The Royal Commission on Criminal Justice

Crown Court Study

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The Royal Commission on Criminal Justice

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Any views expressed in this report are those of the authors and do not necessarily reflect the views of the Royal Commission.

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Introduction

The Crown Court Study was conceived in the first weeks of the Royal Commission's existence in the summer of 1991. The aim was to throw new light on a wide variety of topics relevant to the Commission's work on which there was insufficient information and to provide a more solid basis for views and opinions as to how the criminal justice system operates. The best way of finding out how a justice system works is to look in as much detail as possible at a sample of actual cases. It was decided to limit the study to cases in the Crown Court.

Considerable thought went into the question of how to draw the sample and what size sample to aim at. We opted for a complete national sample over a two week period as the best way to collect a large sample in a short time. Our objective was to take a 'snapshot' of as many aspects of the system as possible in the time available. In particular we wanted a large sample of contested cases.

We estimated that a two week national sample could produce a sample size of between 3,000 and 3,500 case, which should produce close to a thousand contested cases. (In the event we had 3,191 cases in the sample.) The study was based on every case completed in the last two weeks of February 1992 in every Crown Court in the country – other than the three courts, Kingston, Reading and Snaresbrook, that took part in the one week pre-pilot study.[1] (For description of the methodology and an evaluation of the study's statistical representativeness see Appendix 1, p. 245. For a description of the logistics of the study see Appendix 2, p. 259.)

Our method of proceeding was to devise questionnaires that would be given for self-completion to the main actors in all the sample cases. We defined the main actors as the judge (Jg), the prosecution and defence barristers (Pb and Db), the defence solicitor (Sol), the Crown Prosecution Service (Cp), the police (Pol), the court clerk (Cc), the defendant(Def) and the 12 members of the jury. On this basis we had to prepare and then to administer nine separate questionnaires. We would have liked to have also included victims and other witnesses, but it was reluctantly decided that there was no way of bringing them in in a systematic way – without which the effort would have been statistically valueless.

[1] The sample did not, however, include appeals from magistrates' courts nor committals for sentence only.

Approval for the study was obtained from the Lord Chancellor, Lord Mackay of Clashfern, and from the then Lord Chief Justice, Lord Lane who agreed that the participation of the judiciary was essential.

The Lord Chancellor's Department gave invaluable assistance throughout the study. I would thank in particular Mr John Tanner, who bore the main burden of liaison with the Department from summer 1991 to well into 1992. I would also acknowledge the great assistance given to us by Chief Clerks and their staffs at all the Crown Court Centres. Without their contribution, the study would not have been possible.

We obtained the wholehearted support and cooperation of all the different agencies whose members were to be involved including in particular, the Council of Her Majesty's Circuit Judges, the Bar Council, the Criminal Bar Association, the Law Society, the London Criminal Courts Solicitors' Association, the Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO).

The next stage was the process of drafting the questionnaires. This went on over a period of months and involved all the above organisations and many individuals from different interest groups. As fresh drafts of the different questionnaires were prepared, they were circulated to relevant bodies and individuals for comment both in written form and at drafting meetings.[2] We also received invaluable help from individual members of the Royal Commission and from other individuals, both practitioners and academics. In spite of the severe time constraints imposed by the Commission's programme of work, each of the questionnaires went through many drafts.

The questionnaire administered to the jurors was a late addition. Because of the great sensitivity of this issue and, in particular, because of the provisions of the Contempt of Court Act 1981[3], great care had to be taken in drafting the questionnaire and in consulting the appropriate authorities on it. As a result of these consultations it was agreed that there should be no way of linking the juror questionnaires with the other questionnaires. In analysing the returns to questionnaires, it was therefore not possible to

[2] The three police representative agencies – ACPO, the Police Superintendents' Association and the Police Federation – pooled their resources for the purposes of presenting evidence to the Royal Commission on Criminal Justice and we mainly dealt with this joint body.

[3] Section 8 of the Act makes it 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 in any legal proceedings'. This meant we could not ask questions about the deliberations of the jury.

identify from other questionnaires any of the features of the case being dealt with by any particular juror or jury, nor the other respondents' views about the case.

The final version of the nine questionnaires was prepared after the pilot study which took place in the week of January 13, 1992. Given the complexity of the project and the speed with which the project had to be assembled, a second pilot would have been desirable, but the Commission's time-limits made this impossible.[4]

One of the problems of studying people in action is that their actions may be affected by knowledge that the research is taking place. From the stage of the pre-pilot in mid-January 1992 it was public knowledge that the study was taking place. (A press release was issued to coincide with the start of the pilot.) For this reason we were careful, however, not to release the date of the main study until the last possible moment. Respondents would not have had any way of knowing the dates of the survey until its start on Monday February 17th. Most would probably only have found out about it when they were handed their first questionnaire. (Some will have been asked to fill out several questionnaires during the two-week survey period.) There is therefore little reason to suppose that pre-trial conduct would have been affected.

Nor does it seem likely that there would have been much 'change of behaviour' by trial participants simply through knowledge that the study was on – if only because so much of the conduct of a trial is driven by the needs of the case. But obviously one cannot say that no one was affected by awareness of the study.

The reliability of the results of the study is of course crucially dependent on the quality of both the questions and of the answers. We hope and believe that broadly the quality in regard to both was reasonably high. There were however some faults in questionnaire drafting and design that were not spotted until the stage of analysis, at which point it was of course too late to rectify them. It was at that stage that one most regretted not having had time to conduct a second pilot.

Not surprisingly, considering the length and complexity of the questionnaires, there were also some errors in their completion. The fact

[4] The Commission, which had its first meeting in June 1991, had been asked by Ministers to report within two years. To that end it stipulated that all research should be completed by February 1992. The field-work for this study, however, only took place at the end of February . It was many more months before the data could be punched,analysed and written-up even for internal use by the Commission and its staff. The time-pressure was therefore fierce at every stage.

that respondents filled out questionnaires on their own (as opposed to having a researcher there to help) was no doubt a contributory factor. But self-completion was the only way a study of such large proportions could have been carried out. Moreover the fact of the sheer size of the sample will to an extent have compensated for some respondent error.

The reliability of the results is also crucially dependent on whether the sample drawn can be said to be statistically valid. The details of this important issue are addressed in a technical appendix (pp.245–58 below). But in brief it can be said that the cases in the sample represented a high proportion of the cases dealt with in the two week period of the study and we had a satisfactory response rate in regard to eight of the nine questionnaires. The 3,000 plus cases in the sample represented an estimated[5] virtual 100 per cent of the contested cases tried in the survey period and 71 per cent of the guilty pleas.

Until the pilot study we had no way of knowing whether busy practitioners and others involved in trials would be willing to fill out long questionnaires. (The barristers' questionnaires had close to 200 questions and ran to over thirty pages.) The pilot results were encouraging, however, and the response rate for the main study lived up to these expectations.

For the jury questionnaire we had returns from an estimated 93 per cent of the actual juries that sat during the survey period. An average of ten jurors per jury answered the questionnaire. In all, we had 8,338 questionnaires returned by jurors. (The jury questionnaire had 81 questions and ran to 14 pages.) The response rate from jurors was therefore very high.

The response rate of court clerks was 84 per cent. For the judges it was 77 per cent. For prosecution barristers it was 71 per cent and for defence barristers 66 per cent. For the CPS it was 67 per cent, for the police 57 per cent and for defence solicitors it was 44 per cent.

The only category of respondent with a response rate that was statistically 'too low' was defendants at 19 per cent. Considering that defendants were being asked to complete the questionnaires at a time of inevitable stress and tension, the low response rate, though disappointing, was perhaps not surprising. But in fact we were able to run a number of tests of representativeness of this part of the sample. The results in regard to these tests suggest that it was very close to the known national norm and was therefore in fact close to being representative, despite the overall low response rate. (The details are to be found in Appendix 1.) We would have

[5] Appendix 1 on methodology explains the problem of arriving at an estimated figure for the number of cases heard in the sample period.

wanted to include the results of the defendant questionnaire in any event, if only as a way of reflecting the contribution of many hundreds of defendants who took the trouble to assist the study. But the further tests we ran on the defendant sample showed that it was fully worthy of inclusion in the study.

We were satisfied therefore that the study was broadly sound from a statistical point of view. This means that, provided the sample size on the particular topic in question was large enough[6], it should be legitimate to generalise from the findings. On occasion during the report, where it seemed that the figure might be of particular interest, we have 'grossed up' particular findings to give an estimated annual figure[7]. These should however be treated with caution as no more than approximations.

It should also be said that even though we are satisfied as to the statistical representativeness of the study it should not be thought that the results of the study are presented as if we claim that they represent 'the truth'. The truth about what 'really' happened in these 3,000 or more cases is more complex, and multi-faceted than can be captured by means of any questionnaires. Nor do we claim any exactitude in the data. A study based on self-completion of lengthy and complicated questionnaires cannot produce results of any exactitude. This point is important. Throughout the report data are produced in the form of statistics and tables. Some readers might assume from this fact alone that they are put forward on the basis that they pretend to hard accuracy. In the study of a complex phenemenon such as the criminal process, this is not, and can never be so. The most we would claim is that the figures give an indication of the likely actual position. The more clear-cut the figures, the greater the likelihood that the indication is broadly right.

The usual difficulties of extracting reliable data from social science studies through the use of questionnaires were compounded in the present study by the fact that we had not one but multiple accounts of the same event.There were various purposes in seeking information about cases from different actors. In regard to matters of opinion (such as whether the judge's summing up was even-handed), the chief purpose was to see how far the different participants agreed or disagreed with eachother. If all or several participants from different perspectives have a particular opinion it gives it greater weight than if that view is held by only one. In regard to

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[6] As will be seen, even with a study of this size some of the topics studied have exceedingly small sample sizes.

[7] Since the survey lasted for two weeks, our rough-and-ready way of grossing-up was simply to muliply the relevant figure by twenty six. For various reasons (including the fact that the numbers did not include the three courts used in the pilot or non-replies), this 'grossed-up' annual figure will always be somewhat lower than the likely 'true' figure.

matters of 'fact' (such as whether the defendant pleaded guilty or was found guilty), the main purpose was to maximise the chance of finding out what had happened – as well as to 'harden' the finding. The more respondents who confirm a 'fact', the more likely it is to be so.

We had no way of guaranteeing a response from any source. It was clearly possible that several of those to whom a questionnaire was addressed in regard to any particular case might not reply. The more persons who were asked the same question, the greater the chance that we would get the information from someone. Even if all but one failed to reply, we could still hope to get the answer from the one who did.

But the multiple questionnaires in regard to every case did have one not inconsiderable disadvantage – that quite often there was a measure of disagreement between respondents as to what had happened even in regard to what might be thought to have been questions of fact such as whether the defendant pleaded or was found guilty. Partly this could be due to 'respondent failure' in ticking the wrong box, or filling out a section of the questionnaire having missed an instruction to skip to a later section. Sometimes it might be because the respondent misunderstood the thrust of the question.

It could also be due to the fact that respondents interpreted the question in different ways because of latent, or even patent, ambiguities in the questions or because of their own professional approach to the issue. Thus barristers quite often reported that the defendant had pleaded guilty to some charges and not guilty to others where the judges said the defendant pleaded guilty to all charges. The difference was probably due to the fact that the barrister was working on the knowledge he had from before the hearing, whilst the judge was reporting the ultimate outcome. Making sense of such disagreements proved difficult – and sometimes impossible.

The main responsibility for all stages of the study was taken by myself. The actual practical operational conduct of the study was entrusted to British Market Research Bureau (BMRB[8]) mainly in the person of Mrs Rachel Craig. Mrs Craig put the nine questionnaires into user-friendly format; she handled the business of dealing with the courts and the Lord Chancellor's Department regarding the distribution and collection of the questionnaires; she supervised the process of punching of the data onto computer readable magnetic tape and the editing of the tapes for use. Appendix 2, written by Mrs Craig, describing this part of the project appears at p.259.

[8] Now known as BMRB International.

I devised the analysis programme of the data. The work of interrogating the computer on the basis of these specifications was performed over a period of many months by my co-author Paul Henderson of the Home Office Research and Planning Unit (HORPU) whose services were kindly made available by HORPU. Paul Henderson also found time to check every figure in the report. Appendix 1 on the statistical representativeness of the study and the methodology of analysis was prepared jointly by Paul Henderson and myself.

Save as just indicated in regard to the two appendices, this Report was written by myself.[9] I gladly acknowledge however the great amount of help I received in the form of detailed comments on drafts especially from the Royal Commission's Secretary, Mr James Addison and from its Research Officer, Ms Julie Vennard – as well as, of course, from Paul Henderson.

It is unusual for a member of a body like a Royal Commission to undertake a major piece of research for the Commission of which he is a member. Because of this and the potential conflict of roles, it was agreed that the report of the study would not include evaluation of the data nor recommendations. It would simply report the results. It would be for the Royal Commission itself to draw any appropriate conclusions.[10]

The study is an attempt to break new ground by collecting a mass of information on a great variety of issues from a wide range of respondents. It is very much a preliminary rather than a definitive study. Almost every topic addressed could benefit from further in-depth exploration. Apart from contributing to the work of the Royal Commission and throwing some new light on how the system works, I hope that the study will stimulate much further research.

M.Z.
May 1, 1993
London School of Economics
& Political Science

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[9] I hope I will be forgiven for using, in the interests of economy, the masculine to include the feminine throughout.

[10] A preliminary account of the results of the survey was presented by the writer at the annual Tom Sargant Memorial Lecture in the Law Society's Hall on December 8, 1992 with the Lord Chief Justice, Lord Taylor of Gosforth in the chair. (For full text see *New Law Journal*, December 11, 1992, p.1730.)

1. Arrest to Trial

1.1 Date of arrest
1.2 'Right of silence'
1.3 Legal advice
1.4 Mentally handicapped defendants
1.5 Admissions/confessions
1.6 PACE
1.7 Length of pre-trial custody

1.1 DATE OF ARREST

The survey took place in the last two weeks of February 1992. The police were asked in all cases whether the defendant was arrested before or after April 1, 1991 – the date when the revised PACE Codes of Practice came into force.

They stated that in over four-fifths of cases (82%) the arrest had taken place after April 1, 1991 and that in under one-fifth (18%) it had taken place before that date.[1]

Defendants were also asked and broadly confirmed the police view. According to them, 78 per cent had been arrested after April 1, 1991 and 22 per cent before that date.[2]

Barristers for prosecution and defence were asked the same question – but only in relation to contested cases. Both agreed that some 70 per cent were arrested after April 1, 1991 (70 per cent[3] and 69 per cent[4] respectively).

The question about date of arrest put to the barristers also threw light on whether the defendant had been arrested at all. But since the question was only put in relation to contested cases, the utility of the information is limited. The proportion of those in contested cases who were not arrested at all was very small. According to the barristers it was low – Pb 4 per cent, Db 2 per cent. It is suggestive of how rarely defendants dealt with in the Crown Court are summonsed.

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[1] N=1, 756; 46 non-replies and 17 'Don't know'. 'Non-replies' throughout means those who should have answered the question but did not. They are always stated as a number in addition to the number who did answer.
[2] N=713; 34 non-replies.
[3] N=667.
[4] N=686.

A composite 'merged[5] table' has 80 per cent arrested after April 1,1991, 19 per cent arrested before that date and 1 per cent not arrested at all.

1.2 RIGHT OF SILENCE

The debate over the 'right of silence' has been raging for several decades. The 'right of silence' has various meanings. One which is not in dispute is the rule that a suspect who remains silent in the face of police questioning cannot generally be prosecuted for obstructing the police in the execution of their duty. There are one or two statutory exceptions. So, for instance, a driver of a vehicle can be prosecuted under the Road Traffic Act for refusing to give his name and address. But broadly this rule is not in dispute. It is accepted on all sides as appropriate.

A different meaning of the phrase 'right of silence', which is very much in dispute, is the rule that neither the prosecution nor the judge may draw attention to the fact of the defendant's silence under police questioning in such a way as to suggest that silence is evidence of guilt.

1.2.1 Was the defendant cautioned about his right of silence?

A person who is suspected of an offence must be cautioned about his right of silence.

The police in both contested and uncontested cases were asked (Po14[6]): 'Was the defendant cautioned about his/her "right of silence" during questioning by the police?'.

Table 1.1
Was defendant cautioned?

	%
Cautioned	84
Not cautioned	4
Don't know	12
Total	100 (N=1,790[7])

According to the police, the great majority (84%) were cautioned. When the category of Don't know was eliminated, only 5 per cent were said not to have been cautioned.

[5] A 'merged' or 'majority' table is one constructed out of a majority view of respondents as to what happened in regard to that particular issue. For further elucidation see Appendix 1, p. 257 below.

[6] The bracket identifies the questionnaire and question number. This style is used throughout the report.

[7] Plus 29 non-replies.

1.2.2 Did the defendant exercise his 'right of silence'?

In order to find out whether the defendant exercised his 'right of silence' we asked a rather broad question: 'Did the defendant significantly exercise his/her "right of silence" (including giving silly, Mickey Mouse, answers[8]) at any stage of the questioning by the police before being charged?'[9]

This question was asked in regard to all the defendants in the sample. It was put to prosecution and defence barristers (Pb55; Db57) and to the police (Po15). The question was also put to the judge (Jg47) and the defence solicitor (So150), but only in cases where the defendant pleaded not guilty. (Because the percentages are therefore not comparable and because fuller information was available from the barristers and the police, the responses from the judges and defence solicitors have been left out of the table and subsequent analysis.)

Table 1.2
Significant use of right of silence

	1 Used for some Qs %	2 Used for all Qs %	3 Did not use %	Total %
Pb[10]	10	13	77	100
Db[11]	9	11	80	100
Pol[12]	17	11	72	100

Column 2 shows that all three categories of respondent agreed that just over ten per cent of defendants had said nothing at all. They were not entirely agreed on the proportions who were silent in relation to some relevant questions (Col.1) and as to what proportion did not use their right of silence at all (Col.3).

But, as Column 3 shows, all three groups of respondents agreed that over 70 per cent of suspects did not use the right of silence at all. The police thought that the proportion exercising the right of silence to some extent

[8] The words in brackets referring to 'Mickey Mouse' answers were not included in the police questionnaire.

[9] The word 'significantly' was intended to make it clear that we were only interested in silence in response to questions relevant to the matter in hand.But respondents were left to deduce this for themselves. The word 'significantly' was not defined or explained.

[10] N=1, 590; 65 non-replies.

[11] N=1, 593; 321 non-replies.

[12] N=1, 545; 274 non-replies.

was 28 per cent; barristers thought the figure was somewhat lower (Pb 23 per cent; Db 20 per cent).

The relatively high number of non-replies from defence barristers and the police on this topic was surprising and unexplained.

* For reviews of previous studies on the extent of the use of the right of silence see **Leng,R.** (1993). *The right to silence in police interrogation: A study of some of the issues underlying the debate*, Royal Commission on Criminal Justice Research Studies, No.10; and **Brown,D. and Larcombe,K.** (1992). *Research on PACE: A review of the literatur*, Home Office Research and Planning Unit.

Exercise of right of silence – plea and verdict

Plea by proportion who were silent: According to the prosecution barristers, 29 per cent of those who pleaded not guilty to all charges[13], exercised their right of silence in the police station, compared with 18 per cent of those who pleaded guilty to all charges[14]. The difference in the defence barristers' figures was less but it was still marked – 24 per cent of the not guilty category[15] against 15 per cent of the guilty plea group[16].

The greatest difference emerged in the police questionnaires – according to which 35 per cent of those who pleaded not guilty to all charges[17] exercised the right of silence, compared with 21 per cent of those who ended by pleading guilty[18].

Silence by proportion who pleaded guilty: The assumption is often made that most of those who are silent in the police station plead not guilty. This is not the case. Around half end by pleading guilty to at least some charges.

According to the prosecution barristers, of those who exercised their right of silence[19], just under one-third (32%) ended by pleading guilty to all charges and nearly one-fifth (18%) ended by pleading guilty to some charges. In total therefore, 50 per cent pleaded guilty to one or more charges. By comparison, of those who were not silent[20], nearly a half (46%) pleaded guilty to all charges and 18 per cent pleaded guilty to some charges – a total of 63 per cent.

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[13] N=589.
[14] N=643.
[15] N=597.
[16] N=693.
[17] N=578. Note that the police were not asked about plea so the plea had to be taken from other questionaires.
[18] N=595.
[19] N=337.
[20] N=1, 165.

The equivalent defence barristers' figures, were just over one-third of those who were wholly or partly silent[21] (37%) ended by pleading guilty to all charges, and another 13 per cent pleaded guilty to some charges, again a total of 50 per cent. By comparison, of those who were not silent,[22] just under a half (49%) pleaded guilty to all charges and another 13 per cent pleaded guilty to some charges – a total of 62 per cent.

Nor were the figures produced by the police respondents very different. According to the police, one-third (33%) of those who used their right of silence at all[23] pleaded guilty to all charges, and a further 14 per cent pleaded guilty to some charges, a total of 47 per cent. By comparison, of those who were not silent[24], nearly half (48%) pleaded guilty to all charges and 13 per cent pleaded guilty to some charges – a total of 61 per cent.

The barristers and the police agreed therefore that about half of the minority who were wholly or partially silent ended by pleading guilty – compared with some 61–63 per cent of those who did not exercise their right of silence at all. But what is also of interest is that all agreed that around half of those who were silent pleaded guilty to some charges, and that about a third pleaded guilty to all charges.

Exercise of right of silence and verdict: It was clearly important to check whether those who were silent in the police station and pleaded not guilty seemed to have a better success rate with the jury than those who were not silent. Conventional wisdom has it that silence in the police station is likely to enhance one's chances of an ultimate acquittal.

Both prosecution and defence barristers said that of those who were acquitted on all charges,a lower proportion had been silent at some stage – Pb 26 per cent of those who were acquitted against 30 per cent of those who were convicted had been silent[25]; Db 22 per cent against 25 per cent[26]. The police agreed – according to them, 31 per cent of those who were acquitted had been silent, compared with 40 per cent of those convicted.[27] This suggests that those who remain silent in the police station are less likely to be acquitted than those who speak.

Looking at the issue from a different vantage point, according to the prosecution barristers' figures, a lower proportion of those who were silent

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[21] N=279.
[22] N=1, 200.
[23] N=387.
[24] N=971.
[25] 64 out of 245, compared with 77 out of 258.
[26] 55 out of 250, compared with 64 out of 254
[27] 69 out of 220, compared with 87 out of 216.

were acquitted. Forty five per cent of those who were silent were acquitted, compared with 50 per cent of those who were not silent[28]. According to defence barristers' figures, the difference was similar – 46 per cent of those who were silent were acquitted, compared with 51 per cent of those who were not silent.[29]

1.2.3 Did use of the right of silence seem to be the result of legal advice?

The police were asked (Pol10) whether defendants who had legal advice maintained silence before or after receiving legal advice.

According to the police, in 5 per cent of cases the defendant was silent before legal advice; in twenty one per cent he was silent after legal advice; in 12 per cent he was silent both before and after advice and in the remaining 62 per cent of cases he was not silent even though he had received legal advice.[30]

In close to 80 per cent of cases therefore legal advice did not lead to silence – either the suspect had been silent prior to receiving legal advice (17%), or the suspect was not silent even after receiving the advice (62%). This finding is of interest in view of the often expressed police belief that lawyers tend to advise their clients to be silent.

Defendants were also asked about this. Those who saw a solicitor at the police station or spoke to one on the telephone were asked (Def15): 'Did the solicitor advise you to answer police questions or to say nothing?'

The replies are set out below.

Table 1.3
Solicitor's advice on questioning

	%
Advised me to answer all questions	36
Advised me to answer some questions, not others	23
Advised me to say nothing	26
Not sure	15
Total	100 (N=435[31])

[28] 64 out of 141, compared with 181 out of 362.
[29] 56 out of 119, compared with 195 out of 385.
[30] N=891; 38 non-replies. All these are cases in which the defendant had legal advice in the police station.
[31] Plus 34 non-replies.

On these figures, a little over one-quarter (26%) of those who saw or spoke to a solicitor said they were advised to answer no questions and just under another quarter (23%) were advised to be selective about the questions they answered. On the other hand, in over a third of cases (36%) solicitors (or their representatives) were advising clients to answer all questions.

1.2.4 Would the prosecution's case have been stronger if comment on silence had been allowed?

Abolition of the right of silence would involve either the prosecution or the judge or both being permitted to comment adversely on silence and to suggest to the jury that silence may be taken as some evidence of guilt.

In cases where the defendant had been silent prosecution and defence barristers (Pb60,Db62) and the police (Pol11) were asked the hypothetical question: 'In your view, would the prosecution case have been significantly stronger if the prosecution and judge could have commented adversely on the defendant's silence during his/her detention?'

The overwhelming majority of the police (81%[32]) thought such comment would have helped the prosecution's case. The barristers were more or less equally divided in their response to this question. Forty seven per cent of prosecution[33] and 52 per cent of defence barristers[34] thought such comment would have strengthened the prosecution's case.

1.2.5 Did the jury learn of the defendant's silence?

If the jurors hear evidence to the effect that the defendant was silent in response to police questions they may draw adverse inferences whether they are instructed to do so or not. No one can prevent them from doing so.

Prosecution and defence barristers were asked: 'Did the jury learn that the defendant used the right of silence from police or other evidence?'

Both sets of barristers agreed that in the clear majority of cases the jury did learn this – Pb 85 per cent[35]; Db 79 per cent[36].

1.2.6 Did the judge give the standard direction regarding the defendant's silence?

The judges have a loose-leaf book with 'standard directions' to juries for a variety of circumstances. One is in regard to the defendant's exercise of the

[32] N=221; 116 non-replies.
[33] N=171; 27 non-replies.
[34] N=142; 27 non-replies.
[35] N=188; 11 non-replies.
[36] N=160; 9 non-replies.

right of silence. The standard direction is:' Any person suspected of a criminal offence or charged with one, is entitled to say nothing when he is asked questions about it. You must not hold his/her [silence/refusal to answer questions] against him/her.'

Prosecution and defence barristers in contested cases were asked (Pb57; Db59) whether the judge gave the standard direction or words to that effect. According to the prosecution, he did so in three-quarters of cases (74%)[37]; according to the defence he did so in some two-thirds of cases (65%)[38]. In something between a quarter and a third of cases therefore the judge said something different from the standard direction.

Where the judge said something different from the standard direction, defence barristers were asked whether they had any objection to the way the judge had put the matter to the jury. There were only 7 cases (16%)[39] in which the defence barrister said he did have an objection – but in no case had he raised the objection in court.

1.2.7 What would the judge have made of the silence if he had been a member of the jury?

In the cases where the defendant exercised his right of silence, the judges were asked (Jg48): 'If you had been a member of the jury, how would you have interpreted the defendant's silence?' They were then offered three alternative answers – 'Probably adversely, the silence seemed suspicious', 'Probably not adversely, the silence was explicable' and 'Don't know'.

There were 180 responses[40]. In 41 per cent of cases the judges answered 'Probably adversely', in 42 per cent they answered 'Probably not adversely', and in 17 per cent they answered 'Don't know'. There was therefore no clear result.

1.3 LEGAL ADVICE

1.3.1 Was the suspect told of his right to advice from a lawyer?

In both contested and uncontested cases, the police were asked (Po17): 'Was the defendant told that he/she had a right of access to free legal advice on arrival at the police station?'

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[37] N=155; 44 non-replies.
[38] N=139; 30 non-replies.
[39] N=44; 5 non-replies.
[40] Plus 8 non-replies.

There were only eight cases out of 1,819 (0.5%) in which the answer to this question was No. In 1,530 (87%) it was Yes.[41] There were 225 (13%) in which it was Don't know.

These are consistent with the figures in the study by Sanders et al (1989) which found 88 per cent of those detained were given spoken information about their right to legal advice[42]. Brown et al (1992) provided a figure of 95 per cent before April 1991 and 96 per cent after April 1991[43].

Defendants were also asked about this. They were asked (Def7): 'When you were first arrested and taken to a police station – (a) were you told that you had a right to see a solicitor? and (b) were you given a leaflet or written notice saying you had the right to see a solicitor?'

There were 738 replies to the first part of the question[44]. Of these, 93 per cent said they had been told, whilst 7 per cent said they had not been told.

There were 713 replies to the second part of the question[45]. Of these, 80 per cent said they did receive the leaflet or written notice, whilst 20 per cent said they had not had it.

Defendants were also asked (Def8): 'Did you know or were you told that the solicitor's services would be free?'

There were 757 replies[46]. Of these, 57 per cent said they knew already, 24 per cent said they were told, but 18 per cent claimed that they did not know and had not been told.

We looked to see whether the answers were affected by whether the arrest had been before or after April 1, 1991 – the date when the new Codes of Practice came into force requiring the police specifically to tell the suspect that legal advice was free of charge.

As Table 1.4 below makes clear, the new requirement does show up as having made a difference. Before April 1, 1991, 21 per cent said they

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[41] In 13 per cent it was Don't know. There were 20 cases in which the defendant had not been arrested and another 36 in which there was no answer to the question.
[42] **Sanders, A., Bridges L., Mulvaney, A., and Crozier, G.** (1989). *Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme.* Lord Chancellor's Department.
[43] Brown et al, p.4 above, at p.115.
[44] Excluding 30 who said they were not sure and 25 who gave no reply.
[45] Excluding 54 who said they were not sure and 26 who gave no reply.
[46] Excluding 36 ineffective replies.

were told about free advice; after April 1 the proportion was 25 per cent. Equally, before April 1, 1991 25 per cent said they did not know that legal advice was free and were not told, whereas after April 1,1991 this proportion had dropped to 15 per cent.

Nevertheless, as will be seen below (sect.1.3.5), a high proportion of those who did not seek advice from a solicitor and gave as their reason worry about costs were arrested after April 1, 1991.

Table 1.4
Date of arrest by whether defendant knew that legal advice was free

	Knew already %	Was told %	Did not know %	Total %
Arrested before April 1991	53	21	25	100 (N=154)
Arrested after April 1991	59	25	16	100 (N=541)

1.3.2 Did the defendant ask to see a solicitor?

Defendants were asked (Def9): 'Did you in fact ask to see a solicitor while you were at the police station?'

There were 760 replies[47]. Of these, no fewer than 66% said they had asked, whilst 34 per cent said they had not asked for a solicitor. The two-thirds who said they had asked for a solicitor are a considerably higher proportion than has been recorded in previous studies. These figures are, however, the first that relate to a sample of Crown Court defendants and it is possible that Crown Crown defendants would ask for a solicitor more often than the general run of defendants. We had no way of cross-checking the information as the same question was not put to any other respondents. But we did ask the police whether the suspect got legal advice.

1.3.3 Did the suspect get legal advice?

The police were asked (Po18): 'Did the defendant receive legal advice while in custody in the police station before being charged?' The range of answers is set out in Table 1.5 below:

[47] Plus 33 non-replies.

Table 1.5
Did defendant have legal advice?

	%
Yes – in person	34
Yes – on the phone	5
Yes – both in person and on phone	14
No	28
Don't know	19
Total	100 (N=1,775[48])

According to the police therefore, 53 per cent of suspects had legal advice either in person or over the telephone or both. Moreover in 19 per cent of cases the police said they did not know. Presumably in at least some of those cases the suspect would have had legal advice. Even if all the Don't knows are assigned to the category who did not get legal advice, the proportion who appear to have got legal advice would be high.

Obviously the figures are based solely on the police statement.No other professional participant in the process was asked the same question. (We did not think it worth asking the defence lawyers whether the defendant had been given the PACE warnings about access to legal advice. It seemed unlikely that they would have reliable information on the subject except in the minority of cases where a solicitor had been called to the police station.)

But we did ask defendants themselves. The defendants showed an *even higher* rate of requesting and use of lawyers than the police.

Those who said they had asked for legal advice were asked (Def12): 'Did you in fact see a solicitor in the police station or speak to one on the phone?'

Of the 503 who had said they had asked for a solicitor, 486 replied to this question. Of these, just over half (56%) said they had seen a solicitor, 9 per cent said they only spoke to one on the phone, and 29 per cent said they spoke to one on the phone *and* saw one in person. So 94 per cent of those who asked for a solicitor said they either saw or spoke to one, whilst 6 per cent did not.

1.3.4 Did the defendant ask for his own solicitor or the duty solicitor?

Defendants who said they had asked to see a solicitor, were asked (Def11): 'Did you ask to see your own solicitor, or the duty solicitor?'

[48] Plus 44 non-replies.

There were 490 replies. Of these, 66 per cent said they had asked for their own solicitor, and the remaining 34 per cent had asked for the duty solicitor[49]. This relationship between 'own solicitor' and duty solicitor of two-thirds: one third is the same as in the annual national statistics.

1.3.5 Why did defendants not ask to see a solicitor?

The 257 who said they had not asked to see a solicitor were asked (Def10) why they had not done so.

Defendants could indicate more than one reason, if they wished. In total there were 345 responses from the 257 defendants:

Table 1.6
Reasons for not asking to see a solicitor

	%
Didn't think it necessary	27
Thought I could handle it myself	20
Didn't want the extra wait	13
Experienced in the matter/have been arrested before	7
Worried about costs	7
Too minor a matter	6
Police suggested it wasn't necessary	6
Other reasons	14
Total	100 (N=345[50])

'Other' reasons included:

- 'I didn't realise how serious the offence really was.'
- 'Didn't understand the procedure. I am Bengali and not educated in English.'
- 'Pleading guilty. Couldn't see any point.'
- 'I knew I would be bailed and felt that legal advice was something I could arrange at a later date.'
- 'I knew I was going to court next day – so I waited to see duty solicitor.'
- 'Because I knew my solicitor would be at court the following day.'
- 'My mother told me not to speak to strangers.'
- 'Too drunk.'
- 'I went to the police station with my solicitor' (9 cases)
- 'It was something I didn't do so I didn't want any solicitor.'

70 per cent of the small number (24) who mentioned 'Worried about costs' as a reason had been arrested after April 1, 1991 when the new Codes of

[49] Plus 46 non-replies.
[50] Plus 4 non-replies.

Practice required the arrested suspect to be told that legal advice was free of charge. It seems that over 80 per cent of suspects are aware that legal advice is free but that a significant minority are not.

We checked whether the 257 defendants who did not ask for a solicitor were different from those who did ask for a solicitor in regard to knowledge of their rights to have a solicitor. 230 of the 257 (89%)[51] said they had been told of their right to have a solicitor – almost the same proportion as the 87% for all defendants. 184 of the 257 (72%) said they had received the leaflet about seeing a solicitor – precisely the same proportion as the whole of the defendant sample.[52] The only difference between this group of defendants and defendants generally was in regard to knowledge that legal advice in the police station is free. 26 per cent of the 257, compared with 18 per cent of defendants generally said that they did not know and had not been told this, compared with 15 per cent of those who did ask for a solicitor.

1.3.6 Why did suspect not get legal advice?

In cases where the suspect did not get legal advice, the police were asked (Po19) why not. There were four possible answers suggested to respondents. The police responses were remarkably consistent. According to the police, in just about every case, it was because the suspect had not asked for a solicitor.

Table 1.7
Why did suspects not get legal advice?

	%
The defendant did not ask for a solicitor	96
The defendant asked but it was decided to delay access	0.2
The interview started before the solicitor arrived	–
The solicitor did not arrive	0.2
Other	2
Don't know	1
Total	100 (N=482)

Defendants: The thirty-two defendants who asked to see a solicitor but had not seen or spoken to one were asked why they had not seen or spoken to a solicitor (Def13). There were only 26 replies. In nine cases the defendant said it was because the police had not allowed it. In two cases no solicitor

[51] There were 14 (5%) who said they had not been told and 13 (5%) who said they were not sure.

[52] The proportion saying they had not received the leaflet (21%) and were not sure (7%) was also the same.

had come or spoken to the defendant. In 15 cases there were miscellaneous other replies including:

- 'My solicitor did not attend but sent an unqualified runner.'
- 'Solicitor was not able to come.'
- 'Custody officer could not contact my solicitor.'
- 'I said I would be interviewed without a solicitor.'
- 'I was detained over a week and it was implied by the police that seeing a solicitor would not alter the circumstances of my detention.'

1.3.7 Was the solicitor present during interviews?

The defendants who said they had seen a solicitor or spoken to one were asked (Def14): 'Was the solicitor there while you were actually being interviewed at the police station?'

There were 463 replies[53]. Analysis showed that 42 answered this question in error since they had already said that they had only spoken to the lawyer over the phone (or, alternatively, answered the earlier one wrongly). Excluding these, of the remainder, 65 per cent said the solicitor was there for all interviews, 21 per cent said the solicitor was there for part of the police interview(s) and 14 per cent said the solicitor was not present at interviews at all.

* For other studies with data on this issue see especially **Sanders et al**, (1989) *Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme.* Lord Chancellor's Department and **Brown et al**, (1993) *Changing the Code: Police detention under the Revised PACE Codes of Practice.* Home Office Research Study No.12.

1.3.8 Was the defendant seen by a solicitor or someone else?

Defendants were asked (Def16) whether they were seen by a solicitor, a solicitor's clerk or someone else. It was not assumed that they would necessarily be able to distinguish between a qualified solicitor and an unadmitted adviser. But it was of interest to ask defendants whether *they* thought the adviser was a solicitor.

There were 403 replies[54] In three-quarters of the cases (75 %) the defendant said he saw a solicitor, in 22 per cent he saw a clerk and in 3 per cent he saw 'Someone else'. (There was no way of knowing whether the defendant's impression was correct.[55])

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[53] There were nine non-replies.

[54] Excluding 56 in which the defendant said he did not know the status of the person he saw.

[55] See however Table 7.6 below regarding the status of the person from the defence solicitors' firm filling out the Commission's questionnaire. This was a qualified solicitor in under one third of all cases. Firms were asked to see that the person who instructed counsel filled out the questionnaire.

1.3.9 Did defendant keep the solicitor seen at the police station throughout the case?

Defendants were asked (Def17) whether they kept the same firm of solicitors first seen at the police station throughout or whether they changed to a different firm.

There were 466 replies. In three-quarters (76%) the defendant said he kept the same solicitors. In the remaining quarter (24%), there had been a change of firm, sometimes no doubt because the original solicitor was the duty solicitor and the defendant wanted his usual firm to act for him. (Those who had seen the duty solicitor changed firms in 37 per cent of cases[56], compared with 18 per cent of those who had their own solicitor in the police station[57].)

1.3.10 Had the defendant previously used the solicitors who acted for him at the hearing?

Defendants were asked (Def19) whether they had previously used the firm that acted for them at the trial. There were 45 replies. Of these, 53 per cent said they had used that firm before and about half 47 per cent said they had not.

Those who changed solicitors were asked why they had changed (Def18). The 111 defendants in this category between them produced 91 responses which could be categorised as follows:

Table 1.8
Reasons for defendant's change of solicitors

	No.
Original solicitor no good	58
I was advised to change	11
Wanted own solicitor	10
Case moved to different area	4
Wanted co-defendant's solicitor	4
Other, miscellaneous/not stated	4
Total	91

1.4 MENTALLY HANDICAPPED DEFENDANTS

Defence barristers and defence solicitors were asked (Db48; So148): 'Is the defendant significantly mentally handicapped or mentally disordered as defined in the PACE Codes?[58]

[56] N=149.

[57] N=298.

[58] Obviously we did not expect practitioners to check the definition before answering this question. The PACE Code defines a mentally disordered person as one who suffers from 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind', Code C, Note 1G.

In 98 per cent of cases they both said No. In four cases they both reported the same defendant as having been in that state, in four the defendant barrister alone said he was and in another four the defence solicitor said he was. There were therefore twelve defendants in the sample who were said by their lawyers to be mentally handicapped or mentally disordered.[59]

Defence barristers were then asked how the police responded to the fact that the suspect was mentally handicapped or disordered. According to the defence barrister, the police only called an 'appropriate adult' as required by the PACE Code in two out of these eight cases. However, since there were so few cases the answers cannot be regarded as of much weight.

1.5 ADMISSIONS/CONFESSIONS

We were concerned to try to establish in what proportion of cases the suspect made admissions or confessions. ('Admissions' and 'confessions' are not terms of art with a strict definition but a confession is usually regarded as being a statement admitting substantially the whole of the charges whilst admissions are usually regarded as relating only to some elements of the alleged offence.)

1.5.1 Was there interview evidence?

We first asked the barristers in contested cases (Pb61, Db63): 'Did the prosecution case include evidence from interviews with the defendant?'

Prosecution and defence barristers broadly gave the same answer. According to the prosecution barristers, in 84 per cent of cases[60] there was interview evidence, and in 16 per cent there was none. The equivalent figures for defence barristers were 86 per cent[61] against 14 per cent in which there was none.

1.5.2 In contested cases, did the suspect make admissions or confessions?

The next question (Pb62; Db64) was whether the defendant made admissions or confessions and, if so, whether he disputed the allegations? Admissions and confessions were combined partly because we could not assume that respondents would use such such imprecise terms in the same way. Again, prosecution and defence barristers gave broadly the same responses:

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[59] Db N=620; Sol N=598. In one case the barrister, and in six cases the solicitor said he did not know and there were 82 questionnaires in which the barrister did not reply.

[60] N=661.

[61] N=683.

Table 1.9
Did suspect make admissions/confession?

	Pb %	Db %	Sol %
Admissions/confessions not disputed	25	27	33
Admissions/confessions disputed	10	13	18
No admissions/ confessions only denials	65	60	50
Total	100 (N=620[62])	100 (N=603)[63]	100 (N=480)[64]

According to the barristers, in just under two-thirds of cases there were no admissions or confessions at all. In about a quarter the defendant did not dispute that he had made admissions or confessions, and in around one-tenth of cases the issue was a matter of dispute. (See also sect.1.5.8 below as to the cases in which the truth of a confession or admission was challenged.)

Defence solicitors were not asked the preliminary question whether there was interview evidence, but they were asked (So152) whether the defendant had at any stage 'made admissions or confessions'. As appears from Table 1.9, the responses to this question from defence solicitors were somewhat different from those given by barristers – with a higher proportion of cases where the client was said to have made admissions or confessions and a correspondingly lower proportion of cases where there were only denials. But the very high number of non-replies (171) make these responses problematic. For this reason it is probably best to assume that the barristers' responses give the more reliable figures.

1.5.3 Incidence of tape-recording[65]

Tape-recording has been coming in rapidly over the past few years. Since January 1, 1992, all interviews in police stations in regard to indictable offences are required to be tape-recorded.

We asked barristers in contested cases whether all or some of the interview evidence in the case had been tape-recorded.

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[62] Plus 8 non-replies.
[63] There were 38 non-replies.
[64] There were 171 non-replies.
[65] On tape-recording see also sect.3 below.

According to prosecution barristers (Pb 63), 86 per cent of *all* interview evidence in contested cases was tape-recorded – presumably at the police station.[66]

Defence barristers (Db 65) said the proportion tape-recorded was 87 per cent[67].

The judges (Jg 34), answering in respect of contested cases only, said it was 91 per cent[68].

All three categories of respondent therefore broadly agreed.

In something under 10 per cent of contested cases there was also interview evidence that had not been tape-recorded (Pb 9%, Db 8%). The proportion of cases in which none of the interview evidence had been tape-recorded was small (Both Pb *and* Db 5%).

1.5.4 Where were non-tape-recorded admissions/ confessions made?

Prosecution and defence barristers (Pb71; Db73) – and defendants (Def54) – were asked where non-tape-recorded admissions or confessions had been made. With the exception of 'police car confessions', the answers given by the barristers were very similar. (The figures add up to more than 100 per cent because respondents were told to tick any category that applied):

Table 1.10
Where were the non-taped admissions/confessions made?

	Pb %	Db %
Police station	40	36
Scene of crime (if different)	24	25
Scene of arrest (if different)	23	23
Defendant's home	10	15
Police car	6	15
Elsewhere	17	14
Total	120 (N=78[69])	128 (N=73[70])

The admissions/confessions obtained in police cars in the prosecution barrister responses was 6 per cent compared with 15 per cent in the defence

[66] N=570; two non-replies.
[67] N=582; 5 non-replies.
[68] N=751; 121 non-replies.
[69] Plus 1 non-reply.
[70] Plus three non-replies.

barristers' questionnaires. This difference is marked, but must be viewed with caution in view of the very small numbers involved.(The very small numbers involved made it pointless to test by cross-tabulation for possible variations in verdict by place where the admission/confession was obtained.)

The barristers were asked how important the non-tape-recorded evidence was. There were 75 effective prosecution replies. In 29 cases (39%), the prosecution barrister said the evidence was 'very important'; in 18 cases (24%) it was 'fairly important'; in 28 cases (37%) it was 'not very important'. The prosecution barristers said that there was other important evidence in all but two of the cases.

The defence barristers gave 71 effective replies. In 20 cases (28%) the non-tape-recorded evidence was said to be 'very important'; in 26 (37%) 'fairly important' and in 25 (35%) 'not very important'.

We also asked the defendants. The 339 defendants who had said they had made a confession or had admitted something to the police, were asked *where* they had made a confession or admission (Def54). The question did not, however, ask defendants to distinguish between taped interviews and circumstances where there was no tape-recording, so that these responses cannot be compared with those from barristers.

Given that the responses include taped interviews, it was not surprising that the defendants' responses make the interview room in the police station even more the dominant venue for admissions/confessions than did the barristers. But, like the barristers, they make it clear that admissions/confessions also happen elsewhere. The defendants' responses give 69 admissions/confessions (16%) outside the police station as against 354 in the police station (of which 89 per cent were in the interview room).

Table 1.11
Places where defendants said they made admissions/confessions

	%	
Interview room	93	
At home	8	
In a police cell	8	
In police car	6	
Elsewhere in police station	4	
In street	4	
Somewhere else	2	
Total	339	defendants making 427 confessions)

1.5.5 Was the defendant shown what was written down?

In cases of non-tape-recorded interviews, the defendant was asked (Def58): 'Were you shown what was written down and asked to sign it to show that it was correct?'[71]

In 79 per cent of cases[72], the defendant said that he had been shown the written record and asked to sign it. In 21 per cent he said that he had not been shown it and asked to sign it. (However, the question was not well framed. The answer might have meant he was not shown it, or that he was shown, but was not asked to sign it.)

The prosecution barristers said (Pb) that the defendant was asked to sign the written record of interview in 77 per cent of cases[73] cases and not in 23 per cent. These two sets of figures are therefore almost identical.

The defence barristers (Db) said that the client had been asked to sign the written record in only 61 per cent of cases[74], and not in 39 per cent.

1.5.6 Did the defendant sign any written record?

In cases of non-tape-recorded interviews, the question whether the defendant signed the written record was put to the two sets of barristers (Pb74; Db76). According to the prosecution barrister, the defendant signed in 68 per cent of cases[75]; the defence barrister thought he signed in 72 per cent[76]

Defendants said they signed in 36 of the 37 cases in which they were shown the record and asked to sign it. In 28 of these 36 cases (78%), they said, the record was reasonably accurate, in six (17%) it was not. (There was no response in two cases.) When asked why the defendant had signed the record even though it was not accurate the defendants gave a variety of responses:

- 'Under the influence of drugs and drink.'
- 'Frightened it might go on the record if I did not sign it.'
- 'At the time, after reading out my statement, I realised there were certain parts of my statement not written down – I did not become aware of the issues until it was too late.'
- 'I was emotionally and physically worn down; all I wanted was for the police to leave me alone. You are subject to mental and physical abuse and when you complain it's your word against the police.'

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[71] This is required by PACE Code C, para.11.10.
[72] N=47; 1 non-reply.
[13] N=589.
[74] N=67; 6 non-replies.
[75] N=56; 3 non-replies.
[76] N=39; two non-replies.

- 'Just to make him happy.'
- 'Because I knew I had to go back in the police car with them.'

1.5.7 Was the defendant given a copy?

The defendant was asked whether he was given a copy of the written record (Def62).[77]

In 78 per cent (35 cases) according to the defendant, he was not given a copy.[78] In 22 per cent (10 cases) he was given a copy.

1.5.8 Did the defence barrister suggest at the trial that all or some part of the admission or confession was untrue?

The two sets of barristers and the defendant were asked whether the defence alleged at the trial that the admission or confession was untrue (Pb62; Db64; Def63). All three agreed that in the majority of cases the admission/confession was not disputed.[79] But the prosecution said it was disputed in 29 per cent of cases[80]; the defence barrister said in 34 per cent[81]; the defendant said in 30 per cent[82]. They agreed therefore that there was a challenge in something like a third of the cases.[83]

1.5.9 Did the defence barrister, at the trial, claim that the police notes made of the admission or confession were inaccurate?

Only the defendant was asked this question (Def64). According to the defendant, in 27 per cent of cases the barrister had claimed there were inaccuracies in regard to the confession or admission.[84]

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[77] This is not a requirement under PACE – though copies of interviews are disclosed by the prosecution at a later stage.

[78] N=45; two non-replies.

[79] The percentages that follow are different from those in sect.1.5.1 above – but the absolute numbers are the same. The percentages are different because the number of respondents was different. In sect.1.5.1, the figures include cases where there was no admission or confession; here the figures are based solely on cases in which there was some admission/confession.

[80] N=217; 8 non-replies.

[81] N=244; 38 non-replies.

[82] N=20; 4 non-replies.

[83] See also C.Willis et al, *The Tape-Recording of Police Interviews with Suspects: Second Interim Report*, Home Office Research Study No.97, 1988, p.67–68.

[84] N=22; 2 non-replies.

1.6 PACE

1.6.1 Did the custody record form reveal any breaches of PACE?

Prosecution and defence barristers were asked whether the custody record form revealed any breaches of PACE (Pb90; Db92).

Such cases were exceedingly rare. Prosecution barristers said there was no such evidence in 99 per cent of cases[85]. The defence barristers said there was none in 96 per cent.[86]

1.6.2 Was there other evidence of significant breaches of PACE?

The defence barristers thought there was other evidence of breaches of PACE in ten per cent of contested cases[87]; the prosecution thought there was such evidence in five per cent.[88]

1.6.3 Did the defendant have any complaints about treatment by the police?

Defendants were asked (Def1) 'Did you have any complaints about the way the police treated you between the time that you were arrested and the time you first appeared in court?'[89]

The total sample of defendants consisted of 793. Of these, 6 per cent had not been arrested and the question was therefore irrelevant. Excluding these, almost half of the defendants (46%) said they had complaints.[90]

The sample who had complaints consisted of 346 defendants. Between them they listed 671 complaints – an average of 1.9 per defendant. Because of the low response rate of defendants, there is no way of knowing whether these complaints are representative of those that would be made by defendants generally. In order of frequency of mention the complaints were:

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[85] N=605; 80 non-replies.
[86] N=620; 82 non-replies.
[87] N=628; 74 non-replies.
[88] N=617; 68 non-replies.
[89] This was in fact the first question in the defendant's questionnaire – designedly to encourage a high response rate.
[90] N=747

Table 1.12
Complaints by prisoners about police treatment

	%
The way they questioned me	49
Being kept too long in detention	45
Rough handling	41
Not getting medical care	13
Not being able to see a solicitor	11
Not being told my rights	10
Other	21
Total	190 (N=671)

'Other' complaints included:–

- 'Strongly advised NOT (sic) to see a solicitor by police as this would keep me in custody.'
- 'The way I got disgusting and sick remarks about myself.'
- 'I was made out to be lying and the police would not look into what I was saying.'
- 'No food or drink for approximately 9 hours.'
- 'The amount of police there was to arrest me. Six instead of two.'
- 'The microwaved food was frozen in the middle.'
- 'I didn't like being arrested.'

1.6.4 If so, did the defendant notify his complaint?

Defendants were asked (Def2): 'If you had a complaint, did you make a spoken or written complaint about these problem(s) to the police or anyone else?'

In nearly half the cases (43%[91]), the defendant said he had not complained.

Of the 193 who said they made a complaint, 84 per cent said they had made a written complaint, 5 per cent said they had made only an oral complaint and the remaining I I per cent said they had made both a written and an oral complaint.[92]

1.6.5 If so, to whom was such complaint made?

The 193 who said they had complained were asked (Def3) to whom they had complained?

[91] N=339; 15 non-replies.
[92] There were 15 non-replies.

Between them they had made 306 complaints:

	Complaints %
To my solicitor	41
To the police	39
To my barrister	12
To someone else	7
Total	100 (N=306)

1.6.6 If no complaint made, why not?

Defendants who had not complained were asked why they had not done so. Not all replied but those who did gave a variety of reasons:

	No. of reasons for not complaining
Waste of time	50
Fear of reprisals	16
Didn't trust police	16
All part of being arrested	9
Too upset	6
Not important	2
Other, miscellaneous or not stated	27

1.6.7 How long was the defendant held in police custody before charge?

Defendants were asked (Def6): 'About how long would you say you were held in the police station before you were charged?' There were 670 who answered this question. Their responses are set out below:

Table 1.13
Length of police detention before charge

	%
Up to 3 hrs.	17
More than 3, up to 6 hrs.	23
More than 6, up to 12 hrs.	20
More than 12, up to 24 hrs.	21
More than 24, up to 36 hrs.	11
More than 36 hrs.	8
Total	100 (N=670[93])

Previous figures for length of detention have been based on samples drawn at the police station. This is the first study to attempt to provide figures for

[93] Excluding 39 who were 'Not sure', 11 who were not held in a police station and 27 who did not reply.

length of detention of suspects where the sample was drawn from cases that went to court. Moreover they were all Crown Court cases. On the other hand, since the figures are based on recollection many months later, they must be treated with some reserve.

