report published', (26 July 2001).
[88] CPS, press release, 'CRE and CPS form new partnership to further racial equality', (16 September 2002).
[89] *ibid.*

The National Audit Office which scrutinises public spending on behalf of Parliament has examined the CPS on three occasions in recent years.[90] Its most recent report estimated that annually 71,000 ineffective pre-trial hearings could be attributed to the CPS and that nearly 19,500 ineffective or cracked magistrates' court trials were attributable to the CPS. Together this poor performance was, it claimed, costing the taxpayer almost £24 million.[91] A number of recommendations were made for reducing the number of ineffective hearings and trials. The CPS acknowledged that there were too many ineffective hearings and stated that the report would 'help the CPS to take action to improve its performance'.[92]

3.2.2 Her Majesty's Crown Prosecution Service Inspectorate

In 1996 the CPS set up its own internal inspectorate, which subsequently published a number of critical reports.[93] As noted by Ashworth and Redmayne 'It is to the credit of the CPS' that it took this initiative.[94] The Inspectorate was, however, made up entirely of members of the CPS and it reported directly to the DPP. As noted by the Glidewell review, such factors might well give rise to a suspicion that it would not be able to be wholly frank about any incompetence or inefficiency it discovered.[95] A fully internal inspectorate might also struggle to stay in touch with the interests of the people who

[90] National Audit Office, *Review of the Crown Prosecution Service* (1988-1989) HC 345; National Audit Office, *Crown Prosecution Service* (1997-1998) HC 400; National Audit Office, *Crown Prosecution Service: Effective use of magistrates' court hearings* (2005-2006) HC 798.
[91] National Audit Office, *Crown Prosecution Service: Effective use of magistrates' court hearings* (2005-2006) HC 798, 2.
[92] CPS, press release, 'CPS responds to NAO report on the effective use of magistrates' courts hearings', (15 February 2006).
[93] See, for example, Crown Prosecution Service Inspectorate, *Report on the Thematic Review of the Disclosure of Unused Material* (2000). This report found CPS compliance with prosecutorial disclosure obligations to be defective in a significant number of cases.
[94] A Ashworth and M Redmayne, *The Criminal Process* (3rd edn Oxford University Press, Oxford 2005) 201.
[95] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 201.

come into contact with the CPS.[96] The Glidewell review concluded that there was a need for the introduction of a 'truly independent element'.[97]

On 1 October 2000 the CPS internal inspectorate was replaced by a new body, Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI).[98] The independence of this new body went significantly beyond that recommended by the Glidewell review. It is a fully independent inspectorate reporting to the Attorney General rather than to the DPP, and its inspectors are a mixture of those with a CPS background, including many on secondment from the CPS, and those from other backgrounds. Those from the CPS make an important contribution as they are well placed to know which questions to ask.[99] It is, though, crucial that a number of lay inspectors are included within the ranks. They bring a more external viewpoint and fresh perspectives.[100] They may also help ensure that HMCPSI acts and is viewed as a truly independent inspectorate. HMCPSI seems increasingly aware of the value of the lay inspectors. Its 2006-07 annual report notes that additional lay inspectors were recruited during the year and the remit of the lay inspectors expanded.[101]

HMCPSI works to improve the effectiveness of the prosecution services.[102] This it does through a process of inspection and evaluation, uncovering poor performance, providing

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[96] 'If an inspectorate is too close to the profession it is supervising there is a risk that it will lose touch with the interests of the people who use the service. It may … lose the independence and objectivity that the public needs. Professional inspectorates can easily become part of a closed professional world', *The Citizen's Charter: Raising the Standard* (Her Majesty's Stationery Office, London 1991) Cm 1599, 40.
[97] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 201-202.
[98] The Crown Prosecution Service Inspectorate Act 2000.
[99] HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 8.
[100] *ibid.* 8.
[101] HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 20.
[102] *ibid.* 2.

advice, and identification of good practice. Since 2005 its main inspection methodology has been the overall performance assessment, which assesses each CPS Area against 14 key performance aspects.[103] Each aspect is rated separately so an Area can immediately identify its strengths and weaknesses, enabling it to prioritize efforts to deal with key weaknesses.[104] The same applies to the CPS as a whole, so that nationally it can target the aspects of greatest weakness.[105] Follow up Area effectiveness inspections are conducted on those Areas performing less well. In 2006-07 the four Areas which had an overall performance assessment of poor were subject to full inspection and a further seven Areas received a customized inspection directed towards the aspects of performance where poor performance was found.[106] Almost all these Areas had achieved better performance by the time of the follow up inspections, indicating the positive benefit of assessment and inspection.[107] The DPP has also recognised the utility of the overall performance assessment in helping to produce improvement: 'we aim to help all Areas perform to the standards of the best. These assessments, and the good practice identified in the reports, will help us to do that'.[108]

The fact that the overall performance assessment process relies largely on CPS self-assessment might give rise to concern. As recognised by HMCPSI, on a number of occasions, Area performance is not always reflected accurately in CPS performance

[103] HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006), 6 and 70-71. Available at http://www.hmcpsi.gov.uk.
[104] HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 32.
[105] *ibid.* 32. Aspects identified as requiring more focus on improvement to reach an acceptable standard across the service by the 2004-05 assessment included: pre-charge decision making, resource management, and the managing of custody time limits, HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006) 14.
[106] HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 38.
[107] *ibid.* 38.
[108] CPS, press release, 'CPS welcomes publication of second tranche of performance reports', (14 march 2006).

information and data.[109] Self-assessment is, however, supported by documentary evidence with a view to 'check and challenge' in a meeting held between inspectors and the CPS to ensure accurate portrayal.[110] HMCPSI's chief inspector, Stephen Wooler, has expressed confidence that the overall performance assessment approach 'will prove just as reliable in providing ongoing assessment and assurance as to the quality of performance across the CPS as our earlier and more cumbersome cyclical inspection programme'.[111]

Alongside the overall assessment process HMCPSI continues to rely on other inspection methodologies. Each year it conducts a number of thematic reviews which look at various aspects of CPS performance. These reviews are often conducted jointly with the other criminal justice inspectorates.[112] In 2006 HMCPSI also committed itself to conducting a rolling programme of inspection of specific casework issues. Such inspections aim to look beneath the overall situation in Areas and provide a reality check on an Area's self-assessment.[113] The first such inspection conducted in 2006-07 examined the quality and timeliness of decision making in the discontinuance of proceedings.[114]

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[109] HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 34.
[110] HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 6.
[111] *ibid.* 7. See also the statement by Martin Goldman, Chief Crown Prosecutor for the Cleveland Area, at 16, 'I welcomed the fact that the self-assessment was evidence based, and then openly and fairly tested in a 'check and challenge' meeting. This allowed a true reflection of the area's delivery in the 14 aspects of performance'.
[112] See generally on thematic reviews, HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 44-51 and HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 50-62.
[113] HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 17.
[114] HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 20.

The CPS internal inspectorate, though deficient in a number of respects, was free to publish its reports. Given such openness it is strange that the Glidewell review suggested that the publication of the inspectorate's reports could be abandoned.[115] It felt that this would enable the reports to go into more detail and to use more forceful language. Yet there are strong arguments in support of continued publication and it is appropriate that HMCPSI publishes its reports. In a democracy the public have a right to know how the main authority with responsibility for prosecuting citizens is performing. Such openness may also bolster public confidence. As the Glidewell review itself acknowledged, 'public confidence in any organisation is greatly enhanced if that organisation has an efficient and effective inspectorate system which … publishes the results of its work'.[116] Publication may even provide a degree of accountability for poor CPS performance in particular cases. Public criticism and the ensuing embarrassment may act as a spur to improved CPS performance.

The development of the overall performance assessment is a step towards greater openness. It describes performance simply and clearly as 'excellent' 'good' 'fair' or 'poor' so that the public and others can easily appreciate the level and quality of service being delivered in their locality.[117] When first introduced the prosecutors' union, the First Division Association, argued that the publication of the overall performance assessments could demoralise staff and prove unhelpful.[118] The DPP seems though, to

[115] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (1998 Her Majesty's Stationery Office London) Cm 3960, 203.
[116] *ibid.* 200.
[117] HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006) 4.
[118] P Rohan, 'CPS lawyers give low marks to rating plan' Law Society Gazette (2005) 102(31) 1.

recognise the importance of such openness, 'I welcome publication of these reports. I am determined that we should be accountable to the public we serve'.[119]

Extensive efforts are made to ensure HMCPSI reports are communicated to the public. The overall performance assessment reports were sent to local and national media, to local stakeholders such as community groups, and to Members of Parliament. In total some 50,000 copies of the reports were distributed.[120] The reports are also made available via HMCPSI's website.[121] In their annual report of 2005-06 HMCPSI stated that their website 'continues to evolve as improvements are made and more reports are added'.[122] There is certainly considerable scope for further evolution. The material on the site is poorly organised making reports difficult to locate[123] and information on the site detailing the work of HMCPSI is badly out of date.[124] The internet is only going to become an increasingly important means of communicating with the public in the 21st century and it is to be hoped that HMCPSI's website can be made more comprehensive and 'user friendly'. HMCPSI's 2006-07 annual report states that a search facility will

[119] CPS, press release, 'CPS welcomes publication of second tranche of performance reports', (14 march 2006).
[120] HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 52.
[121] http://www.hmcpsi.gov.uk.
[122] *ibid.* 63.
[123] The 'Reports' page on the website, http://www.hmcpsi.gov.uk/reports/reports.htm, contains none of the overall performance assessment reports and the most recent annual report available on the 'Annual Reports' page, which is accessible from the 'Reports' page, is for the year 2004-2005. The overall performance assessment reports and the annual report 2005-06 are instead available at the bottom of the messy homepage, http://www.hmcpsi.gov.uk. In their 2006-07 annual report HMCPSI accept that it is not as easy as it should be to locate a document on the website, HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 69.
[124] The 'Inspection Programme Methodology' page, http://www.hmcpsi.gov.uk/inspect/inspect.htm, states that, 'HMCPSI currently operates its inspection regime on a two-year cycle, and has now completed the end of its second cycle. HMCPSI are taking the opportunity that this presents to examine the methodology that is used in inspections and the process by which the inspection programme is defined. More information about the new inspection methodology will be published here just as soon as it is available'. With the first reports from the 'new' overall performance assessment methodology being published in December 2005, details should really have been made available by now.

shortly be added to the site to make it easier for users to access documents.[125] This may well help. It would, however, be better, and probably easier for HMCPSI to achieve, if documents were simply placed on the pages where you would expect to find them.

3.2.3 A CPS Ombudsman?

It is arguable that there is a need for the introduction of an administrative oversight mechanism with the power to call in for review certain CPS decisions. This body could be given the power to call in for review particularly controversial or high profile decisions not to prosecute and, where appropriate, overturn the decision. It should also perhaps have the power to review certain cases where the CPS has decided to prosecute but the case has ended in an acquittal.

The remit to review and possibly overturn certain CPS decisions not to prosecute would encompass those cases where a person has died while in custody or following contact with the police. A recent thematic review by HMCPSI found that the CPS was no more likely to misapply the Code for Crown Prosecutors in cases involving the police than it was in other cases.[126] It also noted, however, that 'police complaint cases may be extremely high profile, and the ramifications of poor decisions may be disproportionate to the small number of such cases'.[127] It is, in other words, more important to get these decisions right. Furthermore, it is arguable that even if CPS performance in such cases has improved, it may be too late: the damage has already been done. Following the

[125] HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 69.
[126] 'Of 209 files examined, inspectors concluded that the decision reached was wrong in four cases. This is a margin of error broadly comparable with that found in relation to casework generally'. In the four cases where errors had been made they tended to lead to inappropriate prosecution rather than non-prosecution, HMCPSI and HMIC, *Justice in Policing: A joint thematic review of the handling of cases involving an allegation of a criminal offence by a person serving with the police* (2007) para 6.10 and 6.11.
[127] *ibid.* para 6.10.

judicial review cases discussed earlier in this chapter the CPS may no longer enjoy adequate public confidence in deciding whether to prosecute certain cases.

It is also arguable that this proposed independent review mechanism should be able to investigate high profile cases where the CPS have prosecuted but it appears that the decision may have been mistaken. This category includes cases which end in a directed acquittal[128] and cases where someone is prosecuted on more than one occasion but no conviction results.[129] Such cases may undermine confidence in the CPS. They may also tend to suggest that the person placed on trial has unnecessarily had the stress and pains of prosecution placed on them and that the CPS has performed poorly in the sense that public money has been wasted. An independent investigation of how the prosecution decision was made may reassure the public and help identify lessons which can be learnt, thus ensuring more effective CPS performance in the future.

The CPS is subject to a degree of oversight in deciding whether to prosecute as the Attorney General may be consulted about the prosecution decision and he has the power to direct the DPP to prosecute or not.[130] If a victim or his relatives are unhappy with a

[128] In, for example, one case in February 2006, the judge Elgan Edwards directed an acquittal after three days of evidence and ruled that the case 'should never have been prosecuted'. He ordered the CPS to pay the more than £100,000 costs involved in bringing the case, M Horsnell, 'McCartney brother cleared of groping' *The Times* (February 25 2006).

[129] In July 1998 Sion Jenkins was convicted of the murder of Billie-Jo Jenkins, 'Sion Jenkins convicted of Billie-Jo murder' *BBC News* (July 2 1998); In July 2004 the Court of Appeal quashed the conviction and ordered a retrial, S Morris, 'Retrial ordered for Sion Jenkins, Teacher jailed for killing Billie-Jo wins appeal' *The Guardian* (July 17 2004); In July 2005 the jury at the retrial failed to reach a verdict, L Smith, 'Sion Jenkins faces third murder trial after jury deadlock' *The Guardian* (July 12 2005); At the second retrial the jury again failed to reach a verdict and Jenkins was formally acquitted by the judge, S Laville, 'Jenkins: the allegations of violence the jury never heard, Foster father formally acquitted of murder after second retrial ends without verdict' *The Guardian* (February 10 2006). Similarly in February 2006 a jury were unable to reach verdicts on two charges against Nick Griffin and another member of the British National Party, Mark Collett, that they had sought to incite racial hatred, the CPS decided to press forward with a retrial, A Norfolk, 'BNP leader is acquitted of race hate but faces new trial' *The Times* (February 3 2006); In November 2006 both were acquitted at the retrial, 'A Norfolk, 'BNP chief claims acquittal is his victory for freedom' *The Times* (November 11 2006).

[130] See section 3.3.2.

decision not to prosecute they may make a complaint to the CPS.[131] Such a complaint may lead to a review of the decision and produce a different prosecution decision.[132] Scrutiny by the Attorney General and the CPS complaint process may not, however, be viewed as sufficiently independent to attract public confidence.[133] It may also be of limited effectiveness in ensuring that a decision is made on the correct grounds. In the successful judicial review cases detailed previously in this chapter, superintendence by the Attorney General and internal CPS re-reviews failed to produce an error free decision.

Judicial review challenges have proved effective at exposing CPS error in the decision making process and ensuring that a decision not to prosecute is reconsidered. But a judicial review application is costly to bring, and cases have tended to succeed only where an alternative scrutiny mechanism, normally an inquest, has cast doubt on the original decision. The courts also lack the power on judicial review to order a prosecution; they are limited to sending the case back to the CPS for reconsideration. As we have seen, reconsideration has often not produced a different substantive decision.

A victim or a victim's relatives do have the right to bring a private prosecution.[134] Lord Wilberforce described this right as 'a valuable constitutional safeguard against inertia or

[131] See, CPS, *Complaints: About making enquiries or complaints to the Crown Prosecution Service* (2004), available at: http://www.cps.gov.uk/publications/communications/index.html.
[132] In the words of the Attorney General, 'the CPS does of course take complaints and representations seriously and has reviewed decisions in individual cases on receiving representations from the family of a deceased person', Attorney General, *A Review of the Role and Practices of the Crown Prosecution Service in Cases Arising from a Death in Custody* (2003), para 1.7. Available at: http://www.attorneygeneral.gov.uk/sub_publications_reviews.htm.
[133] For examination of why the Attorney General's oversight fails to attract public confidence, see section 3.3.2.
[134] Prosecution of Offences Act 1985 s 6(1).

partiality on the part of authority'.[135] In a number of cases private prosecutions have been successfully brought where the CPS has decided not to prosecute.[136] To bring a private prosecution requires, though, considerable financial resources[137] and there is no obligation on the police and the CPS to cooperate or provide assistance.[138] Furthermore, the DPP may take over a private prosecution and discontinue it at any stage.[139]

In a case where the CPS has decided to prosecute a degree of independent oversight of the decision is provided by the trial judge and the jury. The judge may direct an acquittal and might strongly criticise the CPS for prosecuting the case.[140] Failures by different juries to convict may indicate that the CPS was wrong to bring a repeat prosecution. The oversight of the CPS prosecution decision provided by the judge and

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[135] *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) 477. See also Lord Diplock at 498, the right of private prosecution 'is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities [the prosecution authorities] to prosecute offenders against the criminal law'.

[136] In 1995 two women brought a private prosecution against Christopher Davies. He was convicted of rape, indecent assault, false imprisonment and actual bodily harm, S Weale, 'Private case brings rapist to justice; Prostitutes succeed with prosecution after CPS refuses to pursue attacker for lack of evidence' *The Guardian* (May 18 1995); In 1996 Allen Chubb was found guilty of assaulting a woman and falsely imprisoning her after she brought a private prosecution. He was ordered to pay £1000 compensation, M Horsenell, 'Solicitor convicted of assault' *The Times* (March 16 1996); In 2006, a professional huntsman, Tony Wright, became the first person in England and Wales to be convicted for illegal hunting with dogs after a private prosecution by the League Against Cruel Sports. He was fined £500 and ordered to pay £250 costs, S de Bruxelles and V Elliott, 'Caught on video: first huntsman convicted of breaching the ban' *The Times* (August 5 2006).

[137] It cost, for example, the League Against Cruel Sports £60,000 to £70,000 to bring a private prosecution against Tony Wright, S de Bruxelles and V Elliott, 'Caught on video: first huntsman convicted of breaching the ban' *The Times* (August 5 2006). To bring their private prosecution for murder Stephen Lawrence's parents raised around £70,000 in donations, V Chaudhary, 'Anger after race case collapse' *The Guardian* (April 26 1996). It is possible though that at the conclusion of a private prosecution, whether it has been successful or not, the judge may order that costs be paid from central funds. This occurred in the Lawrence case.

[138] In the private prosecution of Christopher Davies, 'Kent police were angry that the CPS had dropped the prosecution and were extremely helpful', R Pearson, 'Analysis: A Successful Private Prosecution Of Rape Originally Thwarted by the CPS' (October 3 1995) The Lawyer 12. By contrast, when in 1994, Allyson Burgess attempted to bring a private prosecution for manslaughter against Dean Ryan after he drove through a red traffic light and killed her husband whilst over the alcohol limit, she felt that she 'had to go against the CPS as well as the defendant … At every turn they blocked me. When I started the private prosecution, I was not allowed access to anything, we had to re-interview all the witnesses and I was not even allowed to see the police evidence', F Gibb, A Fresco and S de Bruxelles, 'Justice must be improved says Lyell' *The Times* (March 24 1994).

[139] Prosecution of Offences Act s 6(2).

[140] See above, section 3.1.2.

the jury is though limited. A more expansive investigation which can look beyond the case as presented in court to see how and why the case came to be brought by the CPS and to see what lessons can be learnt for the future may be required.

Given the limits of the current oversight of CPS prosecution and non-prosecution decisions there is a strong case for introducing an independent ombudsman to examine certain such decisions. This oversight mechanism could help ensure greater prosecutorial effectiveness and may be necessary given a possible lack of public confidence in the current arrangements following certain high profile CPS blunders. If such an ombudsman were introduced it would need to make efforts to publicise its role and responsibilities so as to impact on public confidence. The public would only be re-assured by the oversight provided if they were made aware of its role and work. This openness should extend to the publication of reasons why a prosecution would not be brought if the ombudsman agreed with the CPS and the publication of any report produced, highlighting how a mistaken decision was taken and the lessons to be learnt for the future.

As to the form that such a body might take, HMCPSI examines CPS decisions during inspections and has the necessary expertise to provide this independent review. If HMCPSI is involved in reviewing and possibly overturning CPS decisions not to prosecute this might though, increase tension between the two bodies and damage the openness and cooperation so vital to HMCPSI's inspectorate function. When an independent complaint mechanism was introduced in the prison context the role was handed not to HMIP but to a new ombudsman set up for the purpose.[141] This is a

[141] See section 5.2.3.

precedent that should be followed if the independent scrutiny mechanism advocated here were to be introduced.

3.3 Public scrutiny

Direct oversight of the CPS by the general public is possible as a result of the information published by the CPS and via its consultation efforts. Scrutiny which may also be categorised as public is provided by the Attorney General, Parliament and the media.

3.3.1 Making information available and consultation efforts

In 1998 the Glidewell review suggested that the CPS needed to increase its public exposure: 'there is a need to remove some of the mystery that seems to shroud it at present'.[142] It has made significant strides towards greater openness in recent years.

The CPS Code is published, as required by statute.[143] In the words of the DPP, this 'allows everyone – criminal justice partners and the public alike – to see and understand the basis upon which our decisions are made'.[144] Such understanding is necessary for

[142] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 204.
[143] Prosecution of Offences Act 1985 s 9 and 10. The fifth edition of the code was published on 16 November 2004, CPS, press release, 'New Code for Crown Prosecutors sees CPS come of age in the 21st century', (16 November 2004).
[144] CPS, press release, 'New Code for Crown Prosecutors sees CPS come of age in the 21st century', (16 November 2004). Also helpful in this regard is the leaflet published by the CPS which explains how prosecution decisions are reached, CPS, *The decision to prosecute,* (2004), available at: http://www.cps.gov.uk/publications/prosecution/index.html. Particular efforts have been made to ensure that the Code is accessible to ethnic minority communities and hard to reach groups. In 2000, the DPP stated, 'The Code will be more accessible to ethnic minority communities. It will be produced in 12 languages in addition to English and Welsh, and all of these will be available on the Internet. Translation into any other language required will also be provided on request. In addition, the Code is being published in Braille and an audio-taped version will be available on request', D Calvert-Smith QC, 'The Code for Crown Prosecutors' (2000) 150 NLJ 1494, 1495. The Code is currently available in nine different languages on the CPS website, http://www.cps.gov.uk/victims_witnesses/code.html.

the maintenance of public confidence. It is also arguable that the public have a right to this information in a democracy. In addition, publishing the Code aids judicial scrutiny of CPS performance. As noted by Hilson, 'For there to be a chance of successfully reviewing a body's prosecutorial decision on the ground that they have ignored or acted contrary to their prosecution policy … a policy must exist, it must be open and some of the provisions must be sufficiently detailed'.[145]

In the past there was concern that CPS prosecution policy guidance was removed from the Code and hidden away in the restricted CPS manuals.[146] As Ashworth and Redmayne note, however, there has been a move towards greater transparency in the last few years. Much of the prosecutorial guidance previously kept confidential is now available on the CPS website.[147]

In the late nineties the CPS came under increasing pressure to give detailed reasons to a victim or his family where it decided not to prosecute or to discontinue a prosecution.[148]

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[145] C Hilson, 'Discretion to Prosecute and Judicial Review' [1993] Crim LR 739, 743.
[146] JA Fionda and A Ashworth, 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' [1994] Crim LR 894, 900-901.
[147] A Ashworth and M Redmayne, *The Criminal Process* (3rd edn Oxford University Press, Oxford 2005) 176.
[148] The Butler inquiry stated that, 'there may well be cases where it would be right to do so [give reasons for a decision not to prosecute]. I would suggest, for example, that it might be right to do so in those cases where there has been a death in custody, and an Inquest jury has returned a verdict of unlawful killing. And no doubt there might be other cases', His Honour G Butler QC, *Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters* (The Stationery Office, London 1999) 55; Following their ad hoc visit to the United Kingdom in 1997 the Committee for the Prevention of Torture said, in the context of CPS decisions regarding the prosecution of police officers, especially in cases involving allegations of serious misconduct that, 'Confidence about the manner in which such decisions are reached would certainly be strengthened were the Crown Prosecution Service to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced', CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000) para 57; The Macpherson report recommended that in relation to the prosecution of racist crimes, 'the CPS ensure that all decisions to discontinue any prosecution should be carefully and fully recorded in writing, and that save in exceptional circumstances, such written decisions should be disclosable to a victim or a victim's family', Sir W Macpherson, *The Stephen Lawrence Inquiry* (Stationery Office, London 1999), para 37. In *R v DPP ex p Manning* [2000] 3 WLR 463, Lord Bingham

This led to the introduction of the Direct Communication with Victims initiative which requires that the CPS communicate any decision to drop or substantially alter a charge directly to the victim. As much detail as possible of the reasons for the decision should be given. In certain serious cases a meeting will also be offered to provide further explanation.[149]

The duty to give reasons may contribute to more effective CPS performance by ensuring 'that all prosecutorial decisions are carefully thought through and are founded on sound and rational bases'.[150] Explaining a decision may also reduce victim dissatisfaction, although this is far from guaranteed. Should a victim or his relatives continue to feel aggrieved by a decision the giving of reasons may facilitate a challenge by way of judicial review. It is difficult to argue that a case has been wrongly decided if you do not know the basis upon which it was decided.

It is unfortunate that HMCPSI scrutiny has revealed that the CPS often fails to explain decisions not to prosecute. The first overall performance assessment found that most Areas had difficulty identifying all those cases where a letter should have been sent. The reality checks conducted on CPS self-assessment data showed significant non-

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noted at 477 that, 'it was increasingly the practice of the Director to give reasons to interested parties for decisions such as this, for the sake of greater openness' and suggested at 477-478 that in cases where 'an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reason's, we would expect the Director to give reasons in such a case'.

[149] The Direct Communication with Victims Initiative is detailed in the legal guidance section on the CPS website, concerned with the Care and treatment of victims and witnesses, http://www.cps.gov.uk/legal/section16/chapter_a.html. See also, Office for Criminal Justice Reform, *The Code of Practice for Victims of Crime* (2005), para 7.2 - 7.7. Available at: http://www.homeoffice.gov.uk/documents/victims-code-of-practice.

[150] D Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 JICJ 124, 143.

compliance.[151] An inspection across 11 Areas in 2006-07 found that performance in relation to the provision of letters to victims continued to provide a challenge in terms of ensuring that letters were sent in all appropriate cases and that they were sent within the time limits.[152]

As well as offering explanations to victims the CPS has, in certain high profile and controversial cases, explained publicly how a decision not to prosecute was reached, and the reasoning behind it.[153] The CPS has also sought to explain and justify decisions to prosecute in cases which have ended in directed acquittals.[154] Such transparency is important to help maintain public confidence in the CPS. It might help remove a taint on the reputation of those who had fallen under suspicion. A public explanation for a decision not to prosecute may also help ensure that the decision is properly thought through and stands up to scrutiny. Whilst the CPS has given detailed public explanations of decisions not to prosecute in some controversial cases, there remains

[151] HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006) 14. This finding echoed earlier HMCPSI findings: the 13 follow up inspections conducted to complete the second round of cyclical inspections found that there was a need to improve compliance with the CPS's initiative, Direct Communication with Victims, HMCPSI, *Promoting Improvement HM Chief Inspectors Annual Report 2005-2006* (The Stationery Office, London 2006) HC 1315, 31.

[152] HMCPSI, *Direct Communication with Victims, An Audit of CPS Performance in Relation to Keeping Victims Informed* (HMCPSI, London 2007).

[153] In announcing that having re-reviewed the decision not to prosecute any police officer following the death of Oluwashijibomi Lapite the CPS had concluded that there was insufficient evidence to prosecute any police officer the CPS stated that, 'before coming to this decision advice was obtained from Senior Treasury Counsel, a member of the independent Bar'. Furthermore, reasons for the decision were given: 'five pathologists, who were involved in the original investigation, coroner's inquest and judicial proceedings, were consulted again. None of them were able to state, without reservation, that compression of the neck was a substantial cause of Mr Lapite's death or that any other act of a police officer caused his death. In the absence of evidence to show that the actions of the police officers either singly or in concert were a substantial cause of Mr Lapite's death, there is not a realistic prospect of conviction against any police officer for manslaughter', CPS, press release, 'Decision in case of R v DPP ex parte Lapite', (4th June 1998). See similarly, CPS, press release, 'statement: Death of Derek Bennett', (25 March 2003); CPS, press release, 'decision in Henry (Harry) Stanley case', (20 October 2005); CPS, press release, 'statement: Charging decision on the fatal shooting of Jean Charles de Menezes', (17 July 2006); CPS, press release, 'DPP decides no charges following death of Simon Murden', (3 October 2006).

[154] See, for example CPS, press releases, 'Judge dismisses charges against five police officers over death of Christopher Alder', (21 June 2002); CPS, press release, 'CPS was right to prosecute over Hatfield train crash, says DPP', (6 September 2005); CPS, press release, 'Police officers acquitted following death of Michael Powell', (2 August 2006).

scope for providing more detail in others. On a number of occasions the CPS has merely stated that there was 'insufficient evidence' to bring a prosecution but that detailed reasons had been given to the victim's family.[155] Given that the CPS acts on behalf of the Crown, not as the agent of a victim or his relatives, it is arguable that the public have just as much right to the detailed reasons. In a number of high profile cases the explanation which the CPS has withheld from the public has been disclosed by the victim's family to the media and reported to the public.[156] If the victim's relatives are happy to have the information made public there seems little reason why the CPS should not make the explanation publicly available in the first place. Indeed, it would be preferable if the information came directly from the CPS.

The CPS also publishes information detailing its own performance. As required by statute,[157] it produces an annual report detailing the discharge of its functions.[158] Efforts are made to ensure that this report is distributed widely.[159] Since 1996 CPS local branches have published their own annual reports in an attempt to improve communication with local communities.[160] Each autumn the CPS also publishes a report setting out its performance and progress against the Government's Public Service

[155] See, for example, CPS, press releases, 'CPS statement on Alton George Manning (deceased)', (25 January 2002); CPS, press release, 'CPS Concludes review of Roger Sylvester Case', (16 June 2005); CPS, press release, 'CPS advises no prosecution following death of teenager in custody', (19 December 2005); CPS, press release, 'CPS statement: Fatal shooting of Azelle Rodney', (4 July 2006).
[156] This occurred, for example, in relation to the CPS decision not to prosecute any police officers over the killing of Jean Charles de Menezes, V Dodd, 'Report says armed police were meant to arrest, not shoot Menezes: Officers believed Brazilian was a suicide bomber: Family considers court challenge to CPS findings', *The Guardian* (July 22 2006).
[157] Prosecution of Offences Act 1985 s 9.
[158] Reports available at, http://www.cps.gov.uk/publications/reports/index.html.
[159] In the context of the Crown Prosecution Service annual report 2005-06, the Solicitor General told the House of Commons, 'The report cost a total of £22,405.95 which included the receipt of 3,000 reports. Copies of the report were distributed throughout the service's 42 geographical areas in England and Wales and copies were sent to other Government Departments and the CPS's Criminal Justice System (CJS) partners. Chief Crown Prosecutors will have distributed copies to key local partners in their own criminal justice area; to members of their local communities; to visitors of CPS offices; and as part of local publicity or careers activity', Hansard HC vol 450 col WA96 (9 October 2006).
[160] Available at: http://www.cps.gov.uk/local/index.html.

Agreement targets.[161] CPS performance statistics are included in the Government's annual Judicial Statistics publication,[162] and in the Criminal Statistics Bulletin.[163] Since January 2006 the CPS has also published a monthly analysis of the outcomes of its prosecution cases,[164] and since May 2006 a quarterly summary of performance in key areas of business.[165]

This openness is important for the same reasons that the continued publication of HMCPSI reports is appropriate. In a democracy the public have a right to know how their prosecuting authorities are performing. Such transparency may also contribute to more effective performance by providing accountability in the form of public embarrassment or criticism for poor performance. The DPP has recognised the importance of such openness, 'People are entitled to know how the CPS in their Area is performing against its stated objectives and to have an explanation if it is not meeting those objectives. I believe that the more information the public has about the performance of criminal justice, the better'.[166]

It is clear that an increased amount of statistical performance data has been made available in recent years. An HMCPSI study has, however, cast doubt on the accuracy

[161] The Autumn performance reports are available at:
http://www.cps.gov.uk/publications/reports/index.html
Progress against the public service agreement targets is also now set out in the CPS annual report.
[162] Department for Constitutional Affairs, *Judicial Statistics (Revised), England and Wales, for the year 2005*, (The Stationery Office, London 2006) Cm 6903.
[163] Home Office, *Criminal Statistics 2005* (2006).
[164] CPS, press release, 'CPS begins monthly publication of case outcomes', (23 January 2006). Monthly publications available at: http://www.cps.gov.uk/publications/performance/case_outcomes/index.html.
[165] CPS, press release, 'CPS publishes summary of performance in key areas of business', (12 May 2006). Quarterly summary's available at:
http://www.cps.gov.uk/publications/performance/area_performance/index.html.
[166] He was speaking in relation to the commencement of the publication of a quarterly summary of performance in key areas of business, CPS, press release, 'CPS publishes summary of performance in key areas of business', (12 May 2006). His words are, though, equally applicable to the publication of the various performance data. See also, CPS, press release, 'CPS welcomes publication of second tranche of performance reports', (14 March 2006), which contains a similar message from the DPP, 'I welcome publication of these reports. I am determined that we should be accountable to the public we serve'.

of the performance data gathered by the CPS.[167] It is to be hoped that the CPS has acted on the recommendations designed to improve the accuracy of such information. There is no point publishing performance information if it misleads the public. The fact that the accuracy of CPS performance information is now monitored as part of the HMCPSI overall assessment process may help ensure accurate data.[168]

The CPS Code, CPS press releases and performance information are all published on the CPS website.[169] Efforts have been made to improve the CPS website in recent years and ensure it is accessible to all.[170] Such efforts seem to have paid off; the site has been rated highly in comparison to other Government websites.[171] It is certainly vastly superior to the website of its inspectorate. Some local CPS Areas have also begun to develop their own websites.[172]

As well as publishing information it is important that the CPS makes efforts to engage with local communities. This is an important aspect of democratic participation. Members of the public should have an opportunity to make their views known on the operation and policies of their prosecution service. Dialogue between the public and the CPS may also bolster public confidence. The CPS has an opportunity to educate the

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[167] HMCPSI, *A Review of the use of Performance Information in the Crown Prosecution Service* (2005) 25-32.

[168] Aspect 12 of the overall assessment process, 'Managing performance to improve', includes, amongst other matters, a check that performance information is accurate, HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006) 71.

[169] http://www.cps.gov.uk/.

[170] See, CPS, press release, 'New CPS website prioritises accessibility', (10 May 2004), which states that: 'The Crown Prosecution Service's redesigned public website www.cps.gov.uk now makes it possible for an estimated five million more people to learn about the CPS and its work. The website's revamp, launched this month, focuses on accessibility for people with visual, mobility and cognitive-related disabilities'.

[171] The CPS reported in 2005 that its site was rated forth in an independent survey of Government websites, CPS, press release, 'Freedom of Information Statistics', (23rd July 2005).

[172] See, CPS, press release, 'CPS London takes to the web', (10 January 2005). The site can be found at: http://www.cps.gov.uk/london.

public about their role and work and the public may feel more confident if their views are being taken into account. The Glidewell review suggested that there was considerable scope for improved public engagement.[173] In recent years the DPP has strongly supported community engagement stating that, 'engaging with the wider community enables us to understand the needs of the public we serve, to protect appropriately the rights of those we prosecute and to focus on delivering just and effective outcomes for the community'.[174]

It seems that greater efforts are being made to engage with the public. There has, for example, been engagement in relation to the development of particular policies. When the CPS Code was reviewed in 2000 a consultation exercise was carried out and the views of a wide selection of interest groups and the general public were sought.[175] More recently, the CPS has sought views on how road traffic offences are prosecuted.[176] In the words of the 2006-07 CPS annual report, 'The CPS has continued to seek public opinion on new and revised policies … Feedback received has ensured that public concerns and social issues form part of the policy-making process'.[177]

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[173] It stated that the CPS needed 'to establish a more positive relationship with the general public, and to operate in a way that enables it to take properly into account the views of the public at large', Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 204.

[174] CPS, press release, 'DPP publishes statement of CPS independence', (12 July 2004) para 8. See also, CPS, *Annual Report and Resource Accounts 2005 – 06* (The Stationery Office, London 2006) HC 1203, 3, 'our work with communities will help us to develop robust and practical policies that will improve people's quality of life and build trust in the work of the Criminal Justice System'.

[175] CPS, press release, 'CPS seeks views on Code for Crown Prosecutors', (23 March 2000). In the words of the DPP at the time, 'this code review has been carried out with the assistance of Crown Prosecution Service staff, external consultees from the criminal justice system, legal academic world, and the general public. Their contribution was enormous and was greatly appreciated. This wide consultation process has allowed every aspect of the Code to be reconsidered', D Calvert-Smith QC, 'The Code for Crown Prosecutors' (2000) 150 NLJ 1494, 1495.

[176] CPS, press release, 'CPS seeks views on road traffic prosecutions', (13 December 2006); CPS, press release, 'CPS announces changes in policy on bad driving and publishes summary of responses to consultation' (6 September 2007). See earlier, a similar consultation exercise on hate crimes, CPS, press release, 'Public consultation on hate crimes', (10 November 2003).

[177] CPS, *Annual Report and Resource Accounts 2006-07* (The Stationery Office, London 2007) HC 619, 29.

The CPS has also attempted more general engagement with local communities. In 2005 the Attorney General asserted that the CPS, 'has in place community engagement initiatives which are opening channels of communication across diverse communities and faith groups to help prosecutors understand community issues that go to the heart of their role'.[178] HMCPSI's overall performance assessment seemed to support this assertion. It found that many CPS Areas had 'worked pro-actively to secure the confidence of the community, with both senior managers and staff engaging with community groups'.[179]

Yet there clearly remains scope for further improvement. The overall performance assessment found that many Areas viewed community engagement 'as an opportunity to help communities understand the role of the CPS', rather than as a process of two-way dialogue which can impact upon CPS practice.[180] The CPS seems to accept the need for further improvement and is making extensive efforts to this end. In 2005-06 it conducted three community engagement pilots to look at different ways of engaging with a wide range of community groups.[181] The findings from these pilots were brought together in the first CPS Community Engagement Good Practice Guide.[182] During 2006 the CPS introduced an initiative to increase engagement with Muslim communities through a series of meetings in eight Areas.[183] The last of these eight meetings took

[178] Attorney General, *The Prosecutors' Pledge* (2005) 8. Pledge available at: http://www.attorneygeneral.gov.uk/sub_disclosure_log_2005.html.
[179] HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05* (2006) 20. A good example of such engagement is detailed in, CPS, press release, 'CCP consults with local communities', (10 November 2005).
[180] *ibid.* 20.
[181] CPS, *Annual Report and Resource Accounts 2005 – 06* (The Stationery Office, London 2006) HC 1203, 27.
[182] CPS, *Annual Report and Resource Accounts 2006-07* (The Stationery Office, London 2007) HC 619, 24.
[183] CPS, *Annual Report and Resource Accounts 2005 – 06* (The Stationery Office, London 2006) HC 1203, 27. See also, CPS, press release, 'CPS to strengthen its commitment to Muslim community engagement', (9 November 2005).

place in November 2006 and there are plans to hold further meetings in 2007-08, including some targeted at Muslim women.[184]

3.3.2 The Attorney General

The DPP is appointed by the Attorney General (AG)[185] and operates under her superintendence.[186] This superintendence encompasses oversight of the overall conduct and policy of the CPS, and scrutiny of prosecution decisions in individual cases.

On a number of occasions the AG has acted to improve aspects of CPS performance at the policy level. In 2001, for example, the then Attorney General, Lord Goldsmith,[187] announced a review of the role and practices of the CPS in cases arising from a death in custody.[188] This review, published in 2003, led to a number of changes,[189] which the AG felt would ensure 'improved public confidence, high quality and more efficient decision-making, and the adoption and continuing development of best practice'.[190] The AG has also issued guidelines covering miscellaneous topics.[191] In April 2005 he published revised guidelines on disclosure,[192] designed to help ensure 'that the

[184] CPS, *Annual Report and Resource Accounts 2006-07* (The Stationery Office, London 2007) HC 619, 24.
[185] Prosecution of Offences Act 1985 s 2(1). By the Law Officers Act 1997 s 1, all functions of the Attorney General may be exercised by the Solicitor General.
[186] *ibid.* s 3(1). See generally, Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 193-197.
[187] Lord Goldsmith announced his resignation on 22 June 2007, Attorney General's Office, press release, 'Statement from the Attorney General' (22 June 2007). Baroness Scotland was appointed as his replacement on 28 June 2007, Attorney General's Office, press release, 'Baroness Scotland appointed as new Attorney General' (28 June 2007).
[188] Hansard HL vol 629 col WA237 (13 December 2001).
[189] See, Attorney General, *A Review of the Role and Practices of the Crown Prosecution Service in Cases Arising from a Death in Custody* (2003), para 6.7-6.8. Available at, http://www.attorneygeneral.gov.uk/sub_publications_reviews.htm.
[190] *ibid.* para 10.1.
[191] Recent guidelines are available at: http://www.attorneygeneral.gov.uk/sub_publications_guidelines.htm.
[192] Attorney General's guidelines on disclosure, available at: http://www.attorneygeneral.gov.uk/attachments/disclosure.doc.

disclosure regime operates effectively, fairly and justly'.[193] In October 2005 he launched a 10-point Prosecutor's Pledge, giving victims a clear commitment of what could be expected from prosecutors.[194] The CPS has acted to fulfil the commitments contained within the Pledge.[195]

In superintending individual cases the AG must give his consent before certain criminal offences can be prosecuted.[196] In the words of Lord Goldsmith, the AG also has 'a right … to be consulted and informed about difficult, sensitive and high-profile cases',[197] and according to the DPP it is 'normal practice' for the AG to be consulted in such cases.[198] In the event of the AG and the DPP disagreeing about whether there should be a prosecution, the AG's view will prevail.[199] The AG can also terminate criminal proceedings on indictment by issuing a nolle prosequi.[200]

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[193] *ibid.* 3.
[194] Available at: http://www.attorneygeneral.gov.uk/sub_disclosure_log_2005.html.
[195] See, CPS Public Policy Statement on the Delivery of Services to Victims, the Prosecutors' Pledge, available at: http://www.attorneygeneral.gov.uk/sub_our_role_work.htm#TheProsecutorsPledge; and the CPS website at: http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html.
[196] Statutes requiring the AG's consent for a prosecution include, the Explosive Substances Act 1883; the Official Secrets Act 1911; the Suppression of Terrorism Act 1978; and part III of the Public Order Act 1986. For a comprehensive list see: The Law Commission, *Consents to Prosecution, Law Com No. 255* (1998) Appendix A.
[197] Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 6. available at:
http://www.attorneygeneral.gov.uk/sub_publications_foi.htm.
Furthermore, and as detailed above, following the cases of Lapite, O'Brien and Treadaway, prosecution decisions concerning deaths in custody and cases involving serious assault allegations against police officers, must be made in consultation with senior treasury counsel and if there is a disagreement the Attorney General must be consulted.
[198] In a statement issued on 6 November 2006 the DPP stated: 'The Attorney General is entitled to be consulted about cases, and it is normal practice for him to be consulted in serious and complex cases'. Statement attached to an open letter from the Attorney General to the shadow Attorney General, Dominic Grieve, available at: http://www.attorneygeneral.gov.uk/sub_disclosure_log_2006.html.
[199] The Glidewell review noted that holders of both the offices of DPP and AG, 'have accepted that the Attorney General's power of superintendence of the DPP is such that, in the event of a stark disagreement, the Attorney General's view would prevail', Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 195. In the words of David Calvert-Smith QC, DPP in 1999, 'If I go to the Attorney-General with a particular problem and ask for advice, then I will accept it', A Rutherford, 'Preserving a robust independence' (1999) 149 NLJ 908, 909.
[200] This discretion is most commonly exercised 'because the accused is physically or mentally unfit to be produced in court and his incapacity is likely to be permanent', P Murphy (ed), *Blackstone's Criminal Practice: 2006* (Oxford, Oxford University Press, 2005) 1158.

The AG's scrutiny of individual cases helps ensure effective CPS performance and provides a safeguard for the rights at stake in a prosecution decision. Again quoting Lord Goldsmith, 'part of the role of superintendence is that somebody comes and you look at it [the case] and you say, "well, just hang on a second, what about this? Is that right or not?" and you debate that, and sometimes they will say they will get further advice from outside and they will come forward and you have a discussion about it'.[201] The importance of this safeguard has been recognised by the courts.[202] The AGs oversight also helps provide a degree of transparency. In high profile or controversial cases the AG will explain the reasons for the decision to Parliament and take questions on the matter. The fact that the decision making process is open to such scrutiny may provide a degree of reassurance to the public.[203]

In recent times there has been considerable controversy over the AG's superintendence role in individual cases, given his involvement in deciding whether there should be a prosecution in cases with a strong political dimension. This flows from the fact that he is a member of the Government; he provides the Government with legal advice; he is appointed by the Prime Minister; and, in the case of Lord Goldsmith, was ennobled by the Prime Minister and had, in the past, donated money to the Labour Party. Despite

[201] Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-i, answer to Q83. This evidence was given as part of the Constitutional Affairs Committee inquiry into the role of the Attorney General announced on 21 December 2006. See, Constitutional Affairs Committee, Press Notice 3 of Session 2006-07, 21 December 2006, available at: http://www.parliament.uk/parliamentary_committees/conaffcom/cacpnsession200607.cfm.

