CHAPTER 1

1 (a) Lenny Wise is charged with burglary, contrary to s. 9 Theft Act 1968 which is an offence triable either way.

(b) Roger Martin is initially charged with dangerous driving contrary to s. 2 Road Traffic Act (an either-way offence), common assault contrary to s. 39 Criminal Justice Act 1988 (summary-only) and failing to stop and report an accident contrary to s. 170 Road Traffic Act 1988 (summary-only). The dangerous driving is subsequently replaced with a less serious charge of careless driving contrary to s. 3 Road Traffic Act 1988 which is a summary-only offence.

(c) William Hardy is charged with sexual activity with a child under the age of 16, contrary to s. 9(2) Sexual Offences Act 2003. As the offence involves penetration it is triable only on indictment.

2 (a) Where the value of damage in a criminal damage case is less than £5,000, the case will be tried summarily.

(b) Where the value of damage in a criminal damage case is more than £5,000, the case is triable either way.

(c) Possession of a controlled drug is an either-way offence.

(d) Careless driving is a summary-only offence.

(e) Burglary is an offence triable either way. However, there are circumstances in which burglary is triable only on indictment, including if a person(s) inside a dwelling-house was subjected to violence or threat of violence or if the accused is over 18 and has two separate convictions for domestic dwelling-house burglary committed after 30 November 1999.
(f) Affray is an offence triable either way.

(g) Theft is an offence triable either way. However, special provision (which came into force on 13 May 2014) was made for low-value shoplifting wherever the value of the goods does not exceed £200. Such an offence is triable only summarily, although s 22A MCA 1980 preserves the defendant’s right to elect trial by jury in which case the magistrates’ court must send D to the Crown Court. Scenario (g) does not indicate whether the theft could be classed as shoplifting theft.

3. A summary-only offence is an offence that starts and ends its life in the magistrates’ court. Summary-only offences are the least serious offences.

4. An indictable-only offence will be tried in the Crown Court, although the accused will make his initial appearance in connection with an indictable-only offence before a magistrates’ court. Indictable-only offences are the most serious offences.

5. An allocation hearing will be held in connection with an either-way offence to which the accused has indicated an intention to plead not guilty or refuses to give an indication of plea at the plea before venue hearing.

6. The overriding objective of the Criminal Procedure Rules is identified in Rule 1.1—requiring that all criminal cases be dealt with ‘justly’. Considerations relevant to dealing with cases ‘justly’ are identified further in Rule 1.1.
7. Section 3 Human Rights Act 1998 places an obligation on the criminal courts to interpret all legislation ‘as far as possible’ to comply with ECHR law. In determining Convention rights, the courts must apply ECHR law as decided by the general principles of law and case law of the European Court of Human Rights. The HRA 1998 does not give the courts the power to strike down legislation which is contrary to the ECHR. So, where it is not possible to give effect to the ECHR law in a case, s. 4 HRA 1998 requires the superior courts (Court of Appeal and the House of Lords) to make a declaration of incompatibility. The declaration gives Parliament the opportunity to amend the domestic provision which conflicts with Convention law.

A defence solicitor might rely on Convention rights (most obviously Article 6) in support of a legal submission to have evidence excluded in a case. It could also be relied on to challenge an aspect of procedure; to stay proceedings for an abuse of process and on appeal against conviction; challenging the admissibility of prosecution evidence or seeking the exclusion of a confession. In resisting any defence submission, the prosecutor would argue that a defendant’s rights under Article 6 had not been infringed.

8. The consequences of failing to comply with the SRA Code of Conduct can include an appearance before the Solicitors Disciplinary Tribunal for breach of the code. The SDT’s powers of punishment range from a reprimand to striking a solicitor off the Roll. In relation to non-qualified staff, it can make a direction that no firm employs that person. The lawyer may cause his firm to have a
complaint made against it to the Solicitors Regulation Authority. The lawyer may also be censured in court by the judge/Bench and by his peers.
CHAPTER 2

CASE STUDY R v LENNY WISE

The prosecution will contend that Lenny is the man responsible for unlawfully entering Lillian Kennedy’s house and stealing money from her. The prosecution will allege that Lenny was assisted in the burglary by another individual—most probably Lloyd Green. The police have not charged Green. The prosecution will further contend that this person deliberately distracted Lillian Kennedy at her front door to enable the burglar to obtain access to her property in order to steal. We must speculate on the motives for the burglary. It may be the prosecution’s theory that Lloyd Green was putting Lenny Wise under pressure to pay off a debt owed to him. The person who entered Lillian Kennedy’s property through an unlocked backdoor is said to be Lenny Wise. What evidence links Lenny to the crime?