The proportions held for longer than 12 hours (40%), longer than 24 hours (19%) and longer than 36 hours (8%) are all greater than in previous studies. For instance in Brown's study of the records of 5,500 prisoners in police stations the proportion of those charged who were held for over 12 hours was only 10 per cent and for longer than 24 hours was 1 per cent.[94] But the problem of accurate recall some months after the event means that one cannot be too confident about these estimates.

1.7 LENGTH OF PRE-TRIAL CUSTODY AFTER CHARGE

1.7.1 Was defendant held in custody or on bail while waiting for his trial?

Defendants were asked (Def20): 'After your arrest, while you were waiting for your Crown Court case, were you in custody or on bail?'

Two-thirds (66%) said they were on bail throughout; sixteen per cent were held in custody throughout; the remaining 18 per cent had experienced both custody and bail while waiting for the case to come on.[95] This is very close to the position as stated in the latest *Criminal Statistics* which showed that in 1991 20 per cent of defendants committed for trial at the Crown Court were remanded in custody throughout.[96]

1.7.2 If in custody, for how long?

Those who said they had been held wholly or partly in custody were asked (Def21) how long this period of custody had been.

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[94] D.Brown, *Detention at the Police Station Under the Police and Criminal Evidence Act 1984*, Home Office Research Study 104, 1989, Table 6.5, p.62.
[95] N=736; 49 non-replies and 8 non-arrest cases.
[96] *Criminal Statistics*, 1991, Cm.2134, calculated from Table 8.9.

Table 1.14
Length of pre-trial custody

	Any custody %	*Those in custody throughout* %
Up to 3 months	46	16
More than 3, up to 6 months	35	55
More than 6, up to 9 months	11	17
More than 9, up to 12 months	5	8
More than 12, up to 15 months	1	3
More than 15, up to 18 months	0.4	0.8
Over 18 months	0.4	0.8
Total	100 (N=229[97])	100 (N=113)

It should be borne in mind that the numbers in both columns are rather low.

When we checked length of custody against plea it turned out that 51 per cent of those pleading not guilty and 44 per cent of those pleading guilty were held in pre-trial custody for up to three months. In these cases, there was little difference in length of detention between the two categories, with a higher proportion of the not guilty pleas actually being heard *more* quickly. But for cases not dealt with in the first three months the period of detention was distinctly longer for those pleading not guilty:

Table 1.15
Length of pre-trial custody by plea

	Guilty plea %	Not guilty %
Up to 3 months	44	51
More than 3, up to six months	42	21
More than 6, up to 9 months	8	14
More than 9, up to 12 months	4	9
More than 12, up to 15 months	1	5
Total	100 (N=95)	100 (N=65)

1.7.3 Did defendant have problems contacting solicitors?

It is well known that, for a variety of reasons, prisoners held on remand awaiting trial often have problems in getting access to their lawyers.

In order to get a measure of how frequently this acknowledged problem occurs, we asked defendants (Def22): 'While you were in custody, did you have any problems in contacting or getting to see your solicitor?'

[97] Plus 22 non-replies.

In almost exactly three-quarters of these cases – all of them contested – the prisoner said that he had no such problems. In one-quarter of the cases however, there had been such problems.[98]

We asked the defendants who said there had been such problems to indicate their nature. The responses included:

- 'My solicitor had made arrangements to see me and was told that I had been moved to Leeds prison, when in fact I was still in the police container unit at Rotherham police station.'
- 'Letters were sent 2nd class. Legal visit bookings were often full or over-booked resulting in cancelled visits or restricted time. Movements between prisons (I was in 3), police custody (3 police stations) often resulted in my solicitor not knowing where I was being held.'
- 'Didn't show up.'
- 'He didn't keep all the appointments as arranged.'
- 'I was in custody in Dorchester and my solicitors were in Bristol.'
- 'Visits to the prison by solicitor was a problem because of the amount of people in custody waiting to see their solicitor.'
- 'They moved me from one prison to another so I didn't see my solicitor until my Crown Court hearing.'
- 'Solicitor wouldn't come to the prison.'
- 'Not being able to use a phone.'
- 'They just never seem to come. I haven't seen my barrister at all in 9 months.'

[98] N=239; 12 non-replies.

2. Preparation for Trial

2.1 Receipt of briefs by counsel
2.2 Listing
2.3 Receipt of papers by judge
2.4 Contacts between prosecution barrister and CPS/police
2.5 Contacts between defence barrister and defence solicitor
2.6 Contacts between defence barrister and defendant
2.7 Contacts between CPS and police
2.8 Pre-trial hearings
2.9 Pre-trial admissions
2.10 Alibi defences

2.1 RECEIPT OF BRIEFS BY COUNSEL

2.1.1 How much advance warning did chambers have of date of hearing?

Barristers in both contested and uncontested cases were asked: 'How long before the hearing was your chambers notified that the case was coming on for that particular day?'

The response of prosecuting and defence barristers (Table 2.1 below) was quite similar. More than one week's notice was given in around a third to two-fifths of all cases. A day or less notice was given in between a quarter and a third. In two-fifths of cases the barrister did not know when the chambers had notice of the hearing.

Table 2.1
Advance notice of case to chambers

	Pb %	Db %
More than one week	32	38
4–7 days before	7	8
2–3 days before	8	7
Day before, before 4pm	21	18
Day before, after 4 pm	11	9
Don't know	21	20
Total	100 (N=2,188[1])	100 (N=2,017[2])

2.1.2 Was this sufficient notice?

Barristers were asked whether this was sufficient notice. Ninety-two per cent of prosecuting barristers said it was sufficient notice. Only eight cent

[1] Plus 71 non-replies.
[2] Plus 75 non-replies.

said it was not.[3] For defence barristers the equivalent proportions were 87 per cent and 13 per cent.[4]

2.1.3 How much notice was there of counsel's personal involvement?

Barristers in contested cases were asked when they received the brief for the hearing?

Two-fifths of prosecution counsel (41%) and half of defence barristers (51%) got the brief more than two weeks before the hearing. Half of prosecution barristers (51%) and nearly one third of defence barristers (31%) only had it on the day before the hearing or the day of the hearing itself[5].

Table 2.2
When did counsel receive brief in contested cases?

	Pb %	Db %
More than two weeks before hearing	41	51
4 to 14 days	5	9
2–3 days	6	8
Day before, up to 4pm	9	6
Day before, after 4pm	34	23
Day of hearing	6	2
Total	100 (N=663[6])	100 (N=688[7])

2.1.4 Was there enough time to prepare?

In spite of the late receipt of instructions in so many cases, 95 per cent of prosecuting barristers and 93 per cent of defence barristers said they had enough time to prepare.[8]

As might be expected, those who received their brief very late were more likely to say that they had insufficient time.

Prosecution: Twenty two per cent of the (40) prosecuting barristers who got their instructions for a contested case on the very day of the hearing said they had insufficient time – though 78 per cent said they had enough time.

[3] N = 2,003; 256 non-replies.
[4] N = 1,835; 257 non-replies
[5] There were 22 prosecution and 14 defence non-replies.
[6] Plus 22 non-replies.
[7] Plus 14 non-replies.
[8] N = 672 prosecution and 692 defence barristers. There were 13 and 10 non-replies respectively.

Of the 222 prosecuting barristers who got the brief on the day before the hearing, but after 4pm, 7 per cent said this was insufficient time and of the 58 who had the brief on the day before but prior to 4pm, 5 per cent said this was insufficient.

Defence: Nineteen per cent of the (16) defence barristers who got the brief on the day of the hearing said they had insufficent time to prepare. But 81 per cent said they had enough time.

Of the 161 defence barristers who got the brief after 4pm on the previous day, 14 per cent said this was insufficient time and of the 41 who had the brief on the day before but prior to 4pm, 7 per cent said this was not sufficient.

2.1.5 How many pages had to be read?

Counsel in contested cases were asked: 'About how many pages of reading did it involve. Please indicate separately for the brief and for any legal research.'

The responses are reported in Tables 2.3a and b:

Table 2.3a
Pages to be read by barrister in and with brief

Pages	Pb %	Db %
Up to 25	28	15
25–50	31	27
51–100	22	36
100+	19	22
Total	100 (N=671[9])	100 (N=686[10])

[9] Plus 14 non replies.
[10] Plus 16 non-replies.

Table 2.3b
Pages of legal research involved for barristers

Pages	Pb %	Db %
None	23[11]	18[12]
1–5	19	17
6–25	32	33
26–50	14	14
51–100	6	9
100+	5	9
Total	100 (N=482)	100 (N=530)

Some of the cases involving considerable amounts of reading were those in which the brief for contested cases was delivered late. Thus, looking only at the cases where the brief was delivered on the day before the hearing or on the day itself there were nearly a fifth (18%)[13] involving 50 to 100 pages of reading, and another 14 per cent or so involving over 100 pages of reading[14].

2.1.6 Was it a returned brief?

Counsel in not guilty plea cases were asked (Pb29; Db26): 'Had the brief previously been returned by someone else?'

In no fewer than 59 per cent of cases, prosecution counsel said Yes. For defence barristers the proportion was 44 per cent.[15] (See further sect.2.4.6 – CPS said brief was returned in 66% of cases and sect.2.5.6 – defence solicitor said brief was returned in 48%.)

2.1.7 Was the brief adequate?

The barristers were asked (Pb30; Db27): 'Were the brief and supporting documents adequate, or were there any major problems?'

[11] In fact, this proportion may have been considerably higher as there were 203 questionnaires in which prosecuting counsel did not reply. If these are assumed to have meant nil, this category would have been increased to 46 per cent.
[12] See note ll. There were 172 non-replies. If these are counted as nil returns this category would have been 38 per cent of the total.
[13] N= 213.
[14] It was almost certainly more because there were a considerable number of cases that could not be categorised accurately. The numbers of pages of reading were grouped (0–5pp., 6–25pp.,26–50pp.,51-100pp., etc) separately for the brief and for legal research.In adding these one encounters the problem that 26–50 pages of brief plus 6–25 pages of legal research could be anything from 31 to 75 pages overall. We took a conservative approach and counted as in a group only cases that were definitely at least in that category. So 26–50 plus 6–25 was counted in the group 26–50 even though it might in fact have been in the group 51–100.
[15] Pb N = 661; 6 Don't knows and 12 non-replies. Db N=684; 6 Don't knows and 13 non-replies.

24 per cent of prosecuting barristers[16] and 25 per cent of defence barristers[17] said that the brief was not adequate.

Where there were problems, they consisted of a variety of matters (in some cases there were more than one of these per case):

Table 2.4
Problems with briefs

	Pb No.	Db No.
Missing documents	87	75
Missed crucial points	90	40
Too skimpy	26	52
Muddled on issues	19	20
Poor physical presentation	28	28
Lay client caused problems	6	58
Other miscellaneous	10	25

2.1.8 Were shortcomings rectifiable?

Counsel were asked, in regard to the identified inadaquacies (Pb32; Db28): 'Were you able to rectify the inadequacies of the brief?'

Prosecution counsel said Yes in 71 per cent of cases[18]; defence barristers said Yes in 83 per cent of cases[19]

2.1.9 If not rectifiable, did this matter?

Counsel were asked (Pb33; Db29): 'If [you could not rectify the inadequacies of the brief] how much did this matter?'

Both prosecution and defence barristers indicated that in almost all these cases it did matter.

Prosecution barristers said it mattered 'A great deal' in 26 cases and 'A little' in 19. In four cases it 'Did not matter'.

Defence barristers said it mattered 'A great deal' in 12 cases and 'A little' in 14. There was one case in which it 'Did not matter'.

If the cases where it mattered ('a little' or 'a great deal') are taken as a proportion of all briefs it would seem that there are unrectifiable problems

[16] N = 662; 16 non-replies.
[17] N = 693; 9 non-replies.
[18] N = 171; 4 non-replies.
[19] N = 162; 10 non-replies.

prejudicial to the case in something like 5 per cent of all briefs. (Pb 45 out of 678 or 7%; Db 26 out of 702 or 4%).

2.1.10 Whose fault were the shortcomings?

Prosecution counsel were asked: 'Would you say that the shortcomings of the brief and its supporting material were the fault of the CPS, the police, both or neither?'

It seems that the blame was apportioned fairly evenly between the police and the CPS.

Table 2.5
Whose fault were the faults?

	%
Police	26
CPS	24
Both	36
Neither	6
Can't say	8
Total	100 (N=172[20])

An equivalent question was not put to defence barristers. It seemed unlikely that they would be able to apportion blame for any defects in the instructions between the instructing solicitor and the lay client.

2.2 LISTING

2.2.1 Was this the first listing?

Barristers were asked in both contested and uncontested cases (Pb5; Db6): 'Was this the first time the case had been listed for trial or plea, or had there been any earlier non-effective hearings?'

In as many as two-fifths of cases there had been an earlier ineffective hearing – Pb 41%, Db 39%[21]. In a third of these cases there had been more than one ineffective hearing. In a fifth of the cases (20%)[22] there had been two, in 7 per cent three and 2 per cent four or more. (In one case there had been seven.)

2.2.2 Was it a 'backer' or 'floater'?

We checked whether the rate of previous ineffective hearings was affected by whether the case was listed as a 'backer' or 'floater', both of which are

[20] Plus 3 non-replies.
[21] Pb N = 2,244; 15 non-replies. Db N = 2,066; 26 non-replies.
[22] N= 786; 14 non-replies.

cases brought on at short notice used by the listing office to fill gaps. (A 'back-up' or 'backer' is a trial listed after a previous trial where the first trial is expected to collapse or go short – typically because it 'cracks' through a last minute guilty plea. A 'floater' is a case not allocated as specifically as a backer.)

According to prosecution barristers, where the case had been listed as a backer or floater, there had been previous ineffective hearings in 44 per cent of cases[23], compared with 41 per cent where it was not so listed[24].

According to defence barristers, where the case had been listed as a backer or floater there had been previous ineffective hearings in 43 per cent of cases[25], compared with 39 per cent where it had not been so listed[26].

The two sets of barristers therefore broadly agreed.

2.2.3 Was this a retrial?

The question whether this was a retrial produced the same response from both barristers and the court clerks. All three agreed that retrials were 2 per cent of the total.[27]

2.2.4 What was the nature of the committal proceedings?

The court clerks were asked to indicate the nature of the committal proceedings (Cc4).

In the great majority of cases (91%) the defendant was committed under the procedure introduced in 1967 for 'paper committals' which permits the magistrates to commit a person for trial without a proper hearing. The prosecution sends copies of its witnesses to the defence and, provided the defendant is legally represented and agrees to be committed, this can be done with little expenditure of time or money.

But if the defendant wants to see the prosecution witnesses examined and cross-examined he can ask that the proceedings be an 'old style' committal which involves the prosecution witnesses presenting their evidence orally. The number of 'old style' committals has been a matter of some controversy. In our sample, 8 per cent of the cases were 'old style' committals.[28]

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[23] N=478.
[24] N=1,675.
[25] N=444.
[26] N=1,545.
[27] Pb N=2,172, Db N=1,986, Cc N=2,559.
[28] This is the same figure as in P.Jones, R.Tarling and J.Vennard, 'The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System' in D.Moxon (ed. *Managing Criminal Justice*, 1985.

There were three cases (0.1%) which were transfers under the serious fraud provisions of the Criminal Justice Act 1987 and six cases (0.2%) which were sent direct to the Crown Court under the special procedure of a voluntary bill which, like serious fraud transfers, avoids the need for committal proceedings.

2.2.5 When was the committal?

The delay from committal to trial is shown in Table 2.6 below based on figures supplied by court clerks (Cc5):

Table 2.6
Period from committal to trial

	%
Under eight weeks	31
8 up to 12 weeks	21
12 up to 16 weeks	14
16 up to 20 weeks	10
20 up to 24 weeks	6
24 up to 28 weeks	5
28 up to 36 weeks	5
36 up to 44 weeks	3
Over 44 weeks	4
Total	100 (N=2,674[29])

The Lord Chancellor's Department and the Criminal Statistics regularly present figures showing average waiting times between committal and trial.

Averages however do not tell the full story. 'Grossed up' for a full year, the figures in Table 2.6 mean that there are ten thousand or more persons waiting for trial for over six months from committal.

2.2.6 How was the case listed?

The most accurate information as to how the case was listed is presumably that obtained from the court clerks – who were asked to check this information with the Listing Clerk. The clerks were asked (Ccl): 'How was this case listed?' with three precoded replies – 'For plea', 'Trial', and 'Floater/back-up trial' – which, as has been seen (sect.2.2.2) are terms of art to indicate that a case is in the warned list to come on at short notice.

According to the court clerks, over two-fifths of cases (45%) were listed as contested cases ('for trial')[30]. Another two-fifths (41%) were listed

[29] Plus 18 non-replies.
[30] N = 2,679; 13 non-replies

as uncontested cases ('pleas'). The balance (14%) were listed as 'floater/back-up'.

However the two sets of barristers said that the case had been listed as a floater/backer in a considerably larger proportion of cases. Prosecution barristers said there were over a fifth (22%[31]), defence barristers gave precisely the same proportion (also 22%[32]). It would appear that for some reason there is a systemic difference of view between barristers and court clerks as to whether a case is listed as a floater/backer. We were not able to establish the reason for this difference of view.

2.2.7 Was there a listing information form (Form A or equivalent?)

Defence solicitors were asked (Sol6): 'Did your firm receive and return a defence listing information form (Form A or equivalent)?' (The form is designed to give the listing office basic information as to the likely plea.)

In three-quarters of the cases (76%[33]) the solicitors said the form was received and returned. In 15 per cent it was not received and in one tenth of cases (10%) it was received but not returned.

2.2.8 Was the listing information form returned by the defence?

We asked the court clerks whether the defence listing information form (Form 5085 or 5085A, often called Form A) had been received.

According to the court clerks, it had been returned in 53 per cent of cases[34]. So in almost half the cases, the defence had not sent in the form – which was somewhat different from the position as reported by defence solicitors.

Moreover, according to court clerks, in a proportion of the cases where it had been returned, the form came in only after the case had already been listed. In total therefore it came in late (7%) or not at all (47%) in 54 per cent of all the cases.

Where the form had been received but not returned, the defence solicitors' firms were asked to explain. In two-thirds of the cases (65%[35])

[31] N = 2,192; 67 non-replies
[32] N = 2,014; 78 non-replies.
[33] N=1,130; 189 Don't knows and 73 non-replies.
[34] N=2,601; 91 non-replies.
[35] N=83; 27 non-replies.

they said that the information had not been available. In one third they gave a variety of miscellaneous other explanations.

2.2.9 Did listing cause problems?

Listing has for many year been a serious area of concern to the Lord Chancellor's Department, to the judges, the Bar and indeed to all concerned with the processing of Crown Court cases. When barristers filled in the back page of questionnaires which asked for Any Further Comments, problems about the listing of cases were one of the most frequently mentioned issues – and often with great feeling.

Despite this, surprisingly, listing seemed to have caused problems in a relatively small proportion of cases in the actual sample.

Prosecution barristers said that there were 'No problems' in 86 per cent of cases; defence barristers said the same in 81 per cent. 'Serious problems' were said to occur in only 1–2 per cent of cases.

Table 2.7
Did listing cause problems – all cases?

	Pb %	DB %
No	86	81
Yes – very serious	1	2
Yes – some	8	11
Yes – minor	4	6
Total	100 (N=2,234[36])	100 (N=2,040[37])

There were problems roughly twice as often with contested as compared with uncontested cases:

Table 2.8
Percentage of cases with listing problems – by plea

	Pb		Db	
	Guilty %	Not guilty %	Guilty %	Not guilty %
'Some' or 'serious' problems	5 (N=949)	12 (N=772)	8 (N=836)	20 (N=707)

2.2.10 Listing problems by amount of advance notice

Not surprisingly, problems were more likely as the amount of advance warning decreased.

[36] Plus 25 non-replies.
[37] Plus 52 non-replies.

Thus, prosecution barristers said there were problems in 8 per cent of cases where there was more than a week's notice to chambers, compared with 18 per cent of cases where there were only 2–3 days notice, 20 per cent of cases where notice was given on the day before up to 4pm and 24 per cent where notice came on the day before after 4pm.

The results for defence barristers showed a greater proportion of problems close to the hearing. There were problems in 11 per cent of cases where there was more than a week's notice, in 24 per cent where there was only 2–3 days notice, in 34 per cent where notice was given on the day before up to 4pm and in 44 per cent where notice was given on the day before after 4pm.

Nevertheless it is worth noting that even where notice was given very late a majority of barristers said it created no problems.

Where the case was a floater or backer the proportion of problems caused prosecution barristers by listing was 19 per cent, compared with 12 per cent when the case was not[38]. For defence barristers it was 32 per cent for floaters/backers compared with 16 per cent for other cases[39].

2.2.11 Would a different system of listing have avoided the problems?

Counsel who said that listing had caused problems were asked: 'Do you think that these problems would have been avoided if this court operated a different system of listing?'

Two-thirds of prosecution barristers (66%) and nearly three-quarters of defence barristers(75%) thought the problems could have been wholly or partly avoided by better listing.

2.2.12 Disadvantages of court listing system

Both prosecuting (Pb13) and defence barristers (Db14) were asked the same questions: 'What are the disadvantages, if any of the listing system at this court?' and (Pb14; DB15): 'If you were responsible for listing cases to come to court, what listing system would you use? (Please describe – either a good example you have come across or your own suggestion)'.

Many barristers also used the non-reply page at the end of the questionnaire to identify problems with the listing system in courts they knew. It was clear from these that for large numbers of barristers, listing was a major problem area.

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[38] N = 2,180.
[39] N = 1,996.

The issues mentioned most frequently were:

- Insufficient flexibility; undue weight given to the LCD's priorities for maximum through-put of cases and for keeping judges busy all the time and not enough to the needs of the case, the parties and the professionals.
- Insufficient attention to counsel's convenience – this term was treated by some listing clerks almost as a term of abuse.
- Insufficient attention to the need in some types of cases for fixed dates and/or counsel of choice.
- Too much over-booking – too many backers and floaters. Often such cases were not reached – with resulting exasperation for all concerned. Sometimes cases were listed as backers or floaters (and not reached) more than once.
- Inappropriate selection of cases as floaters and backers – only very straightforward and short cases were suitable.
- Insufficient notice for floaters and backers.
- In some areas cases floated between courts in different places with resulting inconvenience to all concerned.
- Too many long or serious cases were listed late in the week and then stood out for lack of court time.
- Not enough use made of time markings – 'not before 11.0am, noon etc'.
- Lists not available until mid or late afternoon on the day before. Should be available by noon.
- Too many late changes in the list.
- Too many cases listed unnecesarily for Plea and Directions or unnecessary Pre-Trial Hearings.

2.2.13 What improvements would barristers propose?

Barristers were asked for concrete suggestions in regard to listing. Suggestions included:

- Better liaison with the parties.
- Earlier publication of warned lists.
- Fixed dates for all but simple, standard cases.
- In larger centres have one court initially to take floaters, then trials that went short, then effective trials.
- List Pleas, Pre-Trial Reviews and Mentions early in the day and contested cases for later in the day.
- Floaters not reached by lunch-time should be released.
- Copy the system used in the Chancery Division to call all counsel in at the start of the day so that short and ineffective matters can be dealt with right away and released.

- On Plea days[40] when part-heard cases from the previous days have to be given priority, pleas should be given time-markings.
- At least one court should be left relatively free to handle over-booking. Wrong therefore to list a trial, a backer and a floater for every court-room.

2.2.14 Did the hearing start on the day for which it was originally listed?

The judges were asked (Jg27) whether the case began on the date for which it was originally listed. In 87 per cent the answer was Yes[41]. There were 107 cases in which the answer was No. In 90 of these cases the judge gave reasons. In all, 112 reasons were given:

Table 2.9
Reasons why case did not start on time

	%
Witnesses unavailable	23
Previous case part-heard	21
Counsel needed more time	15
Defendant failed to appear	13
Prosecution witness failed to appear	12
More time needed to get evidence	10
Miscellaneous	6
Total	100 (N=112)

The miscellaneous category included: judge unavailable; listing errors; jury problems; and unexpected new evidence. Unavailability of counsel occurred in exactly the same number of cases for prosecution and defence.

2.2.15 Did the case last for the expected length of time?

The judges were asked (Jg28) whether the case lasted the expected length of time. In 55 per cent of cases[42] the answer was Yes. In 32 per cent it had gone short, and in 13 per cent it had taken longer than expected.

In the 238 cases which went short, there were 219 judges who gave reasons. Between them they gave 240 replies:

[40] Most courts have one day a week, usually Friday, when just guilty pleas are taken.
[41] N=787; 80 non-replies.
[42] N=751.

Table 2.10
Reasons why case went short

	%
Evidence took less time than expected	25
Directed acquittal	17
'Cracked trial'	15
Counsel's efficiency	12
Issues agreed in advance of trial	6
Defendant did not appear	3
Judge's efficiency	3
Miscellaneous	17
Total	100 (N=240)

Most of the answers listed as Miscellaneous were ones in which the judge stated merely that the length had been over-estimated.

The 98 cases in which the case had gone on longer than expected produced reasons from the judges in 87. Between them they gave a total of 110 reasons:

Table 2.11
Reasons why case took unexpectedly long

	%
Inefficiency of counsel	17
Witnesses took longer than expected	16
Illness of some participant	12
Unexpected evidence	10
Difficult defendant	7
Length of cross-examination	7
Police failure	4
Jury took a long time reaching verdict	3
Miscellaneous	23
Total	100 (N=110)

Again the Miscellaneous category consisted mainly of cases in which the judge said only that the time needed had been under-estimated.

2.3 RECEIPT OF PAPERS BY THE JUDGE

2.3.1 When did the judge receive the papers in the case?

Judges in contested cases and cracked trials were asked when they received the papers in the case[43]?

[43] Judges did not fill out questionnaires when the case was *listed* as a guilty plea.

About half (51%) got the papers on the day of the hearing itself and another 29 per cent got them on the previous day. Seventeen per cent had them two to seven days prior to the hearing.[44]

2.3.2 When did the judge read the papers?

The responses to the question (Jg2): 'When did you read the papers' in contested and cracked trials were completely in line with when they were received. Fifty per cent read them on the day itself; 31 per cent read them on the day before; eleven per cent read them in the prior five days.

In a hundred and one cases (7 per cent)[45] the judge said he had not read the papers at all.

Where the case was contested, the judge said he read the papers on the day before the hearing in a third of the cases (33%), on the day of the hearing in a half (52%) and not at all in 5%. In guilty plea cases the percentages were virtually the same: 32%, 50% and 8% respectively.

2.3.3 Were the papers read in working or unsocial hours?

We asked the judges (Jg3): 'Did you read the papers in working hours, "unsocial" hours (i.e. outside 9am–5.30pm Monday to Friday) or both?'

Almost two-thirds (63%[46]) said they read the papers in working hours. Twenty nine per cent said they read them wholly in 'unsocial' hours (as defined), and in nearly one-tenth of cases (9%), it was a mixture of the two.

2.3.4 Did the judge need more time?

The judges were asked: 'Would you have spent (more) time reading the papers if you could have done?'

In nine cases out of ten (90%) the answer was No[47].

2.3.5 Was the hearing delayed to enable judge to finish reading?

The judges were asked (Jg5): 'Did you delay the start of the hearing to allow you to complete reading the papers?'

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[44] N = 1,518; 11 non-replies.
[45] N = 1,472; 57 non-replies.
[46] N = 1,371; 53 non-replies.
[47] N = 1,520; 9 non-replies.

Almost all (95%) said No.[48]

2.4 CONTACTS BETWEEN PROSECUTION BARRISTER AND CPS/POLICE

2.4.1 Number of pre-hearing conferences between counsel and CPS

Prosecution counsel in contested cases were asked (Pb36): 'How many conferences (including phone conversations), if any, were there between counsel and the CPS before or on the day of the hearing?

In almost half the cases (47%) there were none. In a quarter (26%) there was one. In a tenth or so (10%) there were two and in 15 per cent there were three or more.[49]

The CPS were asked the same question (Cp11). The responses were somewhat different. The respective four percentages were no conference 53%, one 32%, two 7% and three or more 8%.

2.4.2 Were such conferences in person or on the phone?

About half the conferences (48%) were in person, 17 per cent were only on the phone, 30 per cent were both in person and on the phone.[50]

2.4.3 Would more consultation have been useful?

Prosecution barristers in contested cases were asked (Pb41): 'In your view, was there sufficient consultation with the CPS before the day of the hearing?'

In the clear majority of cases (86%)[51] the barristers said Yes. In the remaining 14 per cent of cases however the answer was No.

2.4.4 Was the barrister in conferences the same as the barrister at trial?

In three-quarters of the cases (74%)[52] the barrister at the hearing had been personally involved in all the pre-trial conferences with the CPS. In 13 per cent he had been involved in at least some of the pre-trial conferences. In

[48] N = 1,518; 11 non-replies.
[49] N = 660; 25 non-replies. There were 3 per cent Don't knows.
[50] N = 357 including 4 per cent Don't knows and 5 non-replies.
[51] N = 636; 49 non-replies.
[52] N = 352; 8 non-replies.

only 13 per cent had the barrister at the hearing not been involved in any of the pre-trial conferences.

2.4.5 Was the CPS representative at court involved before the trial?

Prosecution barristers in contested cases were asked (Pb42): 'Had the CPS representative(s) who attended the hearing been involved in the preparation of the case, or did he/they only become involved just before the Crown Court hearing?

The CPS representative at the Crown Court court is normally an unadmitted law clerk who, it is generally thought, is rarely involved in the case before the hearing. Despite this, the responses stated that in about a fifth of the cases (21%)[53], the CPS representative at the hearing *had* been involved in the case before the trial. In about two-fifths (43%) he had not, in 28 per cent the question was idle since there was no CPS representative, and in about a quarter (24%) the prosecution barrister said he did not know.

2.4.6 Was the prosecution barrister the one instructed originally?

The CPS was asked (Cp14): 'Was the barrister who appeared in court for the prosecution the one instructed originally?'

In two-thirds of cases (66%) the reply was No[54]. The brief had been returned. (As was seen above, the prosecution barrister said in answer to the same question that his brief had been returned in 59 per cent of cases – see sect.2.1.6.)

The ultimate plea made virtually no difference. Thus the brief had been returned in 69 per cent of guilty plea cases[55] and 65 per cent of not guilty plea cases.

2.4.7 If not, when did the CPS learn of the change of counsel?

The CPS were asked to say when they heard about the change of barrister (Cp15):

In ten per cent of cases it was 14 days or more before the hearing. In another 8 per cent of cases it was between 2 and 14 days before. But in a high proportion of cases it was at the last minute:

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[53] N = 655; 30 non-replies.

[54] N=1,280 plus 29 non-replies and 13 'Don't knows'.

[55] These would all have been 'cracked trials' because the CPS did not fill out questionnaires in cases listed as guilty pleas.

Table 2.12
When return of brief was notified to CPS

	%
14 days or more before hearing	10
2–14 days before hearing	8
The morning of the day before	2
The afternoon before, noon to 4pm	32
The afternoon before, after 4pm	38
The day of the hearing itself	10
Total	100 (N=770[56])

In other words, 82 per cent of returned prosecution briefs in cases listed as contests were notified on the day before the hearing – or later still.

2.4.8 Did change of barrister cause problems?

A last minute change of the barrister in a contested case might be seen, by definition, as a problem. But we wanted to find out whether the professionals operating the system thought a last minute return of the brief to be an issue.

The CPS were therefore asked (Cp16) in all cases where there was a return of a brief whether the change of barrister had 'caused any problems for the prosecution'?

In 92 per cent of cases the CPS said there was no problem; in 8 per cent there was a problem.[57] As has already been seen, the barristers who received the brief late equally for the most part viewed the matter with equanimity – see sect.2.1.4.

When there was a problem it was generally that the second counsel did not have enough time to 'get the case up' properly.

2.4.9 Did the barrister appear to know the case well in pre-trial discussions?

In all cases the CPS were asked (Cp17): 'Did the barrister appear to have sufficient knowledge of the prosecution's case in pre-trial discussions.

In almost all cases (98%) the CPS said that the barrister did appear to have sufficient knowledge.[58]

[56] Plus 16 non-replies and 60 Not sure.
[57] N=836; 10 non-replies.
[58] N=1,077 plus 39 non-replies, 50 'Don't know' and 156 cases in which there was no pre-trial discussion.

2.4.10 Did the barrister know the prosecution's case well enough at the hearing?

The CPS were asked (Cp18): 'Did the barrister appear to have sufficient knowledge of the prosecution's case at the hearing itself?'

Again the response was overwhelmingly favorable. In 98 per cent of contested cases the CPS said that the barrister had sufficient knowledge [59].

2.4.11 Did the barrister's lack of knowledge prejudice the prosecution's case?

In the two per cent of cases where the CPS had indicated that the barrister's knowledge of the case, whether pre-trial or at trial, was insufficient, they were asked whether this prejudiced the prosecution (Cp19).

In three-quarters of these cases (ie 0.5% of the total) the CPS thought there had been no prejudice to the prosecution case.[60]

2.4.12 Were any defects in the instructions revealed?

The CPS were asked (Cp20): 'Were any shortcomings in the instructions revealed at or before the hearing?'

There were a small number of cases in which such shortcomings had been revealed – 42 cases (4%) through the barristers' comments, 21 cases (2%) in comments by the court, and 37 cases (3%) in miscellaneous other ways. The shortcomings that emerged were such things as missing documents (29 mentions), incomplete witness proofs (26 mentions) etc. The 100 instances of shortcomings occurred in 94 cases.

But in the great majority of cases (92%) no such shortcomings had emerged.[61]

2.4.13 Was prosecution counsel well-prepared?[62]

The judges were asked (Jg59) whether counsel was well-prepared. Nearly half the judges (47%) thought the prosecution barrister was 'Very well prepared' and the same proportion that counsel was 'Adequately prepared'. The remaining 6 per cent thought that counsel was 'Not well prepared'.[63]

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[59] N=1,281; 23 Don't knows.
[60] N=34; 5 non-replies.
[61] N=l,044, plus 140 non-replies and 44 Don't knows.
[62] For the equivalent question for defence barristers see sect.2.5.21.
[63] N=872; 95 non-replies.

These results were not affected by the outcome of the case. (As will be seen, see sect.2.5.21 below, the comparable result for defence barristers was affected by outcome of the case. See also sect.4.4.7.)

2.4.14 Who's in charge at court – barrister or CPS?

The relationship between prosecution counsel and the CPS on the day of the hearing was dealt with by the Farquharson Committee in its 1986 Report. The Committee said that counsel should have full authority in the case from the moment when it was impracticable for the CPS to withdraw his instructions.[64] The Committee said, however, that on 'policy matters', such as the dropping of charges or acceptance of a plea, counsel should not act contrary to his instructions unless in his judgment there is no alternative.[65]

In regard to this issue, prosecution counsel in all cases were asked (Pb174): 'When a decision has to be taken on whether to drop a case, offer no evidence, alter charges or accept a plea, and the CPS and prosecution barrister hold different views, who do you think should have the final authority to decide?'

The response to this question was unequivocal. Ninety four per cent of barristers[66] thought that counsel should be in charge.

Many barristers expressed themselves forcibly on this subject on the back of the questionnaire which invited Any Further Comments. It came up repeatedly as an issue on which barristers who replied felt strongly.

2.4.15 Was such a decision required here?

They were then asked whether such a decision had been required in this particular case (Pb175).

In three-quarters (76%[67]) no such decision had been required; in a quarter (24%) it had been required.

2.4.16 If there was a difference of view between prosecuting counsel and the CPS, how was it resolved?

In four out of five cases (80%)[68] there was no difference of view between prosecuting counsel and the CPS. In about half the cases where there had

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[64] See *Archbold Criminal Pleadings, Evidence & Practice,* 1992, p.450.
[65] Ibid,p.451.
[66] N = 2,103; 156 non-replies.
[67] N = 2,124; 135 non-replies.
[68] N = 504; 5 non-replies.

been such a difference of view (46%) the barrister's view had prevailed. In just under a third (30%), the CPS view had prevailed. In about a quarter (23%) a 'compromise solution' had been found.

No questions were asked as to the mechanics of resolving any differences – whether it involved reference back by the CPS law clerk at court to a lawyer at the office.

2.4.17 The police view of the CPS

The police in contested cases were asked (Po126): 'What is your overall assessment of the work done on the case by the CPS?'

In two-fifths of cases the verdict was 'Very good' (12%)[69] or 'Good' (30%). In just under half (46%) it was 'Adequate'. In about one tenth of cases the verdict was 'Poor' (11%) or 'Very poor' (2%).

2.4.18 The police view of prosecution counsel

The police in contested cases were asked the same question in relation to prosecution counsel (Po127).

The positive rating was somewhat higher. In some two-thirds of cases the verdict was 'Very good' (29%) or 'Good' (35%). It was 'Adequate' in 28 per cent of cases and less than adequate in under a tenth – 'Poor' (6%) and 'Very poor' (1%).[70]

2.4.19 CPS view of the police

The CPS were asked (Cp9): 'What is your overall assessment of the way the police prepared this case?'

In about half the cases the CPS verdict was 'Very good' (8%) or 'Good' (42%). It was 'Adequate' in 43 per cent. The verdict was 'Poor' in 6 per cent and 'Very poor' in 0.5 per cent.[71]

When the CPS thought the police had done a poor job it was generally because they thought there had been failures in the investigation of the case and the collection of evidence.

– 'I indicated to the police when I received the committal files that the files depressed me because i) basic errors pointed out in previous files were repeated – the police were learning no lessons; ii) index to

[69] N = 858; 67 non-replies.
[70] N = 858; 70 non-replies.
[71] N=1,322; plus 20 non-replies and 18 Don't knows.

statements incomplete and inaccurate; iii) identification parade statement inadaquate, parade forms incorrectly assembled; iv) exhibits not properly identified; and v) basic points of investigation not followed up.'

- 'There were crucial pieces of the prosecution evidence missing....'
- 'Due to the fact that no statements were taken from the losers, CPS could not prove 2 out of 3 counts on the indictment. Consequently, CPS forced into accepting plea for 1 count only. Judge extremely critical:– "Outrageous, if no admissible evidence". The police failed to respond to memo requesting required statements – thereby causing above adverse comments.'

  'The interview with the accused on the day of the offence was deficient in important aspects – she was not questioned in detail about her actions, or about her state of mind.'
- 'Forensic science evidence not followed up.'
- 'At least five further witness statements were obviously needed. File not in a sensible order. No copy exhibits.'
- 'The police lost the copy of the interview tape. The officer in the case did not attend the hearing and the CPS were not notified that through ilness he could not. It was a fixed hearing date. No warning was given to the CPS that one important prosecution witness could not be contacted.'

2.4.20 CPS view of the prosecution barristers

The CPS were asked (CP23): 'What is your overall assessment of the conduct of this case by counsel for the prosecution?'

In nearly one fifth of all cases (19%) the CPS thought the prosecution barrister had been 'Very good' and in half (52%) he thought he was 'Good'. In a little over a quarter (27%) the barrister had been 'Adequate'. He was 'Poor' or 'Very poor' in 2 per cent and 0.4 per cent respectively.[72]

The details of poor or very poor work by the barrister included:

- 'Senior counsel but very ineffectual and indecisive. Conviction secured in a simple and strong prosecution case despite rather than because of the performance of counsel.'
- 'Counsel offered no evidence in a perfectly good case.'
- 'CPS had stated that trial should go ahead. Counsel when addressing the judge was very negative and over-emphasised the witness's reluctance to give evidence. He did not appear to want to conduct trial at all.'
- 'Inability to follow problem through to logical conclusion. Thought defence agreed points which in fact they did not. Seemed unable to appreciate the gravity of the situation.'

[72] N=1,256; 39 non-replies and 27 Don't knows.

- 'Counsel did not seem to have much knowledge of the case. Kept stopping when opening the facts. Mixed defendants up.Did not know the procedure when putting alternative on indictment.'
- 'Despite having had the brief for 3 months and having appeared in the case at court on 3 previous occasions, she still did not appear to be fully conversant with the case.'

2.4.21 Barristers' views of the police

Prosecution barristers in contested cases were asked the same question about the work done on the case by the police (Pb47).

In over half the cases the verdict was positive – 'Very good' (17%) or 'Good' (37%). In around a third ((31%) it was 'Adequate'. It was less than adequate in something over one-tenth – 'Poor' (13%) or 'Very poor' (2%).[73]

When police work was described as 'Poor' or 'Very poor' the cases included: inadaquately taken statements/inadaquate record of interview/ poor summary of taped interview (26 cases); failure to apply PACE rules (11 cases); failure to interview potential witnesses; failure to get necessary forensic evidence (eg fingerprints from a rifle where possession was an issue); insufficient attention to detail; holes in the evidence; missing exhibits or other documents; failure to warn witnesses; failure to respond to CPS requests or advice; failure to attend conferences with counsel; failure to attend trial.

In one case counsel said 'They failed to pursue inquiries into a serious offence and were content to charge and stay with a charge whose penalties in no way fit the gravity of the offence'.

The reasons for failures included: expectation of a guilty plea; investigation being done by officers of insufficient rank/experience; lack of knowledge of PACE leading to statements being held inadmissible; officer having moved to other duties; police 'too personally involved'; and in one case funding restrictions had prevented the taking of a crucial blood sample on grounds of cost.

2.4.22 Barristers' views of CPS

Prosecution counsel in contested cases were asked to comment on the quality of the work done on the case by the CPS.

In over half the cases[74] the verdict was positive – 'Very good' (15%) or 'Good' (41%). In another one-third or more (36%) it was 'Adequate'. It

[73] N=685; 27 non-replies.
[74] N = 685; 43 non-replies.

was less than adequate in under one-tenth – 'Poor' (7%) or 'Very poor' (0.5%).

2.5 CONTACT BETWEEN DEFENCE BARRISTER AND DEFENCE SOLICITOR

2.5.1 Number of pre-hearing conferences between defence counsel and defence solicitor

Both defence barrister (Db33) and defence solicitor (Sol9) in contested cases were asked about the incidence of conferences between the barrister and 'the instructing solicitors' before or on the day of the hearing. Since conference was defined to *include* conferences on the day of the hearing, a barrister who came into the case on the morning of the case could answer this question affirmatively. The responses of the barristers and solicitors differed somewhat.

Defence barristers said that there was no conference in two-fifths of cases (40%)[75], one conference in 23 per cent, two in 12 per cent and three or more in 20 per cent. Defence solicitors said there was no conference in 29 per cent[76]. In many instances they disagreed on the same cases. It seems entirely possible that they simply differed on the definition of 'conference'. Or possibly differences of view flowed from changes in barrister during the case.

2.5.2 When were such conferences?

They were then asked when the conference took place (Db34; Sol10):

Table 2.13
Time of pre-trial conference between defence counsel and defence solicitor

	Barrister %	Solicitor %
Before committal	9	9
More than 14 days before	66	65
3–14 days before trial	34	38
1–2 days before	22	22
Day of hearing	29	48
Total	160* (N=360[77])	182* (N=311[78])

*The percentages add to more than 100 as respondents were asked to indicate all the categories that applied

[75] N = 672; 30 non-replies.
[76] N = 598.
[77] Plus 21 non-replies.
[78] Plus 76 non-replies.

There was a considerable measure of agreement between the two sets of respondents. Conferences before committal were comparatively rare. Conferences more than two weeks before the hearing occurred in over half the cases and 3 to 14 days before the hearing occurred in a little over a third of the cases. The only real difference of view to emerge concerned conferences on the day of the hearing where barristers said they occurred in 29 per cent and solicitors said they occurred in 48 per cent. There was no ready way to explain this difference of view.

According to the solicitors (Sol11),in a little over a third of the cases the conferences (37%) were all in person, in a quarter (24%) they were all over the telephone and in nearly two-fifths ((39%) there were conferences both in person and over the telephone.[79]

2.5.3 Who attended on behalf of solicitors?

Defence counsel in contested cases were asked (Db37) who, if anyone, attended on behalf of their instructing solicitors. If more than one person attended, the barristers were asked to say so.

The distribution in order of frequency of attendance was as follows[80]:

Table 2.14
Who attended pre-trial conferences with counsel?

	%
Unqualified person	33
Legal executive	28
Partner	14
Articled clerk	12
Asst.solicitor	8
Other	13
Don't know	13
No one attended	0.3
Total	117 (N=657[81])

The most striking feature of this table is that (ignoring the Don't knows) 78 per cent of those attending on behalf of instructing solicitors were not solicitors.

2.5.4 Did the person who attended have sufficient knowledge of the case?

Defence counsel were then asked(Db38): 'Did the representative from the instructing solicitors in your view have sufficient knowledge of the case?'

[79] N=347; 79 non-replies.
[80] The percentage adds to more than 100 because respondents could tick more than one box
[81] Plus 45 non-replies.

There were 668 responses to this question[82]. In 588 (88%) the answer was Yes. There were 80 cases (12%) in which the answer was No. But in only 18 (23% of the 80 or 3% of all the 668 cases)) did this lack of knowledge cause problems.

Of those who were identified as not knowing the case well, almost all were neither solicitors, nor articled clerks nor legal executives.

2.5.5 Was there sufficient consultation pre-trial with the instructing solicitors?

Defence counsel in contested cases were asked(Db36): 'In your view, was there sufficient consultation with the instructing solicitors before the day of the hearing?' Defence solicitors were asked the same question in regard to consultation with counsel.

The great majority of both barristers and solicitors thought that there had been sufficient pre-trial consultation. This was the opinion of 91 per cent of defence barristers[83] and of 92 per cent of defence solicitors[84]

2.5.6 Was the barrister at trial the one instructed originally?

All defence solicitors[85] were asked whether the barrister at the trial was the one instructed originally (Sol14+83).

The response was almost equally divided – 52 per cent Yes, 48 per cent No.[86]

2.5.7 Was the barrister the one who saw the defendant before the hearing?

Defence solicitors in contested cases and last minute guilty plea cases ('cracked trials') were asked (Sol14, Sol83): 'Was the barrister who appeared at the hearing the one who saw the defendant before the day of the hearing?'

The responses are shown below – divided between 'cracked trials' (ie last minute guilty pleas), and contested cases:

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[82] Plus 34 non-replies

[83] N = 635; 67 non-replies.

[84] N = 344; 82 non-replies, including Don't knows.

[85] NB that defence solicitors only answered questionnaires in contested cases and cracked trials.

[86] N = 776; 72 non-replies.

Table 2.15
Was the barrister the same pre-trial as at trial?

	'Cracked trials' %	Not guilty pleas %	Total %
Yes, the same	30	45	40
No, not the same	14	17	16
No barrister saw defendant before trial	56	38	43
Total	100 (N=234[87])	100 (N=530[88])	100 (N=767)

The aggregate of lines two and three in this table shows the proportion of cases in which the client saw the barrister in his case for the first time on the morning of the trial. In last minute guilty pleas ('cracked trials') the proportion was 70 per cent. In contested cases it was 55 per cent.

2.5.8 When were solicitors informed of return of brief?

In cases where counsel changed, the solicitors were asked (Sol15 +84)) when they were informed of the return of the brief.

In a fifth of the cases (19%) notice was given more than 7 days before the hearing. In a slightly smaller proportion (17%) it was given 2 to 7 days before. But in the majority of cases it was given on the day before or on the day of the hearing itself. This was the case in 56 per cent of contested cases and 68 per cent of last minute guilty plea (cracked trial) cases.

Table 2.16
Notice of returned brief

	Not guilty plea %	Cracked trials %	Both %
More than 7 days before	21	16	19
2–7 days before	19	12	17
The day before, am	5	3	4
The day before, noon to 4pm	24	13	21
The day before, after 4pm	19	43	26
Day of hearing	8	9	8
Not sure	4	4	4
Total	100 (N=248[89])	100 (N=111[90])	100 (N=359)

[87] Plus 16 non-replies.
[88] Plus 68 non-replies.
[89] Plus 14 non-replies.
[90] Plus 4 non-replies.

2.5.9 Did this allow time to find replacement?

The defence solicitors were asked (Sol16 and 85) whether the notice they were given was sufficient to find a suitable replacement barrister.

In 84 per cent of cases there was sufficient time; in 8 per cent there was not; in 8 per cent they 'Could not say'. [91]

2.5.10 Had the firm any experience of working with the replacement barrister?

Solicitors were asked(Sol17 and 86) whether they or their firm had had experience of working with the replacement barrister before this case.

In 86 per cent of cases they had had such prior experience; in 12 per cent they had not; in 2 per cent they could not say.[92]

2.5.11 Was a specific replacement barrister requested?

Solicitors were asked (Sol18 and 87)whether they had requested a particular named barrister for the replacement, or whether the replacement barrister was effectively chosen by the barristers' clerk.

In the great majority of cases, the solicitors said that they had efectively left it to the barrister's clerk. This was so in some four-fifths (79%) of the last minute guilty plea (cracked trial) cases[93], and in over two-thirds (71%) of the contested cases[94]. Overall it happened in 74 per cent of cases.

2.5.12 Had the replacement barrister enough time to prepare?

Solicitors in contested cases (Sol19) were asked whether the replacement barrister had had enough time to prepare the case adequately.

In 85 per cent of cases the solicitor said that there had been sufficient time; in 15 per cent there had not been sufficient time.[95]

2.5.13 Did the replacement barrister prepare adequately?

Solicitors were asked (Sol20) whether the replacement barrister had in fact prepared the case adequately.

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[91] N=360; 21 non-replies.
[92] N=365; 21 non-replies.
[93] N=107; 6 non-replies and 6 Not sure.
[94] N=235; 12 non-replies and 15 Not sure.
[95] N=252; 10 non-replies.

In 91 per cent of cases the answer was Yes; in 3 per cent it was no; in 6 per cent it was 'Can't say'.[96] (If the 'Can't say' category is excluded, the proportion saying Yes would go up to 97%.)

2.5.14 Would the original barrister have been better?

Defence solicitors in contested cases were then asked (Sol21): 'Do you think that the barrister who was originally going to take the case would have handled the case better than the replacement barrister?'

Table 2.17
Would original barrister have been better

The answers were:	%
Yes	17
No	53
Don't know	30
Total	100 (N=249[97])

According to the solicitors, the original barrister would have been better in only 17 per cent of cases (or 24% when the Don't knows are excluded). He would not have been better in 53 per cent including (and 76% excluding) the Don't knows.

2.5.15 If so, would that have made a difference to the outcome? of the case?

Where the original barrister 'would have been better', we asked the solicitors (Sol22) whether that 'might have made a difference to the outcome of the case'.

In just over half the cases (54%[98]) the answer was 'Probably no'; in a fifth (20%) it was 'Probably yes' and in the remaining quarter (26%) it was 'Don't know'.

The eight cases where the solicitors said it 'probably would have made a difference to the outcome of the case' were 2 per cent of the 372 in which the solicitors said the brief had been returned.

2.5.16 Did the solicitor originally ask for a named barrister?

Solicitors in contested cases were asked (Sol23) whether when seeking the original barrister they had asked for a specific named individual.

[96] N=254; 8 non-replies.
[97] Plus 13 non-replies.
[98] N=39; 3 non-replies.

In the great majority of cases (88%) the solicitors said they had asked for a particular named barrister. In nine per cent they had left it to the barrister's clerk and in 3 per cent they were 'Not sure'. [99]

2.5.17 Did the barrister ask for more preparatory work to be done? If so, were such requests met?

Defence solicitors in contested cases were asked whether the barrister asked for more work to be done in the preparation of the case (Sol24).

In about half the cases (47%) this had occurred; in just over half (53%) it had not.[100]

Almost all such requests had been met either in full (88%) or in part (11%)[101]. When they were not met, the chief reason given was insufficient time or that witnesses could not be found.

2.5.18 Did any shortcomings in the instructions emerge?

Defence solicitors were asked (Sol28) whether any shortcomings in counsel's instructions had emerged 'either from the defence barrister's comments, or the judge's comments or otherwise'.

In 95 per cent of cases none had emerged.[102] Those that did emerge were mainly 'missing documents'.

As has been seen (sect.2.1.7 above), the same issue was addressed in an equivalent question to defence counsel who were asked whether the brief and supporting documents were adequate (Db27). The barristers identified problems in 26 per cent of cases – five times as many as were reported by defence solicitors.

