



The Leveson Review 2015

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A. Introduction

1. The 140 page Leveson "Review of Efficiency in Criminal Proceedings" (January 2015¹), makes for interesting reading for all criminal practitioners and those involved in the criminal justice system.

2. This presentation looks at the Review from a Defence practitioners point of view; considering the practical implications of the suggested CJS efficiency recommendations and the use that can be made in practice as per recent case law : see Court of Appeal decision in R v Boardman [2015] EWCA Crim 175.

3. The Review's introductory chapter 1 recognises² that the review was conducted (in 2014) against an austerity background of decreasing public funding affecting the Courts system, Police, CPS, the National Offender Management Service and Legal Aid Agency.

4. The terms of reference³ are set out as streamlining the disposal of criminal cases to reduce costs for all public bodies. Emphasising robust case management and improved use of technology to minimise the number of hearings or, alternatively, conducted (whether by telephone, or internet based video) without requiring the attendance of counsel.

The Review⁴ does not suggest legislative changes but suggests changes in existing practices with the existing Criminal Procedure Rules, requiring **maximum efficiency** from every CJS participant.

5. The Review⁵ clearly states that the Executive is in charge of public funding but recognises that a criminal justice system that is professionally staffed and effective is

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

² at page 1 para. 1

³ at page 1 para. 2

⁴ page 2 para. 3

⁵ page 4 para. 11

essential to a democratic society. The importance of quality advocacy being reflected by the Review citing a passage from the judgment in R v Crawley [2014] EWCA Crim 1028 :

“The criminal justice system in this country requires the highest quality advocates both to prosecute and to defend those accused of crime... The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing and the better the prospect of true verdicts according to the evidence... We have no doubt that it is critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex.”

B. Suggested efficiency improvements

6. The Review makes a number suggested **efficiency improvements**, as there is a clear need for (a) better, quicker and less costly ways of creating, filing and distributing documents (b) easier and more flexible ways for all parties to communicate and (c) a reduction in the number of hearings a defendant has to attend.⁶

7. First : the Review highlights and emphasises the importance of a CJS Common Platform⁷.

- “CJS Common Platform” to provide a comprehensive, online case-management system from point of charge, the police will make all the relevant documentation available via a digital case file, to which the CPS will be provided access. Case progression will take place online, and all the decisions in the case will be made and communicated online. The parties and participants will electronically file in a digital format their statements, exhibits, lists of previous convictions, correspondence, pre-sentence and other reports, Plea and Case Management Forms (PCMH) forms. Applications and written submissions will be filed online. Paper process will be effectively eliminated.
- The Judge/list officer/case progression officer will each be automatically alerted when a new application or submission is received, and he or she will be able to decide how

⁶ page 5 para. 15

⁷ page 6 para. 16-17

it is to be resolved: by way of an in-court hearing, a remote hearing or an electronic exchange of written submissions, with the Judge communicating his or her decision via a written message (including any reasons). This is to be commended to avoid "pointless" mention hearings which waste time and money.⁸ The entirety of the documentation in the case will be filed in an electronic store that will be accessible to those involved in the case whose role entitles them to access the information. The parties will present their cases digitally in court, and it is proposed that the information will be made accessible to the jury (on tablets) in this format.

- There is recognition⁹ that there maybe added cost to Defence lawyers eg where the Defendant cannot access the case papers online and needs a hard copy photocopied. That needs to be recognised in any negotiation as to remuneration.
- Listing will be undertaken by way of a digital diary under the control of the Resident Judge and Listing officer¹⁰

8. Second, "Getting it Right First Time" is noted in Chapter 2 of the Overarching Principles of the Review, as an important issue in efficiency terms. This is particularly important for the Police and CPS, who are gatekeepers to the CJS, as the Review states:¹¹

" If they make appropriate charging decisions, based on fair appraisal of sufficient evidence, with proportionate disclosure of material to the defence, considerable delay can be eradicated"

With a footnote¹² making the practical observation that : *"It is worth mentioning that this principle applies to decisions whether to proceed by arrest and charge or by voluntary attendance and postal requisition"*.

