REVIEW OF THE CRIMINAL JUSTICE SYSTEM ARISING FROM PUBLIC CONCERN AT RECENT DEVELOPMENTS

SUBMISSION BY THE DIRECTOR OF PUBLIC PROSECUTIONS

INTRODUCTION

1. I have been invited by the Joint Committee on Justice, Equality, Defence and Women's Rights to make a submission to the committee which intends to undertake "a review of the criminal justice system arising out of public concern at recent developments".

2. While the Committee's initiative in holding these hearings is one which I welcome, I have some concerns about appearing before the Committee which I have expressed in a letter dated 21 November 2003 to your Chairman. My letter is included as Appendix 1 to this submission.

3. Although the Committee has not defined the "recent developments" to which it refers, I take it the intention is to deal with the response of the criminal justice system to organised criminal gangs, particularly those associated with drug-trafficking. Attention was focused on this following the recent collapse of a particular trial in which six prosecution witnesses failed to give evidence in accordance with their statements.

The Role of the DPP

4. It is necessary when reading this submission for the Committee to be aware of the limitations of my role as Director of Public Prosecutions (DPP) in the criminal justice system. The DPP has no investigative function in relation to crime. Criminal investigation is a matter for the Garda Síochána. The Garda Síochána may ask the DPP for legal advice at the investigative stage, but in most cases the DPP's first involvement in a case is when a file is prepared by the Garda Síochána and sent to the DPP for a decision whether to prosecute. When the DPP decides to prosecute he is responsible for the subsequent prosecution of the case. The case is

conducted in court by solicitors employed by the DPP or working on contract to the State, and by counsel acting on the DPP's instructions.

The Broader Context: Society

5. Although this submission is confined to issues arising within my sphere of responsibility, that of criminal prosecution, it is important not to lose sight of the fact that these issues exist in a broader social context, which includes the problem of drug addiction in Ireland, the social and economic environment in which the drug gangs flourish, the effectiveness of programmes to keep young people out of trouble and to deal with young offenders, and the effect of the paramilitary culture of violence and the availability of weapons and expertise to organised criminal gangs from paramilitary groups.

The Broader Context: The Criminal Justice System

6. It is also necessary to consider current problems in the context of the criminal justice system as a whole. It is simply not the case that the entire criminal justice system is in crisis, although this is no reason to be complacent about the problems that we do face in tackling organised crime. Despite the large increase in the murder rate in recent years Ireland still has a lower crime rate than other developed Western societies, although the crime rate is high in particular locations. In the vast majority of cases brought to court, the trial system functions well. About 90% of indictable prosecutions end in a guilty plea, and of the remainder about half end in conviction and half with an acquittal, leaving an overall conviction rate of almost 95% (see Annual Report of the Director of Public Prosecutions 2001, Charts 10.7 and 108). In a recent speech Mr. Justice Carney of the High Court pointed out that acquittals in murder cases are extremely rare, and that in almost all "contested" murder trials the real issue is not the guilt or innocence of the accused but whether the crime was murder or manslaughter. This, of course, is not to deny that there is a significant number of murder cases where the Garda Síochána have insufficient evidence even to ask my Office to prosecute and where therefore no trial takes place.

7. It is important, therefore, to ensure that any changes that are made in the criminal justice system do not undermine the system insofar as it functions well. It is also

important that any changes are well-thought out, are sound in principle and respect the constitutional rights of accused persons to a fair trial as well as vindicating the rights of victims.

8. There are, however, a number of areas of criminal law which I believe should be reformed and where in my opinion the balance has shifted too far in favour of accused persons and where the people, society as a whole, are not treated on a basis of equality with the defence. Most of these areas relate to procedural issues which have not received as much attention from law reformers in recent years as has the substantive law. There has been considerable reform of the substantive criminal law over the last twenty years, much of it to implement the very comprehensive programme of reform proposed by successive Law Reform Commissions during that period. As a result, much of the criminal law, including the laws relating to theft, fraud, forgery, robbery, burglary, rape and other sexual offences, drug offences, public order offences, criminal damages and non-fatal offences against the person, are now contained in modern statutes. Some important gaps remain, notably homicide, contempt of court, and perjury, which are mainly governed by judge-made law common law. Procedural criminal law has not, however, been addressed in comparable detail in legislative reforms. The Fennelly Report does make some recommendations touching on procedural questions, but only insofar as they related to its principal task which was to examine the jurisdiction of the courts.