2.5.19 Did the barrister know the defence case well pre-trial and at the trial?

Defence solicitors were asked 'Did the barrister appear to have sufficient knowledge of the defendant's case during pre-trial discussions?' (Sol30).

In 99 per cent of cases the answer was Yes[103].

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[99] N=245; 17 non-replies.
[100] N=598.
[101] N=282; 1 non-reply.
[102] N=598.
[103] N=471, plus 62 non-replies, and 18 Don't knows. We also excluded here the cases in which there were no pre-trial discussions.

The tiny number of cases in which the barrister was said to have had inadequate knowledge of the defendant's case during pre-trial discussions included one in which the solicitors admitted that he had been given the brief for a different case.

The same question, in relation to the barrister's knowledge of the case at trial, gave the same result.[104] There were only 7 cases (1%) in which the solicitors answered No. In none did the solicitors think that the client's case had been seriously prejudiced, but in six out of the seven they thought it had been prejudiced 'somewhat'.

2.5.20 Was the amount of preparation done affected by the 'standard fee' issue?

A high proportion of Crown Court work is now paid under the 'standard fee' system under which the lawyers get paid a set amount unless they can show the case is exceptional. (It was introduced in Crown Courts in 1988. In 1991/92 standard fees accounted for 69% of payments to barristers for Crown Court work and for 72% of payments to solicitors.)

Solicitors were asked 'Did the knowledge that only a standard fee would be payable mean that the amount of preparation for the case was adversely affected?' (Sol36)

There were 409 effective replies[105]. In 11 per cent (46 cases) the solicitor said that the preparation was affected. In 62 per cent the answer given was simply No. In 27 per cent the solicitor said that more than a standard fee was available.

In the 46 cases when it was claimed that more preparation might have been done if the fee had not been a standard one, the work fell into various categories: – checking prosecution evidence in more detail (32 mentions), questioning of more witnesses (29 mentions),seeking expert evidence(12 mentions),doing scientific tests (3 mentions). Other miscellaneous instances included arranging photographs of the scene of the crime, making a plan of the scene of the crime,more conferences with counsel and/or the client and research on the relevant law.

2.5.21 Was defence counsel well-prepared?

The judges were asked (Jg59) whether defence counsel was well-prepared. Nearly half (47%) of the judges thought the defence barrister was 'Very well prepared' and another 47 per cent thought the barrister was 'Adequately

[104] N=534; 64 non-replies.
[105] Plus 98 non-replies,and 91 Can't says.

prepared'. The remaining 6 per cent thought the defence barrister was not well prepared.[106] The results were therefore the same as for prosecution barristers (sect.2.4.13 above and see also sect.4.4.7 below). But unlike the results for prosecution barristers, the judges were somewhat less likely to think the defence barrister was well-prepared when the defendant was found guilty than when he was found not guilty:

Table 2.18
Was defence counsel well-prepared – by verdict?

	Not guilty %	Guilty %
Very well prepared	50	37
Adequately	44	54
Not well prepared	6	9
Total	100 (N=228)	100 (N=270)

2.5.22 Solicitors overall view of defence barrister

Solicitors in contested cases were asked 'What is your overall view of the quality of the defence barrister's work in this case?' (Sol38)

The response was almost wholly favorable and in no less than two-thirds of all cases, strongly favourable.

Table 2.19
Solicitors' view of defence barrister's work

	%
Very good	68
Good	24
Adequate	8
Poor	1
Very poor	–
Total	100 (N=598[107])

(For CPS view of prosecution barristers' work see sect.2.4.20 above.)

2.5.23 According to the solicitor, was the defendant satisfied with the barrister?

Solicitors were asked (Sol47+81): 'As far as you can tell, was the defendant satisfied with what was done by his/her barrister?'

[106] N=872; 90 non-replies.
[107] Plus 72 non-replies.

Solicitors thought the defendant was 'very satisfied' in 68 per cent of cases, 'fairly satisfied' in 29 per cent, 'not very satisfied' in 0.5 per cent, 'not at all satisfied' in 0.25 per cent and 'partly satisfied' in 2 per cent.[108] (For the defendants' view see sect.2.6.8 below.)

2.5.24 Barristers' overall view of defence solicitors

The barristers were asked the same question in regard to the work done by the solicitors. (For prosecution barristers' view of CPS work see sect.2.4.22 above. For defendants' view of defence solicitors' work see sect.2.6.9 below.) The spread of responses was also broadly favourable but the picture was somewhat more mixed.

Table 2.20
Barristers' view of defence solicitors' work

	%
Very good	37
Good	37
Adequate	21
Poor	4
Very poor	1
Total	100 (N=702[109])

Criticisms of 'poor' or 'very poor' work consisted for instance of inadequate instructions, skimpy statements taken from witnesses, failure to act on counsel's advice regarding the need for expert reports or local inquiries, muddled presentation of documents and the like. In some cases counsel said that the client was more to blame than the solicitors.

2.6 CONTACTS BETWEEN DEFENCE BARRISTER, DEFENCE SOLICITOR AND DEFENDANT

2.6.1 What conferences were there between counsel and the defendant and when did they occur?

The defence barrister (Db40+176) and the defence solicitor (Sol39+73) were asked about the extent of conferences between counsel and the defendant before the day of the trial.

There was a considerable degree of agreement between the lawyers. They agreed first that in the majority of cases there was no conference at all

[108] N=848; 78 non replies and 25 Don't know.
[109] Plus 14 non-replies.

before the day of the hearing. This was so according to the barristers in 58 per cent of cases [110], and according to the solicitors in 59 per cent[111]. Both agreed that this was far more often so in guilty plea cases (Db 73%; Sol 70%) than in ones that were contested (Db 37%; Sol 46%).

When there was any pre-trial conference,one was considerably more common than two. More than two conferences was very rare.

The conferences were mainly held sometime more than 14 days before the hearing. Barristers said this was so in 72 per cent of cases[112], solicitors in 74 per cent[113]. They were held 3 to 14 days before in something over a quarter of cases (29% and 25% respectively), and 1 to 2 days before in about 10 per cent (10% and 9% respectively). There was no significant difference in this respect between cases that ended as guilty pleas and not guilty pleas.

2.6.2 When did the defendant first meet the barrister?

Defendants were asked 'When did you first meet the barrister who handled your case in the crown court?' (Def25).
Three-fifths (60%) said that they met the barrister for the first time on the day of trial. (It will be recalled that defence solicitors said the defendant saw his barrister for the first time on the morning of the trial in 55% of contested cases and 70% of cracked trial cases – see sect.2.5.7 above).

Over a quarter of defendants said they met the barrister before committal (8%) or more than two weeks before the day of the trial/hearing (20%). The rest met the barrister a few days before the hearing.

Table 2.21
When did defendant first meet trial barrister?

	%
At or before committal	8
More than 2 weeks before trial	20
3–14 days before trial	8
1–2 days before trial	4
The day of the hearing	60
Total	100 (N=750[114])

2.6.3 How long was the first meeting?

We asked defendants (Def27) about how long they spent with the barrister at the first meeting with the barrister.

[110] N=1,632; 284 non-replies .
[111] N=1,071; 67 non-replies and 33 Don't knows.
[112] N=763; 20 non-replies.
[113] N=459; 17 non-replies and 44 Can't says.
[114] Plus 38 non-replies.

In regard to pre-trial conferences,the defendant said he had spent under 30 minutes with the barrister in a quarter of the cases (26%), between 30 minutes and an hour in a third (30%), between 1 and 2 hours in just under a third (30%) and over two hours in 13 per cent [115].

2.6.4 Was there sufficient consultation before the hearing?

We asked defence barristers (Db42+178), defence solicitors (Sol41+75) and defendants (Def28+33), whether they thought there was sufficient time for consultation with the defendant before the hearing.

Opinions varied. Defendants who saw their barrister before the day of the hearing thought there was insufficient time for consultation in 17 per cent of cases[116]. (As will be seen, when the defendant saw his barrister for the first time on the morning of the trial this figure went up to 31 per cent.) The defence barristers thought there was insufficient time for consultation in 11 per cent of cases[117].

Solicitors thought there was insufficient time in 6 per cent[118]:

- 'Not sufficient because it was a complicated case. The client had never seen the barrister before. The barrister needed frequent oral briefings throughout the trial.'
- 'Insufficient time due to change of counsel and change of emphasis.'
- 'Very difficult case concerning domestic GBH/Attempted murder. Discussions related to client's final instructions as to a guilty plea to GBH. Case called into court before discussion complete.'
- 'Pressure from court to determine plea. Court not sitting after lunch first day.'
- 'Difficult case with lengthy taped interviews to be reviewed. Prosecution failed to provide transcript until morning of hearing.'

2.6.5 Was there a conference on the day of the hearing; how long was it; and was it sufficient?

Barristers (Db43+179) and solicitors (Sol42+76) were asked whether there was a conference on the day of the hearing.

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[115] N=286.

[116] N=304.

[117] N=916 plus 43 non-replies. The figure could well have been higher. Where the case was contested, the sample who answered this question included those who had no conferences with the client. (Where the case was a guilty plea, questionnaire design unfortunately routed the respondent away from answering this question.)

[118] N=442; 39 non-replies.

In most cases there was a conference – though, according to the solicitors, in 11 per cent of contested cases[119] there was no conference, compared with 1 per cent[120] of cracked trials.

As the table below shows these conferences were typically short:

Table 2.22
Length of conference on day of hearing – defence barristers

Length	Contested %	Uncontested %
Under 15 mins.	11	30
15–30 mins.	40	44
31–60 mins.	34	21
Over 60 mins.	15	5
Total	100 (N=666)	100 (N=910)

According to the barristers, even when the cases were contested, the conference in about half (51%) took under 30 minutes and in 85 per cent took under an hour. Where the defendant pleaded guilty, the conference was even more likely to be brief. Three-quarters (74%) took under 30 minutes and 95 per cent took under an hour.

Barristers thought there was insufficient time for consultation in 6 per cent of cases[121]. (In one third of these cases the reason was said to be the late arrival of the defendant from prison.) Reasons included:

- 'Previous inadequate preparation made it difficult to go over all the issues adequately.'
- 'An earlier conference would have revealed additional defence witnesses.'
- 'Evidence had been served by the prosecution at a very late stage and needed to be considered.'
- 'Insufficient to establish rapport with lay client, to tax him on witnesses, on the weakness of his case or to establish the basis of his defence.'
- 'I would have preferred longer to explain to the defendant the hopelessness of his case.'
- 'Because the possibility of further evidence would have been investigated.'

There had been insufficient time for the conference with the client in nearly 50 cracked trial cases:

[119] N=598.
[120] N=238.
[121] N=2,013; 9 non-replies.

- 'Pressure to start the case.'
- 'Clerk decided to call case on even though she was aware defendant had come from prison and a conference was necessary.'
- 'I would have wished to explore the issues in a calmer atmosphere than at the door of the court.'
- 'I was engaged on another case that day (as is usual). I was encouraged not to keep the judge waiting.'
- 'In the cells at the door of the court when defendant under pressure.'

Solicitors thought there was insufficient time in 5 per cent of cases[122]:

- 'Far too many cases listed to allow proper attendance on client and counsel.'
- 'A pre-court conference would have been more appropriate but was not possible due to manner in which case listed and non-availability of client ie in custody in prison.'
- 'Counsel did not have psychiatric report even though delivered to chambers one week previously. Certain disclosures in report needed discussion.'
- 'Time spent settling plea and basis of plea. Insufficient time spent preparing mitigation, obtaining background information. Revealed itself adversely in court re previous conviction.'

We asked the same question of defendants who saw their barrister for the first time on the morning of the trial. According to them, the meeting lasted under 15 minutes in a third of the cases (32%), 15 to 30 minutes in over a third (37%), between 30 minutes and an hour in a fifth (20%) and over an hour in only 11 per cent of cases[123].

Thirty one per cent of the defendants thought they had insufficient time for consultation with their barrister.[124]

2.6.6 Was the barrister the same one throughout? If not, did that create problems?

Defendants who saw a barrister before the day of the hearing were asked (Def29) whether the barrister who came to the earlier meetings was the same as the one who acted for them at the crown court.

In a quarter of the cases (27%) the barrister had changed[125].

The 75 defendants who said they experienced a change of barrister were asked whether this had caused any problems. If so, they were asked to

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[122] N=744; 15 non-replies.
[123] N=101 – there was an unusually high number of non-replies, 447.
[124] N=429; 41 non-replies.
[125] N=282; 2 non-replies and 20 cases where there was no prior meeting.

tick any of a pre-coded list of possible problems that applied. Twenty three did not reply at all, presumably because they had no particular problems. The remaining 52 between them identified 83 different problems:

Table 2.23
Problems created by change of barrister

	% of mentions
Having to explain things again	38
Different barristers giving different advice	28
Hearing delayed	12
Second barrister did not know as much about the case	11
Other miscellaneous	11
Total	100 (N=83)

The nine who ticked 'other miscellaneous' reasons included at least three whose answers made it clear they had not understood the question:–

- 'Both gave same advice and were very good.'
- 'No problems: the first barrister explained the case the case to the second. I had no explaining to do.'
- 'Second barrister much better than the first.'

2.6.7 Were the solicitors satisfied with the barrister's handling of the interviews with the defendant?

We asked the solicitor 'Were you satisfied with the way the defence barrister handled the issues in the interview with the defendant?' (Sol45+79)

In 98 per cent of cases the solicitor was satisfied. In the remaining 2 per cent he was not satisfied[126]:

- 'Counsel's only concern was to 'crack' the case regardless.'
- 'The defendant had always maintained his innocence. Defence counsel was very abrupt and told him immediately and forcefully on meeting him that she felt he was guilty. Difficult for him then to feel he was being represented fairly.'
- 'Did not know anything about the case.'
- 'Initially unclear and conflicting advice re sentencing if found guilty. Client confused.'
- 'He was rather like a bull-in-a-china-shop.'

2.6.8 Was the defendant satisfied with the barrister?

We asked defendants whether they thought the barrister had done a good or a bad job? (Def34)

[126] N=752; 7 non-replies.

On the whole, they were very positive about what had been done for them by the lawyers.

Table 2.24
Defendants' view of the barristers' work

	%
Very good	59
Good	26
Adequate	10
Bad	4
Very bad	1
Total	100 (N=733[127])

The defendant thought the barrister's work was either 'Good' or 'Very good' in 85 per cent of cases. The solicitors were therefore only a little out as to what the client thought about the work done by the barristers.

Reasons of satisfaction given in order of frequency of mention included: 'Put the case well'; 'Good result'; 'Was well informed'; 'Kept me informed'; 'Professional approach'; 'Good rapport'.

The rating 'Adequate' was almost wholly negative or critical and had to be combined with the small number who said the barrister did a 'bad' or 'very bad job'. The reasons given in order of frequency of mention included: 'Did not put case well'; 'I didn't see my barrister until the day of trial'; 'Didn't do as much as he could have done'; 'Not knowledgeable'; 'Just went through the motions'; 'Not interested'; 'Bad result'; 'Didn't explain; 'Forced me to plead guilty'.

Satisfaction by verdict Not surprisingly, it proved that those who were found guilty on all charges after a contested trial were less likely to think the barrister had done a 'Good' or 'Very good' job than where they had been acquitted – 73 per cent of the former[128] as compared with 97 per cent of the latter[129]. (There was one acquitted defendant who thought his barrister had done a 'Bad' job.)

Of the 19 defendants found guilty who did not give the barrister a 'Good' or 'Very good' rating, thirteen thought he had done an 'Adequate'[130] job , five thought he had done a 'Bad' job, only one thought he had done a 'Very bad' job.

[127] Plus 3 non-replies.
[128] N=130.
[129] N=67.
[130] Which may again have been a negative verdict.

2.6.9 Did the solicitors think the defendant was satisfied with the work of the solicitors?

Solicitors were asked (Sol46+80) 'As far as you can tell, was the defendant satisfied with what was done for him/her by his/her solicitors?'

According to solicitors, the defendant was satisfied in 94 per cent of cases, not satisfied in 3 per cent and in 3 per cent the solicitor said he did not know.

But what did defendants in fact think of the work done by their solicitors?

2.6.10 Were defendants satisfied with the work done by their solicitors?

We asked defendants 'Did your solicitor do a good or a bad job for you?' They were offered five pre-coded responses. As appears from the table the solicitors were not too far out in their view as to the clients' satisfaction rate.

Table 2.25
Defendants' view of the solicitor's work

	%
Very good	58
Good	25
Adequate	13
Bad	3
Very bad	2
Total	100 (N=793[131])

The defendant thought the solicitor's work was either 'Good' or 'Very good' in 83 per cent of cases – not quite so high a proportion as had been supposed by solicitors, but still very high.

Grounds of satisfaction mentioned in order of frequency of mention included: 'Professional approach'; 'They gave good advice'; 'It was a good result'; 'They were helpful'; 'They kept me informed'; 'They were friendly'; 'They were trustworthy'; 'They were available'; 'I always use them'.

The table shows that 13 per cent of defendants said that the solicitor did an 'adequate' job but when they were asked to give their reasons it turned out that they had much the same criticisms as the 2 per cent who said the solicitor did a 'bad' job. The two categories must therefore be added together, so making 15 per cent who were critical of their solicitors.

[131] Plus 37 non-replies and 3 who did not use a solicitor.

The reasons they gave in order of frequency of mention included: 'They didn't do as much as they could have done'; 'They didn't keep me informed'; 'They were not interested'; 'They were not available'; 'They gave bad advice'; 'It was never the same person'; 'Change of barrister'; 'Some are good, others poor'; 'Didn't trust them'.

Not surprisingly, the result made a difference. Where the client had been convicted, 69 per cent thought the solicitor's work was 'Very good'[132] or 'Good'; where he had been acquitted the rating went up to 92 per cent[133].

2.7 CONTACT BETWEEN CPS AND POLICE

2.7.1 What CPS contact was there with the police pre-trial?

The CPS were asked (Cp7) 'Did the CPS have any oral or written communication with any police representatives before the day of the hearing?'

The pre-coded answers distinguished between contact with the officer(s) on the case, the Police Crime Support Unit which acts as the intermediary between the police and the CPS and 'Other' police representatives.

In 7 per cent of cases there was no contact with the police at all; in a fifth of cases (21%) there was contact only with the officers in the case; in a quarter of cases (25%) there was contact only with the Crime Support Unit; in a third (32%) there was contact both with the officers in the case and with the Crime Support Unit and in another 6 per cent with both plus other officers. In the remaining cases there was contact with other combinations of officers.[134]

2.7.2 Was the CPS satisfied that all information necessary was received from police?

The CPS were asked (Cp8): 'Was the CPS satisfied that it received all the information and help needed from the police in preparing for this case?'

In 87 per cent of cases the CPS said it was satisfied. But in 13 per cent of cases it was not.[135]

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[132] N=68.
[133] N=133.
[134] N=1,322.
[135] N=1,255 plus 50 non-replies and 17 in which the answer was Not sure.

2.8 PRE-TRIAL HEARINGS

2.8.1 Was there a pre-trial hearing?

According to court clerks (Cc8), in three-quarters of all cases (75 per cent), there was no pre-trial hearing.[136] The judges reported a lower proportion of cases in which there was no pre-trial hearing. They said that there were no such hearings in 71 per cent of the 1,468 cases in which they replied to the question[137].

Not surprisingly, the incidence of pre-trial hearings varied considerably depending on the plea. In contested cases there was one in 40 per cent of cases; in cases that ended in last minute guilty pleas ('cracked trials') there was a pre-trial hearing in over a third of the cases (35%); in cases listed as guilty pleas there was one in only 6 per cent.[138]

2.8.2 How many pre-trial hearings?

The court clerks were asked to state (Cc9) how many pre-trial hearings there had been in each case. In three-quarters of the cases (75%) where there was a pre-trial hearing there was only one; in 17 per cent there were two, in 4 per cent there were three, in 3 per cent there were four and in 2 per cent there were five or more pre-trial hearings.[139]

2.8.3 How long were such hearings?

The clerks were asked (Cc10), if there was more than one, to state the aggregate length of all pre-trial hearings. Ninety six per cent of pre-trial hearings lasted less than half a day in total.[140] In 2 per cent it was about half a day, in 2 per cent up to a day and in one case up to 3 days.[141]

2.8.4 Was the pre-trial hearing before the trial judge?

According to the court clerks (Cc11), in over four-fifths of cases (83 per cent) the pre-trial hearing was before someone other than the trial judge.In a tenth (10%), the hearing was before the trial judge and in a further 8 per cent there were some of each.[142] The proportions given by the judges were similar – in 83 per cent they had not conducted any of the pre-trial hearings,in 13 per cent they had and in 4 per cent they had conducted some, but not all such hearings.[143]

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[136] N = 2,617; 75 non-replies.

[137] Plus 61 non-replies.

[138] N=2,427 – excluding 87 cases where no plea was entered and 141 where the information was not stated.

[139] N = 653.

[140] Unfortunately the question did not allow for sub-division below half a day.

[141] N = 659; 6 with no answer to this question.

[142] N = 649; 10 non-replies.

[143] N = 434 with 7 non-replies.

2.8.5 Did it matter that the trial judge did not conduct the pre-trial review?

The judges who had not conducted all the pre-trial hearings were asked (Jg18): 'In your view, did it matter that another judge conducted(some of)the pre-trial review(s)?'

The overwhelming majority of the judges (95%) said they did not think that it mattered that they had not conducted the pre-trial review.[144]

2.8.6 Did it matter when the barristers at the trial had not attended the pre-trial hearings?

The judges were asked (Jg19) to say whether the barrister at the trial hearing was different from the one who handled any pre-trial hearing and, if so, whether it mattered (Jg20). In the overwhelming majority of cases it seemed to the judge that it did not matter. In the case of defence barristers it did not matter at all in 78 per cent of cases and to matter 'a lot' in 12 per cent of cases where counsel had been different[145]. A change of prosecution barristers mattered 'Not at all' in 85 per cent of cases, and to matter 'a lot' in only 7 per cent.[146]

2.8.7 What were the objectives of the pre-trial review?

The judges were asked (Jg21): 'What were the objectives of the pre-trial review(s)?'

In the great majority of cases(70%[147]) the stated objective was to deal with questions of plea. In those cases, half the defendants ended by pleading guilty and half not guilty.

In 13 per cent of the cases in which a pre-trial review had been held the objective was 'to simplify factual issues', in 12 per cent it was to enter admissions or to agree other evidence and in 6 per cent it was to resolve issues of law. There were a considerable number of cases (115 or 27%) where other reasons were mentioned including: witness matters (6%); length of trial (5%); date of trial (4%); and indictment queries (3%). In the cases where the objective of the pre-trial review was something other than plea, the ultimate guilty plea rate was between 36 and 39 per cent.

2.8.8 Were the stated objectives realised?

The judges were asked (Jg22): 'Was the pre-trial review successful in achieving its objectives?'

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[144] N = 347; 29 non-replies

[145] N=134; 8 non-replies.

[146] N =145; plus 6 non-replies.

[147] N = 552. The percentages added to more than 100 as there could be more than one objective of a pre-trial hearing.

In nearly half the cases (47%)[148], the judges replied that they had been achieved and in a further 19 per cent that they had been partially realised. But in a third of cases (34%), the objectives had not been achieved.

2.8.9 Was time and money saved?

Judges were asked (Jg23): 'Do you think the pre-trial review(s) saved much time and money?

In as many as two-thirds of cases (66%)[149], the judges answered No. In another quarter of cases(24%), they said that a little time and money had been saved. There were only 29 cases (8%) in which it was thought that a fair amount of time and money had been saved and nine (2%) in which it amounted to a 'great deal'.

2.8.10 Did the barristers at trial change what had been agreed pre-trial?

Judges were asked (Jg24): 'Did the prosecution or defence change what was agreed in the pre-trial review when it came to the hearing?'

In most cases,(70%)[150], there was no attempt to change what had been agreed. But in a minority of cases this did occur – in five per cent it was the prosecution that changed something, in 16 per cent it was the defence and in eight per cent it was both.

2.8.11 Were there issues not dealt with at the pre-trial stage that should have been?

In cases that went to trial, the judges were asked (Jg25): 'Do you think there were any(other)issues which should have been resolved at a pre-trial review?'

In the great majority of cases (88%)[151], the judges said No.In a tenth of cases (10%) they answered Yes and in a further two per cent they did not know.

Those who said Yes, were asked (Jg26) 'What sort of issues?'

There was a wide variety of answers including: whether the indictment should have been severed (8 cases); whether another count should

[148] N = 377 with 64 non-replies.
[149] N = 386 with 55 non-replies.
[150] N = 370 with 71 non-replies.
[151] N = 740 with 77 non-replies.

have been added (2 cases); the form of the indictment (3 cases); whether the prosecution would accept a plea to a lesser offence (8 cases); the admissibility of evidence (8 cases); the presentation of bundles of documents (4 cases); agreement on schedules; problems of expert evidence (3 cases); points of law; issues regarding 'unused material'; evidence lost by the prosecution; need for an interpreter; getting defence to admit facts; questions about summaries of taped interviews or whether tapes should be played to the jury.

In several cases the judges thought the parties should have done more (or at least something) to explore the possibility of getting agreement on issues.

2.9 PRE-TRIAL ADMISSIONS

2.9.1 Were any pre-trial admissions sought?

Prosecution and defence barristers were asked (Pb49; Db51): 'Before the trial, did either counsel attempt to get pre-trial admissions from the other side to save time and money?'

Both agreed that in 73 per cent of cases[152] no such attempt had been made.

Prosecution barristers said that in 27 per cent of cases such efforts had been made – and that they had been initiated by the prosecution five times more often than by the defence. Defence barristers agreed that such efforts had been made in 27 per cent of cases – but said that they had initiated them more than twice as often as the prosecution.

They agreed however that in 13 per cent of cases they had *both* shared in initiating the attempt to get pre-trial admissions.

2.9.2 Were any pre-trial admissions agreed? If so, were there any important savings of time and money?

Both barristers were asked (Pb50; Db52) if any such admissions were agreed.

They broadly agreed that admissions were agreed in around four-fifths of the cases in which the attempt to get them was made.(Pb 83%[153]; Db 78%[154]).

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[152] Pb N=660; 25 non-replies. Db N=685; 17 non-replies.
[153] N=182; 2 non-replies
[154] N=180; two non-replies.

Where admissions had been agreed, the barristers were asked (Pb51; Db53): 'Given the overall length of the case, how important do you think the savings of time and money were?'

Prosecution barristers thought the savings of time and money were 'Very important' in 15 per cent of cases, 'Quite important' in 47 per cent, and 'Not important' in 37 per cent.[155]

Defence barristers thought the savings of time and money were 'Very important' in 29 per cent of instances, 'Quite important' in 39 per cent and 'Not important' in 31 per cent.

Neither side thought there would have been much scope for further admissions. Ninety per cent of prosecution barristers[156] and 93 per cent of defence barristers[157] said they did not think that further admissions should have been made.

However in about half of all the cases (Pb 48%, Db 50%) they agreed that, apart from pre-trial admissions, there had been contact with the opponent 'to address matters which could save time or money or both'.[158] The matters on which there was contact appears in the Table below:

Table 2.26
Pre-trial contact between counsel

	Db %	Pb %
Agree evidence	29	28
Agree interview evidence	26	26
Witness matters	15	13
Change of plea	15	12
Miscellaneous	14	20
Total	100 (N=361)	100 (N=310)

2.10 ALIBI DEFENCES[159]

2.10.1 Did the defence include an alibi?

In regard to contested cases, we asked the barristers (Pb122; Db137), the police (Pol17),the defence solicitor (Sol61) and the CPS (Cp60) whether there had been an alibi defence.

[155] N=150; 2 non-replies.
[156] N=180; 4 non-replies.
[157] N=655; 57 non-replies. The great discrepancy in the numbers responding compared with the Db rate in the previous note was due to a filtering error in the Pb questionnaire.
[158] Pb N=639; 46 non-replies. Db N=647; 55 non-replies.
[159] See also 'Ambush defences', sect.4.12 below.

They broadly agreed that there had been an alibi defence in 9–12 per cent of contested cases. (Pb 12%[160]; Db 12%[161], Pol 9%[162]; Sol.12%[163]; Cp 10%[164]). The police and the CPS thought the proportion was about ten per cent; the barristers and the defence solicitors thought it was 12 per cent.

2.10.2 When was the alibi notice supplied to the prosecution?

According to the rules, an alibi notice is supposed to be delivered to the prosecution not later than seven days after the committal proceedings. It is often said that alibi notices are in fact generally served late. We tried to establish when they had actually been delivered.

Table 2.27
When were alibi notices delivered?

	Pb %	Db %	Pol. %	Sol. %	CPS %
At least 15 days before hearing	59	63	57	80	72
2–14 days before hearing	8	9	12	5	14
Day before or day of hearing	7	14	31	15	13
No alibi notice	26	14	*	*	*
Total	100 (N=74)	100 (N=79)	100 (N=67)	100 (N=60)	100 (N=97)

* Through an oversight this was not given as a precoded possibility which makes the preceding percentages for these respondents non-comparable with those for the barristers.

The first line of the table shows that there was some considerable difference of view. The barristers seem to agree that the alibi notice was delivered at some point at least 15 days before the hearing in something like three-fifths of cases – Pb 59%, Db 63% and that it was delivered at the last moment or not at all in a third or less – Pb 33%, Db 28%.

If 'Not delivered at all' is taken with 'The day before or on the day of the hearing' as late delivery, the police agreed with the barristers that late delivery or none occurred in around 30 per cent of cases – while the defence solicitors and the CPS thought it occurred in only half that proportion.

However it is important to get a sense of the number of cases in which even the police said that there was 'last minute delivery' – on the day

[160] N=645; 40 non-replies.
[161] N=660; 42 non-replies.
[162] N=772; 86 non-replies.
[163] N=531; 67 non-replies.
[164] N=672; 4 non-replies.

before the hearing, the day of the hearing or not at all. According to the police there were 21 cases in which there was last minute delivery of the alibi notice or introduction of an alibi without notice. This represents 3 per cent of the contested cases in its sample, or 1 per cent of the whole sample.

2.10.3 Did late supply of alibi notice cause checking problems?

We asked the prosecution barrister (Pb124), the police (Pol19) and the CPS (Cp62) whether late delivery of the alibi notice[165] caused the prosecution problems in checking it. The results are set out below. The numbers reporting late delivery of the alibi were so small that it made no sense to give percentages.

Table 2.28
Did late delivery cause checking problems?

	Pb Nos.	Pol. Nos.	CPS Nos.
Serious problems	2	10	4
Slight problems	3	2	3
No problems	5	8	6
Total	10	20	13

The police thought the checking problems were 'Serious' in more cases than either the barrister or the CPS. But even the police thought that there were 'Serious' problems in only half the cases of late delivery and in close to half, late delivery caused 'No problems'.

2.10.4 Was the alibi nevertheless checked in spite of serious problems in checking?

We asked the prosecution barrister, the police and the CPS whether the police had nevertheless checked in spite of there being a 'Serious' problem in checking. Each said that the alibi had not been checked in half the 'Serious' problem cases – Pb 1 out of 2, Pol.5 out of 10, CPS 2 out of 4.

This means that there were 5 cases in all in which the police said there were serious problems in checking and the alibi had not in fact been checked. (Five cases represented 0.6 per cent of all contested cases in the police sample and 0.2 per cent of the whole police sample including guilty pleas.)

2.10.5 Did the judge criticise the lateness of delivery of the alibi notice? If so,was the alibi nevertheless admitted as evidence?

The defence barrister was asked (Db140) whether there had been any criticism from the judge about 'late disclosure' of the alibi defence.

[165] Defined as later than 14 days before the hearing.

The defence barrister said there had been such criticism in four of the eleven cases in which it had been delivered on the day before the hearing or on the day of the hearing itself[166]. But in all four cases the judge had allowed the alibi evidence in as evidence.

[166] The question was unfortunately not asked where the alibi notice had not been delivered at all.

3. Evidence

3.1 Matters relating to tape-recorded evidence
3.2 Scientific evidence
3.3 Identification evidence

3.1 TAPE-RECORDED EVIDENCE

3.1.1 Was there any interview evidence?

Both barristers in contested cases were asked (Pb61; Db63): 'Did the prosecution case include evidence from interviews with the defendant?'

They agreed in reporting that there was such interview evidence in over four-fifths of cases – Pb 84 per cent[1], Db 86 per cent[2].

3.1.2 Was any evidence tape-recorded?

The barristers and the defence solicitors were all asked (Pb63; Db65; Sol53): 'Was all or any of the interview evidence tape-recorded?' (See also sect.1.5.3)

The barristers and defence solicitors stated that it was tape-recorded wholly or partly in more than nine-tenths of cases.

Table 3.1
Was interview evidence tape-recorded?

	Pb %	Db %	Sol. (N=100[1]) %
Recorded wholly on tape	86	87	87
Recorded partly on tape	9	8	5
Not recorded at all on tape	5	5	7
	100(N=570[3])	100(N=587[4])	100(N=522[5])

The figures showed that there was a slightly higher incidence of cases in which interview evidence was not tape-recorded when the defendant pleaded guilty than when he pleaded not guilty.

[1] N=661; 24 non-replies.
[2] N=683; 19 non-replies.
[3] Plus 2 non-replies.
[4] Plus 5 non-replies.
[5] Plus 76 non-replies.

3.1.3 Was the tape played in court? If so, how long did playing the tape take?

The judges in contested cases were asked (Jg30–1) whether the tape was played in court and how long that took. The answer to the first question in 89 per cent of cases was No, and in 11 per cent (68 cases) Yes.[6]

When it had been played in court, in almost half the cases (47%) it took under 15 minutes to play. In another fifth of the cases (19%)it took between 15 and 30 minutes. In the same proportion (19%) it took between 30 minutes and an hour and in 15 per cent it took over an hour.[7]

3.1.4 How clear was the tape?

The judges were asked (Jg32): 'How would you describe the clarity of the tape?'

In over half the cases (57%) it was described as 'Good'. In a third (33%) it was 'Adequate'. In a tenth (10%) it was 'Poor'.[8]

3.1.5 How valuable was playing the tape?

The judges were asked (Jg33) how valuable it had been to have the tape played in court.

In over a third of the cases (37%) it had been 'Very valuable'; in just over a third (35%) it had been 'Somewhat valuable'; and in just over a quarter (28%) it had been 'Not valuable'.[9]

3.1.6 To what extent were the tapes listened to?

The barristers and the defence solicitors[10] in contested cases were asked (Pb64, Db66, Sol54) whether they had listened to the tape-recording. The responses appear in the table below:

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[6] N=638; 13 non-replies.
[7] N=68; one non-reply.
[8] N=69.
[9] N=68; 1 non-reply.
[10] But due to an unfortunate error, not the CPS.

Table 3.2
In contested cases was the tape-recording listened to?

	Listened to tape-recording		
	Pb %	Db %	Sol. %
No one listened	66	48	37
Listened to all	28	45	55
Listened to most	3	3	4
Listened to some	3	2	3
Listened to a little	1	2	1
Total	100 (N=540[11])	100 (N=551[12])	100 (N=471[13])

Prosecution barristers did not listen to the tape-recording in two-thirds of contested cases, defence barristers did not listen in about half the cases and defence solicitors did not listen in over a third.

3.1.7 How long did listening take?

Those who said the tapes had been listened to, were asked how long it took. The results are stated in Table 3.3:

Table 3.3
How long did listening to tape-recordings take?

	How long did listening take?		
	Pb %	Db %	Sol. %
Under half an hour	54	39	24
31–60 mins.	30	39	44
1-2 hrs.	7	11	19
Over 2 hrs.	9	11	13
Total	100 (N=149[14])	100 (N=183[15])	100 (N=284[16])

The minority of cases where listening took over two hours included a few extremely long tapes. Prosecution barristers said there was one case where listening took over 40 hours and another where it took some 30 hours. Defence counsel said there was one case (not the same as reported by prosecution counsel) where listening took some 40 hours.

[11] Plus 1 non-reply.
[12] Plus 4 non-replies.
[13] Plus 12 non-replies.
[14] Plus 7 non-replies.
[15] Plus 34 non-replies.
[16] Plus 13 non-replies.

3.1.8 Were the barristers supplied with a transcript of the tape?

The prosecution barristers (Pb67) and the defence barristers (Db69) were asked in cases where there had been a tape recording of interview evidence : 'Did you receive a verbatim transcript of the tape?'

Prosecution barristers said they had a verbatim transcript in 30 per cent of cases[17]; defence barristers said they had a verbatim transcript in 29 per cent of cases [18].

3.1.9 Was the written record or summary of the tape, if any was provided, adequate?

It is known from research focussed on this precise issue[19] that police summaries of tape-recorded interviews are quite often inadequate. We wanted to get the barristers' impression of the quality of the summaries. (In effect this was to see whether barristers check the summary against the tape.)

No question was asked as to whether a summary had been received. Instead barristers were asked (Pb68, Db70): 'Was any written summary or record of interview on the tape provided by the police adequate?'

A summary of the tape (known to the police as a 'record of interview') was received in all but a handful of cases (Pb and Db 98%[20]).

In the majority of cases where a tape was received (Pb 86%; Db 73%[21]), the barristers said the summaries were 'Adequate'. The fact that defence barristers said they were inadequate in twice the number of cases as prosecution barristers is perhaps not surprising. It is likely that in a proportion of cases the defence will have 'defence points' regarding the way the summary has been written. It also suggests that more defence barristers listened to the tape – which was in fact the case.

3.1.10 In what ways was the summary defective?

In the cases where the barristers said that the summary had been inadaquate they were asked in what way (Pb69; Db71). They were offered three specific pre-coded replies plus 'Other reason' and asked to tick any that applied. (Percentages therefore added to more than 100.)

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[17] N=530; 11 non-replies.

[18] N=543; 12 non-replies.

[19] See J.Baldwin, 'Summarising Tape Recordings of Police Interviews' [1991] *Criminal Law Review*, p.671.

[20] Pb N=527; 14 non-replies. Db N=546 9 non-replies.

[21] Pb N=517. Db N=537.

The most frequently mentioned deficiency in summaries was 'Left out significant material' (Pb56%; Db 77%).[22] Overstressing the strength of the prosecution case was mentioned twice as often by the defence as the prosecution mentioned understressing it. (Pb 14%; Db 29%). 'Otherwise inaccurate' was mentioned in a few cases (Pb 16%; Db 18%), and there were further miscellaneous reasons given including 'too long', 'too brief', 'not fair to the defence', 'no verbatim quotes', 'needed more detail', 'poor interpretation by interpreter'. In several cases the barrister said that a transcript of the whole interview or just the tape would have been better than the summary. In a number the criticism was that the summary contained inadmissible material.

3.1.11 How important was the tape-recorded evidence in this case?

The barristers were asked (Pb70; Db 72) how important was the tape-recorded evidence in this case.

As the table below shows, the two sets of barristers were not agreed on the importance of the tape-recorded evidence:

Table 3.4
Views of barristers on importance of tape-recorded evidence

	Pb %	Db %
Very important	20	31
Fairly important	38	45
Not that important	42	24
Total	100 (N=533[23])	100 (N=548[24])

3.2 SCIENTIFIC EVIDENCE

3.2.1 Proportion of cases with scientific/expert evidence

We wanted to find out in what proportion of cases there was scientific evidence. Unfortunately the questions we put to different respondents were not the same, making comparison effectively impossible.

Prosecution and defence barristers in all contested cases were asked (Pb95; Db96): 'Was there any scientific evidence in this case?' The judges

[22] Pb N=70; 2 non-replies. 70 respondents produced 89 reasons
Db N=146. The 146 respondents produced 212 reasons.
[23] Plus 8 non-replies.
[24] Plus 7 non-replies.

were asked (Jg37) 'Was there any prosecution scientific or other expert evidence in this case?'. The CPS were asked (Cp46): 'Was there significant scientific evidence in this case?' The defence solicitors were asked (Sol56): 'Was there any significant prosecution scientific evidence in this case?'

Given these different questions, not surprisingly there were differences of view as to whether the case involved scientific evidence[25] – 37 per cent according to prosecution barristers[26], 40 per cent according to defence barristers[27], 35 per cent according to the judges[28], 19 per cent according to defence solicitors[29] 30 per cent according to the CPS[30].

In broad terms it would seem that there was scientific evidence in about one third of contested cases.

3.2.2 What sort of scientific evidence?

It seemed worthwhile to try to discover the incidence of different kinds of scientific evidence. The list that follows shows the kinds identified in order of frequency.

[25] Also the samples were different. For judges and the CPS it included contested cases and cracked trials. For the barristers and the defence solicitors it included only contested cases.
[26] N=651.
[27] N=662.
[28] N=742.
[29] N=526.
[30] N=668.

Table 3.5
Types of scientific evidence

	Pb %[31]	Db %	CPS %
Medical[32]	47	52	44
Drugs	22	18	24
Fingerprints	12	12	10
Blood samples (person)	9	10	8
Handwriting (documents)	7	7	6
Contact evidence (person)[33]	7	(not listed)	6
Blood samples (alcohol/drugs)	6	5	4
Firearms/ballistics	5	4	7
Contact evidence (property)[34]	4	2	6
Other	13	17	11
Total	132 (N=249[35])	127 (N=269[36])	126 (N=197[37])

'Other' scientific evidence included DNA samples; footprints; evidence of cause of fire or impact of vehicle; evidence of speed of vehicle; facial mapping; metereological evidence re weather on the day.

3.2.3 How important was such evidence?

All three respondents asked this question (prosecution and defence barristers and judges) were of almost the same mind as to how often the scientific evidence was important. In more than two-fifths it was thought to be 'Very important' (Pb 44%[38], Db 42%[39], Jg 45%[40] respectively); in more than one third it was thought to be 'Fairly important' (Pb 38 %, Db 39%, Jg 36% respectively).

It was 'Not important' in just under a fifth of the cases (Pb 18%, Db 19%, Jg 19% respectively). These 45–50 cases were excluded from all succeeding questions put to the barristers regarding scientific evidence. These next questions, in other words, were only asked of barristers in regard to the cases where they said that the scientific evidence was either

[31] They add to more than 100 per cent because there could be more than one type of scientific evidence per case.
[32] This category covers mainly evidence about the victim's injuries.
[33] This category covers evidence linking the defendant to the victim such as clothes fibres.
[34] This category covers evidence (other than fingerprints) linking the defendant to the scene of the crime such as scuff marks, footprints and the like.
[35] Plus 2 non-replies.
[36] Plus 4 non-replies.
[37] Plus 2 non-replies.
[38] N=247; 2 non-replies.
[39] N=264; 5 non-replies.
[40] N=258; 5 non-replies.

very or fairly important. (The judges were also asked to distinguish scientific evidence by reference to whether it was important, so this qualification applies to the next questions on this topic answered by the judges.)

3.2.4 Was the scientific evidence challenged by the defence?

The defence barrister (Db102) and the judge (Jg39) were asked whether the defence challenged the scientific evidence.

They agreed that in three-quarters of the cases or more (Db76%[41]; Jg 77%[42]) there was no challenge by the defence.

Even when where the scientific evidence was 'Very important', according to defence barristers, 66 per cent of such evidence[43] went unchallenged or 68 per cent according to the judge.

On the basis that there was scientific evidence in about one third of contested cases and a challenge in about a quarter of these, it would seem that the defence challenge prosecution scientific evidence in under a tenth of all contested cases – or less than 3 per cent of all cases.

3.2.5 Why was the prosecution's scientific evidence not contested?

The defence was asked (Db) the reason for not contesting the prosecution's scientific evidence.

In 95 per cent of cases[44] the reason was that there was no basis for disputing the evidence.

There were 17 cases in which other reasons were mentioned. In 4 the reason given was 'Lack of relevant information'; in two it was 'Lack of time'; in one it was 'Cost'. There were ten cases of other miscellaneous reasons. There was no case in which 'Lack of facilities' was given.

3.2.6 How did the defence challenge the prosecution's scientific case?

The defence barrister was asked (Db104): 'How did you challenge the prosecution's scientific evidence?'

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[41] N=202; 12 non-replies.
[42] N=206; 3 non-replies.
[43] N=109; 2 non-replies.
[44] N=159; 3 non-replies.

There were 49 cases out of 202 in which the defence said they challenged the prosecution's scientific evidence. In 44 there was an answer to the question. In 29 cases of the 44 (66%) the challenge was simply through cross-examination. In 13 cases (29%) the evidence was challenged both by cross-examination and by defence evidence, in one solely by the introduction of defence evidence, and in one by unspecified means.

On this basis, it would seem that there was a scientific expert for the defence in about 3 per cent of all contested cases – or under 1 per cent of all cases.

3.2.7 Were there difficulties?

(a) *With pre-trial disclosure?*

Each side was asked whether there were difficulties with disclosure by the other. Ninety two per cent of prosecution barristers[45] and 82 per cent of defence barristers[46] said there was no such difficulty.

(b) *With access to facilities for the defence?*

Both sides were asked whether there were difficulties in regard to 'access to adequate scientific expertise, lab facilities etc by the defence'.

According to prosecution barristers, in 95 per cent of cases[47] there were no such difficulties. In 92 per cent of cases[48] the defence barrister was of the same opinion. The defence thought there were difficulties in 8 per cent (or 14 cases).

A follow-up question to the defence barristers asked whether experts for the defence went to the Home Office forensic science laboratories to inspect exhibits or check tests done for the prosecution.

In 88 per cent[49] they had not done so. In 12 per cent (four cases) they had.

They were asked whether the defence experts had gone to any other laboratories to conduct tests.

In 87 per cent of cases they had not.[50] In 13 per cent (again four cases) they had.

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[45] N=195; 9 non-replies.
[46] N=208 with 6 non-replies.
[47] N=195; 8 non-replies.
[48] N=181; 33 non-replies
[49] N=33; 4 non-replies.
[50] N=31; 6 non-replies.

The defence barrister was then asked whether the defence experts had had any problems in conducting such tests. In 11 of the 12 cases they said that the experts had no problems.

(c) *With regard to delays in receiving information or samples from the prosecution?*

Both sides were asked whether the defence had had problems through delays in receiving information or samples from the prosecution.

Ninety one per cent of prosecution barristers[51] and 87 per cent of defence barristers[52] said there were no such problems.There were 24 cases (13%) in which the defence said there were such problems.

(d) *With regard to cost?*

The defence barrister (but unfortunately not the defence solicitor) was asked whether the defence had difficulties in regard to costs – a term that was not defined.

Ninety eight per cent of defence barristers[53] said the defence had no such problems. There were four cases in which costs were said to have been a problem.

In one the defence said that a hospital would not tell solicitors whether there were medical notes without 'money up front'. Counsel had to write advice on evidence before solicitors could pay otherwise 'legal aid would not have paid'. In a second case the defence barrister said the court indicated there would be difficulties in payment for a defence doctor to be present in court – even though the prosecution had a doctor in court.In the third case the complaint concerned delay in getting legal aid for the defence expert.

For some reason the number of non-replies in answering this particular question (40) was rather high. A better result emerged from a more specific follow-up question about funding which asked 'Did you have any problems with funding the scientific evidence for the defence?'[54]

Seven defence barristers (22 per cent of the 31 effective replies) said there were problems. In four cases the problem was that it was not clear whether legal aid would be granted, in one case the legal aid certificate was limited and in two there were other unspecified problems.[55]

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[51] N=184; 19 non-replies.
[52] N=191; 23 non-replies.
[53] N=174; 40 non-replies.
[54] There were 31 responses and 6 non-replies.
[55] See on this issue also Beverley Steventon, (1993), *The Ability to Challenge DNA Evidence*, Royal Commission Research Study No.9, para.4.1.17, which found that 25 out of 27 applicants for legal aid in cases involving DNA got legal aid.

3.2.8 How was the scientific evidence presented at court?

Both sides were asked in all cases in which the scientific evidence was said to be very or fairly important (Pb100,101; Db101,105) whether the scientific evidence was presented by an expert at the trial. (It should be recalled that all these questions, from sect.3.2.4 onwards, were put only where respondents had already said that the scientific evidence was 'very' or 'fairly' important and were not asked in the one fifth of cases where it was described as 'not important'.)

Given that the defence only rarely disputed the prosecution's scientific evidence, it was not surprising that both agreed that in the overwhelming majority of cases the court only heard from a prosecution expert.

The replies are set out in Table 3.6:

Table 3.6
How, if at all, was the scientific evidence presented at court:

	Pros.ev. Acc. to		Def.ev. Acc. to	
	Pb %	Db %	Db %	Pb %
By expert in person	42	43	18	11
Read	49	35	2	3
None presented	9	22	80	86
Total	100 (N=204[56])	100 (N=203[57])	100 (N=180[58])	100 (N=201[59]

There were relatively minor disagreements as between the two sets of barristers but what is most striking about the table is the difference that emerges as to how prosecution and defence scientific evidence is given at trial. In most cases there is evidence for the prosecution, normally presented either by an expert in person or by having the evidence read. By contrast, in four-fifths of cases there is no evidence for the defence at all; when there is such evidence it is usually presented by an expert in person.

[56] Plus 4 non-replies.
[57] Plus 11 non-replies.
[58] Plus 34 non-replies.
[59] Plus 3 non-replies.

3.2.9 Did the defence communicate its scientific evidence to the prosecution?

The barristers (Pb102; Db111) and the CPS (Cp48) were asked whether the defence communicated its scientific evidence to the prosecution.

There was a puzzling difference of opinion between the three sets of respondents. According to the prosecution barristers, the defence handed over its scientific evidence in 93 per cent of cases[60]. The CPS said that the defence handed over its expert scientific evidence in 56 per cent of cases[61]. But the defence barrister said the defence handed over its scientific expert evidence in 61 per cent of cases[62]. We were unable to explain these differences of view.

3.2.10 When did the defence communicate its scientific evidence to the prosecution? Did this create problems for the prosecution?

The rules specify that the defence must supply the prosecution with any scientific expert evidence it intends to call as soon as practicable after committal. According to the prosecution barristers, the defence disclosed its scientific evidence in 26 cases. In 20 of these (80%) it was disclosed late. In 6 cases (23%) the material was not supplied to the prosecution until the very last minute – 1 to 2 days before the trial, at the start of the case or even later. In 4 of the 26 cases (15%) there was no reply to this question – so the proportion of cases in which communication of the evidence was late could have been higher still.

Moreover there were also 2 cases in which the defence did not communicate its evidence at all. If these are added to the total, the overall position was 22 cases out of 29 (76%) in which it was communicated late or not at all, 2 (7%) in which it was communicated on time and 5 (17%) in which the information was not given.

The numbers are very small but the overall picture is clear.

It did not appear however that there were many instances in which this caused the prosecution difficulties. In 16 cases (61%) of the 26 cases where the defence disclosed its defence, the prosecution did not need to run any tests on the defence scientific evidence. In 7 cases (27%) it did need to do tests and there was time to do them.

There were 3 cases out of 26 (11 per cent) in which the prosecution said there was insufficient time to do tests that were needed. These three

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[60] N=28; 1 non-reply.
[61] N=41.
[62] N=36; 1 non-reply.

cases were out of 249 cases in which the prosecution barrister said there was scientific evidence (1%) – which in turn were about one third of all contested cases. These three cases would therefore have been 0.4 per of all contested cases or 0.1 per cent of all cases.

3.2.11 Was there an attempt to get both sets of experts to agree pre-trial?

Each side was asked (Pb105; Db114; Cp50)) whether there had been an attempt to get the experts to agree pre-trial – beyond merely serving statements. (The question was only asked where the respondents had already indicated that the defence communicated expert evidence to the prosecution – 26 cases according to the prosecution barrister, 22 according to the defence barrister, 29 according to the CPS.)

Prosecution and defence barristers and the CPS all agreed that an attempt to get pre-trial agreement between the experts was rare. The prosecution barristers said it happened in only 8 per cent of cases (2 cases, both initiated by the prosecution[63]); the defence barristers said it happened in 25 per cent of cases (5 cases, all initiated by the defence[64]). The CPS said it happened in 28 per cent of cases (8 cases, in 6 initiated by the prosecution[65]).

3.2.12 Did the defence barrister have a conference with the defence expert?

According to defence barristers (Db106) in 69 per cent of cases where the defence challenged the prosecution's scientific evidence the defence barrister had had a conference with the defence expert.[66] But in as many as 30 per cent of such cases they had not conferred. In a quarter (9 cases or 25%) this was because no conference was needed. In 6 per cent (2 cases), the defence barrister said it did not happen although it should have. In both cases lack of time was given as the reason.

3.2.13 Did the defence approach any experts who were not used because of their unfavorable views?

Defence barristers who said the defence had its own expert to present scientific evidence were asked (Db117): 'Were any experts approached who were then not asked to assist the defence because of their view of the evidence?'

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[63] There was 1 non-reply.
[64] There were 2 non-replies.
[65] There was 1 non-reply.
[66] N=36; 1 non-reply.

There were 7 such cases (19%)[67]. In four it was because the view of the expert approached would have assisted the prosecution; in three it was because the expert approached gave an inconclusive view.

