A REPORT BY JUSTICE

The Unrepresented Defendant in Magistrates' Courts

CHAIRMAN OF COMMITTEE
ALEC SAMUELS

A STEVENS Publication

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LONDON
STEVENS & SONS
1971

Published in 1971 by Stevens & Sons Limited of 11 New Fetter Lane, London, and printed in Great Britain by The Eastern Press Ltd. of London and Reading

This report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

SBN 420 43810 6

JUSTICE

British Section of the International Commission of Jurists

This report was prepared by a special committee appointed by the Standing Committee on Criminal Justice, of which the chairman is Lewis Hawser, Q.C. The members of the committee were:

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The report and its recommendations have been endorsed by the Council of JUSTICE.

AUSTRALIA
The Law Book Company Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Agincourt, Ontario

INDIA
N. M. Tripathi Private Ltd.
Bombay

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THE UNREPRESENTED DEFENDANT IN MAGISTRATES' COURTS

INTRODUCTION

1. The committee which prepared this report was set up following a resolution passed at the 1970 Annual General Meeting of JUSTICE at which anxiety had been expressed by several members at the manner in which some magistrates' courts dealt with cases in which defendants were unrepresented.

2. The committee included a stipendiary magistrate, a lay magistrate, a justices' clerk, practising members of both branches of the legal profession and academic lawyers. The committee met between December 1970 and July 1971.

3. The committee's terms of reference included the entire position of the unrepresented defendant in magistrates' courts.

4. Six years ago the report of the Widgery Committee (Legal Aid in Criminal Proceedings, Cmnd. 2934 of 1966), referred to here as the Widgery Committee Report, expressed broad satisfaction with the way the legal aid system was working in magistrates' courts. It drew attention to a certain lack of uniformity in decision-making by magistrates but said that "the general impression left upon us by most of the witnesses who are able to judge the question on a country-wide scale is that the present system is working tolerably well." (Para. 75.)

5. This impression that the system is working reasonably well was echoed much more recently on behalf of the Home Office by the responsible Minister, Mr. Mark Carlisle. Speaking in a debate in the House of Commons on December 4 1970 the Parliamentary Under Secretary stated: "I have no doubt—and this is certainly the view of the Government and probably both sides of this House—that in general the legal aid system in criminal courts is working well. It is providing a system of justice for the individual of which we can all be proud." (*Hansard, House of Commons, December* 4, 1970, col. 1736.) Later in the same debate Mr. Carlisle referred to the criteria laid down for the grant of legal aid by the Widgery Committee: "We have no reason to be aware of any substantial body of disagreement with the criteria, nor do we have any substantial reason to believe that they are not fully known to the different courts." (*Ibid.* col. 1740.)

6. We have not found it possible to agree with the view that the system is working broadly as it should. On the contrary, we feel

that there is much that is seriously wrong. We would wish to make it plain however that our criticisms are of the system itself and not of the thousands of magistrates both lay and stipendiary who in our judgment render invaluable service to the community in the labours they perform so conscientiously. Our aim is in no way to weaken the respect for their efforts but rather to assist in the search for improved methods with a view to enabling them to do their job even more successfully.

7. Our view that there is much in the operation of the present system to give rise to concern is born out of our experience in magistrates' courts, as magistrates or lawyers. It is fortified by evidence published since the Widgery Committee Report about the operation of the system. We have in mind in particular five reports: Michael Zander, *Unrepresented Defendants in the Criminal Courts* [1969] Crim.L.R. 632 (referred to here as Zander, 1969); Keith Bottomley, *Prison Before Trial*, 1970 (referred to here as Bottomley); G. J. Borrie and J. R. Varcoe, *Legal Aid in Criminal Proceedings, A Regional Survey* (referred to here as Borrie and Varcoe); Michael Zander, *A Study of Bail Custody Decisions in London Magistrates' Courts* [1971] Crim.L.R. 191 (referred to here as Zander, 1971); and, in particular, Susanne Dell, *Silent in Court*, 1971 (referred to here as Dell).

8. Unfortunately, the Widgery Committee was handicapped by the fact that no such studies had been undertaken at the time it was sitting. It had to form its impression and reach its conclusions on the basis of memoranda submitted to it and on the evidence of witnesses, supplemented only by a study of a two-week sample of legal aid applications. From this, the Committee concluded that the average refusal rate (23 per cent. for summary trials) was not too high.

9. The refusal rate for legal aid applications is however only a small part of the problem because only a tiny fraction of those tried by magistrates ever apply for legal aid. (In 1969 the number tried in the magistrates' courts applying for legal aid was 67,898 as against some 1·7 million tried, or 4 per cent.)

10. The fact that the writers of the five reports made studies of actual proceedings in the courts or interviewed individual defendants, or both, is in our view crucial, as the Widgery Committee was not in a position to do this. The inclusion in their broader pictures of all those defendants who do not obtain, or do not even apply for, legal aid explains the wholly different impression gained about the working of the system.

11. Access to these reports is not generally easy. We have therefore

thought it right to summarise, in the first part of this report, the evidence now available which sustains our belief that the problem of the unrepresented defendant in the magistrates' courts demands immediate reconsideration. Aside from this evidence, our committee like the Widgery Committee itself relied perforce on the collective experience and knowledge of its members. The evidence of reputable researchers however has added greatly to knowledge of this subject and must we think be given due weight. In the second main part of the report we consider how the criteria set out by the Widgery Committee could be more successfully implemented and conclude that there is no alternative to the adoption of a system of "duty solicitors" similar to that in operation in sheriff courts in Scotland. In Part IV we make suggestions for improving the methods of communicating information about legal aid to defendants. In Part V we make recommendations for changes in procedure designed to assist the defendant who remains unrepresented.

PART I

Is the Present System Working Well?

English method of trial is adversary

12. The English system of trial is adversary. The whole process is based on the assumption that each party in turn will marshal and present his evidence, dissect and disclose the weaknesses of the opponent's case and argue the conclusions which support his own case. The role of the judge during the trial is to preside, to listen to each side, to intervene as little as possible and principally only to clarify points that are obscure. It is not the function of an English judge to call the witnesses, nor to examine them. It is his duty to control the proceedings and finally to instruct the jury, if there is one, or otherwise to make the decision on the basis of the case presented by both parties.

13. This system of trial depends entirely on both sides being adequately equipped to present their cases. It must be obvious that if one party is for any reason not able to do his own cause full justice, the court will to that extent be handicapped in dealing with and deciding the case.

Most defendants are unrepresented

14. Most defendants in magistrates' courts are unrepresented. Unfortunately the Criminal Statistics do not show the proportion of defendants in magistrates' courts who are represented. They do however show the number granted legal aid. Although the percentage of defendants receiving legal aid has been steadily increasing the total proportion represented is still very small indeed. In 1962 it was ·6 per cent.; in 1969 it was still only 3·4 per cent. of all defendants.

15. To this must be added a number who are represented privately or through some organisation such as the R.A.C. or the A.A. It is unlikely that this would amount to more than a further 1 per cent. of the total defendants.

16. If therefore about 4 per cent. of defendants in magistrates' courts are represented it follows that about 96 per cent. are not. It is this 96 per cent., amounting to more than one and a half million cases per year, which constitutes the focus of this report.

The Widgery Committee's criteria for legal aid

17. In 1966 the Widgery Committee said that " legal representation cannot be said to be a necessary condition for the effective defence

of every criminal charge." It was necessary, it said, to bear in mind the practical consideration that there was a limit both to the number of practitioners available for such work and to the funds that the state could reasonably be expected to make available. It concluded that " the object of the (legal aid) system should be to secure that injustice does not arise through an accused person being prevented by lack of means from bringing effectively before the court matters which may constitute a defence to the charge or mitigate the gravity of the offence." (Para. 56.) We accept this definition of the proper scope of an adequate legal aid scheme.

18. The Committee went on to define the criteria which magistrates ought to apply when deciding whether a grant of legal aid for summary trials is " in the interests of justice."

> " To summarise . . . therefore, our conclusion is that the main factors, apart from means, which may point to eligibility for legal aid in magistrates' courts are the following:
>
> (a) that the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or suffering serious damage to his reputation;
> (b) that the charge raises a substantial question of law;
> (c) that the accused is unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;
> (d) that the nature of the defence involves the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;
> (e) that legal representation is desirable in the interest of someone other than the accused as, for example, in the case of sexual offences against young children where it is undesirable that the accused should cross-examine the witness in person.
>
> If a case exhibits none of these features then, prima facie, it is not a case in which the interests of justice require that the accused should be professionally represented. If, however, one or more of these features is present then there are grounds for thinking that representation is desirable." (Para. 180.)

Cases heard by magistrates

19. It is relevant in this context to ask to what extent magistrates do in fact hear cases of any degree of seriousness. One answer is to be found in the Criminal Statistics. We show in Table 1 the breakdown of offences for 1969.

TABLE 1

Indictable and Non-Indictable Cases Heard by Magistrates
(Source: 1969 Criminal Statistics)

Indictable Offences	
Offences against the person	
Malicious wounding	17,835
Indecent assault on female	3,348
Others	25,477
Offences against property with violence	
Burglary, going equipped for stealing, robbery and blackmail	57,413
Arson and other malicious injury to property	1,002
Offences against property without violence	
Stealing, frauds, handling stolen goods	204,288
Miscellaneous	5,432
Total	314,795

Non-indictable Offences	
Non-motoring	
Drunkenness	84,328
Motor vehicle licence offences	80,143
Wireless Telegraphy Acts	38,094
Malicious damage	20,653
Defrauding the railway and other railway offences	17,120
Obstruction other than by a vehicle	12,196
Disorderly conduct	11,394
Assaults (other than on constables)	10,016
Assaults on constables	8,661
Miscellaneous	306,257
Total	588,862
Motoring	
Unfit to drive through drink or drugs	23,066
Reckless or dangerous driving	5,914
In charge of a motor vehicle while unfit to drive	968
Driving while disqualified	8,001
Others	939,560
Total	977,509
Grand Total	1,566,371

Cases where representation not needed

20. There are plainly some types of cases in this list where legal representation is unnecessary, especially minor motoring offences such as illegal parking. In 1969 motoring offences accounted for 980,000 out of a total of 1·9 million cases. Of these some 940,000 were classified in the Criminal Statistics as being motoring offences other than the four more serious categories of: (1) reckless or dangerous driving; (2) being unfit to drive through drink or drugs; (3) being in charge of a motor vehicle while unfit to drive; and (4) driving while disqualified. We are prepared to assume that the overwhelming majority of the 940,000 cases of "other" motoring offences are very trivial cases which would not require legal representation.