⁸ page 6 para. 18

⁹ page 7 para. 19

¹⁰ page 7 para. 20

¹¹ page 9 para.25

¹² Footnote 13

9. On the basis of getting it right first time with proper charges and proportionate disclosure, the Review observes,¹³ that it is "*incumbent on the defence to take proper instructions and progress expeditiously*".

10. The Review goes on "*Getting it right first time is the absolute priority of any improvement to efficiency*" as the first overarching principle of the efficiency recommendations.

11. Third, the importance of Case Ownership is noted as the second overarching principle of the efficiency recommendations.

- "**Case Ownership**: for each case, in the Police, the CPS and for the defence, to maximise the opportunities for case management, there must be **one person is identified to be responsible for the conduct of the case.**"¹⁴ "*In order for case ownership to work in practice, the Review recommends that the Legal Aid Agency should change the definition of 'instructed advocate' to the advocate who conducts the main hearing – usually the trial, but frequently the sentence.*"¹⁵

12. Fourth, closely allied to case ownership, is the third overarching principle of **direct engagement**.

- the Criminal Procedure Rules should place a duty of **direct engagement** at the first available opportunity between identified representatives who have case ownership responsibilities.¹⁶ This should include communications before any first hearing, with parties positions reduced to writing to avoid any misunderstandings between the parties and there to be a written recording of inter-parties communications. "*There should be an expectation that the identified case representatives*

¹³ page 9 para.25

¹⁴ page 9 para.26

¹⁵ page 10 para.31. The Ministry of Justice response to this Case ownership recommendation can be found at https://www.gov.uk/government/news/crime-news-crown-court-fees-to-be-paid-directly-to-trial-advocates?dm_i=4P,3BW0Q,7OWXBG,BWUQG,1. In short, in May 2015 "trial advocates" attending the main hearing in a criminal case will receive the legal aid fee as the Ministry of Justice will be amending the Criminal Legal Aid (Remuneration) Regulations 2013.

¹⁶ page10-11 paras. 33-34

will have communicated in advance of the first hearing. If they have not, they should have to explain to the court, at that hearing, why they have failed to do so."¹⁷

- with a recommendation¹⁸ that it should be a pre-condition that any practitioner wishing to conduct Crown Court litigation should have access to **cjism**.
- with a presumption that interlocutory matters should be completed electronically by written submissions as opposed to a formal court hearing, with written resolution by the court, or to arrange a suitable hearing time online or by telephone. "***The Criminal Procedure Rules (and Practice Directions, as appropriate) should make it clear that there is an obligation on any party to justify the need for an interlocutory hearing to take the place of a formal court hearing with all parties present.***"¹⁹

13. Fifth recommendation, relates to a fourth overarching principle of **consistent judicial case management**.²⁰

- robust **judicial case management**, with all parties required to comply with the Criminal Procedure Rules and "***to work to identify the issues in a case to so as to ensure that court time is deployed to maximum efficiency and effectiveness.***"

14. The Sixth series of efficiency recommendations²¹ concern the role that information technology can play in reducing the number of actual physical attendances at court by the parties and use of digital evidence.

¹⁷ page 11 para.34

¹⁸ page 11 para.36

¹⁹ page 12 para. 37

²⁰ page 12 para. 38

²¹ see chapter 3 "The Role of IT" at pages 13-19 inclusive

15. In terms of recommending the increased use of "remote" hearings the Review identifies eight essential pre-requisites:²²

- (1) high quality equipment;
- (2) digital recording and access to the audio and visual archive;
- (3) hearings to be "queued" online;
- (4) involvement of instructed advocate for the substantive hearing;
- (5) video facilities in prisons;
- (6) showing exhibits by video link;
- (7) training in use of the new technologies;
- (8) retention of gravitas of the proceedings, with best practice in conduct of remote hearings included into the CPR and practice directions.

