should be an exempt disclosure, subject to the need to safeguard any information that may be disclosed. Additionally, the Commission provisionally proposes that there ought to be defence of prior publication where the defendant proves that the information in question was already lawfully in the public domain and widely disseminated to the public.
Finally, the Commission welcomes views on whether the categories of information protected by the 1989 Act ought to be more narrowly drawn. Given the conclusion of the Franks Committee that "exceptionally grave injury to the economy qualifies for the protection of criminal sanctions", the Commission also asks whether sensitive information relating to the economy insofar as it relates to national security ought to be included as a distinct category.

Miscellaneous unauthorised disclosure offences
The review has also considered the wider legislative landscape of unauthorised disclosure offences to assess the extent to which these offences form a rational scheme for the protection of information. The Commission provisionally concludes that there is a lack of uniformity as to the type of conduct that the offences criminalise, their *mens rea*, the defences available, as well as the maximum sentences. In light of these inconsistencies, the Commission asks whether a future full review of these miscellaneous unauthorised disclosure offences ought to be undertaken.

Procedural matters relating to investigation and trial
At the trial itself the principle of open justice is vital. The Commission proposes that the power to exclude the public that is contained in s.8(4) of the Official Secrets Act 1920 be narrowed to a strict necessity test: a hearing could only be held *in camera* if necessary to ensure that national safety - which is the term used in the legislation - is not prejudiced. The Commission further proposes that the guidance on the power to undertake authorised jury checks be amended so that such checks must be brought to the attention of the defence representatives if they are undertaken.
Outside the specific sphere of the Official Secrets Acts, the Law Commission invites views on whether a separate review ought to be undertaken to evaluate the extent to which the current mechanisms strike an appropriate balance between the right to a fair trial and the need to safeguard sensitive material in criminal proceedings.

Freedom of expression and the introduction of a public interest defence
Given the importance of ensuring that any proposals for reform are compatible with the ECHR and the intensity of the debate surrounding the introduction of a public interest defence, separate chapters have been devoted to each issue. Following the House of Lords' decision in *Shayler*, and the absence of Strasbourg jurisprudence which holds otherwise, the Commission provisionally concludes that compliance with Art.10 of the ECHR does not mandate a statutory public interest defence. The Law Commission's analysis of the relevant case law demonstrates that Art.10 compliance requires the existence of a robust process that enables concerns to be raised as a viable alternative to making a public disclosure. On the basis of that ECHR position, the Commission provisionally concludes that the public interest would be best served by the introduction of a direct reporting mechanism to an independent, external statutory commissioner who holds or has held high judicial office and who has statutory powers to investigate concerns, oblige departments to comply, and report findings. In reaching this proposal, the Commission was influenced by the views of the organisations Liberty and Article 19 that "relying on whistleblowing to expose wrongdoing is unsatisfactory and a poor substitute for properly effective structures of accountability, both internal and external".[5]

Conclusion
The present review is the first occasion that the Official Secrets Acts regime in its entirety has been subject to sustained, holistic, independent scrutiny. Although the consultation formally closed on 3 May, the Commission will consider responses after the deadline.

5 Liberty and Article 19, *Secrets, Spies and Whistleblowers: Freedom of Expression in the UK* (2000), para.7.3.

Are we doing enough to ensure juries understand expert evidence and judicial directions?

By Joe Stone QC[1]

Recent Research
In a recent survey some 60% of experts thought that juries were *not* equipped to understand technical expert evidence. The findings are contained in the 2016 national annual expert witness survey carried out by Bond Solon, a leading expert witness training company. Approximately 744 experts were consulted in diverse fields covering hundreds of specialisms. Bond Solon's conclusions were that:

> "... this could be due to experts not explaining things properly or clearly enough or because the issue is so complex ordinary citizens cannot be expected to understand. If the former, the experts may need further training and perhaps judges should allow different types of evidence eg/ videos or demonstration aids".[2]

1 Doughty Street Chambers.

2 Bond Solon, *Annual Expert Witness Survey Report 2016 – First Joint Annual Expert Witness Survey in collaboration with The Times*, 16 December 2016.

Relevant Background - Juror Comprehension of Evidence/Directions

Jurors' ability to understand legal directions is a crucial element in the proper functioning of the jury decision-making process and concerns about jurors' inability to understand complex evidence and follow judicial directions are not new. In a study of 7,000 jurors in 1993 Michael Zander found that almost all jurors felt they had little difficulty understanding judges legal directions[3]. But there had been no research examining jurors' *actual* comprehension of judicial directions. In 2007 Lord Phillips (then then Lord Chief Justice) publicly called for legal directions to juries to be simplified[4]. He also suggested that it might be time to reconsider proposals made by Lord Justice Auld for restructuring the trials to aid comprehension[5]. Lord Justice Auld, it will be recalled, recommended that at the start of the trial the judge should give the jury a summary of the case and the questions they will have to decide, supported by a written *aide memoire*. After the evidence, the judge would no longer direct the jury on the law but would provide the jury with written factual questions the answers to which would lead to a verdict of guilty or not guilty.

