Darbyshire on the ELS Update

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New Book in ELS

P. Darbyshire, *Nutshells ELS*, Sweet & Maxwell, Feb 2010 (new colourful layout). The headings in this update co-ordinate with headings in the bigger textbook *Darbyshire on the ELS*, 9th ed., 2008.

Bibliography used here

Criminal Law Review (hard copy)

New Law Journal (hard copy)

Radio 4

Guardian

Times

Timesonline http://business.timesonline.co.uk/tol/business/law/

Many websites, as listed in *Darbyshire on the ELS*, such as the Ministry of Justice (masses of stuff here), CPS, Judiciary, Parliament etc.

Westlaw Legal Journals Index

1. Understanding the ELS

4. The Mother of All Common Law Systems

To mark the transformation of the law lords into the UKSC, the Canadian Chief Justice, Beverley McLachlin and South African Justice Kate O'Regan wrote an article, "Views from Canada and South Africa: We owe a great debt to the work of the judges", acknowledging the contribution of the law lords to the worldwide spread of common law: 1 October 2009, *Timesonline*. I wrote this on the HL, recently:

> "Students of **the role of the Court in the development of international common law and human rights** can find case evidence in dozens of sources, not least in some of the 51 essays in *Tom Bingham and the Transformation of the Law* (M. Andenas and D. Fairgrieve (eds.), Oxford, Oxford University Press, 2009). For instance, Michael Kirby, former Justice of the Australian High Court said 'Decisions have no binding force whatsoever…the greatest tribute to the House of Lords can be found in the fact that…they continue to be cited in so many fields.' Similarly, Andenas and Fairgrieve, referring to his judgments on liberty and anti-terror, said 'Lord Bingham persuades through his reasoning…his judgments are comparative law sources, as persuasive authority, all over the world'. Zeno-Zencovich details the court's internationalism. **Of 475 decisions in 2000-2007, 250 centred on interpretation of or made use of transnational or international law,**

including 100 human rights and 50 Community law cases, plus a number citing American, Canadian and Commonwealth authorities. Listing 24 cases invoking comparative inquiry, he said 'A comparativist finds in the House of Lords reports a *bonanza* for his classes and case-books'. Andenas and Fairgrieve **claimed Bingham to have been a pioneer in developing comparative law in modern court practice. They pointed to his willingness to use European human rights law to develop the common law**".

5. Keeping up to Date with the ELS

See not only the *New Law Journal* in hard copy and online on *Lexis* but also www.newlawjournal.co.uk

Watching the ELS

Ceremonial at the opening of the legal year: judges process from the Royal Courts of Justice, Strand, to Westminster Abbey, on 1st October. They leave the RCJ at 10.30 and go by car. The UKSC justices walk across the road from their building. See Judiciary website.

2. Sources

1. Legislation

In *R v Chambers* [2008] EWCA Crim 2467, the CA realised that **for seven years no-one had noticed that the law on confiscating smuggled tobacco had changed**, so over 1,000 confiscation orders were flawed. The CA said this was symptomatic of a wider problem - that the law was inaccessible to everyone today, because most of it was secondary legislation; the volume of legislation had increased; legislation could not be found in a single place and there was no comprehensive statute law database.

2-016 Delegated legislation

Most statute law consists of statutory instruments rather than Acts. There were **3,327 in 2008**. Most European Community law comes into the UK via these. Parliament also delegates law-making powers to public bodies and local government to pass laws within their own field or locality, in the form of byelaws. In December, for the first time, the UKSC was asked to review a **Scottish Act**. One Justice asked if these were **delegated legislation** and the advocate confirmed that they were.

20-17 Statutory interpretation – example

The CA held that a generous interpretation should be put on 'building', under the Cremation Act 1902, to permit Hindu open air funeral pyres. There was no reason not to give the word its natural and relatively wide meaning. It should be possible to make a building in a private location with substantial openings: *R (Ghai) v Newcastle-upon-Tyne City Council* [2010] EWCA Civ 59.

2-034 The HL/UKSC and Precedent: the 1966 Practice Statement

In *R (on the application of Purdy) v DPP* [2009] UKHL 45 they ruled that Art. 8(1) of the European Convention on HR was engaged, when a terminally ill person sought assisted suicide, departing from their previous decision in *R on the application of*

Pretty v DPP [2002] 1 All ER and instead following the ECtHR in *Pretty v UK* (2346/02) [2002] 2 FCR 97.

FURTHER READING

Evans J, speech, 25 Feb 2010, on Welsh devolution and legal system.

R. Moules, "Judicial Review of Prerogative Orders in Council" (2009) C.L.J. 68(1) 14-17, on *Bancoult*.

3 Community law

FURTHER READING

Treaty of Lisbon, of course.

E. Baker, "The European Union's "Area of Freedom, Security and (Criminal) Justice" Ten Years On" [2010] Crim. L.R. 833.

A. Arnull, "The Law Lords and the European Union: swimming with the incoming tide" E.L. Rev (2010) 35(1) 57-87. Looks at their performance in 1973-2009 *Westlaw*.

F. Van den Berghe, "The EU and issues of human rights protection: same solutions to more acute problems?" (2010) 16 (2) E.L.J. 112-157 *Westlaw*.

4 Human Rights

1. Incorporation into UK Law

DPP Kier Starmer QC, renowned international human rights expert, heavily criticised those who attack the HRA 1998: CPS Annual Lecture, 21 October 2009. Full text on CPS website
http://www.cps.gov.uk/news/articles/public_prosecution_service_annual_lecture_-_the_role_of_the_prosecutor_in_a_modern_democracy/

Without naming the Conservatives, he referred to

> "the debate that has emerged around the extent to which it is appropriate...to repatriate the Human Rights Act and make it "more British". I do not think it unreasonable to conclude that those who advance such a view somehow propose to replace the Human Rights Act, or at least those articles in it which are taken from the European Convention, with other human rights which they consider to be more appropriately geared to "British" society... **the United Kingdom played a major role in the design and drafting of the European Convention**... I am proud to be part of a society that regards these rights as part of my entitlement as a member of that society... The idea that these human rights should somehow stop in the English Channel is odd and, frankly, impossible to defend.... so I find myself in difficulty when I hear talk of the need to "re-engineer" or "re-balance" the criminal justice system."

The Conservative plans on human rights are unclear. Their spokesperson said on Radio 4, w/b 1st March "I don't know. I haven't drafted the Bill yet". In the meantime, David Cameron has said that the HRA had enabled a prisoner to have hard core porn

and that the police were not allowed to put criminals' faces on wanted posters. **He was corrected in 2007, after the same speech to the Police Federation but seems to have forgotten.** See http://www.met.police.uk/wanted/ (Source R. Smith, 'Executive decision' (2010) 160 N.L.J. 296). The DPP also corrected the same myths in the above speech but the Conservatives keep repeating them.

The Ministry of Justice launched a green paper Bill of Rights in March 2009. It included rights such as health care and rights for crime victims. It listed citizens' responsibilities too.