16. With increased utilisation of audio and **video hearings**.²³ Provision to be made for locked-down computers linking lawyers with in custody clients by way of internet-based video conferencing. Similar facilities would be of value in the Police station.²⁴

17. Courts must ensure ease of use of **digital evidence**.²⁵

18. Chapter 4 is entitled "Appropriate allocation; **the right cases for the Crown Court**" and examines charging decisions and the sending of too many cases to the Crown Court.

19. Chapter 5²⁶ deals with the **Magistrates Court**, examining three broad concepts of (1) simplifying cases (2) identifying early guilty pleas (3) smoother case progression; with inefficiencies cited which include (a) failures in the way a case file is constructed, (b) the need to improve Magistrates' expertise on disclosure issues, (c) identification, preparation

²² pages 14-16 inclusive para. 47

²³ page 17 para.49

²⁴ page 17 para.50

²⁵ page 17 para. 51

²⁶ pages 27-36

and prioritisation of guilty plea cases and (d) the rates of effective first hearings in not guilty cases .²⁷

20. Chapter 6²⁸ deals with **Listing**. The Criminal Practice Direction Amendment Number 2, 2014, [2014] EWCA Crim 1569, sets out in clear terms the purpose, manner and responsibility for the listing of cases in the Magistrates' and Crown Courts:

'Listing is a judicial responsibility and function. The overall purpose is to ensure that, as far as possible, all cases are brought to a hearing or trial in accordance with the interests of justice, that the resources available for criminal justice are deployed as effectively as possible, and that, consistent with the needs of the victims, witnesses of the prosecution and the defence and defendants, cases are heard by an appropriate Judge or bench with the minimum of delay.'

21. To reduce the need for multiple listings, the Review, identified²⁹ five things that need to be achieved:

- (1) greater certainty about disclosure;
- (2) greater liaison between the parties;
- (3) the early Guilty Plea system to be given fresh impetus to identify guilty pleas as early as possible;
- (4) cases to be proactively managed by the CPS, with a single case progression officer;
- (5) defendants facing indictable only charges to indicate at the Magistrates Court whether or not they intend to plead guilty.

- **Timing of Guilty plea** : suggestion³⁰ that if there has been a 'not guilty' indication at the Magistrates' Court and a 'guilty' plea entered at the first Crown Court hearing, it should be open to the Judge, exercising his discretion, to reduce the credit for that plea, it not having been tendered at the first available opportunity.

²⁷ pages 27-28 para.86

²⁸ pages 37-45

²⁹ page 40 paras. 138-142

³⁰ page 41 para. 142

21. Chapter 7 deals with Crown Court pre-trial hearings with recognition of the following :

(a) the importance of the PCMH in terms of case management;³¹

(b) recommendation³² that the LAA should examine a fee mechanism that rewards early significant engagement with the prosecution that results in the more effective and efficient early disposal of cases, including guilty pleas;

(c) there should be one case progression officer, responsible to the Judge whose role will be to ensure that all the participants have complied with judicial orders.³³ The police, CPS and defence practitioners must be held accountable for repeated default. Courts should therefore maintain a record of failures to comply with the Criminal Procedure Rules and insist on a compliance court appearance once a pattern of failure is identified.³⁴

22. Chapter 8 deals with Crown Court trial issues. With a number of issues identified and recommendations made:

- the delays caused by late arrival of prisoners from prison, with a need to reconsider the terms of any future contract with prisoner movement providers. They must demand greater efficiency and properly managed performance of the contract.³⁵
- flexible court sitting hours and arrangements as per Maxwell times for long, complex trials.³⁶
- in relation to expert evidence the importance of scientifically rigorous accessible forensic evidence. The court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted.³⁷ The common law admissibility test remains assisted by the Criminal Procedure Rules (listing those matters which must be covered in the experts' report) and Criminal Practice Directions 33A.4-33A.5