A later Lord Chief Justice, Lord Judge, has also suggested that courts in future might need to present more information visually instead of orally to juries to reflect everyday advances in information technology[6].

Whilst there had been studies in other jurisdictions examining how certain tools or procedures could aid juror comprehension[7], until 2010 there had been no similar research in the UK. Then in 2010 the Ministry of Justice commissioned a paper - *Are Juries Fair* by Professor Cheryl Thomas - a member of the Centre for Empirical Legal studies in the Faculty of Laws, University College, London[8]. This study inter alia involved "an initial exploration of how well jurors actually understood judges oral instructions on the law and whether certain tools may improve comprehension"[9]. The research was detailed and involved case simulation studies at Nottingham, Winchester and Blackfriars (797 jurors). The conclusions were:

> "Most jurors believed they understood the judges' directions on the law. However, a substantial proportion of these jurors in fact did not fully understand the directions in legal terms used by the judge. A written summary of legal directions improved juror comprehension of the law... Such understanding is crucial to ensure that miscarriages of justice do not occur as a result of jury misunderstanding of legal instructions. Our study did not examine juror comprehension of complex or specialist evidence but these are issues of concern".[10]

In the light of the Bond Salon 2016 Expert Witness Survey this was a prescient observation.

A step in the right direction: amendments to the Criminal Practice Direction

Following recommendations by Sir Brian Leveson in his *Review of Efficiency in Criminal Proceedings* in 2015[11], a number of significant amendments were made to the Criminal Practice Direction last year[12], intended to address the concerns described above. For reasons of space only a summary of them can be given here. They are important, however, and deserve to be read in full – by practitioners, and by judges too. Counsel should be proactive to ensure that they are brought to the attention of the trial judge, to ensure maximum jury participation and comprehension of the evidence at trial.

CPD 25A.1 opens by reminding us that CPR 3.11(a) requires the court, with the active assistance of the parties, to establish what are the disputed issues in order to manage the trial. It then says that prosecution opening speeches should be used for this purpose. CPD 25A.2 then complements this by reminding us of CPR 25.9(2)(c), which provides for the defence to set out the issues in the defendant's own terms immediately after the prosecution opening, and adds that "for the defendant to take the opportunity at this stage to identify the issues may assist even if all he or she wishes to announce is that the prosecution is being put to proof". CPD 25A.3 then points out that:

> To identify the issues for the jury at this stage also provides an opportunity for the judge to give appropriate directions about the law; for example, as to what features of the prosecution evidence they should look out for in a case in which what is in issue is the identification of the defendant by an eye witness. Giving such directions at the outset is another means by which the jury can be helped to focus on the significant features of the evidence, in the interests of a fair and effective trial.

CPD 25A.4 provides that a defendant is not entitled to identify issues at this stage by addressing the jury unless the court invites him or her to do so. However, given the advantages described above, usually the court should extend such an invitation. Examples are then given of situations in which it might be appropriate for such an invitation to be withheld – one of which is where "that the case is such that the issues are apparent".

CPD 25A.5 provides that the question of whether or not there is to be a defence identification of issues, and if so in what terms, is a matter to be resolved in the absence of the jury.

CPD 25A.6 makes it plain that the court's invitation to identify the issues by addressing the jury is one which the defendant is at liberty to refuse. However, "where the court decides that it is important for the jury to be made aware of what the defendant has declared to be in issue in the defence statement then the court may require the jury to be supplied with copies of the defence statement, edited at the court's direction if necessary."

CPD 26K.1 reminds us that Sir Brian Leveson's recommendations for improving the efficiency of jury trials included the early provision of appropriate directions, the provision of a written route to verdict, a summing up delivered in two

3 Crown Court Study, Royal Commission on Criminal Research Study No 19 London HMSP – 1993.
4 *Trusting the Jury;* Criminal Bar Association Kalisher Lecture, 23 October 2007.
5 In his *Review of the Criminal Courts* (2001).
6 *The criminal justice system in England and Wales: Time for Change?* Speech to the University of Hertfordshire – 4 November 2008..
7 Dann - 2005 – *"Testing the effects of selected jury trial innovations on juror comprehension of contested DNA evidence"* - US Department of Justice.
8 Ministry of Justice Research Series 1/10 – February 2010.
9 Ibid, p.4.
10 Ibid, p.48.

11 Online at https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf
12 Criminal Practice Direction (CPD) Part VI Trial 25A.1 to 25A.6 - Identification for the jury of the issues in the case CPD Part VI Trial 26K1 to K22 - Jury Directions, Written Materials and Summing Up. For a hard copy version, see *Archbold* (2017) Second Supplement, pp 486-488 - Para B-349.

parts, with the first part prior to the closing speeches and the second part afterwards, and streamlining the summing up to help the jury focus on the issues.