3.2.14 Was the evidence understandable by the jury?

The judges were asked to say whether they thought the scientific evidence was understandable by the jury.

In 94 per cent of cases[68] they thought it was 'All understandable'. In 5 per cent they thought 'Some was understandable'. There was only one case in which 'None was understandable'.

When the jurors themselves were asked, they took very much the same view – ninety per cent of jurors said the scientific evidence was basically unproblematic – 'Not at all difficult' (56%); 'Not very difficult' (34%). Nine per cent thought it was 'Fairly difficult'. Only 1 per cent thought it was 'Very difficult'.[69] (See further sect.8.2.1–2 below.)

3.3 IDENTIFICATION EVIDENCE

3.3.1 Was there significant identification evidence?

In contested cases the two barristers were asked (Pb108; Db 120): 'Did identification evidence play an important part in the case?'

They broadly agreed. There was no identification evidence in around half the cases (Pb 56%; Db 50%)[70]. In another fifth to a quarter of the cases (Pb 20%; Db26%) there was identification evidence but it was 'Not important'.

There was 'Very important' identification evidence in some 15 per cent of contested cases (Pb *and* Db 16%). There was 'Fairly important' identification evidence in under 10 per cent (Pb8%; Db 7%).

3.3.2 Did the judge give the standard *Turnbull* warning?

The judges have a standard direction to give the jury about the dangers of relying on identification evidence – known in the profession as the *Turnbull* warning for the name of the case which first established the test. In the cases when they had said that there was important identification evidence, we

[67] N=37.
[68] N=254; 6 non-replies and 3 Can't say's.
[69] N=1,904; 18 non-replies.
[70] Pb N=660; 25 non-replies. Db N=677; 25 non-replies.

asked the barristers (Pb109; Db121) whether the judge had given a standard *Turnbull* warning.[71]

The judge seems to have given a *Turnbull* warning in only just over half the cases – Pb 57%[72]; Db52%[73].

[71] We wanted then to find out whether the barristers had been content with the way the judge had put the issue to the jury. But through an unfortunate editing error this question was posed only where there had been a *Turnbull* warning, instead of where there had been no such warning. No doubt some barristers will have realised the obvious error and have answered appropriately. But there was no way of telling how often the answer was 'straight' – and therefore wrong – or 'adapted' and therefore right. The answers simply had to be disregarded.

[72] N=122; 33 non-replies.

[73] N=139 plus 22 non-replies

4. Trial

4.1 Plea
4.2 Challenges to, and admissibility of, evidence
4.3 Unused material
4.4 Time and alleged time wasting
4.5 Defendant giving evidence
4.6 Matters relating to previous convictions
4.7 Nature of defence
4.8 The dock
4.9 No case to answer' submissions
4.10 The judge's role
4.11 'Innocent pleading guilty' cases
4.12 'Ambush' defences
4.13 Plea bargaining

4.1 PLEA

4.1.1 How did the defendant plead?

The question how did the defendant plead was put in seven of the nine questionnaires. The answers given on this basic issue of fact were not always the same.

According to the court clerks: The most comprehensive information on the subject was obtained from the questionnaire addressed to court clerks.

The question they were asked (Cc13) and their answers in order of frequency were as follows: 'Which of these applies to the defendant's plea?'

Table 4.1
How did the defendant plead?

	%
Case listed as guilty plea	39
Pleaded not guilty to one or more counts, case went to full trial	31
Pleaded guilty when listed as not guilty ('cracked trial')	26
No plea (defendant bound over, charges to lie on file)	3
Total	100 (N=2,606[1])

[1] Plus 86 non-replies.

According to the court clerks therefore, 65 per cent of the sample pleaded guilty to all counts – 26 per cent being 'cracked trials' where the guilty plea came at the last moment after the case had been listed as a not guilty or contested case.[2] However, if one excludes the cases listed as guilty pleas, the percentage of cases listed for trial which 'cracked' was 43 per cent.

In just under one third of cases (31%) the defendant pleaded not guilty on one or more counts and there was a full trial. In three per cent of cases there was no plea at all because the defendant was simply bound over, or the charges were ordered to lie on the file.

There were 444 cases in the sample in which the court clerks did not fill out a questionnaire. The problem of establishing the plea in those cases from the other questionnaires is discussed in Appendix 1, pp. 246–48. We did establish the plea in a total of 2,891 out of the 3,191 cases in the sample – a shortfall of exactly 300. For reasons discussed in Appendix 1, we assume that virtually all of these 300 cases were guilty pleas.

4.1.2 Who helped the defendant to make up his mind about his plea?

Defendants were asked (Def40): 'Who was the main person to help you decide about pleading guilty or not guilty, or did you decide on your own?'

Respondents were specifically asked to tick only one of the five pre-coded boxes. But in fact a few answered more than one.[3]

The categories in order of frequency of mention were:

Table 4.2
Who helped the defendant decide how to plead?

	%
Decided on my own	56
Barrister	25
Solicitor	16
Friend/relative	2
Other	1
Total	100 (N=841[4])

In over half the cases (56%) the defendant said that he decided the matter of his plea by himself.

[2] See sect.5. below on 'Cracked Trials'
[3] The sample size was 793 of whom 24 did not reply, making 769. Between them they produced 841 responses.
[4] Plus 24 non-replies.

4.1.3 Did the defendant change his mind over the plea?

Defendants were asked (Def41): 'Did you change your mind about pleading guilty or not?'

Over two-thirds (68%) said they always intended to plead the way they did, but 32 per cent said they changed their minds.[5]

4.1.4 Did the defendant get legal advice as to how to plead?

Defendants who said they had changed their minds were asked (Def42): 'Did you get legal advice from your lawyers whether to plead guilty or not?'

Almost all said they had had legal advice. Out of 234, there were 11 (5%) who said they received no advice and 4 who said they had advice from someone other than a barrister or solicitor. All the rest had had advice from one or more lawyers[6].

Those who received legal advice were asked whether they agreed with the advice (Def43) and whether they followed the advice (Def45):

In 90 per cent of cases[7], the defendant agreed with the advice. But there were 22 cases where the defendant said he did not agree with the advice. In six of these the defendant claimed not to have committed the offence. In all but one of these the defendant pleaded not guilty. In the sixth case the defendant pleaded guilty 'because of what the barrister said to me.'

In several cases the defendant indicated he had been persuaded to plead guilty against his wishes (none of these were cases where the defendant said he had pleaded guilty to offences he had not committed):

- 'She wanted me to plead guilty against my wishes and in fact persuaded me to do so.'
- 'I did not agree because of the mitigating circumstances – ie why this event had happened and why I had got involved.'
- 'The advice given was aimed at the easiest solution for them with the least amount of effort. But I did not feel the best case had been put forward on my behalf. I felt they thought there was no point. I took their advice because I felt that if they were not interested, what chance did I have.'
- 'Because I was only technically guilty. But because of the nature of the charge I had to plead guilty.'

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[5] N=740; 53 non-replies.
[6] There were 2 non-replies.
[7] N=214; 6 non-replies.

– 'The barristers were negative and advised against a not guilty plea'.

In 94 per cent of cases the defendant followed the advice.[8]

4.2 CHALLENGES TO, AND ADMISSIBILITY OF, EVIDENCE

4.2.1 Was the admissibility of any evidence challenged?

The judges were asked (Jg41): 'Was there any challenge to the admissibility of any evidence?'

There were only 36 contested cases (5%) in which the judges said a confession was challenged and another 160 cases (21%) in which they said there was a challenge to some other form of evidence.[9] According to the judges, in the majority of contested cases (75%) there was no challenge of any kind to the admissibility of evidence.

The barristers' report of the proportion of contested cases with no challenge of any kind to evidence was much the same – Pb 77 per cent[10], Db 72 per cent[11]. The barristers were not asked a single overall question like that put to the judges – 'Was there any challenge to the admissibility of any evidence'. As will be seen, they were asked whether there was a challenge 1) to any tape-recorded interview evidence, 2) to any non-tape-recorded interview evidence, or 3) to any other evidence. The figure for 'no challenge to any evidence' was obtained by looking at the answers to all three questions in relation to each case.

Considering the emphasis usually given to problematic confession evidence, the relative infrequency of challenged confessions is of interest.

The barristers were agreed that the proportion of *all* cases that involved a challenge to evidence (ie including guilty pleas was around 10 per cent – Pb 9 per cent[12], Db 11 per cent [13].

The questions put in this regard to the barristers were somewhat more detailed. Barristers in contested cases were asked (Pb78, Db80): 'Was there any challenge to any tape-recorded interview (allegedly) made by the defendant, either at a voir dire and/or at the trial?' The same question was

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[8] N=216; 6 non-replies.
[9] N=754 with 86 non-replies.
[10] N=781 – the cases of mixed pleas were excluded.
[11] N=724. Again the mixed plea cases were excluded.
[12] N=2,254
[13] N=2,092

then put in relation to non-tape-recorded confession/admission evidence (Pb82, Db84).

When the interview was tape-recorded, challenges were very rare. When it was not tape-recorded, challenges occurred in only a minority of cases but, as one would have expected, the proportion was considerably higher.

Table 4.3
No challenge to tape-recorded and non-tape-recorded evidence

	Pb %	Db %
No challenge to tape-recorded evidence	94[14]	92[15]
No challenge to non-tape-recorded alleged admission or confession	42[16]	34[17]

4.2.2 Was there a defence challenge to prosecution scientific evidence?

As has already been seen (sect.3.2.4 above), the defence only challenged the prosecution's scientific evidence in a minority of contested cases involving such evidence – according to the defence barristers, in 24 per cent of cases in which there was scientific evidence, according to the judges, in 20 per cent.[18]

The 49 cases in which, according to defence barristers, the defence challenged scientific evidence represented seven per cent of the sample of Db contested cases[19]. The 51 cases in which, according to the judges, scientific evidence was challenged by the defence, represented 6 per cent of the sample of Jg contested cases.[20]

4.2.3 Nature of challenge to admissibility of evidence

The barristers were asked (Pb78,82; Db 80,84) to distinguish the nature of the challenge mounted by the defence to the evidence. The table below shows the numbers of cases in which a challenge was made to the fact of the evidence, or to its content or to some other circumstance or aspect of the evidence – distinguishing between cases where the evidence in question had been tape-recorded and not tape-recorded:

[14] N=529 with 11 non-replies.
[15] N=535 with 20 non-replies.
[16] N=78
[17] N=73
[18] The question, through an oversight, was not posed to prosecution barristers.
[19] N=724.
[20] N=844.

Table 4.4
Challenge to evidence

	Tape-recorded		Non-tape-recorded	
	Pb No.	Db No.	Pb No.	Db No.
Voir dire				
To fact	0	1	4	8
To content	2	4	9	15
Other	19	24	20	18
Total	21	29	33	41
Trial				
To fact	4	4	12	16
To content	17	16	26	26
Other	25	28	5	8
Total	46	48	33	50

The table demonstrates how rare such challenges are. To take the (higher) defence barrister's figure, there were only 16 cases in the entire sample in which the defence barrister stated that there was a challenge at the trial to the *fact* of non-tape recorded confession or admission evidence and only 26 cases in which the *content* of such evidence was challenged. (This represents respectively 0.8% and 1.2% of *all* cases in the defence barrister sample[21] and 2.2% and 3.6% of all contested cases[22].)

Other evidence: The questions about challenge to evidence were also asked in regard to 'other evidence' – ie evidence that was neither tape-recorded nor non-tape-recorded confessions or admissions – such as a fingerprint,a document or a weapon.

In regard to such evidence it obviously would not make sense to attempt to differentiate between objections to its fact or content. The barristers were therefore simply asked (Pb86, Db88): 'Was there any challenge to the admissibility of any other evidence?' and a distinction was drawn in responses between the *voir dire* and the trial.

According to the prosecution barristers, there was a challenge in regard to non-interview evidence at the *voir dire* in 8 per cent of contested cases[23] and at trial in 19 per cent of cases[24].

According to defence barristers, there was a challenge to non-interview evidence at the *voir dire* in 8 per cent of contested cases[25], and at trial in 22 per cent[26].

[21] N=2,092 – including 34 non-replies.
[22] N=724 with 34 non-replies.
[23] N=440; 50 non-replies
[24] N=608; 50 non-replies.
[25] N=543; 68 non-replies.
[26] N=601; 68 non-replies. It should be noted that the tick box structures for prosecution and defence barristers in regard to this question were different but the difference in the result was not material.

Overall, according to prosecution barristers, in contested cases there was a defence challenge of some kind in 202 cases out of 1,146 (18%); and according to defence barristers in 218 out of 1,146 (19%). In four-fifths of contested cases therefore there was no defence challenge of any kind to the prosecution evidence.

4.2.4 Was evidence held inadmissible?

The judges were asked (Jg42): 'Did you rule the [challenged] evidence admissible?'

In regard to confessions, in 14 cases (30%) the evidence was all held to be admissible[27], in 17 cases (36%) some had been held admissible and in 16 cases (34%) none had been held admissible. In two-thirds of cases therefore the evidence was held wholly or partially admissible.

In regard to other evidence, in 67 cases (45%) it was all held admissible[28], in 53 cases (36%) some was held admissible and in 29 cases (19%) none was held admissible. In four-fifths of the cases therefore the evidence was held wholly or partially admissible.

Again the questions put to the barristers were more detailed. Barristers were asked 1) whether the challenged evidence was held to be admissible 2) if not,on what ground it was held inadmissible and 3) how important it was. The numbers of cases are shown below. The numbers were so small as to make percentages somewhat meaningless. The low numbers also made cross-tabulation by variables (such as result of case,plea or where the confession or admission was obtained) pointless. But the numbers do at least demonstrate the relative frequency of each category.

1) The kind of evidence

Table 4.5a
Admissibility of tape-recorded evidence (Pb79; Db81)

	Pb No.	Db No.
Held admissible	18	13
Held inadmissible	7	6
Partly admissible/partly inadmissible	22	32
Total	47[29]	51[30]

[27] N=47.
[28] N=149.
[29] Plus 17 non-replies.
[30] Plus 9 non-replies.

Table 4.5b
Admissibility of non-tape-recorded confessions/admissions (Pb83; Db85)

	Pb No.	Db No.
Held admissible	21	15
Held inadmissible	13	15
Partly admissible/partly inadmissible	7	6
Total	41[31]	36[32]

There were fewer than two dozen cases where challenged non-tape-recorded confession or admission evidence was held wholly or partly admissible and an even smaller number where it was held wholly inadmissible.

Table 4.5c
Admissibility of other evidence (Pb87; Db89)

	Pb No.	Db No.
Held admissible	49	46
Held inadmissible	25	57
Partly admissible/partly inadmissible	49	51
Total	123[33]	154[34]

Again, much more evidence was held admissible than inadmissible. The numbers were slightly greater than for the two previous tables relating to interview evidence but, given that these were very large samples, the numbers were still low.

2) Grounds of inadmissibility

There are various grounds why evidence can be held inadmissible. We identified two in particular, inadmissibility under ss.76 and 78 of PACE. (Section 76 makes inadmissible confessions that are unreliable because of the way they have been obtained.Section 78 makes inadmissible any evidence, including confessions, the admission of which would make the proceedings unfair.)

[31] Plus 12 non-replies.
[32] Plus 18 non-replies.
[33] Plus 10 non-replies.
[34] Plus 11 non-replies.

Table 4.6a
Grounds of inadmissibility – tape-recorded evidence (Pb80; Db82)

	Pb No.	Db No.
PACE, s.76	3	2
PACE, s.78	5	7
Both ss.76 and 78	3	4
Other	20	22
Total	31[35]	35[36]

'Other' grounds of inadmissibility of tape-recorded evidence included – tape-recording included inadmissible material; irrelevancy; prejudicial effect outweighed probative value; inaccuracy of translation.

Table 4.6b
Grounds of inadmissibility – non-tape-recorded confession/ admission evidence (Pb84; Db86)

	Pb %	Db %
PACE, s.76	2	2
PACE, s.78	13	13
Both ss.76 and 78	3	4
Other	2	4
Total	20	23[37]

Table 4.6c
Grounds of inadmissibility – other evidence (Pb88; Db90)

	Pb %	Db %
PACE s.78	7	12
Hearsay	23	36
More prejudicial than probative	39	56
Other	16	36
Total	85	140[38]

'Other' grounds of inadmissibility included irrelevancy; relevant mainly to co-defendant; previous inconsistent statement; not allowed to refresh memory from document; called for expert answer from someone who was not an expert; wife not competent as witness.

[35] Plus 2 non-replies.
[36] Plus 6 non-replies.
[37] Plus 2 non-replies.
[38] Plus 1 non-reply.

3) How important was the inadmissible evidence?

We asked the barristers to give a view as to the importance of the inadmissible evidence.

Table 4.7a
Importance of inadmissible tape-recorded evidence (Pb81; Db83)

	Pb Nos.	Db Nos.
Sole evidence in the case	1	3
Important	7	9
Not so important as there was other evidence	21	22
Total	29[39]	34[40]

Table 4.7b
Importance of inadmissible non-tape-recorded confession/ admission evidence (Pb85; Db87)

	Pb No.	Db No.
Sole evidence in the case	1	1
Important	11	11
Not so important as there was other evidence	10	7
Total	22	19[41]

Table 4.7c
Importance of inadmissible other evidence (Pb89; Db91)

	Pb No.	Db No.
Sole evidence in the case	1	4
Important	26	37
Not so important as there was other evidence	52	62
Total	79[42]	103[43]

It seemed that the tape-recorded evidence held to be inadmissible was of considerable significance in a quarter to a third of the cases in question, and the non-tape-recorded confession/admission evidence was of considerable significance in something close to a half of the cases in question. Other evidence held to be inadmissible was of importance in around one third of cases.

4.2.5 Are the rules of evidence sensible?

The judges and the barristers were asked (Jg43,Pb92,Db94): 'Do you think that the rules of admissibility applied in this case is/are sensible?'

[39] Plus 2 non-replies.
[40] Plus 4 non-replies.
[41] Plus 7 non-replies.
[42] Plus 1 non-reply.
[43] Plus 5 non-replies.

The response was clear. The rules of evidence applied were said to be sensible in 97 per cent of cases by the judges[44], in 93 per cent of cases by prosecution barristers[45] and in 93 per cent of cases by defence barristers[46].

4.2.6 Did exclusion of evidence signify serious criticism of the police?

The judges were asked (Jg45): 'In the context of your decision to exclude some of the prosecution evidence, do you have any serious criticism of the conduct of the police in this case?'

The answers are shown below.

Table 4.8
Gravity of police conduct where evidence held inadmissible

	%
No criticism at all	68
No serious criticism	16
Yes – criticism of serious malpractice (fabrication of evidence, improper physical or mental pressure on defendant etc)	0
Yes – criticism of serious breaches of rules in PACE Codes of Practice	11
Yes – other serious criticism	5
Total	100 (N=106[47])

In over two-thirds (68%) of the instances where evidence was excluded it signified no criticism of the police at all. There were no cases of the most serious kinds of malpractice. Serious breaches of PACE occurred in a total of 12 cases – 1 per cent of the contested cases in the Jg sample[48].

4.2.7 Was it a case in which the police should have considered disciplinary proceedings?

The judges who had said they had held evidence to be inadmissible were then asked (Jg46): 'Do you think that the police should consider your decision to exclude evidence (and any critical remarks you may have made

[44] N=186; 8 non-replies.
[45] N=138; 104 non-replies and 443 cases in which the reply was 'None applied'. It seems likely that most of the non-replies were also cases in which no rules of evidence were applied.
[46] N=159; 108 non-replies and 435 cases in which the reply was 'None applied'. The same comment as in the previous footnote applies to the large number of non-replies.
[47] Plus 11 non-replies.
[48] N=844

in court) as a basis for possible disciplinary action against the officer(s) concerned?'

There were 79 replies[49]. In four cases the judge said he thought that the police should consider disciplinary proceedings. Four cases does not sound like many but 'grossed up' on an annual basis this would mean 100 or more such cases per year.

4.2.8 Did the police have any inadmissible evidence that would have strengthened the prosecution's case?

The police were asked in contested cases (Pol16): 'Did the police have any *inadmissible evidence* which you believe would have made the prosecution case stronger, had you been allowed to use it?'

In over three-quarters of the cases (77%[50]) the police said they had no such evidence. In 23 per cent (173 cases) however they said they did have such evidence.

The 173 cases in which there was such evidence, resulted in 143 cases which gave particulars of 147 types of inadmissible evidence.In a quarter of these the inadmissible evidence was regarding 'previous convictions', in nearly a fifth (18%) it was the evidence of a co-defendant and in a little over one tenth (12%) it was hearsay evidence.

When there was inadmissible evidence, the defendant pleaded not guilty twice as often as when there was none – 25 per cent[51], against 11 per cent[52].

But where the cases were contested, there was no great difference between those that ended in a guilty or a not guilty verdict – the police had no further inadmissible evidence in 78 per cent of the former and 75 per cent of the latter.

4.3 'UNUSED MATERIAL'

4.3.1 Was the prosecution aware of any 'unused material'?

'Unused material' is material in the possession of the prosecution which the prosecution do not intend to use and which, under the Attorney General's Guidelines, may or may not have to be disclosed to the defence.

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[49] Plus 34 non-replies.
[50] N=762; 96 non-replies.
[51] N=109.
[52] N=538.

The CPS were asked (Cp52): 'Were the CPS aware of the existence of any 'unused material' (within the meaning of the Attorney General's Guidelines) in this case?'

In just under one third (32%[53]) of the cases (which consisted of contested cases and 'cracked trials' but not cases listed as guilty pleas), the CPS said they had been aware of the existence of 'unused material'.[54]

The prosecution barristers in contested cases were asked (Pb113) whether they had had to consider at any stage whether 'unused material' should be disclosed to the defence.

Like the CPS, they said that this issue had come up in just under one third of the cases – 31%.[55]

4.3.2 If so, was there any difficulty in getting the unused material from the police?

Both the CPS and the prosecution barrister were asked (Cp53; Pb115) whether the prosecution had experienced any difficulty in getting the 'unused material' from the police.

The CPS said there was no difficulty in 94 per cent of cases but that there was difficulty in the remaining 6 per cent[56]:

- 'Police told CPS that a witness had not been interviewed when he had been.'
- 'The police didn't think that surveillance logs should be classified as unused material.'
- 'A number of requests to the police needed to obtain the statements.'
- 'List of items received was lost by the police.'
- 'Unused material re ID parade not supplied with file. When requested it turned out to have been destroyed.'
- 'The superficial investigation of the case by the police failed to reveal all significant documentary evidence.'
- 'Evidence retained by doctors and social workers who were obstructive to full disclosure.'
- 'It was plain from the papers that the victim had made a previous statement which had not been included in the papers and this was not sent despite a memo requesting it.'

The prosecution barristers said there was no difficulty in 89 per cent of cases and some difficulty in 11 per cent.[57]

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[53] N=1,299; 23 non-replies.
[54] N=129; 23 non-replies.
[55] N=670; 15 non-replies.
[56] N=401; 9 non-replies.
[57] N=204; 6 non-replies.

4.3.3 Was the material obtained from the police?

Again, both the CPS and the prosecution barrister were asked (Cp54; PbI16): 'Were you satisfied that you got all the 'unused material' from the police?'

The CPS said that in 96 per cent of cases they were so satisfied, but that in 4 per cent (17 cases) they were not.[58]

The prosecution barristers said they were satisfied in 84 per cent of cases and not satisfied in 2 per cent (4 cases) – but in 14 per cent they said they did not know.[59] (The 'Don't know' option was not given to the CPS respondents. If the Don't knows are eliminated from the barristers' responses to make the two sets of figures comparable, 98 per cent of barristers were satisfied and 2 per cent were not.)

4.3.4 Was there any difference of view between the police and the CPS as to what the defence should see, and if so, whose view prevailed?

The CPS were asked (Cp55) whether there had been any difference of view between the CPS and the police about what unused material should be disclosed to the defence.

The CPS said in 99 per cent of cases there was no difference of view, but that in 1 per cent (5 cases) there had been.[60] In four of those five cases the matter was resolved in line with the CPS' view. In one it was resolved in line with the police view.

4.3.5 Was there any difference between prosecution counsel and the CPS as to what should be disclosed to the defence, and if so, whose view prevailed?

The CPS were asked (Cp57) whether there was any difference of view between the CPS and prosecution counsel as to what 'unused material' should be disclosed to the defence and if so, how it had been resolved.

In 98 per cent of cases there had been no difference of view.[61] In two per cent (6 cases) there had been a difference of view. In two cases the disagreement had been resolved in line with the barrister's view, in one case in line with the CPS view and in three cases a compromise result had been agreed.

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[58] N=400; 10 non-replies.
[59] N=208; 2 non-replies.
[60] N=401; 9 non-replies.
[61] N=398; 12 non-replies.

4.3.6 Was all the 'unused material' disclosed to the defence?

The prosecution barristers (Pb114) and the CPS (Cp59) were both asked whether all the 'unused material' was disclosed to the defence.

They more or less agreed as to what had happened. They both said that in over four-fifths of the cases (CPS 85%[62]; Pb 81%[63]) 'All' was disclosed and in around a tenth of the cases (CPS 10%; Pb14%) 'Some' was disclosed. They both said that in 5 per cent 'None' (CPS 21 cases; PB 10 cases) was disclosed.

4.3.7 Was there defence concern over the existence of 'unused material'?

The defence barrister (Db125) and the defence solicitor (Sol57) in contested cases were both asked: 'Did you at any stage feel concerned that the prosecution had not disclosed any 'unused material?'

The barristers said they felt such concern in nearly a quarter of the cases (23%[64]). The solicitors said they felt such concern in 18 per cent of cases[65].

4.3.8 If so, was the matter taken up with the prosecution?

Both agreed that in almost all cases the matter was taken up with the prosecution. According to the barristers it was not taken up in 7 per cent of cases[66]; the solicitors said in 6.5 per cent[67].

4.3.9 What was the resolution of the matter?

The barristers (Db127) and the solicitors (Sol60) were both asked how the matter had been resolved. There were four pre-coded answers:

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[62] N=394 plus 16 non-replies.
[63] N=208 plus 2 non-replies.
[64] N=680; 22 non-replies.
[65] N=525; 16 non-replies.
[66] N=157; one non-reply.
[67] N=93.

Table 4.9
How was the matter of unused material resolved?

	Db %	Sol %
Established there was no unused material	16	14
All the unused material was disclosed	44	34
Some disclosed, some improperly not disclosed	24	34
None disclosed, at least some improperly withheld	16	18
Total	100 (N=144[68])	100 (N=84[69])

As is clear from Table 4.9 the barristers and the defence solicitors agreed that in a large proportion of these cases (Db 40%; Sol.52%) they felt that unused material that should have been disclosed had not been.

4.3.10 Were the defence satisfied with this resolution?

Given the replies to the previous question, it is hardly surprising that there were a considerable number of cases in which the defence said they were not satisfied with the outcome.

The defence barristers said there were 23 cases (16%) in which they were 'Not satisfied' and another 52 (36%) in which they were only partially satisfied[70]. Defence solicitors said there were 24 cases (28%) in which they were 'Not satisfied' and another 33 (38%) in which they were only partially satisfied[71]. Both were therefore dissatisfied in more than half these 'unused material' cases.

4.3.11 Did the defence ask the judge to intervene?

Defence barristers who said they were not satisfied with the outcome were asked (Db129) whether they had asked the judge to intervene or assist.

Two-fifths (41%) said they had; three-fifths (59%) said they had not.[72]

4.3.12 Did the judge know of any important witness who was not called?

A quite different kind of 'unused material' is the witness who is not called by either side. It is said to be a defect in the Anglo-American, so called,

[68] Plus 2 non-replies.
[69] Plus 3 non-replies.
[70] N=146.
[71] N=87.
[72] N=71; 4 non-replies.

'adversary system' that sometimes neither side calls a relevant witness and the judge does not call him either. (In a criminal case the judge has the technical power to call a witness not called by either party – but the power is virtually never exercised.) We therefore asked the judges (Jg50): 'Were you aware of any important witness(es) who were not called by either side?'

In just over four-fifths of cases the judges said No – but in 19 per cent they said Yes they did know of one or more important witness who was not called by either side.[73]

4.4 TIME (AND ALLEGED TIME) WASTING

4.4.1 Did counsel call too many witnesses?

The judges were asked (Jg49): 'In your view, did either counsel call too many witnesses?'

There were three offered alternative answers – 'Far too many', 'Too many' or 'Not too many'. In regard to both prosecution[74] and defence[75] the judges said in 97 per cent of cases that the answer was 'Not too many'. There was not a single case in which a judge said that either the prosecution or the defence had called 'Far too many'. In only 18 cases (2%) did the judge say the defence had called 'Too many' and in 19 cases (3%) they said the prosecution had called 'Too many'.

Each barrister likewise was asked (Pb130, Db123) whether his opponent had wasted time by the 'calling of unnecessary evidence'. (It will be noted that the question was slightly differently phrased from that put to the judges. It seems likely however that both questions would have been treated as meaning the same since the word 'calling' could only properly be applied to witnesses.)

In 96 per cent of cases the prosecution barristers thought the defence had not called too much unnecessary evidence, in 4 per cent there had been 'a little', and in 0.5 per cent a 'fairly large amount' [76]. The defence barristers thought there had been none in 91 per cent of cases, 'a little' in 8 per cent and also 'a fairly large amount' in 0.5 per cent [77].

4.4.2 Was counsel too long-winded?

The judge was asked (Jg60): 'Did you think that either counsel was too long-winded in presenting his/her case?'

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[73] N=743 plus 119 non-replies. Note that the number of non-replies was very high. If the non-replies are all taken as signifying No, the proportion of Yes replies would still be 17% of the total.
[74] N=687; 185 non-replies.
[75] N=754; 118 non-replies.
[76] N=619; 66 non-replies.
[77] N=674; 28 non-replies.

The answers were:

Table 4.10
Was counsel too long-winded?

	%
Yes – the defence	10
Yes – prosecution	3
Yes – both	3
No	84 (N=782[78])

'Long winded' is obviously a relative concept and it may be that practising lawyers and judges are too inured to leisurely exposition to be good judges of brevity. Nevertheless it is of interest that, from the judge's perspective, although a minority of counsel talk too much, the great majority are not excessively long-winded. It is also perhaps of interest that the judges found defence counsel long-winded more than three times as often as prosecution counsel.

4.4.3 Did the judge try to get counsel to be more succinct?

The judge was asked (Jg61): '[If counsel was too long winded] did you try to get counsel to be briefer?'

In reply the judges said:

Table 4.11
Did judge try to get counsel to be briefer?

	%
Yes – with success	18
Yes – with mixed success	38
Yes – with no success	11
No attempt made	33
Total	100 (N=122[79])

In over half the cases (56%) the attempt had been made and with at least some success. But in just under half either no attempt was made (33%) or it was made with no success (11%).

4.4.4 Did the indictment contain too many counts?

The barristers in contested cases (but unfortunately not the judges) were asked (Pb112, Db124): 'Do you think that the indictment used for the trial contained unnecessary counts?'

[78] Plus 90 non-replies.
[79] Plus one non-reply.

Prosecution counsel in 95 per cent of cases[80] thought there had not been too many counts in the indictment. In 90 per cent of cases defence barristers were of the same opinion[81].

There were only two cases (0.3%) in which the prosecution thought there were 'Far too many' counts and 31 (5%) in which they thought there were 'Some too many'. The comparable numbers for defence barristers respectively were four (1%) and 65 (10%).

4.4.5 How long was prosecuting counsel's opening speech?

Prosecution counsel in contested cases was asked: 'How long was your opening speech?'

In 89 per cent of cases[82] prosecuting counsel estimated his opening lasted under half an hour[83] and in another 8 per cent between 30 minutes and an hour. In 23 out of 651 cases (under 4%) the opening speech was longer than an hour and in 10 cases it was longer than two hours.

4.4.6 Did the defence make an opening speech?

The defence barrister in contested cases was asked (Db134): 'Did the defence make an opening speech before starting the defence evidence?'

Excluding the cases in which the defence called no evidence[84], the defence made no opening speech in 92 per cent of cases[85]. In the 37 cases in which the defence made an opening speech, it lasted under half an hour in 32 (86%).

4.4.7 Judges' overall view of counsel

The judges were asked (Jg62) 'What was your overall view of counsel?'

In regard to the prosecution, 28 per cent of prosecution barristers were thought by the judges to be 'Very competent', 56 per cent were thought to be 'Competent', 14 per cent were thought to be 'Mediocre' and 1 per cent 'Incompetent'[86].

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[80] N=663; 22 non-replies.
[81] N=677; 25 non-replies.
[82] N=661; 24 non-replies.
[83] The pre-coded answers did not offer divisions of less than half an hour.
[84] Of which there were 154 – being 24 per cent of those in which the defence barrister replied to this question.
[85] N=497.
[86] N=872; 96 non-replies.

In regard to the defence, 30 per cent of defence barristers were thought by the judges to be 'Very competent', 51 per cent were thought to be 'Competent', 16 per cent were thought to be 'Mediocre' and 3 per cent 'Incompetent'.

The assessment of prosecution and defence barristers was therefore very similar. For both prosecution and defence barristers, the judges referred to 'lack of ability' and 'lack of experience' as grounds for their negative verdicts about the quality of the work much more frequently than 'lack of preparation'.

There was however one difference. The judges' overall view of the competence of prosecution counsel was not affected by the outcome, whereas in regard to defence barristers there was such a connection:

Table 4.12
Judges' overall view of defence counsel's ability – by verdict

	Not guilty %	*Guilty* %
Very competent	33	23
Competent	50	51
Mediocre	15	20
Incompetent	3	6
Total	100 (N=226)	100 (N=265)

4.5 DEFENDANT'S EVIDENCE

4.5.1 Did the defendant give evidence?

Both prosecution and defence barristers were asked whether the defendant gave evidence.

The prosecution said he gave evidence in 74 per cent of cases[87]; the defence said he gave evidence in 70 per cent of cases[88].

Giving evidence by verdict

According to the prosecution, where the defendant gave evidence he was acquitted of all charges in 49 per cent of cases[89]. Where he did not give evidence he was acquitted in 37 per cent[90]. But according to the defence barristers, the proportion acquitted was 50 per cent in the one case[91] and

[87] N=641; 44 non-replies.
[88] N=659; 43 non-replies.
[89] N=327.
[90] N=91.
[91] N=315.

49 per cent in the other[92]. Where we had a questionnaire returned by both barristers there was no discrepancy. The difference arose from cases where there was a questionnaire from one only of the barristers.

Giving evidence by previous convictions

According to the prosecution barrister, where the defendant had previous convictions[93], he gave evidence in 71 per cent of cases, compared with 83 per cent of cases where he had no previous convictions[94].

The broad direction of this result was confirmed by defence barristers, according to whom, where the defendant had previous convictions he gave evidence in 67 per cent of cases[95] – compared with 77 per cent where he had no prior convictions.[96]

Giving evidence and ethnic background

Both prosecution and defence barristers agreed that Indian/Pakistani/Bangladeshi defendants[97] were the most likely to give evidence (Pb – 90%[98]; Db 81%[99]) followed by White defendants[100] (Pb – 74%[101]; Db – 71%[102]), followed by Black-Caribbean/African defendants[103] (Pb – 68%[104]; Db – 64%[105]).

4.5.2 If defendant did not give evidence, did judge give jury the standard direction?

The barristers were then asked (Pb135; Db147): 'If the defendant did not give evidence, did the judge give the standard direction'.[106] (As has been seen[107], standard directions are supplied to the judges in a loose-leaf book.)

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[92] N=88.
[93] N=490.
[94] N=147.
[95] N=510.
[96] N=146.
[97] Pb N=30. Db N=31.
[98] N=30.
[99] N=31.
[100] Pb N=488. Db N=495.
[101] N=489.
[102] N=495.
[103] Pb N=87. Db N=93.
[104] N=87.
[105] N=93.
[106] The standard direction is: 'The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict or explain the evidence put before you by the prosecution.'
[107] See sect.1.2.6.

The table below indicates the responses to the four precoded answers:

Table 4.13
Did judge give standard direction?

	Pb %	DB %
Gave standard direction	60	58
Gave gist of standard direction in different form of words	26	24
Gave a more robust direction favorable to the defence	11	11
Gave a more robust direction favorable to the prosecution	3	7
Total	100 (N=113[108])	100 (N=120[109])

Prosecution and defence barristers gave virtually identical answers. In over 80 per cent of cases the judge gave either the standard direction or words to similar effect. In around 10 per cent he used a different formula which was more favorable to the defence. In under 10 per cent he used a different formula favorable to the prosecution.

4.5.3 If standard direction not given, did counsel object?

Where the defendant did not give evidence, counsel were then asked (Pb136; Db148): 'If the standard direction was not given, did you have any objections to the way the judge put the matter to the jury?'

There were 44 cases in which the prosecution responded[110]. In 91 per cent the answer was No. There were 48 cases in which the defence responded.[111] In 81 per cent the answer was No.

The prosecution barrister said that in none of the four cases in which he had objected to the judge's formulation of the direction on the right of silence in court had he given voice to his objections. The defence barrister said that he had given voice to his objections in only one of the nine cases in which he had had such objections. (Six of the eight cases in which he did not express his objections were ones in which the prosecution barrister said that the judge had given a robust direction to the jury favorable to the prosecution.)

[108] There were 54 non-replies.
[109] There were 81 non-replies.
[110] With 1 non-reply.
[111] With 2 non-replies.

4.6 MATTERS RELATING TO PREVIOUS CONVICTIONS

4.6.1 Did the defendant have previous convictions?

The barristers in contested cases were asked (Pb 131; Db 142) whether the defendant had previous convictions.

The responses were the same. Both prosecution and defence barristers said the defendant had previous convictions in 77 per cent of cases.[112]

4.6.2 Were the previous convictions filed with the court before the hearing?

The court clerks were asked (Cc18): 'Were the defendant's previous convictions filed with the court before the trial/hearing?'

In 70 per cent of cases the court clerk said that the previous convictions were filed with the court before the trial/hearing; in 17 per cent they were not filed; in 10 per cent the defendant had no previous convictions and in 3 per cent the court clerk did not know.[113]

4.6.3 Did the judge know about the defendant's previous convictions during the trial?

Two questions were asked to discover whether the judge knew about the defendant's prior convictions during the trial. Court clerks were asked (Cc19): 'If the previous convictions were filed with the court,was the list given to the judge before the summing up?'. The judges were asked (Jg51): 'Did your papers for the trial include a form showing the defendant's previous convictions?'

The court clerks said that in 93 per cent of cases[114] the judge was told of the defendant's previous convictions before the summing up. The judges said that information about previous convictions was included in the judge's papers in 83 per cent of cases.[115]

4.6.4 How serious were the previous convictions?

The judges were asked (Jg52) whether they would describe the defendant's previous convictions as 'Very serious', 'Fairly serious' or 'Not very serious'. No guidance was given as to what we meant by these terms.

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[112] Pb N=665; 20 non-replies. Db N=682; 20 non-replies.
[113] N=740; 16 non-replies.
[114] N=513; 7 non-replies.
[115] N=783; 89 non-replies.

In one tenth of cases they were described as 'Very serious', in half the cases (53%) as 'Fairly serious', and in the remaining one third or so of cases ((37%) as 'Not very serious'.[116]

4.6.5 Were the previous convictions similar to the present charges?

The judges (Jg53) and the barristers (Pb132; Db143) in contested cases were asked how similar they thought the present charges were to the charges concerned in previous conviction cases.

In the view of both sets of barristers the previous convictions were similar in something over half the cases (Pb 56%[117]; Db55%[118]). The judges thought they were similar wholly (24%) or at least in part (40%) in a little under two-thirds of the cases (64%[119]).

4.6.6 Did the previous convictions become admissible?

The judges (Jg54) and the barristers (Pb133; Db144) were asked whether in cases where the defendant had previous convictions they emerged during the trial.

The judges said that they did not emerge in just over 80 per cent (82%[120]) compared with around or just under 80 per cent as reported by the barristers (Pb 79%[121]; Db 78%[122]).

According to the judges, when the previous convictions did emerge, they were usually introduced by the *defence* (68 cases) rather than by the prosecution (16 cases). In other words, the defence introduced the previous convictions in 81 per cent of cases in which they emerged.

The two sets of barristers agreed that the defence sometimes introduced the previous convictions – but they thought it happened somewhat

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116 N=488; 9 non-replies.
117 N=504; 5 non-replies.
118 N=521; 6 non-replies.
119 N=486; 11 non-replies.
120 N=470; 27 non-replies.
121 N=497; 10 non-replies.
122 N=510; 17 non-replies.

less often than the judges – Pb 56 cases out 103 (or 54%), Db 68 cases out of 114 (or 60%).[123]

4.6.7 How did the previous convictions emerge?

The question to the barristers asked them to differentiate more precisely as to how the previous convictions had emerged. The pre-coded answers proceeded on the assumption that previous convictions normally emerge as a result of the prosecution rather than the defence. They referred to the four rules of evidence which allow the prosecution to introduce the defendant's previous convictions. One is where the defendant asserts his good character. Another is where the facts of the previous case are very similar to the facts of the present case. Another is the so called 'tit for tat' rule which allows the prosecution to ask permission to introduce the defendant's prior convictions when the defence makes imputations against the character of prosecution witnesses. A variant of this rule is when one co-accused has made imputations against the character of another. For the sake of completeness there was also the usual final category of 'Other'.

The table below gives the frequency of these various possible grounds for the prosecution introducing the previous convictions:

Table 4.14
How did previous convictions emerge?

	Pb No.	Db No.
'Tit for tat' rule	26	26
Defendant asserted good character	8	7
'Similar facts'	2	2
Evidence of co-defendant	2	1
Other	17	30
Total	53	66

In 'other cases', one common reason for the defence introducing the prior record was where the previous convictions had occurred a long time before

[123] The question to the judges was slightly different. They were asked: 'Did the defendant's previous convictions become admissible, and, if so, who introduced them?'. The barristers were asked: 'Did (any of) the previous convictions emerge in evidence during the case, under any of the following circumstances' – one of which was 'Introduced by the defence'. It is difficult to see how this slightly different question could explain the different result.
In some cases there was a straight difference as regards what happened. Thus there were 17 cases in which the judge said the previous convictions did not emerge and the defence barristers said they did. There were 14 where the judge said that previous convictions did not emerge but prosecution barristers said they did. There were also a few cases where the barristers said that the previous convictions did not emerge and the judges said they did.

– a fact that was used by the defence to show that the person was a person of (reasonably) good character. Or the defence admitted minor previous convictions in the context of a generally positive character statement. In some cases the defence admitted the previous conviction as a way of pre-empting the prosecution's introduction of such material – typically after an attack on a co-defendant.

In some cases the defendant's previous convictions had emerged inadvertently – blurted out by mistake by the defendant (or by someone else). In some the previous conviction was an integral part of the charge (theft from the defendant's probation officer; possession of a firearm within 5 years of a relevant offence; or the prosecution's case was that the three defendants had met and hatched their conspiracy in prison).

4.6.8 Was the defence inhibited by the 'tit for tat' rule

The 'tit for tat' rule creates a potentially serious problem for the defence. If the defendant has previous convictions and his defence includes an attack on the character of prosecution witnesses, his convictions may be brought out by the prosecution. If, because of this, he decides not to make such an attack, his defence may be seriously (or even fatally) weakened.

The Criminal Law Revision Committee in its 1972 Report[124] recommended that where the attack is central to the defence case (eg that the police fabricated or planted evidence), the 'tit for tat' rule should not apply. This recommendation was however not implemented.

In order to find out how often the defence find themselves in difficulties over this rule, defence barristers were asked(Db145): 'In cases where the defendant had previous convictions, was your defence inhibited in any way by the 'tit for tat' rule(where the prosecution is allowed to introduce previous convictions in evidence if the defence attacks the character of prosecution witnesses)?'

There were 471 substantive replies[125]. Of these, over 70 per cent said the defence was not inhibited – either because there was no need to attack the prosecution evidence (20%) or otherwise (52%). But there were 134 cases (28%) in which the defence barrister said the defence *was* inhibited by the rule.

Inhibited by 'tit for tat' rule by result

We looked to see whether the acquittal rate in cases where the defence said it was inhibited by the 'tit for tat' rule was different from cases in which this was not the case.

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[124] *Evidence (General)*, 1972, Cmnd 4991. paras 123–30.
[125] Plus 56 non-replies.

It proved that the acquittal was virtually the same in either case – 48 per cent where the defence was inhibited by the rule[126], compared with 47 per cent[127] where it was not.[128]

4.7 NATURE OF DEFENCE

4.7.1 What was the nature of the defence?

Prosecution and defence barristers in contested cases were asked (Pb121; Db136): 'What was the nature of the defence?' They were asked to differentiate between the facts (*actus reus*) and criminal intent (*mens rea*). Criminal law normally requires that the prosecution proves both that the defendant did the act in question[129] and that he had the necessary knowledge or intent to make it a crime.[130]

The facts (actus reus) The barristers were asked whether the defendant admitted or denied the basic facts.

They agreed that in 40 per cent of cases the defendant admitted the basic facts, and that in 60 per cent of cases he denied them.[131]

4.7.2 Admitted basic facts by previous convictions

Cross-tabulation showed that those with previous convictions were slightly *less* likely to admit the basic facts (Pb and Db 38%[132]), than those without previous convictions (Pb and Db 45%[133]).

The knowledge or intent ('mens rea'). They were then asked to state what was the defence position on *mens rea*. The answers given by the barristers are set out below:

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[126] N=84 cases.

[127] N=156.

[128] For the purposes of this test we looked only at cases where the defendant was found either guilty of all charges or not guilty of all charges and was inhibited by the rule or was not inhibited by the rule. So cases where he was found guilty of some and not guilty of other charges were excluded and so too were cases in which the question of attacking the character or credibility of the prosecution's witnesses did not arise.

[129] An example would be that the defendant admits that he hit the victim or that he did have the stolen goods in his garage.

[130] That he intended to cause him injury; that he knew the goods were stolen.

[131] Pb N=619 with 77 non-replies; Db N=638 with 71 non-replies. The two barristers gave precisely the same figures.

[132] Pb N=463; Db N=479

[133] Pb N=136; Db N=146

Table 4.15
Defence position on *mens rea*

	Pb %	Db %
No criminal intent	52	54
No criminal knowledge	25	29
Self-defence	21	22
Provocation	2	2
Diminished responsibility	0.2	–
Miscellaneous other	30	33
Total	130[134]	140[135]

In over three-quarters of the cases (Pb 77%; Db 83%) the defence was a lack of criminal knowledge or intent.

4.7.3 Admitted *mens rea* by previous convictions

Where the defendant had previous convictions he was a little *more* likely to admit the *mens rea* (Pb 62%; Db 60%) than where he had none (Pb 55%; Db 56%).

In 1972 the Criminal Law Revision Committee (CLRC) in its 11th Report (paras. 92–94) recommended that where the defendant admitted the act (*actus reus*) and denied only that he had the necessary knowledge or intent (*mens rea*) his previous convictions could be brought to the notice of the jury. The recommendation was not implemented.

If it were implemented, what numbers of cases would be affected?

According to the prosecution barristers, there were 134 cases in which the defendant admitted the *actus reus* but denied the *mens rea*. Ninety six (72%) of these defendants had previous convictions of which 53 were 'similar previous convictions'. In 38 of these 53 cases the previous convictions did not emerge. These 38 cases would therefore have been affected if the CLRC's proposal had been implemented.

According to the defence barristers there were 149 cases in which the defendant admitted the *actus reus* but denied that he had the necessary *mens rea*. One hundred and seven of the 149 (72%) had previous convictions of which 54 were 'similar previous convictions'. In 44 of the 54 cases the previous convictions did not emerge. These 44 cases would therefore have been affected if the CLRC's proposal had been implemented.

[134] N=555 with 141 non-replies. The percentage is more than 100 because respondents could tick more than one category.
[135] N=578 with 131 non-replies. Again, the percentage is over 100.

4.8 POSITION OF THE DOCK

The fact that the defendant is placed in the dock may be said to put him at a disadvantage not only by identifying him as 'guilty' in the eyes of the jury but by impeding his contact with his own lawyers. Questions about this were put to the defence.

4.8.1 Do the lawyers think it would have been helpful for the defendant to sit closer to them?

The defence solicitors[136] were asked (Sol.72): 'If the defendant had been sitting close to his/her lawyers rather than in the dock, do you think that it would have helped in the presentation of his/her case?' They were asked to differentiate between their perspective and that of the defendant. The answers appear in the table below:

Table 4.16
Defence solicitor's view as to whether client sitting closer to lawyer would have helped

	Yes %	No %	DK %
As far as defence barrister is concerned[137]	29	59	12
As far as defendant is concerned[138]	39	46	15

As expected, the solicitors were inclined to think that clients generally would want to sit close to their lawyers more often than the lawyers themselves would have wanted this. But the proportion of defence solicitors who themselves thought it would have been helpful for the client to have been sitting near counsel was almost one third (32%)[139].

What did the defendants themselves think?

4.8.2 Did the defendant want to talk to lawyers but found the dock too distant

The defendant was asked (Def66): 'During the trial, were there things you wanted to tell your lawyers, but you couldn't because you were too far away?'

In nearly two-thirds of cases (63%)[140] the defendant said No; in over a third the defendant answered Yes.

[136] Though, unfortunately, not the defence barristers.
[137] N=469 with as many as 129 non-replies.
[138] N=457 with as many as 141 non-replies.
[139] N=412; 129 non-replies, 57 Can't say.
[140] N=464; 36 non-replies.

But defendants in contested cases thought (Def68) that they could have helped the barrister in putting the defence across in 60 per cent of cases[141] and that the barrister would have found it helpful to have him sitting close by in 72 per cent of cases.[142]

4.8.3 How important were the things the defendant wanted to say to his lawyers?

Defendants who said there were things they had wanted to say to their lawyers which they couldn't say from the dock were asked (Def67) how important were these things. They were offered four precoded alternatives:

Table 4.17
How important was what defendant wanted to tell his lawyers?

	%
Very important	46
Fairly important	42
Not very important	12
Not at all important	0.6
Total	100 (N=161[143])

In nearly 90 per cent of cases (88%) the defendants thought what they wanted to tell their barrister to be 'Very important' or at least 'Fairly important'.

4.9 'NO CASE TO ANSWER' SUBMISSIONS

4.9.1 Did the defence submit there was 'no case to answer'?

At the end of the prosecution's case the defence can submit that there is no case to answer. If the judge accepts this submission, the case is brought to an immediate end on those counts with a directed acquittal.

The barristers in contested cases were asked (Pb117; Db 130) whether the defence had made such a submission.

They broadly agreed that such a submission had been made in something under one third of cases – Pb 30 per cent[144]; Db 28 per cent.[145]

4.9.2 If so, was it upheld?

The barristers were then asked (Pb118; Db131) whether the submission had been successful.

[141] N=446; 52 non-replies.
[142] N=296. There were 48 non-replies and 155 who said they were 'Not sure'.
[143] Plus 3 non-replies and 9 Don't knows.
[144] N=658; 27 non-replies.
[145] N=672; 30 non-replies.

The pre-coded responses were slightly different for the respective questionnaires. The prosecution barristers were simply asked to answer 'Yes' (ticked in 28% of cases) or 'No' (72 per cent).[146] The defence barristers were given a choice between 'Yes, upheld on all counts' (27%) or 'Yes, upheld on some counts' (16%), or No (56%)[147].

But when the 'Yes, upheld on some counts' category were counted as 'No' (which in the overall sense seems appropriate), the defence barristers agreed with the prosecution that 27 per cent were upheld.

4.9.3 If not upheld, would the barristers themselves have upheld the submission?

Both barristers were asked (Pb119; Db 132) whether, if they had been the judge, they would upheld the submission.

In only 9 cases (6% of 140) did the prosecution barrister say that he would personally have upheld the submission. Defence barristers took a more kindly view of the merits of their own submissions of no case – in as many as 54 out of 121 cases (45%) they would have upheld them.

4.9.4 If not upheld, would the submission have been upheld pre-*Galbraith*?

In *R v Galbraith* [1981] 1 WLR 1039, the Court of Appeal narrowed the test of when a submission of no case should be accepted – in essence by depriving the judge of the right to stop the case where he took the view that the prosecution witnesses should not be believed.

The barristers and the judge were asked (Pb120; Db133; Jg58): 'If the rules pre-*Galbraith* had applied in this case, do you believe that the submission would have been upheld?'

The three categories of respondents gave a very different range of responses to this question. The prosecution barristers thought that pre-*Galbraith*, the submission of no case would have been upheld in only 9 per cent of the cases[148]. Defence barristers, by contrast, thought it would have been upheld in 48 per cent[149].

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[146] N=190; 6 non-replies.
[147] N=182; 5 non-replies.
[148] N=138; 1 non-reply.
[149] N=119; 13 non-replies.