Cases where representation needed

21. This leaves about 940,000 other cases dealt with by magistrates. As appears in Table 1 these included some 215,000 cases of theft or handling of stolen goods, 23,000 cases of being unfit to drive through drink or drugs, 17,000 cases of malicious wounding, some 18,000 cases of assault, including 8,500 cases of assault on police officers, and 6,000 cases of reckless driving. Charges in all these categories vary in degree of seriousness but a substantial proportion of such cases could be regarded as serious, in the light of the possible consequences to the accused if he is convicted. The significance of this is borne out by the fact that magistrates send more persons to prison than the higher courts. (In 1969 magistrates gave prison sentences without the option of paying a fine in 17,931 cases compared with 11,931 such sentences given by assize and quarter sessions courts: Criminal Statistics, 1969, pp. 33 and 123.) There can therefore be no doubt that magistrates do deal with a large number of "serious" cases.

Representation and the gravity of the offence

22. If the adversary system of trial were working properly one would expect that legal representation would be available first in the more serious or more difficult cases. The Criminal Statistics do not show any breakdown between legal representation and the nature of the offence but there has been at least one attempt to provide such information in Michael Zander's study of fifteen London courts in 1969. His figures are given in Table 2.

TABLE 2

Charges in Trials in Magistrates' Courts Showing whether Defendant Represented

(Source: [1969] Crim.L.R. 672)

Charge	*Total*	% *of total unrepresented*
Drunkenness	119	100
Thefts of amounts under £100	84	82
Dangerous driving/driving whilst uninsured	73	67
Thefts of amounts of uncertain value	78	64
Taking motor vehicle without consent	39	74
Disorderly and threatening behaviour	37	95
Highway obstruction/nuisance	36	88
Assaults	27	59
Drugs	26	53
Receiving/unlawful possession	20	85
National insurance and social security fraud	20	95
Firearms offences	16	80
Betting and gaming	12	83
Sex offences (other than prostitution)	11	64
Wounding	11	72
Other frauds	10	90
Malicious damage	8	75
Theft of amounts between £100 and £1,000	8	87
Loitering or entering with intent	7	71
Burglary	6	50
Prostitution	5	100
Living off immoral earnings	3	33
Theft of over £1,000	3	100
Miscellaneous	6	17
Cases when charge or representation unclear	55	
Total	720	

23. From this it appears that in a very high proportion of cases defendants were unrepresented even in the most serious kinds of cases tried by magistrates. Zander's study showed that, in a sample of 720 cases, in every single offence category except living off immoral earnings more than half the defendants were unrepresented. The unrepresented included: 95 per cent. of those charged with social security frauds, 85 per cent. of those charged with receiving stolen goods, 80 per cent. of those charged with firearms offences, 75 per cent. of those charged with malicious damage, 72 per cent. of wounding cases, 64 per cent. of sex offences other than prostitution and 53 per cent. of drugs offences.

24. There is no way of knowing in what proportion of these cases defendants applied for legal aid but it would be wrong to assume that none did so. There is some limited evidence about the fate of legal aid applications in different offence categories in the study conducted in 1969 in four Midlands courts by Professor Gordon Borrie, Director of the Birmingham Institute of Judicial Administration, and his colleague Mr. J. R. Varcoe. The study was based on a survey in two city courts, one county borough court and three rural petty sessional divisions which were grouped together for this purpose as one court. Cases where a breakdown was given by offence category included theft—where 30 per cent. of legal aid applications were refused—and breaking and entering—where 18 per cent. of applications were refused. These two examples show that at least in some courts a high proportion of applications for legal aid is refused even in cases that must surely be regarded as serious. The figures are the more significant in that in one court all forty-four applications for legal aid in theft cases were approved, whereas in a second court twenty-eight out of forty were denied. This suggests that different courts take different views on what constitutes a serious offence. This problem of different policies pursued in courts is something to which we return below, para. 112.

25. The small amount of evidence available on this question therefore suggests that in a significant proportion of cases of the most serious kind tried by magistrates the defendant is unrepresented.

Representation in cases ending with custodial penalties

26. This evidence is supported by the somewhat greater volume of evidence showing that a majority of defendants sentenced to the most serious penalties available to magistrates are unrepresented. This is one of the most cogent reasons for feeling concern about the present position of the unrepresented defendant in magistrates' courts. The Widgery Committee, rather surprisingly, did not look

into this question at all. It stated that "in those cases where there is real and practical (as opposed to theoretical) risk of imprisonment or other form of confinement, including confinement in accordance with a hospital order made under the Mental Health Act 1959, we consider that there is a strong *prima facie* case for the grant of legal aid." It added that "[We] do not think that experienced magistrates have any difficulty in identifying such cases [*i.e.* those where there is a real risk of imprisonment] from the terms of the information before them supplemented by one or two brief questions as to the nature of the case for the prosecution." (Para. 169.)

27. Unfortunately, the Widgery Committee's confidence that magistrates can without difficulty discern the cases that *may* or even the smaller number of those that *will* end with a custodial sentence does not appear to be borne out by the facts.

28. The first piece of evidence on this question came in Michael Zander's 1969 study in fifteen London magistrates' courts. This showed that 74 per cent. of forty-six defendants given suspended sentences, all of the six defendants sent to detention centres and 55 per cent. of the twenty-two defendants in his sample sent to prison were unrepresented. (Zander, 1969, pp. 643–644.)

29. Borrie and Varcoe's survey in the Midland courts confirmed Zander's findings. The unrepresented defendants included three out of four defendants sent to prison for under three months, five out of twelve defendants sent to prison for over three months, two out of six sent to quarter sessions for sentence, eleven out of sixteen given suspended sentences, and all five defendants sent to detention centres. (Borrie and Varcoe, Table 15, p. 34.) The numbers are small but the figures all point in the same direction—the majority of those given actual or potential custodial sentences were unrepresented.

30. Stronger evidence still is however contained in the paper published in June 1971 by Mrs. Susanne Dell of the Institute of Psychiatry at the Maudsley Hospital. Mrs. Dell's study was financed by the Home Office. It was part of a wider investigation conducted at Home Office expense under the direction of Professor T. C. N. Gibbens. It was based on a random sample of 565 interviews with inmates of Holloway Prison, which draws its women from courts all over the South of England. The sample was every fourth prisoner received in the year 1967, other than women transferred from other prisons, representing about an eighth of all the women received in prison in 1967 in England and Wales. Interviews with the women were supplemented by corroborative information from records of the courts, the prison and prison hospital, from probation officers and from the Criminal Records Office.

31. The intake of a women's prison is liable to be somewhat different from that of a men's prison and the question arises whether the results of the study can be taken as representative of the position for male defendants. It could be argued that what is true for women accused is likely to be even more true of the men simply because courts tend to lean over backwards to avoid sending women to prison. In so far therefore as the study shows that women do not have legal assistance in court, the position of male defendants may actually be worse. There is nothing to suggest that their position is any better than that of the women.

32. Mrs. Dell found that:

- 81 per cent. of those sentenced to prison or sent for Borstal training were unrepresented (in 2 per cent. of cases there was no information)
- 79 per cent. of those remanded in custody after conviction and not subsequently imprisoned were unrepresented (in 9 per cent. of cases there was no information)
- 38 per cent. of those remanded in custody untried and not subsequently imprisoned were unrepresented (in 27 per cent. of cases there was no information)
- 84 per cent. of those imprisoned for failure to pay a fine were unrepresented (in the remaining 16 per cent. of cases there was no information)
- 69 per cent. of all those in the sample were unrepresented (in 14 per cent. of cases there was no information). (Dell, Table 1, p. 4.)

33. The most serious finding in these figures is undoubtedly that 81 per cent. of those sentenced to prison or Borstal were unrepresented. A breakdown of the concluded cases by length of sentence showed that where the sentence was less than three months, forty-five out of fifty-two women (87 per cent.) were unrepresented. Where the sentence was three months to six months the proportion unrepresented was 73 per cent. In cases of sentences of more than six months, four out of seven or 57 per cent. were not represented. (Dell, Table 2, p. 13.)

34. Analysis of the cases where women were sent to prison for failing to pay fines showed that although the sentences were short—typically less than one month—some of the women in fact spent long periods in prison by coming back over and over again. Most of these were chronic alcoholics returning again and again in default of fines they could not pay, serving as they put it, "life sentences on the instalment plan." None of the sixty-eight women in this category

was known to have been represented. Some might have benefited from representation, especially to argue the question of whether they had the means to pay their fines which the courts are supposed to, but do not always, take into account.

35. All the evidence available on this question therefore points in the same direction—a majority of those given custodial penalties by magistrates do not have the benefit of legal representation either on legal aid or otherwise.

The mentally ill

36. The Widgery Committee (para. 177) said that legal representation was generally desirable when an accused was suffering from mental disorder or was incapable through mental disability from conducting his own defence. In Mrs. Dell's sample of those sentenced to imprisonment, just over half were found on psychiatric examination to be suffering from some form of mental disorder. 90 per cent. of these women dealt with by magistrates had been unrepresented. These included a number of women who were mentally subnormal or psychotic and who in the opinion of the researcher were " certainly incapable of conducting their cases properly." (Dell, p. 21.)

37. The Widgery Committee recommended that legal aid should be given to those in danger of being compulsorily confined to a mental institution. Twelve defendants in Mrs. Dell's sample were actually so confined of whom eleven were known not to have been represented while there was no information about representation of the twelfth. (Dell, p. 22.)

38. The proportion of those suffering from mental disorders who were represented was broadly the same as those represented who did not suffer from this disadvantage. In other words, on this evidence which constitutes the only evidence on the subject, the magistrates' courts do not succeed in granting legal aid to those in need because of mental incapacity.

Inability to follow the English language

39. The Widgery Committee said that legal aid was *necessary* for " persons whose knowledge of English was insufficient to enable them to understand the charge, or follow the proceedings properly." (Para. 177.) Again the only evidence on this matter is that in Mrs. Dell's study. Ten women in her sample either knew no English at all or had very poor knowledge of it. Six of these had not been represented. (Dell, p. 23.)

Risk of disgrace

40. The Widgery Committee regarded a real risk of disgrace or serious damage to reputation as a circumstance justifying the grant of legal aid for proceedings in magistrates' courts. (Para. 171.) They cited the example of the respectable housewife charged with shoplifting.

41. The threat of disgrace is perhaps most telling for the first offender. There were 149 first offenders in Mrs. Dell's sample dealt with by magistrates' courts. 61 per cent. were not represented—as compared with 72 per cent. of those with previous convictions. (Dell, Table 5, p. 25.)

Mothers with small children

42. There were seventy-seven cases in Mrs. Dell's sample of women with small children dealt with by magistrates. The effect of remands in custody or prison sentences in such cases is obviously likely to be serious. In 21 per cent. of these cases the defendant was represented; in 57 per cent. she was not. In the remainder there was no information. (Dell, p. 26.)

