

## EXECUTIVE SUMMARY

1. This report makes recommendations for changes to criminal practice and procedure which will facilitate the more effective prosecution of those who have committed multiple offences. The “effective prosecution of multiple offending” project emerged from our work in *Legislating the Criminal Code: Fraud and Deception* (Consultation Paper No 155), consultation issues 10 and 11.<sup>1</sup>
2. The problems which we have sought to address here arise in cases where the offending conduct of the defendant is repeated many times – too many individual offences to be accommodated in a single trial.<sup>2</sup> Formerly, such offending was dealt with by way of an indictment charging offences which were regarded as specimens of a wider range of offending. This pragmatic arrangement was thrown into disarray by the decision of the Court of Appeal in *Kidd & ors.*<sup>3</sup> In that case Lord Bingham LCJ held that it offended a fundamental principle of sentencing for the defendant to be sentenced not only for the four specific offences of which he had been convicted after a trial, but also for others of which the four were specimen; offences of which the defendant had neither been convicted, nor to which he had pleaded guilty nor agreed to have taken into consideration.<sup>4</sup>
3. The logic and correctness in principle of this decision cannot be faulted and we do not seek to do so. The decision does, however, pose an intractable dilemma for prosecutors and the courts in cases such as multiple theft and multiple fraud. In essence it counterposes the inability of a court to deal with an indictment with hundreds of separate counts with the inability to sentence for the totality of offending in the absence of a decision on each instance of offending. The problem is an important one because the consequence of the impracticability of prosecuting the full extent of dishonest offending in such cases is that the vast majority of such offending will not be prosecuted and the offenders will escape appropriate sanction. We have been told that the practice of fraud squads faced with this problem is to charge merely a handful of offences, making no attempt to reflect the full criminality in any given case. Clearly this is not a desirable solution. From the judiciary, we have heard that the present law is found to be “pedantic and unworkable” and the senior judges whom we have consulted recognise that “very real inherent difficulties” exist.

<sup>1</sup> *Fraud* (2002) Law Com No 276, published in July 2002, dealt with most of the other issues raised in that Consultation Paper.

<sup>2</sup> At common law there are rules against the overloading of indictments. The courts recognise that too many counts in a trial cause great difficulties, *Novac* [1977] 65 Cr App R 107 at pp 118–19, *per* Bridge LJ, *Kellard* [1995] 2 Cr App R 134.

<sup>3</sup> [1998] 1 WLR 604. This case is also frequently referred to as *Canavan*.

<sup>4</sup> The outcome however was that the sentence remained unchanged. The court was not able to say that a sentence of 15 months’ imprisonment was manifestly excessive for just those four offences committed by a man who grossly abused his position of trust. There had been no guilty plea to mitigate the sentence.

4. Under the present system (where there is a limit to the number of separate counts, each containing a single offence, that can be managed within a jury trial) it is not possible to give full respect to each of the following two fundamental principles. To some degree, one is bound to yield to the other. The principles are:
  - (1) Defendants should only be sentenced for that which they have admitted, or which has been proved following a trial in which both sides can be examined on the evidence.
  - (2) It should be possible to sentence for the totality of an individual's offending. Defendants should not escape just punishment because the procedure cannot accommodate this.
5. The legal system should operate so as to reflect in full each of these fundamental principles. The constraints that together prevent full recognition being given to both of these principles are three-fold:
  - (1) the requirement that all issues that go to guilt must, if not admitted, be proved to a jury/magistrates;
  - (2) the strict limitations to the inclusion of more than one offence in any single charge/count;
  - (3) the limit to the number of separate counts or charges that can be managed within a trial.
6. It is perhaps not surprising that we have been unable to find any single solution to the complex problems faced. We are making three separate recommendations, each of which addresses one or more of these constraints:
  - (1) We recommend the extension of the ambit of the offence of Fraudulent Trading in section 458 of the Companies Act 1985, to the non-corporate fraudulent trader. This would allow an individual to be prosecuted in a single count for the *activity of* fraudulent trading, although that activity may be made up of a number of otherwise discrete offences.
  - (2) Where a defendant has been convicted in the Crown Court of a count citing conduct which under existing law may be regarded as a "continuous offence", we recommend the use of special verdicts as a means of better informing judges, for the purpose of sentencing, of the extent of offending of which the jury is sure.
  - (3) Where there are allegations of repetitious offending which are not apt to be described as a continuous offence but which, prior to *Kidd*,<sup>5</sup> could have been dealt with by means of specimen counts we recommend a two stage trial procedure. The first stage of the trial will take place before judge and jury in the normal way, on an indictment containing specimen counts. In the event of conviction on one or more counts, the second stage of the trial may follow, in which the defendant would be tried by judge alone. The judge will, at that stage, determine questions of guilt in respect of any

<sup>5</sup> [1998] 1 WLR 604.

scheduled offences linked, at a pre-trial hearing, to a specimen count of which the defendant has been convicted.

7. The benefits of these recommendations are that
- (1) the prosecution will be able to prosecute individual fraudulent traders for the full extent of their offending even where there is no conspiracy nor any involvement of a company in the trading.
  - (2) the prosecution will be able to make greater use in the Crown Court of the method of charging ongoing offending in a single count, known at present as the “continuous offence”. Our recommendation for use of special verdicts where the indictment contains such a compound allegation would enable the trial judge to sentence with knowledge of the extent of guilt determined by the jury. The position of the judge would in this way be closer to that of the District Court judge in such cases, as demonstrated by the case of *Barton*.<sup>6</sup> The benefit to the defendant would be that the judge would discount for sentence any of the offences about which the jury was unable to agree his or her guilt.
  - (3) the two stage procedure would
    - (a) preserve jury trial in respect of core examples of the defendant’s criminality;
    - (b) ensure that the jury trial is manageable and comprehensible;
    - (c) ensure that defendants would not be able to take advantage of the practical limits of trial by jury so as to go unpunished for a significant part of their offending;
    - (d) result in defendants only being sentenced for offences which have been proved to a court after a trial;
    - (e) be likely to encourage guilty defendants, either on initial arraignment or after conviction of a number of specimen counts, to plead guilty to or to admit any linked offences of which they are also guilty.<sup>7</sup>
    - (f) allow full expression of each of the competing requirements of justice identified earlier, in that —
      - (i) the defendant would be given a fair hearing, with an opportunity to present a defence in relation to any or all of the alleged offences;
      - (ii) the Crown would be able to seek verdicts of the court that would enable the judge to sentence the defendant for the full extent of his or her offending.

<sup>6</sup> [2001] EWHC Admin 223.

<sup>7</sup> In contrast to the present situation, where there is little incentive for a defendant to plead guilty to the full extent of offending (see discussion at paras 3.11 – 3.14 below re *Evans* [2001] 1 Cr App R (S) 144).