In the JSB Annual Lecture, March 2009, Lord Hoffmann expressed strong views about the role of the ECtHR. He said the Court had been unable to resist the temptation to aggrandise its jurisdiction and impose uniform rules on member states.

David Pannick QC said there were two answers to this. **1. The ECtHR took account of contracting states' margin of appreciation and 2. The UK courts were not bound by ECtHR decisions.** Under s. 2 of the HRA, courts only had to take into account its judgments: see D. Pannick, "The European rights court has its uses – to keep us on our toes", *Times*, 7 May 2009.

Dialogue between UK judges and the ECtHR

In *R v Horncastle* [2009] UKSC 14, the UKSC declined to follow the ECtHR on Art. 6, in a case on hearsay evidence, yet it said the HL was bound by the ECtHR in a case on control orders, *Home Secretary v AF* [2009] UKHL 14. See B. Dickson, "Year End" (2009) 160 N.L.J. 65. See now summary and comment by E. Craven & R. Pennington-Benton, "When Strasbourg speaks" 160 (2010) N.L.J. 377, 12 March 2010. In the first case, Lord Hoffman felt that the ECtHR decision was wrong but that the UKHL had to submit, or be in breach of our Convention obligation. In the later case, the seven-panel UKSC expressed concern as to whether the ECtHR appreciated the domestic (English) procedure or took account of common law safeguards against an unfair trial. **It recognised the possibility of a dialogue** and, in turn, the ECtHR adjourned the reference of its previous decision to a grand chamber, pending the UKSC decision. The authors point out that **judicial dialogue between the two courts has occurred before**, on Art 8 and housing possession proceedings. In *Doherty v Birmingham CC* [2008] UKHL 37, the UKHL declined to follow *McCann v UK* (2008) 47 EHRR 40, Lord Hope commenting that the Strasbourg decision was "almost useless". In the past, the ECtHR has overturned its own previous decision, following "clarifications" of domestic law by the law lords: *Osman v UK* (2000) 29 EHRR 245.

4-012 Art 3

Torture

The Parliamentary Joint Committee on Human Rights has called for an independent inquiry on *Allegations of UK Complicity in Torture*, July 2009. On 17 March 2010, the Foreign Office issued guidelines but they remain contentious because they do not appear to be very strict. See brief article in the *Guardian*, 18 March 2010.

4-021 Art 6

Terror suspects

In *SS for the Home Dept v AF and another* [2009] UKHL 28, the law lords ruled that the appellant's Art. 6 fair trial rights had been violated, as he had been the subject of a

control order (house arrest), as a terror suspect, pursuant to the Terrorism Act 2005, s.2, for three years. The government sought non-disclosure of intelligence on which the house arrest was based. Rather than disclose the evidence and jeopardise other terror investigations, the Home Secretary lifted the order. See wide media coverage and discussion, such as F. Gibb, "Terror law in turmoil as lords back suspects' fight against house arrest", 11 June 2009, with photos of the nine law lords.

Teachers

In *G, R (on the application of) v X School and Others* [2010] EWCA Civ, it was held that professionals who faced **disciplinary proceedings** should have a right to **legal representation**. Here a school applied for a teacher to be subjected to a lifetime ban on working with children.

4-032 Article 8

Stop and Search

Gillan and Quinton v UK (App. No. 4158/05), 12 January 2010: police stop and search powers under the Terrorism Act 2000 violate Art. 8. The interference with the right of respect to private life was different from an airport search, as anyone could be stopped, any time. There was no requirement that the stop and search be necessary, only "expedient". **The officer's decision to stop was based on hunch or intuition**.

Fingerprints

In 2009, the Home Office consulted on *Keeping the Right People on the DNA Database*, after the ECtHR ruled that the policy of indefinite retention of arrested people's fingerprints breached Art. 8 (see 2009 update).

Prosecution criteria

In *R (on the application of Purdy) v DPP* [2009] UKHL 45 they ruled that the DPP was obliged to publish his policy identifying the facts and circumstances he would take into account in deciding whether to prosecute someone for assisting the suicide of a terminally ill person.

FURTHER READING

Eady J., speech, 11 March 2010.
Arden L.J., "Is the Convention ours?" speech, 29 Jan 2010. Both on the Judiciary website.

6 Civil Courts

6-001 UKSC

This opened on 1st October 2009, in Parliament Square. Nice caff - court attached. Shame about the pop-art pub carpet.

- Its **jurisdiction** is the same as the law lords, save that it reviews devolved legislation and other devolved matters that used to be heard by the Judicial Committee of the Privy Council (JCPC).
- Its **constitution** is largely the same, comprising mainly of the former law lords, who heard their last case in July 2009. New Justices will not be Lords.

- The Court may be assisted by specially qualified **advisers** though that has not happened so far.
- The transformation made the law lords think about their **procedures**.
- They are now more inclined to sit as a **panel** of seven or nine, though this is the continuation of a law lords' trend.
- They are endeavouring to give more **unified judgments**, though this does not always work (*Horncastle*). There is a debate raging about unified judgments, with Carnwath LJ and Neuberger LJ campaigning for more, and Arden LJ campaigning for them to be more user-friendly. See judges' speeches on the Judiciary website and Arden's articles and Lord Hope in the *Solicitor's Journal*, notably Neuberger M.R., "Insolvency, internationalism and Supreme Court judgments", 11 November 2009, from para. 20. He favours USSC style judgments.
- They are more ready to hear **interveners**, giving them a maximum of 15 minutes' argument. See Jewish School's case.
- One aim is that the UKSC should be much more **accessible** to the public. They welcome visitors and have a website that is much more informative than that of the law lords, with details of upcoming cases and excellent press releases summarising their judgments (though the website still shows room for improvement).
- Another change is that all Justices may comment on applications for **leave to appeal** though these are still determined in secret by three Justices.
- Proper conference rooms enable them to do a tiny bit of **pre-deliberation**.
- A **blog** commentary has been established by Matrix Chambers and Olswang solicitors. They complain that there is still no public list of *reasoned* decisions on permission to appeal and parties' written submissions are not made public. www.ukscblog.com
- HR cases still dominate the lists. In Nov-Dec 2009, I found that the court attracts lots of **visitors**, though there is astonishingly little media interest.
- This month they recruited a new Justice, Sir John Dyson. See alleged **scandal** of judges forcing Jonathan Sumption QC out of the recruitment race in summer 2009, before the new appointment system came into force: F. Gibb, "Supreme ambition, jealously and outrage", *Times*, 4 February 2010.
- There was a well-publicised clash of opinions in autumn 2009 on the nature of the new UKSC. Lord Neuberger M.R. said it might become a constitutional court, with power to overrule legislation. Lord Phillips, its first President, and Lord Bingham, previous Senior Law Lord were adamant that it would not. The argument is summed up by Lord Neuberger M.R. in a speech on 3rd December 2009, "Is the House of Lords losing part of itself?"