[202] In *R v Cain* [1976] QB 496 (CA), Lord Widgery said at 502, 'the purpose of requiring the Attorney-General's consent to prosecutions under the Act of 1883 is to protect potential defendants from oppressive prosecutions under an Act whose language is necessarily vague and general;' In *Raymond v Attorney-General* [1982] QB 839 (CA), considering the question of the reviewability of the decision by the DPP to intervene and abort a private prosecution, the court said at 847: 'the safeguard against an unnecessary or gratuitous exercise of this power is that … the director's duties are exercised "under the superintendence of the Attorney-General."' For justification for the consent provisions, see also, The Law Commission, *Consents to Prosecution* (1998) LC255, para 3.27-3.34.

[203] See further section 3.3.3.

assurances from Lord Goldsmith when he was still the AG,[204] this possible conflict of interest may make it difficult for the public to have complete confidence in the prosecution process.

Particular controversy has arisen over the AG's superintendence of the CPS prosecution decision in two cases. In 2004 the prosecution of Katharine Gun under the Official Secrets Act 1989 was discontinued. This decision led to much speculation that the AG had been involved in the decision and that it had been taken primarily to keep his legal advice on the Iraq war secret,[205] the suspicion being that the disclosure of the advice would have been embarrassing for the Government. More recently, there was considerable disquiet about Lord Goldsmith's stated intention to play a role in deciding whether anyone should be prosecuted over allegations that senior members of the

[204] Lord Goldsmith stated recently that when exercising his public interest functions, he does so 'on the basis of an objective, dispassionate assessment of the public interest, without regard to party political considerations', Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 28.

[205] See, for example, P Waugh and K Sengupta, 'The Whistleblower: cleared; The Government: Accused of cover-up; The Case for War: An official secret' *The Independent* (February 26, 2004), which reported the suggestion of Katharine Gun's lawyers 'that the case had been dropped amid fears that Lord Goldsmith, the Attorney General, would have been forced to reveal details in court of his controversial legal opinion backing the conflict' and accused the CPS of a 'cover-up' given its refusal to go into the reasons why it had decided to offer no evidence. Later that day, the CPS issues a press release stating that, the decision to discontinue the prosecution for breach of s 1 of the Official Secrets Act 1989, 'related to the prosecution's inability, within the current statutory framework, to disprove the defence of necessity to be raised on the particular facts of this case', and that 'this determination by the prosecution had nothing to do with any advice given by the Attorney General to Government in connection with the legality of the Iraq war. It was also a determination made by the prosecution in advance of the defence request for disclosure which came on 24 February 2004. The Attorney General was consulted and concurred. But the decision to offer no further evidence was one made by the Crown Prosecution Service as an independent prosecuting authority. It was a decision taken solely on legal grounds and in accordance with the Code for Crown Prosecutors, free from any political interference', CPS, press release, 'Statement on R v Katharine Gun', (26 February 2004). This statement seemed to do little to quell the speculation. See, for instance, R Whitaker and R Verkaik, 'Revealed: Attorney General changed his advice on legality of Iraq war; Lord Goldsmith believed that a further UN resolution was needed' *Independent on Sunday* (February 29, 2004). This stated that the Attorney General's 'full opinion on the legality of the war has never been made public. The desire to keep it secret is believed to be the main reason why the Official Secrets Act prosecution of Katharine Gun, a 29-year-old former employee of GCHQ, the Government's monitoring centre, was abandoned at the Old Bailey last week'.

Labour Party helped procure honours in exchange for non-commercial 'loans' to the Party.[206]

Responding to criticism of his involvement in the latter case Lord Goldsmith drew attention to controversial decisions by former AGs[207] and argued that such examples 'give the lie to any idea that the role of Attorney General has become more "political" or more controversial in recent years'.[208] He submitted that politically contentious decisions are always going to be controversial whichever figure takes them.[209] Be that as it may, it would certainly be harder for allegations to gain traction that a prosecution has been stopped to spare the Government from embarrassment if a member of the Government were not so clearly involved in the decision. It is also arguable that the AG's role has become more controversial in recent decades. The public are no longer as trusting of politicians as they once were; clear independence is demanded. As recognised by the then Lord Chancellor, Lord Falconer, there has been a 'change in the political climate … the public look at these issues in a different way now from the way they looked at them in the past'.[210] Furthermore, even if it is felt that the AG's role has

[206] See, for example, C Dyer, P Wintour and V Dodd, 'Blair's top lawyer to advise on cash for honours charges: Police concern over potential conflict of interest in attorney general's role' *The Guardian* (November 4 2006); and 'Step aside now, Lord Goldsmith' *The Independent* (November 7, 2006). This editorial asserted that, 'It would be difficult to conceive of a more glaring conflict of interest … the notion that the present Attorney General, Lord Goldsmith, should have anything to do with the decision over whether to prosecute the Prime Minister in the cash-for-honours affair is preposterous … To expect Lord Goldsmith to give the go-ahead to a case that would inevitably result in great embarrassment and possible disgrace, to the man who appointed and ennobled him would test the self-control of a saint … It is quite clear what should happen. Lord Goldsmith must voluntarily exclude himself from any CPS decision to prosecute … If the case fails to result in a prosecution, the present ambiguity regarding the position of the Attorney General will inevitably raise suspicion that undue influence has been exerted somewhere down the line'.

[207] Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 28.

[208] *ibid.* para 29.

[209] *ibid.* para 30.

[210] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q157 and Q159. Evidence available at: http://www.publications.parliament.uk/pa/cm/cmconst.htm.

not become more controversial in recent years the fact that it has always attracted a degree of controversy merely strengthens the case for reform.

In February 2007 Lord Falconer, stated that he did not think the current role of the AG was 'maintainable'.[211] In July 2007 the Prime Minister went further stating that, 'The role of Attorney-General, which combines legal and ministerial functions, needs to change. While we consult on reform, the Attorney-General has herself decided, except if the law or national security requires it, not to make key prosecution decisions in individual cases'.[212] As such, Baroness Scotland appears to have played no role in the decision not to prosecute anyone in the 'cash for honours' case.[213]

A way needs to be found to enable the important superintendence of the CPS prosecution decision making provided by the AG to continue, whilst removing concerns about impartiality and introducing a greater degree of independence. Lord Falconer proposed reform involving the removal of the AG's ministerial functions.[214] This would leave the AG with responsibility for giving legal advice to the Government and for superintending prosecutions. Likewise, in their report into the role of the AG published in July 2007, the Constitutional Affairs Committee recommended that the AG's role

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In the words of Professor Jowell, 'Nowadays we subscribe to the principle of the separation of powers and no longer tolerate the appearance of conflict of interest', J Jowell, 'Why the Attorney needs a strong stomach for the fight' *The Times* (November 14 2006).

[211] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q159.

[212] Hansard HC vol 462 col 817 (3 July 2007). At the end of July 2007 the Government published a consultation paper on the reform of the AG's role: *The Governance of Britain, A Consultation on the Role of the Attorney General* (2007) Cm 7192. Available at, http://www.attorneygeneral.gov.uk/sub_publications_foi.htm. The consultation exercise is due to end on 30 November 2007.

[213] See: CPS, press release, 'CPS decision: "Cash For Honours" case' (20 July 2007).

[214] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q148 and Q160.

should be split so that legal decisions in prosecutions and the provision of legal advice rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government. The Attorney General's ministerial functions would be exercised by a minister in the Ministry of Justice.[215]

Splitting the AG's superintendence of individual prosecution decisions and overall CPS policy, the latter presumably included in 'ministerial functions', seems, however, to make little sense. Superintendence of individual cases arguably aids the AG's superintendence of overall policy. If anything is to be removed from the AG's functions it should be his role as legal advisor to the Government.[216] It was the conflict between his position as the Government's in-house lawyer and his superintendence of prosecution decisions which gave rise to the alleged conflict of interest in the Katherine Gun case.

Less drastic measures which would help enhance public confidence in the AG's superintendence should also be taken. Jowell has recommended that the AG's duties, to serve the public interest above party political interest and to promote and enforce the rule of law, be set out clearly in statute and backed up by a revised oath of office.[217] Emphasising clearly that the AG, whilst being a member of the Government, has a

[215] Constitutional Affairs Committee, *Constitutional Role of the Attorney General* (2006-07) HC 306 para 105.
[216] One legal commentator has stated that, 'the reality is that the office of Attorney General, under its existing job description, has outlived its usefulness and no longer has public confidence. Members of the Government, including Gordon Brown and Lord Falconer, realise that something must be done, and a Commons select committee is looking into the issue. On the surface, there is an obvious reform: split the job, with one person as Government lawyer, another taking independent decisions in the public interest. It won't be as easy in practice, but the present system can't continue for much longer', M Berlins, 'Why Goldsmith can't win' *The Guardian* (March 5 2007).
[217] J Jowell, 'Politics and the law: constitutional balance or institutional confusion' (2006) 3(1) Justice Journal 18, 27-31.

special role and responsibilities might provide a degree of re-assurance.[218] The AG's power to prevail over the view of the DPP as to whether or not there should be a prosecution ought also to be removed so that the relationship is one of consultation rather than direction.[219] This might have little impact on how things are done in practice as there are few examples of the AG actually directing the DPP.[220] Making it clear that the DPP takes the final decision and can ignore the wishes of the AG if he so chooses might nonetheless have important symbolic importance.

3.3.3 Parliament

When the Parliamentary Select Committees, including the Home Affairs Committee, were established in 1979, it was made clear that the Law Officers Department was not to be subject to scrutiny.[221] In line with this policy, a request from the Home Affairs Committee in 1980 to examine the DPP, was initially rebuffed by the AG. Eventually it

[218] Lord Goldsmith felt that a statutory duty 'would codify the role in a way which might give greater clarity and transparency', Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 36. This stance has the support of a former Attorney General, Lord Mayhew, 'I rather agreed with what the attorney said … that there was room now for a statutory statement of his responsibilities, and in particular in relation to the public interest and upholding the public interest', Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q132.

[219] See, J Jackson, 'Let the director direct' (2007) 157 NLJ 23.

[220] *ibid.* This view is supported by the Glidewell review which noted that no AG since 1986 had sought to exercise a power to direct the DPP as to a decision in a particular case, Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 194. More recently, Lord Goldsmith stated that he and the DPP had had 'discussions about cases from time to time and we have always reached a common view in relation to them', Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-i, answer to Q82.

[221] The Leader of the House said: 'I am sure that the House will agree that the new committee should not be allowed to threaten the independence of the judiciary or the judicial process. In the Government's view there would be a real danger of that if a Select Committee were to investigate such matters as the responsibility of the Law Officers with regard to prosecutions and civil proceedings. For those reasons the Government considers that the most appropriate course is to exclude those two small departments from scrutiny by the new Select Committees', quoted in Sir T Hetherington, *Prosecution and the Public Interest* (Waterlow Publishers, London 1989) 43.

was agreed that the DPP could appear before the Committee, provided this was not treated as a precedent for further requests.[222]

In recent years the DPP and senior members of the CPS have appeared on a number of occasions in front of the Home Affairs Committee,[223] and the Joint Committee on Human Rights.[224] They have also appeared before the Public Accounts Committee, pursuant to the investigations of the National Audit Office, to provide a cycle of accountability.[225] These examinations inform the work of Committees and aid the development of their recommendations designed to produce improved CPS performance. Viewed more broadly, it is appropriate that in a democracy our elected representatives are able to question those in charge of the main prosecution authority. Publicly questioning the DPP and the CPS on individual cases which have given rise to

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[222] *ibid.* 44.

[223] On 9 May 2000 the CPS submitted to the Home Affairs Committee a memorandum on various aspects of their work and evidence was taken from the DPP, David Calvert-Smith and Mark Addison, the Chief Executive of the CPS, Home Affairs – Minutes of Evidence, (19 July 2000) HC 476-I. On 26 February 2002 evidence was taken from the DPP, David Calvert Smith, Richard Foster, the Chief Executive of the CPS, and Steve Przbylski, the Head of Resources and Performance Division at the CPS, Home Affairs – Minutes of Evidence, (19 December 2002) HC 650. Transcripts of evidence available at: http://www.parliament.uk/parliamentary_committees/home_affairs_committee.cfm.

[224] On 19 May 2004 evidence was taken from the DPP, Ken Macdonald, Philip Geering, Director of Policy at the CPS, and Chris Newell, Director of Casework at the CPS, Joint Committee on Human Rights – Minutes of Evidence (4 August 2004) HL 151, HC 619-I. On 12 March 2007 the DPP, Ken Macdonald was examined, Uncorrected transcript of Oral Evidence, to be published as HC 394-i. Transcripts available at:
http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm.

[225] In 1997, the National Audit Office reported to Parliament on the work of the CPS and made recommendations, National Audit Office, *Crown Prosecution Service* (1997-1998) HC 400. This report was followed up by the Public Accounts Committee. A memorandum was submitted by the CPS detailing preliminary responses to the main issues identified by the NAO report, evidence was taken from the DPP, Dame Barbara Mills, and the Committee issued a report, Public Accounts Select Committee, *Crown Prosecution Service* (1997-98) HC 526. Similarly, the NAO report, *Crown Prosecution Service: Effective use of magistrates' court hearings* (2005-06) HC 798, was followed up by the Public Accounts Committee. Evidence was taken from the DPP, Ken Macdonald and Richard Foster, Chief Executive of the CPS and a report later issued, Public Accounts Select Committee, *Crown Prosecution Service: Effective use of magistrates' courts hearings* (2005-2006) HC 982. The Government and the CPS responded to the latter PAC report by promising to implement recommendations and make improvements. For the Government's response see, Treasury Minutes on the Fifty-eighth, Fifty-ninth, Sixty-first and the Sixty-second Reports from the Committee of Public Accounts 2005-2006, Cm 6981. Available at:
http://www.official-documents.gov.uk/document/cm69/6981/6981.asp.
For the CPS response see, CPS, press release, 'CPS responds to PAC report on the effective use of magistrates' courts hearings', (19 October 2006).

concern may help provide reassurance to the public as well as a degree of accountability.

The Attorney General is also, in the words of Lord Goldsmith, 'answerable to Parliament … for all my functions'.[226] This is the main mechanism by which Parliament is able to scrutinise the work of the CPS. The AG will answer parliamentary questions and reply to letters.[227] Where there are particularly difficult and controversial decisions the AG will go before the Lords, and the Solicitor General before the Commons, to explain the decision and answer questions.[228] The AG may also appear before Select Committees.[229]

In their report into the role of the AG the Constitutional Affairs Committee recommended that the AG should cease to be a Member of Parliament.[230] Parliamentary oversight of the AG is though vital and should be maintained. It may help ensure

[226] Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 32; The Attorney General stated in his review of the year, 2001/02 (the first and last such review to be published), at para 12, that the Attorney General 'is answerable in Parliament for decisions or actions that he or the DPP takes on prosecution matters and for the policy that is applied by the CPS in the handling of particular cases'. Review available at: http://www.attorneygeneral.gov.uk/sub_publications_reports.htm.
In 1986 Sir Michael Havers, the then Attorney General, stated that he was 'answerable in Parliament for decisions or actions that I, or the Director of Public Prosecutions take on prosecution matters and for the policy that is applied by the Crown prosecution Service in the handling of particular cases', quoted in the Glidewell review, Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960, 195.

[227] Lord Goldsmith reports, that in a typical year the Solicitor General and the AG will 'answer some 400 Parliamentary Questions and reply to some 250 letters from members of Parliament or Peers', Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 33.

[228] This occurred, for example, in the Katharine Gun case. For the Attorney General's statement to the House of Lords, see, Hansard HL vol 658 cols 338-351 (26 February 2004). This statement was repeated to the House of Commons by the Solicitor General, Hansard HC vol 418 cols 427-440 (26 February 2004). When the CPS decided that there was insufficient evidence to prosecute anybody over the shootings of Sergeant Steven Roberts and an Iraqi citizen, Mr Zaher Zabti Zaher, the Attorney General explained the decision to the House of Lords and answered questions, Hansard HL vol 681 cols 262-275 (27 April 2006); this statement was repeated to the House of Commons by the Solicitor General, Hansard HC vol 445 col 725-736 (27 April 2006).

[229] See, for example, Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-i.

[230] Constitutional Affairs Committee, 'Constitutional Role of the Attorney General' HC (2006-07) 306, para 106.

effective and proper superintendence of the CPS by the AG. Lord Goldsmith has recognised that the fact that the AG has to explain decisions to Parliament, 'is a very considerable banner and light that one has in front of one'.[231] As with scrutiny of the CPS by Select Committees, as a matter of principle such scrutiny is appropriate in a democracy. It may also contribute to maintaining public confidence. Lord Mayhew, speaking as a former AG has said that 'the accountability to Parliament of the Attorney General seems to me to be absolutely key to the public confidence that anybody needs who exercises his jurisdiction'.[232] Explaining to Parliament how and why a controversial decision, such as the decision not to prosecute Katharine Gun has been reached, may provide reassurance.

The Constitutional Affairs Committee suggested that Parliamentary accountability could be achieved by a variety of mechanisms including continued appearances before a select committee.[233] But this seems inadequate from a constitutional perspective. As stated by Lord Mayhew, 'I believe the House of Commons, and the House of Lords too, would not regard it as sufficiently accountable if the man responsible for exercising jurisdiction over the Prosecution Service in this country … was not able to come and justify himself or herself in person'.[234]

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[231] Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-I, answer to Q39.
[232] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q119.
[233] Constitutional Affairs Committee, 'Constitutional Role of the Attorney General' HC (2006-07) 306, para 106.
[234] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q123.

If there is to be reform of the AG's role it should be directed towards strengthening Parliamentary scrutiny of the AG rather than weakening it. One way in which this could be done is to give one of the Select Committees responsibility for scrutinising the work of the AG's office. There is currently no Parliamentary Select Committee specifically charged with this task. Lord Goldsmith seemed to support this development, suggesting that 'such an arrangement could significantly enhance accountability for, and understanding of, the Attorney General's role'.[235]

The fact that the current AG is unable to appear before the House of Commons since he is not a Member of that House, is also a matter which may require attention. When he first took office Lord Goldsmith considered trying to change this, but the suggestion came to nothing.[236] The Solicitor General is answerable to the Commons on behalf of the Law Officers but this is arguably inadequate. In the words of Lord Mayhew, 'the House of Commons will always insist, if it possibly can, upon having the actual decision-taker stand at the despatch box and justify the decision. Having it at second-hand will seldom be regarded as sufficient'[237] Given the strong probability that the AG will tend to come from the House of Lords in future,[238] it may be desirable if the AG, if

[235] Memorandum from the Attorney General to the Constitutional Affairs Committee - role of the Attorney General, (2007) para 36. Lord Goldsmith has suggested that this role could be fulfilled by the Constitutional Affairs Committee, Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-I, answer to Q1.

[236] Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-I, answer to Q56.

[237] Uncorrected transcript of Oral Evidence given by Lord Morris of Aberavon KG, QC and Lord Mayhew of Twysden; Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, The constitutional role of the Attorney General (28 February 2007) HC 306-ii, answer to Q119.

[238] Uncorrected transcript of Oral Evidence given by: Rt Hon Lord Goldsmith QC, Attorney General, The Constitutional Role of the Attorney General, (7 February 2007) HC 306-I, answer to Q107. Alan Beith put it to Lord Goldsmith that, 'it looks unlikely, does it not, given the difficulties of sustaining legal practice as a barrister at the appropriate level while doing a full-time job as a Member of Parliament, that in future there are going to be strong candidates for the position of Attorney General in the Commons? Are we resigned to the fact that it is now permanently a Lords appointment and more often than not somebody brought into the Lords because they are given that appointment?' The Attorney General replied

he comes from that House, is made competent to stand in the House of Commons and answer questions from the elected politicians.

3.3.4 The Media

It has been suggested that, 'it is public opinion, nurtured by a free and independent press, which is probably the most effective weapon for checking the Prosecutors in the exercise of their discretion'.[239] The CPS has recognised that most people gain their impressions and understanding of the work of the Service largely from what they see, hear and read, via the media.[240] Given this importance, it makes extensive efforts to aid the media in their work and to ensure that they have access to reliable and up to date information. It makes available, as previously detailed, press releases on a wide range of topics.[241] It also publishes press office factsheets to better inform the media about particular aspects of CPS performance.[242] There is also now a national press office contactable 24 hours a day, every day of the year. Local CPS Areas have their own press and publicity officers.[243]

As well as providing coverage of the information provided by the CPS, the media may also, on occasions, unearth their own information. In 2002, an undercover journalist working for the *Sunday Times* posed as an aspiring law student on work experience to

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that, 'I recognise the point you make about the difficulty of carrying on a legal practice with the present demands on a constituency MP and that may well have an impact on the size of the pool which would be available'. In 2005 Lord Rodgers, commencing a debate in the House of Lords on the role of the Law Officers, noted that: 'at the 1964 general election, 100 barristers were elected to the House of Commons – 32 Labour MPs, 64 Conservatives and four Liberals – but by 2005 there were only 34', Hansard HL vol 676 col 1368, 1369 (15 December 2005).

[239] D Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 JICJ Justice 124, 143.

[240] CPS, *Media Liaison, Guidance for Area Communications Managers and Area Press and Publicity Officers* (2003). Available at: http://www.cps.gov.uk/publications/communications/index.html.

[241] Available at: http://www.cps.gov.uk/news/pressreleases/index.html.

[242] Available at: http://www.cps.gov.uk/news/factsheets/index.html.

[243] See, CPS, *Media Liaison, Guidance for Area Communications Managers and Area Press and Publicity Officers* (2003).

gain access to the CPS Thames branch. His subsequent report detailed the 'arcane working practices, haphazard bureaucracy and a demoralised staff who had resorted to cutting corners'.[244]

The Freedom of Information Act enables more straightforward access to CPS information. In 2005 *The Times*, via a Freedom of Information request, obtained casework data from the CPS Areas covering the period September 2004 to August 2005. The data revealed huge variations in performance across England and Wales and exposed systemic inefficiencies within the CPS.[245] On the day of publication it was reported that the CPS had no plans to draw up similar league tables as they were misleading and led to unhelpful comparisons. A day later the CPS apparently changed its mind and published performance statistics for its 42 Area offices.[246] It now publishes a monthly analysis of the outcomes of its prosecution cases on its website and a quarterly summary of performance in key areas. The media, utilising the Freedom of Information Act, apparently succeeded in pushing the CPS towards greater openness. The CPS appears to respond reasonably promptly to requests under the Freedom of Information Act in comparison to other Government bodies.[247]

The media also provides important coverage of the CPS via the reporting of the work of the other oversight mechanisms. The extent to which such mechanisms provide accountability for poor performance via public censure, a spur to more effective performance, ensure the disclosure of the kind of information which ought to be

[244] J O'Reilly and J Calvert, 'The secret witness' *The Sunday Times* (April 28, 2002).
[245] S O'Neil, F Gibb and H Brooke, 'Justice by postcode: the lottery revealed' *The Times* (November 23 2005); S O'Neil and H Brooke, 'Prosecutors in dock over disparity in convictions' *The Times* (November 23 2005).
[246] S O'Neil and F Gibb, 'CPS publishes own league table' *The Times* (November 24 2005).
[247] See, freedom of information quarterly statistics and annual reports produced by the Department for Constitutional Affairs, available at: http://www.foi.gov.uk/reference/statisticsAndReports.htm.

available in a democracy, and bolster public confidence by demonstrating that the CPS is subject to external oversight relies, to a large extent, on media reporting. The media provides reasonable coverage of such mechanisms. Court hearings at which CPS performance is examined and criticised are, for example, often reported in the media.[248] The media also gives coverage to the reports of the various administrative bodies.[249] HMCPSI is at pains, as detailed above, to ensure that their reports are distributed to local and national media.

3.4 Conclusion: The Openness of the CPS

The oversight of the CPS provided by the courts, administrative bodies and the public, and the open manner in which such oversight is conducted provides important accountability, aids effective performance, helps protect rights, ensures the kind of information and opportunities for citizen participation which ought to be available in a democracy and helps maintain public confidence in the CPS.

Accountability is provided in the sense that the openness of the oversight mechanisms publicly exposes CPS poor performance or conduct which breaches rights. Such exposure, particularly when allied with public criticism by the oversight body, may embarrass the CPS. There is some evidence in the CPS request to judges that they stop criticising the CPS in open court that public criticism may have an impact.[250] Such accountability may provide a spur to others to make efforts to avoid being so criticised.

[248] See, for example, the reporting of the *Jones* case, S Milne, 'CPS told to think again on dockside death' *The Guardian* (March 24 2000); and the *Manning* case, F Gibb, 'Lord Bingham overrules DPP on death in custody' *The Times* (May 18 2000).
[249] See the coverage of HMCPSI's overall performance ratings, F Gibb, 'CPS is letting criminals "off the hook"' *The Times* (March 14 2006).
[250] See section 3.1.2.

The accountability provided by the Butler report and the Glidewell review went beyond embarrassing the CPS. It prompted the early departure of the DPP, Dame Barbara Mills. The oversight provided by the courts, administrative bodies and the public may also aid effective CPS performance. Ensuring the CPS performs effectively may aid rights protection by protecting those who should not be prosecuted from the pains of prosecution. Judicial review has helped safeguard effective performance by exposing CPS error and ensuring decisions not to prosecute vitiated by such error are reconsidered. The ad hoc inquiries and inspections by HMCPSI have aided effective performance by uncovering poor practice and making recommendations for improvement. Superintendence by the AG has helped ensure more effective CPS performance both at the policy level and in relation to individual prosecution decisions.

On occasions, the courts have to balance protecting the rights of those caught up in the criminal process with effective performance in terms of convicting the guilty. This balancing of competing considerations arises in the oversight provided by the trial courts in considering whether to stay a prosecution where the CPS has behaved improperly. It is right that stays have been ordered where, for example, the CPS has breached a promise it has made to a defendant, or has failed to comply with repeated disclosure orders.

The openness provided by judicial, administrative and public scrutiny also helps ensure that the kind of information which ought to be available in a democracy is available. In particular, the publication of HMCPSI reports and CPS performance information enables citizens to see how the CPS is performing. It is also right that the CPS makes efforts to explain its decisions not to prosecute to victims and the public. The fact that

the Attorney General is required to account for prosecution activity to Parliament is also vital. The elected representatives of the people should be able to call the prosecution service to account. Democracy also requires that there are opportunities for citizens to play a participatory role. The enhanced efforts made by the CPS to engage with the public on policy development and on general operational matters represent a welcome step forward.

The fact that the public can see that there are oversight mechanisms including, in particular, the courts, HMCPSI, and Parliament, working to ensure that the CPS operates effectively and rights are protected may provide a degree of reassurance. The oversight arising from judicial review challenges to decisions not to prosecute in cases involving the coercive power of the state is particularly important in this respect. Public confidence is very much at stake where someone dies following contact with the police and the CPS decides not to prosecute. Public confidence is also likely to be enhanced by the CPS consultation efforts. People are more likely to have trust in the CPS if they feel involved.

It is clear, therefore, that judicial, administrative and public scrutiny of the CPS goes a considerable way towards the type of openness that supports the values detailed in chapter one. It is also clear that a number of developments in recent years have increased the support. The stream of judicial review cases in which the High Court has ordered that CPS decisions not to prosecute be reconsidered began in 1995. A fully independent CPS inspectorate, HMCPSI, was established in 2000. The CPS has made extensive efforts in recent years to enhance its transparency, raise its profile and increase public consultation. Even with such developments there are, however, ways in

which the oversight mechanisms could be enhanced to provide greater satisfaction of the values of openness.

For the public to be reassured by the oversight provided by HMCPSI, and on the basis of democracy, it is important that HMCPSI seeks to ensure that their reports are distributed widely to the media and the public. Their website will increasingly be the main point of access for such material. At present it is, however, far from adequate for this task. The material is poorly organised making reports difficult to locate and information detailing its work is badly out of date. It is to be hoped that the site is improved significantly in the near future.

Although the information published by the CPS and the CPS consultation efforts have increased in recent years there is certainly scope for further advancement. HMCPSI continues to find, for example, that the CPS is not adequately complying with its duty to explain non-prosecution decisions to victims. Such an explanation is crucial to efforts to try to reduce dissatisfaction with the criminal justice system. In some high profile and controversial cases the CPS has given detailed public explanations of decisions not to prosecute. In other cases, however, it has merely stated that there was 'insufficient evidence'. It is arguable that, subject to the wishes of the victim or his relatives, the CPS should give a full public explanation in all such cases. A public explanation might aid effective performance by ensuring that the reasoning stands up to rigorous scrutiny. It is also arguable that the public have a right to such an explanation in a developed democracy. Further scope for enhanced CPS openness relates to the fact that HMCPSI continues to cast doubt on the accuracy of the performance data gathered by the CPS. Inaccurate and misleading performance data is of no value to the CPS or the public.

HMCPSI continues also to suggest that there is room for improvement in the CPS community engagement efforts.

Considerable controversy has arisen in recent years, over the AG's involvement in deciding whether there should be a prosecution in cases with a strong political dimension. The possible conflict of interest inherent in the role makes it difficult for the public to have complete confidence in the oversight the AG provides in individual cases. The AG's role as the Government's legal adviser should be removed from her portfolio. It is this aspect of the AG's role which arguably does most to engender a perception of a lack of independence. Less drastic measures which would help enhance public confidence in her oversight should also be taken. The AG's duties to serve the public interest above party political interest and to promote and enforce the rule of law should be set out clearly in statute. The AG's power to prevail over the view of the DPP as to whether or not there should be a prosecution ought also to be removed so that the relationship is clearly one of consultation rather than direction.

Proposals for reform of the AG's role by the Constitutional Affairs Committee would see the AG no longer sit in Parliament. Parliamentary oversight of the AG provides, however, important democratic accountability and transparency. If anything, efforts should be made to enhance Parliamentary oversight of the AG. A Select Committee should be specifically charged with examining the work of the AG's office. Given that it seems increasingly likely that future AG's will continue to come from the House of Lords the possibility of the AG being able to stand at the bar of the House of Commons and take questions should also be investigated further.

Alongside the need to improve the existing scrutiny mechanisms there is also arguably a need for the introduction of a CPS Ombudsman to review certain CPS decisions. The non-prosecution decisions that could be reviewed would include those of the type detailed in this chapter which have been the subject of judicial review actions and those which have prompted the latest controversy about the AG's role. Prosecution decisions which could be examined would include those which have ended in a directed acquittal and those where a person is subjected to repeat prosecution for the same offence but no conviction results. The introduction of a CPS Ombudsman to review such decisions is arguably necessary to help ensure more effective prosecution performance and to provide reassurance to the public.

To help ensure recommendations for improved performance are acted upon and the public is re-assured the CPS Ombudsman should, if established, be required to publish the findings of its case reviews. On the basis of democratic accountability it could also be required to explain its findings and decisions to the AG who could then take questions in Parliament. The Ombudsman should also be made answerable to Parliament via regular questioning before a Select Committee.

It seems that there is a reasonable possibility that some of these recommended steps will come to fruition in the near future. Continued close monitoring of the CPS duty to inform victims of a decision not to prosecute by HMCPSI is likely, over time, to help ensure improved compliance. Likewise, HMCPSI continues to monitor the accuracy of CPS performance data and to make recommendations for improvement. In relation to CPS community engagement efforts, the CPS seems fully aware of the deficiencies and is making efforts designed to bring about enhanced engagement. HMCPSI seems also to

acknowledge the limitations of its website and is making some efforts to provide a more user-friendly site.

The Attorney Generals role will, it appears, be reformed soon to help ensure that her superintendence of the prosecution decision enjoys public confidence. There is no clear indication yet of how the role will be reformed. There is though, as detailed, a push from some to remove the AG from Parliament. It is vital, on the basis of democracy and public confidence, that the AG continues to be directly answerable to Parliament.

The need for the introduction of a CPS Ombudsman to review controversial and high profile decisions by the CPS is likely to be dismissed by many, especially given the costs that would be involved. The need for the development of independent oversight mechanisms to oversee the criminal process has though gradually been accepted in recent years and such mechanisms have been established in a number of areas. There may well come a point in the future, following perhaps further controversial CPS decisions, that calls for such an oversight mechanism will grow.

Chapter 4

The Trial Courts

This chapter examines the oversight of the trial courts provided by the higher courts, administrative bodies and the public. It will be argued that such oversight promotes accountability, helps ensure effective performance, provides protection for rights, constitutes an important aspect of democracy and enhances confidence in the criminal justice system. Where it appears that there is scope for greater fulfilment of these values, proposals for achieving this will be advanced.

4.1 Judicial Scrutiny – The Appeals Process

Decisions made by courts at trial may be subject to consideration by higher courts via the appeals process.[1] This oversight may aid effective performance by helping ensure the 'right' decision is made on the available evidence and the guilty are adequately punished. It provides important protection for the rights at stake in the trial process, including, most particularly, the right to a fair trial and a proportionate sentence. The fact that the appeal courts may provide a degree of accountability in the form of a public rebuke for an inferior court, may help ensure more care is taken in future cases. A decision by the Court of Appeal to quash a conviction in a high profile case undoubtedly undermines confidence in the trial courts. Innocent people are always, though, going to be convicted. The fact that the verdict of a trial court may be re-examined in open court and quashed may provide a degree of reassurance.[2] A system

[1] See generally, R Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, Oxford 1996).
[2] In his report *Access to Justice,* Lord Woolf stated that one of the two purposes of the appeals system was to 'ensure public confidence in the administration of justice', Lord Woolf, *Access to justice: final report to the Lord Chancellor on the civil justice system in England and Wales* (Her Majesty's Stationery Office,

without such a safeguard would probably enjoy less confidence than one prepared to publicly face up to its mistakes.[3] The importance of the right to appeal is indicated by its inclusion in certain fundamental human rights conventions.[4]

A person convicted by a magistrates' court may appeal to the Crown Court against his conviction if he pleaded not guilty,[5] and against his sentence.[6] The Crown Court will rehear the case[7] and may confirm, reverse or vary any part of the decision appealed against.[8] In 2005 there were a total of 12,805 appeals to the Crown Court. In 3,676 (28.7 per cent) the conviction was quashed and in 1,886 (14.7 per cent) the sentence varied.[9] In 2005 the total number of people found guilty at the magistrates' court was 1,426,000.[10] From these figures it is clear that in a small proportion of cases the scrutiny provided by the Crown Court provides an important corrective mechanism.

London 1996) ch 14 para 2. The Court of Appeal's review of the year states that the overall purpose of the Court, 'is to maintain and promote public confidence in the criminal justice system', The Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) para 2.1. Available at: http://www.judiciary.gov.uk/publications_media/general/index.htm.

[3] On the purposes served by criminal appeals see further, R Pattenden, 'Criminal Appeals: The Purpose of Criminal Appeals' in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, Oxford 2002) 487.

[4] Article 14(5) of the International Covenant on Civil and Political Rights provides that, 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2, states, 'Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal'. It should, though, be noted that the United Kingdom has not yet signed this protocol.

[5] The courts have, though, permitted some limited exceptions to this rule: where the plea is equivocal or not genuine the case may be remitted to the magistrates for re-hearing on a 'not guilty' plea, see, *R v Durham Quarter Sessions ex p Virgo* [1952] 2 QB 1 (QB), *R v Blandford Justices ex p G* [1967] 1 QB 82 (QB), and *R v Huntingdon Crown Court ex p Jordan* [1981] QB 857 (QB); where the accused raises a plea of autrefois convict or autrefois acquit it may be considered, *Cooper v New Forest DC* (1992) 142 NLJ Rep 491; [1992] Crim LR 877 (QB); also, the Criminal Appeal Act 1995 s 11(2) provides that where a person has been convicted of an offence by a magistrates' court in England and Wales, the Criminal Cases Review Commission may at any time refer the conviction to the Crown Court, and such a reference 'shall be treated for all purposes as an appeal by the person under s 108(1) of the Magistrates' Courts Act 1980 against the conviction (whether or not he pleaded guilty)'. See further on such exceptions, P Murphy (ed) *Blackstone's Criminal Practice: 2006* (Oxford, Oxford University Press, 2005) para D27.4.

[6] Magistrates' Courts Act 1980 s 108.

[7] Supreme Court Act 1981 s 79(3).

[8] *ibid.* s 48(2).

[9] Home Office, *Criminal Statistics 2005* (2006) Table 2C. Available at, http://www.homeoffice.gov.uk/rds/crimstats05.html.

[10] *ibid.* Table 1.1.

Oversight of a trial held in the magistrates' court is also provided by the High Court at the instigation of either the prosecution or the defence. A challenge may be brought on the basis that a decision is wrong in law or is in excess of jurisdiction by applying to the magistrates' to state a case for the opinion of the Administrative Court of the Queen's Bench Division.[11] In 2005 there were 98 appeals by way of case stated. Of the 79 disposed of, 39 were allowed.[12] An application may be made to the High Court for judicial review of a decision of a magistrates' court.[13] In 2005 there were 251 applications for permission to apply for judicial review in criminal cases, of which 90 were granted. Of the 58 disposed of, 29 were allowed.[14] The High Court may also examine the outcome of an appeal in the Crown Court via either the case stated process,[15] or on an application for judicial review.[16] In 2005 there were 23 appeals by way of case stated against decisions made in the Crown Court. Of the 18 disposed of, 6 were allowed.[17]

In his review of the criminal courts, Lord Justice Auld recommended that the only avenue of direct appeal from the magistrates' courts should be to the Crown Court and that this avenue should be subject to permission from a judge.[18] Given the already low number of appeals from the magistrates' courts to the Crown Court, and the high

[11] Magistrates' Courts Act 1980 ss 111-112.
[12] Department for Constitutional Affairs, *Judicial Statistics (Revised), England and Wales for the year 2005* (The Stationery Office, London 2006) Cm 6903, Table 1.14. Available at, http://www.official-documents.gov.uk/document/cm69/6903/6903.asp
[13] Supreme Court Act 1981 ss 29-31. See further, JN Spencer, 'Judicial Review of Criminal Proceedings' [1991] Crim LR 259.
[14] Department for Constitutional Affairs, *Judicial Statistics (Revised), England and Wales for the year 2005* (The Stationery Office, London 2006) Cm 6903, Table 1.13.
[15] Supreme Court Act 1981 s 28.
[16] Supreme Court Act 1981 s 29(3).
[17] Department for Constitutional Affairs, *Judicial Statistics (Revised), England and Wales for the year 2005* (The Stationery Office, London 2006) Cm 6903, Table 1.14.
[18] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 12 para 30.

success rate of such appeals (43.4 per cent in 2005), it seems right that a leave requirement has not been introduced.[19]

Simplification of the appeals process may nonetheless be desirable. Roberts and Malleson noted in 2002 that the enhanced understanding which could flow might be 'particularly important in the light of the high proportion of appeals initiated without legal advice'.[20] This proportion seems set to rise in the near future. The financial thresholds set when a means test for publicly funded legal advice was reintroduced on 2 October 2006[21] seem to significantly limit access to funded legal advice.[22] Simplifying the appeals process might help those without legal advice to appeal. It would, though, only go so far. Many potential appellants without funded legal advice might be deterred from appealing regardless of how simple or complex the appeals process appeared. If the financial limits have rendered as many ineligible as claimed it may be appropriate if the thresholds are raised.[23]

Defendants convicted at a trial on indictment may appeal to the Court of Appeal against their conviction[24] and / or sentence.[25] If still dissatisfied following an appeal to the

[19] See further, S Roberts and K Malleson, 'Streamlining and Clarifying the Appellate Process' [2002] Crim LR 272, 273-275.
[20] *ibid.* 273.
[21] Access to Justice Act 1999 sch 3 para 3B, introduced by Criminal Defence Service Act 2006 s 2(1), (2). For the regulations made under this provision see, The Criminal Defence Service (Financial Eligibility) Regulations 2006 SI 2006 / 2492.
[22] A study by the New Policy Institute in December 2006 found that up to a half of all households were ineligible, and that up to three quarters of adults in households where at least one person was doing paid work, were no longer eligible, P Kenway, *Means-Testing in the magistrates' court: is this really what Parliament intended*? (New Policy Institute, 2006) and *Means testing in the magistrates' court: a clarification* (2007). Both available at, http://www.npi.org.uk/legal%20aid%20061205.htm.
[23] The financial eligibility limits were raised on 2nd April 2007, see, The Criminal Defence Service (Financial Eligibility)(Amendment) Regulations 2007 SI 2007 / 777. This raise was though, it seems, prompted by a desire to keep the limits in line with inflationary trends rather than any intention to impact upon the proportion of persons eligible, see the explanatory memorandum to SI 2007 / 777, para 7.3.
[24] Criminal Appeal Act 1968 s 1.
[25] *ibid.* ss 9-11.

Court of Appeal a person may appeal to the House of Lords.[26] In 2005 there were 1,661 appeals to the Court of Appeal against conviction and 5,178 against sentence.[27] Of the 614 appeals against conviction heard, 228 were allowed (37.1 per cent) and of the 2,153 appeals against sentence heard, 1,534 were allowed (71.2 per cent).[28] In the same period 58,000 defendants were found guilty at the Crown Court,[29] indicating that the right to appeal to the Court of Appeal provides an important corrective mechanism. It is the oversight by the Court of Appeal which does most to provide reassurance to the public and a degree of accountability for errors made in Crown Court trials as it is the Court of Appeal cases which attract the most media attention.[30]

While it is clear that the Court of Appeal provides an effective corrective mechanism in a significant number of cases each year it also seems that there is scope for improvement. There is concern that waiting times for the hearing of an appeal continue to be too high. Where an appeal against conviction is successful the longer the appellant has spent in custody the graver the injustice. A prisoner may even be deterred from appealing if they feel that they are likely to have completed their sentence before their appeal is heard.[31] In September 2004 the average waiting time for conviction appeals

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[26] *ibid.* ss 33-35.
[27] Department for Constitutional Affairs, Judicial Statistics (Revised), England and Wales for the year 2005, Cm 6903 (The Stationery Office, London 2006), Table 1.7.
[28] *ibid.* Table 1.8. The appeals against sentence figures appear to include the Attorney Generals references against unduly lenient sentences. In 2005 there were 108 such references brought to the Court of Appeal, 82 offenders sentences were judged to be unduly lenient and 67 offenders had their sentences increased. Statistics available on the Attorney General's website at: http://www.attorneygeneral.gov.uk/sub_statistics_bsuls.htm
[29] Home Office, *Criminal Statistics 2005* (2006) 19/06, Table 1.1.
[30] See, for example, B Dowell and J Grimston, 'Rough justice with "Judge Blunder"' *Sunday Times* (December 7 2003). This article highlights the trial judges who had the highest number of successful appeals against conviction in their courts and the sentences they had imposed and details some of the criticisms offered by the Court of Appeal.
[31] In their research study for the 1993 Royal Commission on Criminal Justice, Plotnikoff and Woolfson found that 11 per cent of their sample of prisoners, representing 17 per cent of those who had not appealed, gave as a reason that they felt their sentence would be over by the time their appeal was heard, J Plotnikoff and R Woolfson, *Information and Advice for prisoners about grounds for appeal and the appeals process, Research Study 18* (Her Majesty's Stationery Office, London 1993) 103.

had reached 14.7 months[32] and the average wait for sentence appeals stood at 5.3 months.[33] By September 2005 the average waiting times for conviction appeals had fallen to 14.1 months[34] and to 12 months in September 2006.[35] The waiting times for sentence appeals increased to 5.7 months in September 2005[36] before falling to 5.1 months in September 2006.[37] It seems that waiting times have fallen considerably from the early 1990s.[38]

The waiting times still, though, significantly exceed the target waiting times of 8 months for conviction appeals.[39] Furthermore, the recent reduction in waiting times may be attributable, at least in part, to a fall in the number of appeal applications rather than to any improved performance.[40] Should the number of applications rise again in the future the waiting times are also likely to rise. Auld recommended that the Court of Appeal be reorganised and reconstituted to make more appropriate use of judicial resources and to speed its work.[41] These recommendations have not been implemented. Spencer argues that more radical measures, including the setting up of regional Courts

[32] The Court of Appeal, Criminal Division, *Review of the Legal Year 2004 / 2005* (2005) Annex B. Available at, http://www.judiciary.gov.uk/publications_media/general/index.htm.
[33] *ibid.* Annex B.
[34] *ibid.* Annex B.
[35] The Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) Annex B.
[36] The Court of Appeal, Criminal Division, *Review of the Legal Year 2004 / 2005* (2005) Annex B.
[37] The Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) Annex B.
[38] In his review of the criminal courts, Lord Justice Auld noted that, 'in the early 1990s, a 22 months' wait for hearing of an appeal against conviction was not uncommon. And appeals against sentence frequently waited for 15 months', Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 12 para 80.
[39] As given at, The Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) Annex B.
[40] In 2004-2005 the total number of applications received was 7210. This fell, in 2005-2006 to 6444, a reduction of 10.6 per cent, Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) Annex A. The link between a fall in the number of applications and reduced waiting times was recognised by Lord Phillips in his introduction to the Court of Appeal, Criminal Division, Review of the Legal Year 2005 / 2006, 'the reduction in the backlog of work … has no doubt been assisted by a fall in the number of applications to appeal'.
[41] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 12 paras 78-94.

of Appeal may also be required.[42] It is certainly clear that effective action still needs to be taken to tackle the persistent problem of Court of Appeal waiting times. As well as aiding the fight against excessive waiting times establishing regional Courts of Appeal might also help bring the appeal system closer to the public thereby bolstering confidence. The court would no longer seem, as it may do at present, like such a distant institution based solely in London.