Witness—Lillian Kennedy. She states she saw Lenny in the vicinity of her home an hour or so before the burglary and that he offered to assist her with her shopping. She describes the man as wearing white training shoes. She identifies Lenny to the police when she is taken by them on a tour of the immediate vicinity. She is subsequently unable to identify Lenny at a video identification parade and she is unable to identify Lloyd Green.

Witness—Shirley Lewis. She was in the garden next to the burgled property and gives a description of the man which corresponds with Lenny’s actual appearance and mentions the white training shoes. She subsequently identifies Lenny as being that man at a video parade.

Witness—Harold Finney. This witness provides the police with a registration number of a car parked in Sunrise Road which leads to Lloyd Green being arrested.
He describes a man similar to Lenny approaching the car. This witness is unable to identify Lenny at the subsequent video identification parade.

Lenny’s incriminating admissions made during the police interview satisfy the definition of a confession.

Real evidence of the white training shoes found in Lenny’s flat.

Forensic opinion evidence that shoeprints located and lifted at the rear of the burgled property can be said to match the soles of the training shoes found in Lenny’s flat.

Lenny has several previous convictions and a drug habit which places him in a category of persons more likely to have committed this crime. The prosecution will want to adduce evidence of Lenny’s past bad character, specifically in relation to his past offences of theft and burglary. Can the defence prevent this?

Lenny will plead not guilty. His defence is that it was not him. If it was not him, it must be someone else. The defence theory in this case means the following evidence will have to be challenged:

• eye-witness identification;
• Lenny’s confession;
• forensic evidence.

If Lenny is able to advance an alibi, this will strengthen the challenge to the prosecution’s case if the alibi evidence is accepted. The second person alleged to have been involved has not been charged and, at this stage, Lenny is not implicated by the involvement of any co-accused which might require a corroboration warning to be given.

Having regard to this introductory chapter on criminal evidence and having
identified the areas of criminal evidence involved in this scenario, consider how you might challenge the eye-witness identification in this case. There may be a possible application of s. 78 PACE 1984 in this regard, given Lenny was unrepresented at the police station. You will certainly be talking about the Turnbull guidelines, as this is a case of mistaken identity and there are several weaknesses in the eye-witness identification. You will have concerns about the manner in which Lenny’s confession was obtained and so you will want to make an application to have the confession excluded under ss. 76 and 78 PACE. Might a report from Lenny’s psychiatrist assist in this respect?

The opinion evidence of the forensic scientist will be admissible as expert evidence. You will want to undermine the weight to be attached to the opinion, given the popularity of Nike training shoes. Lenny states he has never worn the shoes. You will no doubt wish to oppose the admission in evidence of Lenny’s past bad character.

You are on your way to securing an acquittal in this case. You have identified the main points of contention. When you have worked through the later chapters on criminal evidence you will be able to fully discuss and apply the principles of evidence law that arise in this case.
CHAPTER 3

1. Judicial guidance on the reasonable suspicion or belief test is provided by O’Hara v Chief Constable, RUC [1997] AC 286. Further, important guidance is located in Code A 2.2–2.11.

2. On arrest, the suspect will be cautioned in the following way: ‘You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given in evidence’, Code C para. 10.

3. The powers to search a person after arrest are contained in s. 32 PACE 1984. The power to search the premises in which a person was at the time of his arrest or immediately before his arrest is also contained in s. 32 PACE 1984. The power to search premises occupied or controlled by a suspect after arrest is contained in s. 18 PACE 1984. Prerequisites apply.