> "In the light of this climate, I have expressed the concern that one unintended consequence of the Supreme Court's creation might be the eventual emergence of a constitutional court; that it would in time consider that it had, like other Supreme Court's, had the power to review the legality of law, to declare Acts of Parliament unconstitutional. Might we see a UK Supreme Court at some time in the future have its own *Marbury v Madison* moment, with a future Supreme Court President declaring like US Chief Justice Marshall, that a particular law was '*repugnant to the constitution*' and therefore no

law at all. Let me be clear I am not saying that this will or that it should happen. I am saying it may happen. Many eminent people, Lord Phillips and Lord Bingham among them, say that it won't, and they may well be right...
Section 40(5) of the Constitutional Reform Act 2005 could imply a power to review the constitutionality of statutes. It provides that the Supreme Court '*has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment.*' What if the question is whether an Act of Parliament is contrary to a fundamental right, a constitutional right? It might, I suppose, be argued that this provides more than the US Constitution does as a guide as to whether constitutional judicial review lies within the ambit of the Supreme Court. "(paras. 23-24).

6-021 The JCPC

This now sits in the UKSC building, in Parliament Square. It has changed practice to sit more often in benches of **three**, to make up for using nine Justices more frequently in the UKSC, though it has backtracked a bit as Commonwealth countries have objected. The problem is that appeals come from some countries without a requirement for leave so days are devoted to trivial civil appeals.

6-032 Openness in family courts

On 21st January 2010, the MoJ announced that parts of the Children, Schools & Families Bill were aimed at encouraging media attendance at family courts. Research showed that rule changes in April 2009, permitting journalists to report anonymised proceedings had had some impact – 25% of court staff said journalists had attended at their court. The Bill would permit broader reporting of family proceedings but includes an indefinite ban on identifying the parties. **A pilot scheme operates at three courts, publishing results of family cases on the internet**.

FURTHER READING

Neuberger M.R., "The Supreme Court: is the House of Lords 'losing part of itself'", speech, 3 Dec 2009.

7. Criminal Courts

7-002 Magistrates' Courts

In 2009, virtual courts were being piloted, trying the defendant on a video link from the police station and, if he pleaded guilty, sentencing him where possible.

7-010 More novelty courts

There is an interesting press release, MoJ, 14 January 2010, on the dedicated drugs court and specialist domestic violence courts at Leeds.

See National Audit Office Report on Crown Court Administration, March 2009.

FURTHER READING

D. Ormerod etc, "Prosecution Appeals – Too Much of a Good Thing?" [2010] Crim. L.R. 169.

10. Civil Procedure

10-071 Barmy costs: story of the Jackson review of costs, continued

The Law Society opposed his interim suggestion of increasing the small claims limit, because thousands of litigants would lose their costs or have to represent themselves, burdening the courts. John McQuater, President of the Association of Personal Injury Lawyers, said the small claims limit for personal injuries should stay at £1,000 because fixed coss were inappropriate for personal injuries. They advantaged well-resourced defendants: (2009) 159 N.L.J. 1079.

Jackson L.J.'s interim report concentrated on remedies through the courts, not alternatives that have grown up, where the party does not need a lawyer. 85 per cent of small claims litigants like the rules as they are, with the parties paying their own costs, according to the Consumers Association, so small claims procedure is doing well without lawyers. Raising the PI small claims limit would upset lawyers but would increase access to justice.

Review of Civil Litigation Costs: Final Report

Press Release, Judiciary website, 14 January, paraphrased/quoted, with additions.

- **Proportionality** re-emphasised.
- MOST CONTROVERSIAL: "**Success fees and after the event insurance premiums to be irrecoverable in no win, no fee cases**...as these are the greatest contributors to disproportionate costs" (and why these are congenial for lawyers, the costs have to be borne by taxpayers, council tax payers, insurance premium payers and uninsured defendants). Incidentally, an MoJ consultation paper suggested that success fees in defamation cases should be no more than 10%. Jackson recommends that success fees should be limited to 25%. No other jurisdiction allows success fees to be recoverable. In no-win no-fee cases, costs are **158-200% of damages awarded**. In other cases, costs are 47-55%.
- "To offset the effects...general **damages** awards for personal injuries and other civil wrongs should be **increased by 10%**".
- "**Referral fees** should be **scrapped** - these are fees paid by lawyers to organisations that 'sell' damages claims but offer no real value to the process."
- "Qualified 'one way costs shifting' – claimants will only make a small contribution to defendant's costs if a claim is unsuccessful...removing the need for after the event insurance".
- **Fixed costs for fast track cases** – "a high public interest" to make litigation proportionate and certain. Lord Woolf wanted this in 1996.
- "Establishing a Costs Council to review fixed costs and lawyers' hourly rates annually".
- "Allowing lawyers to enter into ***Contingency*** Fee Agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual

damages won" but clients must be independently advised. K. Underwood welcomes this. He spends a lot of time working for US law firms and says commercial clients love them and it is common to get a higher fee for a speedy settlement, ie with the lawyers doing less work – "deeply counterintuitive to UK lawyers": "Contingency Matters" 160 (2010) N.L.J. 387. **The English have always considered these American inventions (contingency fees) to be the work of the Devil** though they have long been permitted in Scotland.

- Promotion of 'before the event' legal insurance, encouraging people to take out legal expenses insurance e.g. as part of **household insurance**.
- There should be a serious campaign to promote ADR but it should not be compulsory. (CEDR think he should have gone further. See their website).
- Costs management should be included in CPD training for lawyers and judges.

He was concerned about the huge cost of clinical negligence to the **NHS**. Since his report, Penningtons Sols LLP reported a 12.2% rise in claims in 2009. **Damages payments made were £769.2m, with a further £13.3bn potential liabilities!!!** Clinicians continue to refuse to apologise, despite the fact that research shows this lessens the chance of being sued.

He recommended **"concurrent evidence" of experts**, known as "hot tubbing", in Australia and Canada. The judge controls the proceeding and she and the lawyers can question the experts and they can challenge one another's evidence. See proponent: G. Hain (2010) 160 N.L.J. 316.

Implementing Jackson

He will oversee implementing his recommendations, with the MR and Kay and Moore-Bick LLJ. Some recommendations will need legislation. See NLJ panel discussion on YouTube http://www.youtube.com/user/LexisNexisUK#p/a/u/0/iGq-64sYRts

Some people still want their day in court…A neighbour boundary dispute over who owned a worthless 6m square shrub patch had already cost the defendant £70,000 before proceeding to the CA in autumn 2009. Had it been mediated, it would have cost about £5,000-£6000: (2009) 159 N.L.J. 1077.