43. In forty-seven cases in Mrs. Dell's sample mothers with small children were remanded in custody prior to sentence. Only four had been represented. In many cases it appeared that the court had taken the decision on remand with little or no information about the accused.

44. This finding about lack of information communicated to courts when the accused is unrepresented is supported by evidence in Michael Zander's study published in 1971 of bail decisions in seventeen London magistrates' courts. This showed that where the defendant was represented, information about his circumstances helpful to an application for bail was presented in 40 per cent. of cases as compared with 26 per cent. of cases where the defendant was unrepresented. (Zander, 1971, p. 206.) Precisely the same general finding emerged from the study of bail decisions by Keith Bottomley, conducted in an urban court in the North of England and three rural courts in East Anglia. His study showed that substantially more information about the accused's personal circumstances was provided to the court where he was legally represented than where he was not. (Bottomley, 1970, p. 52.)

Those pleading not guilty

45. Virtually no one maintains that a person pleading not guilty should be denied legal aid in cases warranting custodial penalties or

remands in custody pending sentence. In Mrs. Dell's sample there were 403 cases of women dealt with by magistrates who pleaded guilty and fifty-eight who pleaded not guilty. Of those who pleaded not guilty no less than twenty-five (43 per cent.) were unrepresented.

Those pleading guilty but denying their guilt

46. One of the most disturbing findings in Mrs. Dell's study is the large number of cases in which women interviewed who had pleaded guilty denied to the interviewer having committed the offence in question. Out of the 527 women tried there were 106 who denied their guilt totally. Of these, fifty-six pleaded guilty and forty-seven pleaded not guilty. In three cases there was no information as to the plea. Those pleading guilty gave a variety of reasons for doing so. Seventeen out of the fifty-six claimed the police had advised or pressured them to do so.[1] Eight said there was no point in defending a case where it was simply their word against that of the police. Five said they pleaded guilty to avoid a remand and to get the case over with. Five said they had done so for fear of getting a harsher sentence if they pleaded not guilty.

47. When those who denied guilt but pleaded guilty were compared with those who denied guilt but pleaded not guilty, one significant difference was the proportion legally represented. Seventy-eight of the women who denied guilt had no legal advice before pleading. Two-thirds of them pleaded guilty. By contrast, of the twenty-two who denied guilt and had legal advice before pleading only three (or 13 per cent.) pleaded guilty. This suggests that those who have legal advice before pleading are much less likely to give in to the temptation to plead guilty to an offence they believe they have not committed.

48. It is significant that pleas of guilty by defendants who denied their guilt did not occur in any volume in cases tried before the higher courts—where virtually all the women were represented.

49. The problem of defendants pleading guilty to charges they do not admit has been noted also by Mr. Clive Davies, a practising

[1] The belief that the police commonly try to influence defendants to plead guilty was put to the Royal Commission on the Police by both the Law Society and by the National Association of Probation Officers. The Royal Commission accepted the evidence and said that the practice should be "firmly checked by Chief Constables." (Royal Commission on the Police 1962, Cmd. 1728, paras. 369 and 372; Minutes of Evidence, pp. 1077 and 1221.)

barrister now of Liverpool University, who interviewed 418 men charged with burglary and housebreaking in the Liverpool area. Eight of those interviewed volunteered the information that although they were not guilty of the crime charged they intended to plead guilty. A further twenty-one either said they were not guilty, or said they intended to plead not guilty but subsequently pleaded guilty. The reasons advanced by Davies to explain guilty pleas by those who claim to be not guilty are similar to those mentioned by Mrs. Dell—the belief that the court will deal more leniently with the case, or that the evidence of the police is bound to be preferred to that of the accused, or that a trial will attract more publicity. (Davies, "The Innocent Who Plead Guilty," *Law Guardian*, March 1970. This is one of a number of articles that Davies has based on his study which is itself as yet unpublished.)

50. Davies went on to hazard the guess based "on some years' practice in the criminal courts and a fairly intimate knowledge of those who appear before them" that a very large number of innocent defendants amounting to thousands each year are probably wrongfully convicted on their own evidence.

51. Whether the number is as large as Davies suggested or not it is certain that this is a very real area of concern about the working of the legal aid system. It seems probable that the incidence of wrongful confessions would be reduced if the defendant were represented.

The unrepresented defendant's disadvantage in court

52. Whether the case is serious or not, and whether it technically falls within the criteria laid out by the Widgery Committee, there can be no doubt that the unrepresented defendant often suffers from severe disadvantages. He is scared, inarticulate, unfamiliar with the procedure and commonly unable to understand what is going on. One remanded girl in Mrs. Dell's study, when asked by the interviewer whether she had had bail, replied "What is bail?" Another said: "The judge mumbles away, and you don't know whether or not he's supposed to be talking to you." Many remanded women in the study left the court without realising what had been decided—and therefore were not in a position to ask for bail. Mrs. Dell's study also reveals that in many cases where the accused was unrepresented mitigating circumstances were not mentioned to the court—in spite of the Widgery Committee's belief that legal aid should rarely be necessary for this purpose. Many women when asked "What have you to say?" thought that this question called simply for the reply "I'm sorry." They felt it impossible or inappropriate in the formal atmosphere of

the court to talk about the background of the offence. (Dell, pp. 17–19.)

Conclusion

53. In our view there is an overwhelming and incontrovertible body of evidence that the legal aid system is not working in the magistrates' courts in the way the Widgery Committee intended that it should. No doubt it does provide assistance to some of those tried by magistrates but it is plain that a very large number of defendants are not legally represented even though they fall squarely within the criteria defined by the Widgery Committee.

PART II

The Widgery Committee's Criteria

One reason for failure

54. One reason for failure to implement the criteria may be that, contrary to the statement in the House of Commons on December 4, 1970, by Mr. Mark Carlisle, the courts are not sufficiently aware of them. In 1966 on the Second Reading of the Criminal Justice Bill the then Home Secretary, Mr. Roy Jenkins, undertook to commend the Widgery criteria to the courts at the same time as he brought the contributions scheme into operation. (Hansard, House of Commons, Vol. 738, cols. 73, 74.)

55. Unfortunately, and most surprisingly, this does not in fact appear to have been done. The Home Office in August 1970 advanced two reasons for this little-known omission. One was that "the economics of all-round implementation [of the criteria] would have thrown an intolerable burden on central funds." The other was that "from the point of view of solicitor and barrister man-power, it was unrealistic to hope to provide the sort of service to legally aided defendants which the recommendations of the criteria might have involved." (Dell, p. 61.) This suggests that the Home Office does not believe that the Widgery criteria are now being implemented but rather thinks that implementation would result in a considerable increase in the numbers receiving legal aid.

56. This was not the opinion of the Widgery Committee itself. In its report the Committee said:

> "In a great many magistrates' courts the suggestions which we have made [regarding the criteria for granting legal aid for summary trial] will not represent any change in the existing practice. Our enquiries show that these principles are already widely adopted and our concern is that the minority of courts where legal aid is now granted on too niggardly a scale should come into line with the majority. Since we are not recommending any change in the existing general practice no estimate of additional cost is possible or appropriate." (Para. 181.)

57. Of these two views, we share that of the Home Office—namely that adequate implementation of the Widgery criteria by full grants of legal aid would involve a considerable increase in the numbers granted legal aid. We do not shrink from this conclusion even though we recognise that it necessarily involves the view that more public money

should be spent on criminal legal aid. In an adversary system of criminal trial such as ours the Widgery criteria would appear to us to mark the minimum acceptable standard. Moreover the criteria have been generally accepted as being appropriate and there has never been any public suggestion from any official or other source that they should not be implemented.

Need for extension of the Widgery criteria

58. Moreover, in at least three respects the criteria need to be extended. The first is to alter the onus of proof in the more serious type of case. The Widgery Committee suggested that the burden of making a case for legal aid should fall on the accused and that it should not be granted unless the case fell within one of the specified categories. The Committee said: "If a case exhibits none of these features then, prima facie, it is not a case in which the interests of justice require that the accused should be professionally represented. If, however, one or more of these features is present then there are grounds for thinking that representation is desirable." (Para. 180.) This seems to us to be too restrictive. We strongly recommend that there should be a presumption in favour of the grant of legal aid, at least in any case punishable by imprisonment, to be rebutted only if the court is satisfied that legal aid is definitely not necessary or desirable.

Committals for sentence

59. A second category not adequately covered by the Widgery criteria is that of defendants committed to quarter sessions for sentence only. The criminal statistics for 1969 show that 14 per cent. of 11,550 defendants in this category were not represented. In our view those being sentenced by quarter sessions should normally be granted legal aid certificates (for counsel and solicitor not, as is too often done, for counsel only) and this view ought to be expressed in the criteria.

Bail applications to a judge in chambers

60. A third category of cases that ought to be included within the criteria is that of bail applications to a judge in chambers.* We disagree with the Widgery Committee's conclusion that the Official Solicitor can deal adequately with these cases. The inquiries made by the Official Solicitor about the case and the antecedents of the accused must often be incomplete, especially as the defendant is rarely seen and the information about him is therefore based on his own often

* As from January 1, 1972, legal aid will cover applications for bail to Crown Court judges.

inadequate written statement. We believe that it is not chance that bail is granted much more often where the accused is represented than where the Official Solicitor prepares the case. In our view legal aid should be available for these appeals.

61. Subject to these three suggested modifications we believe that the first priority must be the implementation of the criteria.

Implementing the Widgery Committee's recommended criteria

62. The main difficulties involved in implementation of the Widgery Committee criteria are: first, ensuring that the courts are familiar with the criteria; secondly, ensuring that they have the means of acquiring enough knowledge about the case to apply the criteria, and ensuring that they apply the criteria in a reasonably uniform way; and thirdly, seeing that defendants who need legal aid are aware of the fact and of how to apply.

Ensuring that the courts are familiar with the criteria

63. All magistrates and their clerks should be reminded of the criteria and of the desirability of granting legal aid in any doubtful case. Leaflets or aides-mémoire for this purpose could be distributed by the Home Office; but these, though useful, would probably not make much impact, since leaflets tend not to be remembered and aides-mémoire are often filed away and forgotten. In our view it is essential that the criteria should be enshrined in the form of rules with statutory force. This would give them the appropriate status and bring them to the attention of both courts and lawyers in a way that no other method of communication can equal.

64. We have not thought it right to attempt a draft of a statutory provision to give effect to the Widgery criteria but it is clear that it would inevitably leave a large area of discretion to the courts. There is no way in which any simple formula can solve for the courts the dilemma of recognising those cases where legal aid is needed. The purpose of setting out the criteria would merely be to give them full official recognition and publicity.