The 1993 Royal Commission on Criminal Justice (RCCJ),[43] raised concern about the Court of Appeal's approach to the admission of fresh evidence.[44] It suggested that, 'the court should be more prepared, where appropriate, to admit evidence that might favour the defendant's case even if it was, or could have been, available at the trial'.[45] Malleson's research study for the RCCJ found a total of 23 cases in which fresh evidence was raised. In the 300 cases she examined there were 329 grounds of appeal raised meaning that fresh evidence was raised as a ground in just 7 per cent. In 14 of the 23 cases the evidence was admitted by the Court. Of these 14 cases, 4 were allowed, 2 were adjourned for a full hearing and in 2 cases retrials were ordered.[46]

[42] JR Spencer, 'Does our present criminal appeal system make sense' [2006] Crim LR 677, 694.
[43] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263.
[44] The power to admit evidence is set down in Criminal Appeal Act 1968 s 23, as amended by Criminal Appeal Act 1995 s 4.
[45] Viscount Runciman, (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263 ch 10 para 3. see also, para 56, 'It has been suggested to us that the attitude of the court to these questions [those set down in s 23] has on occasion been excessively restrictive. We would urge that in general the court should take a broad, rather than a narrow, approach to them'.
[46] K Malleson, *A Review of the Appeal Process Research study 17* (Her Majesty's Stationery Office, London 1993) 9.

The RCCJ recommendation that the Criminal Appeal Act 1968 be amended to encourage greater admission of fresh evidence[47] was effected by the Criminal Appeal Act 1995.[48] A study by Roberts in 2002 study found, however, little increase in the admission of fresh evidence. From a total of 641 grounds of appeal advanced, 37 were based on fresh evidence (5.8 per cent).[49] Of the 37 fresh evidence grounds, nine were allowed, 27 were dismissed or refused and one was adjourned for a full hearing. Therefore of the total grounds, 27 per cent were successful as compared with almost 35 per cent in Malleson's sample.

It may be that it is the overworking of the Court of Appeal which makes the Court reluctant to become involved in time-consuming appeals involving fresh evidence. In the words of Spencer:

> 'It is scarcely an exaggeration to say that the Court of Appeal, like army doctors in the First World War, is forced to operate a "triage" system, under which it does the best it can for those whom it can deal with quickly, while abandoning those whose treatment would be slow and complicated, and who if treated would stop the lightly wounded getting any treatment at all'.[50]

Taking action to reduce the overworking of the Court of Appeal might help produce greater receptivity to the admission of fresh evidence.

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[47] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 10 para 60, 'Under subsection 23(2) the court must be persuaded that fresh evidence is "likely to be credible". It has been suggested to us that this is too high a test. We agree. We recommend that the test be changed to "capable of belief". This would in our view be a slightly wider formula giving the court greater scope for doing justice. It would also have the advantage of reducing the occasions when the court has to exclude evidence that is relevant on the ground that the court is not persuaded of its credibility, while at the same time leaving the court fully able to refuse to receive fresh evidence if it is incapable of belief'.

[48] Criminal Appeal Act 1995 s 4.

[49] S Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal' (2004) 1(2) Justice Journal 86, 91.

[50] JR Spencer, 'Does our present criminal appeal system make sense' [2006] Crim LR 677, 693.

In Chapter two[51] consideration was given to the Government's intention to amend the law to ensure that persons convicted are not allowed to go free when the Court of Appeal is satisfied that they committed the offence, regardless of how the conviction was obtained. As well as limiting the oversight of police misconduct provided by the Court of Appeal this proposed amendment could also limit the court's oversight of decisions and rulings made by the trial judge. In, for example, *R v Smith*[52] the Court of Appeal ruled that where a submission of no case to answer was wrongly rejected by the trial judge following which the defendant was cross-examined into admitting his guilt, the conviction could be said to be unsafe. To allow the trial to continue beyond the end of the prosecution case was an abuse of process and fundamentally unfair. If the law was to be amended as the government originally intended similar future convictions would stand untouched.

In clause 26 of the Criminal Justice and Immigration Bill the Government has rowed back somewhat from their original intention. If enacted, the Court of Appeal will be able to allow appeals even where they are satisfied of guilt if they think it would be incompatible with the appellant's rights under the European Convention on Human Rights to allow the conviction to stand. In chapter two, however, it was argued and has apparently been accepted by Jack Straw, that the government needs to move further. It is certainly true, for example, that on the current clause 26 test the conviction in Smith would have stood. A more appropriate test would permit the Court of Appeal to allow an appeal if they think that not doing so would seriously undermine the proper administration of justice. Such a test would continue the current position and would mean that in cases such as *Smith*, appeals could continue to be allowed.

[51] See section 2.1.2.
[52] [1999] 2 Cr App R 238 (CA).

Alongside defence rights of appeal to the Court of Appeal the Attorney General may refer a case or a sentence for re-examination. Where a person tried on indictment has been acquitted the Attorney General can refer a point of law which has arisen in the case to the Court of Appeal.[53] This mechanism, which is only used in a limited number of cases each year,[54] provides for the clarification of the law for future cases. If the Attorney General considers that a sentence is unduly lenient he may refer it to the Court of Appeal for review.[55] The passing of an unduly lenient sentence may attract much media comment and might do much to undermine public faith in the criminal justice system. The fact that this corrective mechanism exists may provide reassurance and help dispel dissatisfaction linked to the sentence. It may also contribute to the development of coherent sentencing practice.[56] Between 2001 and 2006, 768 sentences were examined by the Court of Appeal on references by the Attorney General. Of these, 635 were deemed unduly lenient and 525 offenders had their sentences increased.[57]

In recent years a number of little used rights of challenge to decisions made at trial on indictment have been provided, largely to the prosecution. Both the defence and prosecution may appeal to the Court of Appeal against rulings made at preparatory hearings.[58] In 2005/06 there was 15 such interlocutory appeal applications.[59] Following

[53] Criminal Justice Act 1972 s 36.
[54] The Law Commission report on Prosecution Appeals reports that the first such reference was made in 1974 and over the following 25 years there was a total of only 41, The Law Commission, *Prosecution Appeals Against Judges' Rulings, Consultation Paper No 158* (2000) para 2.3.
[55] Criminal Justice Act 1988 s 36. The Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006 SI 2006 / 1116, lists the offences for which the AG has power to refer the sentence as unduly lenient.
[56] See further, R Henham, 'Attorney-General's References and Sentencing Policy' [1994] Crim LR 499.
[57] Statistics available on the Attorney General's website at, http://www.attorneygeneral.gov.uk/sub_statistics_bsuls.htm
See also, S Shute, 'Who passes unduly lenient sentences? How were they listed?: A survey of Attorney-General's reference cases, 1989-97' [1999] Crim LR 603. For a recent example of a case in which the Court of Appeal increased the sentences imposed, see, M Taylor, 'Sentences doubled for men who raped young girls' *The Guardian* (13 October 2007).
[58] Criminal Justice Act 1987 s 9 and Criminal Procedure and Investigations Act 1996 s 35.
[59] The Court of Appeal Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) para 1.5. To compare this figure with previous years in 2002/03 there were 14 applications, in 2003/04 29 and in

proposals by the Law Commission,[60] the Criminal Justice Act 2003 provides a right of appeal for the prosecution against rulings by the judge in a trial on indictment which have the effect of terminating the proceedings.[61] This right of appeal was brought into force on 4 April 2005[62] and in 2005/06 there were 10 applications for appeal.[63]

The double jeopardy rule is concerned with ensuring persons are not placed in danger of conviction twice. A limited exception to this rule was introduced in 1996 when the prosecution acquired the right to take action to have an acquittal quashed when it appeared to have resulted from the intimidation of a juror or witness.[64] It appears, however, that this power has never been used. More controversially, the Macpherson report recommended that consideration 'be given to the Court of Appeal being given the power to permit prosecution after acquittal where fresh and viable evidence is presented'.[65] This possibility was investigated and supported by the Law Commission,[66] and introduced for a limited number of offences by the Criminal Justice Act 2003.[67]

2004/05 39, The Court of Appeal Criminal Division, *Review of the Legal Year 2004 / 2005* (2005) para 1.5.

[60] See, The Law Commission, *Prosecution Appeals Against Judges' Rulings, Consultation Paper No 158* (2000) and, The Law Commission, *Double Jeopardy and Prosecution Appeals, Law Com No 267* (2001) Cm 5048.

[61] Criminal Justice Act 2003 s 58. The prosecution is provided with a general right of appeal against a judge's ruling. If, however, the Court of Appeal confirms the ruling it must order that the defendant be acquitted, Criminal Justice Act 2003 s 61(3). In consequence, it is only likely to be terminating rulings which are appealed.

[62] The Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 SI 2005 / 950.

[63] The Court of Appeal Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) para 1.6.

[64] Criminal Procedure and Investigations Act 1996 ss 54-57. This procedure was recommended by the 1993 Royal Commission on Criminal Justice, Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 10 para 74.

[65] Sir W Macpherson, *The Stephen Lawrence Inquiry* (1999) Cm 4262-I, recommendation 38. See also, para 7.46, 'If, even at this late stage, fresh and viable evidence should emerge against any of the three suspects who were acquitted, they could not be tried again however strong the evidence might be. We simply indicate that perhaps in modern conditions such absolute protection may sometimes lead to injustice. Full and appropriate safeguards would be essential. Fresh trials after acquittal would be exceptional. But we indicate that at least the issue deserves debate and reconsideration perhaps by the Law Commission, or by Parliament'.

[66] The Law Commission, *Double Jeopardy, Consultation paper No156* (1999); The Law Commission, *Double Jeopardy and Prosecution Appeals, Law Com No 267* (2001) Cm 5048.

[67] Criminal Justice Act 2003 Part 10. The qualifying offences are listed in sch 5 part 1.

The introduction of a power to quash an acquittal if new and compelling evidence emerged was strongly opposed by some.[68] In the two years since it came into force[69] this power has, however, been used only in one case, that of *R v Dunlop.*[70] Quashing the acquittal and ordering a retrial the Court of Appeal concluded that, 'the public would rightly be outraged were the exception to the double jeopardy rule not to be applied in the present case',[71] and stated that they could see, 'no injustice in allowing a retrial'.[72] Dunlop later pleaded guilty to murder[73] and was sentenced to life imprisonment with a recommendation that he serve a minimum of seventeen years.[74] It is difficult, given the facts of this case, to continue to argue against the introduction of this corrective mechanism, although it is too early to reach a conclusive judgement about its operation in practice.

4.2 Administrative Scrutiny

Administrative scrutiny of the trial courts is provided primarily by two bodies established within the last ten years, the Criminal Cases Review Commission and Her Majesty's Inspectorate of Court Administration. The oversight they provide is the main focus in this section. It must be noted, however, that administrative oversight is also provided on a more ad hoc basis by a range of bodies.

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[68] See, P Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65(3) MLR 393; B Fitzpatrick, 'Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002' (2003) 67 J Crim L 149; P Roberts, 'Justice for all? Two Bad Arguments (And several good suggestions) for resisting double jeopardy reform' (2002) 6 E & P 197. For support and counter arguments see, I Dennis, 'Rethinking Double Jeopardy: justice and Finality in Criminal Process' [2000] Crim LR 933; I Dennis, 'Prosecution Appeals and retrial for Serious Offences [2004] Crim LR 619.
[69] The Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 SI 2005 / 950.
[70] [2007] 1 All ER 593 (CA).
[71] *ibid.* 604.
[72] *ibid.* 605.
[73] D Brown and F Gibb, 'Mother's relief as murderer admits guilt under double jeopardy reform' *The Times* (September 12 2006).
[74] R Ford, 'Killer in historic double-jeopardy case jailed for life' *The Times* (October 7 2006).

4.2.1 Ad hoc scrutiny

Administrative scrutiny has been provided by specially established inquiries. The Runciman RCCJ 1993,[75] and the 2001 Criminal Courts Review[76] both examined the operation of the trial courts and made recommendations for improvement. Occasional oversight has also been provided by permanent inspectorate bodies. During their fourth periodic visit to the United Kingdom in 2001 the Council of Europe's, Committee for the Prevention of Torture (CPT) visited the detention facilities at the Central Criminal Court, Highbury Corner Magistrates Court and Thames Magistrates Court. Following their visit they highlighted a number of concerns relating to the treatment of prisoners.[77] In its response the UK Government detailed action to be taken to address the concerns raised.[78] The National Audit Office has, on a number of occasions, examined aspects of court performance related to good financial management.[79] Its reports have made recommendations designed to help the trial courts save tax payers money.

4.2.2 The Criminal Cases Review Commission

The Criminal Appeal Act 1968 provided that where a person was convicted on indictment the Home Secretary could refer the case to the Court of Appeal for consideration.[80] Only if such a reference was made could the Court of Appeal hear a

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[75] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 6-8.
[76] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 10-11.
[77] CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) 6.
[78] CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) 7.
[79] See, National Audit Office, *New IT systems for Magistrates' Courts: the Libra project* (2002-2003) HC 327; National Audit Office, *Facing Justice, Tackling defendants' non-attendance at court,* (2003-2004) HC 1162; National Audit Office, *Department for Constitutional Affairs: Fines Collection* (2005-2006) HC 1049.
[80] Criminal Appeal Act 1968 s 17. Previously, Criminal Appeal Act 1907 s 19.

second appeal.[81] The extent to which the Home Secretary's power to refer cases provided an effective safeguard against miscarriages of justice was inadequate. Sir John May, in his second report into the convictions of four members of the Maguire family and three others,[82] found that the Home Secretary and the civil servants advising him had taken a 'substantially restricted view of cases'.[83] They only responded to representations rather than carrying out their own investigation and their approach throughout was reactive rather than proactive.[84] This restrictive approach was due largely to respect for the separation of powers between the executive and the courts. The Home Secretary was reluctant to be seen to be challenging the judiciary.[85]

This restrictive approach was arguably seen in the Maguire case which the Home Office repeatedly decided not to refer to the Court of Appeal. Sir John May concluded that, 'the improbability of the Crown's case was discoverable from a close study of the evidence'.[86] From a total of between 700 and 800 cases a year the Home Office only referred 54 cases to the Court of Appeal between 1981 and 1992, an average of less than 5 a year.[87] Both the May report and the RCCJ recommended the establishment of a new independent body to consider alleged miscarriages of justice.[88]

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[81] In *R v Pinfold* [1988] QB 462 (CA), the Court of Appeal held that the appeal rights in the Criminal Appeal Act 1968 provided for only one appeal against conviction.
[82] Sir John May, *Second Report on the Maguire Case* (HMSO, London 1992) HC 296.
[83] *ibid.* para 10.7.
[84] *ibid.* para 10.7.
[85] In the words of the RCCJ, 'the scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it', Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 11 para 9.
[86] Sir John May, *Second Report on the Maguire Case* (HMSO, London 1992) HC 296 para 10.9.
[87] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 11 para 5.
[88] Sir John May, *Second Report on the Maguire Case* (HMSO, London 1992) HC 296 para 12.24-12.25; Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 11 para 11. The Royal Commission made detailed proposals as to the form this body, which they named the Criminal Cases Review Authority, should take, ch 11 para 12-32.

Largely implementing the recommendations of the RCCJ, the Criminal Appeal Act 1995, provided for the establishment of the Criminal Cases Review Commission (CCRC).[89] Either of its own motion or in response to an application,[90] the CCRC may refer a conviction or sentence passed in the magistrates' court to the Crown Court,[91] and a conviction or sentence passed in the Crown Court to the Court of Appeal.[92] This it may do if it feels that there is a real possibility that the conviction or sentence will not be upheld.[93] The Commission was formally established on 1 January 1997 and began receiving cases on 31 March 1997.[94]

In the first of the CCRC's references to be heard by the Court of Appeal, *R v Mattan,*[95] the murder conviction of Mahmoud Mattan was held to be unsafe. Rose LJ stated that the case clearly demonstrated that, 'the Criminal Cases Review Commission is a necessary and welcome body, without whose work the injustice in this case might never have been identified'.[96] From 31 March 1997 to 28 February 2007 the CCRC received an average of 950 applications per year.[97] In that period a total of 356 cases were referred back to either the Court of Appeal or the Crown Court, an average of 31 cases per year.[98] Of the 310 cases referred to the Court of Appeal thus far, in 218 the conviction was quashed or the sentence varied, a 'success' rate of 70 per cent.[99] The fact

[89] Criminal Appeal Act 1995 s 8(1).
[90] *ibid.* s 14(1).
[91] *ibid.* s 11(1).
[92] *ibid.* s 9(1).
[93] *ibid.* s 13(1).
[94] Criminal Cases Review Commission, *Annual Report 1997/98* (1998) 5.
[95] The Times, March 5 1998 (CA).
[96] See transcript available on LexisNexis.
[97] Criminal Cases Review Commission, Case Statistics, available at: http://www.ccrc.gov.uk/cases/case_44.htm. Figures include Northern Ireland cases.
[98] *ibid.*
[99] *ibid.* In 2006-07 the Commission completed the review of 990 cases against an intake of 1,051 applications, Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 11. The appeal courts decided the cases of 47 individuals referred by the Commission during the year, 44 were heard by the Court of Appeal in London, 2 in the Northern Ireland Court of Appeal and 1 by Guildford Crown Court. The appeal courts decided that 25 of the 39 convictions referred by the Commission were

that the number of applications has increased and the number of referrals has risen significantly under the CCRC suggests that it is regarded as more effective than the Home Office unit which previously carried out this task and that it takes a less restricted approach. The chairman of the CCRC, Graham Zellick, has described it as an oversight body which citizens should be proud to have as part of our criminal justice system.[100]

Alongside these positive signs there are, however, a number of concerns. The CCRC seems to enjoy greater resources in terms of finances and personnel than its Home Office predecessor.[101] Nonetheless, from its earliest days, there have been complaints

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unsafe. Of the eight sentences referred, all were reduced, Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 26.

[100] 'I think it [the CCRC] remains a beacon. It remains an institution of which we should be incredibly proud. The interest that I discover when I go abroad is quite remarkable. Canada struggles still with the old system we had here where the matters are dealt with within the ministry of justice, done in a very professional way and with a greater degree of detachment than was true here in the past or even true in Canada in the past, but nevertheless there is considerable interest in Canada. In the United States, they simply do not believe that such a body could be created and could function with the degree of independence and authority that we have. Lawyers in other countries simply are astonished that you can have a body like this which in effect sends cases back to the courts and says, 'do it again. You may not have got it right'. They are absolutely astonished that we can do that and continue to enjoy the respect and command the confidence of the courts of this country, which we do. There are lawyers and others who work in the miscarriage of justice field around the world who simply marvel with astonishment that we have a legal, constitutional political and parliamentary culture that permits an organisation like this to function and to flourish. Although there are our critics and many people are a bit jaundiced with how things have gone over 10 years, we just need to I think take stock of the situation, compare the experience with the situation almost everywhere else in the world and with how it was here before we came into the existence and conclude that, whatever our imperfections, whatever our faults, we have created a remarkable organisation that will and must endure and makes an invaluable contribution to the administration of justice', Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Oral Evidence given by Professor Graham Zellick, Chairman, Mr Colin Albert, Director of Finance and IT, and Accounting Officer, Ms Karen Kneller, Director of Casework, and Mr John Weeden CB, Commissioner, Criminal Cases Review Commission, HC (2006-07) HC 1635-i, Q71.

[101] The annual running costs of the CCRC were predicted at the time of the passing of the Criminal Appeal Act 1995 to be £4.3 million, Criminal Appeal Bill, Explanatory and Financial Memorandum (HMSO, London 1995) iii. The annual running cost of the Home Office Unit had, it appears, been £0.8 million, Criminal Appeal Bill, Explanatory and Financial Memorandum (HMSO, London 1995) iv. It was estimated that the CCRC would consist of at least 11 members and up to 60 staff, Criminal Appeal Bill, Explanatory and Financial Memorandum (HMSO, London 1995) iv. A significant increase on the staffing levels of the Home Office unit, 'this increase in public service posts will be offset in part by the savings arising from the loss of 17 Home Office posts and 3 Northern Ireland Office posts as a result of the Commission taking over the Secretary of State's functions in this area … The estimated total increase in manpower attributable to the Bill will therefore be about 50 posts', Criminal Appeal Bill, Explanatory and Financial Memorandum (HMSO, London 1995) iv.

that the resources provided are inadequate.[102] Zellick is on record as stating, 'we have less than optimal resource to carry out our primary task of case review'.[103] This lack of resources manifests itself most clearly in delay. In 2005-06 the CCRC missed its target of completing case investigations within 15 months by a considerable margin in each quarter.[104] In 2006/07 it continued to fail to meet its targeted completion times by a significant percentage.[105] Delay may undermine public confidence in the CCRC and may deter those with shorter sentences from applying.[106]

In 2005 the CCRC initiated a far-reaching and fundamental review of the organisation, its processes and practices, with the assistance of external consultants.[107] It has expressed the hope that the changes flowing from this review will lead to waiting times being reduced.[108] It has also acknowledged, however, that even with enhanced efficiency it will take five years or more for waiting times to reduce to an acceptable level and this is assuming that the number of new applications received in each year

[102] See, L Jason-Lloyd, 'The Criminal Cases Review Commission – one year on – Part 2' (1998) 148 NLJ 1244, 1245, 'my impression is that there is no shortage of enthusiasm or ability within the commission to meet this challenge, but its overall purpose could be severely curtained by a shortage of resources;' A James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice' [2000] Crim LR 140, 'the CCRC has encountered problems since its establishment, especially in regard to the allocation and sufficiency of resources'.

[103] G Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] Crim LR 937, 949. In his foreword to the CCRC's 2006/07 Annual Report Zellick states, 'We remain concerned at our level of resourcing, exacerbated by new financial arrangements … which have the effect, whether intended or not, of imposing further spending constraints', Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 5.

[104] Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 23. Undue delay caused by a lack of resources has caused problems for the Commission since 1997, see, A James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice' [2000] Crim LR 140, 146, and at 150, 'Overall, just as the Home Office miserably failed to provide a fast and fair resolution to miscarriage of justice cases, so the CCRC risks being pushed down the same path and becoming the object of the same scepticism and derision'.

[105] Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 18.

[106] A James, 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice' [2000] Crim LR 140, 146.

[107] See, Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Second supplementary memorandum submitted by the Criminal Cases Review Commission, summary of the report by McKinsey & Co, Improving the Casework Process at the CCRC (2006-07) HC 1635-i.

[108] 'our hope is that the changes we have made to our structures and procedures – and the further changes we are contemplating – will enable us to make substantial inroads into the waiting times for those more complex cases', Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 6.

does not rise and the CCRC's funding is not further reduced.[109] The CCRC's chairman has stated that an extra £500,000 a year for two or three years could enable the backlog of cases to be reduced much more quickly than otherwise will happen.[110] The CCRC is pessimistic about the prospects for such funding being found.[111] Indeed, it seems that its budget is to be cut further in forthcoming years.[112] It also appears that the number of applications may be rising.[113] Given the importance of reducing delay this small amount of extra money really ought to be provided. As argued by Nobles and Schiff, it might even make economic sense. Reducing delay would reduce the compensation payable to those who later have their convictions overturned.[114]

The independence of the CCRC is stated explicitly in the Criminal Appeal Act 1995: 'the Commission shall not be regarded as the servant or agent of the Crown'.[115] In 2006 the CCRC expressed concern about the fact that its sponsor department was the Home

[109] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Memorandum submitted by the Criminal Cases Review Commission (2006-07) HC 1635-i, para 5.7

[110] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Oral Evidence given by Professor Graham Zellick, Chairman, Mr Colin Albert, Director of Finance and IT, and Accounting Officer, Ms Karen Kneller, Director of Casework, and Mr John Weeden CB, Commissioner, Criminal Cases Review Commission (2006-07) HC 1635-i, Q15, and 26-28. Available at: http://www.parliament.uk/parliamentary_committees/home_affairs_committee/home_affairs_committee_reports_and_publications.cfm
In his foreword to the CCRC's 2006/07 Annual Report Zellick states, 'current resource levels inescapably cause real delays to those of our applicants who are in prison on the basis of convictions that will ultimately be quashed. This is a further denial of justice – all for the sake of around £500,000 a year' Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 5.

[111] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Oral Evidence given by Professor Graham Zellick, Chairman, Mr Colin Albert, Director of Finance and IT, and Accounting Officer, Ms Karen Kneller, Director of Casework, and Mr John Weeden CB, Commissioner, Criminal Cases Review Commission (2006-07) HC 1635-i, Q29-30.

[112] Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 40.

[113] The CCRC 2006/07 annual report states: 'there does now appear to be an upward tend in new applications. In 2006-07, we received 1,051 applications compared to 1,011 the year before. Whilst that may not seem a significant increase it does in fact present serious resource challenges for the Commission as we continue to try to do more each year on a reducing budget', Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 23.

[114] R Nobles and D Schiff, 'The Criminal Cases Review Commission: Reporting Success?' (2001) 64 MLR 280, 294.

[115] *ibid.* s 8(2).

Office and argued that 'public perceptions and constitutional proprieties'[116] required that it be sponsored by the Department for Constitutional Affairs.[117] This wish for removal from Home Office oversight has now been fulfilled. On the 9 May 2007 sponsorship of the CCRC was transferred to the Ministry of Justice, which has taken over the responsibilities of the Department for Constitutional Affairs.[118] Given the CCRC desire for such a change, on the basis that it might impact positively on public perceptions, the Commission ought to update its website, which still states that the CCRC is sponsored by the Home Office.[119]

At the time of the setting up of the CCRC it was stated that, despite concerns expressed to the contrary,[120] it would rely on the police to conduct investigations.[121] The 2005-06 CCRC annual report reveals that 32 investigation officers (to-date, always a senior

[116] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Memorandum submitted by the Criminal Cases Review Commission (2006-07) HC 1635-I, para 6.2.
[117] *ibid.* para 6.3.
[118] See, http://www.homeoffice.gov.uk/about-us/organisation/agencies-non-departmental-bodies/, listing the organisations moved to the Ministry of Justice as of 9 May 2007. See also, the Ministry of Justice website, Organisations we sponsor, http://www.justice.gov.uk/about/organisationswesponsor.htm
[119] 'although entirely independent of Government, we have also agreed wider objectives with out sponsor department, the Home office', Criminal Cases Review Commission, Our Role (Overview), http://www.ccrc.gov.uk/about/about_27.htm'.
[120] See, for example, J Wadham, 'Unravelling miscarriages of justice' (1993) 143 NLJ 1650, 1651, 'it is wrong in principle and potentially dangerous in practice to create an organisation part of whose task is to uncover police malpractice and to use other, currently serving, police officers for this'. P Thornton, 'The Royal Commission on Criminal Justice: Part 5: Miscarriages of Justice: A Lost Opportunity' [1993] Crim LR 926, 929, 'the new body should be able to make inquiries through its own "police" force … This would avoid the problem of police officers reluctantly investigating other officers in their own or in another police force;' A letter published in *The Times* from the Legal Director of Liberty, and others, stated, 'Whilst many of the investigations carried out by police forces into cases of miscarriage of justice have been scrupulous, some have not', 'Flaws in the Criminal Appeal Bill' *The Times* (May 15 1995).
[121] Criminal Appeal Bill, Explanatory and Financial Memorandum (HMSO, London 1995) iv, 'The great majority of investigations carried out on behalf of the commission will be undertaken by members of police forces;' and, from Home Office Minister Nicholas Baker speaking during a House of Commons debate on the Criminal Appeal Bill, 'the Government has no intention of funding a team in the commission whose job would be to operate as a mini police force, duplicating work which could, and should, be done by the police or other public bodies … but we accept that, exceptionally, the commission might want one of its staff or someone else to do investigative work such as would otherwise be done by a police officer…No one has provided a convincing example of such a case, but it could, theoretically, happen', Hansard HC vol 263 (1) cols 1371 (17 July 1995) and at col 1372, 'we do not envisage the commission carrying out large-scale investigations. We envisage it doing investigative work from time to time but, generally, the right people to investigate will be the police or other bodies'.

police officer) have been appointed since 1997, to investigate 40 cases.[122] This reliance on the police, albeit in a limited number of cases, may give rise to a degree of concern. The RCCJ recommended a number of powers of supervision for the CCRC which were later enacted.[123] They felt that such powers were sufficient to ensure that the investigation would be thorough and far reaching, noting that, 'these powers are analogous to the ones currently enjoyed in major cases by the Police Complaints Authority'.[124] Since that time this analogous arrangement has, though, been deemed inadequate and the Independent Police Complaints Commission established.[125] The IPCC may conduct completely independent investigations in the most serious cases. There might likewise be a case for the CCRC moving towards completely independent investigations in the future. It should certainly be established policy, or made clear if this is already the case,[126] that a different police force to the one concerned in the case will be asked to conduct any investigations if police assistance is required.

Just as the CCRC provides oversight of the trial courts and the appeal courts it is important that it is, itself, subject to a degree of scrutiny. When a case is referred the appeal court may criticise the CCRC if the judges feel the case should not have been referred.[127] This provides a degree of accountability and may contribute to more effective performance. In the words of the CCRC chairman, Zellick, 'a critical comment

[122] Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 17.
[123] The CCRC has a considerable role in determining the appointment of an investigating officer, Criminal Appeal Act 1995 s 19(6), (7), 20(5); the investigating officer shall undertake such inquiries as the CCRC may direct, Criminal Appeal Act 1995 s 20(1) and the CCRC may take any steps which they consider appropriate for supervising the undertaking of inquiries by the investigating officer, Criminal Appeal Act 1995 s 20(4).
[124] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 11 para 28.
[125] See section 2.2.3.
[126] There is nothing on the CCRC website to suggest that it is. As at 31 August 2007.
[127] In, for example, *R v Sharp* [2004] EWCA Crim 3870; [2004] All ER (D) 119 (Feb) (CA); transcript of judgment available via LexisNexis, Buxton LJ said, 'We are quite confident that had the Commission had its attention drawn to the authorities that we have set out in this judgment, which id does not appear to have had before it, it would have taken a very different view of Mr Sharp's application'. See transcript, para 33.

provoked by a mistake on the part of the Commission will be the subject of careful consideration by the Commission and the Commission will seek to learn from it.[128] An example of such learning followed the case of *R v Siddall.*[129] In passing judgement in this case Longmore LJ criticised the 'lamentable way in which the documents and other case materials were presented to the court on this reference'.[130] His Lordship commented on the lack of pagination, hole-punching and page numbering. Whilst placing responsibility for the problems on the officials and lawyers in the criminal appeal office,[131] the CCRC stated that 'there may be changes we can make which would be helpful to the court, such as numbering, cross-referencing and pagination. The matter has been considered by our casework operations group and will be further discussed with the Registrar of Criminal Appeals'.[132]

Judicial oversight of the CCRC is also possible via judicial review. As of 8 September 2006 the CCRC had been the subject of 160 applications for judicial review since 1 April 1997.[133] In line with the approach set down in *R v Criminal Cases Review Commission, ex p Pearson,*[134] that the discretion of the CCRC is wide, permission to

[128] G Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] Crim LR 937, 939, 'A critical comment provoked by a mistake on our part (as in Sharp) is deserving and we simply have to live with and learn from it', and at 948, 'Criticisms of the Commission's work by the court will be the subject of careful consideration by the Commission'.
[129] [2006] EWCA Crim 1353; [2006] All ER (D) 148 (Jun) (CA); transcript of judgment available via LexisNexis.
[130] See transcript, para 54.
[131] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Oral Evidence given by Professor Graham Zellick, Chairman, Mr Colin Albert, Director of Finance and IT, and Accounting Officer, Ms Karen Kneller, Director of Casework, and Mr John Weeden CB, Commissioner, Criminal Cases Review Commission (2006-07) HC 1635-i, Q47 and Q50.
[132] *ibid.* Q50.
[133] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Memorandum submitted by the Criminal Cases Review Commission (2006-07) HC 1635-i, para 2.23.
[134] [1999] 3 All ER 498 (QB), in the words of Lord Bingham at 505, 'the Commission's power to refer under s 9 is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else…The commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not'. And, at 523,

proceed has been refused in all but one of those cases. The Commission continues to point out that responding to such applications eats up precious resources.[135] It does, though, acknowledge that the work of the CCRC has, on occasions, benefited from such challenges.[136] In 2005-06, for example, there were 28 applications for judicial review of the CCRC's case-related decisions.[137] It agreed to re-open two cases following the issuing of proceedings for judicial review on the basis that the applicant's lawyers identified further investigative work, potentially relevant to the safety of the conviction which could be undertaken.[138] In 2006/07 the Commission was the subject of 27 judicial review applications. One challenge was conceded at the pre-action stage with the Commission agreeing to conduct a further short review.[139]

For public confidence to be bolstered by the existence of the CCRC it is vital that the public are made aware of its work and role. For the CCRC to perform effectively it is also important that potential applicants appreciate its role. Furthermore, in a democracy

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'Had the Commission decided to refer this case to the Court of Appeal, that would (if based upon a proper direction and reasoning) have been a reasonable and lawful decision. The decision not to refer was in our view equally reasonable and lawful. The question lay fairly and squarely within the area of judgment entrusted to the Commission. If this court were to hold that a decision one way or the other was objectively right of objectively wrong, it would be exceeding its function. The Divisional Court will ensure that the Commission acts lawfully. That is its only role. To go further would be to usurp the function which Parliament has, quite deliberately, accorded to the judgment of the Commission. We find no grounds for impugning the Commission's decision, and accordingly refuse this application'.

[135] Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Memorandum submitted by the Criminal Cases Review Commission, HC (2006-07) HC 1635-i, para 2.27 'The effort and in-house expenditure incurred in responding to judicial reviews is considerable. All preparatory work is undertaken by the Commission's Legal Advisers, but counsel's fees in contested cases can represent a significant cost and, in most cases, cannot be recovered. Costs incurred by the Commission in relation to applications for judicial review are difficult to forecast and place a strain on our ability to manage our budget adequately. In 2005-06 we incurred costs of £131,000 in legal fees alone'. The 2006/07 CCRC Annual Report notes that, 'Whilst the Commission plans financially for a number of potential judicial reviews in each financial year, we are susceptible always to significant challenge by way of judicial review of our work which can, even when they are totally devoid of merit, be both disruptive to our casework as well as a huge drain on resources', Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 23.

[136] Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 7.

[137] *ibid.* 26.

[138] At 8 September 2006 there had been 82 applications for judicial review since the year 2004-05, with the CCRC having conceded 11 of them, Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Written Evidence, Memorandum submitted by the Criminal Cases Review Commission (2006-07) HC 1635-i, para 2.24.

[139] Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 21.

it is important that citizens understand how their court system works. The CCRC has always published its Annual Report.[140] Beyond this, however, the Commission has tended not to make very strenuous efforts to publicise itself. Shortly after being appointed as chairman, Zellick suggested that there was 'very much an atmosphere of secrecy' and the policy was not to court publicity.[141] This policy was not, he thought, 'right for a public body, particularly one concerned with public confidence in the justice system'.[142]

The CCRC has made greater efforts in recent years to publicise itself. In the words of Zellick, 'I've tried to be more open than was previously the case, talking to people, explaining our role'.[143] The 2006/07 annual report states, 'The Commission recognises that good communication is vital to achieving its aims, particularly in promoting public understanding of its role'.[144] In November 2003 the CCRC appointed its first full-time Head of Communications,[145] and in 2004 its new look website was launched.[146] The

[140] The annual report is sent to the Home Secretary on the discharge of the Commission's functions during the year and the Home Secretary shall publish the report, Criminal Appeal Act 1995 sch 1 para 8. Annual reports available at: http://www.ccrc.gov.uk/publications/publications_get.asp

[141] Quoted in an interview, F Gibb, 'Justice's quality controller' *The Times* (November 23 2004); See also the quote from David Jessell who was appointed as a part-time commissioner in 2000, 'The CCRC spent its first years in prudent purdah … That, itself, was a frustration for someone brought up to believe in transparency and public accountability'. D Jessel, 'Turning a blind eye' *The Guardian* (July 13 2004).

[142] Quoted in an interview, F Gibb, 'Justice's quality controller' *The Times* (November 23 2004). In evidence to the Home Affairs Select Committee in 2004, Zellick said, 'My colleagues and I take the view that, as a public body with a critically important role to play in the criminal justice system, we owe it to the public and the public's representatives to explain what we do, to account for what we do, and to spend some effort on doing that', Home Affairs Select Committee, The Work of the Criminal Cases Review Commission, Oral and Written Evidence given by Professor Graham Zellick, Chairman, Mr John Weeden CB, Member, Mr David Kyle, Member, and Ms Jacky Courtney, Chief Executive, The Criminal Cases Review Commission (2003-04) HC 289-i, Q98. Available at: http://www.parliament.uk/parliamentary_committees/home_affairs_committee/home_affairs_committee_reports_and_publications.cfm

[143] Quoted in an interview, F Gibb, 'Justice's quality controller' *The Times* (November 23 2004).

[144] Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 35.

[145] Criminal Cases Review Commission, press release, 'New Head of Communication' (27 November 2003). CCRC press releases available at: http://www.ccrc.gov.uk/news.asp. This stated, 'The Commission has had a relatively low public profile … The Commission's role is a complex one and we need to promote better understanding of exactly what it does, particularly as two of its four stated aims are to inform the public about its work and to promote public confidence in the Criminal Justice System'.

Commission now issues regular press releases, including every time there is a referral, and provides an around-the-clock service to the media.[147] It has also developed a national prison awareness campaign to explain its role and remit to prison inmates. Up to six visits to prisons are made each year.[148]

These efforts to raise the profile of the CCRC seem to have had an impact. An independent review of media strategy completed in June 2005 found that the volume and quality of media coverage of CCRC work had increased significantly in the 15-month period since November 2003 and that the CCRC had been more successful at getting its messages across.[149] The CCRC noted in its 2005/06 Annual Report that feedback from applicants, 'indicates a long-term increase in awareness; two-thirds of those expressing a view stated that it was "very easy" or "easy" to find out about the Commission'.[150]

4.2.3 Her Majesty's Inspectorate of Court Administration

The Police and Magistrates' Courts Act 1994 established Her Majesty's Magistrates' Courts Service Inspectorate (HMMCSI)[151] to inspect and report to the Lord Chancellor on the organisation and administration of the magistrates' courts.[152] The Courts Act 2003 provided for the establishment of a national body to manage the magistrates'

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[146] Criminal Cases Review Commission, press release 'Commission Launches New Website and Logo' (17 September 2004). For the period April 2006 to March 2007 the website had 49,867 unique visitors, Hansard HC vol 460 col 537W (14 May 2007).
[147] Criminal Cases Review Commission, News, http://www.ccrc.gov.uk/news.asp.
[148] Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 43. In 2006/07 visits were made to Bristol, Cookham Wood, Dovegate and Stafford prisons, Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 35.
[149] Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 45.
[150] *ibid.* 45. The 2006/07 annual report records that 68 per cent of applicants stated that it was either 'very easy' or 'easy' to find out about the CCRC, Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 36.
[151] Police and Magistrates' Courts Act 1994 s 86-87. Later, Justices of the Peace Act 1997 ss 62-63.
[152] Police and Magistrates' Courts Act 1994 s 86(3)(a).

courts, the Crown Court and the county courts, and the development of the inspectorate to oversee this new body.[153] On 1 April 2005 this new national body, Her Majesty's Courts Service (HMCS) was launched and Her Majesty's Inspectorate of Court Administration (HMICA) replaced HMMCSI with responsibility for overseeing HMCS.[154]

HMICA aims 'to improve the experience of all people who use, or work within, the Courts'.[155] This it does by 'promoting good practice and encouraging the elimination of poor practice'.[156] Good practice is promoted by identifying it in particular areas and seeking to promulgate it throughout the system. Where poor practice is uncovered, recommendations and suggestions for further action designed to bring about improvement will be made. The Court Service will be asked to develop an action plan setting out how it will respond to each of the recommendations and a post-inspection review looking at the implementation of recommendations may be conducted.[157]

Individual HMICA inspections have concentrated so far on the quality of service provided to court users. The first series of inspections focused on the service provided to victims and witnesses with two week inspections being carried out at eight HMCS Areas.[158] Following the inspections HMICA produced a report in the form of a public

[153] Courts Act 2003 Part 5.
[154] The Courts Act 2003 (commencement No. 10) Order 2005 SI 2005 / 910.
[155] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration 2006-2007* (2007) HC 797, 8.
[156] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration, 2005-2006* (2006) HC 1294, 4.
[157] *ibid.* 13.
[158] The eight Areas inspected were Dorset, Greater Manchester, Humber, Norfolk, Northamptonshire, Suffolk, Staffordshire and Thames Valley. During inspections all magistrates' courts that hear trials in these Areas were visited by inspectors, trials were observed, and interviews conducted with victims, witnesses, witness service staff and volunteers, members of the judiciary, court staff, senior HMCS and DCA officials and other stakeholders in the wider criminal justice community, HMICA, *Valuing victims and witnesses, An overview of inspections undertaken during 2005* (2006) 41.

information booklet detailing the findings in each Area,[159] and an overall report summarising findings and making recommendations for the whole of HMCS.[160]

The reports identified a number of areas where there was room for improvement in the treatment of victims and witnesses. They found, for example, problems with the oath-taking procedure;[161] evidence that ushers and witness service volunteers were inadequately trained to look after young witnesses;[162] there was concern about the safety and security of victims within the courthouse,[163] and evidence that such concerns were not adequately considered by HMCS;[164] a lack of information for victims and witnesses;[165] and expressed concern about waiting times.[166]

Responding to the individual Area reports some of the HMCS Areas stated that the findings would help produce improvement.[167] The overall report made six

[159] Available at, http://www.hmica.gov.uk/mcsreps.htm.
[160] HMICA, *Valuing victims and witnesses, An overview of inspections undertaken during 2005* (2006).
[161] Including instances of 'unwitting prejudice' *ibid.* para 4.7 and difficulties flowing from ushers asking witnesses to read from the oath or affirmation card rather than to repeat the words, *ibid.* para 4.10.
[162] *ibid.* para 4.17 and 4.18.
[163] The inspectors found, for example, that not many of the separate waiting rooms provided for witnesses had en-suite toilets and refreshment facilities meaning that witnesses had to venture out alone into the public areas, or wait to be accompanied by a Witness Service volunteer, *ibid.* para 4.30.
[164] Inspectors found that risk assessments tended not to consider the wider implications of how witnesses and their movements were managed within the courthouse, *ibid.* para 4.29.
[165] For instance, defence were often unaware that they could wait in separate witness waiting rooms, *ibid.* para 4.35; In one Area, the Witness Service was relying on Xhibit (HMCS's electronic display system) to inform victims and witnesses of the results of trials. Inaccuracies in this system led to witnesses being misinformed and finding a different outcome reported in the local paper, *ibid.* 4.41; In many areas inadequate effort was made to keep witnesses informed about waiting times, *ibid.* 4.54.
[166] The inspectors found that many witnesses waited too long before giving evidence, *ibid.* 4.64; and that action to address poor performance was minimal, *ibid.* 4.52.
[167] The Greater Manchester Area stated in response, 'This inspection has given us very helpful feedback on the quality of service we provide to victims and witnesses. Whilst we are doing well in some areas, there are aspects in which we need to improve. These recommendations will be complemented by other action we are taking as a result of issues highlighted by the work we did in preparing for the inspection', HMICA, pres release, 'Spotlight on Greater Manchester Courts' (22 December 2005); the Staffordshire Area Director stated, 'This independent assessment in the very early stages of HMCS makes a welcome contribution in our efforts to provide excellent customer service to all court users … there are straightforward things we can and will do at relatively low cost. However the report serves to highlight the significant differences and facilities there are within the courthouses. I will be trying to secure funding to bring about physical improvements within the fabric of some buildings where it is practical and affordable to do so. The report is enabling us to prepare an improvement plan with timescales and

recommendations related to the points of concern and a number of suggestions for further action.[168] HMCS responded in a largely positive manner producing an action plan listing what actions it would take to meet the recommendations and setting improvement targets.[169] Post-inspection reviews conducted by HMICA during 2006-07 found good progress in meeting local recommendations.[170]

The second series of inspections conducted by HMICA focused on the quality of service provided for defendants in the criminal courts. Inspections were carried out in ten HMCS Areas.[171] These inspections again identified a number of strengths and weaknesses. Concerns highlighted included the fact that in all of the areas inspected, at least one courthouse did not provide adequate facilities to enable defendants to meet with their legal representatives in private;[172] where interview rooms were provided they were often not adequately soundproofed;[173] there were shortfalls in the provision of measures to ensure the safety and security of defendants;[174] problems with waiting times;[175] the provision of information was inadequate;[176] and there were concerns expressed about the use of prison-video links.[177]

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responsibilities for individuals in the area. We will have made improvements in our services to victims and witnesses when HMICA conduct a follow up visit', HMICA, press release 'Staffordshire courts build on solid foundations' (17 November 2005).

[168] HMICA, *Valuing victims and witnesses, An overview of inspections undertaken during 2005* (2006). Recommendations collected at 2 and suggestions for further action at 2-3.

[169] *ibid.* 35-40.

[170] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration 2006-2007* (2007) HC 797, 32.

[171] The Areas inspected were, Cheshire, Cumbria, Derbyshire, Durham, Essex, Kent, South West London, West Midlands, West Yorkshire, Wiltshire, HMICA, *Meeting defendants' needs, An overview of the quality of service for defendants in the criminal courts in England and Wales,* 6.

[172] *ibid.* para 3.16.

[173] *ibid.* para 3.21.

[174] For example, ligature points were identified in custody facilities, *ibid.* para 4.15; at a significant number of courts prisoners were transferred between vehicles and court buildings in a public place exposing them to a greater risk of attack and compromising their decency, *ibid* para 4.18; and at some courts prisoners were escorted through public areas to get from the custody facility to a courtroom, *ibid* para 4.19.