8. Evaluating the Woolf Reforms

In addition to a rash of articles responding to Jackson L.J.'s inquiry, 2009, the tenth anniversary of the Woolf reforms, saw a number of evaluations of the CPR in their first decade, especially in the N.L.J.:

- M. Zander said it was predictable that early preparation of cases had increased costs: (2009) 159 N.L.J. 367. D. Regan complained of judges' failure to tackle the high fees charged by experts and barristers: (2009) 159 N.L.J. 875.
- Lord Woolf complained of the lack of the IT systems he envisaged and the increase in court costs that far outstrips inflation, *Times*, 11 June 2009, and very interestingly said **"I was relying on the client controlling the costs…The desire to win at all costs has meant that there is still no proper control".**

In January 2010, the Ministry of Justice published *Monetary Claims in the County Courts (1996-2003)*, research summary 1/10, which found that in most of 2010 cases,

the rules were followed, questionnaires were completed on time and guidelines on trial scheduling were followed.

10-042 Appeal procedure in family cases

As in criminal cases, appeal lies to the Crown Court and takes the form of a full rehearing. In family matters, appeal used to lie to the High Court "by way of case stated". This has now been replaced, in 2009, with an appeal to the county court, on the grounds that the decision is wrong in law or in excess of jurisdiction. The change was made by delegated legislation.

10-077 IT

District Judge David Oldham said **electronic filing and document management has been abandoned, except for the Commercial Court**. Meanwhile, solicitors swamp courts with email, fax and hard copies of all documents (2009) 159 N.L.J. 1223. He said proposals for e-filing for courts have been shelved so courts work with paper files. These get lost regularly and there are fewer staff now to manage the files and keep them up to date. He encourages parties to email a case summary and draft directions to the court, provided they copy-in their opponents. This means that at least the judge will have the documents before the hearing but not all judges do this. Phone conferences are very effective but deprive new advocates of experience in short appearances: D. Oldham, "Online justice" (2009) 159 N.L.J. 615.

10-080 Family justice system

A fundamental review of family justice was announced by the LC, Jack Straw, on 20 January 2010, alongside the publication of the Families and Relationships Green Paper. The aim is to reduce conflict and the adversarial atmosphere.

FURTHER READING

Dame Hazel Genn's 2008 Hamlyn lectures, referred to in the March 2009 update, were published in late 2009: *Judging Civil Justice*, Cambridge.

11. Alternatives to the Civil Courts

11-028 The Tribunals, Courts & Enforcement Act 2007

See diagram of the new tribunals structure by 2011: *Nutshell*.

11-035 Family mediation

- The family lawyers' group Resolution said the use of collaborative law in divorce proceedings had increased by 87 per cent in 2006-7.
- Mediation/collaborative law: Public funding can be obtained for it. Under the Law Society's Family Law Protocol 2002, unless inappropriate, solicitors are required to explain mediation and collaboration to clients. It is not appropriate where violence has been alleged or where drug/alcohol abuse is involved.
- Family mediation began with the *Report of the Committee on One-Parent Families* (1974) (The Finer Report), which referred to conciliation.
- **The Family Mediation Council (= Resolution, Law Society and others) is recommending compulsory mediation assessment meetings for *all***

parents who want to go to court over children's contact and residence *and* parents arguing about money. The former is proposed in the MoJ green paper *Support for All – the Families and Relationships Green Paper*. **This would bring private clients into line with the requirement for those on legal aid**. See MoJ announcement 20 January 2010.

Road accident compensation fast-track

This is currently being introduced by the MoJ, for £1,000-£10,000 claims. The scheme incorporates three fixed stages and fixed costs. In stage 1, the insurance company must deny or admit liability within 15 days. Costs of £400 will be paid if liability is admitted.

12. Criminal Procedure

12-001 Too much legislation

In a 2009 interview, the ex-DPP, Ken Macdonald, said that the department (Ministry of Justice) would call him asking for "this month's idea"! **In 1920-1980 there were eight Criminal Justice Acts but since 1997, there was at least one every two years**.

12-003 legal representation

In 2009, the Recorder of London ruled, at the Old Bailey, that there is no right in a criminal trial to be represented by a Mackenzie friend.

12-011 fair trial

The problem with the demands made by James Bulger's mother (Denise) to know details of the allegations against Jon Venables and to attend his trial is that too much negative comment in the public domain might prejudice a fair trial, then a trial would not be able to take place.

12-018 right of silence

Apparently, suffering post-traumatic stress disorder, having been tortured and being at risk of self-harm does not let D off the adverse inference. Trial judges must weigh the public interest in having D's account against the risk to D's well-being: *R v Tabbakh* [2009] EWCA Crim 464 and [2010] Crim. L.R. 79.

12-023 case management

The judge should not, as a matter of case management, decide that the defence is rubbish so could not be used: *R v S and L* [2009] EWCA Crim 85.

12-030 Attorney General

On the Parliament website, it says that the **clauses on reforming the Attorney General's role in the Constitutional Reform Bill have been dropped**. I was unable to get anyone from Jack Straw's Parliamentary team to explain why.

12-031 CPS Inspectorate condemnatory report 2010

A March 2010 report said that in the London CPS area, which handles almost one fifth of prosecutions in England and Wales, failings allowed lots of defendants to go free, through poor case preparation. 15.4% of cases were dropped before trial. Using in-house lawyers instead of independent advocates in the Crown Court led to a shortfall of lawyers in the magistrates' court so there had been a **290% increase in the estimated spending on independent lawyers in mags' courts. Acquittals in contested cases were rising : 37.6% in mags' courts and 48.6 % in the Crown Court**. The CPS was bombarded with initiatives and prosecutors were struggling with caseloads, just "firefighting". **Hammersmith had seven chief prosecutors in a year. In one borough, employees averaged 26 days sickness per year**. F. Gibb, "Shortfalls in CPS leads to hundreds of defendants avoiding trial", *Times* 16 March 2010.

12-032 Victims

From April 1st 2010, there is to be a new National Victims Service. Vulnerable victims will be given dedicated support. See MoJ press release 27 January 2010. M. Hall challenges the rhetoric claiming that victims are at the heart of the CJ system: "The Relationship between Victims and Prosecutors: Defending Victims' Rights?" [2010] Crim. L.R. 31.

12-038 Code for Crown Prosecutors

Following consultation, a new one was launched on 22nd Feb 2010. See CPS website. It clarifies "public interest" criteria and the test. **Novelty**: Para 3.3

> "Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, but…**they should swiftly stop cases which do not meet the evidential stage**…and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution."

It applies to Revenue & Customs prosecutors (a Division of the CPS – thankfully, at last) and applies to police officers making charging decisions. The DPP also published *Public Prosecution Service: Setting the Standard and Core Quality Standards*, to which the Code cross-refers.

12-038 Cautioning and fixed penalty notices (and double jeopardy)

On 14 December 2009, the Home Sec, LC and AG launched a review of out-of-court disposals, such as cautions and on-the-spot fines, doubtless prompted by the horrific BBC1 ***Panorama*** programme, *Assault on Justice*, November 2009, on people committing hideous crimes such as violent burglary and getting off with a caution, not to mention what the courts had to say about one of the cases featured in the programme. Still available to watch on iPlayer till November 2010. http://www.bbc.co.uk/programmes/b00nvwql#synopsis Note that the DPP, Keir Starmer, has also condemned the over-use of cautions and called for a review. F. Gibb, "Chief prosecutor demands curb on police cautions", *Times* November 8, 2009. The article mentions **40,000 on-the-spot cautions per year for assault**, including a 15 year old boy for rape and a man who smashed a beer glass into a pub landlady's

face. About 8,000 police cautions are issued per year. The DPP asked for monthly returns.