Getting the Evidence

9. The principal problem for the criminal justice system in responding to the drug gangs is that of gathering enough evidence to bring a successful prosecution. Where crimes are committed by organised gangs who are prepared to use extreme violence and have a history of doing so, civilian witnesses may feel under pressure not to testify. This is so whether a gang is organised for profit or exists to promote some political purpose.

10. The difficulty in getting witnesses to come forward poses a challenge to the investigator to see whether alternative methods of obtaining evidence can be used.

Such methods may include a greater reliance on forensic evidence and the use of covert surveillance not only to obtain intelligence but to obtain usable evidence. The extent to which it might be possible to further improve the ways in which evidence not dependent on civilian witnesses might be obtained in such cases is outside my area of competence but is one which the Committee might usefully discuss with the Garda Síochána.

PROPOSALS FOR REFORM

The possible use of the Special Criminal Court and methods similar to those used against terrorist crime

11. A number of commentators have argued for the use of the Special Criminal Court and the introduction of measures analogous to those used against terrorism in dealing with organised criminal gangs. Such proposals raise important questions of policy, which would be for the Government, the Minister for Justice, Equality & Law Reform, and for the Oireachtas, to address. It is not my intention to intervene in such a policy debate but to draw attention to technical questions which would arise.

12. As the law stands, I have the power, under section 46 of the Offences Against the State Act, 1939, to have a trial sent to the Special Criminal Court whenever I am of opinion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to that particular trial. Given the place of jury trial in the constitutional scheme it is a power which I believe I should not lightly use, but nevertheless one which I have a duty to exercise if I form the appropriate opinion. The power has been used on a small number of occasions in recent years in relation to offences which were carried out by organised criminal gangs rather than terrorists.

13. There is a discussion on the possible use of the Special Criminal Court to deal with organised crime in the Report of the Hederman Committee to review the Offences Against the State Acts, 1939-1998 and related matters at pp 224-7. There is no doubt that a widespread use of the Special Criminal Court to try cases involving organised crime would amount to a weakening of the jury system and would tend to

establish the Special Criminal Court as a permanent institution of the State. It would also run counter to the intention to phase out the use of the Special Criminal Court which was a feature of the Belfast Agreement.

14. The sending of organised crime cases to the Special Criminal Court would avoid jury intimidation where this is or is likely to be a problem, but sending a case to the Special Criminal Court will not supply evidence where this is lacking. Nor is such a reference likely to avoid the possibility of witnesses refusing to give evidence because of fear or intimidation.

15. The strategy which has been developed over the years to deal with terrorist crime involves more than merely the use of non-jury courts, but also allows for the use of more extensive powers of detention and special evidence-gathering powers in relation to specific offences. Such powers have the potential to reduce the reliance on civilian evidence. The powers in question include the use of opinion evidence of Chief Superintendents in relation to charges of membership of unlawful organisations and the power to draw certain inferences from silence contained in the Offences Against the State (Amendment) Act, 1998, where certain offences are being prosecuted. They also include the power to detain suspects for up to 72 hours.

16. If a package of legal measures, similar to those which at present apply to terrorism, was applied to organised crime, that package might include, as well as reference of cases to be tried in the non-jury Special Criminal Court, some or all of the following: -

    (1) extended powers of arrest and detention
    (2) new offences such as membership of an organised criminal gang or participation in organised crime, and directing the activities of such a gang or of organised crime,
    (3) the possibility of providing for opinion evidence of a senior Garda officer in relation to such offences, and
    (4) increasing the power to draw inferences from silence in certain cases.