[175] The inspectors reported that they 'often encountered defendants who had waited at court for several hours', *ibid* para 5.13; They found that HMCS had 'no standards for how long defendants should have to wait and little evidence of performance management', *ibid* para 5.15.

Responding to the Public Information Booklet a number of the HMCS Areas stressed the importance of the inspection process in helping to bring about improvement.[178] The examples of good practice were passed onto HMCS Head Office to enable exemplary practice to be shared nationally.[179] Four recommendations and a number of suggestions for further action were made to help HMCS tackle the weaknesses identified.[180] HMCS produced a plan detailing the action that would be taken in response.[181] The post-Inspection reviews conducted by HMICA during 2006-07 again found good progress in meeting the recommendations made.[182]

Alongside the individual inspections HMICA has also worked with the other criminal justice inspectorates[183] to provide oversight of the trial courts. In 2005, for example, the findings of a joint inspection of prisoner escort and court custody conducted by

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[176] For instance, most defendants the inspectors spoke to stated they had not received any information prior to their first hearing, *ibid.* para 6.9; the provision of information in other languages was deemed inadequate, *ibid.* para 6.11; inspectors found that defendants had difficulty reading the information provided to them, *ibid.* para 6.13; and noted that, the HMCS website does not provide much on what might happen at court, which is something first-time defendants, in particular, are concerned about', *ibid.* para 6.14.
[177] *ibid.* para 6.26.
[178] See, for example, a comment from the West Yorkshire Area, 'West Yorkshire welcomes HMICA's independent inspection. The objectives and recommendations are a valuable control to our aim of continuing to improve services to court users', HMICA, press release 'Defendants in the West Yorkshire Courts' (11 April 2006); from the Kent Area, 'We accept the findings of the report … recommendations are being acted upon, where possible'. HMICA, press release 'Spotlight on the Courts in Kent' (9 June 2006); from the Essex Area, 'I found the recent inspection an excellent opportunity to review our systems and practices, and we have already commenced work to ensure the recommendations and suggestions of the inspection are met' HMICA, press release, 'Essex Courts Achieve Excellence' (21 July 2006); Comment from the Cumbria Area, 'I have found the recent inspection to be an excellent opportunity to review our systems and practices and have already embarked upon a programme of activity to meet the inspector's recommendations' HMICA, press release, 'Defendants in the Cumbria Courts' (7 April 2006).
[179] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration, 2005-2006* (2006) HC 1294, 24.
[180] HMICA, *Meeting defendants' needs,* An overview of the quality of service for defendants in the criminal courts in England and Wales (2007) 2-3.
[181] *ibid.* Annex A.
[182] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration 2006-2007* (2007) HC 797, 32.
[183] Her Majesty's Inspectorate of Constabulary, Her Majesty's Crown Prosecution Service Inspectorate, Her Majesty's Inspectorate of Prisons and Her Majesty's Inspectorate of Probation.

HMICA[184] and Her Majesty's Inspectorate of Prisons were published. The joint inspection looked at the treatment and conditions experienced by prisoners within court custody facilities and raised a number of concerns. A total of eight recommendations intended to address the areas of greatest concern were put forward.[185] In 2006 HMICA revisited the recommendations made to assess progress.[186]

It is clear that HMICA has succeeded in identifying examples of good practice and uncovering poor practice in the administration of the trial courts. Yet concern might be raised about the adequacy of the oversight provided by HMICA. HMICA examines few of the 42 court Areas each year. In 2005-06 it only examined 15 of the Areas via its individual inspections and these inspections were far from comprehensive. Eight focussed on the service provided to victims and witnesses, seven on the service provided to defendants. The HM Inspectorates with responsibility for overseeing the police,[187] and the CPS[188] provide far more intensive scrutiny.

It is difficult for this level of scrutiny to provide reassurance that there is an independent check on the administration of the courts. It is also debateable whether this degree of inspection is sufficient to enable the type of recommendations that are being made for the whole system. There is certainly scope for a considerably higher level of scrutiny. In 2005-06 HMICA returned £210,000 of its budget unused.[189] It may be that HMICA, being a relatively new body, is just taking time to find its feet. However, HMICA has

[184] The inspection itself was undertaken under the auspices of HMMCSI but the report was published under the logo of HMICA.
[185] HMICA and HMIP, *Thematic Review, The joint inspection of prisoner escort and court custody in England and Wales* (2005).
[186] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration, 2005-2006* (2006) HC 1294, 32-33.
[187] See section 2.2.2.
[188] See section 3.2.2.
[189] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration, 2005-2006* (2006) HC 1294, 18.

not issued any statements about aiming for a more rigorous inspection regime in the future, suggesting that it does not perceive any significant deficiency in the current level of oversight. Even it did wish to raise its inspection level it may no longer have adequate spare resources. Its budget for 2006-07 was 2,385,000 of which it spent 2,363,000, leaving little room for increased expenditure.[190]

The fact that HMICA publishes its inspection reports and its annual report[191] promotes democracy. The public have a right to know how the courts are being administered and their money spent. Such openness is also important to help bolster public confidence and provide reassurance. For the public to be reassured that there is an independent body which checks on the effectiveness of the administration of the court system they need to be made aware of its role and work and to be able to see that it is performing its role effectively. Publishing inspectorate reports and assessments may also help produce improvement. The reports may provide a degree of accountability for poor performance, particularly so if they are picked up by the media. This may place extra pressure on the court Area in question to rectify the problems identified.

It is pleasing, therefore, that efforts are made by HMICA to publicise its Area reports and annual reports. HMICA has a user-friendly website on which all its reports are available.[192] More proactively, the Area inspection reports produced as part of HMICA's focus on the quality of service provided to court users have been made

[190] HMICA, *Annual Report of Her Majesty's Chief Inspector of Court Administration 2006-2007* (2007) HC 797, 57.
[191] The Chief Inspector must make an annual report to the Lord Chancellor as to the discharge of the functions of HMICA, Courts Act 2003 s 60(1). The Lord Chancellor must, within one month of receiving the annual report, lay a copy of it before both Houses of Parliament, Courts Act 2003 s 60(3).
[192] http://www.hmica.gov.uk. For the period April 2006 to March 2007 the HMICA website had 27,957 unique visitors, Hansard HC vol 460 col 537W (14 May 2007).

available in the courts in question. Press releases are also often produced,[193] and, presumably flowing from this, reports occasionally receive coverage in local newspapers.[194] Press releases are not produced in every case though and media coverage is quite infrequent. There is no reason why press releases should not be issued as standard and sent, possibly even with copies of the report, to the local print and broadcast media.

4.3. Public Scrutiny

The public are able to oversee the workings of the trial courts via the publication of reports by the court system; via the fact that the courts are open to the public and as a result of the recently established Community Courts. Selected members of the public are also able to oversee the courts by serving on a jury and by volunteering as a Lay Observer. Media coverage provides oversight of the trial courts and helps open up court proceedings to the public.

4.3.1 The publication of reports, public access and Community Courts

The openness of the court system enables a degree of direct public scrutiny. Those responsible for administering the courts issue reports on a regular basis which detail performance. Both Her Majesty's Courts Service and individual Crown Court centres publish annual reports.[195] The Department for Constitutional Affairs which, until 9 May

[193] Available alongside reports at, http://www.hmica.gov.uk/allpubs.htm.
[194] See, for example, 'Court inspectors praise service but criticise facilities' *Bath chronicle* (February 8 2006); 'Criminal courts pass inspectors' tests' *Hull Daily Mail* (July 29 2005). HMICA also occasionally uses the media to aid its inspection process, see, for example, 'Defendants asked for their verdict' *Derby Evening Telegraph* (April 4 2006); 'Views sought on court service' *This is Wiltshire* (October 20 2005).
[195] HMCS annual reports available at, http://www.hmcourts-service.gov.uk/cms/8592.htm. Crown Court annual reports available at:
http://www.hmcourts-service.gov.uk/publications/annual_reports/crown/index.htm.

2007 had responsibility for running the courts, issued yearly judicial statistics,[196] an autumn performance report,[197] and statistical bulletins detailing particular aspects of court performance.[198] It also commissioned research into selected aspects of the operation and administration of the courts.[199] The Ministry of Justice, which took over responsibility for the running of the courts from the DCA, will continue to publish such material.[200]

As argued in relation to the publication of HMICA reports, making information available to the public on the performance of the courts may provide accountability for poor performance. This may be seen in the statistical bulletins detailing the time taken between stages of proceedings in the magistrates' courts. These bulletins detail performance court by court, allowing comparison and identification of the worst performing courts. Such accountability may provide a spur to more effective performance. The publication of these reports is also arguably important on the basis of democracy and public confidence. The majority of the public may have little interest in such reports but it is nonetheless right that they are made available and can be consulted by those members of the public who do take an interest as well as by the media.

Court openness flows, primarily, from the traditional principle of open justice. In the words of Lord Diplock,

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[196] Available at, http://www.judiciary.gov.uk/keyfacts/statistics/index.htm.
[197] Available at, http://www.dca.gov.uk/dept/dcareports.htm.
[198] Including, the time taken between stages of proceedings for defendants in magistrates' courts (quarterly), and the time adult defendants in criminal cases wait on the days of their hearings (bi-annually). Available at, http://www.dca.gov.uk/statistics/crjust.htm.
[199] See, for example, R Hood, S Shute and F Seemungal, *Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment Research Series No 2/03* (2003). Available at: http://www.dca.gov.uk/research/resrep.htm.
[200] See, http://www.justice.gov.uk/publications/publications.htm.

> 'this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this'.[201]

A number of rationales have been advanced in support of such openness. In the leading case of *Scott v Scott*,[202] Lord Atkinson said, 'in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect'.[203] In *R v Sussex Justices, ex p McCarthy,*[204] Lord Hewart CJ said, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[205] Article 6(1) of the European Convention on Human Rights provides that 'In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing'.

As recognised by Lord Diplock in *AG v Leveller Magazine Ltd,*[206] and in Article 6(1) of the European Convention on Human Rights,[207] it may, in certain circumstances, be necessary to restrict public access to the court. The Official Secrets Act 1920 permits,

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[201] *AG v Leveller Magazine Ltd* [1979] AC 440 (HL) 450. See generally, J Jaconelli, *Open Justice: A critique of the public trial,* (Oxford, Oxford University Press 2002).
[202] [1913] AC 417 (HL).
[203] *ibid.* 463.
[204] [1924] 1 KB 256 (QB).
[205] *ibid.* 259.
[206] 'since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest', *AG v Leveller Magazine Ltd* [1979] AC 440 (HL) 450.
[207] 'the press and public may be excluded from all or part of the trial in the interests 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'.

for example, the exclusion of the public from a trial where the publication of any evidence would be prejudicial to national safety.[208] The Children and Young Persons Act 1933 provides protection from publicity for juveniles by providing that members of the public may only be present at the sitting of a Youth Court if specifically authorised by the court.[209]

Subject to such proper exceptions the trial courts are open to the public and the media. Representatives of the media will often attend to view proceedings. It might be the case that more could be done to make the trial courts more welcoming to the public. In his review of the criminal courts, Lord Justice Auld stated that there was much that could be done to make the court building and the courtroom a more open and less intimidating and confusing place.[210] He recommended that proper signs around the court become standard and that each court have a reception desk to provide information.[211] He suggested that all courts have a layout diagram in the waiting area to remove mystery, and function plates inside the courtroom to clarify for witnesses, jurors and members of the public the role of each person present.[212] There was also scope for enhanced information to be provided via the internet. Auld recommended that court websites be developed to include case lists and to detail the progress of cases.[213]

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[208] Official Secrets Act 1920 s 8(4). See, for example, R Norton-Taylor and P Keel, 'Ponting witness's four-hour secret session / Trial of defence department civil servant' *The Guardian* (30 January 1985); '"Spy" case in camera; Trial of Mr Erwin van Haarlem' *The Times* (2 March 1989); K McVeigh, 'Two accused of leaking secret memo on Bush-Blair Iraq talks: Contents could have put troops at risk, court told: Note detailed strategic discussion, says QC' *The Guardian* (19 April 2007). For further examples see, J Jaconelli, *Open Justice: A critique of the public trial,* (Oxford, Oxford University Press 2002) 139.
[209] Children and Young Persons Act 1933 s 47(2).
[210] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 11 para 165.
[211] *ibid.* ch 11 para 165.
[212] *ibid.* ch 11 para 166.
[213] *ibid.* ch 11 para 164.

In their recent inspections focussing on the quality of service provided for defendants HMICA found that most of the courts they inspected had a reception desk or enquiries counter. These facilities could, however, become very busy at the start of the morning and afternoon court sessions and not all courts had the capacity to cope with demand during the busiest periods.[214] The information displays within courthouses ranged 'from comprehensive and well presented through to virtually non-existent'.[215] The Court Charters for users of the magistrates' courts and the Crown Court, published by Her Majesty's Court Service in January 2007, may help improve the provision of information. The charters promise that courts will provide 'clear signs to help you find your way around' and 'information leaflets on display'.[216] A greater degree of information is now provided on the internet about court proceedings, including Crown Court case lists.[217] At present these lists merely, though, state the name of the defendant and give no details of the case or offence charged.

It is also arguable that as well as providing enhanced information to help those members of the public who are interested in attending court to view proceedings there is scope for greater efforts to be made to educate the public about the fact that they may attend if they wish. It is debateable how many of the public realise they are free to attend a trial and sit in the public gallery. The two government funded websites designed to inform the public about the criminal justice system, Her Majesty's Courts Service site[218] and

[214] HMICA, *Meeting defendants' needs, An overview of the quality of service for defendants in the criminal courts in England and Wales* (2007) para 5.4.
[215] *ibid.* para 5.7.
[216] Charters available at, http://www.hmcourts-service.gov.uk/infoabout/courts_charter/index.htm.
[217] See, http://www.hmcourts-service.gov.uk/onlineservices/xhibit/court_lists.htm.
[218] http://www.hmcourts-service.gov.uk/.

the Criminal Justice System online site,[219] give no details about the public's right to attend a trial.

In summary it is clear that the courts have moved to be more open to members of the public since the time of the Auld review. It also appears, however, that there is scope for further improvement. The provision of information and facilities for the public and the media has so far gone unexamined by HMICA. This may be an area which it might look to investigate in the future. That said, it is unlikely, and understandable, that even if everything is done to make the courts as open and welcoming as possible to the public, that many members of the public unconnected to a case are ever likely to attend. It is perhaps the recommendation that greater efforts be made to educate the public about the openness of trials which is of most importance. Whilst it might do nothing to increase the numbers attending to view proceedings, public confidence in the trial process might be enhanced if a greater proportion of the public were made aware that trial proceedings are not as inaccessible and remote as they may currently appear.

In recent years efforts have been made to provide openness beyond that flowing from the right of access to the public gallery as a spectator. A number of courts have held open days[220] both as one-off events and as part of the now annual, 'Inside Justice Week'.[221] During such days members of the public inspect the court cells, learn about

[219] http://www.cjsonline.gov.uk/.
[220] Open days were held on 13 March 2006 by the Croydon Crown Court and Magistrates' Court, http://www.hmcourts-service.gov.uk/cms/2036.htm; On 9 September 2006 by Lewes Crown Court, http://www.hmcourts-service.gov.uk/cms/8981.htm; On 17 November 2006 by Feltham Magistrates' Court and Stratford Magistrates' Court, http://www.hmcourts-service.gov.uk/cms/2036.htm; and on 25 November 2006 Bishop Auckland Magistrates' Court opened their doors to the public, http://www.hmcourts-service.gov.uk/cms/10093.htm.
[221] See, http://insidejustice.cjsonline.gov.uk.

the functions of their local court and view a mock trial. Such openness may help enhance public understanding of, and confidence in, the trial courts.

A number of Community Justice Initiatives including Community Courts have also been established. In October 2005 the Community Justice Centre in Liverpool was officially opened[222] and on 22 November 2005 the Community Justice Court in Salford sat for the first time.[223] The aim of these Community Courts is to engage directly with the local communities so that they can work together to tackle local crime problems in an effective manner and bolster the confidence of local residents. In the words of the then Home Secretary David Blunkett:

> 'I want ordinary people to feel they are involved in beating crime and meting out punishment to offenders. For people to have confidence in the system they must feel it works on their behalf, is accountable to them and that they are connected to it. The more people are involved in the solution the greater the success'.[224]

The two Community Courts established in 2005 seem to have helped bring justice closer to the community. In Liverpool Judge David Fletcher holds regular meetings with community groups[225] and he has hosted a number of 'meet the judge' evenings.[226] The courts have responded effectively to local community concerns in various ways and the two pilots have generally been deemed a success.[227] This has led to the creation of ten

[222] Community Justice, press release, 'Harman opens first Community Justice Centre' (20 October 2005).
[223] Community Justice Salford, press release, 'Community Justice Salford' (13 December 2005).
[224] Community Justice, press release, 'Serving the community – major international criminal justice conference' (8 July 2003)
[225] See, http://www.communityjustice.gov.uk/northliverpool/about.htm.
[226] See, Community Justice, press release, 'Meet the Judge' (16 October 2006) and for details of the events, http://www.communityjustice.gov.uk/northliverpool/events.htm.
[227] See: K McKenna, *Evaluation of the North Liverpool Community Justice Centre* (Ministry of Justice Research Series 12/07, 2007); S Llewellyn-Thomas and G Prior, *North Liverpool Community Justice Centre, Surveys of local residents* (Ministry of Justice Research Series 13/07, 2007); R Brown and S Payne, *Process Evaluation of the Salford Community Justice Initiative* (Ministry of Justice Research Series 14/07, 2007). These three reports are available at: http://www.communityjustice.gov.uk. See also: Community Justice Centre, North Liverpool, Success Stories,

more Community Justice Initiatives,[228] some of which are already up and running.[229] Furthermore, the Government has announced that HMCS is working to embed community justice principles in all magistrates' courts to ensure that courts are connected to the community and local people are involved more in the work of the courts.[230]

4.3.2 The Jury

Each year around 450,000 members of the public[231] have the responsibility, in a small proportion of crucial trials,[232] to decide on a verdict of guilty or not guilty. This oversight and involvement in the trial process may provide a degree of education about the trial process. Serving as a juror is probably the only time that most of the public will enter a courtroom. Such enhanced understanding may bolster confidence in the criminal process.[233] As well as educating those who take part it may help educate the public

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http://www.communityjustice.gov.uk/northliverpool/210.htm; Community Justice, press release, 'Liverpool's pioneering Community Court comes of age' (20 October 2006); Community Justice, press release, 'Lord Chancellor recognises Manchester Courts' pioneering success' (9 February 2007); HMCS, News Release, 'Local Court Team Wins National Excellence Award' (29 March 2006).

[228] As announced in, Department for Constitutional Affairs, *Delivering Simple, Speedy, Summary Justice* (2006) paras 6.10-6.12. See also the written statement to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor (Lord Falconer), Hansard HL vol 687 col WS65 (27 November 2006).

[229] http://www.communityjustice.gov.uk/index.htm.

[230] 'We are embedding community justice principles in all magistrates courts ensuring that courts are connecting to the community, that they are involving local people more in the work of the court. Making a breakthrough in the experience of the courts does require more than procedural reform. Down the road in Salford and North Liverpool we have seen the confidence that can come when local people feel that the court is there to address their problems, and is engaging them in the solution', Lord Falconer, Making the Breakthrough, (16 May 2007). Transcript of speech available at, http://www.justice.gov.uk/news/sp160507a.htm. See also the written statement to Parliament by the Secretary of State for Constitutional Affairs and Lord Chancellor (Lord Falconer), Hansard HL vol 687 col WS65 (27 November 2006), 'The aim of this next phase of community justice work will be to provide further learning and best practice so that in the long term the principles of community justice are applied in the courts and the criminal justice system throughout England and Wales'.

[231] Figure taken from the juror section of CJS Online, http://www.cjsonline.gov.uk.

[232] In 2005 there were 27,879 jury trials, DCA, *Judicial Statistics (Revised) England and Wales for the year 2005* (2006) Table 6.8. By contrast, there was a total of 1,859,000 defendants proceeded against at magistrates' courts, Home Office, *Criminal Statistics 2005* (2006) Table 2A.

[233] Amongst those who had not performed jury service in the past, over two-fifths (43 per cent) left jury service with a higher level of confidence in the court system than before their service, R Matthews, L Hancock and D Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system, a study of six courts, Home Office Online Report 05/04* (2004) 45.

about the trial process. Jurors occasionally write articles detailing their experiences for the media.[234] The involvement of the jury in a criminal trial and the notion of trial by a group of one's peers seems to enjoy enduring public support.[235] The jury may also occasionally provide protection for a defendant from an arguably oppressive or unjust law or prosecution. In the celebrated words of Lord Devlin, 'trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives'.[236]

In his review of the criminal courts, Lord Justice Auld found that 'juries in England and Wales mostly still do not reflect the broad range of skills and experience or ethnic diversity of the communities from which they are drawn'.[237] Such a lack of representation might undermine the ability of the jury to perform its task and threaten public confidence. The Auld Report recommended that the electoral roll should be supplemented or cross-checked against other sources of information;[238] that with the

[234] See, for example, 'Beyond reasonable doubt: Less than six per cent of all rapes reported to the police result in a conviction, and juries are often blamed for letting rapists walk free. So what's it like to sit on a jury at a rape trial? An anonymous juror offers his unique insight' *The Guardian* (12 April 2007).
[235] Evidence to support this comes from a survey of public opinion commissioned by The Bar Council, The Law Society and The Criminal Bar Association, SWR Worldwide, *Views on Trial By Jury: The British Public Takes the Stand* (2002). A representative survey of 903 members of the general public found, at 4, that 80 per cent of those surveyed had a 'great deal' or 'some' confidence in Juries. The only 'player' in the justice system to enjoy greater confidence was the Police. 85 per cent 'strongly' or 'somewhat' agreed with the statement that 'On the whole, I trust juries to come to the right decision', see 12. Report available at, http://www.barcouncil.org.uk/assests/documents/ViewsonJTrialbyJury.pdf.
[236] Sir P Devlin, *The Hamlyn Lectures, Eighth Series, Trial by Jury* (3rd impression Methuen & Co Ltd, London 1966) 164. For a more sceptical view see, P Darbyshire, 'The Lamp that shows that freedom lives – is it worth the candle' [1991] Crim LR 740.
[237] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 para 11.
[238] *ibid.* ch 5 para 23. In support of this recommendation Auld cited a Home Office research study, J Airs and A Shaw, *Jury Excusal and Deferral, Research Findings No. 102,* Home Office Research, Development and Statistics Directorate (1999). This study found at 2, that about 8 per cent of those eligible to be registered on the electoral register were not registered. Non-registration being particularly high for young people and ethnic minorities, and of the 50,000 jurors included in the sample 13 per cent were ineligible, disqualified or excused as of right and 38 per cent were excused.

exception of those suffering mental illness, everyone should be eligible for jury service;[239] and that no-one should be excusable as of right.[240]

The recommendation that other sources of information be used to supplement the electoral register has not been implemented. The Government's response did, though, note that work was underway by the Electoral Commission to improve the quality of the electoral register and to ensure in particular that more people from minority ethnic communities were registered.[241] The jury diversity research project recently found that selection from the electoral roll produces a representative cross-section of the local population suggesting there is no need for the electoral rolls to be supplemented with additional sources of information.[242] The recommendations on juror eligibility and excusal were, however, implemented.[243] The jury diversity research project found that the new rules had resulted in an increase in the proportion of those serving from those summoned from 54 per cent to 64 per cent, disqualifications being reduced by a third, and excusals falling by a quarter.[244] It also found that contrary to Auld's expressed concern, ethic minority jurors served in appropriate proportions.[245]

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[239] *ibid.* ch 5 para 34. Persons ineligible and excusable were set out in Juries Act 1974 sch 1 part I and part III.
[240] *ibid.* ch 5 para 40.
[241] Home Office, Lord Chancellor and the Attorney General, *Justice for All* (The Stationery Office, 2002) Cm 5563, para 7.28.
[242] Of the 84 Crown Court centres in the survey, there were only two courts where differences between the proportion of BME jurors summoned and the BME population in the court catchment area were statistically significant. As such it concluded that there was clearly no need to alter or supplement the summoning source lists: 'Computerised random selection of jurors from local electoral lists reaches a representative section of the local population for virtually every court in the country', Ministry of Justice, *Diversity and Fairness in the Jury System* (2007) 57-58.
[243] Criminal Justice Act 2003 s 321 and sch 33 amending the Juries Act 1974.
[244] Ministry of Justice, *Diversity and Fairness in the Jury System* (2007) 107.
[245] *ibid.* 86, 123-131, 146-147, 148-150.

In the 18th century Blackstone described trial by jury as the grand bulwark of every Englishman's liberties.[246] Devlin said trial by jury 'gives protection against laws which the ordinary man may regard as harsh and oppressive … an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just'.[247] In *R v Wang,*[248] the House of Lords, affirming its earlier decision in *DPP v Stonehouse*[249] that a judge may not direct the jury to convict, quoted the latter part of Devlin's statement with approval.[250]

In a number of cases the jury has acquitted in the face of overwhelming evidence. Most famously this occurred in *R v Ponting,*[251] despite the judge, McCowan J, making it clear that Ponting had no defence in law.[252] In a number of cases peace campaigners have been acquitted against strong evidence,[253] and in recent years a number of Multiple Sclerosis sufferers charged with possessing cannabis, which they claim helps alleviate pain and distress, have been acquitted.[254] It is assumed, though we have no way of knowing for certain, that in such cases the jury has acquitted because they disapprove of

[246] Sir W Blackstone, *Commentaries on the laws of England, in four books. By Sir William Blackstone* (13th edn London 1800) vol 4, 349.
[247] Sir P Devlin, *The Hamlyn Lectures, Eighth Series, Trial by Jury* (3rd impression Methuen & Co Ltd, London 1966) 160. See also, Lord Devlin, 'The Conscience of the Jury' (1991) 107 LQR 398.
[248] [2005] 2 Cr App R 8 (HL).
[249] [1978] AC 55 (HL).
[250] [2005] 2 Cr App R 8 (HL) para 16.
[251] *R v Ponting* [1985] Crim LR 318. see further, C Ponting, *The right to know: the inside story of the Belgrano Affair* (Sphere Books Ltd, London 1985).
[252] R Norton-Taylor, 'Ponting motives no defence, judge tells jury' *The Guardian* (February 9 1985); R Norton-Taylor, 'Belgrano Extra (the Trial): Search for a scapegoat' *The Guardian* (February 13 1985). The latter reports that, 'his six-hour summing up to the jury … was a direction to convict in all but name'.
[253] For a recent example see, E Addley and R Norton-Taylor, 'Fairford Two strike blow for anti-war protesters after jury decide they were acting to stop crime', *The Guardian* (May 26 2007).
[254] See, R Jenkins, 'Jury clears man over 'medicinal' cannabis' *The Times* (June 6 1998); R Jenkins, 'Jury clears 'medicinal' cannabis grower' *The Times* (July 23 1999); B Farmer, 'Court clears MS patient who used cannabis openly' *The Independent* (March 18 2000); I Herbert, 'MS patient cleared of cannabis possession' *The Independent* (September 29 2000); S de Bruxelles, 'Cannabis smoker wins medical use victory' *The Times* (October 10 2002). Though see also, more recently, and perhaps reflecting a change in the public mood, R Jenkins, 'Cannabis chocolate makers guilty' *The Times* (December 16 2006); J Vasagar, 'Woman, 68, who put cannabis in casseroles guilty of growing drug' *The Guardian* (March 8 2007).

the prosecution or the law, at least as it has been applied in the instant case, and feel that the allegedly criminal conduct was in fact morally acceptable.

Criticising the power of the jury to acquit against the weight of evidence, Darbyshire asks, 'What business have the jury to be rewriting the law … We have elected the House of Commons and selected the Law Lords to re-write the law for us'.[255] In acquitting someone in these cases the jury is not, however, rewriting the law. They are merely giving an indication from the 'grass roots' to the appropriate authorities that the particular prosecution or the law may be inappropriate. It is left to Parliament to re-write the law if MPs so choose. Just as the CPS has discretion in deciding whether to prosecute or not, the jury provides another 'public interest' filter. Auld regarded 'the ability of jurors to acquit … in defiance of the law and in disregard of their oaths, as … a blatant affront to the legal process and the main purpose of the criminal justice system – the control of crime'.[256] It is arguable, though, that the conviction of someone such as Clive Ponting would have done more damage to confidence in the criminal justice system than his acquittal. Without public confidence in the criminal justice system it will struggle to control crime. It is also arguable that conduct in relation to which juries have refused to deliver a guilty verdict time after time, such as Multiple Sclerosis sufferers possessing cannabis, is clearly not regarded by a significant section of the population as conduct worthy of control by the criminal justice system. The people are often way ahead of Parliament and the law on where the law should be. Such decisions give a powerful indicator of societies views.

[255] P Darbyshire, 'The Lamp that shows that freedom lives – is it worth the candle' [1991] Crim LR 740, 750.
[256] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 para 105.

In 1954 Sir Travers Humphreys wrote, 'I cannot bring myself to believe that there are any persons other than the inmates of a lunatic asylum who would vote in favour of the abolition of trial by jury in serious criminal cases'.[257] That is, however, precisely what Parliament has done in recent years. Prompted by the recommendations of the Fraud Trials Committee[258] and Auld's review,[259] the Criminal Justice Act 2003 provides for trial to be conducted without a jury in serious and complex fraud cases.[260] It also provides for trial without a jury if there is evidence that jury tampering would take place,[261] or appears to have taken place.[262] The Domestic Violence, Crime and Victims Act 2004 provides that a sample of charges may take place before a jury with the rest of the counts being tried by the judge without a jury.[263]

Most controversial, and still not yet in force, are the provisions seeking to restrict the right to trial by jury in serious and complex fraud cases. The Fraud Trials Committee believed that 'the most complex of fraud cases will exceed the limits of comprehension of members of a jury',[264] and that in such cases, 'many jurors are out of their depth'.[265]

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[257] T Humphreys, 'Do We Need a Jury?' [1956] Crim LR 457, 459.
[258] Lord Roskill (chairman), *Fraud Trials Committee Report* (Her Majesty's Stationery Office, London 1986). The Committee concluded, with one dissentient, that certain types of fraud cases are of such complexity that jury trial was unsatisfactory. They felt that a judge and two specially qualified lay members would be the most appropriate tribunal to try complex fraud cases, ch 8.
[259] Auld recommended that as an alternative to trial by judge and jury in serious and complex fraud cases, the nominated trial judge should be empowered to direct trial by himself sitting with lay members, or where the defendant agrees, trial by judge alone, Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 paras 173-206.
[260] Criminal Justice Act 2003 s 43.
[261] *ibid.* s 44. This section came into force on 24th July 2006, The Criminal Justice Act 2003 (Commencement No. 13 and Transitional Provision) Order 2006, SI 1835 / 2006.
[262] *ibid.* s 46.
[263] Domestic Violence, Crime and Victims Act 2004 s 17-20. Implementing the recommendations made by the Law Commission in, *The Effective Prosecution of Multiple Offending, Law Com No 277* (2002). Sections 17 to 20 of the Domestic Violence, Crime and Victims Act 2004 came into force on 8 January 2007, The Domestic Violence, Crime and Victims Act 2004 (Commencement No. 7 and Transitional Provision) Order 2006, SI 3423 / 2006.
[264] Lord Roskill (chairman), *Fraud Trials Committee Report* (Her Majesty's Stationery Office, London 1986) para 8.34.
[265] *ibid.* para 8.35.

Lord Justice Auld agreed.[266] It is though, as noted by the Runciman RCCJ 1993,[267] difficult to reach such conclusions in the absence of evidence.[268] Furthermore, the limited evidence that is available seems to suggest that juries may in fact be able to comprehend the evidence quite adequately. Following the collapse of the Guinness fraud trial the foreman of the jury stated that the jurors had not found it unduly difficult to understand the evidence.[269] Research into the collapse of the fraud and corruption trial, *R v Rayment and others,*[270] interviewed 11 of the jurors and found that they, 'did not appear to have had difficulty understanding the evidence or the essentials of the case presented to them'.[271]

For the provisions restricting the right to jury trial in fraud cases to come into force a draft of the relevant statutory instrument has to be approved by both Houses of Parliament.[272] An attempt to introduce the relevant sections in 2005 was abandoned

[266] 'The fact is that many fraud and other cases, by reason of their length, complexity and speciality, now demand much more of the traditional English jury than it is equipped to provide', Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 para 183.

[267] 'We have indeed had put to us suggestions that, as recommended by a majority of the Roskill Committee, juries should no longer be used for trials of complex and serious fraud…however, the statutory bar on research into juries means that we have no basis for making any recommendations for dispensing with juries, whether for serious and complex fraud or for other long trials'. Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 8 para 76.

[268] The Fraud Trial Committee's view was, in part, based on a research project conducted with individual volunteers, Lord Roskill (chairman), *Fraud Trials Committee Report* (Her Majesty's Stationery Office, London 1986) paras 8.33-8.34. This research was published, Fraud Trials Committee, *Improving the presentation of information to juries in fraud cases* (HMSO, 1986). For criticism of the research see, TM Hoeness, M Levi, EA Charman, 'Juror Competence in Serious Frauds Since Roskill: A research-based assessment' (2003) 11 Journal of Financial Crime 17, 19-20.

[269] F Gibb, 'Juror's comments increase pressure for court reform' *The Times* (3 March 1992).

[270] Generally referred to as the Jubilee Line case.

[271] HMCPSI, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (2006) para 11.7. Review and transcripts of the interviews available at: www.hmcpsi.gov.uk. For further reflection on the interviews by the researcher who conducted them see, S Lloyd-Bostock, 'The Jubilee Line Jurors: Does Their Experience Strengthen the Argument for Judge-Only Trial in Long and Complex Fraud Cases' [2007] Crim LR 255. For similar findings based on a simulation of the Maxwell trial see: TM Honess, 'Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial' Crim LR [1998] 763; TM Honess, M Levi, EA Charman, 'Juror Competence in Serious Frauds Since Roskill: A research-based assessment' (2003) 11 Journal of Financial Crime 17.

[272] Criminal Justice Act 2003 s 330(5)(b).

when it was realised it was going to fail.[273] A more recent attempt to remove the requirement that the commencement of section 43 be affirmed by both Houses of Parliament,[274] with the result that section 43 could be implemented by means of a commencement order made by the Secretary of State without further parliamentary procedure, failed in the House of Lords.[275] It is right that these provisions continue to be held back given the importance of the oversight provided by the jury in criminal cases and the uncertain empirical basis for the argument in favour of restricting the right to jury trial in serious and complex fraud cases.

It is important that the jury is, itself, subject to a degree of oversight. The courts have, within limits, provided a check on behaviour which might bring into question whether or not the jury reached its verdict independently and impartially, based solely on the evidence.[276] In a number of cases a note has been passed from a juror, or the entire jury,[277] to the trial judge alleging juror impropriety, including, racial bias against the defendant.[278] The trial judge has tended to respond by enquiring of the jury whether they are capable of trying the case impartially and re-directing the jury as to their duty to attempt to ensure the impartiality of the tribunal.[279] Where it is alleged that some

[273] C Dyer, 'Goldsmith fights to save plans for no-jury fraud trials' *The Guardian* (26 November 2005).
[274] Fraud (Trials without a Jury) Bill, Clause 1.
[275] Hansard HL vol 690 cols 1146-1204 (20 March 2007).
[276] Article 6(1) of the European convention on human rights requires that, 'in the determination of … any criminal charge against him, everyone is entitled to a fair … hearing … by an independent and impartial tribunal…'
[277] The trial judge is now required to warn the jury that 'it is the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern', *Practice Direction (Crown Court: Guidance to Jurors)* [2004] 1 WLR 665.
[278] See, *Gregory v United Kingdom* (1998) 25 EHRR 577; *Sander v United Kingdom* (2001) 31 EHRR 44; *R v Smith* [2005] 1 WLR 704.
[279] Though such redirection has not always been sufficient. In *Sander* the European The European Court of Human Rights held by four votes to three that there had been a violation of Article 6(1), the court felt that the judge should have reacted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence. By failing to do so, the trial judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court. In *Smith* the House of Lords ruled that the judge was justified in the

'extrinsic factor' has impacted upon the jury the courts have investigated and taken action which has included quashing a conviction and ordering a retrial.[280] If an investigation is ordered, the CCRC may be directed by the Court of Appeal to question jurors.[281]

Where the alleged impropriety relates to something intrinsic to the jury and their deliberations the courts were, until recently, prohibited from investigating further by the Contempt of Court Act 1981. This provides that 'it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations'.[282] In *R v Young*[283] the Court of Appeal ruled that this section applied to the courts just as it applied to everyone else.[284] In *R v Mirza,*[285] however, the House of Lords stated that section 8(1) did not prohibit investigations by the courts.[286] The courts are, though, restricted in their investigations by the long-standing common law rule. In the words of

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circumstances in giving the jury a further instruction rather than discharging the jury. The direction given was not, however, sufficiently comprehensive or emphatic.

[280] In, for example, *R v Young* [1995] QB 324 (CA), it was alleged by one of the jurors following the conclusion of a murder trial that whilst accommodated overnight in a hotel some of the members of the jury purported to make contact with the victim, Harry Fuller, via a ouija board and to have received certain information from him bearing upon the case. The Court ruled that the jury's stay in a hotel was a hiatus between sessions in the jury room and was not a period during which the jury as a whole was in the course of its deliberations so the court had jurisdiction to inquire into what had happened at the hotel. Affidavits were taken from each of the 12 jurors and considered by the Court of Appeal. The court concluded that the ouija session amounted to a material irregularity and the appeal against conviction was allowed. See similarly, *R v Hood* [1968] 1 WLR 773 (CA); *R v Brandon* (1969) 53 Cr App R 466 (CA); *R v Sawyer* (1980) 71 Cr App R 283 (CA); *R v Spencer, R v Smails* [1987] AC 128 (HL); *R v McCluskey* (1994) 98 Cr App R 216 (CA); *R v Appiah* [1998] Crim LR 134 (CA); *R v Davis, Rowe, Johnson* [2001] 1 Cr App R 8 (CA).

[281] See, *R v Davis, Rowe, Johnson* [2001] 1 Cr App R 8 (CA) para 75-77.

[282] Contempt of Court Act 1981 s 8(1).

[283] [1995] QB 324 (CA).

[284] In the words of Lord Taylor at *ibid.* 330, 'We are in no doubt that section 8(1) applies to the court as to everyone else'.

[285] [2004] 1 AC 1118 (HL).

[286] In the words of Lord Slynn at *ibid.* 1146, 'it seems to me clear that in enacting section 8 of the Contempt of Court Act 1981 … Parliament did not intend to fetter the power of a court to make investigation as to the conduct of a trial. Properly constructed, section 8(1) does not apply to the court of trial or to the Court of Appeal hearing an appeal in that case. It cannot properly be read as categorising what the court does in the course of its investigation as a contempt of the court itself. What was said in *R v Young (Stephen)* [1995] QB 324, 330 should not be followed'.

Lord Parker CJ in *R v Thompson*,[287] 'It has for long been a rule of practice, based on public policy, that the court should not inquire by taking evidence from jurymen as to what did occur in either the jury box or the jury room'.[288] This common law rule has been restated and applied in a number of subsequent cases.[289] In *R v Miah*[290] it was said that the rule extended 'to cover anything said by one juror to another about the case from the moment the jury is empanelled'.[291]

In *Ellis v Deheer*[292] Atkin LJ said that the reason why evidence of the jury's deliberations is not admitted is twofold, 'on the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict'.[293] In *Gregory v United Kingdom*[294] the European Court of Human Rights acknowledged the rule governing the secrecy of jury deliberations as 'a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard'.[295]

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[287] (1962) 46 Cr App R 72 (CA).
[288] *ibid.* 75-76. One of the authorities cited by Lord Parker was the civil case of Ellis v Deheer [1922] 2 KB 113 (CA). In the words of Bankes LJ at 117-118, 'I desire to make it clear that the Court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision, whether the discussion took place in the jury room after retirement or in the jury box itself'.
[289] *R v Bean* [1991] Crim LR 843 (CA); *R v Scholfield* [1993] Crim LR 217 (CA); *R v Less* The Times March 30 1993 (CA); *R v Miah* [1997] 2 Cr App R 12 (CA); *R v Millward* [1999] 1 Cr App R 61 (CA); *R v Qureshi* [2002] 1 WLR 518 (CA); *R v Mirza* [2004] 1 AC 1118 (HL); *R v Smith* [2005] 1 WLR 704 (HL).
[290] [1997] 2 Cr App R 12 (CA).
[291] *ibid.* 18. In *R v Mirza* [2004] 1 AC 1118 (HL) Lord Slynn said, at 1143, 'the prohibition on receipt of evidence takes effect from the moment the jury is empanelled and covers not only what took place in the jury box or the jury room but covers any statement as to what the jury believed the attitude of other jurors to be as deduced from their behaviour in the box or as to what the juror thought the effect of the verdict to be'.
[292] [1922] 2 KB 113 (CA).
[293] *ibid.* 121. See further, all five judgments in *R v Mirza* [2004] 1 AC 1118 (HL).
[294] (1998) 25 EHRR 577
[295] *ibid.* para 35.

Against this traditional view, it has been strongly argued that the courts should be able to receive relevant evidence where impropriety is alleged.[296] In his review of the criminal courts Lord Justice Auld stated that 'the effective bar that section 8 puts on an appellate court inquiring into and remedying possible bias or other impropriety in the course of a jury's deliberations is indefensible and capable of causing serious injustice'.[297] His Lordship would presumably extend the same critique to the common law prohibition after *Mirza*. In his dissenting judgement in *Mirza* Lord Steyn argued that the restrictive view adopted by the majority 'will gnaw at public confidence in juries'.[298]

In 2005 the Government consulted on the possibility of amending the law to permit wider investigation into juror impropriety by the courts.[299] Its preferred view was to leave decisions as to whether and how allegations of jury impropriety should be handled to the courts to consider on a case-by-case basis, rather than making amendments to statute.[300] This option received support from most respondents to the consultation paper,[301] and the Government, not surprisingly, reaffirmed that it remained of the view that this was the best course of action.[302]

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[296] See, N Haralambous, 'Investigating Impropriety in Jury Deliberations: A Recipe for Disaster?' (2004) 68 J Crim L 411; K Quinn, 'Jury Bias and the European Convention on Human Rights: A well-kept secret' [2004] Crim LR 998; L McGowan, 'Trial by Jury: Still a Lamp in the Dark' (2005) 69 J Crim L 518; PR Ferguson, 'The Criminal Jury in England and Scotland: the confidentiality principle and the investigation of impropriety' (2006) 10 E & P 180.
[297] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 para 98.
[298] [2004] 1 AC 1118 (HL) 1137.
[299] Department for Constitutional Affairs, *Jury Research and Impropriety, A consultation paper to assess options for allowing research into jury deliberations and to consider investigations into alleged juror impropriety, Consultation Paper* (2005) CP 04/05.
[300] *ibid.* 48.
[301] Department for Constitutional Affairs, *Jury Research and Impropriety, Response to Consultation* (2005) CP 04/05, 11.
[302] *ibid.* 17.

It seems, from the recent case of *R v Adams,*[303] that leaving the courts to develop the matter on a case by case basis might, by itself, produce wider investigation. In this case the CCRC took the view that, following the decision of the House of Lords in *Mirza,* the scope for inquiry into an allegation of jury bias was wider than hitherto.[304] Eleven members of the jury were interviewed by the CCRC and four gave evidence to the Court of Appeal. This evidence included details of conversations which had taken place between jurors in the jury room, material which clearly goes beyond that previously admissible. In the words of Gage LJ giving the judgement of the court, 'in our judgement, in this appeal, hearing evidence from these jurors was the only way to resolve the issue of bias'.[305] The court went on to say that since judges are now advised to tell jurors that they should report any irregularities to the court the circumstances in which the Court of Appeal will need to hear evidence from a juror or jurors are 'likely to be rare and exceptional' as silence from the jury at trial stage 'will in our opinion almost certainly mean that this court will assume that none occurred'.[306] This case nonetheless indicates that, following *Mirza*, the courts have the power to inquire further than was previously the case and to hear evidence about communications between jurors in the jury room, should they choose to do so in the future.