BBC Radio 4's *Law in Action*, coincidentally, carried an interview with the outgoing DPP, on 3rd November 2009, saying the same thing. Still on iPlayer.

The *Panorama* programme included Mr. **Guest**, victim of assault in his own home. He obtained a judicial review of the decision not to prosecute: R. *(on the application of Guest) v DPP* [2009] EWHC 594 (free from BAILII). Facts: he was asleep in bed then attacked at home "he was punched several times to the right eye and fell to the floor. When on the floor and crawling towards his bedroom, Mr Watts, it is alleged, continually kicked him in the legs and head."

Held: "it is wholly artificial to distinguish between the decision not to prosecute and the decision to administer a conditional caution." para. 41. The decision was "fundamentally flawed", per Goldring L.J.:

1. Both prosecution tests were satisfied. There was strong evidence of serious violence (photos).
2. Serious assault, at night, in someone's home.
3. DPP's Guidelines on cautioning did not permit it for ABH.
4. V was not involved in the decision, contra Guidelines. Indeed, it was clear he did not agree. (He had written letters indicating this).
5. In light of the photos, there was only limited consideration of £200 as compensation.

Per curiam: **criminal litigation is not a game** and (paras. 56 and 57):

> "By Part 3 of the Criminal Justice Act 2003, Parliament has decided to place very considerable responsibility on the Crown Prosecution Service. By a decision to offer a conditional caution to an offender, the court is effectively bypassed. It means that someone who is guilty of committing a criminal offence is not prosecuted, does not appear before the court and is not sentenced by the court. The importance of taking such a decision conscientiously and in accordance with the law can hardly be overstated. The effect on the victim and the damage to the criminal justice system is self-evident if such a decision is taken without proper regard to the relevant guidance. In this case, decisions were taken without regard to the Code for Crown Prosecutors, the Director's guidance on Conditional Cautioning and the Secretary of State's Code of Practice. **It seems to me astonishing**, as it would no doubt to many members of the public, that the Crown Prosecution Service could seriously contemplate not prosecuting someone who, it was alleged, deliberately went to a person's house at night, attacked him inside that house with some ferocity (including kicking him) in the presence of his (obviously very frightened) partner. I very much hope that this was a one-off aberration and not typical of the manner in which the Crown Prosecution Service discharges its heavy responsibilities in respect of conditional cautioning."

Decision not to prosecute and decision to caution quashed. The court distinguished *Jones v Whalley* [2006] UKHL 41 where the law lords said a private prosecution

following a formal caution for the very same offence arising from the same facts was an abuse of process.

In *R. v Gore; R. v Maher* [2009] EWCA 1424, G was issued with a FPN for a drunken altercation and M was issued with a FPN for a public order offence. Later, having reviewed the CCTV footage, both were charged with inflicting GBH. The Home Sec's guidelines permit charging in these circumstances. The CA held it was **abundantly clear that the Criminal Justice and Police Act 2001 only precluded prosecution for the same offence as that in the FPN**. Again, *Jones v Whalley* was distinguished.

12-074 (12-009) Retrials and double jeopardy

In *R. v B (J)* [2009] EWCA Crim 1036 the CA refused a prosecution application for a retrial because the "new and compelling evidence" was from **a former co-accused** "with a powerful self-interest to serve" because of an agreement he had entered into under the Serious Organise Crime and Police Act 2005. *R. v G(G), R. v B(S)* [2009] EWCA Crim 1077: almost identical. Respondents were acquitted of murder then the convicted **former co-accused offered himself as an informant under a 2005 Act agreement**.

A prosecution application *was*, however, granted in *R. v A* [2008] EWCA Crim 2908, in a retrial for rape on new and compelling evidence which was one of a series of allegations forming a pattern of abuse. **Lord Judge wrongly stated, in my opinion, that double jeopardy as a prohibition on a second trial following an acquittal had been abolished by the 2003 Act**.

12-047 Plea bargaining

There is an interesting US/English comparison and a critique of the *AG's Plea Negotiation Framework for Fraud Cases* (18 March 2009): N. Vamos, "Please Don't Call it "Plea Bargaining"" [2009] Crim. L.R. 617.

12-060 young offenders

The age of criminal responsibility is 10. The Children's Commissioner thinks it should be higher, as it is in many other countries.

Sentencing

You can try your hand at sentencing on the *You be the Judge* interactive website http://ybtj.cjsonline.gov.uk/ launched by the MoJ to enhance understanding of sentencing.

12-073 Court of Appeal (Criminal Division) overload

The Court regularly complains of being swamped with material, as its workload is extremely high and advocates do not make life easy for the judges. In *R. v Erskine; R.v Williams* [2009] EWCA Crim 1425, Lord Judge cited Viscount Falkland in 1641: **if it was not necessary to refer to a previous decision, it was necessary not to refer to it**. Advocates should expect to be required to justify every citation. Anyway,

appeals on fresh evidence all turned on their own facts. See case and comment at [2010] Crim. L.R. 48.

The CA also had strong words in *R v Fortean* [2009] EWCA Crim. 798 about meritless applications. In this case, F had been refused leave by a single judge, on paper, giving a careful, reasoned decision. F renewed his application. The court said it was "coping" with **6,000 applications a year** and applications "without any vestige of merit" hampered its work, which was why the application form contained a warning in bold letters that the court could, under the 1968 Act, order that time spent in custody as an appellant should not count towards sentence.

12-092 expert witnesses causing miscarriages of justice

See Law Commission consultation paper 192 and A. Roberts, "Rejecting General Acceptance, Confounding the Gate-keeper: the Law Commission and Expert Evidence" [2009] Crim. L.R. 551. The House of Commons Science & Technology Committee attributed Angela Cannings' wrongful conviction to systemic failures and recommended that **judges should** have a gate-keeping role, **ensuring that evidence presented to juries is sufficiently reliable**, as in the US Federal Rules of Evidence and USSC case law.

Prerogative Power of Pardon

This power has existed since the seventh century and *R. (On the Application of Shields) v SS for Justice* [2008] EWHC confirms that the power still exists and is vested in the SS for Justice. See H. Quirk, "Prisoners, Pardons and Politics" [2009] Crim. L.R. 648.

FURTHER READING

D. Jones & J. Brown, "The relationship between Victims and Prosecutors: Defending Victims' Rights?" A CPS Response" [2010] Crim. L.R. 212.

I. Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Crim. L.R. 255. See *Davis* [2008] UKHL 36.

L. Elks, book review of M. Naughton (ed.) *The Criminal Cases Review Commission: hope for the innocent?* (2010) *Archbold News* (1), pp. 5-6, *Westlaw*.

D. Watson, "The Attorney General's Guidelines on plea bargaining in serious fraud: obtaining guilty pleas fairly?" (2010) 71(1) Jo. Crim. L. 77-90.