Ensuring that the courts have enough information about the case to apply the criteria

65. By far the most difficult problem to solve is how to recognise the case that merits legal aid at the very early stages when representation is so important. Some cases no doubt reveal themselves from the outset as being serious but in many it is difficult, if not impossible, at the outset for the magistrates or their clerk to form any clear view of what is involved. If it is a theft charge involving stealing a sweater at a department store, the case may end with a probation order or a six months' sentence. Depending on the circumstances

a driving offence could be penalised with a £10 fine or with disqualification for a year. How is the court to be able to form any view as to the probable seriousness of the outcome of such cases unless it knows the defendant's previous record? If the problem is the fact that the defendant does not have adequate command of English, how is the clerk of the court to appreciate this without seeing or hearing the defendant, unless the defendant happens to realise that this is one of the special grounds for applying for legal aid which he ought to mention in his application? Legal aid applications are normally dealt with by magistrates' courts' clerks simply on the basis of the forms. Even if the application mentions the difficulty, the defendant is rarely present and there is therefore no way for the clerk or the court to evaluate the degree of incapacity involved. The same is true of mental disabilities. It is highly unlikely that defendants so affected would have the insight to describe themselves as handicapped in this way. Even if they recognised and accepted their own condition, they would often be reluctant to refer to it or to claim that it entitled them to what they might regard as the favour of legal aid.

66. The same difficulty affects most of the other matters that the Widgery Committee thought courts ought to consider. Clerks and justices have no way of knowing until the trial whether the case will involve a substantial question of law, or whether there is a need to trace witnesses or to cross-examine prosecution witnesses. They do not know whether the prosecution will be legally represented. Often they do not even know whether the defendant intends to plead guilty or not.

67. It is remarkable that the Widgery Committee did not consider this matter at all. It simply stated the criteria and hopefully assumed that courts would know how to apply them. It seemed not to recognise that application of the criteria on the basis of the present procedure is not merely difficult but in many cases quite impossible. It is therefore hardly surprising that, as the evidence reveals, the courts seem to fail to identify a very high proportion even of those obviously needing help.

68. On any view those sentenced to prison terms normally require representation, yet as has been seen the evidence shows that the great majority of those given prison sentences by magistrates are not represented. If the magistrates fail to identify these cases in advance it must be because of the inherent difficulty of doing so. No amount of publicity for the criteria can solve this problem.

69. Indeed it seems doubtful whether under the present system the problem is one that could ever be wholly solved at least on a

case-by-case basis. For a solution means that the court must be in possession of a considerable amount of information about the case, the defendant, the way he proposes to plead, the nature of his defence, whether he intends to call witnesses, his record and personal circumstances. There does not appear to be any way in which the trial court could be put into possession of this information prior to the trial without prejudicing the defendant's prospects of a fair trial. Our system has so far not countenanced any suggestion that an accused person should have to reveal his defence in order to get legal aid and it would plainly be intolerable for such information to be communicated to the court that is going to try him.

70. This leaves open the question whether such information should not be communicated to some other person or body who is not to be involved in the trial itself. This could either be a magistrate who will not sit on the bench for the trial, or a clerk who will not have any part in it or some independent committee of lawyers organised by the Law Society. In Scotland legal aid applications are normally heard by a sheriff in chambers with the defendant and a solicitor present but in the absence of the procurator fiscal. In this country we have since 1967 entrusted the main burden of decision-making to the clerk, using the magistrates only in cases where the clerk feels unable to make the grant. To go back to using magistrates would of course add greatly to their burden of work, especially if the defendant is to be present. Yet without the defendant present it might be difficult to collect the necessary information. We do not see how clerks could be required to find out such details since they would often be involved in the trial. In the case of Law Society committees we cannot see how this would work without unacceptable delays, although if the Law Society could devise a scheme that would overcome this problem we would not necessarily be against it. But all of these alternative methods would in any event work only to the extent that defendants were helped to formulate their applications for legal aid and to state the reasons why they came within the criteria.

71. We cannot see how such help could be provided under the existing system. We do not believe that any reform of the present procedure could ensure that the court has enough information to identify the case needing legal aid at any early stage.

72. We make a variety of suggestions later in this report for changes in the existing machinery designed to ensure that defendants are even better informed of the right to apply for legal aid and of the procedure for doing so. We recommend changes aimed to make this procedure simpler and more effective in reaching its aim. But

none of these changes can singly or together achieve any major improvement in the existing system for the simple reason that an unrepresented defendant is inevitably and necessarily in a poor position to help himself. Even a simplified procedure, even forms couched in the plainest English and even the most helpful court officials and magistrates cannot make up for the ordinary defendant's inability to appreciate his need for representation and his inability to plead his own cause adequately.

Part III

The Duty Solicitor

73. For all the foregoing reasons we have looked for a way in which the ordinary defendant could be given a form of legal representation without placing exhorbitant demands on either the legal profession or the Exchequer. After considering various possibilities we have concluded that there is one which could and should be tried—the duty solicitor on the model of the schemes now operating in Scotland and in Ontario. Our study of the Scottish scheme was aided by the co-operation of members of the Glasgow Bar Association who showed the system in operation to a member of the committee, and to the staff of the Law Society of Scotland who provided further information about the way the scheme worked.

74. The Widgery Committee considered and dismissed the duty solicitor in the following two paragraphs:

> " We have also considered the possibility of introducing a scheme similar to that which has for many years existed in Scotland, under which ' duty ' solicitors are in daily attendance at courts to give advice to certain classes of defendants at the initial hearing, before the accused are required to plead. Under the Criminal Justice (Scotland) Act 1963 free preliminary advice is available as of right, without inquiry as to means, to persons in custody brought before a sheriff's summary court or a justice of the peace juvenile court charged with a summary offence. This assistance is available up to the end of the first diet, at which the accused pleads. Legal advice is similarly available in the preliminary proceedings before a magistrate in cases being prosecuted under solemn procedure.
>
> We do not consider that it would be practicable to introduce a scheme of this kind on the much larger scale which would be necessary in England and Wales. It would be impossible to make arrangements for a ' duty ' solicitor to attend the sittings of approximately a thousand courts of summary jurisdiction and as the services of the solicitor would not always be required the system would be unnecessarily wasteful of public funds. Moreover we see no reason why persons whose means are sufficient should not contribute towards the cost of the advice they receive." (Paras. 206 and 207.)

75. We have of course given most careful consideration to the reasons given by the Widgery Committee for its rejection of the scheme but have not found ourselves persuaded by them.

The duty solicitor in Scotland

76. The Scottish scheme operates only in the sheriff courts and does not apply in the police courts. Sheriff courts have a double jurisdiction in criminal cases: for summary offences where the sheriff or sheriff substitute sits alone, with power to give sentences up to a maximum (generally) of six months' imprisonment, and for more serious offences, where the court sits with a jury (known as solemn procedure). The scheme covers all cases where the accused comes to court on the first appearance in custody—including cases where he has been released by the police after arrest and told to surrender himself into police custody shortly before the trial. (The Scots have no system of bail from the police station but the police can release the accused informally.)

77. The scheme is operated under the direction of the Law Society's sixteen legal aid committees. In Glasgow two or three solicitors drawn from a roster are on duty each day for periods of one week. In Glasgow trials are in the afternoon and they see their clients between 1 and 2 pm. The prisoners in custody have been seen in the morning by an official of the Law Society who helps them fill out applications for legal aid.

78. The duty solicitor interviews clients in special small cubicles in the cells. Normally he will have the police papers in front of him including the precise terms of the charge and details of previous convictions. He helps the defendant decide whether to plead guilty or not guilty; if the case is to be remanded he ascertains the facts that would support an application for bail; if the defendant intends to plead guilty he collects information appropriate for a plea in mitigation. In Glasgow, when he leaves the duty solicitor's cubicle the defendant is seen by the Law Society official who says to him, "The solicitor you have just seen is Mr. X. If you are granted legal aid you can have Mr. X or any other solicitor on this list." He then shows him the entire list of solicitors who undertake criminal legal aid in Glasgow. (About half of those who do court work participate in the scheme.) Sometimes the client chooses from the list, sometimes he selects the name of the solicitor he has already seen.

79. The defendant then goes back to his cell. When the duty solicitor has seen all prisoners in custody who are making their first appearance in court, he goes to the court where they are to be dealt with. If he has more than one court to cover he will inform the ushers so that the cases can be arranged in such a way as to make it possible for him to be there.

80. He represents the clients he has seen in their first appearance. In the case of those to be remanded he makes applications for bail and asks for a suitable date for the next appearance. In the case of those pleading guilty he makes a plea in mitigation. His three main functions therefore are to advise a man how to plead, to apply for bail and an adjournment and to make the plea in mitigation of sentence for those pleading guilty.

81. If a guilty plea is remanded for reports or for other reasons the duty solicitor continues to act for all future appearances. In all other cases his duties cease on the completion of the first appearance. There is separate payment for these follow-up duties.

82. The duty solicitor is paid per morning or afternoon session at the rate of £5 for the first case plus £1 for each additional case up to a maximum of £5; £5 for the next client; then £1 for each of the next two clients and thereafter nothing. This therefore represents a maximum total of £17 per day or £85 per week on the basis of one session a day.

83. In some places the system is slightly different. Thus in Edinburgh custody cases are taken in the morning rather than the afternoon and the duty solicitor accordingly has to be present in the cells before morning court hours. In most courts there is no Law Society official to help with legal aid applications and this function is therefore performed by the duty solicitor. He is not supposed under the rules of etiquette to "push" his own claim to undertake the case, but he is permitted to mention that he is available.

84. In some parts of Scotland where the number of custody cases does not justify the presence of a duty solicitor on all days of the week they will often be held back so that they are dealt with on a particular day. Also, in some of the more outlying areas the number of solicitors is such that the tour of duty is longer than a week. But on the other hand in such more remote areas the "duty" is done mainly in the solicitor's own office. If a custody case comes into court the clerk dealing with the matter simply rings the solicitor on duty and asks him to come over to see the prisoner in the cells. This avoids the difficulty referred to by the Widgery Committee of the duty solicitor wasting time in court when there are no cases for him.

85. Legal aid applications are dealt with by the sheriff in chambers with the applicant and the nominated solicitor present. The procurator fiscal has no right to attend. This is mainly because the sheriff in deciding whether to grant the application often inquires about the nature of the accused's defence.