The jury has also been subjected to oversight by various administrative bodies and academics conducting research. Such studies have, for example, looked at jurors' perceptions, understanding, confidence, and satisfaction following their service.[307] The jurors in the Jubilee Line case were interviewed about their understanding of the

[303] (2007) 1 Cr App R 34 (CA).
[304] *ibid.* para 160.
[305] *ibid.* para 176.
[306] *ibid.* para 180.
[307] R Matthews, L Hancock and D Briggs, *Jurors' perceptions, understanding, confidence and satisfaction in the jury system, a study of six courts, Home Office Online Report 05/04* (2004).

evidence following the collapse of the case.[308] Researchers and Government inspectors have also investigated the support given to juries and how this could be improved[309] and the representativeness of juries.[310] More intrusive research looking at the deliberations of jurors remains prohibited by the Contempt of Court Act 1981.[311]

The RCCJ 1993 recommended that section 8(1) of the Contempt of Court Act 1981 be amended to permit research to be carried out into the way in which juries reach their verdicts so that more informed recommendations for reform could be made.[312] Others have argued that allowing such research might undermine confidence in the jury system.[313] Auld advocated careful consideration of existing research material throughout the common law world on jury trial, and further research of the non-intrusive variety that does not violate the 1981 Act, rather than amendment of section 8(1).[314] In 2005 the Government consulted on the possibility that the law might be amended to allow research into a jury's deliberations.[315] Most respondents were in favour of allowing some degree of research into the jury decision-making process.[316]

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[308] HMCPSI, *Review of the Investigation and criminal proceedings relating to the jubilee line case* (2006).
[309] See, for example, HMICA, *A thematic review of quality of service provided by HMCS for jurors in the criminal courts* (2006).
[310] Ministry of Justice, *Diversity and Fairness in the Jury System* (2007)
[311] s 8(1).
[312] Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, para 8 and 52.
[313] JC Smith, 'Is Ignorance Bliss? Could Jury Trial Survive Investigation?' (1998) 38 Med Sci Law 98; Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5, paras 79-80.
[314] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 para 87. Research previously conducted on the jury throughout the common law world was analysed for the Criminal Courts Review by Darbyshire, see, P Darbyshire, A Maughan and A Stewart, 'What Can the English Legal System Learn From Jury Research Published up to 2001?'. Available at, www.criminal-courts-review.org.uk. For a summary of this report see, P Darbyshire, 'What can we learn from published Jury Research? Findings for the Criminal Courts Review 2001' [2001] Crim LR 970.
[315] Department for Constitutional Affairs, *Jury Research and Impropriety, A consultation paper to assess options for allowing research into jury deliberations and to consider investigations into alleged juror impropriety, Consultation Paper* (2005) CP 04/05, 31.
[316] Department for Constitutional Affairs, *Jury Research and Impropriety, Response to Consultation* (2005) CP 04/05, 6.

The Government concluded though, like Auld, that before any amendments were made to statute, more research could be done within the confines of the current law.[317]

It certainly seems that there is scope for more research than has currently been conducted. As noted by the Jury Diversity Research Project, 'the existence of section 8 has created great confusion about what research can and cannot be conducted with jurors'.[318] The resulting hesitancy to conduct research 'has created an information vacuum about juries in this country in recent years'.[319] This hesitancy is, however, uncalled for as, 'contrary to common assumption … [s 8] does not in fact prevent most research about juries'.[320] It is to be hoped that the recent examples of research studies briefly summarised here may illustrate a trend towards more intensive scrutiny of the jury. Given the apparent confusion about the degree of intrusion permitted it may be appropriate if the Ministry of Justice takes the lead in commissioning research projects on the jury.

Further openness as regards jury deliberations could also be introduced if another one of Auld's recommendations were pursued. Auld suggested that juries be given a series of questions by the judge which would lead to a verdict of guilty or not guilty, and where appropriate be required to answer these questions publicly.[321] Auld felt that such openness might enhance public confidence in the jury decision making process.[322] It might also improve the oversight provided by the Court of Appeal.[323] The reluctance of

[317] *ibid.* 16.
[318] Ministry of Justice, *Diversity and Fairness in the Jury System* (2007) 5.
[319] *ibid.* 5.
[320] *ibid.* 5.
[321] Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationery Office, London 2001) ch 5 paras 88-97 and ch 11 paras 50-55.
[322] *ibid.* ch 5 para 89.
[323] *ibid.* ch 11 para 53.

the Court of Appeal to overturn convictions on the basis of a 'lurking doubt'[324] about the correctness of the verdict has been criticised.[325] The court might be less reluctant to overturn verdicts on the basis of a lurking doubt if it could study the reasoning of the jury. This is a proposal which seems to have merit. The jury may already proceed through such questions if jurors take notes during the trial judge's summing up. Answering such questions publicly may disclose that the jury have understood the issues and produced a verdict which stands up to scrutiny thereby enhancing confidence and a sense that justice has been done or, if they have not, allows an appeal by the defence against an irrational verdict. The fact that inquest juries can now give narrative verdicts[326] might suggest that the jury in a criminal trial is quite capable of explaining its reasoning.

Auld also recommended, however, that a right of appeal be given to the prosecution against a verdict disclosed as perverse by the question answers.[327] This would greatly restrict the scope for acquittals against the evidence.[328] It has been argued that the right

[324] In *R v Cooper* [1969] 1 QB 267 (CA) Lord Widgery said, at 271, 'the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done'.
[325] The RCCJ, suggested that the Court of Appeal was overly reluctant to quash convictions on this basis. All of the commissioners were of the opinion, 'that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past … more willing to consider arguments that indicate that a jury might have made a mistake', Viscount Runciman (chairman) *The Royal Commission on Criminal Justice* (Her Majesty's Stationery Office, London 1993) Cm 2263, ch 10 para 3. The RCCJ was helped towards this view by the findings of a research study conducted on its behalf by Malleson. In the first 300 appeals against conviction which the Court considered in 1990 the possibility of a 'lurking doubt' was referred to directly in only 8 cases, though the Court appeared to have the principle in mind in a further 2 cases. In 6 cases the Court held that there was a 'lurking doubt' sufficient to render the conviction unsafe, K Malleson, *A Review of the Appeal Process, RCCJ Research Study No 17* (Her Majesty's Stationery Office, London 1993) 11. It seems that the Court of Appeal may, despite the urgings of the RCCJ, still be taking a restrictive approach. In 2002 Malleson's study was replicated by Roberts. She found that the principle of lurking doubt was referred to directly or indirectly in only seven of the 300 appeals, with one allowed and six dismissed or refused. S Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal' (2004) 1(2) Justice Journal 86, 88.
[326] *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 (HL). See section 5.1.3.
[327] *ibid.* ch 12 paras 66-67.
[328] Auld did recognise that, 'a determined and sufficiently conspirational jury could still manage it [to deliver such an acquittal] in their answers to one or more of the individual questions of fact', *ibid.* ch 11 para 54.

of the jury to acquit against the evidence could be protected by requiring reasons in the case of a verdict of guilty but not if the jury chooses to acquit.[329] Alternatively, the jury could still be required to give reasons in the case of an acquittal but the prosecution right of appeal should not perhaps be introduced. If jurors acquit against the evidence because they object to the prosecution or the law, giving reasons for their verdict would make this explicit. Jackson argues that this could lead to unnecessary conflict with the legal system and that the jury's exercise of nullification is best viewed as a private act of dissent.[330] It is arguable, though, that such conflict already arises, as in certain cases it is presumed and widely acknowledged, whether correctly or not, that the jury have acquitted against the evidence because jurors disagreed with the law or the prosecution. Furthermore, as was argued previously, the jury nullification role can provide an important reform indicator for those sitting in Parliament. This would be all the more so if the jury were able to state their view clearly. It has been argued that to protect the jury nullification role any statement of issues given by the judge 'must end with the most unequivocal proclamation of the jury's right to bring in an acquittal regardless of the evidence because it regards a conviction as morally unacceptable'.[331] This is probably going too far towards encouraging such acquittals. Jury nullification would be adequately protected by making clear that the questions were for guidance only.

4.3.3 Lay Observers

The Criminal Justice Act 1991 provided for the establishment of panels of Lay Observers (LOs) to inspect the conditions in which prisoners are transported or held at

[329] J Jackson, 'Modes of Trial: Shifting the balance towards the professional judge' [2002] Crim LR 249, 269-270; J Jackson, 'Making Juries Accountable' (2002) 50 Am J Comp L 477, 517; AM Prichard, 'A reform for jury trial?' (1998) 148 NLJ 475, 476 and 478.
[330] J Jackson, 'Modes of Trial: Shifting the balance towards the professional judge' [2002] Crim LR 249, 270; J Jackson, 'Making Juries Accountable' (2002) 50 Am J Comp L 477, 517.
[331] AM Prichard, 'A reform for jury trial?' (1998) 148 NLJ 475, 476.

court and to make recommendations to the Secretary of State.[332] Such oversight may provide important protection for the rights and well-being of those detained in court cells. Reports are produced following inspections and forwarded to the courts. Criticisms made may produce action designed to improve conditions. The fact that members of the local community may inspect the conditions within courts may enhance public confidence and contribute to wider participation in the tasks of governance. The production of reports may also provide information on the conditions within courts for the public which has been argued previously to be appropriate in a developed democracy.

It is difficult to assess the effectiveness of the oversight provided by Lay Observers given that there is so little information in the public domain about how they perform their task. There are, though, indications that they make a positive contribution to protecting rights and improving conditions for those detained within courts. The joint thematic review of prisoner escort and court custody conducted by HMICA and HMIP states that, 'Lay Observers provide a valuable voluntary service, which helps ensure prisoners are appropriately cared for whilst under escort or in court custody'.[333] Jennifer Ball, a former chair of the Greater London Panel of LOs, reported that in 2001 her observer panel made 507 visits to all the magistrates', youth and Crown Court centres in London, spoke to 2,829 prisoners in the course of their visits and made observations on lighting, heating, ventilation and cleaning.[334] To give a specific example of improvement stimulated by LO inspection, the joint inspection of the Surrey Criminal Justice Area conducted in 2005 by HM's criminal justice inspectorates noted that, 'The

[332] Criminal Justice Act 1991 s 81(1)(b).
[333] HMICA and HMIP, *Thematic Review, The joint inspection of prisoner escort and court custody in England and Wales* (2005) para 62.
[334] J Ball, 'Lay Observers' (2003) 59 Magistrate 239.

condition of the custody suites was good; improvements to décor and cleaning schedules having been made during the preceding 18 months, following sustained pressure from the escort contractor and Lay Observers'.[335]

Even on the limited information available, there is evident scope for bolstering the oversight provided by LOs. On their fourth periodic visit to the United Kingdom in 2001 the Council of Europe's, Committee for the Prevention of Torture visited the cells at three courts in London. The CPT requested information about the LOs' activities and on the action taken upon their recommendations.[336] In their response the Government stated that the court manager had not received any correspondence from the LOs in the last two years and had never seen any observers on site.[337] The joint thematic review of prisoner escort and court custody found that the effectiveness of LOs in ensuring prisoners were appropriately cared for was inhibited by the fact that their reports went predominantly to the Home Office and did not effectively incorporate the Department for Constitutional Affairs and the courts, from where improvements to facilities could be delivered.[338] Their effectiveness was also limited by the absence of agreed standards, against which they could judge treatment and conditions.[339] To illustrate this inhibited role, the 2004 joint inspection of the Gloucestershire Criminal Justice Area found that the LOs had drawn attention to the poor conditions for prisoners and staff, and health

[335] HMIC, HMCPSI, HMMCSI, HMIP, HMIP, *The Joint Inspection of the Surrey Criminal Justice Area* (2005) para 8.70.
[336] CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) para 29.
[337] CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) para 35.
[338] HMICA and HMIP, *Thematic Review, The joint inspection of prisoner escort and court custody in England and Wales* (2005) para 61.
[339] *ibid.* para 46 and 62.

and security hazards in the court custody suites. These observations had not been acted upon and they were not pursued by the LOs in subsequent reports.[340]

The effectiveness of the LOs in improving the conditions for prisoners might be enhanced if Her Majesty's Inspectorate of Court Administration were to pay greater attention to their reports and recommendations. HMICA has rarely considered the role or recommendations of LO panels. It is particularly striking that their examination of the quality of service for defendants in the criminal courts[341] made no mention of any oversight or recommendations provided by the LOs. Yet LOs have vital insight and knowledge gained from far more frequent inspection than HMICA are ever likely to provide, this expertise should be put to better use. Greater examination of LOs work by HMICA could also provide a check to ensure that LOs are performing their role effectively.

The fact that there is such limited information available publicly about the LOs also gives rise to concern. Information about the picture 'below the stairs' in courts which they could make available, and which it is arguably right and proper is made available in a democracy, is not provided. It is difficult for the LOs' inspection role to enhance public confidence if efforts are not made to educate the public about their existence. They may also struggle to recruit new panel members with such a low public profile.[342]

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[340] HMIC, HMCPSI, HMMCSI, HMIP, HMIP, *The Joint Inspection of the Gloucestershire Criminal Justice Area* (2004) para 9.30.
[341] HMICA, *Meeting defendants' needs, An overview of the quality of service for defendants in the criminal courts in England and Wales* (2007). See also, the ten individual Area reports.
[342] Though there has been occasional efforts to use the media for this purpose, See, 'Volunteer vacancies' *Express and Echo (Exeter)* (November 30 2006); 'Help oversee the welfare of prisoners' *This is Local London* (April 12 2002); 'Wanted: Court visitors' *This is Local London* (January 3 2001); 'Volunteers needed for prison visits' *This is Local London* (January 3 2001); 'Call for Volunteers to keep an eye on Jailers' *The Northern Echo* (January 17 1997).

This lack of information compares unfavourably with the openness provided by Independent Custody Visitors, who have responsibility for visiting police stations[343] and, is particularly stark when viewed against the information published by Independent Monitoring Boards, who inspect prisons.[344] These bodies have developed websites on which reports detailing their work are available and have made efforts to publicise themselves. One explanation for this disparity may relate to the fact that there is a central administrative body helping run and publicise ICV and IMBs. By contrast, in 2003 Jennifer Ball stated that LOs 'remain without regular clerking'.[345] There is no indication that an administrative body has yet been set up to provide central support for the LO panels. If this is the reason for the limited publishing of information, this underlines the need for greater administrative support. There is certainly a case for making LO reports available publicly and generally doing more to raise the profile of the work and role of the LOs. A higher profile might even help ensure that HMICA pays greater attention to the work and recommendations of the LOs.

4.3.4 Media reporting

As touched upon throughout this chapter, the media provides important coverage of the work of the mechanisms which oversee the trial courts including, in particular, the CCRC and HMICA. The extent to which such oversight bolsters public confidence in the criminal justice system, provides the kind of transparency required in a democracy and accountability for poor performance, hinges largely on the degree of media coverage. The public are unlikely to search out such information on their own.

[343] See section 2.3.4.
[344] See section 5.3.3.
[345] J Ball, 'Lay observers' (2003) 59 Magistrate 239.

The media also provide direct scrutiny of court proceedings, including, in particular, oversight of the trial courts and the appeal courts. The second aspect of a public trial, as set down by Lord Diplock in *AG v Leveller Magazine Ltd,*[346] requires that, subject to certain proper exceptions,[347] nothing should be done to discourage the publication to a wider audience of fair and accurate reports of proceedings that have taken place in court.

Media reporting of trial proceedings may aid effective performance in the sense that it might enhance the deterrent effect of the criminal justice system. In the words of Duff, 'public convictions may more effectively dissuade actual and potential offenders from crime'.[348] It may enhance performance by providing a degree of accountability where, for instance, judges make inappropriate remarks or pass inappropriately light sentences.[349] This accountability may, in turn, act as a spur to others to perform better in future. On occasions reporting on the trial courts may go beyond reporting on an individual trial to highlight failings in the administration and functioning of the

[346] [1979] AC 440 (HL) 450.
[347] See, for example, the Contempt of Court Act 1981 s 2(2) which prohibits the publication of material which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced; the Contempt of Court Act 1981 s 4(2) gives the court the power to order that the reporting of a matter be delayed to avoid a substantial risk of prejudice to the administration of justice; the Contempt of Court Act 1981 s 11 enables the court to prohibit the publication of a name or other matter withheld from the public in proceedings before the court; anonymity is granted to a range of sexual offence complainants, Sexual Offences (Amendment) Act 1992, as amended by the Youth Justice and Criminal Evidence Act 1999 sch 2; and there are various restrictions on identifying young persons caught up in the criminal process, Children and Young Persons Act 1933 s 39 and 49.
[348] RA Duff, *Trials and Punishments* (Cambridge University Press, Cambridge, 1986) 148.
[349] See for example, most famously, the outcry over the comments by Judge Starforth Hilll when sentencing a man who had admitted a charge of attempted unlawful intercourse with an 8-year-old girl to two years probation, that he had been provided with information which led him to think that, 'she was not entirely an angel herself', R Duce, 'Judge under fire for freeing sex attacker of 8-year-old girl' *The Times* (June 9 1993). On referral by the Attorney General the Court of Appeal said that the judge's remark was unacceptable and a custodial sentence of four months imprisonment was imposed, *Attorney General's Reference No 13 of 1993* The Independent July 30 1993. See further, A Wade, 'When justice is caught napping: This judge fell asleep twice during a rape trial. Thirty seven of his cases were successfully appealed. And yet his only punishment was a reprimand. Alex Wade on the judges who get it wrong'. *The Guardian* (December 16 2003). In June 2006 the Sun Newspaper launched a campaign naming and shaming judges it deemed 'guilty of being soft on killers, child sex beasts, rapists and other violent criminals', For a taster see, G Pascoe-Watson, 'Guilty' *The Sun* (June 12 2006).

courts.[350] The more such failings are highlighted the more pressure is placed on the system to rectify matters.

The fact that the public can see that the media are acting as their eyes and ears in court and the knowledge that they will create a fuss over anything which they regard as untoward may provide a degree of reassurance. As noted by Lord Steyn, 'Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice'.[351] Media coverage of the courts is also arguably important on the basis of democracy. Such coverage may allow the values or views of the public to impact upon the enforcement of the criminal law. This is most often seen in newspaper complaints that sentences are too low. Such complaints or campaigns may help prompt the Attorney General to refer a sentence as unduly lenient,[352] and encourage action to be taken to amend the sentencing provisions.[353] It was argued

[350] See, for example, D Ellam and A Hagger, 'Shambles in court; of 132 cases in one court last week, 28 were stopped because of bungling and bureaucracy *Sunday Mirror* (March 17 2002); A Hill, 'Judge admits: Britain's youth courts are 'crap', On the eve of two major reports into juvenile justice, The Observer went behind closed doors to spend a week inside the system. What we found was a 'slow, inefficient, flawed and bankrupt' process that 'doesn't work'…and that's the lawyers' damning verdict' *The Observer* (22 October 2006).

[351] *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (HL) para 30.

[352] In January 2006, Alan Webster was sentenced to life imprisonment with a minimum term of six years for offences including the rape of a baby, D Ward, 'Babysitter couple jailed for rape of 12-week girl' *The Guardian* (January 11 2006). This minimum term provoked considerable anger in the media, see for instance, 'Now right this terrible wrong' *The Sun* (editorial) (January 17 2006), 'Vile Webster was given life for his sick crime – but will only actually serve six years. What does this say about our pathetic, broken system of so-called justice? It stinks. It's an affront to the nation. Shame;' '55,000' *The Sun* (January 21 2006), 'Sun readers say: Give rape monsters a proper jail sentence. MPs called on the Government to get tough on baby rapists yesterday –as 55,000 readers signed our petition demanding longer sentences for two child sex monsters'. In referring the case to the Court of Appeal the Attorney General submitted that the media outcry 'reflected public outrage at the sentences' and that, 'sentences should properly reflect public feeling and the public feeling in this case called for significantly heavier sentences than those imposed'. *Attorney General's References No's 14 and 15 of 2006 (Tanya French and Alan Robert Webster)* [2007] 1 Cr App R (S) 40, para 27. The Court of Appeal agreed that a higher sentence was appropriate and increased the minimum term to 8 years.

[353] Part of the reason for the low minimum term in the Webster case was the fact that guidelines issued by the Sentencing Guidelines Council in January 2005 provided for a reduction in the sentence of one third where the guilty plea was entered at the first reasonable opportunity. This was the case even if the offender was caught red-handed. The Court of Appeal in *Attorney General's References No's 14 and 15 of 2006 (Tanya French and Alan Robert Webster)* recommended that the council should reconsider this guideline as a matter of urgency, para 56. This recommendation was later endorsed by the Home Office, 'We want judges to have more discretion so that they no longer have to reduce the minimum sentence

previously that jury findings of not guilty against the evidence might contribute to law reform. The media focus on such verdicts enhances this prospect. It is arguable, for example, that acquitted verdicts in a number of cases where cannabis was being used for its medicinal value, combined with the reporting of such cases, has produced an atmosphere in which politicians feel able to call for the legalisation of cannabis for medicinal use.[354]

To a certain extent these values are fulfilled by the current reporting of criminal trials. It is also clear, however, that much reporting is sensationalist and often misleading. Rather than enhancing transparency and bolstering confidence in the courts it may actually undermine confidence, often unfairly.[355] It is important that efforts are made to try and

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they impose by up to a third, regardless of the circumstances. Judges should be able to reduce or remove the discount for an early guilty plea where the evidence against the defendant is overwhelming'. Home Office, *Rebalancing the criminal justice system in favour of the law-abiding majority, Cutting crime, reducing reoffending and protecting the public* (2006), para 2.22. Available at, http://www.homeoffice.gov.uk/documents/CJS-reiew.pdf/. The sentencing guideline council has now reconsidered this and reduced the discount to 20 per cent, Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (2007).

[354] See, for example, G John, 'Straw supports the case for medical use of cannabis' *The Independent* (April 3 2000); A Grice, 'Cameron calls for legalisation of 'medical marijuana' *The Independent* (January 22 2007).

[355] In the 'no angel' case the Court of Appeal said, 'Whilst the judge's remark was unacceptable, we have to say that the way in which it was seized upon by the media, extracted from its context and emblazoned in headlines is regrettable. The judge's comment that here was no excuse for the offender, and his later remark that the girl of 9 could not be blamed, did not figure in any of the press reports that we have been shown. We wish to stress that it does not assist the administration of true justice for a campaign to be mounted on the basis of a phrase ripped out of context and used to vilify a judge', *Attorney General's Reference No 13 of 1993* The Independent July 30 1993. In the Webster case the Court of Appeal said, 'We should say at the outset that the suggestion, widely made by the media, that Webster would, as a result of the judge's sentence, "walk free" after six years was a distortion of reality. Webster was given a life sentence. That sentence means that he will remain in prison unless and until the Parole Board is satisfied that he no longer poses a danger to the public', *Attorney General's References No's 14 and 15 of 2006 (Tanya French and Alan Robert Webster)* para 30. In 2006 Craig Sweeney, a convicted sex offender, received a life sentence with a minimum term of 6 years less time served on remand, for kidnapping and sexually assaulting a three-year old girl. Whilst some sections of the media pointed out that the minimum term was set in accordance with sentencing guidelines, see, for example, F Gibb, 'Rules on guilty plea put judges in a straightjacket' *The Times* (June 13 2006), others were less restrained and launched strong attacks on Judge Griffith Williams and judges in general. In a leader column the Daily Express attacked, 'our deluded, out-of-touch and frankly deranged judiciary – in this case represented by Judge Griffith Williams', 'Judges have to make the punishment fit the crime' *The Express* (June 13 2006). See similarly, J Coles, 'Sack the Softie' *The Sun* (June 13 2006); 'We rest our case' *The Sun* (June 13 2006). In announcing that he would not be referring the sentence to the Court of Appeal as unduly lenient the Attorney General stated that the minimum term set was within existing sentencing

ensure that the public gain a more accurate and informed impression of court proceedings.

Some efforts have been made to this end in recent years. In *R v Huntley* (the Soham murder trial) live transcripts of the court proceedings were provided to the media for the first time. These were made available, subject to a short delay, by Sky News via their TV channel and on their website. Journalists also read sections of the transcripts over 3-D representations of the courtroom and participants. There was evidence of a degree of public interest in the transcripts.[356] In 2005 this process was taken one step further when Sky News transmitted live the stenography from the opening and closing speeches, the summing up and the verdicts in the re-trial of Sion Jenkins.[357]

In October 2005 a protocol was agreed between the police, the CPS and the media on the release of prosecution material used in a trial to the media.[358] This provided for the release of more information than previously available, allowing those not present to see, for the first time, actual evidence shown in open court. As a consequence, trial reports on television and in the newspapers are now routinely illustrated by CCTV footage and other evidence. It is suggested that this has improved the reporting of court cases:

> 'Actual footage of what happened is far more engaging than any verbal description. The policy also aids accurate reporting. Seeing transcripts of police audio recordings means reporters don't have to rely on muffled recordings

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guidance and law, Attorney General, The Craig Sweeney Case, (10 July 2006). Attorney General's statement available at, http://www.attorneygeneral.gov.uk/sub_disclosure_log_2006.html.

[356] T Branigan, 'Judiciary rethinks its camera-shy attitude: Saturation reporting of the Soham murder trial included coverage on 24-hour channels, 3D reconstructions and line-by-line transcripts' *The Guardian* (December 20 2003).

[357] R Rothwell, 'Falconer close to rejecting TV trials as Sky breaks new ground in Jenkins case' (2005) 102(27) Law Society Gazette 11.

[358] Publicity and the Criminal Justice System, protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media. Available at, http://www.cps.gov.uk/publications/agencies/mediaprotocol.html.

played in court. The transcript shows the wording on the tape, including when defence and prosecution dispute what was said on the tape'.[359]

These steps, particularly the agreement and implementation of the protocol on publicity and the criminal justice system, are significant steps in opening up the courtroom to the public and aiding accurate reporting. There is clearly, though, more that could be done. The House of Lords Select Committee on the Constitution recently examined the relationship between the judiciary, the media and the public.[360] It noted that in recent years a number of judges have drafted media releases to accompany their judgements in certain high profile cases to promote understanding and increase transparency.[361] Although, to-date, limited to a handful of cases,[362] the Select Committee 'strongly encouraged' the use of such media releases.[363] It also recommended that judges should co-operate more with the Judicial Communications Office (JCO). Such co-operation could include alerting the JCO if there is a possibility of a judgment or sentencing decision being controversial or newsworthy and asking the JCO for advice on presentational issues such as how a speech might be portrayed in the media.[364] Consideration might even be given to appointing a spokesman who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the

[359] J Battle, 'Media is given more evidence from court' *The Times* (November 28 2006). See also, J Battle, 'Closed circuit judgment: Last week's 21/7 trial was a landmark for court reporting because of its use of CCTV imagery' *The Guardian* (July 16 2007). The author is head of compliance at ITN and represented ITN in the media group that liaised with the CPS on the protocol.
[360] House of Lords, Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (2007) 6th Report of Session 2006-07 HL Paper 151.
[361] See, Sentencing remarks: R v Thomas William Palmer, 20 March 2007; Sentencing remarks: R v Davina Smith 2 February 2007; statement from the Judicial Communications Office: Mr Justice Openshaw, 17 May 2007, 'A media report on a judge reported as saying "I don't really understand what a website is" has been taken out of context'. All available at, http://www.judiciary.gov.uk/publications_media/general/index.htm
[362] The 3 media releases detailed are the only 3 available on the Judiciary's website.
[363] House of Lords, Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (2007) 6th Report of Session 2006-07 HL Paper 151, para 155.
[364] *ibid.* para 170.

judgment or sentencing decision.[365] Alternatively, perhaps judges could speak for themselves rather than relying on such spokesmen or, as at present, on retired judges.[366]

Such recommendations appear worthy of further investigation. There is much inaccurate media coverage of, in particular, sentencing decisions which may undermine public confidence. Greater engagement with the media might go some way towards reducing misleading or sensationalist coverage. If, for example, greater efforts had been made to point out that the judge in the Sweeney case was simply following sentencing guidelines newspapers might have restricted their attacks on the judge and directed their anger in a more appropriate direction.[367]

A more dramatic step which could significantly enhance media reporting of the courts would be to allow court proceedings to be televised.[368] This would significantly enhance the openness of the courts, given that the vast majority of the public get their news and current affairs information from television. It might also enhance the accuracy of media reporting as people would be able to observe proceedings for themselves, rather than having a journalist filter and editorialise what is said and done in court. Public confidence might be significantly enhanced if the public could see trial proceedings with their own eyes and ears rather than merely being told about events second-hand.[369]

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[365] *ibid.* para 171. See also, D Pannick, 'Sweeney case points up need for press flying squad' *The Times* (July 4 2006).
[366] F Gibb, 'Chief Justice hits back in row over 'soft sentencing'' *The Times* (June 19 2006), Judge Keith Cutler, secretary to the Council of Circuit Judges, said: 'the tradition where a serving judge should not speak to the press is something which perhaps should be reviewed'.
[367] House of Lords, Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (2007) 6th Report of Session 2006-07 HL Paper 151, para 163.
[368] Criminal Justice Act 1925 s 41 prohibits photographs and Contempt of Court Act 1981 s 9 prohibits sound recording.
[369] See further, Report of a Working Party of The Public Affairs Committee of the General Council of the Bar (J Caplan ((Chairman)), M Kalisher, A Speaight), *Televising the Courts* (1989). This report concluded that the law should be amended to permit the televising of the courts on an experimental basis.

In 2004 the Government issued a consultation paper on the possibility of amending the law to allow the courts to be broadcast,[370] and permitted a pilot experiment to run for six weeks in which cameras filmed cases in the Court of Appeal.[371] It has been suggested that the cameras in the pilot project had little effect on the proceedings,[372] though the footage was not broadcast. The major concern evident from the responses to the consultation paper was that the broadcasting of witnesses' and victims involvement in proceedings should continue to be prohibited.[373] The majority of respondents agreed, however, that broadcasting would make the courts more accessible, educate the public about how the judicial system works and give the public a better idea of what happened in a particular case.[374] The Government stated that in the light of the responses it was exploring whether there were options which might achieve the benefits, without risking collateral harm to participants or any negative impact on the administration of justice.[375] In November 2006 there were reports that the then Lord Chancellor, Lord Falconer, had concluded that the law should be amended so that criminal trials and appeals could be televised subject to limits to prevent victims and witnesses being identified.[376] Aside from these unconfirmed reports, there have to-date, been no further Government statements on the matter.

It is to be hoped that, in due course, the Government leans towards allowing at least the televising of the judge's summing-up and the sentencing stage of a criminal trial and hearings in the appeal courts. Allowing these parts of the criminal process to be broadcast would significantly enhance the openness of the courts with benefits for

[370] DCA, *Broadcasting Courts, Consultation Paper* (2004).
[371] F Gibb, 'Cameras allowed in court – but not for public viewing' *The Times* (November 16 2004).
[372] J Battle, 'Why not take open justice to a wider audience' *The Times* (April 26 2005).
[373] DCA, *Broadcasting Courts, Response to Consultation* (2005) 10, 15.
[374] *ibid.* 24.
[375] *ibid.* 42.
[376] F Gibb, 'Criminal trials to be shown on television' *The Times* (November 13 2006).

public confidence in the criminal justice system, whilst avoiding any harm to witnesses and victims that might flow from more extensive coverage. Once these stages of the trial have been opened up to television viewers we might later see, if there are no problems flowing from the coverage, other stages of the trial being broadcast. As with Parliament, television coverage is likely to be introduced slowly, stage by stage.[377] Once broadcasting of the courts is permitted, as it almost certainly will be at some point, and becomes a normal part of open, publicly-accountable criminal process, we will probably be left wondering why it took so long to introduce.

4.4 Conclusion: The openness of the trial courts

It is clear that the higher courts, certain administrative bodies and the public provide considerable oversight of the trial courts. This oversight, and the open manner in which it is conducted, promotes accountability, aids effective performance, helps protect rights, provides the kind of transparency and opportunities for citizen participation required in a democracy and helps bolster confidence in the criminal process.

The accountability provided flows from the fact that the oversight mechanisms may publish reports or make statements which might embarrass those who have performed ineffectively or who have made improper decisions. The appeal courts may, for example, rebuke an inferior court where they have made an error. HMICA reports on the administration of the courts may uncover and expose poor performance. Statistical bulletins issued by the Ministry of Justice detail performance court by court, allowing comparison and identification of the worst performing courts. The media, by reporting

[377] DCA, *Broadcasting Courts, Consultation Paper* (2004) Annex B.

these criticisms, enhance the degree of accountability. The media also provides its own direct oversight of the courts which can provide accountability. It has, for example, offered strong criticism of judges who have made inappropriate remarks or passed inappropriately light sentences.

The oversight provided may also aid effective court performance. Oversight by higher courts via the appeals process may help ensure the 'right' decision is made on the available evidence and the guilty are adequately punished by correcting an unduly lenient sentence. The National Audit Office has, on occasions, inspected the administration of the trial courts and made recommendations designed to save money. Her Majesty's Inspectorate of Court Administration aims to improve the experience of all people who use, or work within, the courts. It has, for example, looked at the quality of service provided to victims and witnesses. If such persons are treated properly by the courts they may be more likely to attend court to give evidence. The accountability flowing from the issuing of critical HMICA reports may help bolster effective performance by providing a spur to improved performance. The media coverage of trial courts may aid effective performance by, for example, enhancing the deterrent effect of the criminal justice system. On occasions the media has also looked behind the scenes and highlighted failings in the administration of the court system.

Oversight by higher courts provides important protection for the rights at stake in the trial process, including, most particularly, the right to a fair trial and a proportionate sentence. Various administrative mechanisms also provide important rights protection. In 2001 the CPT visited the detention facilities at a number of courts. Their report highlighted a number of concerns relating to the treatment of prisoners. In its response

the UK Government detailed action to be taken to address the concerns raised. The Criminal Cases Review Commission may refer cases to the courts for re-examination if it feels someone has been mistakenly convicted or has received a disproportionately lengthy sentence. HMICA has examined the service provided to defendants and made a number of recommendations designed to ensure that they are treated properly and their rights respected. The jury may occasionally provide protection for a defendant from an arguably oppressive or unjust law or prosecution by acquitting against the evidence. It is important that the jury is itself subject to a degree of oversight to protect the right to a fair trial and to help ensure the jury performs effectively. The establishment of Lay Observer panels enables members of the public to inspect the conditions in which prisoners are transported and held at court. There are some indications that this oversight provides important protection for the rights and well-being of those detained in court cells. The accountability provided by the publication of CPT and HMICA reports may help ensure that rights are respected in future.

The oversight mechanisms help provide the kind of transparency required in a democracy. Of most importance in this respect, the courts are open to the public and the media. Also crucial is the fact that HMICA reports are published and efforts are made to publicise them, and HMCS and the Ministry of Justice publish reports and statistics detailing performance. The public arguably have a right to such information. It is also appropriate in a developed democracy, that there are opportunities for citizens to participate and feel part of the criminal justice system. The establishment of a number of Community Courts has bolstered local democratic involvement. Such courts hold, for example, community meetings, and the courts have responded effectively to local concerns. Almost half a million members of the public are involved in the court system

via jury service each year. In occasional cases this involvement may, where the jury acquit against the evidence, give a powerful indicator of the views of the community on a particular prosecution or law thus providing a pointer to reform. Members of the public are also able to directly impact on the administration of the court system via the role of Lay Observer panels. Media coverage may allow the views or values of the public to impact upon the enforcement of the criminal law. This is most often seen in newspaper complaints that sentences are too low. Such complaints may prompt the Attorney General to refer a sentence as unduly lenient and encourage action to be taken to amend the sentencing provisions.

Public confidence in the trial courts may be enhanced by the fact that the public can see the progress of criminal trials. The fact that there are independent mechanisms working to hold the courts to account for poor performance or mistakes and to improve performance or correct mistakes also enhances confidence. Likewise, the fact that the public can see that members of the public play a direct role in the administration of the criminal courts may also bolster confidence.

It is clear that the oversight provided by independent administrative bodies and the public has developed considerably in recent years. The Criminal Cases Review Commission was established on 1 January 1997 and began receiving cases on 31 March 1997. Her Majesty's Magistrates Courts Service Inspectorate was established in 1994 to inspect and report on the organisation and administration of the magistrates courts. On 1 April 2005 Her Majesty's Inspectorate of Court Administration was established in its place with responsibility to inspect the whole court system. In recent years the court system has begun to publish performance information and opportunities for the public

to influence the courts have grown with the development of the Community Courts. Lay Observer panels were established to inspect court custody suites in 1991. Efforts have also been made in recent years to enhance the media coverage of criminal trials. In particular, much of the evidence presented in court is now made available to the media.

Although it is clear that the trial courts have become more open in recent times there is also scope for further development. The main concern with the oversight provided by the Court of Appeal relates to waiting times. These remain too high. It is also arguable that there remains scope for the Court of Appeal to be more receptive to the admission of fresh evidence. Working to reduce the excessive caseload burden on the Court of Appeal might, it seems, go some way towards rectifying these deficiencies. It has been suggested that this could be done by setting up regional Courts of Appeal. Setting up regional Courts of Appeal might also help open up the appeal process to the public by bringing the appeal system closer to a greater proportion of the public thereby bolstering confidence.

From the beginning of its existence there have been complaints that the CCRC is inadequately resourced. This under-funding manifests itself most clearly in delay which may undermine confidence in the CCRC and discourage those with shorter sentences from applying. It seems that a small increase in resources could have a significant impact on reducing delay. If anything though, the CCRC's budget looks like being further reduced in future years rather than increased. Eyebrows might also be raised by the fact that the CCRC continues to rely on the police to conduct investigations in a limited number of cases. Times have arguably changed since the development of the

CCRC. Independence is now key to public confidence and the CCRC ought perhaps to be looking to cease using police officers to conduct investigations in the future.

HMICA has succeeded in identifying numerous weaknesses in court administration during its inspections. The degree of oversight it currently provides does not, however, seem fully equal to the task of securing effective performance, enhancing rights protection and maintaining public confidence. HMICA examines only about a third of the 42 court Areas each year and the inspections it has conducted have not been comprehensive but have focussed on particular aspects of performance. HMICA really ought to be aiming to raise its inspection levels in the near future.

With one or two noted exceptions, there has been little research on the workings of the jury in recent years. Research might help Her Majesty's Courts Service to provide better support for juries and could dispel myths about jury performance, some of which may go to undermine confidence in the jury as a decision making mechanism. More research is certainly possible under the existing law. It is to be hoped that the jury diversity project serves as an example of what can be done which will encourage greater research in the future. The Ministry of Justice ought also perhaps to take a more pro-active role in encouraging and commissioning such research. There may, though, come a point in the future where the Contempt of Court Act 1981 might need to be amended to permit more intrusive research into jury decision making.

On the limited information available about Lay Observers it appears that there is scope for bolstering the rights protection they provide. LOs do not seem to inspect often enough, their reports do not necessarily go to those who most need to see them, their

recommendations might not be acted upon and such inaction may be met with acquiescence. The fact that there is such limited information available about LOs by itself gives rise to concern. It is difficult for the LO's oversight to provide reassurance to the public when they are almost completely invisible. Publishing inspection reports could raise their profile. It might also provide a greater degree of accountability which could help ensure that recommendations were taken on board. Providing the type of independent central administrative support enjoyed by Independent Custody Visitors and Independent Monitoring Boards might help raise the profile and degree of openness provided by LOs.

Whilst media coverage of the courts may help to promote a number of the values associated with openness it often, unfortunately, falls far short of an ideal standard and is frequently inaccurate or misleading. It is reassuring that efforts have recently been made to facilitate greater court openness via the media and to enhance the accuracy of court reporting. These efforts, in particular the making available of more prosecution evidence to the media, seem to have had some success. It is also clear, however, that there is scope for further improvement. Greater co-operation with the Judicial Communications Office and the issuing of press releases in controversial cases may help. There is also a case to be made in favour of the judges being prepared to speak out to explain decisions or even to appoint a designated spokesman to do so. More radically, there is a strong case in favour of allowing the broadcasting of trial proceedings.

For a number of these reform proposals to come to fruition would require the provision of extra resources. Inadequate resources seem to limit the extent and quality of the

oversight provided by the Court of Appeal, the CCRC, possibly HMICA, and the Lay Observers. The figures required to bring about more effective oversight are relatively modest in the overall scheme of things. The CCRC, for example, requires only an estimated additional £500,000 to optimise its performance. Such resources really ought to be provided to serve the values of open justice. It seems unlikely, however, that additional resources will be provided in the near future. The problems of the Court of Appeal have been known for a long time yet no adequate action has been taken. The CCRC has been complaining for a number of years about a lack of resources yet its resources keep being cut.

The most radical step for opening up the trial courts to the public would be to allow cameras to broadcast the courts. It seems inevitable, and welcome from the perspective of promoting open justice, that at some point in the future, cameras will be permitted to broadcast at least the judge's summing-up and sentencing. Once this initial step has been taken the broadcasting of other areas of the trial may gradually be permitted.

Chapter 5

The Prison System

This chapter examines the oversight of the prison system provided by the courts, independent administrative bodies and the public.[1] It will be argued that such oversight, and the open manner in which it is conducted, promotes accountability, helps ensure effective performance, safeguards the rights of prisoners, enables the kind of transparency and opportunities for citizen participation required in a democracy, and helps bolster public confidence in the prison system. Where it appears that there is scope, and a need, for a higher degree of openness to provide greater fulfilment of these values, proposals for achieving this will be advanced.

5.1. Judicial Scrutiny

There are five main routes to the administration of the prison system being examined by the courts. Prison officers may have their conduct examined by the courts if it is alleged that they have committed a criminal offence. A prisoner may bring a civil action for damages if they feel they have been mistreated in some way. In the event of a death in prison an inquest will be held at which the circumstances surrounding the death will be examined. Prison policy may be challenged either via judicial review or through an application to the European Court of Human Rights. This judicial oversight may help safeguard prisoners rights and aid the effective performance of the prison system. The fact that the oversight provided by the courts will take place in public and will normally attract a high degree of media attention enhances the accountability which it provides.

[1] For an examination of the prison oversight mechanisms as they existed in 1985 see, M Maguire, J Vagg, and R Morgan (eds), *Accountability and Prisons: Opening up a Closed World* (Tavistock Publications, London 1985).

That the public can see that the prison system is overseen by the courts and held to account may provide a degree of reassurance.

5.1.1 Criminal prosecution

In a small number of cases prison officers have been prosecuted for allegedly breaking the criminal law while performing their duties. Most frequently, it is alleged that a prisoner has been assaulted by a number of prison officers. The most high profile example of prison officers being held to account via the criminal process followed the alleged abuse of prisoners in Wormwood Scrubs prison in the late 1990s. 27 prison officers were eventually prosecuted over a period of 14 months with 6 being convicted.[2] Even if a prosecution does not result in a conviction it may still produce a degree of accountability if the trial judge, despite the acquittal, feels that there was fault on the part of the prison management and offers public criticism.[3]

Prison officers convicted of breaking the law are held to account in the sense that the court will pass a sentence and, if the offence is serious, the officers will be dismissed from the Prison Service.[4] The fact that the trial is conducted publicly and such cases tend to attract considerable media attention also adds a degree of accountability. The

[2] On 28 July 2000 three prison officers were found guilty of assaulting a prisoner in July 1998, I Burrell, 'Scrubs officers guilty of cell attack on murderer' *The Independent* (29 July 2000); On 9 August 2001 a further three officers were convicted of committing assault occasioning actual bodily harm on a prisoner in March 1998, I Burrell, 'Three jail officers convicted for assault at Scrubs' *The Independent* (10 August 2001).
[3] See: D Campbell, 'Jail suicide was avoidable says judge as manslaughter trial ends' *The Guardian* (3 April 2007); A Norfolk and R Ford, 'Prison officers cleared over death in cell' *The Times* (3 April 2007).
[4] The three prison officers convicted on 28 July 2000 were sentenced to 12, 15 and 18 months imprisonment, V Dodd, 'Prison staff jailed for cell attack' *The Guardian* (5 September 2000). Of the three officers convicted on 9 August 2001 two were sentenced to four years imprisonment and one received a sentence of three and a half years, V Dodd, 'Prison officers jailed for sadistic attack' *The Guardian* (15 September 2001).

guilty prison officers will normally be named by the media,[5] and given the nature of their offence will serve any prison sentence fearing attack from fellow prisoners.[6] The public conviction of prison officers and the accountability provided may help protect the rights of prisoners by deterring other prison officers from behaving in such a manner. Public convictions may also aid rights protection in future cases as if prisoners can see that the system works to hold prison officers to account they may be more likely to report assaults than they might otherwise have been. Ensuring the rights of prisoners are respected may aid the effective performance of the prison system in terms of reducing the reoffending rate. In the words of Lord Ramsbotham, the former Chief Inspector of Her Majesty's Inspectorate of Prisons, 'if you treat prisoners in the way they were treated in Wormwood Scrubs you will turn them into bitter citizens who will reoffend'.[7]

It is clear that although prison officers have, on occasions, been convicted of committing criminal offences, this is a fairly rare occurrence. It is arguable that prison officers and the prison system should be held to account via the criminal process more

[5] The last of the 10 trials relating to the alleged abuse of prisoners in Wormwood Scrubs throughout the late 1990s concluded on 4 September 2001 at which point court orders which had prohibited the identification of those previously convicted were lifted, I Burrell, 'Officer cleared in final Wormwood Scrubs court case' *The Independent* (5 September 2001).

[6] Following the convictions of the three prison officers on 28 July 2000 it was suggested that they would have to serve their sentences on special segregated wings with other inmates who were at risk from attack by fellow prisoners but that even this might not be enough to protect them from being attacked. In the words of Harry Fletcher, of the National Association of Probation Officers, 'It's going to be extremely difficult to protect them within a prison environment. They will have to be held in segregation and secure conditions for the rest of their sentence', quoted in, I Burrell, 'Brutality shocked prison officers' *The Independent* (5 September 2000). This possibility might have been slightly exaggerated. The three officers were not identified at the time they were convicted. Orders prohibiting their identification were not lifted until 4 September 2001 when the last of the 10 trials relating to the alleged abuse of prisoners in Scrubs throughout the late 1990s concluded, I Burrell, 'Officer cleared in final wormwood scrubs court case' *The Independent* (5 September 2001). By this point the three officers convicted in July 2000 would likely have been released given that they were sentenced to 12, 15 and 18 months imprisonment. By contrast the three officers convicted on 9 August 2001 were identified at the time they were sentenced and likely faced such threats.