³¹ page 49 paras. 177-180

³² page 51 para. 190

³³ page 53 para. 195

³⁴ page 55 para. 202

³⁵ page 57 para. 210

³⁶ pages 59-60 paras. 218-222

³⁷ page 60 para. 223

(listing the factors which the court may take into account in determining the reliability of the expert).³⁸ Courts must use more frequently their power under Criminal procedure Rules CPR 33.6(2) to direct a discussion between experts to identify areas of agreement and disagreement to include in a Statement of Issues document.³⁹ In relation to publicly funded cases a court should be prepared to hear an application for expert evidence and provide a reasoned decision as to whether it is justified. Such a court direction should be regarded by the Legal Aid Agency as strong supporting evidence of a funding application, such that if the LAA refuses funding the LAA must provide full reasons to the court.⁴⁰

- In relation to **opening speeches** the Review notes the following: Criminal Procedure Rules be amended so as to require, immediately following the prosecution opening, a **public identification by the defence of the issues in the case.**⁴¹
- **Judge's directions and summing-up:** "The Judge should devise and put to the jury a series of written factual questions, the answers to which logically lead to an appropriate verdict in the case. Each question should be tailored to the law as the Judge understands it to be and to the issues and evidence in the case".⁴² "These questions – the 'route to verdict' – should be clear enough that the defendant (and the public) may understand the basis for the verdict that has been reached".⁴³ "These directions, along with the standard generic directions relevant to all criminal trials should be provided before speeches so that advocates can tailor their remarks to the law".⁴⁴ "The Judge should remind the jury of the salient issues in the case and (save in the simplest of cases) the nature of the evidence relevant to each issue. This need be only in summary form."⁴⁵

³⁸ page 61 para. 227

³⁹ page 63 para.236

⁴⁰ page 65 para. 244

⁴¹ page 73 para. 279

⁴² page 79 para. 307

⁴³ page 79 para. 308

⁴⁴ page 80 para. 309

⁴⁵ page 80 para. 310

Case law

23. R v Boardman [2015] EWCA Crim 175 Court of Appeal Criminal Division 26th February 2015.

Judgment

President of Queens Bench Division **Sir Brian Leveson** :

1. It is beyond argument that there is considerable pressure on all involved in the criminal justice system to maximise the use of limited resources and to ensure that cases are processed as efficiently as possible. The recent Review of Efficiency in Criminal Proceedings makes it clear (at para. 22);

“It is ... necessary to ensure that the scarce resources are not wasted or used inefficiently. Demands on public funds must be kept to a minimum while, at the same time, ensuring that the delivery of justice is effective and meets the highest standards that any democratic society is entitled to expect.”

2. The Review goes on to deal with the critical importance of the Criminal Procedure Rules (CPR) and the role of the judges in effectively managing the work of the court. It emphasises (at para. 199):

“Whatever we do, we must encourage a reduced tolerance for failure to comply with court directions along with a recognition of the role and responsibilities of the Judge in matters of case management. It cannot be right that a ‘culture of failure’ has developed in the courts, fed by an expectation that deadlines will not be met. If a deadline (e.g. for service of a document(s) or an application) is not met, there must be good reason for it and there must be an expectation that the party which failed to comply can provide that reason. A failure to tackle this culture leads to a general indifference to rule compliance. Whichever party has failed to comply or failed to meet the deadline, the opponent perceives objection as a waste of time because it will be largely pointless: there is no sanction that can

be applied. Perhaps most significantly, it allows cases to ‘drift’, and for further hearings to take place unnecessarily.”

24. R v Helps and Jacobs [2015] unreported Snaresbrook Crown Court March 2015

25. The Review's recommendations are summarised at chapter 11⁴⁶

- There is an analysis of the defendant's right to a trial by Jury at paragraphs which worryingly begins under the heading Changes to the right to elect trial by jury :

"Although expressed views are not unanimous, the Review has heard the voices of many involved in the criminal justice system calling for a change to the right to elect trial by jury. A court, not a defendant, it is said, should decide how he is to be tried".⁴⁷

Going on to state :

"This issue is of the highest order of public policy; if the right of election is to be maintained, however, it must be paid for by the provision of appropriate funding for the system".⁴⁸

The arguments for and against the right to a jury trial are considered.⁴⁹

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⁴⁶ pages 96-107

⁴⁷ page 87 para.336

⁴⁸ page 87 para.341

⁴⁹ page 90 para.352-353