86. Both the solicitors in Glasgow and the Law Society of Scotland expressed the view that the system works extremely well with virtually no snags. Administratively it is extremely simple. At the

end of each session the duty solicitor fills out a simple form claiming payment. From the client's point of view it ensures that everyone in custody is seen automatically. From the court's point of view it means that defendants who have been in custody are never unrepresented on their first appearance and rarely at later stages because their legal aid applications will normally be granted. From the lawyer's point of view the system, apart from its own satisfaction, provides some modest incentive in the form of the payment for the work done and the promise of more if the client happens to select the duty solicitor as his lawyer for a defended case.

87. The latest figures for the costs of the scheme for the sixty or so sheriff's courts show that for the year ending March 1970 £51,506 was paid to duty solicitors for first appearances plus £20,191 for further attendances. The total of £71,697 was in respect of 28,266 defendants or an average of under £2·50 per case, involving 7,051 original sessions plus 5,410 from other attendances—a total of 12,461 sessions.

Duty counsel in Ontario

88. Ontario introduced a scheme similar to that operating in Scotland as part of the Legal Aid Act 1966. The Act was based on the report of the Joint Committee on Legal Aid of the Province of Ontario published in 1965. The Committee looked at legal aid systems in England, Scotland, Australia, Canada, the United States and Scandinavia and concluded that the Scottish system was " the best system existing for furnishing legal aid in criminal proceedings." (Page 47.) Having described the functioning of the duty solicitor scheme it observed, " This is a system which appears to be working remarkably well." It recommended that a similar system be introduced in the province. The Ontario scheme applies in all the provincial courts (equivalent to our magistrates' courts) except when they are dealing with minor traffic offences or minor by-law infractions. Principally it caters for those in custody but those on bail or who have been summonsed are also eligible. In this respect therefore the Ontario scheme is broader in scope than that in Scotland. Another difference is that the duty solicitor in Ontario is not permitted to take the case on ordinary legal aid if it is subsequently granted. A third difference is that the duty solicitor is permitted to take simple not guilty pleas where they can be dealt with during the duty solicitor's term of duty. The aim of this is to avoid the waste of public money that would be involved if legal aid were granted in the ordinary way with consequent adjournments and extra expenses.

89. As in Scotland, there is no means test for the preliminary help given by the duty solicitor, although the Ontario legal aid system,

like our own, provides for contributions from defendants granted full legal aid.

90. We set out in Appendix 1 guidance given to duty counsel as to the way they should perform their functions offered by Mr. G. Arthur Martin, Q.C., chairman of the Legal Aid Programme.

91. In the year ending March 1969, 65,598 persons were assisted under the duty counsel scheme for criminal cases. In 1970 the figure was 62,703. Total counsel fees and disbursements under the duty counsel scheme in criminal cases was $718,598 in 1968–69, an average of $10.95 per case, and $694,445 in 1969–70, an average of $11.08 per case.

Advantages of the duty solicitor scheme

92. The duty solicitor scheme has obvious advantages. First and most important it provides assistance to a large number of defendants who would otherwise not receive any. It does so at the vital first stage of the legal proceedings when they are still in a position to decide how to plead. It helps them to make up their minds on this critical issue on the basis of professional advice rather than rumour, suspicion, police pressure and imagined fear of consequences. It is thereby likely substantially to reduce the problem of defendants pleading guilty to charges which they regard as baseless, or to charges where there is a valid defence which the accused has not the knowledge to advance. A duty solicitor scheme seems the only viable way of ensuring that defendants are advised before they plead.

93. Secondly, the scheme helps to ensure that legal aid applications are made by those who need it. The failure of defendants to apply for legal aid from ignorance of the facility or from a lack of appreciation of its value or from other reasons is one of the major defects of the existing scheme. The duty solicitor would advise whether legal aid was necessary. This is particularly important in view of the finding in Mrs. Dell's study that statistically the most significant difference between the represented and the unrepresented women in the sample was whether they had been remanded before trial. Those that were remanded were told about legal aid in Holloway and made applications, some of which were successful. Those not in custody very rarely applied for legal aid. Mrs. Dell's conclusion is that notices about legal aid in police stations or in leaflets are not nearly so effective in communicating information about the value of legal aid as oral discussion with an informed person with time for the matter to be considered. The duty solicitor would provide such advice at the earliest possible moment, and the interview with him would be an opportunity for a breathing space in which the question of representa-

tion could be considered. He could also help in the actual process of making an application for legal aid—especially by drafting the special circumstances which the defendant should mention by way of argument as to why he should get legal aid.

94. Another advantage would be that a very large number of those pleading guilty to charges of some seriousness would be represented for the purpose of a plea of mitigation. It is clear that the ordinary defendant is simply incapable of doing himself justice in this situation. The duty solicitor would advance such factors as ought to be mentioned to the court.

95. The duty solicitor would also perform an extremely important role in making bail applications. As has been seen, there is some evidence that defendants are remanded in custody in cases where the court has heard little or no information about the accused. Often he does not even consider asking for bail because he is unaware of the possibility, or of the procedure. There is also evidence that legal representation does make a difference to the success of bail applications. In Zander's 1971 study, when the police opposed bail a represented defendant got bail in 31 per cent. of cases compared with 16 per cent. of those who were unrepresented. (Zander, 1971, p. 194.) The presence of the duty solicitor would ensure that the court heard more of the relevant considerations before making its decisions.

96. Another very important function would be to ask the court for an adjournment in an appropriate case. This is something which unrepresented defendants rarely do even in cases that merit such an application. If they appreciate the possibility of doing so they are too timid to ask; usually they simply do not realise that they could even try to gain extra time. Often too they would not realise the value of an adjournment to trace a witness, or to get clearer evidence of an important fact. Moreover a court would be much more inclined to grant an adjournment if it were asked for by a lawyer rather than by a layman simply because it would assume that an application made by a lawyer would be more likely to be of substance.

97. The duty solicitor may also be of help to the court in a more general way by being available to assist unrepresented defendants at the request of the court in moments of crisis or difficulty that may occur in any court. This could be a variation on the traditional "dock brief."

Man-power

98. The Widgery Committee appeared to dismiss the duty solicitor scheme on account of the man-power problem—the shortage of

barristers and solicitors. We are not persuaded that this difficulty is in fact insuperable. In the first place virtually every magistrates' court in the country is served by solicitors' firms. Obviously few firms could carry the burden of providing a duty solicitor in the local court for long periods, but in areas where there are a number of firms the duty could be shared. In some instances the duty lawyer might have to come some little distance but this occurs in both Scotland and in Ontario and seems to be accepted there as part of the profession's service to the community. In smaller courts with few cases it may be that the duty solicitor could in fact operate from his own office—simply coming to court at the request of the clerk or gaoler when a case required his assistance.

99. Even if there were areas of the country where no adequate roster could be maintained, this should not we think be accepted as a reason for denying the validity of the duty solicitor concept in principle. Courts in outlying country areas with few solicitors would between them have only a small fraction of the total volume of cases requiring the help of the duty solicitor. Such courts could, if necessary, be exempted from the duty of providing lawyers under the scheme, if the local Law Society were unable to organise solicitors on a roster system.

100. Consideration could be given to imposing a requirement that any solicitor wishing to conduct cases under the criminal legal aid scheme should be under an obligation to take part in the duty solicitor scheme. This might be regarded as a reasonable contribution by lawyers to the public sector of legal services, especially as the work would be adequately rewarded, with the possibility of further remuneration from cases represented subsequently on full legal aid.

101. We have referred mainly to solicitors, but we see no reason why barristers should not take part in the scheme on an equal footing. If the man-power problem proved intractable we would hope that the Lord Chancellor might consider the possibility of legal executives having a right of audience for this purpose in the magistrates' courts subject to appropriate safeguards and satisfactory experience or training in advocacy and the law of evidence. The work involved in being a duty solicitor should be within the scope of many members of the Institute of Legal Executives. It is of interest in this context that the Advisory Committee on Legal Aid in Ontario in its second annual report approved the contribution of second and third year law students who under the Ontario regulations have a right of audience in criminal legal work. It said that this ought to be expanded and that such

activity in other jurisdictions had " provided a valuable service to the community." (At p. 7.)

Cost

102. With regard to the cost, this would depend on a variety of factors, some of which are not easy to calculate. One important question is what classes of cases should be brought within the duty solicitor scheme.

103. There are several possible ways of defining the cases to be covered. A list could be drawn up of " serious " charges. This would be open to the objection that some charges which appeared " serious " on paper would not be serious in the particular circumstances of the case and conversely that some that would not appear to qualify would be serious because of the particular circumstances. If, alternatively, one took " likely consequences " rather than the charge as a way of defining eligibility, this would be difficult or even impossible to administer since in many cases neither the duty solicitor nor the administrators of the scheme would have enough information about the charge, the case, the evidence and the defendant to know, at least at the outset, what the penalty was likely to be.

104. If the test of eligibility were, as in Scotland, that the defendant was in custody, this would have the great merit of being precise and simple to administer, but it would include many minor cases, such as drunks. Conversely the million or so non-custody cases in 1969 included many serious offences—for instance, 8,017 of malicious wounding; 14,666 of burglary; 4,968 of handling stolen goods; 52,449 of stealing and 11,359 of causing malicious damage. (Criminal Statistics, 1969, pp. 14–20, col. 3.) Any duty solicitor scheme should apply to cases such as these.

105. Probably the only practical way of avoiding these difficulties is to give the defendant not in custody the opportunity of having the help of the duty solicitor, subject only to the priority of custody cases.

106. The cost of the service would depend on the number of sessions worked and the level of fees paid. We have not attempted to estimate the cost, since no information is at present available as to the volume of different kinds of work in different magistrates' courts. (The Home Office kindly offered to supply such information for a fee of about £500 but this was beyond our research budget.) In the absence of such information or an experiment no costing can be done. It is clear however that through economies of scale the duty solicitor would be extremely cheap per unit of work done. In Scotland the

average cost per defendant is £2·50 and there is no reason to suppose that it would be more in England and Wales.

107. Moreover the introduction of a duty solicitor scheme would result in certain significant savings elsewhere. The most important form of such savings would be in the likely reduction in the prison population as a result of the remand on bail of defendants who would otherwise have been remanded in custody or the sentencing to non-custodial penalties of defendants who would otherwise have been sent to prison. According to the latest figures it costs some £23 a week to keep a man in prison or Borstal (and about £20 in a detention or remand centre) so that a reduction in the daily prison population of only 100 persons could save about £115,000 per year. In so far as these were remand prisoners there would be savings on especially heavy costs involved in receiving, guarding and escorting remand prisoners due to the rapid turn-over of these cases. There would also be useful savings in support costs now paid out of supplementary benefit and other public funds to maintain the wives and children of men in custody.

108. Another advantage would be the saving of court-time in cases where the accused is legally represented. In our view legal representation is more likely to shorten than to lengthen proceedings in magistrates' courts. Time is frequently saved by advised pleas of guilty and by better general understanding of the procedure.