17. To adopt this full package of measures in conjunction with an increased use of non-jury courts would amount to a major change in our criminal justice system. Clearly, there comes a point at which society may have to take drastic steps to defend itself, but a political judgment has to be made whether we have reached that point or whether there are still effective steps which can be taken to deal with the problem without major alterations to the system as a whole. That judgment is in the first instance one for the Minister for Justice, Equality and Law Reform to make. I understand the Minister has rejected the option of permitting Garda opinion evidence in this area. There is no doubt that admitting Garda opinion evidence as to the commission of a crime would represent a far-reaching shift in how the system works and a huge extension in police powers. Its use has been accepted in relation to terrorist crime but arguably the threat from terrorism is of a different order to that posed by organised crime. It is likely that such a move would be scrutinised very carefully both by the Irish Courts and the European Court of Human Rights.

18. With regard to the suggested offence of membership of, or participation in the activities of, an organised criminal gang, there are obvious technical difficulties. Firstly, in principle any crime committed by more than one person is an organised crime, although the degree of organisation may be very slight. A question might be raised as to whether criminal gangs have the necessary characteristics to be regarded as "organisations" – they are, for example, unlikely to have formal rules or procedures and may be somewhat amorphous bodies. They may not even have a name, other than the name of their leader, and may be difficult to define or describe. They may come together only for one crime. The same crime may involve more than one gang. They will generally have no objective other than to make money. But arguably even without these characteristics they are still organisations of a type. It is difficult to see that an activity such as the importation, distribution and sale of drugs can be carried out without the existence of a body which can properly be described as an organisation, even though it might be difficult to describe it in a legal instrument proscribing it. Undoubtedly there is a huge variety in the degree of organisation of criminal gangs, ranging from the high degree of organisation involved in carrying complex crimes to the more transient and *ad hoc* arrangements at the other end of the scale.

Powers of Detention

19. There are a number of legal issues arising in relation to powers of detention. At present there are three main provisions concerning Garda powers of detention which appear to be relevant:

    (a) section 4 of the Criminal Justice Act, 1984, as amended, which provides for six hours detention extendable by a further six hours in the case of all offences which under or by virtue of any enactment are punishable by five years imprisonment,

    (b) the provisions relating to drug trafficking offences contained in the Criminal Justice (Drug Trafficking) Act, 1996, which are somewhat complex but permit detention for up to seven days in some circumstances and

    (c) section 30 of the Offences Against the State Act which permits detention for up to 72 hours where the person detained is suspected of committing an offence under that Act or a scheduled offence. Scheduled offences at present include explosives and firearms offences. Murder as such is not included but murder involving the use of a firearm or explosives is covered, and it is not necessary that the offence be related to terrorism.

20. While Garda powers of detention are primarily of concern to the investigator rather than the prosecutor, it is worth pointing out that at present there are a number of serious offences where the Garda Síochána have no power to arrest and detain on suspicion. There are many offences where the maximum penalty is greater than five years, but where there is no power of arrest because the penalty is fixed under common law and not by virtue of any enactment. These include most offences of conspiracy, and the offence of attempting to pervert the course of justice. I understand the Department of Justice, Equality and Law Reform intend to address this issue in the near future. It also seems anomalous that a murder committed by shooting or explosion can lead to detention under section 30 of the Offences Against the State Act, 1939, while one committed by stabbing or some other method of killing cannot.

Admissibility of Statements – the Canadian Rule

21. A suggestion has been made that Ireland should change its rule in relation to the admissibility of statements which are made to the Garda Síochána but subsequently retracted at trial. The model adopted in Canada has been proposed.