The question to the barristers was posed only in the cases where there had been a submission of no case that was rejected in whole or in part. The question to the judges was asked for all contested cases. The proportionate response cannot therefore be compared with that of the barristers.

The judges thought that pre-*Galbraith* the submission would have been upheld in 6 per cent of cases[150]. These 36 cases included at least 15 in which the defence in fact made no submission of no case.

We compared the acquittal rate in cases where the respondents thought that pre-*Galbraith* a submission of no case would have succeeded, with those where they thought it would not have succeeded. As can be seen from Table 4.9.1, for all three categories of respondent, the calculation produced striking results.

The 'weakest' was for defence barristers. Where in their view, pre-*Galbraith* a submission of no case would have succeeded, the acquittal rate was 69 per cent[151], compared with 57 per cent where such a submission would not have succeeded[152].

For prosecution barristers the difference was much greater – 91 per cent acquittal rate where they thought the submission would have succeeded pre-*Galbraith*[153], as compared with 44 per cent where it would not[154].

For judges, the contrast was stronger still – every one of the cases in which the judge thought the submission would have succeeded pre-*Galbraith* ended with an acquittal[155], compared with 46 per cent in the other cases[156].

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[150] N=605.
[151] N=35.
[152] N=37.
[153] N=11.
[154] N=80.
[155] N=9.
[156] N=403.

Table 4.18
Acquittal rate by whether submission of no case 'would have succeeded pre-*Galbraith*':

	Acquittal rate	
	Would have succeeded %	*Would not have succeeded* %
Pb	91	44
Db	69	57
Jg	100	46

4.10 THE JUDGE'S ROLE

4.10.1 How long did the judge take in preparing his summing up?

In cases where there was a summing up to the jury, the judges were asked (Jg65) to estimate how long it took them to prepare it.

The answers are given in the table below:

Table 4.19
How long did judge take preparing summing up?

	%
Under 15 minutes	21
16–30 minutes	19
31–60 minutes	17
1–2 hours	22
2–3 hours	11
3–5 hours	4
Over 5 hours	5
Total	100 (N=601)

In 40 per cent of cases preparation took less than 30 minutes; in almost four-fifths (79%), preparation took under two hours.

4.10.2 Did the judge discuss his summing up with counsel?

The judges were asked (Jg67): 'Did you discuss any items in the summing up with counsel?'

In 40 per cent of cases the judge said that he had discussed items with counsel.[157]

[157] N=664; 141 non-replies.

4.10.3 Did the judge try to influence the prosecution in regard to prosecution policy?

The CPS were asked (Cp85) whether the judge attempted to influence the prosecution policy on the charges.

The CPS responses showed that this was exceedingly rare – it happened in regard to dropping of charges in 4 per cent of cases[158], in regard to lessening of charges in 2 per cent[159] and in regard to continuing with charges in 4 per cent[160]. In a few cases the judge tried to influence the prosecution in more than one way.

4.10.4 Did counsel think that the judge made any serious errors in his summing up – and if so, did such error favour either side?

Counsel were asked (Pb154; Db166): 'Did you feel that the judge made any serious error in his summary of the facts and/or the law?' They were then asked whether the error favoured either side (Pb155; Db167), whether counsel attempted to 'correct' the judge (Pb156; Db168), and, if so, whether the judge had accepted the point(s) counsel was making (Pb157; Db169).

Prosecution counsel thought the judge made a serious error of fact in 6 cases, of law in 19, and of both fact and law in 4 – a total of 29 cases or 5 per cent[161].

In eight cases (28%) the prosecution barrister thought the error favoured the prosecution, in nine cases (31%) he thought it favoured the defence and in the balance of cases (41%) he thought it favoured neither one nor the other[162].

In 20 cases (69%) prosecution counsel had attempted to 'correct' the judge[163] and in all but two of these (90%) the judge had accepted counsel's view wholly or in part. He accepted all counsel's points in 15 out of the 20 cases (75%) and some points in 3 cases (15%).

Defence counsel took a more critical view. They noted serious errors of fact in 21 cases, of law in 23 and both fact and law in 11 cases – 55 cases

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158 N=676; 90 non-replies.
159 N=660; 101 non-replies.
160 N=657; 98 non-replies.
161 N=547; 12 non-replies.
162 There were two non-replies.
163 There was 1 non-reply.

or 11 per cent[164]. Also, according to the defence, the error favoured the prosecution in 48 cases (92%) and the defence in 1 (2%). In three cases (6%) it favoured neither side.[165] The difference in regard to this point between the views of the two counsel is striking.

In 25 cases out of 52[166] (48%) defence counsel had attempted to 'correct' the judge and in 17 of these 25 (68%) the judge had accepted counsel's views wholly or in part.[167] He accepted all counsel's points in 10 out of the 25 cases (40%) and some in 7 (30%).[168]

4.10.5 Did the judge's summing up point the jury toward a particular result?

We asked the barristers (Pb150; Db162), the defence solicitors (Sol68), the CPS (CPS83), the accused (Def71) – and the judge himself (Jg72). The question put to all respondents (except the defendant, for whom see below) was: 'In your view did the judge's summing up point towards acquittal or towards conviction?' (For jurors' views see sect. 8.6.4–6.)

The words 'point towards' are perhaps a shade ambiguous. They could signify the situation where the judge puts some kind of slant or 'spin' on the summing up, or they could refer to the situation where the summing up is just a reflection of the weight of the evidence.

The question considered here should not therefore be taken to imply any 'slanting' or 'spin' being put on the summing up. It should simply be taken to be dealing with the question whether the summing up favoured one side or the other, regardless of whether, if so, the reason was judicial slanting, the weight of the evidence or a mixture of the two.

There were 5 possible pre-coded responses to the question put to the professional respondents:

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[164] N=485. There were no non-replies.
[165] There were 3 non-replies.
[166] There were 3 non-replies.
[167] There were two non-replies.
[168] N=23; two non-replies.

Table 4.20
Was the judge's summing up pointed toward one side or other?

	Pb %	Db %	Sol. %	Cp %	Jg. %
Strongly to acquittal	4	4	4	5	2
Somewhat to acquittal	8	8	14	14	9
Strongly to conviction	3	10	2	7	2
Somewhat to conviction	20	26	19	19	19
Neither	65	52	55	55	68
Total	100[169]	100[170]	100[171]	100[172]	100[173]

The broad pattern is somewhat consistent. All the respondents agreed that in a significant number of cases the judge summed up toward a conviction – four out of five sets of respondents (including the judges) said this happened in between 21 per cent and 26 per cent of cases of cases. Defence counsel thought it happened even more often (36%).

The table below presents a simplified version of the previous table by aggregating the 'Strongly toward' with the 'Somewhat toward' categories

Table 4.21
Overall thrust of summing up

	Pb %	Db %	Sol. %	Cp %	Jg %
Toward an acquittal	12	12	18	19	11
Toward a conviction	23	36	21	26	21
Neither	65	52	55	55	68
Total	100	100	100	100	100

This table shows that in a large proportion of cases the judge's summing up favoured one side or the other. In the view of four of the five respondents, the summing up favoured the prosecution much more often than it favoured the defence. Only the defence solicitor did not entirely share this view.

[169] N=559 with 65 non-replies.
[170] N=477 with 8 non-replies
[171] N=353 with as many as 211 non-replies, in most cases presumably because the person filing out the questionnaire had not been in court.
[172] N=455 with 79 non-replies and 125 Don't knows. (The category 'Don't know' was not included in the other questionnaires.)
[173] N=664 plus 140 non-replies.

4.10.6 Did the barristers agree as to which side was favoured?

The barristers agreed about the summing up in 88 per cent of the 277 cases in which comparison was possible and disagreed in 12 per cent. In over half (56%) they agreed that the summing up favoured neither side; in nearly a quarter (23%) that it favoured conviction and in 9 per cent that it favoured an acquittal.

4.10.7 The judge's view compared with that of counsel

We compared the view the judge took of his own summing up against first that of prosecution and then of defence barristers.

There were 470 cases in which the comparison was possible with prosecution barristers. Where the judge thought he summed up for an acquittal (49 cases), prosecution counsel either agreed (29 cases) or thought the judge was 'even-handed' (20 cases).

Where the judge thought his summing up was 'even-handed' (316 cases), prosecution counsel mainly agreed (227 cases or 72% of the 316). But in 31 (or 10%) of these cases prosecution counsel thought the judge had summed up for an acquittal and in 58 (18%) he thought the judge had summed up for a conviction.

Where the judge thought he had summed up for a conviction (105 cases) prosecution agreed in 48, but in 54 he thought the judge had been even-handed – and in three he thought the judge had summed up for an acquittal!

There were 391 cases in which it was possible to make the comparison with defence barristers. Where the judge thought he summed up for an acquittal (46 cases), defence counsel either agreed (19 cases) or thought the summing up was even-handed (22 cases). But there were 5 cases where defence counsel thought the summing up had been 'Somewhat toward a conviction'.

Where the judge thought he had been 'even-handed' (265 cases), defence counsel agreed in 158 (60%). But in almost a third (83 cases or 31%) defence counsel thought the judge had summed up for a conviction – and in just under a tenth (24 or 9%) he thought the summing up had leant toward acquittal.

In regard to the 80 cases where the judge thought the summing up favoured conviction, defence counsel mostly agreed (51 cases), but in 29 cases defence counsel thought the summing up had been even-handed.

4.10.8 The defendant's view

The defendant in contested cases was asked (Def70,71): 'Do you think that the judge was generally fair during the trial and during the summing up?'

To the first part of this question, the defendant said that he thought the judge was 'generally fair during the trial' in over four-fifths of cases (81%)[174]. In 16 per cent the defendant thought the judge was biased against him. In 3 per cent, rather remarkably, he thought the judge was biased against the prosecution.

We looked at this question by the result of the case. All of those discharged or bound over thought the judge was fair.[175] This figure dropped to 92 per cent of those found not guilty to all charges[176], 79 per cent of those found guilty of some charges[177], and 64 per cent of those found guilty of all counts[178].

In cases where the judge summed up to the jury, the defendant was also asked (Def71): 'In the judge's summing up to the jury, do you think he was fair to the defence?' There was a summing up in 71 per cent of cases in which a valid reply was given[179]. 86 per cent of those discharged or bound over[180] thought the judge was fair to the defence, compared with 87 per cent of those found not guilty of all charges[181], 66 per cent of those found guilty of some charges[182] and 49 per cent of those found guilty on all counts.[183]

To the second part of the question, the defendant thought the judge was fair in his summing up in 73 per cent of cases and not fair in 27 per cent.[184]

4.10.9 Was there an association between the thrust of the judge's summing up and the result?

We tested whether there was any statistical association between the thrust of the judge's summing up and the result of the case. (The fact there is a

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[174] N=500; 46 non-replies.
[175] N=30; 2 non-replies.
[176] N=138; 6 non-replies.
[177] N=167; 5 non-replies.
[178] N=71; 1 non-replies.
[179] N=498; 98 non-replies. In the non-reply cases it was not possible to determine whether or not there was a summing up.
[180] N=7.
[181] N=108.
[182] N=80.
[183] N=53.
[184] N=284; 98 non-replies.

statistical association does not prove that there is a relationship of cause and effect; but it is suggestive that there *may* be some causal relationship.)

As the table below shows, the test showed that there was indeed such a statistical association.

Table 4.22
Relationship between summing up and acquittal rates

Judge sums up	*Acquittal rates according to:* Pb %	Db %	CPS %	Jg %
For acquittal	83[185]	78[186]	66[187]	80[188]
For conviction	27[189]	35[190]	16[191]	20[192]
Neither	46[193]	54[194]	47[195]	47[196]

According to the defence barrister, when the judge summed up for an acquittal, the defendant was acquitted in 78 per cent of cases; when he summed up for a conviction, the defendant was acquitted in 35 per cent of cases – a percentage point difference of 43. When he did neither the defendant was acquitted in 54 per cent of cases.

According to prosecution barristers, when the judge summed up for an acquittal, the defendant was acquitted in 83 per cent of cases as compared with 27 per cent when the judge summed up for a conviction – a percentage point difference of 56. When the judge did neither, the acquittal rate was 46 per cent.

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[185] N=54, 12 mixed verdicts excluded
[186] N=49, 6 mixed verdicts excluded
[187] N=44, 10 mixed verdicts excluded
[188] N=59, 5 mixed verdicts excluded
[189] N=88, 24 mixed verdicts excluded
[190] N=133, 38 mixed verdicts excluded
[191] N=49, 15 mixed verdicts excluded
[192] N=109, 18 mixed verdicts excluded
[193] N=275, 48 mixed verdicts excluded. 11 non-replies and 3 cases with no summing up also excluded
[194] N=215, 27 mixed verdicts excluded. 17 non-replies and 5 with no summing up also excluded.
[195] N=238, 49 mixed verdicts excluded. 129 non-replies and 125 with no summing up also excluded.(The CPS results were done by cross-tabulation with 'merged verdicts'.)
[196] N=334, 59 mixed verdicts excluded. 30 non-replies and 1 with no summing up also excluded.

The equivalent percentage point difference in the judge figures – 60 – was greater even than in the barrister figures.

It should be emphasised again that the question posed did not attempt to establish that the judge's summing up was contrary to the weight of the evidence – that issue is dealt with below.

4.10.10 Where the summing up favoured one side, was this supported by the evidence?

As has been said, it is obviously possible that the fact that the judge sums up for one side or the other is a reflection of the relative strength or weakness of the evidence. (Though even when the evidence for one side is clearly stronger than for the other, the even-handed judge 'playing it down the middle' can still put the issue to the jury without indicating his own views.)

But it was of interest to try to discover respondents' views on the extent to which judges were presenting the case to the jury against the weight of the evidence.

Where respondents had already said that the judge's summing up favoured one side or the other, they were asked: 'Do you think this was against the weight of the evidence.' The pre-coded answers distinguished between 'Yes – completely' and 'Yes – partially'.

According to the prosecution barristers, the judge went against the weight of the evidence in 40 cases (20% of those where the summing up was thought to favour one side or the other)[197]. None were 'Wholly against the evidence'.

For defence barristers the equivalent figure was 79 (35% of such cases).[198] Eight of the 79 were 'Wholly against' the weight of the evidence.

For defence solicitors there were 57 cases (37%)[199]. Eleven of the 57 were 'Wholly against' the weight of the evidence.

For the CPS there were 41 such cases (34%)[200]. Nine of the 41 were 'Wholly against' the weight of the evidence.

According to the prosecution barristers, in 34 of the 40 cases (85%) where the summing up was against the weight of the evidence, it favoured

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[197] N=195; 2 non-replies.
[198] N=226; 4 non-replies.
[199] N=153; 5 non-replies.
[200] N=121; 2 non-replies.

an acquittal. But according to defence barristers, in 73 out of the 79 cases (92%) where the summing up was against the weight of the evidence, it favoured a conviction. (See further sect.8.6.5 below.)

4.10.11 Was the judge influenced by the defendant's previous convictions?

As has been seen (sect.4.6.3), the judge usually is told whether the accused has previous convictions. Obviously there is a possibility that the judge may be influenced by knowledge of the prior convictions when summing up to the jury. This possibility seemed to be confirmed when it appeared that the judge was more likely to sum up for a conviction when the accused had previous convictions, than when he had none. But the impression was cancelled when we looked at whether the summing up was against the weight of the evidence. As Table 4.23 makes clear, there was remarkably little difference between the cases where the summing up was against the weight of the evidence and the cases where it was not.

Table 4.23
Judge summed up for conviction where defendant had prior convictions

	Pb		Db	
	%	(N=)	%	(N=)
Summing up against weight of evidence	83	(6)	77	(73)
Summing up not against weight of evidence	78	(118)	74	(98)

Thus according to prosecution barristers, when the summing up was for a conviction and was against the weight of the evidence, the accused had previous convictions in 83 per cent of cases, but where it was for a conviction and *not* against the weight of the evidence, the accused had a record in 78 per cent of cases.

Similarly, according to defence barristers, when the summing up was for a conviction and was against the weight of the evidence, the accused had prior convictions in 77 per cent of cases, but where it was for a conviction and *not* against the weight of evidence, he had a prior record in 74 per cent of cases.

But it is clear that in the view of participants there are numbers of cases where the judge's summing up not only favours one side or the other but does so against the weight of the evidence.

If the number of such cases is taken at the lower CPS/Prosecution barrister figure of 40 or so in the sample, this would mean a 'grossed up'

figure of more than 1,000 such cases nationally each year. If the figure is taken at the higher level of 79 proposed by the defence barristers, that would mean over 2,000 such cases per year.

It seemed worth looking to see how cases in which the summing up was 'against the weight of the evidence' ended. Did the jury basically follow the judge or the evidence?

4.10.12 Judge sums up against weight of evidence by result

For this purpose we looked only at cases where the jury either acquitted on all charges or convicted on all charges. No clear pattern emerged.

Where the defence barrister thought the judge summed up for a conviction 'against the weight of the evidence', the jury in fact acquitted on all charges in 45 per cent of cases.[201] In the six cases where the prosecution barrister thought the judge summed up for conviction 'against the weight of the evidence', the jury acquitted in four (66%).

Where the defence barrister thought the judge summed up for an acquittal 'against the weight of the evidence', the jury nevertheless convicted in five out of six cases (83%). Where the prosecution barrister thought the judge summed up for an acquittal 'against the weight of the evidence', the jury convicted in eight out of 24 cases (33%)[202]

Both barristers agreed therefore that where the judge summed up 'in line with the evidence' the jury was more prone to follow the judge's indication to acquit than to convict. (See also sect.8.6.6 below.)

4.10.13 Did the judge's interruptions favour the prosecution or the defence?

The barristers were asked (Pb149; Db161): 'Would you say that the judge's interruptions during the trial favoured the defence or the prosecution?'

The results are set out below:

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[201] N=56. There were a further 16 cases where the summing up was 'against the weight of the evidence' and the jury convicted on one or more and acquitted on one or more charges.

[202] There were another eight cases in which the jury found the accused guilty of one or more and not guilty of one or more charges.

Table 4.24
Did judge's interruptions favour one side?

	Pb %	Db %
Favoured defence	5	4
Favoured prosecution	9	24
Favoured neither	58	43
Made none	28	30
Total	100[203]	100[204]

The two sets of barristers agreed that the judge made no interruptions in under a third of cases (Pb 28%, Db 30%) and that the interruptions favoured the defence in around 5 per cent of cases. But whilst prosecution barristers thought interruptions favoured the prosecution in only 9 per cent of cases, the defence thought the figure was 24 per cent.

However the disagreement between the two may not have been quite so great as appears from the table. There were 316 cases where we had both barristers' questionnaires with valid responses to this question. We were therefore able to compare the answer on the individual case. The barristers agreed in 236 cases or 75 per cent.

4.10.14 Did the judge give the jury any non-verbal indications of his views?

Where the barristers had already answered that the summing up favoured one side or the other, they were asked (Pb152; Db164): 'In your view, did the judge give any non-verbal indications of his views (such as tone of voice or 'body language') which pointed towards acquittal or conviction?'

The defence perceived this phenemenon more than the prosecution. In the view of the prosecution barristers there were 32 such cases out of 198 (16 per cent [205]) – 6 favouring the defendant, 26 favouring the prosecution. In the view of the defence barristers there were 80 such cases out of 228 (35%)[206] – 11 favouring the defence and 69 the prosecution.

4.10.15 Would the tenor of the summing up be apparent from the transcript?

Again, barristers who had already said that the summing up favoured one side or the other were asked (Pb153; Db165): 'Do you think that the

[203] N=539 with 8 non-replies.
[204] N=459 with 10 non-replies.
[205] There were no non-replies.
[206] There were 2 non-replies.

way the judge's summing up pointed overall would be apparent from the transcript of the proceedings?'

The prosecution were more sanguine than the defence. According to prosecution barristers, the transcript would have told the full story in 86 per cent of cases[207]; according to defence barristers, the same was true in 72 per cent.[208]

4.10.16 Should the judge have been more/less robust?

It is sometimes said that judges are not sufficiently robust (a term used by lawyers to indicate strength and firmness). We asked counsel to express a view on this matter. The question put to both (Pb158; Db170) was: 'In your view, should the judge have been more (or less) robust in his handling of the case?'

On this point prosecution and defence were broadly in agreement. In 86 per cent of cases prosecution counsel[209] and in 83 per cent defence counsel[210] said that they would not have wished the judge to be either more or less robust.

Prosecution barristers said there were 44 cases (7%) in which the judge should have been more robust and precisely the same number in which the judge should have been less robust.

Defence counsel thought there were 32 cases (6%) in which the judge should have been more robust and exactly double that number (12%) in which the opposite tendency would have been preferred.

4.11 'INNOCENT PLEADING GUILTY' CASES

4.11.1 Was this a case of an innocent person pleading guilty?

In cases where the defendant pleaded guilty to all charges, defence barristers were asked (Db184): 'An innocent defendant sometimes decides to plead guilty to achieve a sentence discount or reduction in the indictment. Were you concerned that this was such a case?' (According to the Bar's Code of Conduct, counsel's duty in such a situation is to advise his client that he should not plead guilty unless he is guilty. But the decision as to plea is for the client.)

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[207] N=194; 4 non-replies.
[208] N=225; 5 non-replies.
[209] N=613; 72 non-replies.
[210] N=570; 68 non-replies.

There were 846 substantive replies to this question – not counting 368 non-replies, most probably signifying Don't know or No view. In 793 (94%) the reply was No. But in 53 (6% of the 846) the reply was Yes. These 53 cases 'grossed up' represent close to 1,400 cases a year. This appeared to be a cause for concern. It was clear that further analysis of the cases should be undertaken.[211]

The further analysis showed that few (if any) of these cases could safely be characterised as clear examples of what QI84 in the defence barrister's questionnaire was intended to reveal – namely cases where a person, who in the view of his lawyers could have been innocent of all the charges he faced, nevertheless pleaded guilty because of the sentence discount. It was plain that in many of the 53 cases the defence barristers had misunderstood the thrust of the question – no doubt due to the imperfect drafting of the question and the absence of guidance to respondents as to what it was intended to mean.[212]

In regard to 15 of the 53 cases, the defendant also returned a questionnaire. In six of these cases the defendant said he pleaded guilty though he was not guilty of the offence. In nine he said he had been guilty of the offence(s) charged or similar offences.

The other side of the same coin was the response made by defendants themselves to a somewhat similar question we put to them. We did not think we could fairly ask defendants who pleaded not guilty whether they were actually guilty of the offence. But we asked those who pleaded guilty (Def38): 'Did you actually commit the offence(s) for which you pleaded guilty, or a similar offence?'

There were 269 effective replies[213]. Of these, 71 per cent said they had committed the offence as charged and another 17 per cent said they had committed a similar offence.

But there were 31 cases (11%) where the defendant claimed that he had not committed the offence. In 26 of these 31 cases the defence barrister had also returned a questionnaire. In 20 of the 26 cases the barrister gave

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211 For the detailed results of that analysis and discussion of the results see Michael Zander, 'The "Innocent" (?) who plead guilty', *New Law Journal*, January 22,1993, p.85, and letter, *ibid*, p.133. See critical comment by Professor Mike McConville and Lee Bridges, 'Pleading guilty whilst maintaining innocence', *ibid*, February 5, 1993, p.160. For further exchanges see, *ibid*, February 12, 1993, p.192; ibid, February 19, 1993, p.228; and February 26, 1993, p.276.

212 In particular, it was unfortunate that we did not define 'innocent', nor make it clear that we intended to cover only cases where the barrister thought the defendant was innocent of all charges.

213 Plus 5 non-replies.

no indication in answering Q184 that he took the view that his client might have been an innocent person pleading guilty because of the sentence discount.

But in six, as has been seen, the barrister did give this indication. (In none of these six cases did the defendant go to prison.)

- *Case No.46* – D, aged 21, no previous convictions, charged with theft from his employer, got a community service order. He had simply helped a friend but had not done much and had not benefitted from the crime. Db thought it was too trivial to warrant prosecution. Def. said 'I didn't commit the offence but pleaded guilty because of the credit factor which was explained to me because of the statement of my co-defendant'. He had confessed in a tape-recorded interview.
- *Case No.50* – D, no previous convictions, charged with gross indecency, given a conditional discharge. Def. said he did not commit the offence but pleaded guilty 'to get it over as quickly as possible'. He agreed with the advice of his lawyers to plead guilty. Db said the Def. had had no faith that his evidence would be believed.
- *Case No.9* – D, aged 22, several previous convictions, charged with assault occasional actual bodily harm and theft, put on probation and ordered to pay compensation of £400. Db said:'The prosecution was intending to add a charge of blackmail. D refused to run the risk.' Def. said 'I pleaded guilty because of threat to amend the charges to assault with intent to rob and blackmail, theft and actual bodily harm. I was blackmailed into pleading guilty. Disgusting. By the time you read this paper I will probably be in prison for two crimes – one of which I did not commit.'
- *Case No.23* – D, female aged 49,three Class B drugs' charges, one of supplying two of possession. Three previous convictions for similar offences in 1977,1986,1987. Given a suspended sentence of 12 months imprisonment. Def. said 'Knew I was guilty of the offences I was accused for. I was lucky to get away with a suspended sentence.' Db said a conference with the client satisfied him that hers was not a case of an innocent person pleading guilty. She was facing her first custodial penalty.
- *Case No.24* – D, female aged 25, charged with theft and 1 other offence taken into consideration (TIC). Previous convictions for shoplifing in 1983, 1987 and 1991. Given a suspended sentence of 3 months. Def. said 'I was advised to plead guilty by my barrister to get it over and done with. Otherwise we would of (sic) come back for a hearing.' She agreed with this advice. Db said D's instructions revealed a good defence. Crown offered to drop a further charge currently in the magistrates' court on a similar matter for a guilty plea.'

- *Case No.16* – D, male aged 25, no previous convictions, charged with shoplifting from W.H.Smiths and Woolworths. His co-defendant had a string of previous convictions for shoplifting. Def. admitted the W.H.Smiths offence but initially denied the Woolworths one. Pleaded guilty to both. Given conditional discharge. Def. said 'Pleaded guilty although I was not guilty – to keep myself in one piece. I decided my plea on advice from the barrister and solicitor. I did not agree with the advice. I was only being used.' He had made a confession in the police car and at the police station. He had signed it, but it was not accurate: 'I signed under the influence of drink and drugs.'

In the other 25 cases where the defendant said he was not guilty the following were typical of the reasons or explanations given:

- *Case No.0014* 'So I did not have to go through a trial. Also because of the advice of my barrister.' (Many previous convictions. Facing nine charges including burglary and assault occasioning actual bodily harm. Received 15 months.)
- *Case No.0085* 'If I had pleaded not guilty, I would have received a bigger sentence, I think.' (One previous conviction in 1988 for offences against the person. Charged with burglary. Conditional discharge plus £75 prosecution costs.)
- *Case No.0592* 'I have been in prison for similar thefts. I was out to steal that day but I never actuallyu attempted to steal what the store detective claim. I pleaded guilty because my barrister spoke to the judge and got assurance that if I plead guilty I would not be sent to prison. However this guarentee did not extend if I pleaded not guilty and was found guilty.' (Many previous convictions. Charged with attempted theft. Conditional discharge.)
- *Case No.0125* 'Because the police bully you and it is pure hell.' (Many previous convictions. Facing four charges of burglary and theft. 9 months imprisonment.)
- *Case No.0183* 'I wanted to protect my co-accused.' (Many previous convictions. Charges of theft, taking a conveyance, driving whilst disqualified, driving without insurance. 6 months imprisonment on each charge concurrent.)
- *Case No.0642* 'Seemed easier at the time to get it over with.' Agreed with the lawyers' advice to plead guilty. (Many previous convictions. Charged with drugs and vehicle offences.3 months imprisonment suspended.)
- *Case No.0310* 'Because my solicitor told me so.' (Several previous convictions. Charged with burglary. Probation.)
- *Case No.0352* 'To dispence(sic) with the case and lead a normal life' (Many previous convictions. Charged with theft. 3 months imprisonment, including 1 months for an activated previous conditional discharge.)

- *Case No.0418* 'To save time and taxpayer's money'.(Many previous convictions. Facing seven charges of burglary and theft. Three sentences of 2 years imprisonment concurrent and four of 3 months imprisonment.)
- *Case No.0575* 'I did not want to put the victim through a court ordeal.' (1 minor previous conviction. Charged with four counts of indecent assaults on a child. Two months imprisonment.)

4.12 'AMBUSH' DEFENCES[214]

4.12.1 Did the defence produce any 'ambush' defences?

It is sometimes said that defendants quite commonly produce an 'ambush' defence. By 'ambush' defence is meant a defence sprung on the prosecution at the last moment at which point there may not be time to rebut it. But how common is this? In contested cases, the prosecution barristers,the CPS and the police were each asked about this.

The question to the barristers in contested cases (Pb126) was: 'Did the defence produce any wholly unexpected ('ambush') defence other than an alibi, which could have been checked or rebutted if there had been time, but which could not be checked or rebutted for lack of time?' (Yes or No). The question to the CPS in contested and 'cracked trials' (Cp64) and to the police in all cases (Pol21) was: 'Did the defence include any wholly unexpected ('ambush') defence.'

According to prosecution barristers, there was an ambush defence in 41 cases out of 601 in which there was a substantive reply (or 7%).[215] According to the CPS there was an ambush defence in 70 out of 724 contested cases (or 10%). According to the police there was an ambush defence in 152 out of 581 (or 26%).

4.12.2 Ambush defences by verdict

According to the police, ambush defences occurred in 21 per cent of contested cases ending in a verdict of not guilty[216] and 34 per cent of cases ending in a verdict of guilty[217]. Also according to the police, the acquittal rate in contested cases involving an ambush was 39 per cent[218]. By contrast, the acquittal rate in cases not involving an ambush was 55 per cent.[219]

According to the CPS, ambush defences occurred in 9 per cent of contested cases ending in a verdict of not guilty[220] and 11 per cent of cases

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214 See also 'Alibi defences', sect.2.10 above.
215 There were 72 non-replies.
216 N=200.
217 N=197.
218 N=109.
219 N=286.
220 N=264.

ending in a verdict of guilty[221]. Again, according to the CPS, the acquittal rate in contested cases involving an ambush was 46 per cent[222]. By contrast, the acquittal rate in cases not involving an ambush was 55 per cent[223].

It seems therefore that ambush defences occur more often in cases ending in conviction than acquittal, and that the acquittal rate in cases involving ambush defences is lower than the acquittal rate where there is no ambush defence. Both of these findings are counter-intuitive.

4.12.3 Did lack of notice cause checking problems?

The CPS (Cp65) and the police (Pol22) were asked: 'Did the lack of notice of the [unexpected[224]] defence cause the prosecution any problem in checking or rebutting it/them?'

The CPS said that 40 per cent of ambush defence cases[225] caused 'No problem'; the police said the same in 37 per cent of ambush defence cases[226]

There were 'Serious problems' according to the CPS in 20 cases (28%), and according to the police in 44 cases (also 28%).

There were 'Slight problems' according to the CPS in 23 cases (32%) and according to the police in 54 cases (or 35%).

4.12.4 If serious problems, was it checked despite such problems?

In cases where the previous answer had indicated a serious problem, the CPS (Cp66) and the police (Pol23) were asked: 'Was/were the unexpected defence(s) nevertheless checked or rebutted?'

The CPS gave 19 substantive replies[227]. In 12 cases (63%) there was no check. The police gave 43 substantive replies[228]. In 30 cases(70%) there was no check.

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221 N=235.
222 N=50.
223 N=449.
224 This word was in the police questionnaire but not in the CPS questionnaire. The lack of consistency was a result of oversight.
225 N=72 with 2 non-replies.
226 N=156 with 8 non-replies.
227 There was 1 non-reply.
228 There was 1 non-reply.

4.12.5 Did the prosecution barrister ask for an adjournment to permit the ambush defence to be checked?

Prosecution barristers (Pb127) were asked in relation to any ambush defence (ie. not just the ones that created 'Serious problems'): 'Did you ask for an adjournment or delay to check or rebut the defence?'[229]

In 8 of the 43 cases (19%) in which prosecution barristers had said there was an ambush defence, an adjournment had been sought and in four cases it had been granted, in three it had not been granted and in one there was no reply. None of these eight cases had involved problems for the CPS. Three had involved 'Serious problems' for the police and one had involved 'No problems'.

In the 35 cases where no adjournment had been sought, the barrister was asked to state the reason for this. In virtually every case the reason was that an adjournment would not have helped, was unnecessary or would not have been justified:

- '3 counts of theft, each involving £3.30.'
- 'Would have involved interviewing witnesses whose evidence may not have taken the matter much further or who would not have been prepared to talk.'
- 'Short case, not in interests of justice.'
- 'Too late for the information to be available.'
- 'The surprise witness was petrified and his evidence was sufficiently weakened by cross-examination.'
- 'I took the view that the ambush witness would not be believed by the jury.'
- 'No need. I could deal with the evidence on the hoof and crush it.'
- 'The case was long enough to make enquiries during the trial.'
- 'It was not a difficult problem at the end of the day and I felt that we already had sufficient evidence to rebut it.'
- 'The defence was not given until the defendant gave evidence. If I adjourned every case for that reason many cases would have to be adjourned.'
- 'The events occurred in 1986 – little prospect of finding information today.'

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[229] For further data on ambush defences see **Leng,R.**, (1993) *The Right to Silence in Police Interrogation – a Study of some of the issues underlying the debate*, Royal Commission Research Series No.10.

4.13 PLEA BARGAINING

4.13.1 Should *Turner* be reformed?

In *Turner* [1970] 2 WLR 1093 and cases that followed this decision, the Court of Appeal laid down rules that make trial judges exceedingly cautious about having discussions with counsel about the defendant's plea.

The barristers and the judges[230] were asked (Pb183; Db197; Jg89): 'Do you think that *Turner* (1970) should be reformed to permit full and realistic discussion between counsel and the judge about plea and especially sentence?'

Eighty six per cent of prosecution barristers[231], 88 per cent of defence barristers[232], and 67 per cent of judges[233], thought that *Turner* should be reformed so as to permit realistic discussions of plea and especially sentence.

4.13.2 Reform of *Turner* by type of practice

Those whose practice was wholly prosecution work were less likely to think that *Turner* should be reformed than those who did mainly defence work or had mixed practices.

For prosecution barristers, the proportion who thought reform of *Turner* was desirable was 81 per cent of those who did mainly prosecution work[234], 88 per cent of those who had a mixed practice[235], 90 per cent of those whose work was mainly defence.[236]

For defence barristers, the proportion thinking reform of *Turner* was desirable was 91 per cent of those who did mainly defence work,[237], 87 per cent of those who had a mixed practice[238], and 74 per cent of the small number who did mainly prosecution work[239].

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230 To avoid double counting, each was supposed to answer the question only on the first occasion he/she filled out a Royal Commission questionnaire.
231 N=965 with 13 non-replies.
232 N=1,058 with 15 non-replies
233 N=421 with 9 non-replies.
234 N=172
235 N=523.
236 N=73.
237 N=271
238 N=477
239 N=47

4.13.3 Did the defendant know that guilty pleas get lower sentences when deciding how to plead? If so, how important was this?

The defendant was asked (Def46): 'When you (finally) decided to plead guilty, did you know that people who plead guilty usually get a lower sentence?'

Two-thirds of the defendants (66%)[240] said they did know when pleading that a guilty plea normally entitles one to a lower sentence.

Those who said Yes, were then asked (Def47) how important this had been in the decision to plead guilty. Over two-thirds (69%)[241] said it was 'Very important' and 16 per cent said it was 'Fairly important'.

The sentence discount therefore played a significant role in the decision in some 85 per cent of cases of defendants who said they knew of the sentence discount – who in turn were two-thirds of those pleading guilty. If these figures are somewhat representative, this would mean that over half of those pleading guilty are influenced by the sentence discount.[242]

4.13.4 Who told the defendant about the sentence discount?

Defendants were asked (Def48): 'Who told you about this (getting a lower sentence if you plead guilty)?'

Over three-fifths of defendants (62%)[243] said they 'Knew already' – which was not surprising considering that some three- quarters of the defendants in the sample had previous convictions.

But some were told by the barrister (41 mentions), the solicitor (33 mentions) or someone else (12 mentions).[244]

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[240] N=268; 6 non-replies. (There were 274 in the sample who said they pleaded guilty to all charges.)

[241] N=172; 4 non-replies.

[242] Eighty five per cent of two-thirds is 56%. C. Hedderman and D. Moxon in their recent study (*Magistrates' court or Crown Court? Mode of trial decisions and sentencing*, Home Office Research Study No. 1992, Table 3.4) found likewise that the sentence discount was by far the most common reason for changing plea at the Crown Court.

[243] N=174; 2 non-replies.

[244] The sample size of those who knew about the sentence discount was 176 but there were 194 answers to the question – obviously in several cases more than one applied.

Only 23 (13%) who knew of it, said they had heard of the sentence discount on the day of the hearing. Most knew 'A long time ago' (65%), or 'Some time before the hearing' (21%).[245].

[245] N=171; five non-replies.

5. 'Cracked Trials'

5.1 Was there advance warning of plea, or was it a 'cracked trial'?

There has been much concern for many years over 'cracked trials' – cases where the defendant states that he intends to plead not guilty but in the event, on the day of the proposed trial, changes his plea at the last moment to guilty. Cracked trials potentially involve a waste of resources – in terms of court time, judge time, and the time of lawyers, witnesses and others involved in cases who come prepared for a trial which does not take place.

As has been seen (sect.4.1.1 above), the court clerks questionnaires suggested that the proportion of cracked trials was 26 per cent of all cases but 43 per cent of cases other than those listed as guilty pleas.[1]

5.2 How was the case listed?

The court clerks were asked both how the case was listed (Ccl) and whether it was a cracked trial (Cc13). Cross-tabulation of these two showed that 70 per cent of cases that ended as cracked trials had been listed as trials and 30 per cent had been listed as 'floaters' or 'backers'[2].

Of those listed as 'floaters/backers'[3], 48 per cent ended as cracked trials[4] – compared with 38 per cent of those listed as trials[5].

5.3 If last minute guilty plea, why was this?

Where the guilty plea was not notified to the court until the day of the hearing, defence solicitors were asked why it had not been notified earlier.

The answers in order of frequency of mention were:

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[1] There are few sets of figures with which this can be compared. The Lord Chancellor's Department Court Service *Annual Report 1991–92*, Table 6.6, shows the 'cracked trial' rate of the previous three years respectively as 29%, 28% and 28%. When taken as a proportion of cases listed as contests, the official figures show cracked trials to have run at 57 per cent for both of the past two years. But these official figures must be viewed with caution since they are in fact based not on 'cracked trials' but on trials that are *ineffective* for any reason. The 'cracked trial' figure is therefore overstated, but it is not known by how much. This means that the figure in the present Study is the only available national figure for cracked trials.

[2] N=628.

[3] For definition see p.35 above.

[4] N=374; 14 non-replies.

[5] N=1,158; 42 non-replies.

Table 5.1
Reasons for late notification of plea

	%
Earlier consultation with client impossible/did not take place	31
Change in prosecution's approach	28
Late consultation with counsel	19
Client changed mind	6
Plea bargaining	4
Miscellaneous	12
Total	100 (N=240)

Out of 240 reasons given, 'client unavailable' was mentioned in only two, and 'witnesss unavailable' was mentioned in only four cases. There were four cases in which it seemed that no defence listing form had been received from the court and another four in which notice of the hearing was too short to permit advance notice of plea to the court. But most of the reasons were variations on the theme of not having spoken to the client or to counsel ahead of time or a change in the prosecution's approach. There was no way we could tell whether anyone had been at fault in the matter.

5.4 How much time had been allowed for the cracked trial?

The judges were asked (Jg12): 'How much time had been allowed for the cracked trial?'

The breakdown appears below:

Table 5.2
Time allowed for cracked trials

	%
Up to one day	40
More than 1, up to 2 days	42
More than 2, up to 3 days	10
Over 3 days	8
Total	100 (N=542[6])

In more than 80 per cent of cases, the time allowed for was up to one day (40%) or one to two days (42%). But in 14 cases it was between 1 and 2 weeks, in three cases it was 2–3 weeks and in another three cases it was respectively three, four and 3–4 weeks.

[6] Plus 33 non-replies.

5.5 Was judge's time wasted?

The judges were asked (Jg13): 'Was your time on the day wasted as a result of the 'cracked trial?'

There were 564 effective replies[7]. In as many as 81 per cent the judge said No, his time had not been wasted. In half of these 564 cases the reason was that the judge was able to get on with another trial. In a fifth (20%) it was because he was able to get on with other work in his room; and there were a further 9 per cent of miscellaneous reasons.

In many of these cases the judge said the case had been listed as a floater[8], and the cracked trial was seen as a way of using court resources economically:

- 'Time wasted was as a result of the listed trial not being able to proceed due to the need for the defence to find and interview potential witnesses.... This floater was brought in to fill the gap.'
- 'This was a floater brought into my list when my own trial pleaded.'
- 'Case was listed as a floater therefore court time was saved.'
- 'The cracked trial was the back up for another trial which was adjourned.'
- 'The case was a floater. It helped use my day profitably as the listed trial was also cracked.'
- 'I was not able to sit on the following day because there was no court room available so I could hear the case only if it was a cracked trial.'
- 'Defendant was dealt with while awaiting jury's verdict in previous case.'
- 'Cracked trial was listed as a floater and was interposed in my list during an adjournment in the listed trial.'
- 'It was a floater which I took after my own case collapsed.'

One judge made the general comment: 'I do not regard cracked trials as wasting time. They save time.'

There were 117 cases (20%) in which the judge said that his time *had* been wasted as a result of the last minute change of plea. In 43 per cent of these cases, the time wasted had been up to two hours; in 56 per cent the waste of time had amounted to between two and five hours and in one case the judge reported over 5 hours wasted time.

5.6 Was court time wasted?

The court clerks were asked (Cc15): 'How much court time, if any, was wasted on the day or was other work available?'

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[7] With 11 non-replies.

[8] The court clerks reported that 14% of all cases were listed as floaters or backers – see sect.2.2.6 above.

According to the court clerks, no time was wasted in 69 per cent of cases[9] and time *was* wasted in 31 per cent. In cases where time was wasted it amounted to about an hour in a quarter of the cases, to about 2 hours in over a third (38%), to three to four hours in about another quarter (27%) and to more than four hours in the remaining one tenth of cases.

5.7 Was police time wasted?

The police were asked (Pol31): 'In what ways was any police time wasted as a result of the cracked trial?' There were 432 replies[10] which between them produced 972 instances of time being wasted.

Table 5.3
Was police time wasted?

Reasons for wasted police time	No.	%
Police witnesses turned up	383	39
Police preparation time wasted	299	31
Other police officers in case turned up	256	26
Other	34	3
Total	972	100

The 'Other' category included eleven cases where officers missed leave because of the cracked trial.

5.8 Was time of civilian prosecution witnesses wasted?

The police were asked (Pol32): 'How many witnesses other than police officer witnesses had their time wasted because of the cracked trial?'

The answers are set out below:

Table 5.4
Waste of time of civilian witnesses

Nos. of witnesses wasting time	%
None	30
1–2 witnesses	34
3–5 witnesses	25
Over 5 witnesses	8
Don't know	4
Total	100 (N=491[11])

[9] N=633 with 11 non-replies.
[10] Not counting 38 non-replies.
[11] There were 12 non-replies.

In nearly one third (30%) of the cracked trial cases therefore, the police said that there were no civilian prosecution witnesses who had their time wasted by the cracked trial. But in the remaining cases there were hundreds of civilian prosecution witnesses who had had time wasted. No doubt there were also many hundreds of defence witnesses who had similarly come to court in vain.

5.9 Was the cracking of the trial due to last minute prosecution/defence discussions?

It is normally assumed that trials crack at the last moment principally because of charge bargaining between prosecution and defence when the prosecution agrees to drop more serious charges and accept a guilty plea to lesser charges. One of the factors in this process is the 'sentence discount' which is permitted (or even encouraged) by the Court of Appeal under which the defendant who pleads guilty can normally expect to have his sentence reduced by a factor of up to one third. Another well known factor is that often the defendant will only plead guilty at the last moment under the pressure of imminent trial and the discouraging advice of his counsel as to his prospects.

It was unfortunately not possible to ask defence barristers about any discussions they had with their client leading to a change of plea. Any such questions would clearly have invaded the lawyer-client relationship which meant that counsel could only have answered with the client's consent. There was no way of ensuring that such consent was forthcoming before the barrister answered the questionnaire and we therefore had to avoid any such question. (As will be seen below, questions were asked of defendants.)

Prosecution counsel's view: However, in cases where the defendant pleaded guilty to all counts (whether or not it was a cracked trial) prosecution counsel was asked the converse question (Pb166): 'Did you have any discussion about the defendant's plea with the defence barrister or the defence solicitor's representative?'

In 655 cases (72%) there had been such discussions. In 96 per cent of these cases the discussion had been with defence counsel, in one case it had been with the solicitor and in 3 per cent it had been with both the defence solicitor and barrister.

Where such discussion had taken place, prosecution counsel was asked (Pb167): 'Did this discussion play an important part in the defendant changing to a guilty plea?'

In 22 per cent of cases[12], the discussion was said to be 'Very important'. In 21 per cent it was 'Fairly important'. In 57 per cent the barristers ticked 'Not important/likely to plead guilty anyway'.

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[12] N=647; 8 non-replies.

CPS view :A related question was also put to the CPS in cracked trial cases (Cp32): 'Were there discussions with the defence involving the CPS on the day of the hearing (or just before) which led to the case cracking?'
They reported that in nearly three-quarters of cases (72%[13]) the case cracked because of discussions between the prosecution and the defence involving the CPS.

5.10 Was the cracked trial the result of a reduction in or dropping of charges?

According to the CPS, in 77 per cent of cases[14] the discussions led to charges being reduced, or allowed to lie on the file or dropped.

However the police questionnaire gave a different result on this question. The police were asked (Pol33): 'Was the cracked trial as a result of reduction in charges?' The answer was something over half No (52%) and under half Yes (45%).[15] There were 3% Don't knows.

There is no way of reconciling these two sets of figures, but perhaps it should be assumed that the CPS would be in a better position to give accurate information on the matter than the police.

5.11 Who played the leading role on the prosecution side in those discussions?

The CPS said (Cp35) that the leading role in charge and plea discussions was taken by the prosecution barrister in 71 per cent of cases, by the CPS in 28 per cent and by the police in the remaining 1 per cent.[16]

5.12 Did the CPS law clerk at court seek the advice of a CPS lawyer back at the office? If so, did this involve significant delay?

The unadmitted CPS law clerk sought the guidance or authority of a CPS lawyer as to the question of last minute plea/charge alterations in under half these cases (45%), as against 172 (55%) in which this did not occur[17].

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[13] N=588; 12 non-replies.

[14] N=446. The number is greater than the sample size of 423 because respondents were asked to tick all that applied and obviously more than one of these could apply in a given case.

[15] N=490; 13 non-replies.

[16] N=319; 11 non-replies.

[17] N=309; 10 non-replies. When it did not occur it is well possible that the law clerk already knew the parameters of agreement to a deal between prosecution and defence through his written instructions in the file. It is increasingly common for the law clerk to receive such indications with his papers. But no question was asked about this.

According to the CPS (Cp37), in 98 per cent of cases this did not involve any significant delay.

5.13 Did the CPS lawyer decide the matter or did he tell the law clerk to leave it to counsel?

There were 134 substantive answers to the question (Cp38) whether the CPS lawyer decided the issue himself or told the law clerk to leave it to the barrister[18]. According to the CPS, in two- thirds of cases (65%) it was settled by the CPS and in one fifth (20%) it was left to the barrister. There were 15 per cent of 'Other' responses most of which were to the effect that the issue was determined by the CPS law clerk or by agreement between counsel and the CPS lawyer.

5.14 Was there any dispute between the prosecution barrister and the CPS, and, if so, how was it resolved?

According to the CPS (Cp39), there was no dispute in 97 per cent of cases[19], but in the tiny number of cases where there was a dispute[20], it was resolved in line with counsel's view in just under half (44%), in line with the CPS view in a third (33%) and compromised in the remaining one fifth (22%). The numbers are however so small as not to be a reliable basis for any conclusion on this issue.

5.15 How experienced was prosecution counsel?

In any issue between the CPS and the Bar the experience of counsel might be a factor. The CPS were therefore asked to say (Cp41) whether prosecuting counsel was experienced or not.

There were 313 substantive answers to this question. In almost half (47%), the barrister was described by the CPS as 'Very experienced', and in the same proportion (47%) 'Fairly experienced'. He was described as 'Not very experienced' in only 6 per cent of cases and, remarkably, there was not a single case in which he was described as 'Inexperienced'.

5.16 Did the police play any significant part in the plea/charge discussions leading to a cracked trial? If so, who led for the police?

The CPS said that the police played a significant role in the charge/plea discussions leading to a cracked trial in just over one third of the cases

[18] There were 3 non-replies.
[19] N=313; 6 non-replies.
[20] N=10; 1 non-replies.

(38%), a 'Very minor role' in nearly half (47%) and 'No role' in 15 per cent.[21]

When the police played a role, the person who led for the police was the officer in charge of the case in 91 per cent of cases and another officer in the case in 7 per cent.[22]

5.17 Was a cracked trial better than a full trial?

The CPS were asked (Cp44) whether the cracked trial outcome was on balance better than a trial. The response was overwhelmingly affirmative – a 'Good outcome' in nearly two-thirds of cases (64%), and 'Satisfactory' in one third (34%)[23]. As many as 623 different reasons were given why the cracked trial had been a good outcome. The only surprise was that the reason mentioned most often was that the sentence would have been the same even if the case had gone for trial – suggesting that the sentence discount would not have operated.

Table 5.5
Reasons why cracked trial was good outcome

	%
The sentence would have been the same even if there had been a trial	35
The prosecution secured a conviction	23
Saved time/expense	21
It would have been difficult to get a conviction	13
Saved victim/witnesses an ordeal	7
Def. pleaded guilty to the most serious charge	6
Total	100 (N=623)

There were only 14 cases out of 515 (3%) in which the result was described as 'Not a good outcome'.

5.18 If the cracked trial case had gone to trial, what would have been the chances of the defendant being acquitted?

There were 40 cases (8% of the 483 cases in which there was a substantive reply[24]) in which the CPS said that if the case had gone for trial the defendant would have had 'Good' chances of an acquittal and another 86 cases (18%) in which the chances of an acquittal were said to be 'Fairly

[21] N=313; 6 non-replies.
[22] N=118; 1 non-reply.
[23] N=515; 34 non-replies.
[24] There were 30 non-replies.

good'. In 357 cases (63%) the prospects of an acquittal were said to have been 'Poor' and in 87 cases (15%) the CPS said they could express no view either way.

If these figures are 'grossed up' on an annual basis it would mean that there over 600 Crown Court defendants a year pleading guilty when the CPS believe they have 'Good' chances of an acquittal and another 2,000[25] or so who plead guilty when their chances of an acquittal are deemed 'Fairly good'. (It should of course not be assumed that they are necessarily innocent. The point considered is only whether there is enough evidence to secure a conviction.)

[25] 26 times 79 is 2,054.

6. Result of Case and Other Jury Matters

6.1 Verdict
6.2 Jury matters
6.3 Ordered acquittals
6.4 Directed acquittals
6.5 Other weak cases

6.1 VERDICT

6.1.1 Did the jury reach a verdict?

There appear to be no existing official figures as to the proportion of cases in which a jury fails to reach a verdict – otherwise known as 'hung juries'.

The reponses of the barristers (Pb143, Db155) and the judges (Jg73) appear in the table below. Although in each category there were many non-replies, the pattern of responses was remarkably consistent. All were agreed that there was a hung jury in 3–4 per cent of cases. The court clerks (Cc20) agreed that the jury failed to agree on its verdict in 3 per cent of cases.[1]

Table 6.1
Did the jury agree on its verdict?

	Pb %	Db %	Jg %
Jury agreed on all counts	93	93	94
Agreed on some counts	4	3	3
Hung jury	4	4	3
Total	100 (N=541[2])	100 (N=513[3])	100 (N=637[4])

6.1.2 What was the verdict?

The jury's verdict was the subject of a question to the courts clerks (Cc20), the prosecution barristers (Pb144), the defence barristers (Db156), the judges (Jg74) and the defendants (Def73). The various responses are set out below:

[1] N=720; 36 non-replies. The court clerks were not asked a separate question on the matter. Instead they were invited to state that the jury was 'hung' in the question as to its verdict.
[2] Plus 12 cases where the jury did not go out and 93 non-replies.
[3] Plus 8 cases where the jury did not go out and 117 non-replies.
[4] Plus 168 non-replies.