13. Lawyers

13-005 Women and Minority Solicitors

Optimistically, McConnell demonstrated how the regulatory objectives of the 2007 Act may be used to benefit women and minority solicitors. She quoted the 2009-10 business plan of the LSB to "promote equality". She cited examples of powerful clients successfully demanding that their legal providers have a certain percentage of women partners. Under the LSA, performance targets may be set and, theoretically, these could include the promotion of flexible working: (2009) 159 N.L.J. 863.

The 2008 statistics show that 47 per cent of minority solicitors are concentrated in very small firms. In 2008, 10 per cent of solicitors were from ethnic minorities. 28.6 per cent of students enrolling with the Law Society were from ethnic minorities but the biggest problem they face lies in entering the profession and progressing to partnerships within it. In 2003, the Society launched a Diversity Access Scheme. See now *The Law Society Group Equality and Diversity Framework 2009-11*.

In Feb 2010, the *Times* reported that women comprise less than 20 per cent of **partners** in Britain's 30 biggest law firms. **In magic circle firms, the average is 15 per cent. Women comprise 60 per cent of the graduate intake of many firms**. See A. Spence "You are a lawyer, a woman and have a family – and the big firms cannot tempt you with a partnership", *Times*, 8 February 2010, citing a study in *Legal Week*. Alan & Overy announced in January that it would allow partners to work part-time. 62 per cent of its new hires were women but only 15 per cent of partners were. Women left on the verge of partnership at twice the rate of men: A. Spence, *Times*, 22 January 2010. **Young women solicitors now seem to be in a worse position than women now in their fifties, who battled in the 1980s to work part-time.**

13-005 Social diversity

In 2009, the Cabinet Office published *Unleashing Aspiration*, which disclosed that half of professional occupations are dominated by those from public schools, who represent only seven per cent of the population. **There is less social mobility now than post-war**. It is extremely expensive to qualify as a barrister or solicitor (up to £12,000 for the professional course and you have to support yourself) and many fail to find a job. **In 2008-9, 7,000 people completed the LPC but there were only 6,000 training contracts available. Unless the excess 1,000 find contracts, they will not qualify as a solicitor**. Because of the recession, some law firms offered trainees £10,000 to take a sabbatical.

13-008 Legal Services Act 2007

The Office for Legal Complaints will come into being in late 2010. A new Ombudsman scheme will investigate and resolve complaints about legal services.

13-052 QCs

A commissioned report by Sir Duncan Nicol, in 2009, advised against reforming the QC system yet again, saying the 2006 system was too new to judge. **In the latest silk round, 2010, nearly 50% of applicants were successful** but only one solicitor-advocate was appointed (MoJ press release 26 Feb). The Law Society Chief Executive expressed disappointment, criticising the criteria for emphasising oral advocacy in the higher courts.

13-055 Impact of the LSA 2007

"Alternative business structures" will be permitted from October 2011. According to *Legal Risk*, only five per cent of the top 100 law firms believe the Act will have "a significant" impact on them. C. McConnell considers that **firms that practice internationally are not likely to transform into ABS** or accept outside ownership because both are banned by the American Bar Association and there are similar problems in Europe, for instance in Germany. High Street firms will be affected because Tesco etc. will sell commoditised, standardised legal products: "A profession in transition" (2009) 159 N.L.J. 1069.

The MoJ published a *Baseline survey to assess the impact of legal services reform* (research Series 3/10, March 2010). The research found:

> "Thirty-four per cent of people in England and Wales aged 16+ were found to have used legal services in the last three years. Legal service users were generally content with their legal service providers and the services they provided. For example, 91% of users felt that they received a good service, 92% felt that their provider acted in their best interests and 92% were satisfied with the outcome of their matter".

About a quarter felt the work had taken too long and a quarter thought it was too expensive. The most commonly used services in the last three years were conveyancing (50 per cent), will writing (27 per cent), probate (17 per cent), family matters (15 per cent) and accident or injury claims (11 per cent). 81 per cent thought a solicitor or trainee solicitor handled their affairs.

FURTHER READING
The Lawyer http://www.thelawyer.com/

14. Judges

14-025 Who can apply to be a judge? Diversifying the Judiciary

From 2010, legal executives are eligible to apply for DJ posts.

The Judicial Appointments Commission has a statutory duty to promote diversity under the 2005 Act. It has a JAC Diversity Forum, whose work is explained in the JAC Annual Report. The 2008-09 research reports mentioned above indicate that the following factors discourage potential applicants and these are outside the control of the JAC:

- The policy of requiring applicants to have served part-time (in fee paid work);
- lack of availability of salaried part-time working (this means the lack of fulltime appointments on a fractional basis (not to be confused with fee-paid work mentioned above);
- a lack of diversity among lawyers and
- working conditions within the judiciary. (2008-09 *Annual Report*).

14-081 The continuing attempt to diversify…continued

Research published by the Judicial Appointments Commission in June 2009 showed that **"unfounded myths" were deterring solicitors from applying for judicial appointments**. The press release on *Barriers to Application* summarises the findings:

> "For example:
>
> - One third of those who responded believe that they cannot apply unless they know a High Court judge who will act as a referee.

- It is still widely believed that to become a judge one needs to be a barrister, have the right kind of education, be part of the right social network and know the top judges.
- It is believed that being under 40 or working class is a disadvantage.
- Many still do not see the appointments process as based solely on merit. For example, women think men have an advantage and men think women are favoured." (JAC website).

Nevertheless, over half said they would consider applying if they could work part time. The Law Society President remarked that permitting CPS lawyers to apply was a Law Society success. It might diversify applicants because, of the 3,155 CPS lawyers, 54.5% are women and 15.1% BME: (2009) 159 N.L.J. 837.

See also *The Report of the Advisory Panel on Judicial Diversity* 2010, MoJ press release 24 Feb. The main points are:

- In a democratic society, the judiciary should reflect the diversity of society and the legal profession. (NOTE THE CONTRADICTION HERE) This would enhance public confidence.
- There is no quick fix.
- We lack a coherent, comprehensive strategy.
- We need to address everything, from the legal career to appointments at the top level, also addressing retention and promotion. They list what is needed. For example, the JAC should revise its merit assessment criteria, to clarify its commitment to diversity.
- Achievements so far include the development of the Solicitors in Judicial Office Working Group, joint action by the MoJ, JAC and Directorate of Judicial Offices and "real momentum" on the need for appraisals.
- Heads of the legal profession need to be included in the effort.
- We need a "mythbusting" campaign.

Incidentally, the Law Society has set up a mentoring group to encourage more solicitors to apply to the bench.

14-044 Disciplining judges

For statistics on disciplinary action against judges, see the Office for Judicial Complaints *Annual Report*. Action was taken against 49 judicial office holders in 2007-08. The March 2009 report revealed a seven per cent drop in complaints, to 1,339, 799 of which were irrelevant (complainant should have appealed).