Conclusion

109. Our conclusion on the duty solicitor is therefore that the scheme is both necessary and feasible. We think that the man-power problem is capable of solution at least in all but the smallest courts and that the cost would not be disproportionate having regard to the total now being spent on criminal legal aid for trials.

110. We believe that if the Widgery Committee had had available to it the wealth of evidence which we have considered and presented in the first part of this report it too would have felt the need of a duty solicitor scheme as the cheapest and simplest solution to a serious social problem.

The Public Defender

111. We have not investigated the institution of the Public Defender—by which we mean a public salaried staff of lawyers whose full-time responsibility is the defence of criminal cases. We reached the conclusion that the main problem of the unrepresented defendant should be capable of solution through the cheaper and less drastic innovation of the duty solicitor. We did not so much decide that a

Public Defender was undesirable, as reach a decision that if the job could be done more simply and at less cost by a different means, that should be preferred. The decision not to go further than the duty solicitor was therefore based on the premise that the duty solicitor supplemented in the ways we recommend in this report should suffice to solve the main problem. If in the event this analysis were to prove to be mistaken we would wish to reconsider the role of a Public Defender.

Part IV

Uniformity of Decisions and Knowledge of the Scheme

112. There are startling discrepancies in the attitudes of different courts to the grant of legal aid. Thus the figures quoted in Michael Zander's 1969 study showed considerable variations from court to court in the proportion granted legal aid. (Zander, 1969, Table 7, p. 638.) A study of five London courts conducted by the Cobden Trust showed that the rate of refusal in legal aid applications varied from 5 per cent. in Courts 1, 2 and 5 to 23 per cent. in Court 3 to 43 per cent. in Court 4. (The Cobden Trust, *Legal Aid as a Social Service*, Appendix 4, Table A.) Figures were also given in Borrie and Varcoe's study in the Midland courts. This showed for instance that at three of the four courts studied legal aid was granted for nearly all committal proceedings whereas at one court it was granted much less frequently. Similarly in regard to summary proceedings, the percentage of applications refused varied from 60 per cent. in Court A to 36 per cent. in Court B to 15 per cent. in Court C to 3 per cent. in Court D. As has already been seen, these differences included some great discrepancies in relation to the same offence. One court refused twenty-eight out of forty applications relating to charges of theft and seven out of twenty-six applications in relation to charges of breaking. In another court fifty-four cases of these two kinds resulted in no refusals. In the third court there were six refusals out of thirty-one cases. Further figures were given in the debate already referred to on December 4, 1970, by Mr. Clinton Davis M.P. and by Mr. Frederick Willey M.P. At Great Marlborough Street Court, for instance, 68 per cent. of applications in respect of legal aid in summary proceedings were refused as compared with 32 per cent. at Bow Street. After all allowances have been made for slightly different case loads in two neighbouring courts with broadly similar social problems, such discrepancies appear to reflect different policies rather than different cases. In replying to the parliamentary debate, the Minister admitted there were variations from court to court—ranging from 1 per cent. refused in Carlisle to over 90 per cent. in Bootle. Partly he thought this might be explained by differences in the type of cases, but to the extent that this was not the full explanation the grant of legal aid was a matter for the discretion of the courts. "I do not think that it would be right for me, as a Home Office Minister, to comment further on statistics relating to any particular court. In every case it is a matter for free judicial decision." (*Hansard*, December 4, 1970, col. 1740.)

113. However correct the Minister's decision not to comment in a debate on the "judicial decisions" of any particular court, we find his answer disquieting. He seemed to be accepting as inevitable the wide discrepancies in the practice of different courts to which his attention had been drawn by members. We consider that such discrepancies are most unsatisfactory and should be reduced as soon as possible and by any possible means. We suggest that greater emphasis should be placed upon the whole subject of legal aid during the training of new magistrates, and that meetings of magistrates should be held, on a regional basis, for discussion of legal aid, comparable to those held to discuss sentencing.

114. A second way of achieving greater consistency in court decisions would be to give greater publicity to statistics and trends and studies of actual decision-making. For this reason amongst others we are convinced that it would be an advantage to have a supervisory committee responsible to the Home Secretary equivalent to the Lord Chancellor's Advisory Committee on Legal Aid in civil matters. One of the functions of such a committee is that it keeps the system under continuous review from year to year, and can make recommendations on the basis of accumulated experience gained over the years. We think it extremely unsatisfactory that at present the only reports on a system which costs the taxpayer some £3·5 millions a year should be through the medium of questions put by backbench Members of Parliament and occasional reports of *ad hoc* committees such as the Widgery Committee. It should be mentioned here in support of this proposal that, in its Memorandum of Evidence to the Widgery Committee in 1966, JUSTICE recommended that "any system for providing legal aid in criminal cases should be under the general supervision of a joint body which should make periodic reports on the working of the system and to which any complaints would be addressed." In making the recommendation, the JUSTICE Committee also had in mind the need to secure that legal aid defences were properly conducted and fairly distributed among all the firms of solicitors in the area competent and willing to do the work. It was, however, rejected by the Widgery Committee.

115. More recently, the Home Office considered the suggestion for an Advisory Committee when Michael Zander advocated it in his 1969 *Criminal Law Review* article which he sent to the then Parliamentary Under-Secretary of State, Mr. Elystan Morgan M.P. The correspondence arising out of this approach is reproduced in Appendix 2. The chief Home Office objections were first that the Home Secretary did not have genuine powers of supervision of criminal legal aid, secondly that an advisory committee would not be able to

do much to reduce variations in policy of different courts and thirdly that grants of legal aid were discretionary and therefore not open to guidance from the Home Office.

116. These do not seem to us to be valid objections. Even if the Home Secretary's role in relation to criminal legal aid is not so clearly supervisory as that of the Lord Chancellor vis-à-vis the civil scheme, he is nevertheless the Minister most closely associated with the problem of criminal legal aid. There can surely be nothing but advantage in the Home Secretary having a standing committee to help him to formulate policy in relation to a scheme for which he is responsible to Parliament. Whether an advisory committee could do much to reduce variations in policy of different courts would depend on the way in which the committee approached its task, but there seems to be little doubt that it could help to form the attitude of courts by publishing its own reports including, where appropriate, statistical or other surveys of special problems.

117. Finally the Home Office said that legal aid was a matter for the discretion of the courts. This is correct; but although their discretion must not be fettered, it can be guided. The exercise of discretion in judicial decisions is subject to guidance from the superior courts: as Lord Denning said in the Court of Appeal in *Ward* v. *James* [1966] dealing with whether and when the court should exercise the discretion to order trial by jury:

> "It is of the first importance that some guidance should be given —else you would find one judge ordering a jury, the next one refusing it, and no one would know where he stood. . . . This would give rise to much dissatisfaction. It is an essential attribute of justice in a community that similar decisions should be given in similar cases. . . . The only way of achieving this is for the courts to set out the considerations which should guide the judges in the normal exercise of their discretion. And that is what has been done in scores of cases where a discretion has been entrusted to the judges. . . . The cases all show that when a statute gives a discretion the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised and thus ensure some measure of uniformity of decisions. From time to time the considerations may change as public policy changes, and so the pattern of decision may change. This is all part of the evolutionary process." (At pp. 293, 294 and 295.)

118. The decision to grant or refuse legal aid in criminal cases is not susceptible of control in the same way, as the decision is not a judicial act; there is no right of appeal, and the Court of Appeal has no opportunity of giving guidance. But this does not mean that guidance cannot be given. It would be constitutionally wrong for the Home Office or for any committee set up by the executive to purport to direct the courts in any of their judicial functions; but as the decision to grant or refuse legal aid is an administrative decision there can be no possible objection to advice being given by a supervisory committee, or, indeed, by the Home Office itself. Such advice could reasonably set out the considerations which should influence courts in the exercise of their discretion.

Ensuring that defendants who need legal aid are aware of the scheme and of how to apply for it

119. We believe that considerably more could be done to communicate information about the legal aid scheme and to ensure that those who need it are aware of it.

(1) All summonses should be accompanied by information about legal advice and legal aid. It is arguable that the legal aid pamphlet or leaflet ought only to be sent if the case carries the possibility of a serious penalty but the disadvantages of this approach are that many cases where legal aid is needed will inevitably be missed. Saturation coverage is no doubt wasteful of paper but this seems to us a minor matter by comparison with the possible denials of justice (and the waste of public funds) resulting from lack of legal representation.

(2) The same leaflet ought to be handed by the police to all defendants on being arrested and charged.

(3) The leaflet ought to be prepared and distributed by the Home Office. It seems to us wrong that individual courts should (as now) be permitted to introduce their own variations into a standardised procedure. It is possible that courts may produce better versions than the official one, but if improvements are made they should be made available to courts and thus to defendants throughout the country.

(4) The style of the leaflets ought to be even simpler and easier to follow than has been the case hitherto. Also they should be much shorter.

(5) The leaflets should be distributed by the Home Office to courts, police stations, citizens' advice bureaux, and probation officers.

(6) All police and prison cells should have the same standard notice regarding legal aid.

(7) Rules should provide that an unrepresented defendant should always, save in minor motoring cases, be asked in open court whether he has read the leaflet on legal aid and advice, whether he has understood it and whether he wishes to apply for legal aid. This question should be put by the clerk, not by the court.

(8) The form for applying for legal aid should be simpler and in particular should give specific guidance to the applicant as to examples of circumstances to be mentioned as grounds for the grant of legal aid. Borrie and Varcoe's study in the Midlands confirmed the belief that many applicants have no idea how to fill in this section of the form. According to their analysis of 411 forms of application, in 69 per cent. of cases the special circumstances section gave the clerk no assistance in deciding whether to grant legal aid. (In order of frequency they were: no response, lack of means, need someone to speak for me, and unemployed.) The applicant needs help in the form of practical examples. He should also be told that a prior record is relevant and that if it is communicated to the clerk of the court it will not be mentioned to the court which tries the case.

(9) The refusal to grant legal aid should be communicated to the applicant in written form with reasons. This is now the rule in regard to refusals of legal aid in civil cases and of bail under the provisions of the Criminal Justice Act 1967. No doubt certain pro forma reasons would be devised and a printed card or sheet would simply be marked with the appropriate reason or reasons ticked. But this would be better than no reasons at all. We note that the Home Office Minister in the debate on December 4, 1970, rejected the idea of reasons being given on the ground that it would not be appropriate for a court to give an explanation of a decision based on discretion but this answer was surely inadequate in view of the position regarding refusal of bail and civil legal aid where discretion plays at least as great a part. The Minister added that there was moreover no point in giving reasons if there was no appeal and he agreed with the Widgery Committee that a right of appeal would not be appropriate. In our view there is good cause to require reasons even where there is no right to appeal—simply in order to convince the applicant that his case has been rationally determined. Moreover under the present system he can re-apply to the same court with new arguments or facts and if reasons had to be given this would make the right to re-apply more effective. The same is true

if legal aid refusals went from the clerk to a local committee or other body for review.