[7] Quoted in, V Dodd, 'Prison violence: We will kill you. We will get away with it … we've done it before: Prisoners tell of hanging threats by officers holding nooses' *The Guardian* (11 December 2003).

frequently. As will be detailed below, there is a far higher number of successful civil actions brought against the Prison Service each year than there are criminal prosecutions.[8] Many of these cases seem to involve criminal conduct. There has also been a number of inquest verdicts in which the care provided by the Prison Service has been deemed negligent,[9] yet prosecutions have not followed. On occasions, inquests have ruled that prisoners have been unlawfully killed.[10] Despite an unlawful killing verdict requiring a criminal standard of proof, such verdicts have not been followed by prosecutions.[11]

The new corporate manslaughter law introduced by the Corporate Manslaughter and Corporate Homicide Act 2007[12] will, in time, be extended to cover deaths in custody.[13] The introduction of this new offence may lead to a prison being held to account via the criminal process more frequently in cases where inquest juries have, in part, blamed the negligence of the prison authorities for a death. The increased risk of a manslaughter prosecution may help ensure that a prison takes greater steps to safeguard the right to life. It is to be hoped that the provisions in the Corporate Manslaughter and Corporate Homicide Act 2007 covering deaths in prison are introduced as soon as possible.

The proposed introduction of a CPS Ombudsman[14] to review decisions by the CPS not to prosecute in controversial or high profile cases might also have an impact in this area.

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[8] See section 5.1.2.
[9] See section 5.1.3.
[10] On 27 July 1993 an inquest jury ruled that Omasase Lumumba had been unlawfully killed, A Benson 'Asylum seeker's killing unlawful' *The Guardian* (28 July 1993); On 25 March 1998 an inquest jury ruled that Alton Manning had been unlawfully killed, 'six jailers suspended after unlawful killing' *The Times* (26 March 1998).
[11] See: A Travis, 'No prosecution over prison death' *The Guardian* (10 December 1993); V Dodd, 'CPS again bars prosecution over death in prison' *The Guardian* (2 June 2001).
[12] s 2(1)(d).
[13] For more detailed examination of the introduction of this new offence see section 2.1.3.
[14] See section 3.2.3.

Deaths in prison or alleged serious assaults by prison officers would certainly fall within such a remit. There has only been one case in which the CPS has been shown to have failed to adequately consider the evidence in favour of the prosecution of a number of prison officers.[15] It is also true though, that this is the only case in which the decision has been examined by the courts. It is possible that the introduction of a CPS Ombudsman and the resulting oversight might expose CPS error in further cases and lead to a higher number of prosecutions. If such an oversight mechanism were introduced it might certainly provide reassurance to the alleged victims of criminal conduct by prison officers.

There may also be a case for removing the duty to investigate deaths in prison from the police. It will be argued below that the office of the Prisons and Probations Ombudsman ought to be developed so that it conducts such investigations.[16] This may lead to a higher possibility of prison officers being prosecuted and could certainly bolster public confidence.

5.1.2 Civil Actions

For a long time the courts were reluctant to consider private law claims for damages by prisoners. In the words of Lord Denning in *Becker v Home Office,*[17] 'if the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined'.[18]

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[15] *R v DPP ex p Manning* [2005] 3 WLR 463 (QB).
[16] See section 5.2.3.
[17] [1972] 2 QB 407 (CA).
[18] *ibid.* 418. See similarly, *Arbon v Anderson* [1943] KB 252 (KB) Goddard LJ, at 255, 'It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the [prison] rules. The safeguards against abuse are appeals to the governor, to the visiting committee, and finally to the Secretary of State and those, in my opinion, are the only remedies'.

The courts are now more receptive to civil actions against the prison system and each year a high number of actions are commenced.[19] Most commonly, actions are brought alleging negligence[20] or assault by prison officers.[21] Such actions can provide a degree of redress as the Prison Service may have to pay financial compensation. They may also provide accountability as the Prison Service may be ordered to pay punitive or exemplary damages.[22] The openness of the civil process may bolster the degree of accountability as allegations made in court tend to result in embarrassing media coverage. There is some evidence that the Prison Service is sensitive to such adverse publicity.[23]

Quite often a civil action will be settled out of court by the Prison Service.[24] The details of such a settlement may be disclosed to the media.[25] On occasions, however, the

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[19] In 2006 Derek Ramsden, head of the Prison Service's operational litigation unit, stated that more than 1,000 cases were being brought against the Prison Service every year. Quoted in, R Ford, '£2.8m award for prisoner who tried to kill himself' *The Times* (May 19 2006).

[20] In *Ellis v Home Office* [1953] 2 All ER 149 (CA) Singleton LJ stated at 154, 'The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within'. Breach of this duty may give rise to liability in negligence.

[21] 'An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person', Collins v Wilcock (1984) 79 Cr App R 229 (QB) 234 (Goff LJ).

[22] In 1996 the Home Office was ordered to pay £16,000 damages to a former prisoner, David Burke, after he was stripped naked and subjected to a violent and 'quasi-sexual' assault by prison officers. The award included £12,000 exemplary or punitive damages. The judge at Clerkenwell county court Mrs Recorder Suzan Matthews, said the award was being made to 'mark, curb and disavow' the officers' violence. C Dyer, 'Home Office ordered to pay pounds 16,000 for attack on inmate' *The Guardian* (25 July 1996). In 2003 Patrick Petrie was awarded £39,750 after suing the Home Office for assault, malicious prosecution and misfeasance. Three other prisoners who brought the case with Petrie were awarded damages ranging from £12,750 to £13,750. Of the total payout, £10,000 were punitive damages to Petrie and £15,000 in punitive damages shared among all four, D Taylor, 'I thought I would die': When Patrick Petrie was beaten up by prison officers in Parkhurst he felt utterly helpless. But now he's won a High Court case against them - and sent a clear message to the Home Office' *The Guardian* (1 July 2003).

[23] In, for example, 2003 following the agreement of an out-of-court settlement a Prison Service spokesman stated: 'The practical jokes played on a prisoner at Whitemoor were few and ended as soon as they were reported. However, the Prison Service feels that the allegation did not reflect well on those involved so decided to settle out of court for £500'. R Ford, 'Prisoner awarded Pounds 500 over prank' *The Times* (17 July 2003).

[24] In 2005-06 the overall out-of-court settlements to prisoners in publicly run jails totalled £4,010,233, R Ford, '£2.8m award for prisoner who tried to kill himself' *The Times* (19 May 2006).

[25] This occurs in both negligence and assault claims. In 2000, for example, Raymond Christian received £2.25 million damages in an out-of-court settlement from the Prison Service and Lewisham and North Southwark Health Authority. He was paralysed from the neck down after jumping from a 1st floor

details, although tending to eventually leak to the media, have gone undisclosed.[26] It was argued in chapter 2 that the details of out of court settlements agreed by the police should be publicly disclosed.[27] Examining the secrecy surrounding police settlements the Home Affairs Select Committee stated that, 'it is a fundamental tenet of public life that sums paid out by public bodies – particularly very large sums – should in principle be disclosable'.[28] It is arguable that this applies with equal force to the Prison Service and that it ought to be standard practice that settlements agreed by the Prison Service are disclosed. The public have a right to know in accordance with democratic accountability. Given that the details of most large settlements seem to leak to the media indirectly, it would be better if the information were to come direct from the Prison Service.

5.1.3 Inquests

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balcony in Feltham Young Offender Institution. He had a psychiatric condition which was not properly diagnosed, R Ford, '£2.25m for inmate injured in stair fall' *The Times* (December 5 2000); In 2004 Gregg Marston reached an out of court settlement with the Prison Service worth £1.14 million. He was left requiring the use of a wheelchair and regular medical treatment after a doctor failed to send him for an urgent examination, R Ford and R Syal, 'Crippled former prisoner gets £1m payout' *The Times* (12 September 2005). In 2004, seven youths won a £120,000 out-of-court settlement for the violence they allegedly suffered at the hands of prison officers in Portland Young Offenders institution, V Dodd, 'Jail covered up assaults by guards: Whistleblower speaks out as youths win abuse payout' *The Guardian* (January 22 2004).

[26] In, for example, 2005-06 a prisoner received £2.8 million compensation after a failed suicide attempt. A Prison Service spokesman refused to comment on the award stating that as it was an out-of court settlement the details of the action and identity of the prisoner and prison were confidential. R Ford, '£2.8m award for prisoner who tried to kill himself' *The Times* (May 19 2006). The £1.14 million settlement agreed with Gregg Marston in 2004 was disclosed to the Times newspaper in September 2005 and reported. A Prison Service spokes-woman confirmed that the service paid compensation to a former prisoner in 2004 for a medical negligence claim but said that the service could not comment further because the case had been settled out of court, R Ford and R Syal, 'Crippled former prisoner gets £1m payout' *The Times* (September 12 2005).

[27] See section 2.1.5.

[28] Home Affairs Select Committee, 'The Confidentiality of Police Settlements of Civil Claims' (1997-98) HC 894 para 16.

In the event of a prisoner dying[29] a coroner shall, as soon as practicable, hold an inquest.[30] The purpose of an inquest is to ascertain who the deceased was; and how, when and where they came by their death.[31]

The oversight of the Prison Service possible at an inquest may provide important accountability and rights protection. In the words of Lord Hope, 'the purpose of the investigation is to open up the circumstances of the death to public scrutiny. This ensures that those who were at fault will be made accountable for their actions. But it also has a vital part to play in the correction of mistakes and the search for improvements'.[32] The inquest helps open up the circumstances of a death to public scrutiny as, subject to national security concerns, all inquests are held in public.[33] Inquests may provide a degree of accountability as a verdict of unlawful killing may be passed which points the finger of blame clearly at the Prison Service.[34] More commonly, an inquest may provide a degree of accountability by publicly identifying failings in the care provided. Such narrative verdicts, made possible by *R (Middleton) v West Somerset Coroner,*[35] have been delivered in a number of cases.[36]

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[29] In 2006 there was a total of 155 deaths in prison and in 2005 there were 174. See, Inquest, Deaths in Prison, http://inquest.gn.apc.org/data_deaths_in_prison_pv.html. Statistics available for years going back to 1993.
[30] Coroners Act 1988 s 8(1)(c).
[31] *ibid.* s 11(5)(b) and The Coroners Rules 1984 SI 1984 / 552 para 36.
[32] *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796 (HL) 801.
[33] The Coroners Rules 1984 SI 1984 / 552 para 17.
[34] See, A Benson, 'Asylum seeker's killing unlawful' *The Guardian* (July 28 1993); S Hall, 'Jail officers suspended over death' *The Guardian* (March 26 1998).
[35] [2004] 2 AC 182 (HL). The House of Lords ruled that to comply with Article 2 of the European convention on human rights inquests had to be permitted to look beyond how a person died and to examine the wider circumstances.
[36] In November 2004 an inquest jury ruled that John Carmody's death was 'due to natural causes in part because the seriousness of his condition was not recognised and appropriate investigations and or treatment were not carried out', E Allison, 'Prisoner died in agony, inquest told' *The Guardian* (12 November 2004); In January 2005 an inquest jury returned a verdict itemising a catalogue of faults at Styal prison and concluded that the prison's 'failure of duty of care' contributed to the death of Sarah Campbell, H Carter, 'Inquest blames jail for overdose death: prison failed in duty of care to vulnerable woman, 18, says jury' *The Guardian* (25 January 2005); In February 2005 the jury at the inquest into the death of Jolene Willis who hung herself in Styal prison returned a narrative verdict that Willis died as a result of 'inadequate treatment' following 'inappropriate perceptions of her behaviour' during the period

The fact that prison failings are highlighted publicly may ensure greater protection for rights is provided in the future. The coroner may also make recommendations designed to ensure similar fatalities are avoided.[37] The fact that coroners can make such recommendations, and often state them publicly,[38] may provide reassurance to the public. It is important for public confidence that they can see that efforts are made to ensure lessons are learned. The improvements to the coroner system detailed in chapter 2,[39] which are due to be introduced soon, will bolster the force of coroner recommendations and the transparency around the implementation of such recommendations. This will enhance the rights protection provided and the degree to which the public may be reassured.

5.1.4 Judicial Review

The administration of the prison system may also be overseen by the courts via judicial review. Such oversight has played an important role in protecting the rights of prisoners.

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before her death. They also blamed low levels of staffing and a lack of staff training in suicide awareness, E Allison and K Cooksey, 'Prisons: Jail failures led to death of woman' *The Guardian* (10 February 2005); The jury at the inquest into the death of Shahid Aziz who was stabbed by his cellmate at Leeds prison, listed in their narrative verdict, a series of failings by the Prison Service which contributed to his death, V Dodd and E Allison, 'Violent white prisoner killed Asian cellmate after staff ignored warning: Inquest jury's devastating verdict on Leeds jail chaos: Widow of dead man is still waiting for formal apology' *The Guardian* (18 May 2007); The jury at the inquest into the death of Gareth Myatt, a teenager who died while being restrained by three guards at a privately run youth prison, criticised the Youth Justice Board for failing to review the safety of the restraints used on teenagers in custody and found that staff's lack of knowledge about the dangers of the restraint contributed to his death, L Smith, 'Restraint blamed for boy's death' *The Guardian* (June 29 2007).

[37] The Coroners Rules 1984 SI 1984 / 552 para 43.

[38] At the conclusion of the inquest into the death of Sarah Campbell the coroner recommended regular mandatory training in suicide and self-harm for all prison staff and ordered a 'thematic review' of the use of segregation in women's prisons, H Carter, 'Inquest blames jail for overdose death: prison failed in duty of care to vulnerable woman, 18, says jury' *The Guardian* (25 January 2005); At the inquest into the death of Adam Rickwood the coroner expressed concern about the brief violence used by staff on Adam shortly before he hung himself and called for an urgent review of the rules on the use of restraint on young offenders, E Allison and M Wainwright, 'Rethink use of restraint on young offenders, urges coroner: youth, 14, hanged himself at secure unit: Jury was not given full facts, claims mother' *The Guardian* (1 June 2007).

[39] See section 2.1.4.

Judicial review actions have helped, for example, remove impediments to prisoners seeking legal advice, and thereby, to judicial scrutiny of the administration of the prison system.[40] They have also played a crucial role in enhancing the fairness of the prison disciplinary system over the years.[41] The courts continue to provide important occasional oversight of the prison disciplinary system. In, for example, *R (on the application of Al-Hasan and Carroll) v Secretary of State for the Home Department*[42] the House of Lords ruled that two disciplinary adjudications were vitiated by the apparent bias on the part of the deputy governor of the prison. The findings of guilt were quashed and deleted from the claimants' disciplinary records.

The enactment of the Human Rights Act 1998 has, it seems, enhanced the possibilities for judicial oversight of the prison system via judicial review. Prior to the enactment of the Human Rights Act a number of unsuccessful attempts were made to challenge the

[40] In *R v Home Secretary, ex p Anderson* [1984] QB 778 (DC) the court concluded that a rule which allowed a complaint about prison treatment to be referred to in legal correspondence only as soon as it had been raised through the internal prison complaint mechanisms, constituted an impediment to the inmates right of access to the courts. In *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 (CA) the Court of Appeal held that the Prison Act 1952 did not authorise the stopping of letters on grounds of prolixity, nor was there any objective justification for an unrestricted power to read and examine such letters. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) the House of Lords ruled that a policy which required the examination (but not the reading) of legal correspondence in the absence of a prisoner, to establish that it was bona fide legal correspondence infringed the common law right to legal professional privilege. The fear that the correspondence might be read was, said Lord Bingham at 543, 'bound to inhibit a prisoner's willingness to communicate freely with his legal adviser'.

[41] In *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425 (CA) the Court of Appeal held that the High Court had jurisdiction to review the proceedings of a Board of Visitors in the exercise of their disciplinary powers. In *R v Deputy Governor of HMP Parkhurst, ex p Leech* [1988] AC 533 (HL) Lord Bridge, was able to comment at 557, that 'the courts' infrequent interventions have improved the quality of justice administered by Boards of Visitors'. In, for instance, *R v Board of Visitors of Hull prison, ex p St Germain (No. 2)* [1979] 1 WLR 1401 (QB) orders of certiorari to quash the findings of guilt made against six of the seven applicants were granted. The court indicated that prisoners in such hearings should be entitled to call relevant evidence and be given a fair opportunity to dispute any hearsay evidence. In *R v Secretary of State for the Home Department, ex p Tarrant* [1985] QB 251 (DC) it was established that a Board must consider whether a prisoner should be allowed legal representation. In *R v Deputy Governor of HMP Parkhurst, ex p Leech* [1988] AC 533 (HL) the House of Lords ruled that the courts had jurisdiction to entertain an application for judicial review of a prison governor's disciplinary award. Lord Bridge suggested, at 568, that 'the availability of the court's supervisory role may have the effect on the conduct of judicial proceedings by governors which it appears to have had in the case of Boards of Visitors of enhancing the standards of fairness observed'.

[42] [2005] 1 All ER 927 (HL).

Prison Service's administration of mother and baby units.[43] In 2003, in the case of *R (P and Q) v Secretary of State for the Home Department*[44] two mothers challenged the Prison Service policy which prohibited babies from remaining with their mothers in prison after they reached the age of 18 months. Lord Philips, handing down the judgement of the court, stated: 'before the introduction of a rights-based culture into English public law these applications for judicial review would have been quite unarguable'.[45] Relying largely on the right to respect for family life provided by Article 8 of the European Convention on Human Rights the court ruled that the policy was overly rigid and must admit of greater flexibility. In the case of Q the evidence was such as 'to suggest that this might be such an exceptional case as to justify a departure from the policy'.[46]

5.1.5 The European Court of Human Rights

The European Court of Human Rights has examined the administration of the English prison system in a small number of cases. Such scrutiny provides redress where rights have been breached and has helped ensure action is taken so that the rights breached are respected in the future. Judgements by the European Court of Human Rights may also provide a degree of accountability in terms of embarrassing publicity. All judgements of the court are published[47] and a judgement that the Prison Service has breached certain fundamental rights tends to produce considerable media coverage.

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[43] See, for example, *R v Secretary of State for the Home Department, ex p. Hickling and JH (a minor)* [1986] 1 FLR 543 (QB). See further, VE Munro, 'The Emerging Rights of Imprisoned Mothers and their Children', (2002) 14(3) CFLQ 303, 303.
[44] [2001] 1 WLR 2002 (CA). See also, *R(D) v Secretary of State for the Home Department* [2003] 1 FLR 979 (QB).
[45] [2001] 1 WLR 2002 (CA) 2020.
[46] *ibid.* 2036.
[47] Available at, http://www.echr.coe.int/ECHR/EN/Header?Case-Law/HUDOC/HUDOC+database/. Also, from June 2007, the public hearings of the Court, which are held in only a small minority of cases, have been webcast. See, European Court of Human Rights, Press release by the Registrar, 'Launch of

Oversight by the European Court of Human Rights has, for example, provided redress and a degree of accountability where the care provided for prisoners has been inadequate. In *Price v United Kingdom*[48] the Court ruled that the problems Price, a thalidomide victim with no arms and legs, experienced in using the bed and toilet in her cell and with her general hygiene and diet, violated Article 3 of the European Convention on Human Rights. She was awarded £4,500 damages. In *Edwards v United Kingdom*[49] the applicants' son died after being attacked by the prisoner he was sharing a cell with. The Court ruled unanimously that there had been a violation of Article 2. On the information available to the authorities the cell-mate, Mr Linford, should not have been placed in Edwards' cell. The Government was ordered to pay £20,000 in damages.

The Court has also examined particular aspects of prison policy. In, for instance, *Ezeh and Connors v United Kingdom*[50] the Court ruled that prison disciplinary hearings held before the governor could amount to 'criminal proceedings'. The proceedings in question were found to amount to criminal proceedings and the failure to allow the requested legal representation therefore breached Article 6(3) of the Convention. Following this judgment the Government implemented changes in August 2002 so that prison governors no longer have the power to award additional days. Such cases must be referred to an independent adjudicator before which prisoners are entitled to be legally represented.[51]

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webcasting and new information about pending Court cases' (25 June 2007). The webcasts can be viewed at, http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/.

[48] (App no 33394/96) (2002) 34 EHRR 53.

[49] (App no 46477/99) (2002) 35 EHRR 19.

[50] (App no 39665/98 and 40086/98) (2002) 35 EHRR 28; (2004) 39 EHRR 1.

[51] See, The Prison (Amendment) Rules 2002 SI 2002 / 2116; The Prison (Amendment) Rules 2005 SI 2005 / 869.

The main limitation on the oversight provided by the European Court of Human Rights is the length of time it takes for a case to come before the Court. The cases examined here took between three and five years to be finally determined by the Court. A wait which, it seems, is fairly standard. This delay flows largely from the fact that the Court is unable to cope with the ever increasing number of applications it receives. Efforts have been made in recent years to improve the efficiency of the Court[52] and such measures seem to have enjoyed some success. The number of judgements delivered by the court each year continues to rise.[53] Nonetheless, the backlog of cases continues to rise and now stands at an all time high.[54] The fact that the European Convention on Human Rights was incorporated into English law by the Human Rights Act 1998[55] may provide prisoners in England and Wales with more immediate protection for their Convention rights. The European Court of Human Rights will though continue to be an important safeguard should the domestic courts fail to provide adequate protection for rights. It is important that efforts to reduce the delays and backlog of the European Court of Human Rights continue.

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[52] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, European Treaty Series – No. 155, replaced the existing, part time Court and Commission with a single, full-time Court; Protocol No. 14 to the Convention for the protection of Human Rights and Fundamental Freedoms, Amending the control system of the convention, Council of Europe Treaty Series No. 194, is designed, when it comes into force, to help the court deal more quickly with its ever-growing list of pending cases by simplifying procedures for dealing both with cases which have no chance of success and well-founded repetitive cases. At the time of writing Russia is the only state out of the 46 required to ratify this protocol before it can come into force which is yet to ratify, see: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=9/26/2007&CL=ENG.

[53] 81 judgments were delivered by the court in 1992, by 2005 this figure had reached 1105, European Court of Human Rights, *Survey of activities 2006* (2007) 47. Available at: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity.

[54] By the 1 September 2007 there were 103,600 pending cases, 2650 from the United Kingdom (figures rounded off to the nearest 50), European Court of Human Rights, Statistical Information, Pending Cases. Available at: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year.

[55] The Human Rights Act 1998 (Commencement) Order 1998 SI 1998 / 2882; The Human Rights Act 1998 (Commencement No. 2) Order 2000 SI 2000 / 1851.

5.2 Administrative Scrutiny

Administrative scrutiny of the prison system is provided primarily by Her Majesty's Inspectorate of Prisons and the Prisons and Probation Ombudsman. In addition it is also subject to more occasional ad hoc administrative scrutiny.

5.2.1 Ad hoc scrutiny

Public inquiries have, on occasions, been established by the Government to look at the workings of the prison system. In April 1990 Lord Justice Woolf was appointed to inquire into the events leading up to a number of serious prison disturbances. His report, published in January 1991, made 12 recommendations and 204 proposals for improvement.[56] The Government agreed to implement the thrust of the recommendations.[57] In April 2004 the Government set up a public inquiry into the murder of Zahid Mubarek at Feltham Young Offenders Institution.[58] The inquiry identified 186 failings that led to Mubarek's death, including many by 19 named individuals, and made 88 recommendations.[59] The Government accepted the majority of these recommendations.[60]

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[56] Lord Justice Woolf (Parts I and II) and Judge S Tumim (Part II), *Prison Disturbances April 1990* (HMSO, London 1991) Cm 1456.
[57] Home Office, *Custody, Care and Justice: The Way Ahead for the Prison Service in England and Wales* (HMSO, London 1991) Cm 1647.
[58] Hansard HC vol 420 col WS55 (29 April 2004). This inquiry was established in line with the House of Lords judgment in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.
[59] Mr Justice Keith (chairman) *Report of the Zahid Mubarek Inquiry, Volume 1* (The Stationery Office, London 2006) HC 1082-I; Mr Justice Keith (chairman) *Report of the Zahid Mubarek Inquiry, Volume 2* (The Stationery Office, London 2006) HC 1082-II.
[60] In the initial preliminary response on the day the report was published the Government agreed in principle to accept 50 of the 88 recommendations. The preliminary response is available at: http://www.homeoffice.gov.uk/documents/mubarek-preliminary-response. The Government's full response, published in August 2006, is available at: http://www.homeoffice.gov.uk/documents/mubarek-response-recommend.

The Council of Europe's Committee for the Prevention of Torture (CPT) has inspected a number of prisons during their visits to the United Kingdom. Such oversight provides important protection for prisoners by uncovering poor conditions within prisons and making recommendations to the Government designed to bring about improvement.[61]

There are certainly some examples of this oversight helping to produce improved conditions.[62] Shaw suggests that, 'British prisons needed kick-starting into the twentieth century. Through its 1990 visit, the CPT was one of the actors applying the boot'.[63] More often than not though, the Government has brushed off CPT recommendations. On a number of occasions it has rejected suggestions that holding two prisoners in cells

[61] During, for example, their first periodic visit to the United Kingdom from 29 July to 10 August 1990, the CPT visited Leeds, Brixton and Wandsworth prisons. It concluded that 'the cumulative effect' of overcrowding, lack of integral sanitation and inadequate regime activities amounted to 'inhuman and degrading treatment', CPT, *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 29 July 1990 to 10 August 1990,* (1991) para 57. During the CPT's second periodic visit it revisited Leeds and Wandsworth prisons. It found that both prisons were still blighted by the 'pernicious combination' of overcrowding, lack of integral sanitation and poor regime activities which the CPT had previously assessed as amounting to inhuman and degrading treatment, CPT, *Report to the United Kingdom Government on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 15 to 31 May 1994,* (1996) para 78. In 1997 the CPT visited HMP Dorchester. It found that 'both material conditions of detention and the regime offered to many of the establishment's inmates left much to be desired', CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000) para 76.

[62] During their third periodic visit in 2001 the CPT inspected Feltham Young Offenders Institution. Their report expressed concern over the inadequate provision of regime activities, out-of-cell time, and outdoor exercise. CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001,* (2002) paras 129 and 130. The Government response to the CPT reports that following the visit daily time in the open air had been introduced, CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) para 88; The Government's response to the CPT periodic visit conducted in 2003 details some improvements introduced following the visit. Action had been taken at both Liverpool and Pentonville to improve the heavily criticised material conditions, prisoners in Liverpool were now no longer being locked up for up to 23 hours a day and Pentonville had introduced at least one hour's exercise per day for all prisoners not working in the open air, CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 to 23 May 2003* (2005) paras 54-57, 78 and 79.

[63] S. Shaw, 'The CPT's Visits to the United Kingdom' in R. Morgan and M.D. Evans, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (Oxford University Press, Oxford) (1999) 265, 267.

measuring only 8.5m^2 is inappropriate.[64] Likewise, the case in favour of prisoners being entitled to at least one hour of outdoor exercise per day has been dismissed.[65] The CPT continues to find the same problems year after year, in prison after prison. As the CPT recognised in its 2003 report many of these problems flow from the issue of overcrowding.[66] For as long as overcrowding exists the CPT will continue to report its symptoms.

[64] In 1997 the CPT expressed concern about prisoners being held two to a cell in cells which it felt, due to their size (8 to 8.5m2), and lack of partitioned toilet facility, were unsuitable for use by more than one person, CPT, *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 17 September 1997* (2000) para 73. In their response the Government asserted that 'the operational capacity of two prisoners to a cell has always been accepted as a safe level for the prison'. CPT, *Response of the United Kingdom Government to the report of the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1997* (2000) para 64. In the report of their third periodic visit conducted in 2001 the CPT again made clear the unsuitability of holding prisoners two to a cell measuring 8.5m^2 or less and including in-cell sanitation. Such detention was occurring at Feltham, Woodhill and Pentonville, CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) para 128. In their response the Government noted that: 'all the doubled-up cells viewed by the CPT, including those measuring 8.5m^2 or less, are assessed as being of sufficient size for doubling, albeit in crowded conditions'. Such conditions 'must be tolerated in order to accommodate the rising prison population', CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) paras 68-69. Following the CPT's 2003 visit the Government again rejected the recommendation that prisoners not be doubled up in cells less than 8.5m^2, CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 to 23 May 2003* (2005) para 43.

[65] In the report made following their third periodic visit in 2001 the CPT recommended that steps be taken to ensure that prisoners are guaranteed at least one hour of outdoor exercise per day, CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001* (2002) paras 58 and 129-130. In their response the Government stated that 'ideally time in the open air should be an hour a day, but not normally less than half an hour', CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 4 to 16 February 2001* (2002) para 83. In their response to the CPT's 2003 visit report the Government again rejected the recommendation that prisoners be guaranteed at least one hour of outdoor exercise per day, CPT, *Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 to 23 May 2003* (2005) para 90.

[66] CPT, *Report to the Government of the United Kingdom on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 23 May 2003* (2005) para 16.

It is vital that the CPT publishes the reports of its visits. As argued by Coyle, prisons 'are managed on behalf of society as a whole … society has a right and an obligation to be aware of what is done in its name behind the walls or fences of its prisons'.[67] Such transparency may also help educate the public and dampen the push for higher criminal sentences.[68] Stereotyped and ill-informed public views about the nature of imprisonment may contribute to inappropriate and unjust sentencing reforms. A lack of public confidence in the current sentence levels and pressure for ever higher sentences may flow, for example, from a public belief that prison is an 'easy ride'. Bibas argues that the 'hiddenness' of the prison system, 'mutes criminal justice's expression of condemnation, and the only way to amplify this muted message seems to be to keep raising the number of years'.[69] The publication of CPT reports and the Government's responses may also reassure the public as it will enable them to see that there is an independent body checking on conditions every so often and working, with some degree of success, to bring about improvements. It is right therefore that CPT reports are published. There may even be scope for greater openness with regard to the publication of the reports. As detailed in chapter 2 they tend not to be published until some time after the CPT has conducted its visit meaning that the findings reported may not be current. It is arguable that the reports of the CPT ought to be published as soon as they are produced.[70]

[67] A. Coyle, *Understanding Prisons: Key Issues in Policy and Practice* (Open University Press, Maidenhead 2005) 54.
[68] See generally, JV Roberts and M Hough, 'The State of the Prisons: Exploring Public Knowledge and Opinion' (2005) 44 (3) The Howard Journal of Criminal Justice 286.
[69] S Bibas, 'Transparency and Participation in Criminal Procedure (2006) 81 NYULR 911 at 965.
[70] See section 2.2.1.

The National Audit Office has, on a number of occasions, examined aspects of prison performance related to good financial management.[71] Its reports have made recommendations designed to help save money. The Commission for Racial Equality has also provided a degree of oversight. In December 2003 it published the findings of its formal investigation of the Prison Service. This report made 17 findings of unlawful racial discrimination against the Service and highlighted 14 areas where there was discrimination against individual staff and prisoners.[72] In response the Prison Service, in conjunction with the CRE, produced an action plan to tackle the problems uncovered.[73]

5.2.2 Her Majesty's Inspectorate of Prisons

In 1979 the May Committee recommended a system of independent inspection of the prison system. It felt that such inspections would benefit the Prison Service and public sentiment required it.[74] In 1981 an Inspectorate of Prisons was established and placed on a statutory basis by the Criminal Justice Act 1982.[75] Her Majesty's Chief Inspector of Prisons is required to inspect the prisons in England and Wales and to report on them to the Secretary of State. In particular, she is required to focus on the treatment of prisoners and on conditions within prisons.

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[71] See, for example: National Audit Office, *HM Prison Service: Reducing Prisoner Reoffending* (2001-2002) HC 548; National Audit Office, *The Operational Performance of PFI Prisons* (2002-2003) HC 700; National Audit Office, *HM Prison Service: Serving Time: Prisoner Diet and Exercise* (2005-2006) HC 939.

[72] CRE, *The murder of Zahid Mubarek, A formal investigation by the Commission for Racial Equality into HM Prison Service of England and Wales, Part 1* (2003); CRE, *Race equality in prisons, A formal investigation by the Commission for Racial Equality into HM Prison Service of England and Wales, Part 2* (2003). Both reports Available at http://www.cre.gov.uk/publs/cat_fi.html.

[73] HM Prison Service and CRE, *Implementing Race Equality in Prisons, A shared agenda for change* (2003). Available at http://www.cre.gov.uk/publs/cat_fi.html.

[74] The May Committee, Committee of Inquiry into the United Kingdom Prison Services (Her Majesty's Stationery Office, London 1979) Cmnd 7673, 95.

[75] s 5A of the Prison Act 1952 as inserted by s 57 of the Criminal Justice Act 1982.

In contrast to the criminal justice inspectorates examined in previous chapters Her Majesty's Inspectorate of Prisons (HMIP) continues to run a cyclical inspection program. Prison establishments holding adults and young adults are inspected once every five years with inspections lasting for a week. Such inspections may be announced or unannounced.[76]

HMIP oversight is designed to improve conditions within prisons and the treatment of prisoners. This it may do by identifying examples of best practice which can be spread throughout the prison system.[77] HMIP also works to uncover and highlight poor practice and to raise concerns in relation to which it will make recommendations.[78] Following an inspection the prison is expected to produce, within two months of receiving the inspection report, an action plan based on the recommendations made. A progress report on the action plain is produced after a further 12 months. HMIP may also conduct unannounced re-inspections to assess progress against the action plan.[79]

[76] In September 2005-August 2006 HMIP inspected 62 prisons and young offenders institutions, 31 of them unannounced, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) 11. For a full list of the inspections undertaken see appendix 1.

[77] Examples detailed in HMIP's 2004-05 annual report include, the arrangements established at Exeter for tackling the problem of bullying, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2004-2005* (2006) 16; the efforts made at Glen Parva prison to prevent suicide and support those prone to self-harming, 15; and the foreign national groups being run in some prisons which helped provide support and improve communication, 22.

[78] HMIP's 2004-05 annual report reveals that at some prisons, in particular, Pentonville, Liverpool, Norwich and the Weare, the inspectorate found lengthy delays in answering cell alarm bells and that sometimes they were even muted, ignored or switched off, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2004-2005* (2006) 15; Despite seven deaths in custody at Norwich prison in the previous three years the inspectorate found that obvious ligature points had not been blocked up and night patrols had not been issued with written instructions for emergency unlock, even though this had been an issue in several of the deaths, 14 At two prisons, the Mount and Liverpool, the inspectorate felt that gang culture, associated with the availability of drugs, had permeated the prison to such an extent that it was unsafe, 17; and the inspectors did not believe that staff were fully in control of Rye Hill prison, 18.

[79] 29 of the inspection reports on prisons in England and Wales published in September 2005-August 2006 were of unannounced follow-up inspections, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) 12.

The current Chief Inspector of Prisons, Anne Owers, states that HMIP 'has saved lives, both by promoting good practice and highlighting bad'.[80] HMIP's 2005-06 Annual Report reveals that of the 2,691 recommendations made during the year, 2,222 (83 per cent) were accepted and 288 (14 per cent) were partially accepted.[81] Follow up inspections found that of the earlier 2,729 recommendations accepted, 1,391 (51 per cent) had been achieved and 570 (21 per cent) partially achieved.[82] Despite these positive indicators it is also true that HMIP inspection reports continue to report the same problems.[83] HMIP links such recurrent problems largely to the scourge of overcrowding.[84]

As with the publication of CPT reports it is important on the basis of democracy and public confidence that HMIP reports are published and that efforts are made to publicise the work of HMIP. Highlighting failings publicly may bring further pressure to bear to help ensure efforts are made to improve conditions. HMIP has a user-friendly website on which all its reports are made promptly available for download[85] and its annual and individual prison reports tend to attract media coverage.[86] In 2006 a journalist was permitted, for the first time, to accompany HMIP whilst it conducted a prison

[80] A Owers, 'Prison Inspection and the Protection of Human Rights' (2004) 2 EHRLR 107 at 112.
[81] HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) appendix 3.
[82] *ibid.* appendix 4.
[83] In relation, for example, to Holloway Prison, D Ramsbotham notes that the Chief Inspectors 2003 report 'said exactly the same things as I did in 2000, 1998, 1997 and 1996, Stephen Tumim did in 1991 and James Hennessy did in 1985. Nothing had changed'. D Ramsbotham, 'What Price Imprisonment?' (2004) 72 (3) Medico-legal journal 88 at 91.
[84] See for example, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) 7.
[85] http://inspectorates.justice.gov.uk/hmiprisons/inspect_reports/.
[86] For coverage of the annual report see: A Travis, 'Jail system in serious crisis says watchdog: Reid cannot build his way out of trouble, Owers says Overcrowding makes prisons "riskier to run"' *The Guardian* (31 January 2007); R Ford, 'Warnings about jail conditions ignored, says chief inspector' *The Times* (31 January 2007). For coverage of individual reports see: A Travis, 'Inspector lists basic failures at prison in corruption inquiry' *The Guardian* (28 September 2006); R Ford, 'Prison "not fit for its purpose"' *The Times* (22 November 2006); R Ford, 'Prison gate left open for parking' *The Times* (17 August 2007).

inspection.[87] The subsequent article highlighted the appalling conditions found. It also emphasised the vital role HMIP plays. Alongside the publication of HMIP prison reports it is arguable that the action plan produced by a prison following an inspection ought to be published. Publishing these plans might help ensure that they were more likely to be carried out.

Media coverage of HMIP may be encouraged by the fact that it has tended, in the past, to issue press releases to accompany reports.[88] It seems, however, to have stopped issuing such press releases.[89] It is to be hoped that they are simply no longer made available on the HMIP website. HMIP should certainly be making every effort to gain media exposure for its reports. The fact that media coverage of HMIP does not appear to have diminished in recent years suggests that HMIP may well continue to issue press releases to the media. It is arguable though, that as well as providing press releases directly to the media, they should also still be made available on the HMIP website alongside the full reports. They provide an easily readable summary of the reports for the public who may not be sufficiently interested to sit down and read a full report.

5.2.3 The Prisons and Probation Ombudsman

In 1991 the Government accepted the case[90] for the introduction of an independent mechanism to deal with prisoner grievances.[91] In May 1994 Sir Peter Woodhead was

[87] M Riddell, 'My shocking day behind bars in Britain's biggest prison' *The Observer* (16 July 2006).
[88] In, for example, 2005 46 press releases were issued. Available at, http://inspectorates.justice.gov.uk/hmiprisons/latest-press-releases/press-releases-2005/.
[89] Only two press releases are available on HMIP's website for 2006 and there are none available for 2007. See, http://inspectorates.justice.gov.uk/hmiprisons/latest-press-releases/press-releases-2006/.
[90] In 1991 the Woolf report stated: 'the case for some form of independent person or body to consider grievances is incontrovertible … A system without an independent element is not a system which accords with proper standards of justice', Lord Justice Woolf (Parts I and II) and Judge S Tumim (Part II), *Prison Disturbances April 1990* (HMSO, London 1991) Cm 1456, 419. See also, G. Douglas, 'Dealing with Prisoners' Grievances' (1984) 24 Brit J Criminology 150; J.E. Hall-Williams, 'The Need for a Prisons Ombudsman' (1984) *Criminal Law Review 87;* P. Birkinshaw, 'An Ombudsman for Prisoners', in M.

appointed Prisons Ombudsman and began receiving prisoner complaints on October 24 1994.[92] On 1 April 2001 the Ombudsman gained responsibility for complaints relating to the probation system and was re-titled the Prisons and Probation Ombudsman (PPO).[93]

The PPO's mission statement in relation to the investigation of complaints is to provide prisoners with an accessible, independent and effective means to resolve their complaint.[94] The PPO enjoys unfettered access to relevant documents[95] and prisons may be visited to conduct interviews.[96] Following an investigation the PPO can make recommendations designed to provide satisfaction to the complainant.[97] Recommendations might include the making of an ex-gratia payment, an apology, revision of a policy, or the quashing or mitigating of an adjudication.

In 2004-05 the PPO received a total of 4,076 complaints about the prison system[98] and in 2006-07 a total of 4,321.[99] Complaints tend to relate to matters such as lost property, security categorisation, prison discipline and incentives decisions.[100] In 2006-07 of the

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Maguire, J. Vagg, and R. Morgan (eds), *Accountability and Prisons: Opening up a Closed World,* (Tavistock Publications: London 1985) 165.

[91] Home Office, *Custody, Care and Justice, the Way Ahead for the Prison Service in England and Wales,* Cm 1647, HMSO, London, 1991, at para 8.8, concluded in the following terms: 'There should be an independent avenue of appeal against a disciplinary finding once avenues within the Prison Service have been exhausted … Appeals against decisions made in response to complaints should also be considered by the same independent body'.

[92] A Travis, 'Ex-NATO Chief to hear jail inmates' complaints' *The Guardian* (24 October 1994).

[93] Given the focus of this chapter discussion is confined to the PPO's role in overseeing the prison system.

[94] Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 57.

[95] *ibid.* Terms of Reference, para 13.

[96] *ibid.* Terms of Reference, para 15.

[97] *ibid.* Terms of Reference, para 19.

[98] Prison and Probation Ombudsman for England and Wales, *Annual Report 2004-2005* (2005) Cm 6612, 53.

[99] Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 53. The number of complaints received by the PPO has risen every year since 1999, Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 5.

[100] *ibid.* 6.

complaints received by the Ombudsman 24 per cent were upheld.[101] This indicates that the PPO provides an important oversight mechanism protecting the rights of prisoners. Even if a complaint is not upheld the fact that it has been investigated by an independent body may lessen the dissatisfaction felt by an aggrieved prisoner. Such an impact may have important implications for prison discipline.

It does seem that the PPO could provide more effective oversight of prisoner complaints. Particular concern arises over the time it takes to deal with complaints. Promptness in the resolution of prisoner grievances is of critical importance. Delay might produce considerable frustration. A complaint not quickly examined may even 'lose its currency for entire categories of prisoner such as those on remand or serving short sentences'.[102] The PPO's target is to give a substantive reply to the complainant in 70 per cent of the cases investigated within 12 weeks.[103] The PPO has, however, 'continually struggled' to comply with this time limit.[104] In 2004-05 only 61 per cent of investigations were completed within 12 weeks.[105] The PPO's 2006-07 annual report reveals that the PPO met his target to assess the eligibility of complaints within 10 days in only 54 per cent of cases.[106] As conceded by the current PPO, Stephen Shaw, this level of performance 'lags well below' what is acceptable.[107] This delay is due largely to the PPO being provided with inadequate resources. In the words of the PPO, 'I

[101] *ibid.* 6.
[102] PE Morris and RJ Henham, 'The Prisons Ombudsman: A Critical Review' (1998) 4(3) EPL 345 at 353.
[103] Prison and Probation Ombudsman for England and Wales, *Annual Report 2004-2005* (2005) Cm 6612, 54.
[104] R Henham, 'Some Alternative Strategies for Improving the Effectiveness of the English Prisons Ombudsman Scheme' (2000) 39 (3) The Howard Journal of Criminal Justice 290, 292.
[105] Prison and Probation Ombudsman for England and Wales, *Annual Report 2004-2005* (2005) Cm 6612, 54. The corresponding figure for 2003-2004 was 66 per cent.
[106] Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 55.
[107] *ibid.* 55.

believe that a shortfall in resources continues to represent a risk both to our reputation and to the services we provide'.[108]

On 1st April 2004 the PPO's mission statement was expanded to include the responsibility 'to provide timely, high-quality investigations of deaths in prison custody'. In the words of the then Prisons Minister Paul Goggins, 'It is essential that in an investigation of this nature, our procedures are beyond reproach, and I believe that transferring this remit to the Ombudsman will increase public confidence through independent scrutiny of the events leading to a death in custody'.[109] Transferring this responsibility to the PPO may also have helped produce more effective investigations. The PPO is on record as stating that, 'the new system is more legitimate in the eyes both of bereaved families and the service concerned, with the result that investigations have a momentum that the old system lacked'.[110] Investigations have certainly succeeded in uncovering poor practice on the part of the prison authorities which may have contributed to deaths.[111]

The fact that the PPO makes efforts to publicise its role and work is important. If the public is made aware that there is an independent mechanism overseeing the prison system in this manner, and in particular, one which has responsibility for investigating deaths in custody, it may provide a degree of reassurance. Important in this respect is

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[108] *ibid.* 10.
[109] Home Office, press release, 'Prisons and Probation Ombudsman To Investigate All Prison Deaths' (6 January 2004).
[110] Prison and Probation Ombudsman for England and Wales, *Annual Report 2004-2005* (2005) Cm 6612, 8.
[111] The PPO's 2004-05 annual report reveals that investigations into deaths in prisons during the year found that standards of records and record keeping were inadequate, Prison and Probation Ombudsman for England and Wales, *Annual Report 2004-2005* (2005), Cm 6612, 39; there were problems with medical screening processes meaning that an incomplete assessment was undertaken and vital information missed, 42; failures and shortages of emergency equipment were uncovered, 42; and the variable communication and sharing of information between departments and agencies was exposed as a factor limiting effective care, 39.

the fact that newspaper reports of a death in prison will normally report that the independent PPO is to conduct an investigation.[112] On occasions the media have also reported the ways in which the PPO has impacted on prison practice to help reduce the chances of deaths occurring in the future.[113] It is also important that the completed fatal incident investigation reports are published on the PPO website.[114] The public have a right to know about the circumstances of a death in custody. The PPO is making efforts to improve its website in the near future to ensure that the reports are available as widely as possible.[115] It does seem though that there might be scope for greater openness. In particular, it is arguable that the prison service or the individual prison in question, should be required to respond publicly and in writing to a fatal incident report and the response should be placed on the PPO website. This step towards greater transparency might help ensure that PPO recommendations are more likely to be acted upon.