Table 6.2
Jury's verdict

	Cc %	Pb %	Db %	Jg %	Def. %	Jurors %
Guilty on all charges	41	45	42	47	19	41
Guilty on some charges	16	17	15	15	44	16
Not guilty to all charges	44	38	42	39	37	43
Total	100[5]	100[6]	100[7]	100[8]	100[9]	100[10]

One might have supposed that all respondents would have been agreed on the outcome of the trial. However, as can be seen, there were some disagreements as to the percentage of cases in each category. [11]

The defendants' figures are seriously out of line with the rest in regard to the proportion of 'guilty on all charges' and 'guilty on some'. It would appear that for some reason, defendants were systematically recording mixed verdicts when all other respondents were recording verdicts of guilty to all charges and vice versa. We found no way of explaining this curious phenomenon. But if the two categories of guilty on all counts and guilty on some counts are added together, the aggregate for defendants comes somewhat into line with that for other respondents. Or, to put the same point in a different way, respondents agreed that the defendant was acquitted on all counts in around 37–39 per cent (Pb, Jg and Def) or 42–44 per cent (Cc, Db and Jurors).

6.1.3 Acquittal rate by ethnicity

According to prosecution barristers, the acquittal rate for the 333 white defendants in regard to whom the information was available was 49 per cent. The acquittal rate for 54 black defendants was 37 per cent. The acquittal rate for 18 Indian, Pakistani and Bangladeshi defendants was 50 per cent.

[5] N=698 with 36 non-replies and 22 cases where the jury failed to agree.
[6] N=512; 5 non-replies.
[7] N=479; ll non-replies.
[8] N=592; 23 non-replies.
[9] N=377 including 31 who said they were 'discharged or bound over'. There were 91 non-replies.
[10] N=7,611 plus 408 non-replies and 323 where the jury was 'hung'.
[11] Cross-checks between the different combinations of respondents showed that there were different views as to what had happened in 5 to 7 per cent of cases. Thus, for instance, prosecution barristers and court clerks disagreed on the verdict in 23 cases out of 423 (5%).Court clerks and defence barristers disagreed in 24 out of 390 (6%). Prosecution barristers and judges disagreed in 27 cases out of 396 (7%).

According to defence barristers, the acquittal rate for the 333 white defendants was 51 per cent and for the 54 black defendants was 44 per cent. For the 18 Indian, Pakistani and Bangladeshi defendants the acquittal rate was 56 per cent.

Jurors were asked only to distinguish between white and non-white. The jury acquittal rate in 279 cases where the jurors said the defendant was white was 45 per cent, compared with 33 per cent in 66 cases where they said he was non-white[12].

6.1.4 Was the jury's verdict unanimous?

According to the annual *Judicial Statistics* (Table 6.10), majority verdicts in conviction cases occur in something like 12 per cent of cases. There have never hitherto been any statistics about the incidence of majority verdicts in cases ending with an acquittal. (The question is never put to the foreman in cases ending in acquittal for fear of creating an impression of a 'second class' acquittal.)

The answers given to this question by the different respondents are shown below:

Table 6.3
Was jury's verdict unanimous?

	Cc %	Pb %	Db %	Jg %
Unanimous	82	82	82	81
Majority verdict on one or more count	15	18	16	19
Don't know	3	0.3	1	0
Total	100[13]	100[14]	100[15]	100[16]

There was a clear consensus that the jury was unanimous in a little over 80 per cent of cases, with a majority verdict in 16–19 per cent of cases. This is somewhat higher than in the annual *Judicial Statistics.*

But we were able to put this question also to the jurors themselves. Their responses stated that the majority verdict rate was 13 per cent, which is virtually the same as that in the *Judicial Statistics.* But they also stated that in 6 per cent of cases the verdict on *some counts* was by a majority. There

[12] In both instances the figure was based on cases where eight or more jurors made effective responses.

[13] N=601 with 13 non-replies.

[14] N=309 with 6 non-replies.

[15] N=274 with 3 non-replies.

[16] N=358 with 6 non-replies.

is no figure for this category in the official statistics. (The jury questionnaire specifically gave respondents the opportunity to state whether the verdict on some counts had been by a majority. The other questionnaires did not give respondents this choice.)

It is likely therefore that the jury's 6 per cent majority verdict on some counts is the explanation of the apparent discrepancy between the jury respondents and the rest.

We were able to check the jurors' report of a majority verdict against the actual result of the case reported by the jury. It proved that it was exactly the same in acquittal as in conviction cases.

It seems that there is an association between the length of the case and the likelihood of a majority verdict. The longer the case, the more likely a majority verdict:

Table 6.4
Majority verdicts by length of case

	Majority verdicts (jurors)
Length of case	%
Under 1 day	2 (N=1,453)
1–3 days	13 (N=3,644)
3–5 days	23 (N=1,039)
Over 1 week	24 (N=507)

Jurors who took part in one-day cases said that majority verdicts happened in only 2 per cent of cases compared with nearly a quarter of those who took part in cases lasting over a week.

6.1.5 Was the jury's verdict surprising in the light of the evidence?

We wanted to find out how different categories of respondents reacted to the jury's verdict. The same question was put to the barristers (Pb146; Db158), the judge (Jg76), the defence solicitor (Sol66), the police (Pol28), and the CPS (Cp80).

The question in each case was: 'In your view, was the jury's decision surprising in the light of the evidence?' The only variation was that in the case of the police questionnaire the words 'in the light of the evidence' were erroneously omitted. The answers of each category of respondents are given below:

Table 6.5
Was jury's verdict surprising?

	Yes %	No %
Prosecution barristers	15	85[17]
Defence barristers	14	86[18]
Judges	14	86[19]
Defence solicitors	18	82[20]
Police	25	75[21]
CPS	27	73[22]

There are two noteworthy features of this table. The first is that in the great majority of cases the jury's verdict was found not to be surprising. The proportion of cases in which there was surprise at the verdict ranged from a high of 27 per cent(CPS) to a low of 14 per cent (defence barristers).

The second is that, with the exceptions of the police and the CPS, all the other participants were close in their view of the overall outcome of jury trials. In particular, the two sets of barristers and the judges had virtually identical percentages in which they were surprised at the outcome.

They were however not necessarily surprised at the same verdicts. So, for instance, taking the same verdicts, the defence and prosecution barristers were surprised in 17 cases and not surprised in 231 but there were 48 cases (16%) in which their views differed. Similarly, the judge and the defence barrister said that that they were surprised in 15 cases and not surprised in 272. But there were 66 cases (19%) in which they disagreed.

6.1.6 Surprise at jury's verdict – by result of case

In the main, acquittals gave rise to surprise considerably more frequently than convictions. The table below shows the very different levels of surprise of each category of respondent by reference to whether the outcome was an acquittal or a conviction on all charges.

[17] N=498; 19 non-replies.
[18] N=465; 25 non-replies.
[19] N=606; 9 non-replies.
[20] N=308 plus 237 non-replies and 53 'Can't say'.
[21] N=451; 112 non-replies and 17 'Can't say'.
[22] N=525; 84 non-replies and 35 'Can't say'.

Table 6.6
Percentage of cases in which respondents were surprised – by result of case

	Overall acquittal %	Overall conviction %
Judges (Jg76)	25 (N=221)	4 (N=276)
Prosecution barristers (Pb146)	26 (N=185)	3 (N=224)
Defence barristers (Db158)	10 (N=185)	14 (N=200)
CPS (Cp80)	44 (N=189)	10 (N=218)
Defence solicitors (Sol66)	14 (N=135)	26 (N=103)
Police (Pol28)	47 (N=158)	8 (N=192)

These differences are striking, both in regard to the reaction to acquittals as compared with the reaction to convictions, and in the sizeable differences as between the perception of the different groups of respondents.

One would expect the prosecution to be more surprised at acquittals than the defence, but the extent of the differences does seem great. Thus the police and the CPS were surprised at no fewer than 44–47 per cent of acquittals, compared with 10-14 per cent for defence lawyers. The prosecution barristers and judges were somewhere between, at 25–26 per cent.

Also,the percentage point difference as between the level of surprise for acquittals, on the one hand, and convictions, on the other, was high for each group, except defence barristers where it was only 4 points.

6.1.7 What did respondents think the jury's decision meant?

In order to try to get a sense of perceptions of the jury's decision, we asked the same respondents (except the CPS who unfortunately were left out), a further question, namely – 'Which of these comes closest to your view of the jury's decision?' (This question was posed regardless of whether in the previous answer the respondent had indicated surprise at the verdict.)

1. 'Understandable in the light of the evidence (strength of defence/prosecution, weakness of other'
2. 'Against the overall weight of the evidence, but explicable because..... (please write in)'
3. 'Against the judge's directions on law but explicable because..... (please write in)'
4. 'Inexplicable..... (please indicate in what sense)'

Each of these four possible answers has been assigned a number which is used in the table that follows:

Table 6.7
What did the jury's decision mean?

	1 %	2 %	3 %	4 %
Judges	85	12	1	2[23]
Prosecution barristers	83	12	0	4[24]
Defence barristers	84	13	0.2	3[25]
Defence solicitors	87	10	1	2[26]
Police	78	13	1	8[27]

What is most notable about this table is, first, the balance of responses:

1. *Jury's decision understandable in light of the evidence*: All categories of respondents thought that in the large majority of cases – ranging from 78 per cent at its lowest, to 87 per cent at its highest -the jury's decision was 'understandable in the light of the evidence'.

2. *Jury's decision against the overall weight of the evidence but explicable*: A little over one-tenth of each category of respondent thought the jury's decision was against the overall weight of the evidence but explicable for one or another reason. The long list of possible explanations for the jury's verdict given by the different respondents in these cases could be classified under one or more of the following broad heads: 1) Sympathy for the defendant/antipathy toward the complainant; 2) Case too trivial or stale; 3) Misconduct by the police; 4) Evidential considerations such as lack of corroboration or evidence all being circumstantial; 5) Concern over possible sentence; 6) Quality (or lack of quality) of the respective barristers.

3. *Jury's decision against the judge's directions on the law but explicable* Hardly any respondents thought that the jury's decision was against the judge's directions on the law.

4. *Jury's decision inexplicable*: Only a very small proportion of jury verdicts were described as inexplicable – for all but one category of respondent the percentage was in the range of two to four per cent. The sole exception was the police who thought that as many as eight per cent of jury verdicts were 'Inexplicable'.

The second striking feature of the table is the fundamental similarity of responses from all five categories of respondent. This is in contrast to the

[23] N=599; 16 non-replies.
[24] N=495; 22 non-replies.
[25] N=461; 29 non-replies.
[26] N=315; 250 non-replies and 33 'Can't say'.
[27] N=450; 18 non-replies.

dissimilarity of views that emerged in the previous table with regard to the verdict.

We cross-tabulated the view of the jury's decision first, by whether the respondent was surprised by the outcome (Table 6.8), and secondly, by whether the result was an acquittal or conviction (Table 6.9)

Table 6.8
What did the jury's verdict mean when the respondent was surprised at the outcome

	Pb %	Db %	Jg %	Sol. %	Pol %
Understandable	10	10	25	29	27
Against evidence	61	69	54	60	38
Against law	–	–	3	–	2
Inexplicable	27	20	18	12	34
Total	100 (N=68)	100 (N=59)	100 (N=85)	100 (N=42)	100 (N=109)

The numbers are rather small but the pattern is consistent. The table shows that 'surprised at the outcome' in the great majority of cases meant (not surprisingly) that the verdict was felt either to be against the weight of the evidence (or law) or 'inexplicable'. This was true for each category of respondent: Pb 90%; Db 89%; Jg 75%; Sol 72%; Pol 74%.

But how did the respondents' evaluation of the meaning of the jury's verdict relate to the actual result of the case? The answer is to be found in the table below. This table is based on the responses of the two sets of barristers, the judges, the police and the defence solicitors. (In the case of the latter two, the verdict is taken from the 'majority view' since they were not asked the outcome of the case.)

Thus where the prosecution barrister thought the verdict was 'Understandable' there was an acquittal rate of 37 per cent, whereas when the defence barrister thought the verdict was 'Understandable' the acquittal rate was 49 per cent.

Table 6.9
Rate of acquittals on all counts by respondent's view of verdict

	Pb %	Db %	Jg %	Sol. %	Pol. %
Understandable	37[28]	49[29]	37[30]	58[31]	34[32]
Against evidence	90[33]	45[34]	92[35]	41[36]	87[37]
Inexplicable	100[38]	50[39]	100[40]	50[41]	86[42]

The table shows a marked similarity of response between the judge, the police and the prosecution barrister, on the one hand, and the defence barrister and defence solicitor on the other.

Where the jury's verdict was viewed by defence barristers and solicitors as 'Understandable', roughly half of the cases ended in acquittal, the balance in convictions. The comparable figure for prosecution barristers, the judges and the police was 34–37 per cent acquittals – the majority of 'understandable verdicts' being convictions.

Of jury verdicts viewed by defence barristers and solicitors as 'against the weight of the evidence', 45 per cent and 41 per cent respectively ended in acquittal. By contrast, some 90 per cent of verdicts regarded as against the weight of the evidence by prosecution barristers, the police and the judge were acquittals. In other words, the judges, prosecution baristers and the police are again saying that when they think the jury goes against the evidence, it normally does so by acquitting, rather than by convicting.

The figures for verdicts that were regarded as 'inexplicable' are included for completeness – but the numbers are so small that they cannot be regarded as very meaningful.

But to what extent were views of individual verdicts shared?

[28] N=341.
[29] N=326.
[30] N=420.
[31] N=220.
[32] N=270.
[33] N=52.
[34] N=53.
[35] N=60.
[36] N=27.
[37] N=45.
[38] N=12.
[39] N=4.
[40] N=8.
[41] N=2.
[42] N=28.

6.1.8 Comparison of views of respondents

As has been seen, the police were the respondents who most often expressed doubts about the jury's verdict, especially where the verdict was an acquittal. In order to assess these negative views more fully we looked at all the cases in which the police said that the verdict was 'Against the weight of the evidence' or 'Against the judge's direction on law' or 'Inexplicable' by reference to the verdict – to see to what extent these views were shared by the other respondents. For this purpose we simply counted negative views without regard to the particular category. Thus 'Against the weight of the evidence', 'Against the judge's directions on the law' or 'Inexplicable' were treated as 'negative views'; 'Understandable in the light of the evidence' was treated as 'not negative'.

Since the sole purpose of this analysis was to see to what extent the police view was shared, we did not include the cases where the only questionnaire returned was that from the police. The actual number of other questionnaires returned in these cases varied from one to four.[43]

Were police negative views of acquittals shared by other respondents? There were 64 cases in which the police expressed negative views about the verdict where the defendant was acquitted on all charges. In 31 of these cases (48%), the police negative view was the majority view; in 22 (34%) it was not the majority view and in 11 (17%) there was no clear result.

In 19 of the 31 cases (61%) where the police view of the acquittal was the majority view, the police negative view was shared by the judge and in 23 of the 31 cases the police view of the acquittal was shared by the judge and/or by one or other of the defence team. In four of the 31 cases (13%), however, the judge disagreed with the police view. (In eight of the 31 cases there was no questionnaire from the judge.)

In the 22 cases where the police view was not the majority view, the judge agreed with the police in two and disagreed in 16. (In four cases there was no judge questionnaire. In all four of these cases the prosecution barrister disagreed with the police view.)

In the 11 cases where there was no majority view, the judge agreed with the police in one case, disagreed in six cases and did not respond in four cases.

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[43] The 'majority view' might therefore be two out of two, two out of three, three out of four, three out of five, four out of four, four out of five, or five out of five. When there was 'no clear result' it meant there were two questionnaires expressing opposing views or four questionnaires with two views on both sides.

A table showing the aggregate of agreement and disagreement appears below. Excluding the third column (cases where there was no reply), the judge disagreed with the police in 56 per cent of 50 cases, the prosecution barristers disagreed with the police view in 34 per cent of 41 cases, the defence barristers disagreed in 78 per cent of 41 cases and defence solicitors disagreed in 77 per cent of 30 cases.

Table 6.10
Respondents' agreement and disagreement with police negative view of acquittal on all counts

	Agree No.	Disagree No.	No reply No.	Total No.
Judge	22	28	14	64
Pb	27	14	23	64
Db	9	32	23	64
Sol.	7	23	34	64

Problematic acquittals – summary

It may be said that problematic acquittals emerge as more of an issue from these findings than problematic convictions. It is important to recall however that all respondents other than the police were agreed that well over 80 per cent of jury verdicts were 'understandable in the light of the evidence'. For judges it was 85 per cent. For prosecution barristers it was 83 per cent. The police said that 78 per cent of jury decisions were 'understandable' in that sense.

Even the clear majority of acquittals were accepted to be 'understandable'. Perhaps the matter can be best put into perspective by a table that shows how acquittals that are thought by the judges and the barristers to be 'against the weight of the evidence' and 'inexplicable' fit into the total pattern of acquittals:

Table 6.11
Percentage of jury acquittals by judges' and barristers' explanations

	Pb %	Jg %	Db %
Understandable in light of the evidence	68	71	84
Against weight of the evidence	25	25	13
Against the judge's direction on the law	0	0.4	0
Inexplicable	6	4	3
Total	100 (N=185)	100 (N=221)	100 (N=185)

What one might call 'problematic jury acquittals' constitute 31 per cent of all acquittals for prosecution barristers, 29 per cent for the judges and 16 per cent for defence barristers.

One should also have in mind that *jury* acquittals represent a minority of all acquittals. On the figures for 1991[44], there were 17,760 defendants who were acquitted of all charges in the Crown Court. Of these, 43 per cent were 'ordered acquittals' where the prosecution offered no evidence; 16 per cent were 'directed' by the judge, usually after the defence submitted that there was 'no case to answer'. Acquittals by the jury were 41 per cent of the total.

If therefore 'problematic acquittals' are taken at their highest as , say, 30 per cent of the 41 per cent of jury acquittals, that would be 12 per cent of all acquittals. If the lower figure of 16 per cent for problematic acquittals suggested by defence barristers is adopted, that would represent 6–7 per cent of all acquittals. ('Grossed up' on an annual basis this would mean something between 1,200 to 2,100 'problematic acquittals' per year, out of some 28,000 cases involving juries.)

Problematic convictions

There were far fewer 'problematic convictions' , but the number and proportion was not entirely negligible.

It will be recalled that the proportion of convictions found to be 'surprising' was: Jg 4%; Pb 3%; Db 14%; CPS 10%; Sol 26%; Pol 8%[45]. It is of particular note that defence barristers (most of whom had a mixed prosecution/defence practice) were surprised by as many as 14 per cent of convictions. Defence solicitors were surprised by a quarter of all convictions. But it also seems noteworthy that the police and the CPS were surprised by as many as 8 and 10 per cent of convictions respectively.

[44] *Judicial Statistics*, 1991, Cm 1990, Table 6.9, p.63.
[45] Table 6.6, sect.6.1.6 above.

When we looked for convictions that were said to be 'against the weight of the evidence' or 'inexplicable' there were not very many of these and, not surprisingly, the defence perceived more of them than the prosecution:

Table 6.12
'Problematic convictions'

	Pb No.	Jg No.	Db No.
Against weight of evidence	5	5	29
Against law	0	1	1
Inexplicable	0	0	2
Total	5	6	32

The numbers are so small as not to be a sound basis for statistical projections but, for what it is worth, the judges and prosecution barristers thought such cases were 2 per cent of the total of jury convictions, whereas defence barristers thought they were 17 per cent of jury convictions. ('Grossed up' on an annual basis, 2 per cent of convictions in 1991 would have been some 250 cases; 17 per cent would have been over 2,000.)

Were police negative views on convictions shared by other respondents? There were 11 cases in which the police expressed negative views about a case ending in conviction.

In two of these cases the police disquiet was the majority view. In six of the eleven cases the police disquiet about the conviction was not the majority view. In five of these cases the judge thought the verdict was 'Understandable in the light of the evidence' – and in four out of the five the defence barrister agreed. In the one case where the judge agreed with the police about the conviction, the two barristers and the defence solicitor all thought that the verdict was 'Understandable in the light of the evidence'.

There were two cases ending in conviction where there was no clear result. In one the judge agreed with the police, though both the defence barrister and solicitor thought the conviction was 'Understandable in the light of the evidence'. In the other case the judge disagreed with the police, as did the prosecution barrister.

In aggregate, therefore, the judge agreed with the police in 3 cases and disagreed in 7, the prosecution barrister agreed in 3 and disagreed in 4, the defence barrister agreed in 3 and disagreed in 6; and the defence solicitor agreed in none and disagreed in 3.

6.1.9 Defendant's view of jury trial

To try to get a sense of how defendants see jury trial we asked them (Def72) – 'If the law was changed so that you could have chosen either a trial by jury in the Crown Court, or a trial just by a judge in the Crown Court (with no jury) which would you have chosen?'

Of the 499 who replied, 70 per cent said they would choose trial by jury, whilst 30 per cent said they would not.[46]

We tested the answers by reference to the result of the case. 85 per cent of those found not guilty on all counts[47] would opt for jury trial, compared with 62 per cent of those found guilty on all counts[48]. The outcome of the case therefore did seem to have affected the defendant's view somewhat.

6.2 OTHER JURY MATTERS

We also posed the question of the merits or otherwise of the jury system to some of the other actors.

6.2.1 Is the jury system sensible?

The judges (Jg85) and the barristers (Pb148; Db160) were asked: 'What do you think of the jury system in terms of generally getting a sensible result?'. (In retrospect, the failure to put the same question to the other categories of respondents was unfortunate.)

Table 6.13
Is the jury system a sensible system?

	Jg	Pb	Db
Very good system	29	38	47
Good system	50	50	44
Neither good nor poor	14	8	7
Poor system	7	3	1
Very poor system	1	1	1
Total	100 (N=419)	100 (N=503)	100 (N=465)

The judges thought the jury system was 'Good' or 'Very good' in 79 per cent of cases, the prosecution barristers in 82 per cent and defence barristers in 91 per cent. The judges thought it was 'Poor' or 'Very poor' in

[46] There were 75 non-replies.
[47] N=138; 14 non-replies.
[48] N=71; 3 non-replies.

cent, prosecution barristers in four per cent and defence barristers in two per cent. The positive rating was therefore high and the negative rating low for all three categories.

We also asked the jurors themselves.

Their view was essentially the same. Seventy nine per cent of jurors generally (and 81% of foremen) rated the system 'Very good' or 'Good'. Only 6 per cent of jurors generally (and 3 per cent of foremen) rated the system 'Poor' or 'Very poor'[49]. (See further sect.8.11.9 below.)

6.2.2 Should jurors take notes?

The judges were asked (Jg86) the general question whether jurors ought to be encouraged or discouraged from taking notes.

There were 410 effective responses[50]. 188 (46%) thought jurors should be encouraged, 93 (23%) thought they should be discouraged and 129 (31%) said they had no opinion on the matter.

6.2.3 Did jurors take notes?

According to others

The barristers were asked (Pb142; Db154) whether any of the jurors did in fact take notes. Where they had a Yes or No answer, the barristers said that one or more jurors had done so in roughly two-thirds of cases – Pb 64 per cent[51], Db 68 per cent[52]

According to the jury?

As will be seen (see sect.8.3 below),two-fifths of jurors said they took notes and most found their notes useful[53]. In three-quarters of cases also other jurors took notes[54]. Seventy per cent of jurors said that courts provided pens and paper for the purpose[55]. It seems therefore that this has already become a more or less accepted if not standard part of the system.

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[49] N=5,958; 3 non-replies.
[50] Plus 20 non-replies. The numbers were low because the question was only to be answered on the first Royal Commission questionnaire filled in by any respondent. Many will have filled in more than one questionnaire during the survey period.
[51] N=502; 28 non-replies and 114 'Not sure'.
[52] N=485; 45 non-replies and 108 'Not sure'.
[53] N=8,223; 119 non-replies.
[54] N=7,034; 244 non-replies and 1,064 'Not sure'. The three-quarters figure was calculated after excluding the 'Not sure's'.
[55] N=7,973; 369 non-replies.

6.2.4 Should jurors be told about their right to ask questions during the trial?

The judges were asked (Jg87) whether they thought jurors should be told of their right to ask questions during the trial.

Nearly three-fifths (59%) thought not. A little over a quarter (29%) thought they should be told. The remaining 13 per cent had no view.[56]

Seventy per cent of jurors said that they had been told about their right to ask questions[57]. Of those who had wanted to ask a question, only 17 per cent had had the courage to do so during the trial.[58] But where the jury wanted to ask questions of the judge after it had retired to consider its verdict it did so in three-quarters of the cases.(See sect.8.5 below).

6.2.5 Should the right of peremptory challenge be restored?

The barristers (Pb182; Db196) and the judges (Jg88) were asked whether they wished to see the return of the defence's right to challenge jurors without giving reasons ('the right of peremptory challenge') which was abolished in the Criminal Justice Act 1988.

A slight majority of prosecution barristers (56%)[59] thought the right should not be restored. Exactly the same proportion of defence barristers thought that it *should* be restored[60]. The judges sided strongly with prosecution barristers – 82 per cent thought it should not be restored.

Where the barristers also sat part-time as recorders or assistant recorders, they were less likely to want restoration of the right of peremptory challenge than where they did not sit – Pb 31 per cent[61] compared with 47 per cent[62], Db 47 per cent[63] compared with 57 per cent[64].

We tested to see whether the barristers' opinions on this matter were affected by certain other variables. There were no significant differences as between practitioners of different years in practice, nor did it make a difference whether their practice was wholly criminal or a mixture of criminal and other work.

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[56] N=416; 14 non-replies.
[57] N=8,216; 126 non-replies.
[58] N=3,544; 31 non-replies.
[59] N=963; 15 non-replies.
[60] N=1,052; 21 non-replies.
[61] N=176.
[62] N=762.
[63] N=141.
[64] N=898.

One variable that did prove noteworthy was that defence barristers on the South Eastern Circuit favoured the restoration of peremptory challenge more than those on the other circuits. In the five other circuits defence barristers were more or less evenly divided between those who wished to see it restored and those who did not. In fact in three circuits, (the Western, Wales and Chester and the Midlands and Oxford), slightly more did not want it restored. But in the South Eastern the ratio of those who wanted it restored was 2:1.

This is consistent with the pattern of use before the right was abolished, since research showed that peremptory challenge was used in particular in London and the South East.[65]

6.2.6 Did counsel have any concerns about the composition of the jury?

We asked the barristers (Pb139; Db151) 'Did you have any concerns about the composition of the jury for the case' on any of a number of stated grounds or on any other grounds?

Unfortunately, however, there was a typographical misprint in the question put to prosecution barristers. The first box to be ticked by was for those who had 'No concerns'. The second was concern about 'Age of jurors'. In the case of the prosection barristers they were run together (the first line read 'No concerns about jurorsMix of ages'). Since having No concerns accounted for by far the largest number of replies, this unfortunate error made the replies of prosecution barrister valueless.

Defence counsel had no concerns at all in over four-fifths of cases (473 or 83%)[66]. In the minority of cases where concerns were expressed by defence barristers, a total of 199 different concerns were expressed:

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[65] See J. Vennard and D. Riley,'The Use of Peremptory Challenge and Stand By of Jurors and their relationship to Final Outcome' (1988) *Criminal Law Review*, p.731.

[66] N=534; 36 non-replies.

Table 6.14
Barristers' concerns about jury composition

	Db %
Mix of racial groups	23
Mix of ages	16
Mix of sexes	16
Mix of social groups	12
Apparent intelligence of one or more jurors	11
Literacy of one or more jurors	7
English language ability/comprehension	5
Other	10
Total	100 (N=199)

The most frequently mentioned area of concern was the racial mix (23%). (One respondent made a systemic point. He had been at the local bar in a mixed area for 17 years and had conducted hundreds of trials. He had 'only seen about a dozen non-white jurors'.) The least mentioned ground was concern over English language ability (5%).

Concerns over jury composition by result of case: The result of the case seemed to have no statistical association with concerns about jury composition. Thus defence barristers had 'No concerns' in 80 per cent of cases ending in acquittal[67] as against 81 per cent of cases ending in conviction[68].

Race: Defence barristers expressed concern about the racial mix of the jury in 18 per cent of the cases when the defendant was black[69], compared with 3 per cent when the defendant was white[70]. Obviously (and naturally) concern about the racial mix was much more (six times more) frequent when the defendant was black – though it is striking that in over 80 per cent of cases of black defendants defence counsel had no concerns about the racial mix.

6.2.7 Do the lawyers think the jury had trouble understanding the evidence?

We asked the barristers (Pb140; Db152), defence solicitors (Sol63) and the CPS (Cp77): 'In this case do you think that a majority of the jury had difficulty in understanding the evidence?'

The responses appear in the table below:

[67] N=202.
[68] N=203.
[69] N=106.
[70] N=583.

Table 6.15
Do the lawyers think the jury had trouble understanding the evidence?

	Yes %	No %	DK %
Prosecution barristers	1	94	5[71]
Defence barristers	4	90	6[72]
Defence solicitors	7	83	10[73]
CPS	3	85	11[74]

Broadly, all categories of respondents, rightly or wrongly, thought that the majority of the jury would be able to understand the evidence. Very few thought they could not.

Unfortunately, through an oversight, this question was not put to the judges. But the judges (alone) were asked (Jg40) in regard to *scientific* evidence: 'In your view, was the scientific evidence in this case understandable by the jury?'

There were 257 cases in which the judges gave a reply[75]. In no fewer than 93 per cent, the judges said that the scientific evidence was 'All understandable'; in 5 per cent they said 'Some was understandable'. In only 1 case out of 257 (0.4%) did the judge think that none of the scientific evidence was understandable by the jury. There were 3 cases (1%) in which the judge was not prepared to hazard a view.

6.2.8 Did the jurors think they could understand the evidence?

The jurors themselves clearly agreed with the view that they could understand the evidence – both in normal cases and in the minority of cases involving scientific evidence. In both kinds of cases, some 90 per cent or so thought neither they nor most of their fellow jurors had had any real difficulties[76]. (See further sect.8.2.1–3)

6.2.9 Did the lawyers think the jury could remember the evidence?

The same respondents were asked (Pb141; Db153; Sol64; Cp78): 'Do you think that the length of the case meant that a majority of the jury would

[71] N=615; 30 non-replies.
[72] N=593; 45 non-replies.
[73] N=477; 121 non-replies.
[74] N=618; 61 non responses.
[75] Plus 6 non-replies.
[76] Ordinary evidence, jurors themselves – N=8,046; 296 non-replies and 281 'Not sure'. Other jurors-N=7,855; 206 non-replies. Scientific evidence-N=1,904; 18 non-replies. (Jurors were not asked whether they thought other jurors had been able to understand the scientific evidence.)

have had difficulty remembering the evidence?' The responses appear below:

Table 6.16
Do the lawyers think the jury could remember the evidence?

	No %	Yes %	DK %
Prosecution barristers	1	97	2[77]
Defence barristers	1	96	3[78]
Defence solicitors	6	86	7[79]
CPS	2	91	7[80]

These results, based on the judgment of lawyers as to the apparent capacity of the jury to remember the evidence, are clear-cut.

Again, the jurors themselves took much the same view. Over ninety per cent thought they had no, or no great difficulties, in remembering the evidence[81]. In the longer cases however there were more jurors who said they had problems remembering the evidence. (See sect.8.2.4–6 below.)

6.2.10 Could the jury have managed without a summing up on the facts?

The judges were asked (Jg 69) whether they thought the jury could have managed without a summing up on the facts.

Somewhat surprisingly, no fewer than 43 per cent of the judges who replied[82] said they thought the jury would probably have managed 'well enough' and a further 32 per cent thought they 'might have managed'. Only a quarter (25%) said they thought the jury would not have managed.

6.2.11 How easy was it for the jury to understand the judge's summing up?

The judges were then asked (Jg70): 'How easy was it for the jury to understand the summing up on the facts?'

Over two-thirds (68%) thought it was 'easy' and 29 per cent thought it was 'fairly easy'[83]. Only 1 per cent thought it was 'difficult' and 3 per cent thought it was 'fairly difficult'.

[77] N=616; 29 non-replies.
[78] N=593; 45 non-replies.
[79] N=467; 131 non-replies.
[80] N=609; 62 non-replies.
[81] N=7,473; 173 non-replies and 696 where the jury did not go out.
[82] N=667; 138 non-replies.
[83] N=650; 138 non-replies and 17 'Can't say'.

When we asked jurors the same question, about half (48%) said that managing without the judge's summing up on the facts would have made no difference (sect.8.6.1).

6.2.12 How easy was it for the jury to understand the summing up on the law?

When it came to understanding the summing up on the law, again the response was broadly very confident. Over two-fifth of the judges (42%) thought it was 'easy', and another 43 per cent thought it wa 'fairly easy'. Three per cent said they thought it was 'difficult' and 13 per cent that it was 'fairly difficult'

The views of jurors themselves were not very different. Well under 10 per cent said they had difficulties in following the judge's summing up on the law (sect.8.6.2–3).

6.3 ORDERED ACQUITTALS

6.3.1 Was this an ordered acquittal?

An 'ordered' acquittal is one in which the case is dropped by the prosecution from the outset – it never gets off the ground. Sometimes this happens before the jury is empanelled at all, sometimes it happens after the jury has been empanelled when the prosecution offers no evidence.

The court clerks were asked (Cc17): 'Where the jury was not empanelled, was there an acquittal on all or some counts, or was there some other reason why the jury was not empanelled?' The other respondents were asked whether the case was one in which the prosecution was dropped from the outset (Pb15; Db16[84]; Jg14; Sol8; Cp25; Pol12).

From the responses it emerged from a 'majority view' that there were 156 ordered acquittals.[85]

6.3.2 Why did the prosecution's case collapse?

Where the prosecution offered no evidence we asked the prosecution barrister (Pb16), the CPS (Cp26), the police (Pol13), and the judge (Jg15) for a view as to why this was. Unfortunately, the pre-coded answers to be ticked were phrased slightly differently so that it was not possible to compare the answers directly.

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[84] In the case of the defence barrister's questionnaire there was a misprint which caused the majority of respondents to fill in the wrong box.

[85] For an evaluation of this figure in relation to the other acquittal figures in the study see p.256 below.

The most detailed breakdown covering the largest number of cases was that reported by prosecution barristers. Their responses were as follows:

Table 6.17
Why did prosecution's case collapse?

	%
Key prosecution witness(es) did not turn up	20
Prosecution witness(es) did not come up to proof or changed their evidence	24
Prosecution evidence held inadmissible, tainted or other submission of law by defence	8
Other	48
Total	100 (N=135[86])

The 'Other' category covered a wide variety of circumstances including:– risk of informer's identity becoming known; medical or psychiatric report on defendant showed it was not in the interests of justice to proceed/ rendered admission unreliable(3 cases); inability to rebut defendant's alibi; lost prosecution exhibits (3 cases); poor police work; evidence against this defendant weak, another co-defendant pleaded guilty; the defendant himself had pleaded guilty to a more serious offence (6 cases); very weak case, defendant willing to be bound over; very weak case, ('should never have been brought'). In one case prosecution counsel said that the case was dropped because the CPS decided that delay due mainly to the defendant having previously failed to appear and listing problems made it not worthwhile continuing. The prosecution barrister disagreed with this decision and thought a conviction would have been 'a certainty'.

The CPS (Cp27) said that ordered acquittals flowed from witnesses refusing to testify, not attending court or changing their stories and other weakness in the prosecution evidence. Sometimes it occurred when the defendant pleaded guilty on other more serious charges.

The police said there were 29 cases out of 99 in which one or more important witness did not turn up, 12 in which one or more witness changed his story or refused to give evidence, nine cases in which the judge gave a preliminary ruling in favour of the defence and 38 cases of miscellaneous other reasons.

The miscellaneous 'Other' reasons given by the police were similar to those given by the prosecution barristers. (They included several cases where the reason given was 'witnesses had not been warned'.)

[86] Plus 7 non-replies.

* See also the study by **Block, B., Corbett, C., and Peay, J.**, (1993) *Ordered and Directed Acquittals in the Crown Court*, Royal Commission Research Series, No.15, Table 5. Out of 100 ordered and directed acquittals in their study, over a third resulted from crucial witnesses being missing (14), missing victim (10) or the victim refusing to testify (11).

6.3.3 Was an acquittal likely all along?

We asked prosecution counsel (Pb17) in these cases: 'In your view was an acquittal probable all along?'

Excluding the Don't knows, in 33 per cent of the rest the barrister said an acquittal was probable all along; in 49 per cent it was 'not inevitable' and in 18 per cent it only became likely at a late stage.

6.3.4 Was the collapse of the prosecution's case anyone's fault?

In regard to the cases in which the prosecution case collapsed, the police were asked(Pol.14) 'Do you think that anyone was at fault in bringing the case?'

There were 66 effective replies[87]. In 71 per cent the police thought no one was at fault. In 17 per cent the police blamed the CPS and in 4 per cent they blamed themselves. In 8 per cent the police blamed the complainant – and in one of these also the victim's mother.

The police were also asked (Pol15) whether, with the benefit of hindsight, they thought that the case should have been dropped or stopped earlier. (The questionnaire did not pursue this issue further so as to find out at what point it should or could have been dropped.)

There were 79 effective replies[88]. In 59 per cent the answer was No. But in the remaining 41 per cent it was Yes – it should have been dropped earlier.

The CPS were asked (Cp30) a slightly different question – whether anyone was at fault for the collapse of the prosecution's case? They were given a number of possible pre-coded responses and asked to tick all that applied (thus the total is more than 100%). There were 32 who said they blamed no one and two who answered they were not sure. Excluding these 34 cases there were 78 respondents giving 112 responses. The breakdown is shown below:

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[87] There were 14 non-replies.

[88] Plus 1 non-reply.

Table 6.18
Who was to blame for collapse of prosecution's case?

	%
The complainant/victim	50
Other prosecution witness(es)	28
The police	23
The CPS	21
Someone else	22
Total	144 (N=112)

By far the most frequently mentioned object of 'blame' was the complainant or victim, followed by 'Other prosecution witness'. (Perhaps 'responsibility' rather than 'blame' would have been a better word.)

6.4 DIRECTED ACQUITTALS

6.4.1 Was this a directed acquittal?

It may happen that the judge directs the jury to acquit on the basis that the prosecution's case is not strong enough to be put to the jury. Usually this happens at the end of the prosecution's evidence on the basis of a defence submission that 'There is no case to answer'.

The question whether the acquittal was directed was put to seven respondents. Inevitably they produced somewhat different responses. According to the 'majority view' there were 113 directed acquittals in the sample.[89]

6.4.2 If so, why did the prosecution's case collapse?

We asked the judge (Jg56), the barristers (Pb138; Db 150) and the CPS (Cp69) why the prosecution's case collapsed. (It was possible to give more than one answer.)

The numbers in each case were very small and the impressions of the different respondents as to the reasons varied considerably. But the following reasons in particular were mentioned:–

[89] For consideration of this in relation to the other categories of acquittal in the study see p.256 below.

Table 6.19
Why did the case collapse?

	Jg %	Pb %	Db %	CPS %
Witnesses not giving evidence not coming up to proof or discredited on cross-examination	35	31	32	53
Submissions of law by the defence or Key evidence inadmissible	44	56	47	30
Other, miscellaneous	25	13	21	16
Total	100 (N=79)	100 (N=48)	100 (N=77)	100 (N=105)

The 'other' category included cases in which it was stated that the prosecution had not 'got their tackle in order'; the case was badly prepared; there was not sufficient evidence to link the defendant to the crime; a bind over was more appropriate; there was a lack of forensic or other important evidence; or it was for one or another reason unsafe to proceed. There was one case in which the defendant's serious ill-health condition was said (by the CPS) to be the reason.

6.4.3 Was anyone at fault?

We asked the judge (Jg57) whether in his view anyone was at fault for bringing the proceedings in cases that ended with a directed acquittal. (More than one answer could be ticked.)

The number of cases was very small[90], but it is perhaps of some interest that in the judge's view no one was at fault in well over half these cases (61%), that the CPS were at fault in a third (33%) , the police in over a tenth (14%), prosecution counsel in 5 per cent and miscellaneous others (such as a trading standards officer) in the remaining 5 per cent.

The CPS were asked (Cp72) whether anyone was to blame for the collapse of the cases. There were 105 responses from 84 respondents[91]. In one fifth of cases (21%) they felt that no one had been at fault. Otherwise, the main problem identified by the CPS was the complainant (31%), followed, in order of frequency of mention, by 'Other prosecution witnesses' (27%), the police (21%), 'other persons' (13%), the CPS itself (7%) – and 'Not sure' (4%).[92]

We asked the CPS (Cp70) whether the unavailability of prosecution witnesses had been due to improper pressures from anyone. The answer in

[90] N=57; plus 10 non-replies.
[91] Plus 3 non-replies.
[92] The numbers exceed 100% because respondents were able to tick more than one category.

84 per cent of the admittedly small number of 44 cases[93], was No. There were five cases in which it was Yes and five in which the answer was 'Don't know'.

In one case the CPS blamed non-disclosure by the police who had failed to disclose that they had suspected and interviewed another distinctly possible culprit. ('Non disclosure by the police completely undermined the prosecution's case'). In another case the CPS blamed lack of communication between CPS and counsel over the prospective non-appearance of a witness. In another the CPS said that prosecution counsel had failed to apply himself to the law because of late return of the brief by another barrister.

According to the CPS (Cp73), in only one case had the CPS recommended that the case be dropped but been pressured by the police to carry on with it.

When the CPS were asked (Cp75) whether now with hindsight, after the directed acquittal, they took the view that the case should have been dropped by the CPS, the response in 72 per cent of the cases[94] was that it should not have been dropped.

We did however inquire more widely regarding weak cases.

6.5 VIEWS ON WEAK CASES

6.5.1 Views on strength of prosecution case

We asked respondents in contested cases (Pb160; Db172; Jg78; Cp81; Pol24) whether they thought the prosecution's case was weak or strong. (Unfortunately we did not ask whether the question was answered before or after the jury reached its decision.) The replies are set out below:

Table 6.20
Strength of prosecution's case

	Weak %	Strong %	Neither %
Prosecution barristers	20	41	39 (N=685[95])
Defence barristers	22	48	30 (N=702[96])
Judges	20	51	29 (N=754[97])
CPS	6	54	39 (N=541[98])
Police	13	56	31 (N=611[99])

[93] Plus 43 non-replies.
[94] N=78; 9 non-replies.
[95] With 24 non-replies.
[96] With 46 non-replies.
[97] With 4 'Don't know' and 22 non-replies.
[98] With 43 'Don't know' and 56 non-replies.
[99] With 16 non-replies.

It is striking that in the view of both barristers and of the judges, as many as about one-fifth of all contested cases are based on a 'Weak' prosecution case.

The views as to the strength or weakness of the prosecution's case were then tested against the actual result of the case.

Table 6.21
Acquittal rate by respondents' views of strength of case

Strength of case	*Percentage of each category ending in acquittal*[100]				
	Pb %	Db %	Jg %	Pol. %	CPS %
Weak	81	79	86	72	67
Strong	21	27	23	27	22
Neither	60	64	64	60	50

The results are broadly similar. Cases that were defined as 'Weak' mainly ended with an acquittal (Pb 81%[101],Db 79%[102],Jg 86%[103], Pol 72%[104], Cp 67%[105]). However, it should be noted that in the view of each category of respondent there were 'Weak' cases that ended in *conviction* viz-

Table 6.22
Conviction rate in 'weak' cases

	'Weak' cases %
Pb	6 (N=226)
Db	8 (N=202)
Jg	4 (N=274)
Pol	6 (N=358)
CPS	2 (N=387)

[100] The sample consisted only of cases in which the defendant was either acquitted of all charges or convicted on all charges. Cases where he was acquitted of some and convicted of others were excluded.
[101] N=74.
[102] N=79.
[103] N=73.
[104] N=72.
[105] N=27.

On the other hand, as can be seen from Table 6.21, in the view of each category of respondent, there was a considerably higher proportion of 'strong' cases ending in acquittal. All thought the acquittal rate in cases said to be 'strong' was over 20 per cent.

6.5.2 Should weak prosecution cases have been dropped earlier?

Prosecution barristers who described the prosecution case as weak were then asked (Pb161): 'Would you say that this was a case that should have been dropped earlier?'

In 81 per cent[106] the barrister said No. In 8 per cent the barrister had no view. In 11 per cent he said that in his view it should have been dropped earlier.

6.5.3 Should the case have been brought?

The barristers in all cases and the judges in all cases in which they received questionnaires[107] were asked (Pb173,Db190,Jg80): 'Did you agree with the CPS decision to prosecute in this case?'

91 per cent of judges[108] gave the answer Yes. But in 103 cases (7%) the judge said he did not agree with the decision to prosecute. (Ten of these were guilty pleas and 13 were mixed pleas.) Between them these 103 cases produced 108 reasons.

95 per cent of the prosecution barristers said they agreed with the decision to prosecute[109]. But in 73 cases (3%) the prosecution barrister said he did not agree with the decision to prosecute.

In the case of the defence barristers, the proportion who said they agreed with the decision to prosecute was 87 per cent.[110] but in 165[111] (10%) the defence barrister did not agree with the decision.

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[106] N=130; non-replies.

[107] It should be remembered that the total universe was smaller for the judges' questionnaire since they were not dealing with cases listed as pleas of guilty.

[108] N=1,455; 74 non-replies.

[109] N=2,165; 94 non-replies.

[110] N=1,631. (For reasons that are unclear, there was the unusually large number of 461 non-replies from defence barristers.)

[111] There were in addition 496 who did not answer the question, 10 who answered 'Can't say' and 10 'Not applicable'.

Their reasons appear below:

Table 6.23
Judges' and barristers' reasons why prosecution case should not have been brought

	Jg No.	Pb No.	Db No.
Case too trivial	23	18	53
Evidence was too thin	56	42	64
Otherwise not in the public interest	25	22	58
Some other reason	4	3	15
Total reasons	108	85	190
Total cases	103(7%)	73(3%)	165(10%)

Cases in which the prosecution barrister said the case should not have been brought included the following:

- 'It was clear from the evidence the prosecution witnesses were wholly untruthful and that the defence of self-defence would succeed.'
- 'Plausible defence – waste of public money.'
- 'Two friends messing about with an air rifle. Judge in sentencing said it was an accident.'
- 'Defendant had already pleaded to two other counts which adequately reflected criminality.'
- 'Very limited evidence of dishonesty in disposing of a car on hire purchase. Defendant remains fully liable for civil debt. Police and crown used for debt collection.'
- 'Offence committed to buy food for woman in desperate circumstances.'
- 'Defendant was a battered wife. Husband unemployed and refused to sign on. She forged his signature to get a loan.'
- 'Assault on ex-girlfriend. Both equally responsbible. Only injury was graze on knee.'
- 'Push and shove between workmates in workplace resulting in a cut below the eye.'
- 'Clear prima facie case but defendant educationally subnormal. The officer in the case did not expect a prosecution.'

Cases in which the judge thought a prosecution was not appropriate included the following:

- 'Fight between neighbours. Should have been left to civil court.'
- '67 year old woman, non-English speaking, charged with shoplifting of skirt worth £9.'

– 'Accused of good character. Complainant very drunk and aggressive. D went too far in self-defence, so pleaded guilty.'

Cases in which defence counsel thought a prosecution was not justified included:

– 'Involved £4 worth of cannabis resin which prosecution accepted he had validly confiscated in his role as a youth club worker – and he was of glowingly good character.'
– 'Defendant is facing charges of fraud on another indictment of £200,000. This matter related to a charge of deception of £34.89p.'

There was a total of 202 cases in which at least one of the three respondents asked this question[112] thought the case should not have been brought. In 47 cases case (23% of the 202) two of the three respondents shared this view. In 18 (9%) the two were the judge and the prosecution barrister, in 10 (5%) the two were both barristers. In two cases all three respondents thought the case should not have been brought.

6.5.4 Cases that should not have been brought – by result

We looked at the result of cases that 'should not have been brought'. (For this purpose we took only those that ended in a verdict of guilty or acquittal on all charges – and used the 'merged' or 'majority' verdict as our basis.)

Where responses were given, according to the judges, 82 per cent of 77 cases that 'should not have been brought' ended in acquittal on all charges. According to the prosecution barristers, 93 per cent of 54 cases ended in acquittals. For defence barristers it was 73 per cent of 107 cases.

6.5.5 Prosecution barristers' view as to whether guilty pleas,if contested, would have ended as acquittals

Prosecution barristers in all guilty plea cases were asked (Pb172): 'If the defendant had pleaded not guilty but the prosecution had gone forward, do you think he/she would have stood a fair chance of an acquittal?'

There were 767 cases in which a Yes or No reply was given.[113] In 91 per cent the answer was No. But in 67 cases (9%) the answer was Yes, the defendant would have had a fair chance of an acquittal.

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[112] Jg N=1,455; Pb N=2,165; Db N=1,631.

[113] In 93 cases the barrister said he could not give a view and there were another 110 cases in which the answer was a non-reply.

7. The Respondents

7.1 The judges
7.2 The barristers
7.3 Defence solicitors
7.4 CPS
7.5 Police
7.6 Defendants

We asked a variety of questions in order to establish certain basic facts about our respondents. In order to deal with the problem of double-counting, each questionnaire asked respondents to say whether this was the first questionnaire answered in the Royal Commission's study. We only counted the answer on the first questionnaire. This question also permitted us to count how many respondents there were in each category.

7.1 THE JUDGES

7.1.1 Type of judge

We asked judges to indicate what category of judge they belonged to:

Table 7.1
Type of judge

	Sample %	National[1] %
High Court judge	4	2
Circuit judge	60	66
Recorder	20	24
Assistant Recorder	9	6
Other full-time judge[2]	3	2
Other part-time judge[3]	3	–
Total	100 (N=433)	100

7.1.2 Period of sitting

The part-time judges were asked (Jg82): 'How long is your present stint of sitting?'

[1] Crown court cases, handled by, *Judicial Statistics*, 1991, Cm1990, Table 6.6, p.62.
[2] 'Other full-time judges' included District judges sitting as recorders and stipendiary magistrates.
[3] 'Other part-time judges' were mainly retired judges and deputy circuit judges.

Nearly half (48%) said their present stint was five days, just over a quarter (26%) said it was ten days. In 5 per cent it was 15 days, in 7 per cent it was 20 days, and in 13 per cent it was some other period.[4]

Part-timers were also asked (Jg83) how long their previous stint had been. The pattern was much the same.

7.1.3 Was the judge experienced in criminal work?

Both barristers were asked: 'In your view is the judge experienced in criminal work?' (Pb159, Db171). (There was no way of checking whether the barrister's view was or was not well informed.)

The defence barristers considered the judge to be experienced in criminal work in 89 per cent of cases and inexperienced in 11 per cent[5]. The prosecution barristers were in almost exact agreement, the proportions being 90 per cent and 10 per cent[6] Where we had responses from both barristers in the same case they agreed as to the experience of the judge in 90 per cent of cases and disagreed in 10 per cent.

7.2 THE BARRISTERS

7.2.1 Does the barrister do mainly criminal work?

We asked the two sets of barristers whether they had a mainly criminal practice (Pb178a; Db192a).

Table 7.2
Type of barristers' practice

	Pb %	Db %
Wholly or mainly criminal practice	62	65
Mixed	35	29
Very little criminal	3	2
Total	100 (N=971)	100 (N=1,068)

It seems as if around two-thirds of Crown Court work is done by practitioners who specialise in criminal work and one third is done by barristers who have a mixed civil and criminal practice.

[4] N=460; 5 non-replies.
[5] N=638; 55 non-replies.
[6] N=685; 70 non-replies.

7.2.2 Does the barrister do mainly defence or prosecution work?

We asked both sets of barristers whether they did mainly prosecution or defence work or a mixture of both (Pb178b; Db192b).

Table 7.3
Barristers doing defence or prosecution work

	Pb %	Db %
Mainly defence work	9	34
Mainly prosecution work	23	6
Mixed	68	60
Total	100 (N=778)	100 (N=808)

From this table it is clear that three-fifths or more of barristers do a mixture of prosecution and defence work.

The pattern varied however somewhat between regions as appears from the table below:

Table 7.4a
Nature of practice – defence barristers

	West. %	Wales/ Chest. %	N. %	Mid. %	NE %	SE/Lond. %
Mainly def.	16	15	31	31	24	48
Mainly pros.	5	14	6	6	4	5
Mixed	79	71	63	64	71	47
Total	100 (N=172[7])	100 (N=101[8])	100 (N=178[9])	100 (N=295[10])	100 (N=224[11])	100 (N=434[12])

[7] Plus 77 non-replies.
[8] Plus 43 non-replies.
[9] Plus 105 non-replies.
[10] Plus 155 non-replies.
[11] Plus 71 non-replies.
[12] Plus 197 non-replies.

Table 7.4b
Nature of practice – prosecution barristers

Mainly pros.	15	22	20	17	21	33
Mainly def.	5	6	10	5	6	10
Mixed	80	72	69	78	73	57
Total	100	100	100	100	100	100
	(N=172[13])	(N=126[14])	(N=213[15])	(N=290[16])	(N=253[17])	(N=511[18])

Mixed practices

So far as defence barristers are concerned, the proportion that have a mixed practice varies from a high of 79 per cent on the Western Circuit to a low of 47 per cent in London and the South Eastern, with two other circuits (N.E. and Wales/Chester) on 71 per cent and two (Northern and Midlands) around 63–64 per cent.