22. Although I think that this might be a desirable reform, and one I would support, I think it is important to emphasise that it would be likely to be of value in only a limited class of cases, those where a witness makes a statement and subsequently retracts it. It would do nothing to address the problem of the witness who refuses to make a statement at all, or who will deal with the police only on the basis of confidentiality, that is, who will make a statement to the police for their information only but not for use in court proceedings. However, the fact that the number of cases where it would be useful is small is not a reason not to adopt it. As the question is a somewhat technical one I have discussed the Canadian rule in more detail in Appendix 2.

PROCEDURAL ISSUES

Delay

23. In my view delay in getting cases to trial is a major problem. Apart from the obvious unfairness both to victims and the accused which long delays in obtaining trials can cause, delay can have other undesirable consequences. The longer it takes to get cases to trial the more time there is for those who seek to pervert the course of justice to get at witnesses and the harder it is to challenge witness claims not to remember events, and, indeed, the more likely it is that witnesses' memories will genuinely fail. Where a trial is long delayed, it is harder for the prosecution to resist a bail application. The present delays in the Central Criminal Court, which essentially tries murder and rape cases, are in my view unacceptable. There is at present a waiting list of 12 months for a date after a case is set down for trial. Not all cases are then reached and those not reached then go to the back of the queue again. There are cases which have been in the list for 4 or 5 years.

24. This situation persists despite the best efforts of the judges assigned to the Central Criminal Court to improve things. Six High Court judges recently sat during the normal court vacation to help clear the backlog. However the delays are still substantial. The number of cases listed in the Central Criminal Court at the beginning of this term in October 2003 was 206. The number of cases heard last year during the regular legal sittings was 116, and including the September sittings, was 139. This suggests that there will be many cases at present listed which will not get a hearing within the next 12 months. It should also be recalled that it may be some considerable time after an offence was committed when a case first appears in the list.

25. These delays have the further result that professional criminals awaiting trial may have an opportunity to commit further offences in the interim. The liberality with which bail can sometimes be granted leaves them plenty of opportunity to do so.

26. The deployment of three additional judges to the Central Criminal Court would immediately reduce the average waiting time substantially and would clear the backlog altogether within a couple of years. Whether this could be done from existing resources or would require the appointment of additional High Court judges is not for me to say, but even if the latter is the case a cost/benefit analysis would have to take into account the cost to society caused by the disrepute into which the criminal justice system is led by reason of delay. Indeed, the present delays are a source of unnecessary financial expense to the State since counsel have to be paid for cases listed which do not get on, and this in an average year could amount to €250,000 in fees to the prosecution and in payments to the defence on legal aid (estimate by the Acting Chief Prosecution Solicitor).

27. The Central Criminal Court is the criminal court with the most serious delays. Generally the Circuit Criminal Court is reasonably up-to-date although there are difficulties in some areas. There have also been problems with the Court of Criminal Appeal. Indeed in one case where I brought an application to review a sentence on grounds of undue leniency involving a short sentence the Court held that the sentence had been unduly lenient but declined to impose a longer one since

the convicted person had already been released and the Court held it would be an unfair procedure to return him to custody. At the time of writing the judges are making a strong effort to clear the Court of Criminal Appeal backlog and there have been additional sittings of this court taking place recently.

Court Arrangements

28. There is an urgent need to attend to the physical arrangements in criminal courts so as to ensure that state witnesses cannot easily be intimidated by accused persons and their friends. The ideal would be a set up similar to those to be found in the new Laganside Courts in Belfast. Prosecution witnesses have rooms in which they can wait before they can give their evidence. They enter the courtroom by a different entrance from the accused and sit in a place well out of the gaze of the accused and their friends. The situation is almost exactly the opposite in the Four Courts in Dublin. The layout of the courts in Dublin presents no obstacle to the intimidation of witnesses by any person who wished to do this. Indeed it is not an overstatement to say that the layout facilitates it. It is to be hoped that the Courts Service plan to rebuild a new criminal court complex will be advanced and will be built to a standard equivalent to the Laganside Court.