14-093

New HC judges received no special training until 2003 and the senior judiciary are not provided with systematic continuation training or expected to attend, though from 2009, induction training is being devised and they have about six tea-time seminars per year in the Royal Courts of Justice.

FURTHER READING

The Governance of Britain – Judicial Appointments, CM 7210, October 2007.

The Governance of Britain Green Paper, July 2007, CM. 7170 and see responses, e.g. the JAC response.
The Governance of Britain – Constitutional Renewal, CM 7342 -1, March 2008.

Chapter 15 Magistrates

Workload

According to Jack Straw, there was a **nine per cent decline** in magistrates' work in 2009, hardly a surprise, given the cautioning rate: speech to the Magistrates' Association AGM, 14 November 2009.

15-002 Appointment

The Judicial Appointments Commission was meant to be taking over responsibility for selecting magistrates which it was given in the Constitutional Reform Act 2005. This plan seems to have been scrapped. In February 2010, the MoJ launched a consultation on advisory committees, which they want to reduce from 101 to 49 (in line with justices' clerkships), 18 or 7, in line with HMCS areas, to save money, and change their name. The paper contains interesting history, reminding us that they were established in 1911, following complaints of political selection:

> "**The position of Magistrates was seen as a reward for political services**. This was highlighted by the large variation in Magistrates appointed under different Governments either side of the 1906 elections". (Para. 2).

Advisory Committees are non-statutory (one of their jobs is to investigate allegations of misconduct) and directed by the Lord Chancellor's...Directions http://www.judiciary.gov.uk/docs/advisorycomm_dir0908.pdf. 43 per cent are chaired by the Lord Lieutenant.

15-004

In 2009 there were around 29,270 lay justices, 14,798 of whom (50.6 per cent) were women and 92.4 per cent of whom were white. About 2,000 new justices are appointed annually. (Diversity statistics, Judiciary website). The Ministry of Justice website lists recruiting more young magistrates as a key diversity objective. The above consultation paper says:

> "The Advisory Committees have provided positive progress on recruitment and diversity recruiting a greater proportion from BME backgrounds (10.1% compared to 7.3% for Magistrates overall) and younger magistrates (44% under 50 years compared **20% for Magistrates overall**) for Magistrates overall." (para. 7)

Remember they are unpaid volunteers, who may claim for loss of earnings and other expenses.

15-011 Complaints

Complaints are handled by the Office for Judicial Complaints. Disciplinary action was taken against 44 magistrates in 2007-8. The biggest group of complaints is about inappropriate behaviour or comments. (OJC annual report).

15-015 Magistrates' Clerks

In 2009, there were 49 justices' clerks, all professionally qualified and 1,800 legal advisers.

FURTHER READING

G. Robson, "Magistrates' courts – a hybrid too far?" (2010) 174 (10) *Criminal Law and Justice Weekly* 137-139. Abstract from the Legal Journals Index on Westlaw:

> "Evaluates the fairness and effectiveness of the magistrates' court system in light of changes to the training and selection of magistrates among other reforms. Traces the history of criticism of the system and asks whether the day-to-day practice of the courts genuinely justifies the praise that they regularly receive, particularly for their perceived role in reflecting "the local community".

Chapter 16 Jury

16-002 widening jury participation

In March 2010, the MoJ launched a consultation on **raising the age limit for jurors** from 70 to 75 or 80.

16-015 Bilingual juries in Wales

Predictably, the MoJ announced in March 2010 that, following consultation, it would not be introducing a the possibility of selecting all-bilingual juries in Wales, because the principle of random selection outweighed the interests in doing so, even in trials where a substantial portion of the evidence was given in Welsh. Thomas's 2007 research for the MoJ, below, showed that under six per cent of those summoned for jury service in Wales declared fluency in Welsh, so such a requirement would exclude over nine tenths of potential jurors in Wales.

16-037 Judge-alone trials – jury tampering

Because of increasing allegations of jury tampering or "nobbling", Auld L.J. recommended in his 2001 Review that a judge should be empowered to order trial by judge sitting without a jury, in such cases. This was enacted in s. 44 of the 2003 Act. The prosecution can apply for a non-jury trial if there is "evidence of a real and present danger that jury tampering would take place" and that security measures would not prevent tampering. In 2009, the CA ruled that the requirements of the section were satisfied in the case of four defendants for a 2004 bungled armed robbery at Heathrow: *R. v T* and others [2010] EWCA Crim 1035. The robbery had already resulted in three trials costing £22 million. (At the first trial, Twomey suffered a heart attack in prison and was severed from the indictment. At the second trial the jury were reduced to nine and were hung.) The third collapsed after a "serious attempt at jury tampering", according to the trial judge. The prosecution had applied under s. 44 but **Calvert-Smith J. was satisfied that the jury trial could go ahead, spending up to £6 million and using 82 police officers on jury protection, then the CA reversed the decision in 2009 and ordered a non-jury trial** under s. 44. The CA gave **guidance** on such cases, including that, when a judge dismissed a jury on a tampering allegation, he should normally order that he should conduct the trial alone, even if he had considered "public interest immunity" protected material. They held that dispensing with a jury did not offend against D's fair trial rights. See case and

comment at [2010] Crim. L.R. 82. The commentator suggests that jury **sequestration** could have been used as an alternative – on a four month trial! **Marcel Berlins, in the *Guardian* criticises the fact that the cost of an alternative jury trial should be taken into account**. See F. Gibb, "First trial without a jury for 400 years" *Times*, 19 June 2009 and "First criminal trial without a jury for 400 years starts", *Times*, 13 January 2010 http://business.timesonline.co.uk/tol/business/law/article6984904.ece Twomey is on trial in the RCJ and told the *Guardian* he feels the police have borne a grudge against him after he gave evidence in a 1982 police anti-corruption inquiry. Remember he escaped….

10 Research into Jury Decision Making

Important new research

You should read *Are Juries Fair?* Ministry of Justice Research Series 1/10, MoJ website, under PUBLICATIONS. It was large scale, using 68 simulated juries at Nottingham and Winchester, 668 post-verdict juror surveys and measuring average outcomes in 68,000 verdicts, nationwide, in 2006-08.

Main points (paraphrased):

- Verdicts of **all-white juries did not discriminate** against BME defendants.
- White juries in Winchester (a white area) had almost identical verdicts for white, black and Asian defendants but white juries at Nottingham (racially diverse, where almost all jurors are white) "had particular difficulty reaching a verdict involving a BME defendant or a BME victim". They were significantly more likely to convict a white D accused of assaulting a BME D than a white D.
- The only personal characteristic that appeared to affect juror decision-making was gender. **Female jurors were more likely to be persuaded to change their vote than men**, who rarely changed their minds.
- Examining 551,669 verdicts in 2006-08, the study examined whether offence type and severity, court, or number of charges had any correlation to verdicts.
- The study ***confirmed*** BME defendants are consistently more likely than whites to plead guilty.
- **BME defendants are three and a half times more likely to face a jury verdict relative to their representation in the population.**
- There was a 63% jury conviction rate for white and Asian defendants and a 67 % conviction rate for blacks.
- This strongly suggests that racially balanced juries are unnecessary for fairness BUT there are concerns about the *appearance* of fairness with all-white juries, especially at courts where mainly all-white juries try substantial numbers of BME defendants.
- **At all Crown Courts, the proportion of BME defendants is greater than in the local population or BME jurors.**
- HMCS should, therefore, ensure that court users understand how representative juries are, locally.
- Only 12% of all Crown Court charges are decided by jury deliberation. 59% of all charges result in a guilty plea. Only 0.6% of all verdicts are hung juries.