So far as prosecution barristers are concerned, the proportion that have a mixed practice varies from a high again of 78–80 per cent (Western and Midland), to a low of 57 per cent in London and the South Eastern, with three circuits (N.E., Wales/Chester and the Northern) in the range 69–73 per cent.

Specialist practices

The defence barristers who specialised in defence work ranged from nearly half of the London/S.E. circuiteers down to 15–16 per cent of those on the Western and the Wales and Chester Circuits. In the other three circuits they ranged from a quarter to nearly a third.

The prosecution barristers who specialised in prosecution work ranged from a high of a third in London/S.E. to a low of 15–17 per cent in the Western and the Midland Circuits. In the other three circuits the specialists were about a fifth of the total.

7.2.3 How long had the barristers been in practice?

We requested that where there was more than one barrister in the case the more senior fill out the questionnaire.

[13] Plus 87 non-replies
[14] Plus 35 non-replies.
[15] Plus 96 non-replies.
[16] Plus 173 non-replies.
[17] Plus 76 non-replies.
[18] Plus 185 non-replies.

We asked each barrister how long he/she had been in practice (Pb193; Db179).

The answers show that over three-fifths of the prosecution barristers and over half of the defence barristers completing the questionnaires were very experienced practitioners (over ten years in practice) and another one fifth were quite experienced (five to ten years in practice).

Table 7.5
Barristers' experience

Years in practice	Pb %	Db %
Up to 5 years	17	28
5–10 years	20	21
Over 10 years	62	51
Total	100 (N=972)	100 (N=1.072)

7.2.4 Did the barristers also sit as a part-time judge?

We asked the barristers whether they sat as Recorders or Assistant Recorders (Pb180; Db194).

Nine per cent of prosecution barristers and 7 per cent of defence barristers said they sat as Recorders; and 10 per cent of the former and 6 per cent of the latter sat as Assistant Recorders.

7.3 DEFENCE SOLICITORS

It was clear that there would be likely to be a problem as to who from the solicitors' firm should fill out the Commission's questionnaire. If we asked the partner in charge to do it, he would frequently know little or nothing as to what had happened. If we asked the firm's representative at court to do so, he would often be a clerk who would not necessarily know what had transpired at earlier stages. (Moreover it was not even certain that there would be a solicitors' representative at court in every case.)

Our instruction to solicitors was that, if the case was a full trial, the questionnaire should be filled out by the person who instructed counsel. We assumed that that person would be likely to be the most knowledgeable person in the firm about the pre-trial stages. If that person was not in court, the questionnaire was supposed to be passed to him/her by the firm's representative who was in court (failing which, by the barrister, who was asked to send it back to the firm with his papers). It was stated that to answer some questions the person who instructed counsel would need to consult with the firm's representative at court.

7.3.1 Job description

We asked the representative who filled out the questionnaire to classify the position held in the firm. (Sol90)

Table 7.6
Position in solicitors' firm

	%
Partner	21
Assistant solicitor	10
Legal executive	21
Articled clerk	9
Other clerk	31
Secretary	2
Other	3
On contract to the firm	2
Not directly employed	2
Total	100 (N=943[19])

The table indicates the extent to which crown court work for solicitors' firms is done by staff who are not solicitors (known in the profession as 'unadmitted staff'). It is true that the question did not ask 'Who did the work' but simply what is the job of the person who filled out the questionnaire. But it seems reasonable to assume that the task of filling out the Royal Commission's questionnaires would in most firms have been assigned to the person who actually did a significant part of the work.

The largest single category was 'other clerk' (31%), followed by legal executive (21%). If one adds articled clerks (9%), and the miscellaneous other non-solicitors, they account altogether for 69 per cent. Qualified solicitors accounted for only 31 per cent of the total.

7.3.2 At what stage did the respondent become involved in the case?

The respondents were asked (Sol2) at what stage they became involved in the case.

[19] Plus 39 non-replies.

Table 7.7
When respondent became involved in case

	%
At police station	29
Before committal	29
Later, 14 days or more days before hearing	16
2–13 days before hearing	7
Day before hearing	7
Day of hearing	11
Total	100 (N=1,367[20])

It is of interest that even in the solicitors' firm there are significant numbers who play a role at court who have had no prior involvement in the case – 18 per cent saying that they became involved on the day before or on the day of the hearing. It is equally of interest that almost a third (29%) said that they were involved from the police station onward.

7.3.3 How long had those who were directly employed worked for the firm?

Table 7.8
Length of employment

	%
Under 6 months	10
6 months to one year	8
Over 1 year up to 2 years	17
Over 2 years up to 5 years	29
Over 5 up to 10 years	18
Over 10 years	17
Total	100 (N=1,254[21])

This question was aimed at discovering the length of experience with the firm. Almost one fifth (18%) of those filling out the questionnaire had been with the firm for under a year and over a third (35%) had been with the firm for under two years. But the table does not show how much, if any, experience they had in criminal work prior to joining the firm.

It would also have been useful to have known how much experience of criminal work each person had – but, regrettably, this question was not put.

7.4 CROWN PROSECUTION SERVICE

7.4.1 In the case of the CPS, it was again clear that there might be problems as to who would complete the questionnaire. The person at court

[20] Plus 25 non-replies.
[21] Plus 42 non-replies.

is normally an unadmitted 'law clerk' – often covering several courts. He would not normally have had any involvement in the pre-trial stages of the case.

After consultation with the CPS, it was agreed that the instructions should make it clear that the form should be filled out by the *lawyer* who reviewed the case. (Every case is reviewed by a lawyer in CPS offices.) The CPS representative in court was asked to ensure that it was delivered to the lawyer. However it was stated 'Some consultation with the law clerk in court will normally be needed'.

7.4.2 CPS function of the person who filled out the questionnaire

The CPS instruction was carried out in nearly all cases. The person who filled out the questionnaire was a lawyer in 93 per cent and a law clerk in 7 per cent of cases.[22] (Cp4)

7.4.3 Length of service with CPS

We wanted to find out whether those who filled out the form, and by inference,those who did the lawyer job in crown court cases were experienced.

We asked (Cp5) how long the person filling out the form had been with the CPS. The questionnaires were completed in February 1992. The CPS began operating in 1986. The CPS had therefore been functioning as an organisation for some 5 or so years.

Nearly four-fifths of the respondents answering questionnaires (77%)[23] said they had been with the CPS for over three years. Just under a fifth (19%) had been with the CPS for 1 to 3 years, and the remaining 4 per cent had been employed for under a year.

7.4.4 How much prior experience?

Before being employed with the CPS, most staff had had little prior prosecution experience. Almost half (49%)[24] said they had less than a year of previous prosecution experience, and another 17 per cent said they had between 1 and 3 years such experience. There were 7 per cent who had 3 to 5 years previous experience and 27 per cent with more than five years.

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[22] N=627; 61 non-replies. 36 of the non-replies ticked both the 'Lawyer' and the 'Law clerk' box.

[23] N=637.

[24] N=625.

Some two-thirds (67%) of those who had been with the CPS for under three years[25], had under a year of previous experience as prosecutors. Those who had been with the CPS for over three years varied. Over two-fifths (43%) had a year or less of previous experience, but a third (33%) had five or more years previous experience. The remainder (24%), had had between one and five years previous experience.[26]

7.5 THE POLICE

The instruction to the police requested that the questionnaire be filled out by an officer with knowledge of the case. If the officer in court did not have such knowledge, he was requested to pass the questionnaire 'down the line' to someone who did.

7.5.1 Role in the case of the person completing the questionnaire

We asked the officer completing the questionnaire to state what function(s) he had had in the case. (More than one function could be ticked.)

In two-thirds of cases (67%)[27] the questionnaire was filled out by the officer in charge of the case.Forty five per cent were involved in the investigation, a third (32%) in the preparation. Over a quarter (28%) gave evidence in court whilst another quarter (24%) were in court but did not give evidence. One tenth were the Antecedents Officer (responsible for checking on the defendant's previous convictions) and 5 per cent were the Crown Court Liaison Officer (responsible for marshalling police cases at court).

Only 10 per cent said they had no direct involvement in the case at all.

Four-fifths of those filling out the questionnaires (80%)[28] were constables; 17 per cent were sergeants, 2 per cent were inspectors or chief inspectors and 0.2 per cent were superintendents.

In the overwhelming majority of cases (81%)[29], the person who was identified in the questionnaire as the officer in charge of the case was a constable. In 16 per cent of cases he was a sergeant and in only 2 per cent an officer more senior than a sergeant.

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[25] N=279; 4 non-replies.
[26] N=968; 26 non-replies.
[27] N=1,819; 3 non-replies.
[28] N=1,383.
[29] N=1,177.

The police said that, in order to assist the survey, they would try to see that wherever possible the officer in charge of the case would be physically present in court during the hearing. In the event, 62 per cent of questionnaires[30] were completed by officers who were present throughout the court hearing and another 25 per cent were completed by officers who were present in court part of the time. Only 12 per cent were completed by officers who were not in court at all.

7.6 THE DEFENDANTS

7.6.1 The number of defendants per case

Prosecution and defence barristers and court clerks were asked (Pb1; Db1, Cc12) how many defendants there had been in the case.

They were more or less agreed. According to the prosecution barristers there was one defendant in 80 per cent of the cases; according to the defence there was one in 78 per cent; and court clerks said in 79 per cent. The prosecution said there were two defendants in 13 per cent; the defence and court clerks said 14 per cent. They all agreed that there were three defendants in four per cent. The prosecution said there were four or more defendants in three per cent of cases; the defence said four per cent. (see also Appendix 1, p.251 below.)

7.6.2 The sex of defendants

Almost all the defendants (92%) were male. [31]

7.6.3 Age of defendants

The age breakdown of the 19 per cent of defendants who responded to the survey questionnaire is as follows:

Table 7.9
Defendants' age breakdown

	%
Under 18	6
18–24	39
25–34	35
35–44	13
45–54	5
55–64	1
65+	1
Total	100 (N=748[32])

[30] N=1,766; 53 non-replies.
[31] N=750; 43 non-replies.
[32] Plus 45 non-replies.

7.6.4 Employment status

Defendants were asked (Def82) about their employment status. The responses appear below:

Table 7.10
Defendants' employment status

	%
Full-time employed	31
Part-time employed	6
Unemployed, but worked in past 2 years	34
Unemployed for more than 2 years	19
Student	4
Retired	1
Other	5
	100 (N=736[33])

7.6.5 What job does the defendant do?

We asked defendants who said they worked or had worked within the previous two years, what they did. They were given 5 pre-coded answers and a final category 'Other'. Their self-evaluation of their own occupations was as follows:

Table 7.11
Defendant's job

	%
Professional/managerial	14
Clerical/administrative office work	4
Work in service industry (such as shop, bank, restaurant, hotel etc.)	14
Manual work – skilled	39
Manual work – unskilled	21
Other	8
Total	100 (N=487[34])

7.6.6 What proportion were self-employed?

We asked those who said they worked (Def84) whether they were self-employed. About one third (30%) said they were self-employed; 70% were not.[35]

[33] Plus 57 non-replies.
[34] Plus 35 non-replies.
[35] N=505; 17 non-replies.

7.6.7 Ethnic background of defendants

Defendants were asked (Def85): 'To which ethnic group do you belong to' – and they were then given 7 different pre-coded answers plus a final 'Other ethnic group'.

The answers are as follows:

Table 7.12
Defendants' ethnic background – defendants

	%
White	88
Black-Carribbean	6
Black-African	2
Indian	1
Pakistani	1
Bangladeshi	0.4
Chinese	0.1
Other ethnic group	2
Total	100 (N=740[36])

The question of the defendant's ethnic background was also put to the barristers. (Pb177; Db191) They were, however, offered only four pre-coded answers (plus 'Other'). If the defendant responses are regrouped in the same format it gives the following comparative figures:

Table 7.13
Defendants' ethnic background – defendants and the lawyers

	Def. %	Pb %	Db %
White	88	86	84
Black	8	10	10
Indian sub-continent	2	3	3
Chinese	0.1	0.3	0.2
Other	2	1	2
Total	100 (N=740[37])	100 (N=2,162[38])	100 (N=1,605[39])

There seems to have been a broad consensus between the barristers as to the ethnic background of the defendant – white in over four-fifths of cases, black in around ten per cent and from the Indian sub-continent in around 3 per cent.

The jury was asked a much broader question still – simply whether the defendant was white or from a different ethnic group (Jy32).

[36] Plus 53 non-replies.
[37] 53 non-replies.
[38] Plus 97 non-replies.
[39] Plus 311 non-replies.

The answers were slightly different from those above. 79 per cent of jurors thought the defendant was white, whilst 21 per cent thought he was not.[40] There is no way of reconciling these somewhat different impressions.

[40] N=8,155; 187 non-replies.

8. The Jury Questionnaire

8.1 Being called for jury service
8.2 The jury and the evidence
8.3 Jurors taking notes
8.4 Legal technical language
8.5 Jurors asking questions
8.6 The judge's summing up
8.7 Barristers and judges
8.8 The result of the case
8.9 Length of case
8.10 Length of jury deliberations
8.11 The experience of jury service
8.12 The foreman
8.13 The make-up of the jury
8.14 Ability of jurors to cope

It will be recalled that the jury study was 'separate' in the sense that we were not permitted to link the jury questionnaires to the other questionnaires. But apart from that fact, the jury study was fully part of the main survey. The jurors were in the same cases that produced the responses to the eight other questionnaires. (We estimated that we had responses from jurors in 96 per cent of the juries that sat during our survey period and from an average of ten jurors per jury[1].)

We analysed the responses from jurors in different ways. One was a straight count of all replies, including foremen. The second was a straight count of the replies just of foremen. But neither of these could reveal the responses of the jury as a whole. In order to assess this we constructed an 'average' response for the jury based on the effective replies (ie excluding don't knows and non-replies) where at least eight members of the jury had replied. The average was constructed in each case by assigning each juror's response a value or score and then calculating an aggregate average based on those scores.

8.1 BEING CALLED FOR JURY SERVICE

8.1.1 Advance information to jurors

Jurors were asked (Jy1): 'Do you feel that you were told enough about the duties involved in jury service a) before you first came to court, b) when you first came to court and c) by the judge at the start of this case?'

[1] For further elaboration of the response rate see Appendix 1 p.245 below.

Table 8.1
Enough advance information to jurors?

	Yes %	No %	Total %	N
a) Before coming to court	73	27	100	(7,170)[2]
b) When first coming to court	88	12	100	(7,068)[3]
c) At start of this case	91	9	100	(6,434)[4]

The great majority of jurors who gave any reply thought they were given enough information.

8.1.2 When were jurors first told they had to do jury service?

Jurors were asked (Jy49) when they were first told that they were being called for jury service.

Most (59%) had been told between one and two months before. Just under a quarter (23%) had been told one month or less before. The rest (17%) had been informed more than two months before.[5]

Almost all respondents (97%) thought they had had sufficient notice.[6]

8.1.3 Did jurors try to get off jury duty?

Jurors were asked (Jy51): 'Did you ask to be let off jury service or to have it delayed?'

The great majority (85%) said they had not. Nine per cent said they had tried to have it delayed; six per cent said they had tried to be let off altogether.[7]

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[2] Plus 1,172 non-replies.
[3] Plus 1,274 non-replies.
[4] Plus 1,908 non-replies.
[5] N=5,961 including 33 non-replies. The numbers of respondents become markedly lower on some questions (including this one) since some questions were only to be answered the first time that a respondent answered a Royal Commission questionnaire. There were 2,203 questionnaires that were answered by respondents who had filled one out previously.
[6] N=5,895; 66 non-replies.
[7] N=5,784; 177 non-replies.

These last 347 respondents were asked on what ground (or grounds) they asked to be let off or to have jury service postponed. Some had more than one ground. The grounds mentioned, with frequency of mention were:

Table 8.2
Reasons for asking for excusal from postponement of jury service

	%
Work commitments	50
Holiday plans	24
Self-employed	12
Family commitments	12
Student commitments	2
Miscellaneous	11
Total	100 (N=848)

'Miscellaneous' included 12 who said they did not want to do jury service and five who raised transport problems as their issue.

But even though they had all had their request refused, the great majority (92%) felt that the request had been dealt with fairly.[8]

8.2 THE JURY AND THE EVIDENCE

8.2.1 Understanding the evidence

Jurors were asked (Jy4): 'How difficult was it for you to understand the evidence in this case?'

Obviously, the fact that jurors think they could understand the evidence does not prove that they actually *did* understand it. Whether they understood could only be properly assessed by independent observation – if such research were ever permitted. Nevertheless, it is intrinsically of interest to know what they thought. Moreover, one should not exaggerate the complexity of the matter. If most jurors think they understood, it seems at least a possible hypothesis that in most cases they did.

At all events, pending permission to undertake research in the jury room, the questions we were permitted to put are as close as one can get to answer the question.

As it happens, most jurors thought they had no great problems:

[8] N=845; 47 non-replies.

Table 8.3
Was it difficult for jurors to understand the evidence?

	%
Not at all difficult	50
Not very difficult	41
Fairly difficult	8
Very difficult	1
Total	100 (N=8,046[9])

Ninety one per cent said it was either 'Not very difficult' or 'Not at all difficult'.

As has been seen (sect.6.2.7), this view is consistent with the opinion of the barristers regarding the jurors' comprehension of the evidence.

8.2.2 Understanding scientific evidence

The same question was asked in regard to scientific evidence presented by expert witnesses, which jurors said happened in 23 per cent of all cases.[10]

The result was much the same. Ninety per cent said it was either 'Not very difficult' (34%) or 'Not at all difficult' (56%).[11] By comparison, only 1 per cent thought it was 'Very difficult' and 9 per cent thought it was 'Fairly difficult'. This view was much the same as that expressed by the judges – see sect.6.2.7 above.

Table 8.4
How difficult was it to understand the scientific evidence?

	%
Not at all difficult	56
Not very difficult	34
Fairly difficult	9
Very difficult	1
Total	100 (N=1,904[12])

We looked at this question by reference to the age when the juror ceased full-time education:

[9] Plus 296 non-replies.
[10] N=8,150; 192 non-replies.
[11] N=1,904.
[12] Plus 18 non-replies.

Table 8.5
How difficult was it to understand the scientific evidence by age ended full-time education:

	to 16 yrs. %	*16–18 yrs.* %	*18+* %
Not at all difficult	52	61	68
Not very difficult	37	31	26
Fairly difficult	10	7	6
Very difficult	1	0	1
Total	100 (N=1,173)	100 (N=424)	100 (N=245)

The pattern is clear. Unsurprisingly, the longer jurors remained in full-time education, the more likely they were to find the scientific evidence not difficult. What may be surprising, is that nearly 90 per cent of those who left school by the age of 16 said the scientific evidence was 'not very' or 'not at all' difficult.

8.2.3 Could jury as a whole understand the evidence?

Jurors were asked (Jy5): 'Do you think that the jury as a whole was able to understand the evidence?'

The response here broadly was Yes. Over half said 'all' understood, and nearly half said 'most' understood. The foremen said just about exactly the same.

Table 8.6
Could jury as a whole understand the evidence?

	View of the jury %	View of the foreman
All of them understood	56	57
Most of them understood	41	41
Only a few understood	2	1
None of them understood	0.4	0.3
Total	100 (N=7,855[13])	100 (N=677)[14]

[13] Plus 206 non-replies and 281 who answered 'Not sure'.
[14] Plus 11 non-replies and 22 'Not sure'.

There were however 143 juries (17% of the 821 juries) in which one or more jurors said 'only a few understood' or 'none of them understood'. 116 juries had one such member; 20 had two such members; 6 had three and one had four.

8.2.4 Could jurors remember the evidence?

Jurors were asked (Jy6): 'How difficult was it for you to remember the evidence when it was time for the jury to consider its verdict?'

Again, over ninety per cent said they had little or no,or no difficulty in remembering the evidence. This was consistent with the lawyers' view – See sect.6.2.9:

Table 8.7
How difficult was it to remember the evidence?

	%
Not at all difficult	50
Not very difficult	41
Fairly difficult	9
Very difficult	1
Total	100 (N=7,473[15])

8.2.5 Difficulty in remembering evidence – by length of cases

The longer the case, the more likely that jurors reported difficulty in remembering the evidence. (For this purpose we looked only at cases where the jury actually went out to consider its verdict.)

The table below shows a clear pattern, with only 2–4 per cent of jurors saying they had trouble remembering the evidence in the one day cases, but a quarter saying it in cases lasting more than a week.

[15] Plus 173 non-replies and 696 where the jury did not go out.

Table 8.8
Per cent of jurors who found it difficult to remember the evidence – by length of case

Length of case	%
Less than half a day	4 (N=306)
Up to one day	5 (N=1,306)
1-2 days	7 (N=2,511)
2–3 days	9 (N=1,524)
3–4 days	16 (N=733)
4–5 days	13 (N=432)
1–2 weeks	26 (N=371)
More than 2 weeks	27 (N=162)

8.2.6 Could the jury as a whole remember the evidence?

Jurors were asked (Jy7): 'Do you think that the rest of the jury found it difficult to remember the evidence?'

There were virtually no jurors who said that all found it difficult and only a very small number (5%) who said that most found it difficult.[16]

Table 8.9
Could jury as a whole remember the evidence?

	View of the jury %	View of the foreman %
None found it difficult	60	56
A few found it difficult	34	36
Most found it difficult	5	6
All found it difficult	1	1
Total	100 (N=7,057[17])	100 (N=600[18])

8.2.7 Should prior convictions be admissible in evidence?

The general rule in English law is that, subject to a small number of exceptions, a defendant's previous convictions cannot be introduced in evidence by the prosecution.

[16] There were 241 jurors who answered either 'all found it difficult' or 'most found it difficult'. 154 juries had 1 such member, 44 had two,25 had three,8 had four, 3 had six, 2 had seven and 1 had eight.
[17] Plus 293 non-replies and 926 'Not sure'.
[18] Plus 19 non-replies and 58 'Not sure'.

Jurors were asked, in effect, whether they agreed with this rule (Jy62): 'If a defendant has any similar previous convictions, do you think the jury should always be told about them before they go to consider their verdict?'

The majority (58%) thought they should not be told; 42 per cent thought they should be told about previous convictions.[19] (See also sect.4.6.8 above on the 'tit for tat' rule.)

8.3 JURORS TAKING NOTES

8.3.1 Did jurors take notes?

Jurors were asked (Jy8): 'Did you take any notes during the trial?'

Three-fifths (60%) said that they had not; two-fifths (40%) said that they had.[20] (For the rather different impression of barristers see sect.6.2.3.)

8.3.2 How useful were the notes?

Those who said they had taken notes were asked (Jy9): 'How useful did you find your notes?'

Over eighty per cent found their notes either 'Very useful' (39%) or 'Fairly useful'(44%).[21] Fourteen per cent found they were 'Not very useful' and 3 per cent 'Not at all useful'.

8.3.3 Did other jury members take notes?

All jurors were asked (Jy10): 'Did other members of the jury take notes?'

The breakdown of responses appears below:

Table 8.10
Did other jurors take notes?

	%
No	24
1–2 others did	24
3–5 others did	28
More than five did	23
Total	100 (N=7,034[22])

[19] N=5,828; 133 non-replies.
[20] N=8,223; 119 non-replies.
[21] N=3,308 – with no non-replies.
[22] Plus 1,064 who said they were 'Not sure' and 244 non-replies.

There were only 33 juries in which there was no note-taker at all. In most juries there was more than one.

8.3.4 Taking notes and length of case

Cross-tabulation showed that in the shorter cases it was more likely that there was no other juror taking notes, whilst in the longer cases it was more likely that there would be several taking notes. Thus in cases lasting up to a day there was no other juror taking notes in 38 per cent of cases[23]; whereas in cases lasting more than a week there was no other juror taking notes in only 4 per cent.[24]

By the same token, in cases lasting up to a day there were more than five other jurors taking notes in only 8 per cent of cases compared with 52 per cent where the case lasted over a week. Equally, the longer the case, the more jurors answered the question 'Did you take notes?' affirmatively:

Table 8.11
Per cent of jurors who said they took notes by length of case

	%
Under half a day	17 (N=535)
Half to full day	26 (N=1,537)
1–2 days	37 (N=2,632)
2–3 days	46 (N=1,622)
3–4 days	53 (N=736)
4–5 days	58 (N=431)
1–2 weeks	66 (N=383)
Over 2 weeks	82 (N=171)

8.3.5 Were pens and papers provided for taking notes? If not, were they asked for?

We asked (Jyll) whether courts were providing the wherewithal for taking notes in the form of pens and paper.

In 70 per cent they were, in 30 per cent they were not.[25]

Where they were not supplied, they generally were not asked for -that was the position in 92 per cent of cases.[26]

8.3.6 Was note-taking encouraged or discouraged by court officials?

All jurors were asked (Jy13) whether note-taking was encouraged or discouraged by court officials.

[23] N=2,032.
[24] N=550.
[25] N=7,973; 369 non-replies.
[26] N=2,136; 199 'Don't know' and 55 non-replies.

Only 106 jurors (1%) said that note-taking had been discouraged. Nearly a quarter of jurors (22%) said that note-taking was actually encouraged, but in the majority of cases (77%) it was neither encouraged or discouraged.[27]

8.4 LEGAL TECHNICAL LANGUAGE

8.4.1 Did jurors find legal technical language or legal terms made it difficult for them to understand the case?

Jurors were asked (Jy 14) whether their understanding of the case was made difficult by what one might call 'legalese' – lawyers' technical jargon.

In just over 90 per cent of cases (91%) jurors replied No. But there were 695 jurors (8%)spread amongst 392 juries who said that legal technical language had been a problem.[28]

The youngest jurors, in the age group 18–24, were somewhat more prone to report that they had difficulties with legalese, than others. So were students. The proportion for those between 18–24 was 13 per cent (N=1,128). For students it was 21 per cent (N=67).

When we looked at work status we found that 6 per cent of those who classified themselves as a 'Professional/managerial' said they had trouble with legal language (N=2,007), compared with 9 per cent of the skilled manual workers (N=1,304) and 12 per cent of the unskilled manual (N=499).

8.4.2 Did other jurors have problems with legal technical language?

We asked (Jy15) whether other jurors had difficulty with legal technical language.

Very understandably, nearly one third of all those who replied (31%-N=8,184) said they did not know. As the table below shows, of those who did have a view, the clear majority thought other jurors had no problems with technical language, but about a quarter of jurors said they thought there were some who had problems.

The foremen's view was similar.

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[27] N=8,194; 148 non-replies.

[28] N=8,197; 145 non-replies. There were 230 juries with one such member, 99 with two, 43 with three, 12 with four, 5 with five and 3 with six.

Table 8.12
Did other jurors have problems with technical language?

	Jurors' views %	View of foremen %
None found it difficult	73	70
Only a few found it difficult	22	26
Most found it difficult	4	2
All found it difficult	1	2
Total	100 (N=5,619[29])	100(N=504[30])

8.5 JURORS ASKING QUESTIONS

8.5.1 Was the jury told at any stage that they could ask questions?

We asked jurors whether they had been informed at any stage 'that they could ask questions by passing a note to the usher for the judge?'

Over-two thirds (71%) said they had been so informed, the remainder (29%) said they had not.[31] (For judges' views on jurors asking questions see sect.6.2.4)

8.5.2 Was there any time during the trial when jurors wanted to ask questions? If so, had they done so?

Had there been any occasions when jurors had wanted to ask a question (Jy17)? 56 per cent said no, 44 per cent said yes[32].

The more than three thousand who said that they had wanted to ask a question were then asked (Jy18) whether they had in fact put the question.

Under a fifth (18%) had done so.[33]

8.5.3 Did other jurors ask questions during the trial?

Jurors were asked (Jy19) whether other jurors had asked questions during the trial?

Just under a quarter (23%) said one or more had; just over three-quarters (77%) said none had.[34]

[29] Plus 2,555 who said they were 'Not sure' and 158 non-replies.
[30] Plus 163 who said they were 'Not sure' and 5 non-replies.
[31] N=8,216; 126 non-replies.
[32] N=8,194; 148 non-replies.
[33] N=3,544; 31 non-replies.
[34] N=7,996, plus 111 who were 'Not sure' and 235 non-replies.

8.5.4 Did any juror want to ask questions after the jury had gone out to consider its verdict? If so, had this been done?

We asked (Jy20) whether any juror had wanted to ask the judge for further directions after the jury had retired to consider its verdict.

One third (32%)[35] said that one or more jurors had wanted to ask the judge for further directions. In two-thirds no one had wanted to do so.

In nearly three-quarters of the cases in which jurors wanted to ask for further directions (73%), the question had in fact been put.[36] But in a quarter (27%) it had not.

The two chief reasons given for the failure to ask for further directions were: 'We found the answer after further discussion' (33%[37]) and 'We did not know we could ask' (30%). The only other frequently mentioned reason was 'Not important enough' (10%).

8.6 THE JUDGE'S SUMMING UP

8.6.1 Would it have been more difficult for the jury if the judge had not summed up on the facts?

In some countries the judge gives the jury directions on the law but says nothing to them about the facts. In England the judge sums up on both the law and the facts.

We asked (Jy23) whether it would have made it harder a) for that juror and b) for other jurors if the judge had not summed up on the facts .

Of those who gave a clear reply for themselves, one-fifth (19%) thought it would have made the juror's task 'Much harder'. One third (33%) thought it would have made their task 'A little harder'. Almost half (48%) thought it would have made 'No difference'.[38] Foremen gave almost identical replies – 19%,35% and 46% respectively.[39]

The longer the case, the more likely it was that jurors said it would have been 'Much harder' without a summing up on the facts:

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[35] N=7,303 effective replies – plus 825 where the jury did not go out and 214 non-replies.
[36] N=2,356; 12 non-replies.
[37] N=472 respondents with 474 answers. There were 160 non-replies.
[38] N=6,728; plus 543 who were 'Not sure' and 246 non-replies.
[39] N=640; plus 33 'Not sure' and 11 non-replies.

Table 8.13
Jurors saying it would have been 'much harder' without summing up on the facts

Length of case	%
Under one day	13 (N=1,523)
1–3 days	17 (N=3,958)
3–5 days	22 (N=1,154)
Over one week	34 (N=531)

When responses to this question were analysed by type of employment, the following results were obtained. 53 per cent of the 'Professional/ managerial' jurors and 50 per cent of those in 'Clerical/office/ administrative' employment thought it would make it 'Much' or at least 'A little' harder. By contrast, 43 per cent of the 'Skilled manual' and 40 per cent of the 'Unskilled manual' workers thought it would be 'Much' or at least 'A little harder'.

When it came to giving a view for *other* jurors, the number who did not know went up very considerably to over a quarter of all respondents. Of the rest, over three-fifths thought it would have made it 'Much harder' (24%) or 'A little harder' (37%), whilst two-fifths (39%) thought it would have made 'No difference'. [40]

The foremen again broadly agreed. A quarter (26%) thought it would have made it 'Much harder', two-fifths (41%) that it would have made it 'A little harder' and a third (33%) that it would have made 'No difference'.[41]

As has been seen (Sect.6.2.10), the judges were also asked for their opinion on this matter. The general question to the judges (Jg69) was: 'Do you think the jury could have managed without the summing up on the facts?' Three alternative responses were suggested – 'Would probably have managed well enough', 'Might have managed' and 'Would not have managed'.

In 25 per cent of cases the judge thought the jury would not have managed without the summing up on the facts; in 32 per cent the judge thought it might have done so; in 43 per cent of cases[42] the judges thought the jury would probably have managed well enough without the summing up on the facts.

[40] N=4,893, plus 2,194 who were 'Not sure' and 430 non-replies.
[41] N=509; 135 'Not sure' and 36 non-replies.
[42] N=667; 138 non-replies.

The judges were also asked two more specific questions regarding the jury's ability to follow the summing up. The first (Jg70a) was 'In your view, how easy was it for the jury to understand the summing up on the facts?'

In more than two-thirds (68%)[43] the judge thought it was 'Easy' and in over another quarter (29%) 'Fairly easy'. In 3 per cent the judge thought it was 'Fairly difficult' and in 0.8 per cent 'Difficult'.

The judges were then asked the same question (Jg70b) in regard to the summing up on the law.

Forty-two per cent thought it was 'Easy' for the jury to understand the summing up on the law, forty two per cent thought it was 'Fairly easy'. In 13 per cent the judge thought it was 'Fairly difficult' and in 3 per cent 'Difficult'.[44]

Judges sometimes pose written questions for the jury to consider. We asked the judges (Jg71): 'Did you put any written questions to the jury in order to simplfy their task?'

In 98 per cent of cases the judge said he had not done so; in 2 per cent he said he had.[45]

8.6.2 Did jurors find it difficult to follow the judge's directions on the law?

Jurors were asked (Jy24) whether they found it difficult to follow any of the judge's directions about the law.

As the table below shows, remarkably few said that they did.

Table 8.14
Did jurors find the judge's summing up on the law difficult?

	Jurors views %	Foremen's views %
Not at all difficult	61	71
Not very difficult	33	25
Fairly difficult	6	4
Very difficult	0.4	0.7
Total	100 (N=7,303[46])	100 (N=602)

[43] N=650; 136 non-replies and 17 'Can't say'.
[44] N=640; 151 non-replies and 17 who 'Can't say'.
[45] N=667; 138 non-replies.

The foremen who found the summing up on the law 'Very difficult' was almost exactly the same as for other jurors. But the proportion who found it 'Not at all difficult' was ten percentage points higher than for other jurors and the proportion who found it 'Not very difficult' was eight percentage points lower.[47]

8.6.3 Did other jurors find it difficult to follow the judge's directions on the law?

We asked jurors also to give a view as to whether other jurors had had difficulty with the judge's summing up on the law.

Again, over a quarter said they were not sure. But those who answered thought that the experience of other jurors was much like their own:

Table 8.15
Did other jurors find it difficult to follow the judge's directions on the law?

	Jurors' views %	Foremen's view %
None found it difficult	65	60
A few found it difficult	30	34
Most found it difficult	4	4
All found it difficult	1	1
Total	100 (N=5,682[48])	100 (N=482[49])

8.6.4 Did judge's summing up point toward acquittal or conviction?

We asked jurors to give an assessment of whether the judges' summing up 'pointed towards acquitting or towards convicting the defendant'.

The pattern of responses showed symmetry. Two-thirds thought the judges did not favour either side. Sixteen per cent thought they summed up for an acquittal, 16 per cent thought they summed up for a conviction[50]. The view of the foremen was almost exactly the same as that of other jurors. (See also Table 4.21 p.130 above.)

[46] Plus 173 non-replies and 41 cases in which there was no summing-up.
[47] N=668; 73 non-replies and 2 cases without a summing-up.
[48] Plus 2,032 'Not sure' and 194 non-replies.
[49] Plus 123 'Not sure' and 72 non-replies.
[50] Directed acquittals and mixed verdict cases were excluded.

Table 8.16
Judge summed up for acquittal or conviction?

	Jurors' view %	Foremen's view %
Pointed strongly to acquittal	4	5
Pointed slightly to acquittal	12	10
Neither	67	69
Pointed slightly to conviction	13	13
Pointed strongly to conviction	3	3
Total	100 (N=5,088[51])	100 (N=590[52])

8.6.5 Was the 'tilt' in the summing up justified by the evidence?

Respondents who thought the summing up had tipped toward one side side or the other were asked whether that had been 'supported by the weight of the evidence in the case or was it against the weight of the evidence?' (See also sect.4.10.10 above.)

The overwhelming majority (88%[53]) thought it was supported by the weight of the evidence. In the case of the foremen, 91 per cent thought it was supported by the evidence.

In the small proportion of cases (12%) where jurors thought the summing up seemed to be against the weight of the evidence we looked to see whether it was for an acquittal or a conviction. The figures in Table 8.17 below show that in the view of jurors it was more likely to be against the weight of the evidence when the judge summed up for an acquittal than where he summed up for a conviction. Thus where the jurors thought the judge summed up for an acquittal, the summing up was 'against the weight of the evidence' in 18 per cent of instances. By contrast, where the summing up was thought to be strongly pro-conviction it was 'against the weight of the evidence' in 5 per cent.

[51] Plus 351 non-replies and 279 who were 'Not sure'.
[52] Plus 79 non-replies and 8 who were 'Not sure'.
[53] N=1,928; 49 non-replies and 290 'Not sure'.

Table 8.17
Jurors say summing up against weight of evidence by whether for conviction or acquittal

Summing up	*% against weight of evidence*
Strongly pro-acquittal	18 (N=337)
Somewhat pro-acquittal	14 (N=793)
Strongly pro-conviction	5 (N=220)
Somewhat pro-conviction	5 (N=868)

8.6.6 Was the 'tilt' in the summing up reflected in the result of cases?

Not surprisingly, there was a marked association between jurors' view of the thrust of the judge's summing up and the result of cases:

Table 8.18
Acquittal rate by jury's view of thrust of judge's summing up

Jury's view of summing up	*Acquittal rate %*
Strongly for acquittal	94 (N=315)
Somewhat for acquittal	89 (N=683)
Somewhat for conviction	13 (N=667)
Strongly for conviction	9 (N=173)
Neither	43 (N=3,488)

Thus when the judge summed up strongly for an acquittal, 94 per cent of jurors reported the verdict as an acquittal. But there were some cases where the jury acquitted even though the judge summed up for a conviction.

When the judge summed up for an acquittal 'against the weight of the evidence', according to our scoring of 'average' jury responses[54], he directed an acquittal in four cases and the jury acquitted in the other nine. When the judge summed up for a conviction 'against the weight of the evidence', by the same measure, the jury acquitted in four, convicted in four and in the remaining four cases it convicted on some charges and acquitted on others.

8.7 JURORS' VIEWS OF BARRISTERS AND JUDGES

8.7.1 How well did the defence and prosecution barristers do their job?

We asked jurors how well they thought the barristers did their job in terms of 'knowing the facts', 'putting the case across', and 'dealing with the points in the opponent's case'.

[54] See above.

Table 8.19
Jurors' view of barristers' performance

	Very well %	Fairly well %	Not very well %	Not at all well %
			Defence	
Knowing facts	51	39	8	2 (N=8,003[55])
Putting case across	51	35	10	3 (N=7,899[56])
Dealing with opponent's case	47	39	11	3 (N=7,846[57])
			Prosecution	
Knowing facts	51	38	9	2 (N=8,075[58])
Putting case across	47	37	12	3 (N=7,970[59])
Dealing with opponent's case	43	42	12	3 (N=7,873[60])

The foremen gave almost identical assessments. There were no significant differences.

On each topic the largest proportion of responses thought the barrister did his job 'Very well' with the second largest being 'Fairly well'. There were positive ratings in 85 to 90 or so per cent of instances.

On the other hand, there were negative ratings in 10 to 15 per cent of barrister performances.

8.7.2 How well did the judges do their job?

The jury were asked equally to evaluate the judge's performance on three different measures. As can be seen from the table, the jurors were on the whole impressed by the performance of the judges. The foremen again said almost precisely the same. There were no significant differences.

[55] Plus 339 non-replies.
[56] Plus 443 non-replies.
[57] Plus 496 non-replies.
[58] Plus 267 non-replies.
[59] Plus 372 non-replies.
[60] Plus 509 non-replies.

Table 8.20
How well did the judges do their job?

	Very well %	Fairly well %	Not very well %	Not at all well %
Keeping the proceedings under control	90	9	0.3	0.1(N=8,099[61])
Keeping a fair balance between defence and prosecution during trial	85	14	1	0.1(N=7,976[62])
Explaining things to the jury	86	13	1	0.1(N=8,069[63])

8.7.3 Should barristers and judges wear wigs and gowns?

We wanted to find out if jurors thought that wigs and gowns worn by counsel and the judges should be abolished.[64]

Unfortunately, our question did not canvass opinion as to whether gowns should continue to be worn but wigs be abolished. We asked simply (Jy61): 'In court, the judge and barristers wear wig and gowns. Do you you think that they should?'

The result was a resounding verdict in favour of tradition. In regard to barristers, 78 per cent of jurors generally[65] and 73 per cent of foremen thought they should continue to wear wigs and gowns.[66]

For judges, the majority view was stronger still, with 88 per cent of jurors generally[67] (and 85% of foremen[68]) preferring wigs and gowns.[69]

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[61] Plus 243 non-replies.
[62] Plus 366 non-replies.
[63] Plus 273 non-replies.
[64] At the time when the questionnaire was developed the subject had not yet become a public issue as it did in 1992 when it was raised first by the new Lord Chief Justice, Lord Taylor and in the Consultation Paper issued in August on behalf of the Lord Chancellor and the Lord Chief Justice.
[65] N=5,538; 423 non-replies.
[66] N=430; 30 non-replies.
[67] N=5,871; 90 non-replies.
[68] N=454; 6 non-replies.
[69] N=5,871; 90 non-replies. N=509; 9 non-replies.

There was not a great difference in attitude as between different age groups though, broadly, the older the jurors, the more likely that they would favour wigs and gowns. But in every age group those who said no to tradition were very much the minority.

Table 8.21
Favoured wearing of wigs and gowns – by age of jurors

	Judges %	Barristers %
18–24	89	78
25–34	85	76
35–44	87	80
45–54	89	80
55–64	90	82
65+	93	87

Those who favoured the wearing of wigs and gowns for judges ranged from 85 per cent of those aged between 25 and 34 to 93 per cent of those over 65; those who favoured wigs and gowns for barristers ranged from 76 per cent of those aged between 25 and 34 to 87 per cent of those aged over 65.

8. THE RESULT OF THE CASE

8.8.1 Was there more than one defendant?

We wanted to establish how many cases involved more than one defendant.

There were 17 per cent who said that there was more than one defendant.[70] (This compares with 20% reported by Pb and 21% reported by Db – see sect.7.6.1.)

8.8.2 Was the convicted defendant sentenced immediately?

Jurors were asked whether convicted defendants were sentenced immediately after the jury gave its verdict?

There were 4,381 cases in which the defendant was convicted of one or more count. In just over half (53%), sentencing took place at once; in the remaining cases (47%), sentencing was postponed[71].

[70] N=8,209; 133 non-replies. The result was the same when we looked at juries instead of jurors. Of 679 juries where more than eight jurors replied, 112 (or 17%) reported more than one defendant.

[71] N=4,381; 780 non-replies and 1,687 where the defendant was not convicted.

8.8.3 Was the sentence unexpectedly high or low?

There were 2,321 cases in which jurors reported that the sentence had been immediate. We asked those jurors (Jy36): 'Was the sentence broadly what you expected, based on the evidence in the case?' (The question could arguably be said to have been ambiguous. Some jurors might have thought it related only to the evidence given before they retired to consider their verdict. Others may have thought it included also material that became known during the plea in mitigation after verdict.)

Whatever the jurors' interpretation, the responses showed that only a minority felt the sentence given was either higher or lower than they had expected.

Almost a third (32%) said the sentence was as they had expected and exactly the same proportion said they had not any expectations as regards sentence. The remaining third was divided between those who thought it was 'More severe' (14%), or 'Less severe' (23%).[72]

The foremen were very similar in their response. Twenty eight per cent of those who replied said the sentence was as they had expected and 27 per cent said they had had no expectations. The rest were divided between those who thought it was 'More severe' (19%) and 'Less severe' (26%).[73]

8.9 LENGTH OF CASE

8.9.1 How long did the case last?

The annual *Judicial Statistics* (Table 6.20) report the average hearing time for both contested and non-contested cases. In 1991, the average hearing time for a Crown Court contested case was 6.6hrs. and for guilty plea cases was 0.8hrs. These figures however give no further detail.

We asked jurors in all the (estimated) 821 cases in which jurors returned questionnaires how long the case lasted (Jy37). The replies by jurors are set out in Table 8.22):

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[72] N=2,288,plus 33 non-replies.
[73] N=198, plus 479 non-replies.

Table 8.22
Length of cases

	Jurors %
Less than half a day	7
Half to one day	19
More than I, up to 2 days	33
More than 2, up to 3 days	20
More than 3, up to 4 days	9
More than 4, up to 5 days	5
More than one week, up to 2 weeks	5
More than two weeks	2
Total	100 (N=8,122[74])

When we looked at the long cases by jury (as opposed to juror) the breakdown in length of case was as follows:

2–3 weeks – 10 cases
3–4 weeks – 11 cases
4–5 weeks – 4 cases
5–6 weeks – 2 cases
6–10 weeks – 7 cases
11–20 weeks – 2 cases
More than
20 weeks – 2 cases[75]

8.10 LENGTH OF JURY DELIBERATIONS

8.10.1 How long was the jury out?

In cases where the jury went out, we asked jurors how long it took over its deliberations (Jy 39).

Table 8.23 shows that in most cases the jury was out for only an hour or two before bringing in its verdict. Over three-fifths (62%) took under two hours and nearly ninety per cent (87%) took under four hours.

Eleven per cent of jurors said their jury was out for between four and eight hours and 2 per cent said they were out for over eight hours. These 2 per cent were 128 jurors in what purported to be 49 cases[76]. In no less than 34 of these 49 cases however only one juror gave this response. Given the very high overall response rate of jurors (an average of ten per jury) it

[74] Plus 220 non-replies.
[75] In one of the two cases, only a single juror responded; in the other all twelve did.
[76] 7 had no number and could therefore not be assigned to a particular jury.

seemed most improbable that in 34 of 49 of the longest cases only one juror returned a questionnaire. It seemed more plausible to assume that these 34 questionnaires are 'rogue' results and that the actual number of cases longer than 2 weeks is 15.

Table 8.23
How long was the jury out?

	Jurors %
Less than 1 hour	33
1–2 hours	29
More than 2,up to 4 hours	25
More than 4, up to 8 hours	11
More than 8, up to 12 hours	1
More than 12 hours	1
Total	100 (N=6,954[77])

Not surprisingly, the length of jury deliberation was closely associated with the length of the case:

Table 8.24
Length of jury deliberation by length of case

Length of case	*Length of jury deliberation*						
	under 1hr. %	1–2hrs %	2–4hrs %	4–8hrs %	8–12 %	12+hrs %	
Under half day	75	21	4	0	0	0	N=253
Half to 1 day	57	32	9	2	0	0	N=1,173
1–2 days	37	31	24	6	0.3	0.2	N=2,366
2–3 days	26	30	35	8	1	0.4	N=1,474
3–4 days	15	26	36	20	3	1	N=717
4–5 days	14	24	36	22	1	3	N=414
I-2 weeks	6	20	27	44	1	1	N=361
2 weeks +	4	3	24	40	8	21	N=161

The pattern is remarkably uniform. Thus where the case lasted under half a day, the jurors reported being out for under two hours in 96 per cent of cases. When the case lasted 3–4 days the jurors were back within two hours in only 15 per cent. When it lasted over two weeks, the jurors took more than four hours in nearly three-quarters of the cases.

Overnight stay together? There were eight cases (1% of the total of 821 jury cases) in which the jury stayed together overnight.

[77] Plus 688 non-replies and 700 when the jury did not go out.

8.11 THE EXPERIENCE OF JURY SERVICE

8.11.1 Was this the juror's first case in this spell of jury duty?

We asked whether this was the first case in the juror's present jury service (Jy43).

In over half the cases (57%) it was the first case in the juror's fortnight spell of jury duty.[78]

8.11.2 If not, how many juries had jurors already sat on?

Jurors were asked (Jy44) how many cases (including the present case) had they already been on.

There were 3,192 effective replies[79]

Table 8.25
Number of previous cases jurors had sat on[80]

	%	
1 previous case	65	
2 previous cases	26	
3 previous cases	7	
4 previous cases	1	
5 previous cases	0.2	
6 previous cases	0.1	
7 or more previous cases	0.1	
Total	100	(N=3,192)

The proposition that jurors may sit on six, seven, eight or even more cases in a two week period seems surprising. The proportion who sit on such numbers of cases is obviously tiny. Out of 8,338 jurors who returned questionnaires at some point during the two week period of the study, only 12 (0.1%), said they had already sat on six or more.

[78] N=8,232; 110 non-replies.

[79] Not including 26 non-replies and 304 cases in which the respondent said One – showing that he should not have answered the question which was only for persons who had served on more than one jury.

[80] There is no way of knowing to what extent these results are statistically representative. The survey questionnaires were filled out day-by-day throughout a consecutive period of two weeks. But we had no information as to when in the fortnight of jury service any case in the sample finished. Also in some areas, our first week of the survey period will have been the first week of jury service for respondents whilst in other areas it will have been the second.

But sitting on two or three cases is clearly very common. We sought to discover how many members of any particular jury have served together on the immediately previous jury. The more that members of one jury go together straight into a new trial, the greater the possibility that the group dynamics of the new jury could be affected by the fact that some of its members are already a group.

8.11.3 How many jurors carried over to the next jury?

In order to generate some data on this topic we asked those who said that they had already been in one or more case (Jy45): 'Were any members of the jury from your previous case kept together for this case?'

The responses are set out below:

Table 8.26
Numbers of jurors from the previous jury

	Jurors %
0 others	15
I other	15
2 others	15
3 others	14
4 others	13
5 others	8
6 others	5
7 others	3
8–10 others	11
All from the previous case	1
Total	100 (N=3,163[81])

On these figures it seems almost commonplace that juries include sizeable sub-groups from the previous jury cases – over two-fifths (41%) of respondents reported that there were four or more jurors from the previous jury.

8.11.4 Were views coloured by having served on a jury before?

Jurors would not necessarily be able to identify the particular effects on them of the experience of having previously been on a jury. Nevertheless it seemed right to invite them to express an opinion on the matter.

All jurors who had been a jury before were therefore asked (Jy47): 'Do you think that your view about the evidence was affected by having been on a jury before?'

[81] Plus 29 non-replies.

They were invited to tick any of the following replies that applied. 3,522 jurors responded and between them gave 5,033 responses. They are set out in order of frequency of mention:

Table 8.27
Why serving on a jury before made a difference?

	%
Made no difference	68
Made it easier to understand procedures	43
Made it easier to understand legal language	22
Made one less likely to believe all evidence	6
Made one less likely to believe defence evidence	3
Made one less likely to believe prosecution evidence	2
Any other differences	2
Total	146 (N=5,033[82])

The jurors who ticked the box 'Any other differences' stated that on the second occasion they were 'more relaxed', 'more comfortable', 'more confident', 'less nervous', 'more likely to ask questions', 'better able to concentrate', that it was 'less stressful', that they 'had a better sense of their responsibilities'. One said he was 'able to read between the lines of what was not said ie the character of the defendant'. Another said that whereas on a previous case 'I thought the defendant was guilty but with only circumstantial evidence and I didn't like to vote for a conviction, this time, in a similar situation, I found it easier to stick to a guilty verdict'.

8.11.5 Suggestions for improvements of jury service

Jurors were offered a number of matters on which they might like reform or improvements – and were asked (Jy54) how important they rated the particular proposal. The items on this shopping list were drawn up largely on the basis of the responses to this question in the pilot study in three London courts.

The list was prefaced with the following introductory words: 'Here is a list of possible improvements which could be made to the court facilities. How important would they be for you personally, to make jury service more pleasant?'

One problem with the formulation of the question was that in some cases jurors might have been expressing a view as to shortcomings at the

[82] Plus 69 non-replies.

court in which they sat. The words 'to make jury service *more* pleasant' would support this interpretation. But some jurors might have been perfectly satisfied with the facilities in that particular court but have been expressing a general view as to the importance to them of the item. The answers should be regarded as covering either or both positions.

Table 8.28
Importance of various improvements for jurors

	Very important %	Quite important %	Not very important %	Not important %	N= / Non-replies
More leg room in jury box	27	28	23	22	5,560/401
More space for writing in jury box	8	22	37	33	5,364/597
More comfortable seats in waiting rooms	30	30	21	19	5,479/482
TV in waiting room	24	19	23	33	5,566/395
Papers and magazines in waiting room	38	35	16	11	5,647/314
Separate smoking and non-smoking areas	55	21	13	11	5,613/348
Drinks vending machine	55	28	10	8	5,573/388
More toilets	20	30	29	20	5,360/601
Better refreshment facilities	47	31	13	9	5,592/369

The items that attracted most support were better refreshment facilities (78%), separate facilities for non-smokers (76%), provision of a drinks vending machine (73%) and provision of newspapers and magazines in the waiting rooms(72%).

8.11.6 Role of jury bailiff

Jurors were asked (Jy55) whether the jury bailiff did all that could have been expected – 97 per cent of jurors said yes.[83]

[83] N=5,902; 59 non-replies.

The 174 who thought that more might have been done between them produced 136 suggestions. The most frequently mentioned suggestions were 'Keep jury better informed' (37 mentions), 'Explain why waiting around' (37 mentions), 'Help with physical aspects'(24 mentions) and 'Explain procedures' (19 mentions).