Prosecution Rights of Appeal

29. Both I and my predecessor have spoken on many occasions about this. There is no equality of arms in the Irish criminal justice system between the prosecution and the defence in relation to rights of appeal. The defence have a full right of appeal against conviction. In the course of this they can raise any question which they claim has been wrongly decided against them, including adverse rulings of law, decisions to admit evidence, wrong charges to the jury, and the decision to leave the case to the jury. If successful, a defence appeal may lead to a re-trial or an acquittal. By contrast the prosecution have a right of appeal in only one circumstance, apart from the right to seek a review of unduly lenient sentences, and that is where on a question of law the judge directs a jury to find an accused not guilty, (Section 34, Criminal Procedure Act, 1967). Even there, the appeal is “without prejudice”. In other words, the verdict in favour of the accused stands, but the appeal court may find that the trial judge’s ruling of law was wrong.

30. The prosecution has no right of appeal, not even a “without prejudice” appeal, in the following cases:

    (a) a ruling by a trial judge to exclude prosecution evidence, even where the ruling leads to the collapse of the trial,
    (b) a direction to the jury on a question of law where the case is left to the jury to decide, even though that direction may effectively undermine the prosecution case,
    (c) a ruling by a trial judge withdrawing the case from the jury on a question of fact.

31. Not only can such rulings not be appealed against, but they stand effectively as unchallengeable precedents which govern how other cases are dealt with.

32. In May 2002 the Law Reform Commission published a Working Paper on the question of prosecution appeals. However, I believe the question is now an urgent one and the forthcoming incorporation of the European Convention on Human Rights at the end of this year, in the absence of prosecution rights of appeal, will put the prosecution at a significant disadvantage. I understand the Minister for Justice, Equality and Law Reform intends to bring forward proposals in relation to the prosecution appeals in the near future.

33. The Fennelly Committee also considered the question of Appeals by the prosecution (Fennelly Report, paragraphs 671 – 693). Their conclusions (at paragraphs 691-693) were as follows:

> The most important point of distinction, in the view of the Law Commission, is that between with prejudice and without prejudice appeals. An appeal which put the acquittal at risk would encroach on the rule against double jeopardy. The Working Group is aware of discussion and even proposals in England for the creation of exceptions to this historic rule. It is clear from the various judgments of the Supreme Court, of which the quotation from Henchy J. in *Crinnion* is but one example, that any such change would be a major one. In any event, that is a

question of substantive law which falls outside the Terms of Reference of the Working Group. For this reason firstly, the Working Group confines its consideration to the without prejudice model. There is no significant body of opinion to the effect that our courts are unduly favourable to the defence so as to create an urgent need for change that would encroach on traditional freedoms.

In fact, there already exists in the form of section 34 of the Act of 1967 a substantive, if limited, form of effective appeal to cover the situation of terminating rulings. The limitation is simply that the prosecution has no means of appealing or referring important points of law determined other than in the form of a directed verdict.

Nonetheless, it is unsatisfactory that there is no machinery at all for the prosecution to contest what it conceives to be an incorrect ruling on a point of law which arises in the course of a trial. The ways in which this can occur are many: rulings on the admissibility of evidence; rulings on the interpretation of police powers of detention; search or questioning; custody rules; bail; rulings on the constitutionality of police behaviour; rulings on the ingredients of an offence; and rulings in the judge's charge to the jury. In reality, many more such rulings on points of law occur in the course of a trial than on the direction of a verdict.

The Working Group is satisfied that there is a compelling case for extending the range of situations in which the prosecution can have a point decided at a higher level. In the first instance, this could be achieved by extending the range of points of law covered by section 34 of the Act of 1067. Except for the fact that it would be without prejudice to an acquitted person, the procedure would be similar to that under section 2 of the *Summary Jurisdiction Act, 1857*.

If this procedure were to be extended, it would be desirable that the acquitted person have the right to have counsel appointed to present argument on his behalf, which is the case under the English Attorney General's Reference. Furthermore, his anonymity would also have to be maintained. This could be done, perhaps, by denoting the case by number, similar to the English system.