Right of appeal against a refusal of legal aid

119A. We would like to see some right of appeal against a refusal of legal aid—either to some form of legal aid committee, or in emergencies to a local legal aid secretary. Alternatively or in addition, we would recommend that appeals against refusals of legal aid might be taken before a circuit judge or recorder. The present system of "appeal" to a higher court is usually unsatisfactory, in that help is given if at all at the trial itself, at which point it is normally too late to do anything significant to prepare the defence. A right of appeal from the decision of the court clerk or from that of the magistrates could be taken well before the date of trial, with resulting advantages to the preparation of the defence case. This recommendation that there should be a right of appeal against a refusal of legal aid is wholly in line with a similar recommendation made by JUSTICE in its Memorandum of Evidence to the Widgery Committee.

PART V

IMPROVING THE POSITION OF THE UNREPRESENTED DEFENDANT

120. For the foreseeable future some accused persons are likely, for one reason or another, to remain unrepresented in magistrates' courts, and to be obliged to be their own advocates. We are of the opinion that such persons can be helped in the conduct of their defence by various means, not all of which are universally adopted at present, and that it may be useful to recommend some of these in this part of our report.

121. The unrepresented defendant should be given a leaflet telling him in simple language what to expect in court and how to conduct himself. This should be given to him when he is charged, or sent with the summons. It should of course point out, in the first instance and in bold type, the advantages of having legal advice before going into court and of applying for legal aid at the first possible moment. But as such admonitions have been shown by experience to be habitually ignored, the leaflet should go on to give him elementary advice about the right to choose trial by jury; how to plead; the order of events in the trial; listening to the prosecution witnesses and questioning them; giving evidence; calling witnesses; pointing out mitigating circumstances; asking for adjournments; bail; time to pay fines; costs.

122. We also think it would be desirable for the Law Society to consider with the Justices' Clerks' Society whether a system could be devised to give defendants, shortly before the sitting of the court, brief oral advice on the same basis. If a duty solicitor were in the building he should undertake this. If not, perhaps a method could be worked out for it to be done either by an ordinary practitioner in court waiting for his case to come on or by a court clerk. Defendants could be given such advice in groups at a fixed time which would be notified on the summons sheet.

In court

123. In all indictable cases, and in all summary cases where conviction is likely to have a serious consequence to livelihood or reputation, an unrepresented defendant should, before being asked to elect place of trial or to plead to the charge, be asked in open court whether he wishes to be represented, privately or by means of legal aid if eligible. Where a case is adjourned for any reason, and the defendant

is not granted bail, the magistrate should consider (or reconsider as the case may be) the question of legal aid.

Plea of guilty and mitigation

124. After the antecedents have been read out following a plea of guilty the magistrate should consider whether it would be desirable for the defendant to be represented for the purpose of mitigation. If, however, the defendant is to deal with mitigation himself, the nature of this should be explained to him. He should be asked not only whether he wishes to give an explanation for the commission of the offence, but also whether he wishes to mention any personal, financial or domestic circumstance which he considers might lessen the severity or nature of the sentence to which he is liable.

Plea of not guilty

125. Where a contested case is about to be heard the defendant should be seen to have a pen and paper to make notes as required, and should be told that he should listen carefully to the evidence against him and that he should be prepared to question the witnesses in due course.

126. When a prosecution witness comes to the end of his evidence in chief the court should remind the defendant that it is now his turn to ask questions about anything with which he disagrees or anything relevant that has been left out. It is not sufficient to ask him as is so often done, " Do you wish to ask this witness any questions? " Most defendants do not have any notion what kind of questions to ask unless given some help. If the defendant starts making a statement the clerk of the court should regard himself as being under a duty to help by translating the statement into question form. Moreover the accused should be allowed to make a statement of his case after the prosecution have outlined their case or after the evidence in chief of the main prosecution witness. This departure from the ordinary rules of the adversary procedure is especially justified where the defendant simply cannot grasp the difference between asking questions and making a statement. Once he has been allowed to tell his story the clerk should have sufficient basic knowledge about the case to help the defendant formulate the right questions to put by way of cross-examination. If necessary, the Magistrates' Courts Rules should be amended to make this possible.

Defendant's speech

127. At the end of the defendant's evidence he should be asked whether he wishes to make any comments or criticisms about any of

the evidence given for the prosecution or give any views about evidence given for the defence. Again he should not merely be asked, " Is there anything else you wish to say? "

Acquittal

128. If the defendant is acquitted, he should be asked in open court by the clerk whether he wishes to make an application for costs or expenses.

Conviction

129. If he is found guilty, the procedure suggested in paragraph 124 should be followed.

Right of appeal

130. After sentence, in every case where there are rights of appeal against conviction and/or sentence, the defendant should be told in open court of these rights, and should also be told of his right to apply for legal aid for the purpose of such appeal.

Bail applications

131. It appears that some courts are not complying with their statutory duties under the Criminal Justice Act 1967, s. 18 (7) and (8), to give reasons for the refusal of bail and to tell the unrepresented accused of his right to appeal to a judge in chambers against the decision to remand him in custody. (See Zander, 1971, pp. 91, 197–198.) Courts should be reminded of these provisions.

132. As has been seen, this same study and others before it showed that the court is less likely to be given a detailed account of the accused's personal, family and work circumstances if he is unrepresented than if he is represented. This defect could be partially cured if the court were to receive a standardised form on which would be summarised main features of the accused's background. The form could be filled in by the police or alternatively by the accused himself. This would ensure that where the defendant was unrepresented the court would receive a basic minimum of information about him.

Conclusions

133. We have little doubt that the single most important element in decisions about representation is the approach of the clerk of the court to the unrepresented defendant. Where he is unrepresented, we would hope that clerks would be even more helpful than at present in enabling him to put his case to the court. Where he

needs representation, he should be given legal aid. In courts where the clerk and the bench follow a generous policy those needing representation are generally represented. In other courts many who need to be legally represented are not. It has become broadly accepted in our legal system that those appearing in the higher courts should normally be represented even when they plead guilty. There is a trend in the direction of normally providing legal representation for committal proceedings. But so far as concerns trials at the summary level, remands in the magistrates' courts and committal for sentence by magistrates, the prevailing philosophy is still that representation is generally unnecessary.

134. In our view there is now a mass of evidence, the main part of which we have tried to present in this report, which shows that the unrepresented suffer hardship in the magistrates' courts. If this came to be fully appreciated by magistrates and their clerks, we have no doubt that the proportion of those granted legal aid would greatly and (properly) increase. The court would not wait for the defendant to initiate an application. In many cases the defendant simply does not appreciate the value of representation. The results in Borrie and Varcoe's study on this issue were probably typical of the situation throughout the country. Of nine unrepresented defendants who had received prison sentences who were interviewed eight had been aware of legal aid, yet only two had applied. Those who did not apply gave as reasons variously: "Don't know; not much time to consider it; not serious enough; I thought I could manage as well without; I was guilty so no use; I was refused last time so not worth applying." (Page 36.) Yet all ended in prison.

135. Even more important therefore than to communicate knowledge to defendants is to reach magistrates and their clerks with the information now known about the dangers of lack of representation and the criteria to be applied when determining legal aid applications. This is a responsibility of government and of the judiciary in the person mainly of the Lord Chief Justice. It is singularly appropriate that the new Lord Chief Justice was the chairman of the committee which defined the criteria to be applied. It is to be hoped that in the future they will be applied more consistently than in the past.

ACKNOWLEDGEMENTS

136. We are greatly indebted to Noory Norell and James Goudie, who shared the secretarial duties of our committee, and to Michael Zander, who provided us with such an abundance of research material and made an invaluable contribution to the drafting of our report.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The committee is not satisfied that the criminal legal aid system is, in magistrates' courts, working as well and fairly as it should (paras. 1–11).

2. Most defendants in magistrates' courts are unrepresented. Magistrates try a large number of serious cases, send more people to prison than do the higher courts, and in a very significant proportion of cases of the more serious kind the defendant is unrepresented (paras. 12–25).

3. The Widgery Committee in 1966 laid down various criteria which ought to apply when deciding on a grant of legal aid (para. 18), but there is overwhelming evidence that a large number of defendants who fall squarely within the criteria are not represented (paras. 26–53).

4. The committee urges the implementation of the Widgery criteria which have never yet been formally commended to the courts and recommends that, additionally, legal aid should normally be granted in cases punishable with imprisonment, in cases committed for sentence, and for bail applications to a judge in chambers. The Widgery criteria should be put into the form of rules with statutory force (paras. 54–64).

5. Considerable information is required to enable courts to apply the Widgery criteria properly, and it is doubtful whether any solution can be found to this problem within the limitations of the system. It is essential to identify cases in need of legal aid at an early stage (paras. 65–73).

6. We should therefore establish a "duty solicitor" system similar to the system presently operating in Scotland and Ontario. Broadly, in both systems, a solicitor appointed by rota from the legal aid panel attends at court prior to the court sitting and interviews accused coming before the court for the first time. He gives advice on the plea and legal aid, and appears before the court to defend if it is thought right for the case to be dealt with on that day, or makes a plea in mitigation, or applies for bail and an adjournment if necessary (paras. 74–91).

7. The duty solicitor scheme has great advantages: legal assistance can be provided to large numbers who would not normally receive any. Legal aid applications will be made by those who really need it. The defendant can be represented for a plea in mitigation or for a bail application, or a request for an adjournment. And the duty solicitor can help the court at its request (paras. 92–97).

8. The committee considers that in the larger cities and towns there are sufficient lawyers to provide for the scheme, and that special

arrangements could be made for outlying country districts. The duty solicitor would be remunerated, as in Scotland and Ontario, on a sessional basis. It has not been found possible to make any estimate of the probable cost of the scheme, but whatever it is, it would be substantially offset by a saving of court time through the accused being legally represented, and a reduction in the cost of persons now unnecessarily remanded in custody (paras. 98–110).

9. To ensure a greater degree of uniformity of attitude by the courts when considering legal aid, more training for magistrates is recommended, together with the establishment of a supervisory committee, responsible to the Home Secretary, to keep the criminal legal aid system under continuous review and to make recommendations (paras. 112–118).

10. Recommendations are made to ensure that information about the legal aid scheme is more readily available, and that reasons are given if legal aid is refused (para. 119).