8.11.7 Feelings about jury service

Jurors were asked (Jy57): 'How do you feel about jury service(this time) in terms of (a) your work situation and (b) your private life?'

The responses are shown below.

Table 8.29
Jurors' feelings about jury service – by work situation

	%
Very inconvenient	18
Slightly inconvenient	40
Not really inconvenient	42
Total	100 (N=5,001[84])

Those in full-time work were much likelier to find it very inconvenient than those doing only part-time work. But a sizeable proportion of those in part-time work (50%) and of students (44%) found it inconvenient to do jury duty. In fact,even some of the unemployed found it inconvenient.

Table 8.30
Jurors found it 'Inconvenient' or 'Very inconvenient' – by work status

	%
In full-time work	60 (N=4,010)
In part-time work	51 (N=761)
Unemployed but worked in previous 2 years	13 (N=284)
Unemployed no work in previous 2 years	7 (N=83)
Students	44 (N=52)
Retired	4 (N=336)
Others	14 (N=251)
	100 (N=2,888)

We also found that those who classified themselves as 'Professional/ managerial' were much more likely to say that jury service was 'Very inconvenient' (28%), by comparison with other groups:

[84] Plus 132 non-replies and 828 who do not work.

Table 8.31
Per cent who found jury service very inconvenient by social class

	%
Professional/managerial	28 (N=1,432)
Clerical/office/administrative	11 (N=1,106)
Service industry	10 (N=705)
Skilled manual	16 (N=949)
Unskilled manual	9 (N=352)
Other	16 (N=365)
Total	100 (N=4,909)

In relation to the work situation, nearly three-fifths (58%) found it either 'Very' or 'Slightly' inconvenient. In relation to private life it was just over one-third (37%).

Table 8.32
Inconvenience for jurors' private life

	%
Not really inconvenient	63
Slightly inconvenient	30
Very inconvenient	7
Total	100 (N=5,796[85])

8.11.8 How interesting did jurors find jury service?

Jurors were asked (JY58): 'How interesting have you found being on jury service?'

The overwhelming majority found it either 'Very interesting' (74%), or 'Fairly interesting' (22%). Only 4 per cent were negative about the experience.[86]

Foremen were even more positive. Eighty three per cent found it 'Very interesting' and 15 per cent 'Fairly interesting'. Only 2 per cent were negative.[87]

8.11.9 How jurors rated the jury system overall

Jurors were asked to rate the jury system(Jy59):

[85] Plus 165 non-replies.
[86] N=5,912; 50 non-replies.
[87] N=508; 6 non-replies.

Table 8.33
How jurors rated jury system

	Jurors' views %	Foremen's view %
Very good system	33	41
Good system	47	40
Neither good nor poor	15	14
Poor system	3	2
Very poor system	2	2
Total	100 (N=5,958[88])	100 (N=459[89])

The verdict was highly favourable. Only five per cent of jurors generally were negative. In the case of foremen it was 3 per cent. Nearly half of jurors generally (47%) thought it was a 'Good system' and a third (33%) thought it was a 'Very good system'. Nearly four-fifths therefore (79%) gave the system a positive rating. (See also Sect.6.2.1 above.)

Among foremen the proportion who thought that it was 'Very good' was 41 per cent and the proportion who gave it a positive rating was 81 per cent.

When we compared the view of different age groups, there was a clear progression (col.1). The older one was, the more likely one was to hold that the system was 'Very good' or 'Good':

Table 8.34
How jurors rated jury system – by age

	1 'Very good' or 'Good' %	2 Neither good nor bad %	3 'Very poor' or 'Poor' %
18–24	73	21	5 (N=861)
25–34	75	20	6 (N=1,267)
35–44	81	13	6 (N=1,355)
45–54	81	13	6 (N=I,318)
55–64	84	11	5 (N=1,006)
65+	85	10	5 (N=99)

But the final column of the table shows that the obverse did not apply – young jurors were not more likely than older jurors to think that the system was 'Poor' or 'Very poor'. The difference between younger and older jurors

[88] Plus 3 non-replies.
[89] Plus 1 non-reply.

was therefore confined to the area between 'Very good' and 'Good' on the one hand and 'Neither good nor bad' on the other.

8.11.10 Is this the first time on jury service?

Jurors were asked whether they had done jury duty prior to this stint of jury duty (Jy60):

Only 13 per cent had done jury service before – 4 per cent within the previous five years and nine per cent more than five years previously.[90]

8.12 THE FOREMAN

8.12.1 How many answered the questionnaire?

We asked jurors:'Were you the foreman of the jury?'.

There were 751 jurors who said they were the foreman – as against 757 numbered[91] juries in the sample. 695 of the 751 were in numbered juries but rather to our bewilderment we discovered that in 34 cases two members of the jury claimed to be the foreman and in two cases three jurors said they were foreman. There was unfortunately no way of determining which of these respondents was the 'true' foreman and which the 'imposters'. We therefore decided to exclude the answers of *all* the 74 respondents in those 36 cases who claimed to be jury foreman.

56 jurors said they were foreman but could not be linked with any particular jury for lack of the crucial identifying number on the questionnaire. However, we deemed all these to be actual foremen. The total number of foremen was therefore 677.

8.12.2 Sex of the foreman

Foremen were disproportionately male – 78 per cent as against 24 per cent female.[92]

8.12.3 Age of foremen

The age profile of foremen was not greatly different from that of jurors generally (see below). Over a quarter of jury foremen were under 34 and a tenth were under 25.

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[90] N=5,898; 63 non-replies.

[91] Each jury was given its own number which identified the twelve members of that jury. In some cases however this jury number had not been put onto the questionnaire.

[92] N=457; non-replies 3. The 'low' number of responses is because for this and other questions relating to the foreman rather than the case we took only the first Royal Commission questionnaire answered.

Table 8.35
Age of foremen

	%
18–24	11
25–34	17
35–44	27
45–54	26
55–64	18
65 or over	1
Total	100 (N=453[93])

8.13 THE MAKE-UP OF THE JURY

8.13.1 Sex distribution (Jy68)

Fifty three per cent of the jurors were male; 47 per cent were female.[94] Comparison with the proportions for the general population shows that males were somewhat disproportionately represented on the jury.

Table 8.36
Sex of jurors

	Male %	Female %
Sex distribution of sample	53	47
Sex distribution of general population[95]	48	52
Sex of foreman	78	22

We tried to establish the sex distribution of jurors in individual cases. This appears from the table below which is based on the answers of foremen and gives the picture for almost every case in the sample:

[93] Plus 7 non-replies.
[94] N=5,194. These were all jurors answering the questionnaire for the first time.
[95] The national statistics are those used by BMRB. They reflect BMRB's so called Target Group Index which is matched to the National Readership Survey which is in turn matched to the Census Mid-Year Estimates for 1990.

Table 8.37
Gender distribution on juries

No. on jury	% of juries	
	Male %	Female %
1	0.1	0.7
2	1	2
3	3	6
4	7	17
5	16	22
6	25	25
7	22	15
8	17	7
9	6	2
10	2	1
11	0.3	–
12	0.1	0.3
Total	100 (N=730[96])	100 (N=728[97])

In 80 per cent of cases the ratio of men to women was 5:7, 6:6, 7:5 or 8:4. The number of all male or all female juries was 0.1 per cent and 0.3 per cent respectively.

8.13.2 Age distribution (Jy69)

The age spread of jurors between 18 and 65 was somewhat different from the age composition of the general population. (Jury service for anyone over 65 is optional.)

[96] Plus 25 juries where there was insufficient information.
[97] Plus 27 juries where there was insufficient information.

Table 8.38
Age of jurors

	Sample	Foremen	General population
	%	%	%
18–24	15	11	14
25–34	21	17	20
35–44	23	27	18
45–54	22	26	15
55–65	17	18	13
Over 65	2	1	20
Total	100 (N=5,909[99])	100 (N=453[100])	100[98]

As has already been noted, the age distribution of foreman was not very different from that for the jury as whole. Even the 18–24 age group contributed something close to its statistically appropriate share of foremen.

We looked to see whether there was any evidence of unusual age spread in juries and whether age spread had any statistical association with a higher or lower acquittal rate.

Most juries had a wide spread of ages. There was no jury in the entire sample where one age group dominated disproportionately. When the average age of jurors was worked out it came plumb in the middle (35–44) band. Where we had eight or more returns from a jury we worked out the 'average age' of juries. Again the majority fell in the middle band. There were no juries with an average age below 25 or above 55.

The youngest jurors, those between 18 and 24, were spread among 530 juries. In 150 (22% of juries) there was no one of that age group. In 441 (65% of juries) the number of young jurors ranged from 1–3; in 88 (13% of juries) it ranged from 3 to 6. In one jury it was between 6 and 9.[101]

[98] The proportions have been reworked on the basis that the population consists only of the age groups eligible for jury service

[99] Plus 48 non-replies.

[100] Plus 7 non-replies.

[101] This calculation was based on 680 juries where a) at least eight jurors replied and b) in some instances the juror did not answer the age question. When we checked the results against the 557 juries where 8 or more jurors replied and all answered the age question the results were virtually identical – 22% – 64% – 14%.

The acquittal rate for the three different ages of juries was as follows:

Table 8.39
Acquittal rate of juries – by age of jurors

Average age of jury	*Acquittal rate** %
25–34	42 (N=19)
35–44	44 (N=291)
45–55	44 (N=80)

Cases ending in directed acquittals, mixed verdicts or hung juries were excluded.

There was virtually no difference – and insofar as there was any, the older age group juries were marginally more inclined to acquit than the younger. It should be noted however that there were very few juries with an average age of 25–34 and none with an average age of over 55.

8.13.3 Work status (Jy70)

Jurors were asked: 'Which of these best describes your current situation?'

Table 8.40
Jurors' work status

	Sample %	Foremen %
Working full-time (30+ hours/week)	69	78
Working part-time	13	8
Unemployed but worked in last 2 years	5	4
Unemployed for more than 2 years	2	1
Not working – student	1	1
Not working – retired	6	5
Other	5	3
Total	100 (N=5,897[102])	100 (N=458[103])

[102] Plus 60 non-replies.
[103] Plus 2 non-replies.

The only significant difference between the foreman and the rest of the jury was that the foreman was somewhat more often in full-time work – 78 per cent, compared with 69 per cent for jurors generally.

8.13.4 Nature of work/Social Class

We did not feel it appropriate to ask a battery of questions designed to fix the jurors' social class. But we did want to get some sense of the social class make-up of our juries.

The compromise was to ask just one question which would permit at least a very rough-and-ready social class assessment. (Unfortunately the scheme adopted by BMRB is not one that can be matched against any national statistics. While the scheme approximates to the classification used by the Registrar General it is sufficiently different to make a direct comparison misleading.)

Those who had worked during the previous two years were asked (Jy71): 'Which *one* of these best describes your job (including your last job if you have worked in the past two years)?'.

The categories are broad and somewhat elastic. It is by no means certain that respondents will have classified their work correctly. These proportions must therefore be treated with some caution.

Table 8.41
Jurors' occupations

	Sample	Foremen	General Ppltn.
	%	%	%
Professional/managerial	29	54	31
Clerical/administrative/office work	22	11	17
Work in service industry (such as a shop, bank, restaurant, hotel etc)	14	8	20
Manual work – skilled	19	14	23
Manual work – unskilled	7	3	7
Other	7	10	2
Total	100	100 (N=4,958[104])	100 (N=405[105])

[104] Plus 153 non-replies.
[105] Plus 55 non-replies.

The match with the breakdown for the general population was tolerably close, with a slight over-representation of clerical workers and under-representation of skilled manual workers.

Fifty-four per cent of foremen considered themselves professional/ managerial, compared with 29 per cent of jurors and 31 per cent of the general population.

A separate question (Jy72) was asked to establish how many of those who worked were self-employed. In response, 11 per cent of those who said they worked said they were self-employed. [106]

In the case of foremen, 17 per cent of those who worked said they were self-employed.

8.13.5 Educational level (Jy73)

In order to get a sense of jurors' educational background – as well as providing some broad check on the self-report data on social class/ work classification – we asked jurors at what age they finished full-time education.

[106] N=4,961; 273 non-replies. BMRB's Target Group Index, see note 95 above, has self-employed adults as 6 per cent of all adults.

Table 8.42
Jurors' educational level
Finished *full-time education*

	Sample	Foremen	General Population
	%	%	%
Up to age 15 years	30	25	39
At 16 years	32	28	26
17–18 years	20	19	15
19–20 years	5	6	12[107]
21 years or over	12	20	–[108]
Still studying	1	1	6
	100	100	100
	(N=5,847[109])	(N=452[110])	

Compared with the general population, there was a bias in the sample toward those who left school later – though students were under-represented. The bias toward those who left school later was even stronger for foremen than for jurors generally.

Finished full-time education by age of juror

Not surprisingly, given the developments in education, the older age groups were less likely to have stayed on at school than the younger.

Table 8.43
Age jurors left education – by age group

Age group		*Left school at age*		
	Total	By 16	17-18	19+
	%	%	%	%
18–24	50	33	17	100 (N=1,129)
25–34	53	23	24	100 (N=1,757)
35–44	60	17	23	100 (N=1,918)
45–54	71	14	15	100 (N=1,750)
55–64	75	13	12	100 (N=1,360)
65+	77	9	14	100 (N=131)

Thus of the 18–24 age group 50 per cent left school by age 16, compared with 70 of the 45–55 age group and 75 per cent of the 55–64 age group. By

[107] This figure relates to the 19+ age group.
[108] See previous note.
[109] Plus 110 non-replies.
[110] Plus 8 non-replies.

contrast, 17 per cent and 24 per cent of the two younger age groups stayed on at school past age nineteen compared with 16 and 12 per cent respectively of the two older age groups.

8.13.6 Jurors' ethnic mix (Jy74)

We asked jurors to identify their own race or ethnic background on a list of seven pre-coded classifications plus one final 'Other ethnic group'. The results show a very close approximation between the sample mix and that in the general population. Even foremen conformed quite closely to the national norm.

Table 8.44
Jurors' ethnic mix

	Sample	General Population	Foremen
	%	%[111]	%
White	95	95	98
Black-Carribean	2	1	0.6
Black-African	0.5	0.4	0.2
Indian	2	1	0.2
Pakistani	0.3	0.9	0.4
Bangladeshi	0.05	0.3	–
Chinese	0.2	0.3	–
Other	1	1	0.4
Total	100	100	100
	(N=5,875[112])		(N=455[113])

When we looked at the ethnic background of the foreman in all the 677 cases in which we had a return from the foreman we found that 14 juries (2%) had a non-white foreman.

We looked at the spread of non-white jurors amongst juries but only on a national basis. (Because of the agreed basis for the jury study we were not able to refine this by reference to local areas and therefore to the geographical distribution of non-white persons in the community.) In almost two-thirds of cases (65%) there were no non-whites on the jury at all. There were 116 juries (16%) with one non-white person, 66 juries (9%) with two, and 39 juries (5%) with three. There was one jury with 10 non white jurors, one jury with eleven and one with 12 non-white jurors.

[112] Plus 82 non-replies.
[113] Plus 5 non-replies.

Table 8.45
Non-whites per jury

	Non-whites per jury %
No non-whites	65
1 per jury	16
2 per jury	9
3 per jury	5
4 per jury	3
5 per jury	1
6 per jury	0.5
7 per jury	0.4
8 per jury	–
9 per jury	–
10 per jury	0.13
11 per jury	0.13
12 per jury	0.13
Total	100 (N=757)

8.13.7 Jurors' command of English

There are allegations from time to time that significant numbers of jurors have an inadaquate command of English.

We asked first: 'Is English your first language?'

For 96 per cent it was[114]; for 4 per cent (289), it was not. Those for whom it was not, were asked to specify what was their first language. Only 190 of the 289 potential respondents answered. 102 gave a language mainly spoken in Asia (Gujerati was the most frequent with 37 mentions); 44 gave a West European language; 19 gave Welsh as their first language; 25 gave a variety of other languages.

We also asked those for whom English was not their first language also (Jy77): 'Did you have any difficulty with the language in following this case?'

Two hundred and seventy three said they had 'No difficulty'. Thirty two said they had 'A little difficulty'. No one reported having had 'A lot of difficulty'[115].

8.14 ABILITY OF JURORS TO COPE

8.14.1 How many jurors could not cope?

We first asked all jurors (Jy 80):'Do you think there were any member(s) of the jury who could not really cope with the case?'

[114] N=8,153; 159 non-replies.

[115] The total was greater than 289 because it included 18 jurors who gave no response to the previous question whether English was their first language. The sample for this question was therefore 289 plus 18 or 307.

There were three pre-coded replies:

Table 8.46
Could jurors cope?

What jurors thought of other jurors	In view of whole sample %	In view of foreman %
All could cope	78	78
Some could not cope	9	11
Not sure	13	10
Total	100 (N=7,997[116])	100 (N=729[117])

Seventy-eight per cent of jurors thought that all their fellow jurors could cope with the case in hand. The view of the jury foreman was the same.

Some could not cope But there were 8 per cent of jurors who said that there were some fellow jurors who could not cope. These 680 opinions were expressed in regard to 300 juries. In other words, there were 300 juries out of 757 (40%) in which one or more juror thought that one or more jurors could not cope. (Conversely, in 60 per cent of juries there was no juror, including the foreman, who thought that other jurors could not cope.)

Foremen said there were 80 juries (11%[118]) on which one or more jurors could not cope.

In order to get further information as to the ways in which jurors were not able to cope we offered respondents four series of boxes to fill in so as to specify the number of jurors affected by the particular form of incapacity in issue. The results stated below are the assessments of foremen. They are not necessarily the same as those made by other jurors. (Indeed the fact noted above that other jurors thought that there were more juries in which there were jurors who could not cope suggests they differed.) But we felt that the assessment of the foreman might be the most reliable guide to what is in any event a very subjective evaluation.

The first issue related to ability to understand English; the second to ability to cope with that case, the third to ability to cope with *any* case and the fourth was open-ended in order to catch any further instances.

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[116] Plus 287 non-replies.
[117] Plus 15 non-replies.
[118] 80 out of 733 not including 22 non-replies.

Table 8.47
Could jurors cope – view of foremen

	Nos. of cases with what number of jurors suffering from the incapacity in question				
	1 juror No.	2 jurors No.	3 jurors No.	4 jurors No.	5+ jurors No
Couldn't understand English very well[119]	10	2	0	1	0
Didn't have the ability to understand the details of this case[120]	27	17	9	4	2
Didn't have the ability to understand the details of any case[121]	19	6	5	2	0
Other problems	15	5	1	4	1

It seems plausible to assume that no reply would tend to mean no juror with that problem.

According to the foremen therefore, there were 18 jurors spread among 13 juries who could not understand English well enough; there were some 114 jurors spread among 41 cases who did not have the ability to understand the details of the particular case; and there were some 54 jurors spread among 35 cases who did not have the ability to understand the details of *any* case.

There was a tiny handful of cases where the average view of the jurors who responded was that more than five members of the jury could not cope. Thus there were five cases where, according to the 'average view' of the jurors who responded, more than five jurors could not understand the details of the current case and six cases where more than five jurors could not understand *any* case. Four of the six juries were in both categories.

Whether in these cases there was an unusually high proportion of jurors of limited intellectual capacity or whether the case was especially complex (or both) we were not able to tell. Nor could we consult the judge or barrister questionnaires since permission had not been given to link the jury questionnaires with those in the rest of the survey.

On the other side of the coin, according to all jurors, there were 455 juries which had no jurors with any of these problems. In those 455 juries (60% of the 757 in which jurors returned questionnaires), no juror suggested that any juror had any of the problems referred to.

[119] There were 25 cases out of 677 in which the foreman did not reply.
[120] There were 12 cases out of 677 in which the foreman did not reply.
[121] There were 24 cases out of 677 in which the foremen did not reply

APPENDIX 1

THE REPRESENTATIVENESS OF THE SAMPLE AND METHODOLOGY

To test whether the survey sample was representative we wanted to know first the total number of cases dealt with by the courts in the survey period. There was no easy way of getting this information. Investigation showed that it could not be done as part of the survey itself.

In the end it became clear that the only way we had of determining the total universe from which our sample was taken was to use the figures supplied by courts to the Lord Chancellor's Department for the purposes of the *Judicial Statistics.*

According to these, the number of cases heard in all the Crown Courts in England and Wales in February 1992 was 7,729. Of these 2,348 (30%) were 'trials' and 5,381 (70%) were guilty pleas to all charges by all defendants.

However, there were three courts (Kingston, Reading and Snaresbrook) that were not included in the survey because they had been used in the pilot. The number of cases heard in these three courts in February 1992 was 296 – 145 trials and 151 guilty pleas[1].

When these had been deducted, the total number of cases heard in February in the courts taking part in the study was therefore a total of 7,433:2,203 (29.6%) trials and 5,230 (70.4%) guilty pleas.

February 1992 had exactly four weeks (twenty days) worth of working days. We therefore assumed arbitrarily that exactly half the court's caseload for the month represented the caseload for the two week period of the survey. There is no way of knowing to what extent this assumption was false.

On this basis, the estimated total number of cases for the survey period would have been 3,716: 1,101 trials and 2,615 guilty pleas. Questionnaires were in fact returned in 3,191 cases (86% of the estimated total). There were therefore estimated to be some 525 cases in which there was no questionnaire.

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[1] The ratio of pleas to trials in the three courts is different from the national picture, with far more contested cases. But this is consistent with the annual picture both for courts on the South Eastern Circuit generally and for these courts in particular. Thus in the financial year 1991/92, contested cases in the three courts were 51 per cent of the total. (Figures supplied by the LCD).

As has been seen, according to the LCD's figures, 30 per cent of cases heard in February 1992 (as in 1991 overall) were contested cases. How many of the cases in the sample were contested cases?

It might be thought that this question would have been relatively straightforward. This, however, was not so. One reason was that not all questionnaires posed the question about the plea, so that if all the respondents who were asked about plea failed to return questionnaires, we had no information on the matter. Sometimes, although the relevant question was put, it was not answered, whether through oversight or otherwise.

Moreover, in some cases respondents disagreed as to whether the plea had been guilty, not guilty or a mixed plea (guilty to some and not guilty to other charges). This might be due to a slip of the pen in ticking the wrong box, or to a genuine difference of opinion. For instance, the lawyers consistently reported more 'mixed pleas' than the judges who tended to record such pleas as pure guilty pleas.

The extent of the disagreement can be seen by considering the proportion of mixed pleas recorded by the various participants: defence and prosecution barristers 26 per cent; defence solicitors 25 per cent; defendants 28 per cent; judges in contested cases 4 per cent. The only figure near the 3 per cent of the *Judicial Statistics* was therefore that of the judges. The others are clearly 'wrong'. The probable explanation seemed to us that barristers approached the trial with a contest in mind, but by the time the case reached court, the prosecution had accepted not guilty pleas to certain charges, the defendant pleaded guilty to other charges and it would be regarded by the judge as a guilty plea. Support for this interpretation comes from the fact that over 200 cases recorded as mixed pleas by defence barristers were recorded as 'cracked trials' (i.e. last minute guilty pleas) by the judges.

In the light of this, we decided to base our calculation of plea on a combination of court clerk, judge and the two barristers. We further decided that the barrister responses identifying pleas of guilty to all charges and not guilty to all charges could be relied on but that the barristers' indications of mixed pleas were unreliable.

Inspection of the barrister mixed plea responses cross-tabulated with court clerk responses confirmed that almost all these cases had ended as uncontested.

To calculate the distribution of pleas in our sample we therefore took: guilty, not guilty and mixed pleas from the court clerk and judge

questionnaires. That accounted for 2,644 cases[2]. There were a further 35 cases in which the court clerk recorded no plea because the case had been allowed to lie on the file, or the defendant had been bound over. That left a balance of 512 unaccounted for[3].

We next looked to see how many definite allocations of pleas we could extract from the barrister questionnaires. For this purpose we took all the cases which one or other or both barristers said were either not guilty pleas or pleas of guilty to all charges. We added to the guilty plea cases 97 per cent of the barristers' 'mixed plea' cases. The remaining 3 per cent of mixed plea cases we treated as mixed pleas – thus taking their appropriate proportion by reference to the proportion of mixed pleas in the *Judicial Statistics*.

The result was an additional 161 guilty pleas, an additional 79 not guilty pleas and an additional 7 mixed pleas – or 247. The total of these added to those arrived at from the court clerk and judge questionnaires is the figure in Table 1. The total now unaccounted for is 265[4].

Table 1 shows the number and proportion of pleas in the sample cases compared with the number and proportion in the cases estimated according to LCD figures to have been heard in two weeks in February 1992 in all the crown courts (excluding the three courts that did not take part in the survey).

It must be emphasised that, unavoidably, both columns represent estimated figures – neither our figures nor those of the LCD can be taken to be exact. There is therefore an unknowable margin of error.

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[2] Guilty pleas 1,689; Not Guilty pleas 890; mixed pleas 65. Total 2,644.
[3] 3,191 less 35 less 2,644=512.
[4] 512 less 247=265.

Table 1
Comparison of pleas in sample and estimate of pleas heard by courts (based on LCD's figures)

	Sample		*Estimated heard by courts in sample period (LCD[5])*	
	No.	%	No.	%
Guilty plea	1,850	64	2,615	70
Not guilty plea	969	34	990[6]	27
Mixed plea	72	2	111	3
Total	2,891*	100	3,716	100

* Plus 265 unallocated cases and 35 cases in which the court clerk said there was no plea, a total of 300 – making up the overall total of 3,191.

Table 1 shows that the estimated proportion of contested cases in the sample was 'high' (A shortfall of 765 it represents only 1.8 cases per courtroom over the two week period of the study[7]. 34% plus 2% mixed plea cases, against 27% plus 3% according to the estimated LCD figures), whilst uncontested or guilty plea cases were 'low' (64% against 70%).

Since, according to the figures in Table 1, the number of not guilty plea and mixed plea cases in the sample (969+72=1,041) was only 60 below the figure in the right column of such cases estimated to have actually been heard in the survey period (990+111=1,101) it may be assumed that some 200 of the unallocated 265 cases were guilty pleas.

The overall 'shortfall' in guilty plea cases[8] was 765 (2,615 less 1,850). This is understandable. Court clerks were instructed to distribute survey questionnaires in every contested and every uncontested case but it was always probable that there would proportionately be many more failures to distribute questionnaires in guilty plea cases, especially in the rush of cases on 'plea days' when courts deal at a considerable pace with a long list of guilty plea cases. (Since most of the questions on all the questionnaires related to contested cases, the relative shortfall in guilty plea

[5] The figures, estimated from those for the whole of February 1992 supplied by LCD, are for *cases*, regardless of the number of defendants per case. The sample figures in the other column are for pleas of one defendant per case. The two sets of figures should therefore be comparable.

[6] The LCD figures for the whole month give 1,101 'trials' for the two week sample period. The LCD figure does not distinguish mixed pleas. This figure and that for mixed pleas in the next line are therefore estimated figures based on the proportions in the annual *Judicial Statistics*, 1991, Table 6.8.

[7] As at March 1992, there were 427 effective courtrooms in use in the Crown Courts. (Figure supplied by the LCD.)

[8] Not counting any of the 265 unallocated cases where the plea was not ascertained, almost all of which would have been guilty pleas.

cases mattered considerably less than if the shortfall had been in contested cases.)

Numbers of questionnaires returned

The numbers of questionnaires returned in each category was as follows in Table 2. The method of calculating the response rate for the different categories of respondent is explained below.

Table 2
Numbers of questionnaires returned

	Numbers returned	Response rate %
Category (1)		
Court clerks	2,692	84
Prosecution barristers	2,259	71
Defence barristers	2,092	66
Police	1,819	57
Defence solicitors	1,392	44
Category (2)		
Judges	1,529	77
CPS	1,322	67
Category (3)		
Defendants	793	19
Category (4)		
Jurors	8,338	85
Juries	821	93
Jury foremen	677	83

How many questionnaires were filled out per case?

As has already been seen, the jurors' questionnaires could not be linked to the others – so as to conform to the perceived requirements of the Contempt of Court Act 1981. In the following calculation of the number of responses per case the jury questionnaire has therefore been excluded.

The numbers of questionnaires returned per case was as follows:

Table 3
Numbers of questionnaires per case

	No. of cases	%
8 questionnaires	125	4
7 questionnaires	306	10
6 questionnaires	540	17
5 questionnaires	605	19
4 questionnaires	573	18
3 questionnaires	441	14
2 questionnaires	270	8
1 questionnaire	331	10
Total	3,191	100

We had six or more questionnaires in almost one third of the cases (31%), and four or more in 68 per cent of cases.

The main questionnaires were those filled out by the barristers. There were 1,591 cases (50% of the 3,191) in which both barristers returned questionnaires. There were 663 cases (21%) in which the prosecution barrister but not the defence barrister replied and 501 cases (16%) in which the defence barrister but not the prosecution barrister replied. There were 436 cases (14% of the 3,191) in which neither barrister replied.

Response rate

In order to make sense, the response rate had to be calculated differently for four different categories of questionnaires.

Category (1) – court clerks,barristers,police,defence solicitors

The response rate in Category (1) is based on the full number of 3,191 cases in which one or more questionnaires was returned. In regard to three of the five questionnaires the response rate was remarkably high: Court clerks 84 per cent, Prosecution barristers 71 per cent and Defence barristers 66 per cent. The response rate of the police (57%) was also very satisfactory. The only category of respondent in this group that fell below a 50 per cent response rate was the defence solicitors – but some 1,400 defence solicitor questionnaires, a 44 per cent response rate, was still statistically acceptable.

Category (2) – judges, CPS

The measure of the response rate in Category (2) was different because judges and the CPS were not given questionnaires in cases that had been *listed* in advance as guilty pleas.[9]

[9] The reason was simple economy of effort. We did not want to put our respondents to needless trouble. We thought that answers from judges and the CPS in regard to cases listed as guilty pleas would not be sufficiently rewarding topics for analysis to make it right to ask them to complete questionnaires in those cases.

The number of listed pleas was estimated to be 1,211. This figure was based on the number of listed pleas reported by court clerks – 1,017. Since, however, court clerks made returns in only 84 per cent of the 3,191 cases, we added a pro rata number of listed pleas for the 'missing' 16 per cent of cases – 194, making 1,211.

The total estimated number of cases in which judges and the CPS should have answered questionnaires was therefore 3,191 less 1,211 or 1,980. This gave a response rate for judges of 77 per cent and for the CPS of 67 per cent. Both were very satisfactory.

Category (3) – defendants

As has already been seen, questionnaires were supposed to be distributed to every defendant in each case (rather than just the 'sample defendant')[10]. The response rate for defendants (Category (3)) was therefore based on the estimated number of defendants in the 3,191 cases in which questionnaires were returned. The number of defendants per case was recorded by the court clerks as follows:

Table 4
Number of defendants per case

Defendants	*Cases*	
	No.	%
One defendant	2,084	79
Two defendants	367	14
Three defendants	113	4
Four defendants	47	2
Five defendants	14	0.5
Six defendants	6	0.2
Seven defendants	3	0.1
Eight defendants	2	0.1
Nine defendants	3	0.1
Total number of cases	2,639	100

The 2,639 cases in which court clerks answered this question involved 3,515 defendants – giving an average of 1.3 defendants per case. This was exactly the same proportion as in the *Judicial Statistics*[11].

On this basis the 3,191 cases in the sample would have involved 4,148 defendants. 793 defendants returned questionnaires – 19 per cent of

[10] The defence barrister was asked to encourage defendants to complete the form and to assist where this seemed appropriate. (The barrister's form said: 'If you feel the defendant may need help in completing the form, we would be grateful if you could offer help, or suggest someone such as the defence solicitor who could.')
[11] In 1991 there were 117,422 defendants dealt with in 90,199 cases – see *Judicial Statistics*, Cm 1990, Tables 6.7 and 6.8.

the 4,148. Of the 793 defendants' questionnaires, 24 had no survey number and could not therefore be allocated to a case. There were therefore 769 that could be linked to a sample case.

A response rate of 19 per cent is very low and cannot be regarded as statistically satisfactory. We did further tests however to see whether there were any other indications as to whether, and if so, to what extent, the defendants' sample was representative.

One was by looking at sentences. We contrasted the proportion of cases in which immediate sentences of imprisonment were imposed on all defendants in the whole sample with the proportion of defendants who returned questionnaires given an immediate term of imprisonment.

The sentences imposed in the cases in the study were not recorded specifically for the study. Instead we obtained them from the official court sheet about each case which court clerks were asked to attach to their own questionnaires. There were 2,692 court clerk questionnaires. In 2,474 (92%) the court staff attached the court sheet. In 531 of these (21%), the court sheet reported that the defendant had been given an immediate custodial sentence.

We then took these 531 cases as a sub-sample. If defendant questionnaires were fully representative of cases of immediate imprisonment, there should have been 111 cases (21%) where there was 1) both a court clerk and a defendant questionnaire and 2) the court sheet reported that the defendant had been given an immediate custodial sentence. In fact there were 92 of these – or 17 per cent of 531. This was not too far off.

We did further checks to test the representativeness of the defendant sample. Thus we looked at the pleas in all cases reported by court clerks and compared them with the pleas in these cases in which there was also a defendant questionnaire. The results are set out in the table below:

Table 5
Comparison between defendant sample and whole sample in regard to plea – court clerk questionnaires

Plea	*All court clerk questionnaires* %	*Court clerk questionaires where also def. questionnaire* %
Plea of not guilty	33	35
Guilty plea listed	39	37
Last minute guilty plea	25	25
No plea, charges to lie on file	3	3
Total	100 (N=2,606[12])	100 (N=626[13])

As can be seen, the correspondence between the two columns is reasonably close. As regards plea therefore it would appear that the defendant sample was fully representative.

We looked also at the verdicts in all cases reported by court clerks as compared with verdicts in these cases in which there was also a defendant questionnaire:

Table 6
Comparison between defendant sample and whole sample in regard to verdict – court clerk questionnaire

Verdict in contested cases	*All court clerk questionnaires* %	*Court clerk questionnaires where also def. questionnaire* %
Not guilty on all counts	42	49
Guilty on all counts	41	32
Mixed	14	15
Hung jury	3	4
Total	100 (N=720[14])	100 (N=190[15])

From this table it appears that the defendant sample contained 7 per cent more acquittals and 8 per cent fewer cases in which the defendant was found guilty on all counts than in the full sample.

A further representativeness test for the defendant sample was in regard to remand prior to trial. 16 per cent of defendants stated that they

[12] Plus 88 where plea not stated.
[13] Plus 27 where no plea stated.
[14] Plus 36 where verdict not stated.
[15] Plus 3 where verdict not stated.

had been remanded in custody throughout the period from committal to trial. (See sect.1.7.1 above.) In 1991, the national percentage of defendants committed for trial at the Crown Court who were remanded in custody throughout the period between committal and trial was 17 per cent. (*Criminal Statistics* (Table 8.9)).

The defendant sample was therefore fully representative in this regard.

A further test of representativeness was in regard to selection of solicitors in the police station. Nationally in 1990–91 65 per cent of solicitors called by defendants to advise in the police station were 'own solicitors' as compared with duty solicitors. In 1991–92 the proportion was 63 per cent. In our sample the proportion was 66 per cent (see sect.1.3.2). Again therefore this was very close to the national norm.

In summary: despite the low overall defendant response rate (19%), and the fact that there were more acquittal cases than in the full sample, there were sufficient indications of representativeness to make the defendant responses worthy of inclusion in the study.

Category (4) – juries, jurors, jury foremen

Court clerks were asked to distribute questionnaires to every member of every jury in the sample cases. The number of questionnaires received from jurors was as follows:

Table 7
Number of jury questionnaires returned per jury

No. of jurors returning questionnaires per jury	*Juries*	
	No.	%
All 12 jurors	264	35
11 jurors	182	24
10 jurors	122	16
9 jurors	69	9
8 jurors	42	5
7 jurors	21	3
6 jurors	12	2
5 jurors	10	1
4 jurors	8	1
3 jurors	5	1
2 jurors	9	1
1 juror	13	2
Total	757	100

Table 7 shows that there were 757 identifiable cases in which jurors returned questionnaires. (There were a further 644 juror questionnaires

that could not be linked with any identifiable jury because they lacked the identifying number.)

The response rate in the 757 identifiable cases in which there were juror questionnaires returned was high. If each of the 757 juries had 12 jurors, there would have been a total of 9,084 jurors. In fact, there were 7,694 jury questionnaires in those 757 identifiable cases, indicating that 85 per cent of jury members completed one, with an average of 10 questionnaires per jury.

In over a third (35%) of the 757 identifiable juries, all twelve members of the jury returned questionnaires; in a quarter (24%) eleven jurors replied, in over a sixth of cases (16%), ten replied. In 84 per cent of the 757 juries we had nine or more jurors responding.

As has been seen, there were 644 juror responses that could not be assigned to any particular jury for lack of the requisite identifying number. If the average response rate in these cases was the same as for the identifiable jury cases (10 juror questionnaires per jury) this would mean that the 644 'unattached' jury questionnaires would represent another 64 juries.

Addition of the 757 'identifiable' or 'numbered' juries with the 64 'non-identifiable' juries gives a total of 821 juries.

How does this figure relate to the number of jury cases actually heard in the survey period? As has been seen above, according to the LCD there were 2,203 'trials' in the survey courts in February 1992 – or an estimated 1,101 in the two week period of the sample. But 'trials' in these LCD figures include ordered acquittals where no jury is empanelled because the prosecution offers no evidence. According to the LCD there were 474 ordered acquittals in the survey courts in February 1992, or an estimated 237 in the two week period of the sample.

If these 237 ordered acquittals are deducted from the LCD's 1,101 estimated 'trials, the estimated number of 'actual' jury cases in the survey courts in the survey period is 878. On this basis, our estimated 821 jury cases would represent 93 per cent of the actual jury trials in the survey period.

We had 751 returns from the foreman of the jury. It proved however that a few of the 'foremen' were 'imposters', in that there were 34 cases in which two persons said they were the foreman and two cases in which three persons said they were the foreman. There was no way of telling which was the imposter and which the real foreman.

695 of the responses from 'foremen' related to identifiable numbered juries; 56 had no determinable jury number. It is possible that all these 56 'unattached foremen' were genuine foremen in the estimated 64 unnumbered juries. It is also theoretically possible, though somewhat unlikely, that all 56 were 'imposters'. The absolute maximum number of possible 'imposters' is therefore these 56 plus the 38 in the numbered juries or 94. Taking the most conservative measure and discounting all the possible 'imposters', the number of foremen at the very least was 657 (751 less 94) – or 80 per cent of the estimated 821 juries in which we had returns.

We decided to deem all the unattached 56 to be genuine foremen but to exclude all the 74 questionnaires[16] from persons claiming to be foreman in the 38 numbered juries where there was said to be more than one foreman. The total number of foremen for the purposes of the study was therefore deemed to be 677 – 83 per cent of the estimated 821 jury trials in the sample, or 78 per cent of the estimated 863 jury trials in the two week period of the survey.

Acquittals and response rate

Another measure of the representativeness of the sample is how well the acquittal rate in the sample measured against the actual acquittal rate in the sample courts in the survey period. This appears in the Table below. (Since the sample for the main study included only one defendant per case[17], whilst the LCD acquittal figures are based on an average of 1.3 defendants per case, the sample numbers have been increased by 1.3 to make them comparable. The figure in brackets represents the sample 'merged' or 'majority' number before the adjustment.)

Table 8
Acquittals and representativeness

	1. *Adjusted figure*	2. *Unadjusted figure*	3. *LCD figures*	*Col.1. as of Col.3* %
Ordered acquittals	201	(156)	237	85
Directed acquittals	147	(113)	165	89
Jury acquittals	368	(283)	363	100

The Table shows that the response rate for all three categories of acquittal is very high – with jury acquittals being effectively 100 per cent.

[16] Two questionnaires in each of the 34 cases, three questionnaires in each of the two cases.

[17] Respondents, other than defendants, were instructed to respond to the questionnaire simply in relation to the one defendant identified as the 'survey defendant' – for further details see Appendix 2, p.262 below.

Another measure of the acquittal rate is to consider the ratio of jury acquittals, directed acquittals and ordered acquittals. This is shown in Table 9.

Table 9
Ratio of different types of acquittal in sample ('merged') and nationally

	Sample %	*Nationally*[18] %
Directed acquittals	21	16
Ordered acquittals	28	43
Jury acquittals	51	41
Total	100 (N=552)	100

Table 9 shows considerable differences between the sample and the national figures. The sample figures are again an estimated 'merged' figure. If they are broadly correct, it would mean that, for whatever reason, the sample is 'high' in jury acquittals and in directed acquittals and 'low' in ordered acquittals.

Method of analysis

It was intended that all the eight questionnaires (other than that for the jury) should be capable of being linked. If all eight respondents replied for the case there were a potential 803 answers per case to be analysed.

Comparison of answers to questions sometimes showed, as has already been stated, differences not only on matters of opinion but also, to some extent, on questions of fact. In some instances this was no doubt due to human error – ticking the wrong box. Sometimes it was due to misinterpretation of the question by the respondent. In a few instances, differences were due to faults in questionnaire construction which erroneously sent some respondents along the wrong path in the questionnaire. Sometimes, of course, it might be due to the responses referring to different cases. Where respondents differed in regard to the same cases and it was important to establish a 'majority view', we created what we called a 'merged view' based on the majority response.

In the case of the jury questionnaire we used two main methods of analysis. The first was that of straightforward analysis of the responses of individual jurors. The second was to arrive at a view as to the overall response of 'the jury'. For this purpose we constructed a jury view in cases

[18] From *Judicial Statistics*, 1991, Table 6.8, p.63.

where there were at least eight juror questionnaires. Both methods of analysis were relevant. Thus, for example, few respondent jurors in any individual jury had difficulty in understanding the evidence and the overall 'jury view' would therefore be that there was in general no difficulty in understanding the evidence. On the other hand, the juror view showed that 8 per cent of jurors did have difficulties.(8% of 12 jurors is one.)

We have rounded percentages to the nearest integer (up if 0.5 or more, down if 0.4 or less). As a result, the numbers in a table do not always add to exactly 100.

Note

An unexpected problem came to light a day or so after the start of the fieldwork when it came to our notice that CPS Headquarters had issued a lengthy guidance memorandum to CPS staff as to 'matters to keep in mind' when filling in the Royal Commission's questionnaire. After urgent consultations with the CPS it was agreed that this guidance memorandum would be withdrawn by CPS Headquarters with immediate effect and replaced by fresh instructions. These fresh instructions were faxed to all branches on the evening of Wednesday February 19th, the third day of the study.

The new instructions stated that 1) the Royal Commission was 'only interested in the views of the individuals actually completing the questionnaire'; 2) the completion of the questionnaires would be done 'only by those who were personally involved in the case' and answers were to reflect 'the individual views of those actually involved in the case and of no other person or body'; 3) the questionnaires would not be photocopied by the CPS and that the confidentiality of responses would be fully preserved. It was also indicated that questionnaires filled out after the date of the fresh instructions should be marked NEW in the top right-hand corner of the front page. We were not able to detect any significant differences in results from questionnaires bearing the word New from those that did not. But there was no way of checking whether CPS questionnaires without the indication NEW were ones filled in before or after the fresh instructions.

APPENDIX 2

LOGISTICS OF THE STUDY

The British Market Research Bureau (BMRB) was commissioned to help design and administer the Royal Commission's Crown Court Study, and in particular to help draft and design questionnaires. BMRB worked closely with Professor Michael Zander of the Royal Commission throughout the project.

Scope of the survey

The survey was designed to provide a 'snapshot' of all cases which reached a conclusion at least as far as a verdict, in all Crown Courts in England and Wales in a specified fortnight. While some details were collected for every such case, much more information was obtained for contested cases which went to a trial with a jury. Up to nine different groups were asked to fill in a questionnaire about each case, as follows:

Guilty Pleas	**'Cracked trials'**	**Full Trials**
Court clerk	Court clerk	Court clerk
Defence barrister	Defence barrister	Defence barrister
Defence solicitor	Defence solicitor	Defence solicitor
Defendant	Defendant	Defendant
Prosecution barrister	Prosecution barrister	Prosecution barrister
Police	Police	Police
	CPS	CPS
	Judge	Judge
		Jury

'Cracked trials' are defined as those cases which were listed as full trials, but where the defendant enters a guilty plea on the day of the hearing.

Distribution and return of questionnaires

The court clerk in each case played a crucial role in facilitating the survey, by distributing self-completion questionnaires to the other participants. Questionnaires for the defence barrister, defence solicitor and defendant(s) were all handed out by the clerk to the defence barrister, and questionnaires for the prosecution barrister, CPS and police were all handed to the prosecution barrister, for further distribution. The clerk gave the judge his questionnaire, and the clerk or jury bailiff handed out jury questionnaires in the appropriate cases. All questionnaires except those for the jury were handed out as early as possible in the case; jury members received theirs after they had given their verdict.

In cases with more than one defendant, each defendant was given a questionnaire to complete. However, for the sake of simplicity, all other participants were asked to fill in their questionnaires in respect of only one defendant, identified to them by the court clerk on the front of the questionnaire. This defendant was selected as being either the first person on the indictment to plead not guilty, or if all pleaded guilty, the first named.

Respondents were provided with envelopes in which to return their questionnaires; these could either be placed in collection boxes within the courts, or posted (reply postage paid) directly to BMRB. Confidentiality of responses was emphasised, and respondents were not asked to write their names on their questionnaires. For defendants in custody, there was an undertaking that questionnaires would not be examined by police or prison officers.

Questionnaire development

Questionnaires were designed for each of the nine groups of respondents covering a very comprehensive range of issues relating both to the period before the trial and to the trial itself. Each questionnaire was tailored to the particular perspective of its respondents, but common themes were included throughout, to obtain as far as possible comparable answers on certain topics from the different respondent groups. These common themes encompassed fairly "factual" issues as well as matters of opinion or judgement.

The questionnaires were intensively developed through several drafts and a piloting phase. In addition, consultation on each draft was sought from the appropriate individuals, bodies and institutions.

All the questionnaires were substantial, and while court clerks and police questionnaires had only 29 and 36 questions respectively, the others (including defendant and jury) exceeded 80 questions, with defence and prosecution barristers each facing almost 200 questions. Thus for full trials, respondents were asked to undertake a very major task in completing the questionnaire, and even for pleas and cracked trials, when many questions were not applicable, the task was substantial. Many of the professional respondents, and in particular the court clerks, were required to fill in multiple questionnaires, one for each of the cases in which they were involved during the survey fortnight.

As well as all the structured questions, there was space at the end of each questionnaire (apart from those for jury members) for respondents to write in any further comments they wished to bring to the attention of the Royal Commission.

Piloting of the study took place in three courts, Snaresbrook, Reading and Kingston. A day of pre-piloting was carried out at Snaresbrook on 12th December, and at Reading on 17th December 1991, when procedures were discussed with Chief Clerks and their staff, and some pilot questionnaires were handed out in a few cases, and discussed briefly with judges, barristers and solicitors who were available. A full pilot of one week was conducted in these two pre-pilot courts and Kingston, from 13th-17th January 1992, when questionnaires were handed out in all eligible cases, exactly as for the main study. A total of 728 questionnaires were returned from this pilot, including 331 from juries, and between 34–69 from the remaining groups, and extensive questionnaire revisions were undertaken before finalising them for the main stage.

The pilot was also valuable in highlighting organisational issues for the main survey, and matters to be covered in instructions to Chief Clerks and court clerks. There was time only for one pilot.

The main survey

The main survey took place in all Crown Courts in England and Wales, apart from the three pilot courts, in the fortnight of 17th-28th February 1992. Documents were despatched by courier to a total of 73 court centres in the preceding week, with some main courts distributing documents to subsidiary locations.

Detailed instructions were provided for Chief Clerks, who played an important role in briefing their own staff, and ensuring that judges and all other court personnel were aware of the study and its requirements. There were also detailed notes for the court clerks themselves, in terms of identifying the appropriate cases and defendants, handing out questionnaires and all the associated administration. Some publicity material was supplied in the form of posters for such locations as barristers' robing rooms and jury rooms, and information slips to be placed on benches in the court rooms, to ensure as far as possible that all those likely to be involved in the study were aware of it before being handed a questionnaire.

The total number of questionnaires returned and accepted as valid for analysis was 22,236, which breaks down among the respondent groups as shown below. (It should be remembered that judges and the CPS were not given questionnaires for guilty pleas other than cracked trials).

Respondent Group	No. of questionnaires returned
Court clerk	2,692
Prosecution barrister	2,259
Defence barrister	2,092
Police	1,819
Defence solicitor	1,392
Judge	1,529
CPS	1,322
Defendant	793
Jury	8,338

For details and assessment of response rates see Appendix 1 above.

Linking questionnaires for each case

As well as basic analysis of each respondent group, one of the key objectives of the study was to facilitate comparison of different respondent groups' answers for the same case. Thus each questionnaire was given a code which allowed it to be linked to the others in the same case.

This was achieved by providing court clerks with a 'distribution record sheet' for each case, to be used with each batch of questionnaires. The distribution record sheet was pre-stamped with a unique serial number, and the clerk was required to transfer this number on to each questionnaire for a case (apart from the jury's) before distribution. Thus in analysis the different questionnaires for a particular case could be linked by the serial number.

Two types of questionnaire could not be linked to the rest. One was the defendant questionnaire: a late decision was taken to include all defendants in cases where there were more than one, and although instructions were given to clerks to identify the 'main' defendant indicated to all the other respondents, the identification system did not work consistently. In cases with more than one defendant, if only one defendant questionnaire was returned it was not always clear whether or not this was the main defendant, and similarly, if two or more questionnaires were returned, the main defendant could not always reliably be identified. Thus the defendant questionnaires were analysed only as a separate group.

Jury questionnaires were also not linked to the other questionnaires in the case. It was requested that no linkages to other questionnaires in the case were made so as to avoid the possibility of any breach of the Contempt of Court Act. Thus an independent numbering system was devised for jury questionnaires, with the numbers on batches of 12 sticky labels, one for each juror's questionnaire in a case. This system allowed the matching of

members of the same jury, by issuing a serial number for each jury with the first four digits identical and the last two digits ranging from 01 to 12.

Editing of questionnaires for analysis

A small number of questionnaires were returned without any serial number, and therefore could not be matched to others in the same case. There were also some instances of duplicate numbers, for example two defence barristers for the same case. Examination of questionnaires eliminated many of these problems by:

- correcting mistakes in data entry resulting from illegible or poorly written serial numbers;

- identifying cases where both senior and junior barristers in a case had returned questionnaires: only the senior barrister's responses were accepted;
- identifying cases with more than one defendant, where not only all defendants, but also all their representatives (barristers, solicitors) were given questionnaires. In such cases only the responses for the main defendant's representatives were accepted, if it was possible to identify these.

If it was not possible to identify the main defendant, the computer selected one defendant randomly as the main defendant.
However, the system devised to protect all respondents' and defendants' confidentiality made it difficult to sort out all cases of duplicate numbers and a small number remained unresolved.

For the jurors, again some questionnaires were returned without any jury serial number, and so could not be matched into jury sets (644, or 8% of those returned). Of the remainder, at least some responses were received from 757 juries, with an average of 10 questionnaires returned per jury. Assuming the same average for the unnumbered questionnaires, these would account for around another 64 juries, giving an overall estimated total of 821 juries in the study.

Most of the questionnaires consisted of 'structured' questions where pre-coded answer categories were printed on the questionnaire. These structured data on all returned questionnaires were entered onto tape and edited to remove discrepancies, primarily resolving routing errors as far as possible.

As well as being very long, the questionnaires were very complex for self-completion documents, and there were many instances where, instead

of proceeding to the next question, respondents were routed to different questions depending on their responses. Sometimes they were asked to miss large sections of questions. While instructions were given, these were not always followed correctly, which was not surprising given that most respondents would not be familiar with questionnaire layout, and would often be completing the form in haste. There were two types of error which resulted:

- missing answers to questions which should have been filled in;

- answers given to questions which should have been missed.

Little could be done in the first case, unless a subsequent answer made it clear what the missing response should have been. The latter case was very frequent in questionnaires relating to pleas and cracked trials, because respondents were often validly able to answer particular questions, but were meant to have routed themselves past them, as only limited details were requested for these cases. Only those who should have answered questions were included in the analysis of the survey.

In most questionnaires, there was a very important routing instruction early on, depending on whether or not the case went to full trial. Some respondents missed this crucial instruction, and while the effect was usually to take them through questions they were not meant to answer, it sometimes resulted in them missing sections of questions they were meant to answer. If respondents did start on a series of questions they should have omitted, and then found the questions inappropriate, it would often be difficult for them to discover which questions they should move on to, and errors also occurred in this way. Such problems are inevitable with self-completion questionnaires, particularly when the routing is complex.

The data as edited by BMRB were supplied on tape to Paul Henderson of the Home Office Research and Planning Unit for the computer analysis.

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