4. The police will apply to a magistrate to search premises under s. 8 PACE 1984 where it is not possible to contact the person who could allow the police to enter premises to search for evidence in connection with an indictable offence.

5. On the facts, the police could stop and search Antonio under s. 1 PACE 1984 provided the officer has reasonable grounds for suspecting Antonio may have on his person a prohibited article. Given the intelligence provided by CCTV operators, reasonable suspicion could easily be established in this case. Based on the
information provided and Antonio’s reaction when approached, the police would have reasonable grounds for suspecting Antonio to have been involved in an offence and that it is necessary to arrest him (s. 24 PACE 1984). Having arrested him and cautioned him, the police officer would be entitled to search Antonio under s. 32 PACE 1984 if he had reasonable grounds for believing Antonio may have evidence on him relating to an offence. The officer may choose to take Antonio into custody or possibly release him on ‘street bail’.

6. A suggested solution can be found in the answers to the self-test questions supporting Chapter 6.
CHAPTER 5

SCENARIO 1

If the jury concludes it was reasonable for Karl to have mentioned he acted in self-defence while being questioned at the police station, he is at risk of an adverse inference being drawn under s. 34 CJPOA 1994 against him at his trial.

SCENARIO 2

Although Shania has put forward facts in support of a possible defence at trial, she failed to mention the possibility that she acted in self-defence. This is a fact she now relies on at court in her defence. If the jury finds she could reasonably have been expected to mention this fact, this could weaken her defence of self-defence (s. 34 CJPOA 1994).

SCENARIO 3

Jason is at risk of a double adverse inference. Providing the circumstances set out in s. 36 CJPOA 1994 are met, he risks an adverse inference in that he has failed to give an explanation for scratch marks visible on his face. The marks are on his person. The arresting constable or other investigating officer must reasonably have believed the presence of the marks might have been attributable to Jason's participation in a crime. The officer must have made Jason aware of his belief before requesting Jason to give an account, explaining in ordinary language the risk he faces from his failure to do so. In addition, Jason risks an adverse inference under s. 34 CJPOA 1994.
SCENARIO 4
In this instance Rio too is at risk of an adverse inference under s. 36 CJPOA. 1994. Subsection 36(3) makes it clear that the section applies to the condition of clothing as it does to footwear.

SCENARIO 5
Providing the conditions set out in s. 37 CJPOA 1994 are met, Jane risks an adverse inference being drawn against her, in that she has failed to give an explanation for her presence near the scene of a crime. The arresting constable or other investigating officer must reasonably have believed Jane’s presence might have been attributable to her participation in a crime. The officer must have made Jane aware of her belief before requesting her to give an account, explaining in ordinary language the risk she faces from her failure to do so. Under s. 37 CJPOA 1994 a ‘place’ is widely defined and includes buildings, vehicles and vessels. By refusing to give evidence at her trial, Jane risks an adverse inference being drawn against her under s. 35 CJPOA 1994.

SCENARIO 6
The fact that Carley remained silent on the advice of her solicitor does not immunise her against the jury drawing an adverse inference. In order to persuade the jury not to draw an adverse inference, Carley is best advised to waive legal professional privilege and explain her reasons for not putting her defence at the police station. This could be done in a number of different ways:
• Carley’s solicitor could have explained his reasons on the tape-recorded interview;
• Carley may give evidence of the reasons herself;
• there may be evidence from the solicitor (either in person or in agreed written hearsay form).

The reasonableness or otherwise of Carley’s decision to remain silent will be a matter for the jury. If this were a Crown Court trial, the judge would be required to carefully direct the jury on s. 34 CJPOA 1994, in accordance with the requirements in *R v Argent* and the Directions in Chapter 17.7/8 of the Crown Court Compendium Part 1 (https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf)
CHAPTER 6