One factor which may limit public confidence in the PPO is the fact that it has no statutory basis. It was the lack of a statutory basis which enabled the Home Secretary to revise the Ombudsman's terms of reference in 1996, in such a way as to 'substantially weaken his remit.'[116] The Ombudsman has long campaigned for a statutory basis,[117] so

[112] See, for example, 'Investigation after city man found hanged' *Coventry Evening Telegraph* (15 September 2007). This article quote a Prison Service spokeswoman as saying 'As with all deaths in custody, the Prisons and Probation Ombudsman will conduct an investigation'. See similarly, 'Inquiry after prisoner is found dead in his cell' *Western Morning News* (12 September 2007); 'Probe launched into latest prisoner death' *Manchester Evening News* (17 July 2007).
[113] See, A Travis, 'Prison officers to carry safety knives to reduce suicides' *The Guardian* (27 December 2006). This article reports that the decision to issue knives to nearly every prison officer comes after such a move was recommended 17 times by Stephen Shaw, the Prisons and Probation Ombudsman.
[114] Available at: http://www.ppo.gov.uk/fainrep.htm.
[115] Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 51.
[116] PE. Morris and RJ Henham, 'The Prisons Ombudsman: A Critical Review' (1998) 4(3) *European Public Law* 345, 355.
[117] In his 1996-97 Annual Report, the then Ombudsman, Sir Peter Woodhead stated: 'If the terms on which I am to operate are to be laid out precisely and, if the confusion caused by sudden changes to them is to be avoided, my office needs to be established in statute', Prisons Ombudsman for England and

as to rule out unilateral interference by the Home Secretary and to 'bolster the actual and perceived independence of the Ombudsman'.[118] In 2002 the government accepted the case in favour.[119] A first attempt in 2005 to provide a statutory basis via the Management of Offenders and Sentencing Bill[120] failed as the general election was called. In, however, May 2007 the government announced that legislation was imminent[121] and in June 2007 the Criminal Justice and Immigration Bill was published. Part 4 of this Bill will, if enacted, establish Her Majesty's Commissioner for Offender Management and Prisons, to take over the functions of the PPO.

It is to be hoped that part 4 is enacted. It should be noted, however, that there appears scope for improving the statutory basis that is to be provided. In particular, it has been suggested that part 4, as currently drafted, may not provide adequate independence for the Commissioner. Giving evidence to the Public Bill Committee Shaw suggested that it would be better for the Commissioner to be accountable directly to Parliament rather than to the Secretary of State and the Ministry of Justice. This, he felt, would bring more conspicuous independence from the government and greater accountability.[122] It is to be hoped that having waited this long for a statutory basis the government respond to such concerns and amend the bill to get it right.

Wales, *Annual Report 1996* (1997) Cm 3687 para 1.36. In his 2006-07 Annual Report Stephen Shaw stated: 'as the ambit of PPO becomes wider, the absence of statutory authority has become more and more glaring', Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007* (2007) Cm 7163, 10.

[118] PE Morris and RJ Henham, 'The Prisons Ombudsman: A Critical Review' (1998) 4(3) *European Public Law* 345, 357. In August 2007 Stephen Shaw stated, 'The big gain will come in removing any perception that the PPO office is not independent of Government', Stephen Shaw, 'Ombudsman legislation will reinforce independence and authority', (2007) 22 *On the Case* 1.

[119] *Justice for All* (HMSO, London 2002) Cm 5563, para 6.39, 'The Ombudsman for Prisons and Probation has an important role in providing independent adjudication of individual cases. At present this is an administrative Home Office appointment. We feel that such a critical appointment should have a clear statutory basis and we will legislate to achieve this as soon as possible'.

[120] Part 3.

[121] The Under-Secretary of State for Justice, Gerry Sutcliffe, stated that the PPO would be placed on a statutory basis 'through the next appropriate legislative vehicle', Hansard HC vol 460 col 662, 666 (16 May 2007).

[122] Public Bill Committee, 'Criminal Justice and Immigration Bill' HC (18 October 2007) col 111, 112.

There might also be scope for further expansion of the PPO's responsibilities. Following on from the expansion of the PPO remit to include the investigation of deaths in prison it is arguable that the PPO should take over the responsibility from the police for the investigation of such deaths. This might enhance public confidence that these investigations will be thorough and proper. People may lack faith where one institution responsible for enforcing the coercive power of the state investigates another. It may also help ensure that the investigations are more effective and lead to greater accountability via the criminal process. One of the arguments for introducing independent oversight of the police in the form of the IPCC was that police officers tended to find that there was insufficient evidence to proceed with a criminal prosecution. It was suggested that this might be because the police conduct in question may well have been part of police working rules and the police conducting the investigation, or their close colleagues, might well have behaved in such a manner in the past.[123] It is arguable that similar considerations arise in relation to police investigations of deaths in custody. Where, for example, a prisoner has died while being restrained by a number of prisoner officers, it is likely that the investigating police will, themselves, have restrained people in a similar manner on occasions.

The case in favour of independent criminal investigation of deaths in prison does not appear to have been pressed in the same way as was the case for independent investigation of police conduct. It may be, though, that if the new corporate manslaughter law, when it is extended to apply to deaths in prison, does not start to produce a greater degree of criminal accountability then calls for such independent

[123] A Sanders and R Young, *Criminal Justice* (3rd edn Butterworths, London 2007) 615.

investigation may grow. If this responsibility were to be placed on the PPO its resources and powers would obviously have to be considerably enhanced.

5.3 Public Scrutiny

A certain degree of public scrutiny of life behind the prison walls and the performance of the prison system is possible. The performance of the prison system is exposed to public scrutiny via the publication of reports and performance ratings. Selected members of the public, including Members of Parliament, those who volunteer to serve on Independent Monitoring Boards and journalists, may also provide oversight. The oversight by such selected members of the public helps open up the prison system to the general public.

5.3.1 The publication of reports and performance ratings

The general public are able to learn about the performance of the prison system and the individual prisons which make up the system as a result of the reports published by the Prison Service. Each year, for example, the Service publishes an annual report.[124] This reports the performance of the Prison Service, including, details of how it has performed against the Key Performance Indicator targets set by the Government.[125] Since 2003 the Prison Service has also published quarterly performance ratings[126] and in December

[124] Annual reports are available at: http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=38.
[125] See, HM Prison Service, *Annual Report and Accounts April 2006-March 2007* (2007) HC 717, 10-12.
[126] Available at: http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=87.

2006 the National Offender Management Service began publishing a weekly prison population briefing.[127]

The publication of this information, particularly the quarterly performance reports, may help bolster prison performance.[128] The quarterly performance reports award each prison a performance rating ranging from level 1 to 4, allowing poorly performing prisons to be clearly and publicly identified. This public identification and ensuing critical media coverage[129] may embarrass those receiving a low rating into making increased efforts to improve performance and drive up standards. There are certainly indicators that prison staff care about how their prison is doing on the performance charts.[130] The first league table published in 2003 revealed that Holloway was one of the worst three prisons in England and Wales.[131] In the performance ratings published in August 2007 it had attained level 4.[132] It is conceivable that the publication of the league tables and the resulting adverse publicity at least helped focus attention and produce such improvement. The publication of the weekly population bulletin may also aid effective performance by helping highlight how overcrowded and overstretched the prison system is. The bulletin tends to attract media attention,[133] which may help bring

[127] Available at: http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=85.
[128] The Prison Service states: 'The Prison Service seeks to attain high standards at all its prisons. To help achieve this it publishes performance ratings four times a year for every Prison Service establishment'. See http://www.hmprisonservice.gov.uk/abouttheservice/performanceratings.
[129] See, for example, R Ford, 'Holloway plumbs depths of worst jails' *The Times* (25 July 2003).
[130] See: A Liebling, assisted by, H Arnold, *Prisons and their Moral Performance, A Study of Values, Quality, and Prison Life* (Oxford University Press, Oxford 2004) 70.
[131] R Ford, 'Holloway plumbs depths of worst jails' *The Times* (25 July 2003). In the first performance ratings made available on the Prison Service website, February 2004, Holloway's performance had risen to level 2, Prison Service Performance Ratings – February 2004.
[132] Prison Service Performance Ratings – August 2007.
[133] See: C Dyer, 'Pressure on Falconer as prison population hits all-time high: Court cells will overflow if too many fail to get bail: Jail system could implode in two weeks, says union' *The Guardian* (30 May 2007); E Addley and A Travis, 'Overcrowded prisons: Record number in jails raises fear of violence: Warning from officers as inmate total hits new high' *The Guardian* (31 August 2006); R Ford, 'Surge in prison population prompts emergency measures' *The Times* (19 June 2006).

pressure to bear on politicians to take effective action to tackle the overcrowding of the prison estate.

As well as helping produce more effective performance the publication of the performance information is also arguably important for public confidence and on the basis of democracy. The fact that the public can see, via occasional media reports, that the prison system is monitored and poor performance is publicly exposed may provide a degree of reassurance. Public confidence may also be enhanced by the publication of the performance information as the quarterly performance ratings, for example, highlight those prisons which are performing well. The media, particularly the local media, may pick up on and report the fact that the local prison has received a good performance rating.[134] As with the publication of CPT and HMIP inspection reports it is also arguable that such transparency about the prison estate is appropriate in a democracy. The public have a right to know how the Prison Service is performing.

Concern might arise over the fact that HMIP continues to question the accuracy of performance figures returned by the Prison Service. Her Majesty's Chief Inspector of Prisons has developed the concept of the 'virtual prison'. The virtual prison is the one that is supposed to be operating according to the performance statistics but it is not always the one that is actually operating.[135] HMIP's 2005-06 Annual Report notes, for example, that as in previous years, the true extent of the problems in the areas of prisoner activity were masked by inaccurate and sometimes wildly exaggerated figures.[136] The publication of misleading performance information is of no benefit to the

[134] See, for example, 'Prisons are making real progress' *This is Local London* (24 January 2007).
[135] A Owers, 'Prison Inspection and the Protection of Human Rights' (2004) 2 EHRLR 107, 112.
[136] HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) 22.

Prison Service or the public. It is to be hoped that continued HMIP exposure of such returns may, in time, produce more consistently reliable performance information.

There is also scope for enhancing the media coverage of the performance reports. The first performance ratings, published in 2003, were widely reported on.[137] This was undoubtedly due, in part, to the novelty value of the information. The publication of the ratings now seems to attract little media coverage. It is arguable that more could be done to encourage the media to provide exposure of these reports. At present the Prison Service does not appear to issue press releases to publicise the performance information.[138] A press release should be issued whenever the quarterly performance reports are published. There is a good possibility that if this was done media coverage of the performance ratings would rise. The media are normally eager to report information presented in the form of a league table which allows the identification of the 'worst' performing institution.

The Prison Service could also publish further performance information which it collects. As part of the Prison Service audit, prisons are subject to the Measuring the Quality of Prison Life (MQPL) survey.[139] This survey, which is designed to uncover the quality of life within prisons by looking at information not covered in the performance

[137] See: H Dougherty, 'Brixton and Holloway "worst jails in country"' *The Evening Standard* (24 July 2003); C Jones, 'Prison is one of the worst' *Liverpool Daily Echo* (24 July 2003); 'Walton Jail One of worst' *Liverpool Daily Echo* (24 July 2003); 'Prisons have made "second-Best" grade' *South Wales Echo* (24 July 2003); J Revill, 'Swinfen Hall is Among Best Prisons' *Birmingham Post* (25 July 2003); 'Prison Problems – But Standards Improving' *Derby Evening Telegraph* (25 July 2003); N Morris, 'Brixton, Holloway and Dartmoor jails are labelled the worst in England' *The Independent* (25 July 2003); 'Prisons have made "second-best" Grade' *South Wales Echo* (25 July 2003); R Ford, 'Holloway plumbs depths of worst jails' *The Times* (25 July 2003); 'West Women's Prison Facing A Sell-Off After Being Shamed' *Western Daily Press* (25 July 2003).

[138] See the press release section on the Prison Service website: http://www.hmprisonservice.gov.uk/resourcecentre/pressarchive/.

[139] See further, HM Prison Service, 'MQPL survey reveals reality of prison life' http://www.hmprisonservice.gov.uk/prisoninformation/prisonservicemagazine/index.asp?id=1436,18,3,18,0,0; A Liebling and H Arnold, *Measuring the quality of prison life,* Home Office Research Findings 174 (2002).

ratings, is conducted in a number of prisons each year.[140] Such information could be of great interest and would help complete the picture of conditions within our prisons. The MQPL reports are not, however, published by the Prison Service. They are, though, available, if requested under the Freedom of Information Act 2000.[141] Given that they are available upon request there is no reason why they should not be published by the Prison Service in the same way as the performance ratings.

5.3.2 Parliament

Members of Parliament may provide scrutiny of the prison system by posing written questions for the Secretary of State for Justice. The Secretary of State, or a minister from his department, will publish a written answer to the question.[142] Alternatively, the Secretary of State for Justice, or one of his ministers, may appear before the House to take questions orally. On occasions, normally where something has gone wrong in the Prison Service, such debates may receive considerable media coverage. Most famously, in 1995 the then Home Secretary,[143] Michael Howard, appeared before the House on an emergency debate called by the opposition to explain why he should not take responsibility for the escape of a number of prisoners from Parkhurst prison.[144] Such oversight is important to provide reassurance to the public. It is also important on the basis of democratic accountability that where something has gone wrong the minister

[140] See, Hansard HC vol 442 cols 577-579W (1 February 2006). Fiona Mactaggart, in response to a parliamentary question, gave details of when prisons were last audited under the Measuring the Quality of Prison Life survey.
[141] On 20 October 2006 the Home Office revealed that it would release hard copies of the Measuring the Quality of Prison Life reports following a request under the Freedom of Information Act 2000. See: http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-offender-management/3013-quality-prison-life-reports?view=Html.
[142] On, for example, 19 July 2007 a minister in the Ministry of Justice, David Hanson provided information about the average number of hours spent by young offenders per day in cells, undergoing education and playing team sport in response to a written question, Hansard HC vol 463 cols 590-592W; On 26 July 2007 David Hanson responded to a request for information about how many three-bed cells are in use in each prison in England and Wales, Hansard HC vol 463 col 1481W (26 July 2007).
[143] Until 9 May 2007 the Home Office had overall responsibility for the Prison Service.
[144] Hansard HC vol 264 cols 502-547 (19 October 1995).

can be called before the House of Commons and publicly questioned on precisely what has gone wrong, and what is going to be done to make sure it does not reoccur.

Parliamentary oversight of the prison system also flows via Parliamentary select committees. In, for instance, the 2004-05 session of Parliament the Joint Committee on Human Rights examined the issue of deaths in custody. As part of their investigation representatives of the Prison Service were questioned.[145] The Committee found that prisoners were often held in conditions which were unsatisfactory or inappropriate, that many of those in prison should be held elsewhere such as psychiatric units or supervised within the community, and that the officers responsible for detention too often lacked adequate training or specialist support.[146] Their recommendations helped stimulate efforts to rectify these concerns.[147]

The Home Affairs Committee has examined a number of aspects of the administration of the prison system. Their investigation into the rehabilitation of prisoners included visits to prisons and the questioning of over 1000 prisoners. They also took oral evidence from senior members of the Prison Service including the Director General.[148] They found little evidence that serious efforts were being made within the Prison Service to prepare prisoners for the world of work and that much of the provision for

[145] The Committee took oral evidence from Phil Wheatley, the Director General of the Prison Service, and Nigel Hancock, Head of the Safer Custody Group, HM Prison Service, Joint Committee on Human Rights, *Deaths in Custody, Volume II* (2004-05) HL 15-II, HC 137-II 60.
[146] Joint Committee on Human Rights, *Deaths in Custody, Report, together with formal minutes* (2004-05) HL 15-I, HC 137-I.
[147] See: Joint Committee on Human Rights, *Government Response to the Third Report from the Committee: Deaths in Custody* (2004-05) HL 69, HC 416; Joint Committee on Human Rights, *Deaths in Custody: further Government Response to the Third Report from the Committee, Session 2004-05* (2005-06) HL 60, HC 651.
[148] Home Affairs Committee, *Rehabilitation of Prisoners* (2004-05) HC 193-II.

rehabilitation and resettlement continued to be inadequate.[149] The Government responded positively to this report.[150]

5.3.3 Independent Monitoring Boards

Every prison in England and Wales has its own Independent Monitoring Board (IMB) made up of ordinary members of the public from the local community. The IMB must satisfy itself as to the humane and just treatment of those held in custody.[151] To carry out this task IMBs visit prisons frequently, often without notice. They enjoy unrestricted access to all parts of the prison and can talk to any prisoner they wish, out of sight and hearing of a member of staff if necessary. IMBs also provide an independent grievance resolution mechanism. They will hear and investigate any complaints raised by prisoners. To attempt to correct inappropriate conditions uncovered or provide redress to a prisoner's complaint, IMBs may raise concerns with the local management of the prison. If this fails to provide satisfactory resolution they may escalate their concerns up the chain of command including, if necessary, to the Home Secretary.

It is clear from an examination of a sample of IMB annual reports that they are successful at uncovering and documenting inadequate prison conditions.[152] It also seems, however, that they may not always be as effective as they ought to be in tackling such conditions. All the examples of inadequate conditions detailed in HMIP's reports and CPT's reports, have occurred in prisons to which IMBs were attached and

[149] Home Affairs Committee, *Rehabilitation of Prisoners* (2004-05) HC 193-I.
[150] The Government Reply to the first report from the Home Affairs Committee (2004-05) HC 193, *Rehabilitation of prisoners* Cm 6486.
[151] For responsibilities see: the Prison Act 1952 s 6 and the IMB Reference Book (IMBs in Prisons) (2005). Reference book available at: http://www.imb.gov.uk/192570/imb-reference-book.pdf?view=Binary.
[152] See, for example, the 2007 report of the IMB at Pentonville prison which reported: 'endemic squalor and a poverty of regime which ought to be a matter of deep shame to Government', The Independent Monitoring Board HMP Pentonville, *2007 Annual Report* (2007) 4. All IMB annual reports are available at: http://www.imb.gov.uk/annual-reports.

responsible for monitoring on a frequent basis. IMBs may, in some cases, have identified too closely with prison staff and ignored clear examples of abuse and improper behaviour.[153] In other cases, however, IMBs have identified unacceptable conditions but adequate corrective action has not been taken. The fact that since 2005 a minister with responsibility for the Prison Service tends to respond in writing and publicly to the IMB's annual reports[154] may help ensure that corrective action is taken. A ministerial response should be given in every case.[155]

As well as providing protection for the rights of prisoners the IMB system also provides an important aspect of participatory democracy. Inspecting prisons may educate those who volunteer to sit on IMBs about conditions of imprisonment. In the words of one IMB, 'I had never been in a prison before joining the IMB and I had a stereotypical view of prison life, gained from television and the press … I have gained insight into a completely different way of seeing things'.[156] As argued previously, educating the public about conditions within prisons may help reduce the pressure for ever longer sentences which, in turn, may help reduce the overcrowding of the prison estate.

The fact that IMB's annual reports have been published since 2002 provides an important degree of transparency and helps educate members of the public beyond those who sit on IMBs about the conditions within prisons. The publication of reports may also produce a degree of accountability for poor conditions. If criticisms are picked up and reported by the media this may help spur the prison in question to take action in

[153] A Coyle, *Understanding Prisons: Key Issues in Policy and Practice* (Open University Press, Maidenhead 2005) 56.
[154] Minister's replies available at: http://www.imb.gov.uk/annual-reports.
[155] It seems that the minister only replies to a selection of the annual reports. In, for example 2006 there were 99 IMB annual reports but only 32 minister's replies.
[156] IMB Volunteer profiles: http://www.imb.gov.uk/volunteer-profiles.html.

response. The fact that ordinary members of the public can enter prisons and check on conditions may also provide reassurance to the public. For the public to be reassured they must be aware of the role and work of the IMBs. A high public profile is also necessary to help aid the recruitment of new IMB members.

In March 2005 the IMB National Council, recognising that independent monitoring had a low public profile, established a Communications Review Working Group to look at ways to raise the profile of IMBs.[157] In July 2007 the chair of the group, Jane King, reported that much had been done towards achieving this objective.[158] It is certainly the case that in recent years critical IMB reports have received media coverage.[159] IMBs have also made successful use of the media to raise awareness of their role to try and recruit new members.[160] The Communications Review Working Group believes, however, that there is still room for further improvement. In particular, it is looking at ways to encourage IMBs to engage more pro-actively with the local media and their local communities.[161] Dr Peter Selby, who is due to become the new president of the National Council of IMBs in January 2008 stated, in May 2007, that, 'we need to raise the profile of the boards'.[162]

5.3.4 The Media

[157] 'Spreading the Word: Report on speech by Angela Clay, Communications Review Working Group' IMB News, issue 7 (October 2005) 13.
[158] J King, 'Communications Working Group' IMB News, issue 11 (July 2007) 21.
[159] See, for example, P McGuffin, 'Jail conditions blasted in report' *Bradford Telegraph and Argus* (20 September 2007); '"Degrading" in city's prison' *Nottingham Evening Post* (19 September 2007); 'Prison's health service rapped' *Peterborough Evening Telegraph* (19 September 2007); 'Armley slammed but staff praised' *Yorkshire Evening Post* (19 September 2007); R Razaq, 'Pentonville squalor is "matter of deep shame"' *The Evening Standard* (9 August 2007); A Hayes, 'Harmondsworth: "unfit for purpose"' *This is Local London* (4 July 2007).
[160] See, for example, 'Get a taste of life within these walls' *Birmingham Evening Mail* (3 August 2007); 'Jail board appeals for volunteers' *The Gloucester Citizen* (28 April 2007); 'Prison board seeks help' *Western Morning News* (24 April 2007); R Clegg, 'Dangerous prisoners jail seeking monitors' *This is York* (16 April 2007).
[161] J King, 'Communications Working Group' IMB News, issue 11 (July 2007) 21, 22.
[162] Quoted in, R Ford, 'A mission to stiffen the boards' *The Times* (1 May 2007).

The closest most members of the public will get to prison is through the media. Media coverage of the prison system therefore has a crucial role to play in informing the public. It is through media reporting that the majority of the public will learn, if at all, about the conditions within prisons and the performance of the prison service.

As touched upon throughout this chapter, the media reports on the activities of the various mechanisms which provide oversight of the prison system. The extent to which those mechanisms provide accountability via public criticism rests largely on such criticism being picked up and reported by the media. Likewise, it is as a result of media reporting that these mechanisms help provide the kind of transparency required in a democracy, and help reassure the public that there are mechanisms overseeing the administration of the prison system.

The media may also provide their own direct scrutiny of prison conditions. Journalists and television cameras have been granted permission to enter prisons with increasing regularity in recent years. Such oversight often works to inform the public about conditions within prisons.[163] As well as providing transparency about the conditions within prisons such openness has, on occasions, helped safeguard prisoner rights. The BBC's Panorama program broadcast on Sunday 11 March 2001 looked, for example, at

[163] On 27 February 2006 BBC2 broadcast 'Women on the Edge: The Truth about Styal Prison', a documentary filmed inside the prison looking at the issues of self harm and suicide. See, R. Coughlan, 'One Night in Styal: The Experiences of a Documentary Film-maker' (2006) PSJ Available at: http://www.hmprisonservice.gov.uk/resourcecentre/prisonservicejournal/index.asp?id=5069,3124,11,3148,0,0. In July 2006 BBC1 broadcast 'Behind the Bars', a week of live programmes designed to give viewers a real insight into life inside a British prison. Broadcast daily from HMP Cardiff, it featured interviews with prisoners and prison officers. See: http://www.hmprisonservice.gov.uk/news/index.asp?id=5350,22,6,22,0,0. The print media has also helped open up the prison system to the public. See, for example, 'A day inside: The prison system is in crisis. Our jails are bursting with convicts and crumbling with age. At least, that's what the headlines tell us. But what is daily life like for the 80,000 people locked up – and for the 25,000-plus who work with them? For this G2 special we talked to 42 people about one day last week – from Category A prisoners whose escape would endanger the public to Category Ds trusted with their own keys; from a money-launderer jailed with her baby to a teenager who caused death by dangerous driving; from the head of the Prison Service to a father whose son died in custody…' *The Guardian* (12 March 2007).

conditions with Feltham Young Offenders Institution.[164] It revealed that the electricity cables from which one 17 year old prisoner had hanged himself had still not been boxed in months later,[165] and the same tables from which one prisoner had used the leg to murder his cell-mate Zahid Mubarek, were still in the cells.[166]

In the absence of permission to enter a prison the media may still examine prison conditions and the performance of the Prison Service. On occasions undercover reporters have gained employment as prison officers so that they can report on the administration of a prison. In, for instance, April 2007, 'Life Behind Bars', a Guardian Films investigation for Panorama, revealed that inmates at Rye Hill prison enjoyed easy access to drugs and mobile phones. The footage used in the programme came from an undercover reporter who worked at the prison as a prison officer for five months.[167] Insight is also provided via the Freedom of Information Act. In October 2007 a freedom of information request by The Guardian revealed that 1,300 prison officers in England and Wales were found guilty of misconduct between 2000 and 2006.[168]

It is important that the media are increasingly able to see prison conditions with their own eyes. The media frequently publish material giving the impression that prison is an easy ride.[169] As is clear from the reports produced by HMIP, the CPT and the IMBs this is mostly far from the truth. Opening up the prison system to journalists may help

[164] See: http://news.bbc.co.uk/1/hi/programmes/panorama/archive/1212014.stm.
[165] See transcript of programme available at: http://news.bbc.co.uk/hi/english/static/audio_video/programmes/panorama/transcripts/transcript_11_03_01.txt.
[166] *ibid.*
[167] See, E Allison and D Campbell, 'Bribery and drugs exposed at private jail: Undercover reporter offered £1,500 by inmates'. *The Guardian* (16 April 2007) and: http://news.bbc.co.uk/1/hi/programmes/panorama/6558855.stm.
[168] R Cookson, E Allison and R Evans, 'Figures reveal 1,300 prison officers guilty of misconduct over six years' *The Guardian* (22 October 2007).
[169] See, for example, A France, 'The lifers of luxury' *The Sun* (12 June 2007); 'Lag of luxury' *The Sun* (15 January 2007); T Whitehead, 'Prisoners get a luxury Xmas' *The Express* (12 December 2006).

educate the media and balance such misleading reporting to present the public with a more accurate picture. This may help reduce the push for inappropriate sentences and help restore public confidence in prison as an effective punishment.

5.4 Conclusion: The openness of the prison system

It is clear that the oversight of the prison system provided by the courts, certain administrative bodies and the public promotes accountability, aids effective performance, helps safeguard the rights of prisoners, provides the kind of transparency and opportunities for citizen participation required in a democracy and helps bolster confidence in the prison system.

Accountability is provided most clearly where prison officers are convicted of breaking the criminal law. In a small number of cases officers have been convicted following assaults on prisoners. The fact that a trial will be conducted publicly, and cases involving prison officers tend to attract media attention, enhances the degree of accountability. Prison officers sent to prison for attacking a prisoner are likely to serve their sentence fearing attack by fellow prisoners. A degree of accountability may also be provided via the bringing of a civil action. Most commonly, actions are brought alleging negligence or assault by prison officers. If the misconduct involved is particularly egregious, the Prison Service may be ordered to pay punitive or exemplary damages.

Aside from criminal sanction or a financial penalty the accountability provided by the various oversight mechanisms takes the form of public criticism which may embarrass the Prison Service. Such criticism has, in particular, been provided by inquests into the

deaths of prisoners. Inquests have delivered verdicts of unlawful killing and narrative verdicts which publicly identify failings on the part of the prison authorities. Where judgments go against the Prison Service at the European Court of Human Rights and it is held that the policy followed has breached rights this leads to much negative media coverage. The publication of critical reports by Her Majesty's Inspectorate of Prisons, the reports of Independent Monitoring Boards and the performance ratings may also produce adverse publicity.

The oversight provided may also help produce more effective performance. Her Majesty's Inspectorate of Prisons provides, for example, a check on the security of prisons. The National Audit Office contributes to effective performance by making recommendations designed to help save tax payers money. Ensuring prisoners rights are respected may also contribute to more effective performance by aiding the rehabilitative process.

A number of the oversight mechanisms work to ensure that the rights of prisoners are respected. Judicial review judgments and rulings by the European Court of Human Rights have led to policies which were deemed to breach rights being rethought. Judicial review challenges have, for example, helped ensure that prisoners have access to legal advice and have enhanced the fairness of the prison disciplinary system. Inquests may provide a degree of future rights protection as the coroner can make recommendations to the prison authorities designed to ensure that similar fatalities are avoided. The oversight provided by the Committee for the Prevention of Torture, HMIP and the IMBs provides rights protection by uncovering inadequate conditions and making recommendations for improvement. Such recommendations have, on occasions,

helped improve conditions. The Prisons and Probation Ombudsman helps protect prisoner's rights by providing an independent complaints mechanism. The PPO also works to help ensure that prison fatalities are avoided. The accountability provided by the oversight mechanisms may help enhance the rights protection provided. The fact that the reports produced by HMIP, the CPT and the IMBs tend to attract media coverage and, in the event of those reports criticising the prison system, adverse publicity, may, for example, provide an added spur to the prison service to rectify matters.

It is important in a developed democracy that the public are informed about the conditions within its prisons and the way prisoners are treated. The oversight mechanisms, in particular, HMIP, the CPT and the IMBs and the media, as well as the publication of performance reports by the Prison Service, help provide such transparency. This transparency, as well as being important in its own right, may also aid effective performance and help ensure prisoner's rights are safeguarded. Educating the public about conditions within prisons so that they come to realise that prison is not actually the 'easy ride' it is often suggested to be by the media may dampen demands for ever longer sentences. Reducing sentences might help reduce the overcrowding of the prison estate which does much to undermine effective performance and threaten the rights of prisoners. It is also important in a democracy that the public are able to know the circumstances of how someone came to die in the care of the state. The oversight provided by inquests and the PPO provides such openness. The notion of democracy also requires that there are opportunities for citizens to participate and to influence the operation of the criminal justice system. The fact that citizens may enter and check on

prison conditions via the IMB system provides such openness, enabling the values of members of society to impact upon the administration of the prison system.

The fact that the public can see that there are independent oversight mechanisms which work to oversee the effective performance of the prison system and to ensure that prisoner's rights are respected and, where standards fall short, can provide a degree of accountability, may help maintain public confidence in the criminal justice system. To maintain public confidence it is particularly important that where something has gone wrong the public can see that efforts are made to ensure it does not reoccur. Such oversight is provided, in particular, by inquests and by the Prisons and Probation Ombudsman.

It is clear, therefore, that judicial, administrative and public scrutiny of the prison system goes to support the values of openness detailed in chapter one. This oversight has developed considerably in recent years. The courts are now much more receptive to civil actions against the prison system than they were. Narrative inquest verdicts which go along way to providing a degree of accountability and rights protection have been possible since 2004. The enactment of the Human Rights Act has enhanced the scrutiny possible via judicial review. The CPT made its first visit to the United Kingdom in 1990 and has visited on a number of occasions since. The PPO was established to consider prison complaints in 1994 and in 2004 its remit was extended to the investigation of deaths in prisons. Since 2003 the prison service has published quarterly performance ratings and since December 2006 the National Offender Management Service has published a weekly prison population briefing. All IMB annual reports have been published since 2002 and since 2005 replies to the IMB's reports from a minister with

responsibility for the prison service have been published. The media has also been permitted to enter prison with increasing regularity in recent years and to report on conditions.

These steps towards opening up the prison system are welcome. It does though seem that there is scope for further steps which would increase support for the values of openness. Although prison officers have occasionally been convicted of committing criminal offences, this is a fairly rare occurrence. It is arguable that prison officers and the prison system should be held to account via the criminal process more frequently. The new Corporate Manslaughter and Corporate Homicide Act 2007 will, in time, be extended to cover deaths in custody. This may produce increased criminal accountability and may help ensure more strenuous efforts are made to safeguard the right to life. It is to be hoped that the provisions of this Act extending it to cover deaths in prison, are introduced as soon as possible.

A case can also be made for removing the duty to investigate deaths in prison from the police. Transferring this responsibility to the PPO may enhance public confidence in the process and might also produce more effective investigations. More effective or objective investigations could help increase the chances of the prison system being held to account via the criminal process where standards have fallen short.

The details of out of court settlements agreed with prisoners when they have brought a civil action against the Prison Service often go undisclosed. The public have a right to know how much of their money is being used in this manner. It is also important to provide a degree of accountability that such settlements are disclosed. Given that the

details of most large settlements seem to leak to the media indirectly, it would be better if the information were published directly by the Prison Service.

At the time of writing the Government has promised to introduce improvements to the coroner system soon which will help ensure that recommendations made by coroners are implemented and will introduce considerable transparency with regards to this process. These changes will help enhance the rights protection provided by the inquest system and may bolster public confidence. It is important for the public to be able to see that lessons are learned following a death in prison and steps are taken to avoid such repeat incidents.

Alongside the proposal to enhance the PPO's role to include the investigation of deaths in custody it seems that there is considerable scope for enhancing the oversight provided via his current functions. Particular concern arises over the time it takes for the PPO to deal with prisoner complaints. Promptness in the resolution of prisoner grievances is of critical importance. The PPO, however, continually fails to meet his targets for dealing with complaints. This inadequate performance is due largely to a lack of resources. The PPO should be provided with sufficient resources to fulfil his duties in an effective manner. There is also scope for enhancing the PPO's current role in relation to the investigation of deaths in prison. It is arguable that just as a minister tends to respond to IMB annual reports, the Prison Service, or even the prison in question, should be required to respond publicly to the PPO report into a particular death. Such openness might help ensure recommendations were implemented and would provide further public reassurance that lessons had been learned. The PPO should also be provided with

the long called for statutory basis as soon as possible. Such a step will help bolster his perceived and actual independence.

In recent years the Prison Service has begun publishing regular performance reports. Such reports can provide importance accountability and it is right that this information is available in a democracy. It does though seem that the accuracy of the performance information may be open to question. HMIP continues to uncover examples of inaccurate statistical returns. It is to be hoped that the continued exposure of such returns will help push the Prison Service towards ensuring the data is accurate. Misleading performance information is of little use to either the public or the Prison Service. It also seems that there is scope for the Prison Service to provide more performance information than is currently available. In particular, the Measuring the Quality of Prison Life survey, which is available under the Freedom of Information Act, should be published.

It is clear that Independent Monitoring Boards have made considerable progress towards a higher public profile in recent years and their reports now tend to attract media coverage. The IMB National Council and the newly appointed president of the Council seem though to feel that there is still scope for enhancing their profile. It is appropriate that efforts will continue to be made towards further raising awareness of the role and work of the IMBs in the coming months. The higher the profile of the IMBs the more effective they will be in providing reassurance to the public, protecting the rights of prisoners and improving prison conditions.

It does seem that a number of these proposals for providing greater support for the values of openness will come to fruition shortly. The Government has firmly committed itself to extending the Corporate Manslaughter and Corporate Homicide Act 2007 to cover deaths in prison as soon as possible. It is also committed to strengthening the coroner system to ensure that coroner recommendations are acted upon and that this process is conducted transparently. Likewise, it has publicly committed itself to providing a statutory basis for the PPO's oversight. If enacted, part 4 of the Criminal Justice and Immigration Bill will establish a statutory body, Her Majesty's Commissioner for Offender Management and Prisons, to take over the role of the PPO. This is a welcome development although it should be noted that there does appear scope for amending part 4 to bolster the independence of this new body.

Other proposals including, for instance, the requirement that the Prison Service be required to disclose out of court settlements agreed with prisoners and to publish the Measuring the Quality of Prison Life reports could be easily introduced. Enhancing the oversight provided by the Prisons and Probation Ombudsman to enable prisoner complaints to be dealt with in a timelier manner would require the provision of additional resources. Without major change the chances of this occurring may, unfortunately, be more limited. The PPO has complained about inadequate resources for a number of years now without any positive response from the Government. Major change is though, it seems, on the horizon in the form of Her Majesty's Commissioner for Offender Management and Prisons. If this new body is established there may be a good possibility that as resource needs are looked at anew, additional resources will be provided.

Most controversial of these proposals is the suggestion that the PPO should perhaps take over from the police the investigation of deaths in prison. This change does not appear to have been advocated or pressed for in the same way as other independent mechanisms for overseeing the agents of the state have been, including, for example, the Independent Police Complaints Commission. Nonetheless, as society increasingly moves towards requiring independent oversight of state institutions, particularly those with responsibility for exercising the coercive power of the state, calls for the PPO role to be so developed may well grow. This might be especially so if juries at inquests into deaths in prison continue to deliver verdicts outlining the negligence of the prison in question, and the extent to which the prison system is held to account for such deaths via the criminal process fails to rise following the extension of the Corporate Manslaughter and Corporate Homicide Act 2007 to cover deaths in prison.

Chapter 6

Open Justice and the English Criminal Process

This thesis has investigated the concept of 'open justice' as it applies to contemporary criminal proceedings in England and Wales. Open justice is conventionally associated with the trial process, and exemplified by the fact that criminal trial proceedings are normally open to ordinary members of the public, who can observe from the public gallery, and subject to extensive media reporting. However, the principle of open justice need not be confined exclusively to trials and courts. This thesis has sought to demonstrate that the principle of open justice has important applications at each stage of the criminal process, beginning with police investigations and extending to post-conviction imprisonment.

This thesis has concentrated on five prominent values of open justice: accountability, effective performance, rights protection, democracy and public confidence. Chapters 2-5 explored various ways in which open justice is promoted through oversight of the police, the Crown Prosecution Service (CPS), the trial courts and the prison system. Such oversight is provided by three different institutional mechanisms: the courts, independent administrative bodies, and various public scrutiny mechanisms.

This concluding chapter will first of all summarise the five principal values and objectives of open justice, giving illustrations of their application at different stages of criminal proceedings. This part of the discussion recaps the more detailed analysis developed in Chapters 2-5. Next, the recent trend towards open justice in English criminal proceedings is summarised. Some consideration will then be given to the ways

in which the recent trend might be taken further, again with concrete examples culled from previous chapters. The prospects for such steps being taken will also be considered. Finally, it will be suggested that it is time to recognise a new, more expansive conception of open justice, which applies at every stage of criminal proceedings and to all of its primary institutions and actors.

6.1 The values of openness and the criminal process

Chapters 2-5 of this thesis examined the extent to which existing oversight of the police, the CPS, the trial courts and the prison system in England and Wales satisfies the criteria of open justice. This scrutiny, it was noted, is provided by the overlapping oversight of the courts, dedicated administrative bodies, and the public at large. It was demonstrated that this oversight, and in particular the open manner in which it is conducted, goes to provide a degree of accountability, helps improve performance, provides protection for rights, bolsters democratic governance and helps maintain public confidence in the administration of criminal justice. We will now briefly revisit each of the five principal open justice values and objectives, in turn. Although each one can be considered separately for the purposes of analysis, in reality they tend, as noted, to overlap and support each other.

6.1.1 Accountability

Accountability is provided most clearly where individual police or prison officers are convicted of committing a criminal offence whilst performing their duties.[1] They are penalised as the court will impose a sentence. The openness of the criminal process adds

[1] In relation to the police see section 2.1.3 and for the criminal prosecution of prison officers see section 5.1.1.

an additional degree of accountability. Such cases tend to receive considerable media coverage and those convicted are likely to serve their prison sentence fearing attack from other prisoners.[2] Individual police officers may also be punished via the police disciplinary system.[3] Punishments imposed in high profile cases are confirmed publicly by the Independent Police Complaints Commission. Disciplinary hearings may also now be conducted in public, reinforcing the message that poor performance by public officials will not be tolerated.

Alongside the punishment of individual police or prison officers through criminal sanction the oversight provided by the courts via civil actions may provide a degree of accountability by penalising the police or the Prison Service financially.[4] Damages awarded in a civil action are primarily intended to compensate the claimant for harm suffered. In particularly egregious cases where the conduct has been 'oppressive, arbitrary or unconstitutional'[5] exemplary or punitive damages may, however, be awarded. There has been a number of successful assault claims against the police and prison service in which exemplary damages have been ordered.[6]

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[2] Following the convictions of three prison officers for attacking prisoners in Wormwood Scrubs prison it was suggested that the officers would have to serve their sentences on special segregated wings with other inmates at risk from fellow prisoners but that even this might not be enough to protect them from being attacked, In the words of Harry Fletcher, of the National Association of Probation Officers, 'It's going to be extremely difficult to protect them within a prison environment. They will have to be held in segregation and secure conditions for the rest of their sentence', quoted in, I Burrell, 'Brutality shocked prison officers' *The Independent* (September 5 2000).

[3] See section 2.2.3.

[4] In relation to the police see section 2.1.5 and for examination of civil actions against the prison service see section 5.1.2.

[5] *Rookes v Barnard* [1964] AC 1129 (HL).

[6] In, for example, 1994 the High Court ruled that Derek Treadaway had been assaulted by police officers of the West Midlands serious crime squad. He was awarded £2,500 compensatory damages, £7,500 aggravated damages and £40,000 exemplary damages, Entitlement to exemplary damages' *The Times* (25 October 1994). In 1996 the Home Office was ordered to pay £16,000 damages to a former prisoner, David Burke, after he was stripped naked and subjected to a violent and 'quasi-sexual' assault by prison officers. The award included £12,000 exemplary or punitive damages, The judge at Clerkenwell county court, east London, Mrs Recorder Suzan Matthews, said the award was being made to 'mark, curb and disavow' the officers' violence. C Dyer, 'Home Office ordered to pay pounds 16,000 for attack on inmate' *The Guardian* (July 25 1996).

Accountability is also provided by the oversight mechanisms as they publicly expose impropriety or poor performance by those responsible for administering the criminal justice system. Added to such exposure they may offer public criticism. Such exposure or public criticism may attract media coverage and embarrass those criticised. Public criticism has, in particular, been focused on the police and the CPS through the public scrutiny afforded by open trial.[7] The appeal courts may rebuke an inferior court where it has made an error.[8] Inquests have frequently delivered verdicts in which the finger of blame has been pointed clearly at the police and the prison service.[9]

Administrative oversight mechanisms routinely expose poor performance. The published reports of Her Majesty's inspectorates for the police (HMIC), the CPS (HMCPSI), the courts service (HMICA) and the prisons (HMIP) highlight poor performance.[10] The police, the CPS, Her Majesty's Court Service and the Prison Service all also now issue regular performance reports which serve to reveal those forces, Areas or prisons whose performance is substandard. On occasions the media has used this information to compile a league table which may go to embarrass those at the bottom of the table.[11]

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[7] In *R v Stagg* Mr Justice Ognall, said that police behaviour betrayed 'not merely an excess of zeal, but a blatant attempt to incriminate a suspect by positive and deceptive conduct of the grossest kind', F Gibb, 'Judge attacks police over "murder trap"' *The Times* (15 September 1994). See further section 2.1.2. In 2002 Judge Michael Commbe refused to extend a custody time limit and released two persons on bail who were charged with manslaughter, making threats to kill and aggravated burglary. He criticised the CPS for a series of lamentable blunders and called the handling of the case a fiasco, M Horsnell, 'Blunders set suspects free' *The Times* (March 15 2002).

[8] See B Dowell and J Grimston, 'Rough justice with "Judge Blunder"' *Sunday Times* (December 7 2003). This article highlights the trial judges who had the highest number of successful appeals against conviction in their courts and the sentences they had imposed and details some of the criticisms offered by the Court of Appeal.

[9] See sections 2.1.4 and 5.1.3.

[10] For discussion of HMIC reports see section 2.2.2, HMCPSI is discussed at section 3.2.2, HMICA at section 4.2.3 and HMIP is examined at section 5.2.2.

[11] In relation to the police see, W Woodward, 'Police assessments show improvements needed' *The Guardian* (October 25 2006). See further, section 2.3.1. For the CPS see, S O'Neil, F Gibb and H Brooke, 'Justice by postcode: the lottery revealed' *The Times* (November 23 2005); S O'Neil and H Brooke,

It might be debated whether accountability in the form of public embarrassment and damage to reputation provides any real 'punishment'. Any effect is likely to be rather transitory. It will, in most cases, pass and probably be largely forgotten as newspapers are discarded at the end of the day and the news cycle moves rapidly on. Yet there are some indications that public criticism is certainly felt by those responsible for administering the criminal justice system. This was seen, for example, in the CPS plea to judges to stop criticising them in open court as they were beginning to feel demoralised.[12] There are also instances where criticism offered by ad hoc administrative inquiries has precipitated more tangible accountability. The Butler report[13] and the Glidewell review[14] led to the early departure of the DPP, Dame Barbara Mills,[15] and the Bichard report[16] led to the Chief Constable of Humberside being removed from his job.[17] The fact that the criticisms contained in these reports were made public and received considerable media coverage undoubtedly helped bring about these departures.

6.1.2 Effective performance

'Prosecutors in dock over disparity in convictions' *The Times* (November 23 2005), see further section 3.3.1.

[12] Sir Ivan Lawrence QC revealed shortly after his retirement as a Recorder that judges had been asked to be more understanding of 'bungling' CPS officials: 'It got so bad that notes were coming round saying, "we would be grateful if judges didn't criticise the CPS in open court." They were feeling demoralised because they were always being criticised', quoted in, J O'Reilly and J Calvert, 'The secret witness' *The Sunday Times* (April 28, 2002). See section 3.1.2.

[13] His Honour G Butler QC, *Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters* (The Stationery Office, London 1999).

[14] Sir I Glidewell (chairman), *The Review of the Crown Prosecution Service – A Report* (Her Majesty's Stationery Office, London 1998) Cm 3960.

[15] C Dyer and A Perkins, 'DPP bows out after Whitehall pressure' *The Guardian* (May 21 1998). See section 3.2.1.

[16] Sir Michael Bichard, *The Bichard Inquiry Report* (The Stationery Office, London 2004) HC 653.

[17] The Chief Constable David Westwood was initially suspended then allowed to resume his duties after agreeing to retire early, see, *R (on the application of the Secretary of State for the Home Department) v Humberside Police Authority* The Times 9 July 2004, transcript available on LexisNexis; I Herbert, 'Humberside police chief to return – and then retire' (September 11 2004). See section 2.2.1.