Following this through, CPD 26K.8-10 make provision for early directions in cases where "the judge decides it will assist the jury in their approach to the evidence and/or evaluating the evidence as they hear it". Paragraph 10 sets out a long list of examples in which an early direction might be thought appropriate. These include identification cases, where a *Turnbull* direction might help the jury when hearing the evidence of eye-witnesses, and – of particular relevance to the topic discussed earlier in this article – the evidence of expert witnesses.

CPD 25K.11 and 12 then deal with written routes to verdict.

> "Save where the case is so straightforward that it would be superfluous to do so, the judge should provide a written route to verdict. It may be presented (on paper or digitally) in the form of text, bullet points, a flowchart or other graphic."

Elaborating this, CPD 25K.13, 14 and 15 then encourage providing juries with "other written materials"; in particular, where these may "assist the jury in relation to a complex direction or where the case involves a complex chronology, competing expert evidence or differing descriptions of a suspect".

CPD 26K.16 then deals with split summings-up.

> Where the judge decides it will assist the jury when listening to the closing speeches, a split summing up should be provided. For example, the provision of appropriate directions prior to the closing speeches may avoid repetitious explanations of the law by the advocates.

The following paragraph then gives a list of examples of situations in which a split might be appropriate.

In the recent case of *Brown*[13] convictions were quashed because the judge had not provided the jury with a written route to verdict. From this it seems clear that the Court of Appeal expects these new provisions of the Criminal Practice Direction to be understood and applied.

13 [2017] EWCA Crim 167; summarised in Issue 3 of *Archbold Review*.

The Prison and Courts Bill: Online courts and the right to a fair trial

By Sebastian Walker[1]

The new Prison and Courts Bill, introduced on 23 February 2017, contained a number of measures designed to further the Ministry of Justice's ongoing plans to transform and modernise the justice system. It aimed to establish new procedures for civil, criminal and family courts and tribunals aimed at ensuring greater efficiency and time and cost savings. The proposed reforms primarily focused on an enhanced use of technology in the courts and criminal justice system.

The proposed reforms would have introduced a number of changes: greatly expanding the availability of live audio and video links to give evidence in criminal hearings;[2] introducing a written information procedure allowing preliminary criminal proceedings, such as indication of plea and mode of trial, to be dealt with on the papers and evidence submitted in writing (and electronically);[3] and abolishing local justice areas and creating a unified magistrates' court.[4]

The flag-ship of the Bill, however, and what this article will focus on, was the proposed new procedure for the automatic online conviction, and sentencing, of low-level offences.[5] With the dissolution of Parliament for a snap election this Bill has now been abandoned. However, it does not require the deepest of gazes into the proverbial crystal ball to foresee that the Bill – or at any rate, the money-saving parts of it – are likely before long to be revived. That being so, the advantages and drawbacks of the proposed new online procedure are still a topic well meriting discussion; and if we are optimistic, a discussion of the problems at this stage might persuade a future government to produce a new version of the scheme which improves upon the first one.[6]

Under the new procedure – which would have been available only for non-imprisonable, summary-only offences to be specified by the Secretary of State – an accused would be able to plead guilty to an offence and accept a number of fixed penalties (including a fine, driving penalty points, compensation and prosecution costs) online, avoiding any need for in-court proceedings. These penalties would be made apparent to the accused before he or she decides whether to accept an online conviction, and the fixed level penalties will be set by the Secretary of State for each offence. Convictions and sentences accepted under the automatic online conviction system would both be subject to potential review by a magistrates' court. The Government's initial intention was to pilot the scheme with the offences of railway fare evasion, tram fare evasion, and possession of an unlicensed rod and line – offences with no identifiable victim.

There is much in principle to be welcomed here. Delays continue to plague the criminal justice system – on average it takes 55 days from the charge or laying of information for a case to be finally disposed of in the magistrates' courts, and a staggering 218 days in the Crown Court[7] – and many courts remain poorly fitted for the use of video evidence or Wi-Fi. As Sir Brian Leveson identified in his 2015 report on the criminal justice system as it stands "the criminal courts are now lagging significantly behind modern practices".[8]

1 Research Assistant at the Law Commission. The views expressed in this article are solely the views of the author and do not represent the views of the Law Commission. Thanks are owed to Lyndon Harris for his invaluable feedback on this piece.
2 Prison and Courts HC Bill (2016-17) cls 32-34 and Schs 4-6.
3 Prison and Courts HC Bill (2016-17) cls 23-31.
4 Prison and Courts HC Bill (2016-17) cl 51 and Sch.12.
5 Prison and Courts HC Bill (2016-17) cls 35-36.
6 Prison and Courts HC Bill (2016-17) cls 35-36.
7 Ministry of Justice, *Criminal Court Statistics: July to September 2016* (15 December 2016) tables T2 and T4.
8 Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (January 2015) para.42.