11. There should be a right of appeal against a refusal of legal aid (para. 119A).

12. In Part V recommendations are made to improve the position of the defendant who remains unrepresented. These include the provision of leaflets, oral advice on court procedure, and suggestions for enabling the defendant to put his case more easily and fully. A standard form with information about the accused could be provided to the court to assist them in bail applications (paras. 120–132).

Appendix 1

Memorandum for the Use of Duty Counsel (Toronto)

The Legal Aid Regulations provide that duty counsel may represent a person if he wishes to enter a plea of guilty and make representations in mitigation of sentence on his behalf.

The Legal Aid Programme Committee is of the view that the following principles should govern duty counsel in performing this function:

(a) duty counsel should be very cautious in advising an accused to plead guilty and should never do so unless he is in possession of sufficient facts to satisfy himself that a plea of guilty is proper and in the best interests of the accused.

(b) It should be borne in mind that duty counsel are giving " on the spot " assistance and the function that they can effectively perform is necessarily limited by that fact.

(c) Where, after duty counsel has explained his legal rights to an accused, the accused indicates that he wishes to plead guilty, counsel should apply the following suggested considerations:

(i) *If the charge is a comparatively minor one, e.g.* impaired driving, duty counsel should inform the accused as to the consequences of the conviction, *e.g.* suspension of licence, the imposition of a fine, and should inform the accused of the provisions of the Criminal Code that require the imposition of a prison sentence in the event that the offence is proved to be a second offence.

If the accused after having been advised of the consequences of conviction informs duty counsel that he nevertheless wishes to plead guilty, duty counsel should elicit enough information as to the circumstances to enable duty counsel to make sure that the offence has in fact been committed. Where possible an effort should be made to get the facts from the police or Crown Attorney sufficient to confirm this. This latter step may not be feasible in large cities like Toronto due to the volume of cases passing through the magistrates' courts.

Where the accused wishes to enter a plea of guilty after being advised as above outlined, and after duty counsel has satisfied himself that the plea of guilty is a proper one in the circumstances, the accused should enter his own plea and duty counsel should then speak to sentence.

If duty counsel in the course of endeavouring to satisfy himself as to whether a plea of guilty is a proper plea becomes aware of

circumstances that indicate that a plea of guilty is not a proper plea, he should, of course, advise the accused to that effect and assist him to obtain a Legal Aid Certificate so that he may be defended.

The purpose of following the above procedure is not to discourage or inhibit pleas of guilty, where it is proper that a plea of guilty should be entered, with the inevitable result that the work of the courts will be increased, but to make sure that no person represented by duty counsel will ever be able to say that he was induced to plead guilty by improper advice, or that he pleaded guilty without understanding the elements of the offence to which he pleaded guilty, or without advice as to the consequences of the conviction.

(ii) *If the offence is a serious one, e.g.* armed robbery, the giving of advice with respect to a plea of guilty places an even heavier responsibility on counsel. Counsel must always make sure that the accused understands the elements of the offence with which he is charged and that the facts establish the commission of the offence and not some lesser charge such as attempt or an assault. Even if it is established that a plea of guilty is a proper plea, it will usually require more time than duty counsel has available to investigate the background of the accused and bring to the attention of the court matters which the court should take into consideration in imposing sentence and which might move the court to leniency.

These considerations are especially applicable to duty counsel in such centres as Toronto. In less densely populated areas where court dockets are not as crowded, the problem of making a proper investigation within the time available to duty counsel may not be so acute. The essential principle, however, is the same; namely, that accused should not plead guilty with the concurrence of duty counsel in a serious case where there has been no adequate investigation to ensure that the plea of guilty is proper and that all mitigating circumstances have been brought to the attention of the court.

Where an accused, charged with a serious offence, informs duty counsel after being advised with respect to the elements of the offence and the consequences of conviction that he nevertheless desires to plead guilty, if the accused wishes legal aid, duty counsel, if he does not have the time or the facilities available to make the necessary investigation, should recommend that the case be adjourned so that the accused may be represented by a solicitor under a Legal Aid Certificate who will be in a position to make the kind of investigation that a responsible counsel acting for a private client would make in such circumstances. The same principles should guide duty counsel where the accused asks duty counsel for his advice as to whether he should plead guilty. Counsel should not make a recommendation to

plead guilty unless he is in possession of the relevant facts which justify such a plea.

It is not the intention of this memorandum to suggest that an inflexible procedure should always be followed. Much will depend on the circumstances surrounding each case and the relative sophistication or otherwise of the accused. The duty counsel must, of course, exercise his own judgment. When in doubt he should ask the area director or senior duty counsel for advice. We must not unnecessarily delay or prolong court proceedings by virtue of the Legal Aid Plan. At the same time, we must guard against possible miscarriages of justice. In the final analysis this can best be accomplished by duty counsel making the same kind of decisions and exercising the same kind of judgment that they exercise in their ordinary practice.

APPENDIX 2

CORRESPONDENCE BETWEEN MR. MICHAEL ZANDER AND MR. ELYSTAN MORGAN

1. *Addressed from the Home Office, dated January 12, 1970*

Dear Mr. Zander, We have been considering your article in the Criminal Law Review for last month, summarising the results of a study of legal representation in some London criminal courts, copies of which you sent to the Home Secretary and the Lord Chancellor. . . . You suggest that there should be a standing committee to supervise the criminal legal aid scheme, and you no doubt have in mind that there is already a committee which advises the Lord Chancellor on the operation of the civil scheme. The Home Secretary is, however, in quite a different position in relation to the criminal scheme from the Lord Chancellor's position in relation to the civil scheme. The Legal Aid and Advice Act 1949 makes the Law Society responsible for securing that legal aid and advice are available in civil cases in accordance with a scheme which has to be approved by the Lord Chancellor, and the Act provides for the Law Society to exercise its functions under the general guidance of the Lord Chancellor. In the case of criminal proceedings, on the other hand, the courts administer the legal aid schemes; they have a wide degree of discretion and are not subject by statute to guidance from the Home Secretary. We do not therefore feel that it would be appropriate to establish an advisory committee for legal aid in criminal cases. Yours sincerely, Elystan Morgan (signed).

2. *Dated January 14, 1970*

Dear Mr. Elystan Morgan, Thank you for your letter of January 12th.

I would like to come back at you on your last point: I am of course aware of the difference between the constitutional position of the Home Secretary vis-à-vis the courts and the Lord Chancellor vis-à-vis the Law Society. With respect however I cannot see how this can make it improper for the Home Secretary to have an advisory committee on criminal legal aid.

The Home Secretary is after all responsible to supervise the criminal legal aid scheme and to make recommendations in the form of proposals for legislation to Parliament if and when he thinks fit. He is also in a position when he thinks fit to issue circulars to magistrates.

In these circumstances it can hardly be constitutionally improper for the Home Secretary to have a committee to help him reach an informed view on how the criminal legal aid scheme is functioning. Indeed, the First and Second Working Parties on Criminal Legal Aid and the Widgery Committee itself were merely expressions of the necessity for such periodic investigations. The Working Parties which reported in 1962 and 1963 were set up by the Home Secretary and the Lord Chancellor jointly and the Widgery Committee was set up by the Home Secretary alone.

The advantage of a permanent advisory committee over ad hoc bodies is that it develops an expertise and a continuing involvement with the field which an ad hoc body cannot match. Also, the annual report produced by such a committee is an invaluable source of public information and of views which can then be publicly discussed. One of the least satisfactory aspects of the present situation is the deplorable lack of relevant information about the working of the scheme and of informed opinion which can provide the basis of discussion.

Moreover, the reports of such an advisory committee could be extremely valuable to the magistrates to give them some idea of how the scheme is operating throughout the country. At present each court is largely dependent on its own practice for an idea as to how it is supposed to handle applications from criminal legal aid. It is precisely because Home Secretaries are understandably reluctant to issue directives to magistrates that the reports of the advisory committee could play so useful a role in informing magistrates of the over-all situation and in communicating comments and criticisms of the practice of some courts. By the same token, such reports would assist the Home Secretary by passing on information to magistrates which he would feel reluctant to convey—especially where such information took the form of criticisms of some courts.

I hope that these considerations may persuade you to reconsider the question of such a committee. In my view it could make an extremely useful contribution to the improvement of the scheme and to the reduction of some of the less desirable attitudes and practices of some courts. It could do so without antagonising or identifying the courts concerned. It could provide basic and much needed information and could assist all those concerned with the criminal legal aid system. Yours sincerely, Michael Zander.

3. *Addressed from the Home Office, dated February 27, 1970*

Dear Mr. Zander, Thank you for your letter of 14th January about the possibility of setting up an advisory committee on legal aid

in criminal proceedings. I am sorry that I have not been able to reply to you before now.

In the last paragraph of my letter of 12th January I set out the reasons why we do not consider that it would be appropriate to have such a Committee. I had not intended to imply that it would be "improper" for the Home Secretary to appoint an advisory committee at all. I accept of course that the Home Secretary has a general responsibility for the law relating to legal aid in criminal cases. I would suggest, however, that he is not responsible for "supervising" the criminal legal aid scheme in the sense in which the Lord Chancellor might be said to supervise the civil scheme, in view of the duty placed upon him by section 8 of the Legal Aid and Advice Act 1949. The Home Secretary's responsibility in relation to legal aid is a more general one and is concerned with the adequacy of the provisions of the law. The Home Secretary is also, as you say, in a position to issue circulars to the courts and he exercises the powers given to him by sections 78 and 83 of the Criminal Justice Act 1967 to make regulations on procedural matters, but the regulations are not concerned with the exercise by the courts of their discretion, under section 75, to grant legal aid when they consider it desirable to do so in the interests of justice.

If I am right in thinking that you are primarily concerned with the way in which the courts have been exercising their discretion in this matter, I doubt whether an advisory committee could properly help very much. Apart from the difficulties with which such a committee would be faced in compiling a report, since it would not, like the Lord Chancellor's Advisory Committee on the civil scheme, have the benefit of a report by the Law Society on which it could comment), responsibility for the giving of guidance to the courts on the exercise of their discretion to grant or refuse legal aid properly belongs to the judiciary rather than to the Home Secretary or to any committee that might be set up to advise him.

This is not to say that we do not recognise that there is scope for improvement in the legal aid arrangements in criminal cases. As I said in my letter of 12th January, the Home Office is prepared to consider issuing further guidance to the courts on certain procedural matters. We are also in process of reviewing the regulations made in 1968, to see what improvements are needed. Moreover, when the new organisation for the higher courts recommended by the Royal Commission on Assizes and Quarter Sessions is established I think we may expect some changes in the administrative arrangements for dealing with legal aid applications. Yours sincerely, Elystan Morgan (signed).

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