- **Juries convict on 64% of all charges, with the highest conviction rates in direct-evidence cases and the lowest where jurors must be sure of the state of mind of D or V.**
- Conviction rates rose with the number of charges: 40% on one charge, 80% with 5 charges.
- Contrary to pop belief and previous government reports, **juries convict in rape more often than not: 55% (of 4,310 verdicts)**.
- Conviction rates in busy courts range from 69% to 53%. There were no courts with a higher acquittal than conviction rate.
- Most jurors at Blackfriars and Winchester felt they were able to understand directions but most at Nottingham felt they were difficult to understand.
- **BUT Only 31% actually understood the directions fully in legal terms used by the judge.**
- **Written instructions increased juror comprehension.** Yes, as I said in 2001, in my research for Auld LJ…
- Most jurors recalled media coverage of their trial only during the trial but in high-profile cases, 35% remembered pre-trial coverage and 20% of these said it was difficult putting these out of their minds.
- Some jurors looked for info on their trial on the internet.
- More should be done to instruct and continually remind jurors of the rules on impropriety.

FURTHER READING

M. Coen & L. Heffernan, "Juror Comprehension of Expert Evidence: A Reform Agenda" [2010] Crim. L.R. 195.
L. Ellison & V. Munro "Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 (1) *Legal Studies* 74-97.

Chapter 17 Legal Aid

July 2009 was the 60th anniversary of legal aid.

Overspend!

The Parliamentary Public Accounts Committee reported in Feb 2010 that the LCS's "lax financial controls" caused it to **overpay solicitors £25m in 2008-9**. Then National Audit Office made the same point before Christmas. **The LSC is to become an executive agency** of the MoJ: MoJ press release, 3 March 2010, following a review by Sir Ian Magee. This has prompted concerns for its independence. It will require legislation.

In October 2009, the MoJ published an *International Comparison of Publicly Funded Legal Services and Justice Systems*, by R. Bowles and A. Perry (MoJ research series 14/09). They compared spending in three common law countries and four European jurisdictions with spending in England and Wales. **They found that spending here was unusually high. This appeared to be caused by a higher case load and higher average cost per case.**

17-018

Means testing was reintroduced in the Crown Court in 2009. Acquitted defendants will get their money back, with interest. For those acquitted who pay for their own representation, however, a new rule from October 2009 will permit them only to recoup their costs at legal aid rates. The Law Society is challenging the legality of this.

17-021 Novelty funding rescue for law centre

Since the first law centres were established, they have always suffered a hand-to-mouth existence. Hearing of financial difficulties at the SW London Law centre, the MoJ offered support. They gave £235,000 and drummed up £80,000 investment from private funders, including **11 city law firms** – better than spending it on bonuses! Allen & Overy say they have a long-term relationship with the law centre.

17-022

A 2009 *Times* report said that Citizens Advice is very overstretched.

17-030 another bad effect of CFAs but good effects too

A *Times* leading article "Sickness in Health", 21 December 2009 said that the Government's "noble goal", to make justice available to all, had become a "costly nightmare", as hospital payouts for clinical negligence had gone from nothing, two decades earlier to £769 million per year, with much of the money going to lawyers. The NHS litigation authority complained to Jackson LJ that the costs claimed by claimants lawyers were disproportionately high and present arrangements were "indefensibly expensive". "Claimants, who were once the David in cases of medical negligence, with the odds of success stacked against them, have become the Goliaths".

Nevertheless, A. Wade argues that no-win no-fee contracts have helped credit crunch victims who would otherwise be unable to act against banks and so on who had given them negligent financial advice: "Credit-crunch victims turn to no-win, no-fee for help", *Times* 7 May 2009.

17-032 Consumer knowledge

A December 2009 Legal Services Board survey showed that less than a third of 2000+ adults surveyed felt they knew a fair amount about what lawyers did.

17-040

The tendering date for civil and criminal LA contracts has been put back to October 2010 to give the LSC time to finalise arrangements.

On 22 March 2010, the MoJ published "Restructuring the Delivery of Criminal Defence Services", proposing a smaller number of larger CDS contracts. Jack Straw LC said that there was now one lawyer per hundred people. He also listed the highest earning lawyers:

> "in 2008/09...there were 874 barristers who earned between £100k and £299k and a further 75 barristers who received more than £300k" (from the LA fund): (Press release).

17-049 cuts in family LA

The family Bar and NSPCC have sent a joint letter to the HC Justice Select Committee asking for an inquiry into the state of the family justice system: report *The Work of the Family Bar*, King's College, showed some barristers were at breaking point and if there are any more cuts in LA, access to family practitioners will be further constrained (March 2009). LA fees are behind private client and local authority rates. The LSC announced cuts in family graduated fees, in Feb. 2009. That, and proposed further cuts will result in a 55% cut in payments, says the Bar Council. Lord Bach, LA minister, said average fees for contact and residence disputes had risen from £800 to £1,450 in five years, "unsustainable". He said child protection work would receive an extra £4.4 million. **Nevertheless, in October 2009, Government announced that they were going ahead. Family lawyers say more firms will close**. The number of family LA practices dropped from 4,500 in 2000 to 2,800 since 2006. See F. Gibb, "Vulnerable youngsters put at risk by plans to slash legal aid" *Times*, 26 October 2009.

The MoJ consulted on cutting lawyers' fees in criminal cases, in 2009, and received 300 responses, mainly negative. The same paper consulted on cutting experts' fees, with the same reaction.

Useful comment

R. Moorhead, in "System failure or broken law?" (2010) 160 N.L.J. 403, produced a brief, plain-English thought-provoking article suggesting that deficiencies lay within the surrounding legal system, not the legal aid system. He suggests "a radical simplification of our laws" (wishful thinking?) and a "radical simplification of process", shifting certain work from the courts to Ombudsman-type services and "removing advantage" from powerful litigants, banning lawyers where this creates inequality of arms.

FURTHER READING

S. Hynes & J. Robins, *The Justice Gap*, Legal Action Group, 200. From the LAG website:

> "There exists a marked difference between the numbers of cases pursued to enforce rights and the many potential cases that people never take up as they are either not aware of their rights or they decide it is not worth the trouble to take it further – this is 'the justice gap'".

Neuberger LJ, Keynote address, Law Society & Bar Council Opening of the Legal Year Seminar, 30 September 2009. Well worth reading on the mess that legal aid is now in. Well researched and interesting.