34. It may be objected that the question of prosecution appeals is not related to the current problems with which the Committee is concerned. To that I would reply,

however, that apart from the injustices caused in particular cases, the absence of a system of prosecution appeals is strangling the development of criminal jurisprudence which can respond only to an agenda set by defendants. The development in the law relating to the admissibility of statements in Canada was judge-made law which could take place because the prosecution could challenge long-established common law in an appellate court. This could not easily happen here.

Juries

35. There are many issues concerning juries which should be addressed if jury trial is to remain our preferred method of dealing with serious crime. The present Juries Act dates from 1976, before the information era, and its reform is overdue. Questions which need to be addressed include the following:-

    (1) How to protect jurors from intimidation. Should there be procedures to allow jurors to be anonymous? If so when and how should these be invoked? Should jurors addresses be confidential?

    (2) Eligibility for jury service. Large classes of citizens are either ineligible or excusable from jury service. I query the rationale for much of this. Why should clergy, dentists, veterinary surgeons or members of the Council of State, be excusable as of right? Why, even, should lawyers not engaged in criminal practice be excluded? The present system excludes many people who have particular professional qualifications or occupations. What one is left with is not in fact a random group of 12 citizens, but a group which is likely to contain fewer middle class or employed persons than the population as a whole. It may be noted that the Auld Report in England recently recommended broadening the range of persons eligible for jury service.

    (3) On the other hand, the exclusions from jury service applying to convicted persons are quite limited. They exclude persons who have ever in any part of Ireland been sentenced to more than five years, or who within the last ten years have served any part of a sentence of imprisonment where the sentence was at least three months. They do not, therefore, exclude persons who have committed offences in other jurisdictions, no matter

how serious, or who have committed serious offences for which a suspended sentence was imposed.

(4) In addition to this, the system of challenges without showing cause enables defendants to overturn whatever degree of randomness may have survived the original exclusions. In cases where there are multiple defendants the defence can have far more challenges than the prosecution. However, some limited power to challenge without showing cause needs to be retained since there can be good reasons to challenge a juror which are not capable of proof in court (for example, Garda knowledge from a confidential source that a potential juror is involved in crime).

(5) The present system for summoning jurors is archaic. The system of requiring upwards of one hundred potential jurors to attend in person at court to be selected is unnecessary and time-wasting. Modern technology could enable citizens to be selected at random using electronic means, and questions of challenges should be capable of being disposed of without summoning persons to court unnecessarily. Why should not challenges be based on pre-supplied lists? Why should a juror be challenged because one side or other does not like his or her appearance?

(6) A problem has arisen in a number of cases recently where jurors have been unable to continue to deal with a case. At present the number may not fall below 10 or the trial has to be abandoned. Some thoughts might be given to this, either by reducing this minimum number or increasing the total number of jurors while leaving the minimum the same for this as in some respects the law relating to contempt is uncertain.

(7) The law relating to interference with a jury, apart from section 41 of the Criminal Justice Act, 1999, which deals with intimidation of jurors, is largely based on the common law rules concerning contempt of court and attempts to pervert the course of justice. It would be desirable to provide a statutory basis.

36. I think it would be worthwhile to appoint a small expert group to report on possible reform of the Juries Act within a short time frame.

Pre-trial hearings

37. There is an urgent need to introduce a pre-trial procedure which would determine certain issues in advance of the jury trial subject, of course, to the right of parties to raise them again in front of the jury where circumstances warrant this. These issues would be determined at what is usually described in the United Kingdom as a "plea and directions" hearing.

38. The most compelling reason for adopting a system to determine legal issues prior to trial is the undoubted effect it would have on a juror's experience during a trial. Jurors, who are carrying out a public service, are frequently inconvenienced for days, even weeks, on end while legal issues such as those regarding admissibility of evidence. are thrashed out in their absence. Whether these issues should be determined by the trial judge or by another judge whose determination is binding is a matter for consideration. However, the enormous savings which would result from this reform cannot be discounted.