The specified aim of the criminal justice system is to convict and punish the guilty and to help ensure that those convicted do not re-offend.[18] The oversight of the criminal justice system provided by the courts, independent administrative bodies and the public helps the criminal justice system to achieve this aim. Bolstering effective performance may also, in certain areas, aid rights protection. Ensuring, for example, that the CPS performs effectively may help protect those who should not be prosecuted from the pains of prosecution.

As already noted, the accountability provided by the oversight mechanisms may push those criticised towards improving performance. The first league table published by the Prison Service in 2003 revealed that Holloway was one of the worst three performing prisons in England and Wales.[19] By the time of the performance ratings published in August 2007 it had attained level 4.[20] It is conceivable that the publication of the league tables and the resulting adverse publicity at least helped focus attention and produce such improvement.

The oversight mechanisms may also improve performance by ordering or recommending that certain action be taken. Judicial review challenges to CPS decisions not to prosecute have, in a limited number of cases, led to the initial decisions being reversed and prosecutions brought.[21] Oversight by higher courts via the appeals process may help ensure the 'right' decision is made on the available evidence and the guilty are adequately punished by correcting an unduly lenient sentence.[22] The fact that the trial courts are open to the public enables the media to highlight and make a fuss about

[18] See: http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html.
[19] R Ford, 'Holloway plumbs depths of worst jails' *The Times* (25 July 2003).
[20] Prison Service Performance Ratings – August 2007.
[21] See section 3.1.1.
[22] See section 4.1.

sentences they regard as unduly lenient. This attention may help prompt the Attorney General to refer a sentence to the Court of Appeal.[23]

The Ad hoc administrative inquiries[24] and the criminal justice inspectorates make recommendations and suggestions for further action designed to improve performance and tackle failings. The response to their recommendations is generally positive.[25] The fact that the reports of the inquiries and the inspectorates are published may place extra pressure on the criminal justice agencies to act on the failings identified and recommendations made.

Efforts to promote effective performance are reinforced by community involvement in criminal justice policy-making at the local level. The input of the local community possible via police authorities and police consultative efforts enables local knowledge and concerns to feed into the development of policing policy.[26] Likewise, engagement by the Community Courts has helped produce more effective sentencing solutions.[27]

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[23] In January 2006, Alan Webster was sentenced to life imprisonment with a minimum term of six years for offences including the rape of a baby, D Ward, 'Babysitter couple jailed for rape of 12-week girl' *The Guardian* (January 11 2006). This minimum term provoked considerable anger in the media, see for instance, 'Now right this terrible wrong' *The Sun* (editorial) (January 17 2006), 'Vile Webster was given life for his sick crime – but will only actually serve six years. What does this say about our pathetic, broken system of so-called justice? It stinks. It's an affront to the nation. Shame;' '55,000' *The Sun* (January 21 2006), 'Sun readers say: Give rape monsters a proper jail sentence. MPs called on the Government to get tough on baby rapists yesterday – as 55,000 readers signed our petition demanding longer sentences for two child sex monsters'. In referring the case to the Court of Appeal the Attorney General submitted that the media outcry 'reflected public outrage at the sentences' and that, 'sentences should properly reflect public feeling and the public feeling in this case called for significantly heavier sentences than those imposed'. *Attorney General's References No's 14 and 15 of 2006 (Tanya French and Alan Robert Webster)* [2007] 1 Cr App R (S) 40, para 27. The Court of Appeal agreed increasing the minimum term to 8 years. See section 4.3.4.

[24] See sections 2.2.1, 3.2.1, 4.2.1, and 5.2.1.

[25] For example, HMIP's 2005-06 Annual Report reveals that of the 2,691 recommendations made during the year, 2,222 (83%) were accepted and 288 (14%) were partially accepted. Follow up inspections found that of the earlier 2,729 recommendations accepted, 1,391 (51%) had been achieved and 570 (21%) partially achieved, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) appendix 3 and 4.

[26] See section 2.3.1.

[27] See Community Justice Centre, North Liverpool, Success Stories: http://www.communityjustice.gov.uk/northliverpool/210.htm. Discussed at section 4.3.1.

The value of open justice is not, therefore, restricted to the more familiar reactive and remedial functions of oversight, review and holding to account. It also has more pro-active dimensions in raising performance standards in the administration of criminal justice.

6.1.3 Rights protection

As we have seen in preceding chapters, the oversight provided by the courts, independent administrative bodies and the public scrutiny mechanisms is a vital guarantor of the rights of those caught up in the criminal process. Judicial review applications and challenges at the European Court of Human Rights have produced rulings that the police and Prison Service have breached rights.[28] Policies have been amended following such rulings so as to make them rights-compliant.[29] At inquests looking in to the circumstances in which people have died following contact with the police or while in custody, coroners have made recommendations designed to ensure that the right to life is not breached again in similar circumstances. Such recommendations have, on occasions, led to changes in police and prison practice.[30] The

[28] In relation to the police see, for example, *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 (HL). In this case a police decision to stop three coaches on their way to a demonstration at RAF Fairford and to forcibly return them to London was challenged. Relying, in part, on the right in Article 10 of the European Convention on Human Rights to freedom of expression and the Article 11 right to peaceful assembly, the House of Lords ruled that the police action represented a disproportionate restriction on the claimant's rights, see section 2.1.1. In relation to the Prison Service in *Ezeh and Connors v United Kingdom* (App no 39665/98 and 40086/98) (2002) 35 EHRR 28; (2004) 39 EHRR 1, the European Court of Human Rights ruled that prison disciplinary hearings held before the governor could amount to 'criminal proceedings'. The proceedings in question were found to amount to criminal proceedings and the failure to allow the requested legal representation therefore breached Article 6(3) of the Convention, see sections 5.1.4 and 5.1.5.

[29] Following *Laporte* Gloucestershire constabulary said that it would be reviewing its policies accordingly, F Gibb, 'Police violated rights of antiwar protesters' *The Times* (14 December 2006). Following the judgment of the European Court of Human Rights in *Ezeh and Connors* the Government implemented changes in August 2002 so that prison governors no longer have the power to award additional days. Such cases must be referred to an independent adjudicator. The new rules also provide for prisoners to be legally represented before the adjudicator. See, The Prison (Amendment) Rules 2002 SI 2002 / 2116; The Prison (Amendment) Rules 2005 SI 2005 / 869.

[30] The points and recommendations made by the coroner at Ibrahima Sey's inquest were, for example, considered by the Metropolitan Police, the Association of Chief Police Officers, and the Home Office. Guidelines produced by the Metropolitan Police on the issue of restraint, in line with the

staying of a prosecution or the exclusion of evidence at trial restores the defendant to the position they would have been in had they not had their rights breached.[31] Scrutiny by the higher courts of the verdicts and sentences passed by the trial courts helps ensure that those who should not have been convicted have their convictions overturned and those who have received an overly harsh sentence have their sentence reduced.[32]

The administrative and public scrutiny mechanisms provide similar protection for rights. HMICA has, for example, looked at the treatment of defendants within courts,[33] HMCPSI works to ensure that only those who ought to be subject to the pains of prosecution are prosecuted, and HMIP helps ensure that prisoners are treated properly. The Criminal Cases Review Commission (CCRC) investigates alleged miscarriages of justice and disproportionate sentences[34] and the Prisons and Probation Ombudsman (PPO) provides a grievance resolution mechanism for prisoners and works to help protect the right to life.[35] More intermittently, the CPT has focussed on ensuring that detainees in police stations,[36] trial courts[37] and prisons[38] are treated properly. Rights protection is buttressed by affording lay volunteers access to closed penal institutions. Assistance for those in police custody is provided by Independent Custody Visitors

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recommendations made by the coroner, were incorporated into the Metropolitan Police officer training manual. A training video on the condition of acute exhaustive mania or excited delirium which followed the criteria commended by the Coroner was also made available to all police forces. See: CPT, *Response of the United Kingdom Government to the report of the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1997* (2000) paras 51-52. See further section 2.1.4 and section 5.1.3.

[31] See section 2.1.2 and 3.1.2.

[32] See section 4.1.

[33] HMICA, *Meeting defendants' needs, An overview of the quality of service for defendants in the criminal courts in England and Wales* (2007).

[34] See section 4.2.2.

[35] See section 5.2.3.

[36] See section 2.2.1.

[37] See section 4.2.1.

[38] See section 5.2.1.

(ICVs),[39] for those held at the trial courts by Lay Observers (LOs)[40] and for those in prison by Independent Monitoring Boards (IMBs).[41] The media may also, occasionally, help expose threats to rights. This is seen, for instance, in the BBC Panorama documentary on Feltham Young Offenders Institution which highlighted the continued existence of dangerous ligature points in cells.[42]

It is crucial for effective rights protection that this oversight is conducted openly. Staying a prosecution or excluding evidence because of police or CPS impropriety may deter others from behaving in a similar manner. It is more likely to have such an effect if those working for the police and the CPS can see that such behaviour will not be tolerated. Publicity given to issues raised at an inquest and any resulting recommendations might enhance the chances of the recommendations having an impact on police practice and on conditions within prisons. Likewise, the recommendations made by the criminal justice inspectorates, the CPT and the panels of members of the public with responsibility for overseeing conditions within police custody and prisons are more likely to have a positive impact if they are made widely known.

The openness of the oversight mechanisms may also bolster rights protection by raising awareness of their roles in providing such protection. It is important that the CCRC and the PPO have made efforts to raise their profile in recent years.[43] Prisoners can only make use of these oversight mechanisms if they are aware of their existence. A higher profile for some of the public oversight mechanisms including, in particular, the ICVs,

[39] See section 2.3.4.
[40] See section 4.3.3.
[41] See section 5.3.3.
[42] See transcript of programme available at: http://news.bbc.co.uk/hi/english/static/audio_video/programmes/panorama/transcripts/transcript_11_03_01.txt. see further, section 5.3.4.
[43] See section 4.2.2 and in relation to the PPO section 5.2.4.

the LOs and the IMBs may also aid rights protection by encouraging members of the public to volunteer to help inspect the conditions within police stations, trial courts and prisons. The more people who volunteer the more frequently these bodies may conduct inspections.

6.1.4 Democracy

The notion of democracy requires that citizens are reasonably well informed about the policing and penal measures that are taken in their name. The fact that the courts are open to the public provides a degree of transparency. Transparency also flows from the publication of reports by the administrative oversight mechanisms and the efforts they make to publicise their work.[44] Likewise, the public scrutiny bodies including the ICVs and the IMBs, publish their reports. In the case of the IMBs each panel produces an annual report and a Government minister with responsibility for the prison service tends to respond in writing.[45] As already noted, the various parts of the criminal justice system now also publish performance information. The fact that Government ministers are required to answer questions from Members of Parliament on the administration of the criminal justice system is vital in a democracy and, given the openness of Parliament, goes to enhance transparency.[46] The media have a crucial role in informing citizens by conveying what has happened in the courts and Parliament, and by reporting the findings of the administrative and public scrutiny mechanisms.[47]

It is also arguable that in a developed democracy the citizens ought to be able to play a role in the criminal justice system beyond receiving information. Citizens should be

[44] See sections, 2.2, 3.2, 4.2, and 5.2.
[45] All IMB annual reports and ministerial responses are available at: http://www.imb.gov.uk/annual-reports. see further, section 5.3.3.
[46] See sections 2.3.2, 3.3.3, and 5.3.2.
[47] See sections 2.3.5, 3.3.4, 4.3.4, and 5.3.4.

able to make their views known and have a degree of influence over the administration of the criminal law. Such participation, as well as being important on the basis of democracy, may, as detailed above, also enhance effective performance. The involvement of the public in this respect is made possible by the community engagement efforts undertaken by the police and police authorities, the CPS and the Community Courts; as a result of the oversight provided by the ICVs, LOs and IMBs; and in relation to the police, via the role of the police authorities. Jury service provides probably the most high profile example of public involvement in the criminal process. Almost half a million members of the public serve as jurors each year. In occasional cases this involvement may, where the jury acquit against the evidence, give a powerful indicator of the views of the community on a particular prosecution or law thus providing a pointer to reform.[48] The media also plays an important role in representing the views of the public, or at least the views they claim are held by the public.

It must be conceded that many individual members of the public may have little interest in seeing how the criminal justice system is performing or in participating in its administration. It is nonetheless healthy in a democracy that such opportunities for direct citizen participation in the administration of criminal justice are preserved. It is important for those who are interested that there is such transparency and opportunities for participating. Those who lack interest may be more likely to become interested as a result of such openness.

[48] In recent years, for example, a number of Multiple Sclerosis sufferers charged with possessing cannabis, which they claim helps alleviate pain and distress, have been acquitted, See, R Jenkins, 'Jury clears man over 'medicinal' cannabis' *The Times* (June 6 1998); R Jenkins, 'Jury clears 'medicinal' cannabis grower' *The Times* (July 23 1999); B Farmer, 'Court clears MS patient who used cannabis openly' *The Independent* (March 18 2000); I Herbert, 'MS patient cleared of cannabis possession' *The Independent* (September 29 2000); S de Bruxelles, 'Cannabis smoker wins medical use victory' *The Times* (October 10 2002). See further section 4.3.2.

6.1.5 Public Confidence

The criminal justice system exists, ultimately, to serve the public, and it is vital that people have confidence that the system works as it should. Higher confidence levels may also feed into more effective performance. People who have confidence in the system may, for instance, be more willing to cooperate with and provide assistance to the police.

Opening up the criminal justice system to the public may help enhance confidence. The openness of the trial courts enables the public to see justice being done. Reports by the criminal justice inspectorates may reveal that the various parts of the system are working effectively and efficiently. The fact that the public are able to play a role via community consultation efforts and jury service also seems to enjoy public support.[49] People tend to have more confidence in something which they are involved in.

More commonly, however, the openness flowing from the oversight mechanisms will diminish, at least temporarily, public confidence. The reports of the administrative oversight bodies frequently reveal ineffective performance and conditions which breach rights. Likewise, the reports of the ICVs and the IMBs often make disturbing reading. Media coverage of the criminal process also tends to concentrate on failings and poor performance. Damaging disclosures may though present an opportunity for swift and effective remedial action. The fact that there are these oversight mechanisms which

[49] Research conducted by Myhill et al in 2003 found considerable support for police engagement efforts with the public, A Myhill, S Yarrow, D Dalgleish, M Docking, *The role of police authorities in public engagement Home Office Online Report 37/03* (2003) 8. See further, section 2.3.1. In 2002 a representative survey of 903 members of the general public found that 80% of those surveyed had a 'great deal' or 'some' confidence in Juries. The only 'player' in the justice system to enjoy greater confidence was the Police. 85% 'strongly' or 'somewhat' agreed with the statement that 'On the whole, I trust juries to come to the right decision', SWR Worldwide, *Views on Trial By Jury: The British Public Takes the Stand* (2002) 4, 12. See further, section 4.3.2.

show themselves to be successful at uncovering poor performance and which take action to try and improve performance may provide some measure of reassurance to the public.

Alongside public confidence it is also important that those caught up in the criminal process as suspects, defendants and imprisoned criminals have confidence that they are being treated fairly and justly. The moral censure contained within a criminal sentence will be undermined if those in prison come to view the system as biased and unfair. The oversight provided by the independent administrative bodies including, in particular, HMIP, the PPO, and the CCRC, and the scrutiny provided by members of the local community as ICVs, LOs, jury members and members of the IMBs, is particularly important in ensuring that confidence is maintained. Those subject to the enforcement power of the criminal law are more likely to have confidence that they are being treated fairly if their treatment and plight is overseen by overtly independent administrative bodies and their fellow citizens. For this benefit to be realised it is important that the administrative bodies make efforts to publicise their independence.

6.2. Recent moves towards greater openness

This thesis has detailed how the oversight of the criminal process provided by the courts, administrative bodies and the public provides accountability, aids effective performance, helps protect rights, enables the type of transparency and citizen involvement required in a developed democracy and helps bolster confidence in the criminal process. This openness has developed considerably over recent years.

The courts have, it seems, partly as a result of the enactment of the Human Rights Act, become increasingly prepared to intervene to protect rights threatened by police decisions or prison policies.[50] Inquests now provide greater openness with regard to the circumstances of a death in custody. This flows from the ruling in *R (Middleton) v West Somerset Coroner*[51] which permitted inquest juries to deliver narrative verdicts. In a number of cases following this ruling inquest juries have delivered verdicts highlighting defects in the care provided for prisoners. The stream of judicial review cases in which the High Court has ordered that CPS decisions not to prosecute be reconsidered began in 1995.[52]

A number of the independent administrative bodies providing oversight of the criminal justice process have developed over the last 15 years. The establishment of the IPCC in 2004[53] introduced a truly independent element into the police disciplinary system which seems to have helped raise public confidence. A fully independent CPS inspectorate, HMCPSI, was established in 2000.[54] The Criminal Cases Review Commission was established on 1 January 1997 and began receiving cases on 31 March 1997.[55] On 1 April 2005 Her Majesty's Inspectorate of Court Administration was established with the responsibility to inspect the whole court system.[56] The CPT began work in 1989[57] and

[50] In relation to the police see *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 (HL) and *Van Colle v Chief Constable of the Hertfordshire Police* [2007] 1 WLR 1821 (CA). These cases are discussed at section 2.1.1 and 2.1.5. In relation to the Prison Service see, *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002 (CA) discussed at section 5.1.4.
[51] [2004] 2 AC 182 (HL).
[52] *R v DPP ex p C* [1995] 1 Cr App R 136 (QB). See further section 3.1.1.
[53] Police Reform Act 2002 Part 2.
[54] The Crown Prosecution Service Inspectorate Act 2000.
[55] Criminal Cases Review Commission, *Annual Report 1997-98* (1998) 5.
[56] Courts Act 2003 Part 5 and the Courts Act 2003 (commencement No. 10) Order 2005 SI 2005 / 910.
[57] Article 1 of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provided for the establishment of the CPT. The convention was opened for signature on November 26, 1987 and entered into force on February 1 1989 following the 7 ratifications required by Article 19. Ratification details available at: http://www.cpt.coe.int/en/about.htm.

made its first visit to the United Kingdom in 1990.[58] The PPO was established to consider complaints from prisoners in 1994[59] and in 2004 its remit was extended to the investigation of deaths in prisons.[60] Over the last few years these administrative oversight mechanisms have really begun to recognise the value of a high public profile and have started to make increased efforts to publicise their role and work.[61]

The criminal justice agencies have themselves also moved towards greater openness. Performance data is now published on a regular basis by the police, the CPS, the trial courts and the prison service.[62] Since 2003, for example, the Prison Service has published quarterly performance ratings[63] and since December 2006 the National Offender Management Service has published a weekly prison population briefing.[64] Greater efforts have also been made to engage with the public. The police have adopted more innovative and inclusive consultation techniques to attempt to include more young people and the socially excluded in the discussion and formulation of policing policy.[65] Efforts have also been made to enhance the oversight provided by police authorities[66] and ICVs,[67] and to raise their public profiles. A number of Community Courts have

[58] See: Committee for the Prevention of Torture, *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 29 July 1990 to 10 August 1990,* (1991).
[59] A Travis, 'Ex-NATO Chief to hear jail inmates' complaints' *The Guardian* (24 October 1994).
[60] Home Office, press release, 'Prisons and Probation Ombudsman To Investigate All Prison Deaths' (6 January 2004).
[61] See, for example, the suggestion made by Graham Zellick shortly after being appointed as chairman of the CCRC that until that point there was 'very much an atmosphere of secrecy' around the work of the CCRC and 'the policy was not to court publicity. This policy was not, he thought, 'right for a public body, particularly one concerned with public confidence in the justice system'. Quoted in an interview, F Gibb, 'Justice's quality controller' *The Times* (November 23 2004). Since Zellick's appointmentas chairman the CCRC made greatly enhanced efforts to raise its public profile.
[62] See sections 2.3.1, 3.3.1, 4.3.1, and 5.3.1.
[63] Available at: http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=87.
[64] Available at: http://www.hmprisonservice.gov.uk/resourcecentre/publicationsdocuments/index.asp?cat=85.
[65] See section 2.3.1.
[66] See section 2.3.3.
[67] See section 2.3.4.

been established to engage with and bring the courts closer to the public.[68] In 1991 LO panels were established to inspect court custody suites.[69] Efforts have also been made to enhance the media coverage of criminal trials. In particular, much of the evidence presented in court is now made available to the media.[70] All IMB annual reports have been published since 2002 and since 2005 replies to the IMB reports from a minister with responsibility for the prison service have been made available.[71] The media has been permitted to enter prison with increasing regularity in recent years and to report on conditions.[72]

6.3. More openness required?

The five values and objectives infusing the principle of open justice do not support unlimited openness. There are important countervailing considerations which demand respect. It is right, for example, that the media's freedom to report criminal trials is restricted to protect young offenders and the privacy of sexual assault complainants.[73]

Some of the open justice values could themselves be harmed if openness were pushed too far. It is important that the public are able to make their views known on the work of the police, the CPS and the trial courts via community consultation efforts. Allowing the views of the public to determine policies might bolster the notion of participatory democracy and public confidence. The final determination of the policy must,

[68] See section 4.3.1.
[69] See section 4.3.3.
[70] Publicity and the Criminal Justice System, protocol for working together: Chief Police Officers, Chief Crown Prosecutors and the Media. Available at, http://www.cps.gov.uk/publications/agencies/mediaprotocol.html. see further, section 4.3.4.
[71] All IMB annual reports and ministerial replies are available at: http://www.imb.gov.uk/annual-reports.
[72] See section 5.3.4.
[73] See section 4.3.4.

nonetheless, rest with the criminal justice institution carrying out the consultation. The views of the public might, if acted upon, result in important rights being breached. They might also threaten effective performance. It is the consulting body which is in the best position to determine the policies which most contribute to effective performance.

It is certainly the case that there are limits to how far openness should and will ever go. That said, it does appear that despite the considerable progress of recent years, there is scope for enhanced oversight which would provide further support for the values of open justice.

The current gap between the number of people dying in custody and the police or the Prison Service not being held to account via the criminal process may damage public confidence.[74] The Corporate Manslaughter and Corporate Homicide Act 2007 might help produce greater accountability via the criminal process for such deaths. It is to be hoped that the new offence of corporate manslaughter is extended to cover deaths in custody as soon as possible. An increased threat of criminal sanction may help ensure that the police and Prison Service do everything possible to safeguard the right to life.

One of the main ways in which accountability is provided for improper behaviour by the police and the Prison Service is via civil actions. In, however, many civil actions, an out of court settlement is agreed. It appears that the details of such settlements continue to go undisclosed.[75] This secrecy undermines accountability and is arguably

[74] See sections 2.1.3 and 5.1.1.
[75] See, for example, in relation to a police settlement, H Carter, 'Payout to father after armed police raid home' *The Guardian* (19 August 2003). In relation to the Prison Service the £1.14 million settlement agreed with Gregg Marston in 2004 was disclosed to the Times newspaper in September 2005 and reported. A Prison Service spokeswoman confirmed that the service paid compensation to a former prisoner in 2004 for a medical negligence claim but said that the service could not comment further

inappropriate in a democracy. If the police or Prison Service have behaved improperly or negligently the full details of their behaviour ought to be exposed to public criticism. The public have a right to know if their money is being squandered. It ought to be an established rule that where the police or the Prison Service settle a civil action they should disclose the level of damages paid and give a summary of the facts.

Recommendations made by coroners can play an important role in protecting the right to life. The fact that coroners can publicly make such recommendations to the police and Prison Service may also provide reassurance to the public. It seems, however, that coroner's recommendations may not always have the impact they should.[76] If they do have an impact it is certainly not made apparent to the public. Taking action to ensure that coroners recommendations are more likely to be acted on could help protect the right to life in future cases. Making this process more open might also help provide reassurance to the public by demonstrating clearly that lessons have been learnt.

Although the waiting times for an appeal to the Court of Appeal to be heard have come down in recent years they still remain too high.[77] It is also arguable that the Court of Appeal ought to be more receptive to the admission of fresh evidence.[78] Working to reduce the overwork of the Court of Appeal might, it seems, go some way towards rectifying these concerns. It has been suggested that this could be done by setting up

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because the case had been settled out of court, R Ford and R Syal, 'Crippled former prisoner gets £1m payout' *The Times* (September 12 2005). See further sections 2.1.5 and 5.1.2.

[76] In January 2007, the then Constitutional Affairs Minister, Harriet Harman stated that, 'Currently, too often, coroners' findings are not acted on', DCA, press release, 'Coroners get more powers to help prevent future deaths' (30 January 2007).

[77] In September 2006 the average waiting times for conviction appeals stood at 12 months, as compared to a target of 8 months, The Court of Appeal, Criminal Division, *Review of the Legal Year 2005 / 2006* (2006) Annex B.

[78] S Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal' (2004) 1(2) Justice Journal 86, 91.

regional Courts of Appeal.[79] As well as bolstering rights protection by reducing the excessive caseload burden on the Court, setting up regional Courts of Appeal might also help bring the appeal system closer to a greater proportion of the public thereby bolstering confidence.

There is scope for enhancing the independence of a number of the administrative oversight mechanisms. In particular, it is arguable that the fact that HMIC is headed by a former senior police officer and its inspection staff is made up almost exclusively of police officers on secondment or retired police officers is inappropriate.[80] Public confidence in the oversight HMIC provides could be enhanced if, like HMIP, it was headed by a respected 'outsider'. Eyebrows might also be raised by the fact that the CCRC continues to rely on the police to conduct investigations in a limited number of cases.[81] Times have arguably changed since the development of the CCRC. Independence is now key to public confidence and the CCRC ought perhaps to cease using the police to conduct investigations. The perceived and actual independence of the oversight provided by the PPO would be bolstered if it were to be provided with the long called for statutory basis.[82]

There is also scope for the administrative oversight mechanisms to improve their working practices. HMIC's new inspection methodology includes 'inspection holidays' and relies very much on police self-assessment.[83] It is arguable that to help safeguard effective performance HMIC should, at the least, be providing on-site validation of self-

[79] JR Spencer, 'Does our present criminal appeal system make sense' [2006] Crim LR 677, 694.
[80] See further, section 2.2.2.
[81] The 2005-06 CCRC annual report reveals that 32 investigations officers (to-date, always a senior police officer) have been appointed since 1997, to investigate 40 cases, Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 17.
[82] See section 5.2.3.
[83] See section 2.2.2.

assessments. Similarly, HMICA examines few of the 42 court Areas each year and the inspections it does conduct have not been comprehensive but have focussed on a particular aspect of performance.[84] HMICA should be aiming to raise its inspection levels as soon as possible. Concern also arises over the fact that the IPCC is intending, as a result of resource constraints, to reduce the number of independent and managed investigations it conducts.[85] Such investigations are key to public confidence in the police disciplinary system.

The oversight provided by some of the administrative bodies also suffers from problems of delay. In particular, the CCRC has, for most of its existence, failed to investigate applications as expeditiously as it aims to.[86] Likewise, the PPO has failed to meet its targets for the investigation of prisoner complaints in each of the last few years.[87] This delay limits the rights protection these bodies may provide. Many prisoners may have left prison before their application or complaint is dealt with.

There is also scope for enhancing the extent to which the administrative bodies work in public. The Committee for the Prevention of Torture provides important occasional insight into the conditions within police stations and prisons. The rights protection it provides and the extent to which it provides transparency as to the conditions within these penal institutions could be raised if the CPT were to publish its reports when they

[84] See section 4.2.3.
[85] In its third year of operations the IPCC commenced 64 independent investigations and 176 managed investigations, IPCC, *Learning the Lessons, Annual Report and Statement of Accounts 2006/07* (The Stationery Office, Norwich 2007) 36. It has now determined, however, that it only has the capacity to undertake about 50 independent and 120 managed investigations in any one year, *ibid.* 37.
[86] In, for example, 2005-06 and in 2006-07 the CCRC missed its targets for dealing with applications by a considerable margin in each quarter. See, Criminal Cases Review Commission, *Annual Report and Accounts 2005/06* (2006) 23; Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 18.
[87] The PPO's 2006-07 annual report reveals that the PPO met its target to assess the eligibility of complaints within 10 days in only 54 per cent of cases, Prison and Probation Ombudsman for England and Wales, *Annual Report 2006-2007*, Cm 7163, 55.

were completed rather than, as at present, some considerable time after the inspection.[88] This would provide a more current portrayal of conditions and might also place greater pressure on the Government to tackle any problems identified.

The IPCC has had the power to order that police disciplinary hearings take place in public since 2004.[89] Public hearings might provide important accountability and reassurance. The IPCC has, though, seemed reluctant to utilise this power. There have been a number of cases in which public hearings ought to have been held.[90]

For the public to be reassured by the oversight provided by HMCPSI, and on the basis of democracy, it is important that HMCPSI seeks to ensure that their reports are distributed widely to the media and the public. Their website will increasingly be the main point of access for such material.[91] It is, at present, far from adequate for this task. The material is poorly organised making reports difficult to locate and information detailing its work is badly out of date.[92] It is to be hoped that the site is improved significantly in the near future.

The PPO provides an important degree of openness with regard to fatal incidents in prisons by publishing the reports of his investigations.[93] It is arguable that this degree of openness could and should be bolstered by requiring the Secretary of State for Justice or a minister from his department to respond publicly and in writing to the PPO's reports.

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[88] It seems that the reports are not normally published until at least a year after the visit has been conducted. See, http://www.cpt.coe.int/en/states/gbr.htm. see further, section 2.2.1.
[89] The Police (Conduct) Regulations 2004 SI 2004 / 645, Regulation 30(5). See also, Criteria for holding police disciplinary hearings in public. Available at: http://www.ipcc.gov.uk/criteria_for_website.pdf.
[90] See, M Wainwright, 'Officer sacked over showjumper's death: Woman was murdered after year of threats: IPCC finds police force response was "abysmal"' *The Guardian* (2 November 2006).
[91] http://www.hmcpsi.gov.uk.
[92] See section 3.2.2.
[93] Available at: http://www.ppo.gov.uk/fainrep.htm.

Requiring such a response might help ensure that action was taken to implement any recommendations made by the PPO. It might also help reassure the public by illustrating clearly that lessons were being learnt and efforts made to avoid such deaths in the future. For similar reasons the action plans produced by prisons following HMIP inspections should be published.

The remit of the PPO ought also perhaps to be expanded so that he takes over the investigation of deaths in prisons from the police.[94] Transferring this responsibility to the PPO may enhance public confidence in the process and might also produce more effective investigations. More effective investigations could help increase the possibility of the prison system being held to account via the criminal process where standards have fallen short.

It has also been argued that a CPS Ombudsman should be established to review CPS decisions not to prosecute in high profile and controversial cases, and decisions to prosecute where it appears that the decision may have been mistaken, such as where the case ends in a judge directed acquittal.[95] The introduction of an independent CPS Ombudsman to review these decisions might help ensure more effective prosecution decision-making and provide reassurance to the public.

There is also scope for raising the degree of openness provided by the criminal justice agencies. The publication of performance information by the police, the CPS, the trial courts and the prison system can contribute to accountability for poor performance and such transparency is important in a democracy. It appears, however, that the accuracy of

[94] See section 5.2.3.
[95] See section 3.2.3.

the information may be open to question. HMCPSI continues, for example, to cast doubt on the accuracy of the performance data gathered and published by the CPS.[96] HMIP has, on a number of occasions, uncovered examples of inaccurate statistical returns by the Prison Service.[97] Inaccurate and misleading performance data is of no value to the criminal justice agencies or the public.

There is also scope for the individual criminal justice agencies to provide a greater degree of information. It is important for confidence in the CPS and for the possibility of bringing a judicial review action against a decision by the CPS not to prosecute that the CPS explains such a decision to the victim or his relatives. HMCPSI continues, however, to find that the CPS is not adequately complying with this duty.[98] As well as being required to give reasons to a victim it is also arguable, on the basis of democracy and public confidence, that the CPS ought to give such explanations publicly in high profile and controversial cases.[99] There is also scope for the Prison Service to publish more information. As part of its audit process the Prison Service conducts the Measuring the Quality of Prison Life survey. Making available the MQPL reports might help provide a more complete picture of life within prisons and they ought to be published.[100]

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[96] HMCPSI, *A Review of the use of Performance Information in the Crown Prosecution Service* (2005) 25-32.
[97] HMIP's 2005-06 Annual Report notes, for example, that as in previous years, the true extent of the problems in the areas of prisoner activity were masked by inaccurate and sometimes wildly exaggerated figures, HM Chief Inspector of Prisons for England and Wales, *Annual Report 2005/2006* (2007) 22.
[98] An inspection across 11 CPS Areas in 2006-07 found that performance in relation to the provision of letters to victim continued to provide a challenge in terms of ensuring that letters were sent in all appropriate cases and that they were sent within the time limits, HMCPSI, *Changing to Improve: HM Chief Inspector of the Crown Prosecution Service Annual Report 2006-2007* (The Stationery Office, London 2007) HC 769, 45.
[99] See section 3.3.1.
[100] See section 5.3.1.

The community engagement efforts by the police, the CPS and the courts can contribute to more effective performance and help bolster public confidence in the criminal justice system. It seems, though, that there is room for improving the engagement efforts. In relation to police engagement it appears that there remain problems with consulting with so called hard to hear groups. There is also scope for raising the profile of the consultation efforts. In 2003 members of the public seemed largely unaware of police consultation efforts.[101] HMCPSI continues to suggest that there is room for improvement in the CPS community engagement efforts.[102]

The superintendence of the CPS provided by the Attorney General helps ensure effective prosecutorial performance and provides a degree of openness. In high profile cases where a decision is made not to prosecute the AG will come before Parliament to explain the reasoning and answer questions.[103] Considerable controversy has though arisen in recent years over the AG's involvement in deciding whether there should be a prosecution in cases with a strong political dimension.[104] The possible conflict of interest inherent in the role of the AG makes it difficult for the public to have complete confidence in the oversight she provides in individual cases. Reform is required and a strong case can be made that the AG's role as the Government's legal adviser should be removed. It is this aspect of the AG's role which arguably does most to engender a perception of a lack of independence. Efforts should also be made to enhance Parliamentary oversight of the AG. A Select Committee could be specifically charged with examining the work of the AG's office. Given that it seems increasingly likely that

[101] See section 2.3.1.
[102] See, for example, HMCPSI, *Overall Performance Assessments of Crown Prosecution Service Areas: Rating and Analysis of Performance for 2004-05,* 20.
[103] This occurred, for example, following the decision not to pursue a prosecution against Katharine Gun. See, Hansard HL vol 658 cols 338-351 (26 February 2004).
[104] See section 3.3.3.

future AG's will continue to come from the House of Lords the possibility of the AG being able to appear in the House of Commons and take questions should also be investigated further.

There appears a need to work to improve the rights protection provided by the public via Lay Observer panels. On the limited information available about LOs it seems that they do not inspect often enough, their reports do not necessarily go to those who most need to see them, their recommendations might not be acted upon and such inaction may be met with acquiescence.[105] There is also scope for bolstering the rights protection provided by Independent Monitoring Boards. A minister with responsibility for prisons now tends to respond publicly to IMB reports. Such a response may help ensure that action is taken to address concerns expressed by the IMBs. A ministerial response should be given to all IMB annual reports.[106]

Efforts also need to be made to raise public awareness of the ICVs and LOs. Enhancing the public profile of these oversight mechanisms may enhance their rights protection capability by bringing further pressure to bear for improvement. It is also important on the basis of democracy that efforts are made to publicise findings. The public have a right to know about conditions within these relatively hidden parts of the criminal justice system. If the public are made aware that their fellow citizens are inspecting these areas this may also provide a degree of reassurance. At present, almost no efforts are made to publicise the role and work of LOs. It is difficult for the LOs' inspectorate role to provide reassurance to the public when they are almost completely invisible.[107]

[105] See section 4.3.3.
[106] At present not all IMB annual reports receive a response from a minister, In, for example 2006 there were 99 IMB annual reports but only 32 ministerial replies, see, http://www.imb.gov.uk/annual-reports.
[107] See section 4.3.3.

A higher profile might also facilitate more effective oversight by assisting with the recruitment of members of the public to serve in such a voluntary capacity. Some efforts have been made to raise the profile of ICVs in recent years[108] but there is clearly scope for further improvement.[109] At the end of each year ICVs and LO panels should, like the IMBs, be required to produce and publish an annual report detailing their work and performance.

Whilst media coverage of the courts may help to promote a number of the values associated with openness it often, unfortunately, falls far short of an ideal standard and is frequently inaccurate or misleading. It is reassuring that efforts have been made in recent years to facilitate greater court openness via the media and to enhance the accuracy of court reporting. These efforts, in particular the provision of more prosecution evidence to the media, seem to have had some success. It is also clear, however, that there is scope for further improvement.[110] Greater co-operation with the Judicial Communications Office and the issuing of press releases in controversial cases may help. There is also a case to be made in favour of judges being encouraged to speak publicly to explain decisions or even to appoint a designated spokesman to do so. More radically, a strong case has been made in favour of allowing the broadcasting of trial proceedings.[111] The arguments in favour of this change are especially pressing in relation to the judge's summing-up, the sentencing stage and the appeals process. Such enhanced openness would help greatly to increase confidence in the criminal process.

[108] See section 2.3.4.
[109] Dr Peter Selby, who is due to become the new president of the National Council of IMBs in January 2008 stated, in May 2007, that, 'we need to raise the profile of the boards'. Quoted in, R Ford, 'A mission to stiffen the boards' *The Times* (1 May 2007).
[110] See section 4.3.4.
[111] See section 4.3.4.

6.4 Prospects for moving towards greater openness in criminal proceedings

It appears that there is a good possibility that a number of these suggestions for enhancing the openness of the criminal process may come to fruition in the near future. The Government has publicly committed itself to doing its best to extend the Corporate Manslaughter and Corporate Homicide Act 2007 to cover deaths in custody within three years.[112] Similarly, it has promised that the Draft Coroners Bill, due to be introduced in the 2007-08 session of Parliament, will be amended to provide more effective rights protection and greater transparency around this process.[113] The government is also seeking to place the oversight provided by the PPO on a statutory basis. Part 4 of the Criminal Justice and Immigration Bill will, if enacted, establish a statutory body, Her Majesty's Commissioner for Offender Management and Prisons, to take over the functions of the PPO.

The degree of openness flowing from the information published by the criminal justice agencies is also likely to continue to rise. The continued exposure by Her Majesty's inspectorate bodies of misleading performance returns may slowly help produce more reliable data. Likewise, the monitoring provided by HMCPSI of the CPS duty to explain a decision not to prosecute to victims might help ensure greater compliance. Efforts are also being made to enhance the community engagement efforts conducted by the police and the CPS.[114] It was suggested that the IPCC could enhance the openness of the police disciplinary system by being more prepared to order that hearings be held in public. In a

[112] Hansard HL vol 694 col 556 (23 July 2007).
[113] DCA, press release, 'Coroners get more powers to help prevent future deaths' (30 January 2007).
[114] In relation to police consultation efforts, for example, in 2006 the Government funded three demonstration sites in Merseyside Cheshire and Northumbria to test ways of engaging more effectively with communities. See, http://www.apa.police.uk/APA/Publications. See further section 2.3.1.

recent case the IPCC did utilise its power to order that a hearing be so conducted.[115] Now that the IPCC has used this power for the first time, it may be more prepared to order such hearings in future.

It also appears that reform of the AG's role is on the cards.[116] As detailed, reform is certainly required. Concern might though arise over the fact that there seems to be a push for the reformed AG to no longer sit in Parliament.[117] Parliamentary oversight of the AG is vital and should be maintained. It may help ensure effective and proper superintendence of the CPS by the AG. Such scrutiny also helps provide important transparency with regard to the prosecution process.

The degree of oversight provided by the courts, administrative bodies and the public is limited, in a number of areas, by a lack of resources. In particular, a lack of resources seems to have resulted in the Court of Appeal failing to meet its targets for hearing appeals within a certain time; the under-funding of the CCRC manifests itself most clearly in delay; the PPO continues to fail to meet his targets for investigating complaints; HMIC and possibly also HMICA have arguably overly restricted their inspections; and the IPCC is reducing its independent and managed investigations.

The figures required to bring about more effective oversight appear fairly minimal in the overall scheme of Government spending. The CCRC requires, for example, only an

[115] See: IPCC, press release, 'Warwickshire Police to hold first misconduct hearing in public' (27 February 2007).
[116] *The Governance of Britain, A Consultation on the Role of the Attorney General* (2007) Cm 7192.
[117] See, for example, Constitutional Affairs Committee, 'Constitutional Role of the Attorney General' (2006-07) HC 306, para 106.

estimated additional £500,000.[118] Given the importance of the oversight provided by these mechanisms efforts really ought to be made to find such resources. Without new and increased pressure it does not, however, appear likely that such resources will be found in the near future. A number of the oversight mechanisms have been complaining about a lack of resources for many years yet their resources rather than being increased keep being cut further.[119]

It is though possible, that forthcoming developments may bring change and new pressure for increased resources. If the functions of the PPO are placed on a statutory basis via the establishment of Her Majesty's Commissioner for Offender Management and Prisons, the resources required for this oversight will be assessed anew. The government is likely to be eager to see a body they have established perform effectively, and thus may provide more adequate resources.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which came into force on 22 June 2006,[120] may help produce increased pressure for enhanced resources for a number of the oversight bodies. The government seems set to designate up to 30 bodies as the independent bodies responsible for visiting places of custody which, together, will form the National Preventive Mechanism required by the Optional Protocol. These bodies will apparently include: HMIC; the IPCC; the ICVs; HMICA; the LOs; HMIP; the PPO;

[118] In his foreword to the CCRC's 2006/07 Annual Report the chairman of the CCRC Graham Zellick states, 'current resource levels inescapably cause real delays to those of our applicants who are in prison on the basis of convictions that will ultimately be quashed. This is a further denial of justice – all for the sake of around £500,000 a year' Criminal Cases Review Commission, *Annual Report and Accounts 2006/07* (2007) 5.
[119] The CCRC's budget is, for example, set to decrease in coming years rather than increase see, *ibid.* 40.
[120] The United Kingdom ratified the Protocol on 10 December 2003. See, http://www2.ohchr.org/english/bodies/ratification/9_b.htm.

and the IMBs.[121] The designation of these bodies may bring pressure for increased resources as the Optional Protocol requires that 'the State Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms'.[122] Furthermore, the National Preventive Mechanism in each country will be overseen by an international committee of experts which may 'make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms'.[123]

Other proposals designed to enhance openness could be implemented at little extra cost but would likely be strongly resisted. The CPT reports of their visits to the United Kingdom could, for example, be published as soon as they were produced if the Government wished.[124] The Government is though probably unlikely to take this step. The police would almost certainly object to the suggestion that a respected 'outsider' should be appointed as Her Majesty's Chief Inspector of Constabulary. It is though quite possible that, despite such objections, in time, a clearly independent person may be appointed to head HMIC.

The proposals that a CPS Ombudsman be established to review certain CPS decisions to prosecute and not to prosecute and that the PPO take over the responsibility from the police the investigation of deaths in prisons would be controversial and would have resource implications. The need for the development of independent oversight

[121] See, Association for the Prevention of Torture, *National Preventive Mechanisms, Country-by-Country Status* (2007) 103-104. Available at, http://www.apt.ch/content/view/44/84/lang,en/. This announcement should have been made by 22 June 2007 as per Article 17 of the Optional Protocol. At the time of writing it is, however, still to be made.
[122] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Article 18(3).
[123] *ibid.* Article 11(1)(b)(iv).
[124] The CPT publishes its reports when requested to do so by the Government, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 Article 11(2).

mechanisms to oversee the criminal process has though gradually been accepted in recent years and such mechanisms have been established in a number of areas. There may well come a point in the future, following perhaps further controversial incidents in these areas, that the need for such independent oversight mechanisms will be accepted or calls for their introduction will at least grow.

The suggestion that the law be amended so that court proceedings can be broadcast is a matter which the Government has recently consulted on and it is still considering its response.[125] Allowing cameras into the courts would be one of the most decisive steps ever taken to open up the criminal justice system, or one aspect of it at least. It is clear from the responses to the Government's consultation paper that it would, though, be a controversial and much opposed step.[126] Nonetheless, it seems inevitable and welcome from the perspective of promoting open justice, that at some point in the future, cameras will be permitted to broadcast at least the judge's summing-up and sentencing. Once this initial step has been taken the broadcasting of other areas of the trial is likely to be gradually permitted.

6.5 Towards a more expansive conception of open justice

The openness of the English criminal process in terms of the oversight provided by the courts, independent administrative bodies and the public, and the transparency with which such oversight occurs, provides important accountability, promotes effective performance, helps protect rights, bolsters democratic governance, and helps maintain public confidence in the criminal justice system. The current degree of openness has

[125] DCA, *Broadcasting Courts,* Consultation Paper CP 28/04 November 2004.
[126] DCA, *Broadcasting Courts,* Response to Consultation, CP 28/04 30/06/2005.

developed quite rapidly over recent years and is at a level beyond that found in many other countries. It is to be hoped that the development of a more open criminal process continues to move at this pace. There certainly remains scope and a need to raise the level of openness further.

Against the backdrop of this move towards ever greater openness it may be time to rethink the broad significance of the oversight of criminal justice agencies provided by the courts, independent administrative bodies and the various aspects of public scrutiny. This thesis advances a new, more expansive conception of open justice, rooted in five, mutually reinforcing values. The traditional concept of open justice, referring only to the narrow principle that the courts should conduct their proceedings in public, no longer seems sufficient in the society in which we live today to satisfy the ever growing demands for accountability, effective performance, rights protection, democratic participation, and public confidence.

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