39. The Fennelly Committee's Report has recommended the introduction of such hearings (Fennelly Report paragraphs 81-91). Their recommendation was that preliminary hearings be introduced with the following functions (which are not intended to be exhaustive) (see paragraph 85),

- to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations;
- to identify areas in which evidence should be agreed or admitted under the Criminal Justice Act, 1984, sections 21 and 22 including admission of expert reports;
- to identify any evidence which might require to be taken by video-link and to make arrangements for the taking of such evidence;
- to ascertain any other arrangements which may have to be made regarding information technology, use of interpreters or other facilities;

- to enable the determination of those types of issue of admissibility of evidence which by their nature are capable of being dealt with prior to trial;
- to receive and deal with a plea or fix a hearing for sentencing;
- to identify any issue of insanity or fitness to plead which may arise; and
- to enable the court to establish the likely length of the trial. (paragraph 776).

40. The principal value of such pre-trial hearings would be to make the trial more coherent and comprehensible to the jury and to facilitate the more rapid and efficient progress of trials. It would not be necessary to send the jury out of court for what can be lengthy periods while an issue such as the admissibility of evidence is dealt with. In some cases the early determination of such issues would also serve to shorten proceedings either because the prosecution would be forced to abandon the case or the accused might decide to enter a guilty plea. The pre-trial hearings would not require the use of a courtroom with facilities for a jury.

41. I was represented on the Fennelly Committee by the Chief Prosecution Solicitor, Ms Claire Loftus. While I have broadly supported the recommendations of the Fennelly Report a dissenting statement made by Ms. Loftus on my behalf, (Report pp 224-6) while welcoming the recognition of the Report that a system of pre-trial procedures was vital and long overdue, criticised the Fennelly proposals as unduly timid in two respects
    (1) in their failure to propose the imposition of any disclosure requirements on the defence
    (2) in their failure to propose any sanction on the defence for non-compliance with their provisions which would thereby be left on a voluntary basis.

42. The dissenting statement suggested that this matter could be usefully the subject of a further and more detailed study by a small working-group appointed by the Minister.

43. A copy of the Chief Prosecution Solicitor's dissenting statement is reproduced as Appendix 3. (pp 224-7)

Composition of the Court of Criminal Appeal

44. The Court of Criminal Appeal as it stands is an *ad hoc* court. It consists of three judges, one drawn from the Supreme Court and two from the High Court. The judges are selected in rotation. The effect of this is that the case-law of the Court is not always consistent. I am strongly of the view that the development of criminal jurisprudence would be better served by the appointment, at any given time, of three judges from the Supreme or High Court to sit in the Court of Criminal Appeal on a more long-term basis. The judges appointed would, of course, continue to carry out their other duties since the case-load of the Court of Criminal Appeal would not occupy them full-time. It is suggested that ordinarily a judge should be appointed for a period of at least three years.

45. The Fennelly Report has recommended that the Court of Criminal Appeal should consist of three judges drawn from a cadre of two Supreme Court and six High Court judges (Report, Paras 68 and 639). This recommendation, if adopted, would be a substantial improvement on the current arrangements, although I believe a greater degree of permanence would be preferable.

Sentencing Guidelines

46. There has been a marked reluctance by the Irish appellate courts to set out the principles which should guide trial judges in deciding on sentencing. This reluctance is, I believe, partly a consequence of the *ad hoc* nature of the Court of Criminal Appeal. The Fennelly Report has recommended that the entire issue of sentencing and guidelines for sentencing warrants independent study. I fully endorse this recommendation (Report, Paras 74 and 670).

Other Fennelly Report Recommendations relating to criminal procedure

47. I fully support the other recommendations of the Fennelly Report relating to the Criminal Trial Process: see Report paragraphs 79-93, and in particular paragraphs 79 (period for Service of Book of Evidence), 80 (Taking of Depositions), 81 (Evidence by Video-Link), 92 (Electronic Recording of Interviews), and 93 (Rules of Criminal Procedure).