EXERCISE 1

ANSWERS TO THE QUESTIONS TESTING YOUR KNOWLEDGE OF CODE C SAFEGUARDS

Question 1

In accordance with Code C 10.1 a caution must be given to any suspect who the police wish to question in circumstances where there are grounds to suspect that person of involvement in an offence and whose silence or answers to any questions may be given in evidence against him. An individual must also be cautioned on arrest and on being charged (C 10.5) or informed that they might be prosecuted. A caution must also be given at the commencement of each interview (Code C 10.1), and where there is a break in an interview the suspect should be reminded that they are under caution (C 10.8). It is the duty of the interviewing officer to ensure that the suspect understands the caution (Code C 10D). Where access to a solicitor has been delayed in accordance with s. 58(8) PACE/Code C 6.6, s. 58 Youth Justice and Criminal Evidence Act 1999 prohibits a court from drawing an adverse inference from silence. In these circumstances the police are obliged to caution the suspect in the following terms: ‘You do not have to say anything, but anything you do say may be given in evidence against you.’

The caution reminds the suspect that he has the right not to incriminate himself. Incriminating admissions obtained in circumstances where a caution has not been properly administered are vulnerable to challenge under s. 76(2)(b) and s. 78 PACE.
In *R v Armas-Rodriguez* [2005] EWCA Crim 1981, while acknowledging that a failure to caution a suspect at the commencement of an interview constituted a ‘significant and substantial’ breach of Code C, on the facts in this particular case, it had not been unfair (in accordance with s. 78 PACE) to admit the interview. In particular, the Court of Appeal observed that the police had cautioned D on arrest; there had been no bad faith on the part of the interviewing officer; the defendant had been represented by a solicitor throughout; the interview had been tape-recorded and the questions put fairly. Furthermore, the defendant had been interviewed a second time under caution and had given a substantially similar account.

**Question 2**

Upon arrival at the police station and in accordance with Code C 3.1, the custody officer should explain to the suspect that he has the following rights which may be exercised at any stage:

(i) the right to have someone informed of his arrest;

(ii) the right to consult in private with a solicitor, such advice being free (save in isolated categories) and independent;

(iii) the right to consult the Codes of Practice.

Furthermore, under Code C 3.5, the custody officer is required to ask the suspect on his arrival at the police station whether he:

- wants legal advice;
- wants to inform someone of his arrest;
- might be in need of medical treatment;
- requires the presence of an appropriate adult; or
• requires an interpreter.

**Question 3**

A number of individuals might be considered vulnerable. Under Code C 3.6–3.10 the custody officer must undertake a risk assessment of all detainees. Detainees who would clearly require assistance include those with learning difficulties or communication difficulties, those requiring an interpreter, those on medication, juveniles, the mentally disordered or mentally vulnerable. In some instances the detainee will require the services of an appropriate adult (C 3.15).

**Questions 4 and 5**

Some very important safeguards are contained in para. 6 of Code C. Code C 6.4 states that no police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice. If the detainee refuses legal advice Code C 6.5 requires the custody officer to explain that he may seek advice over the telephone and if the detainee continues to decline the services of a lawyer, the custody sergeant should ask the detainee why and record the reasons. The effect of these paragraphs is to encourage the police to be proactive in securing suspects access to legal advice.

Access to legal advice may be delayed but only in the circumstances set out in Code C 6.6. If C 6.6 does not apply a detainee wanting legal advice may not be interviewed or continue to be interviewed until they have received legal advice.

The decision to delay access to a solicitor is a serious matter and will require justification by the police. A confession obtained in violation of s. 58 PACE is
particularly vulnerable to challenge under both s. 76 and/or s. 78 PACE.

A suspect should be reminded at the start or re-commencement of any interview that the suspect is entitled to free legal advice and that the interview can be delayed for that purpose.

**Question 6**

Custody time limits are set out in s. 42 PACE as amended by s. 7 CJA 2003. The maximum period of detention for any individual arrested but not charged in connection with an indictable offence is 36 hours. This period can be extended up to 96 hours on the authority of a magistrates’ court for an indictable offence. The detention of any individual must be justified at all times under s. 37(2) PACE. The custody officer must be satisfied that detention is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning. If the detention grounds are not made out, the detainee must be released immediately either with or without bail (s. 34 PACE). Where there is sufficient evidence to charge an individual, s. 37(1) PACE provides the individual must be charged and either released on bail or remanded into police cells pending an appearance before magistrates within 24 hours. Detention is subject to regular reviews, initially at six hours and thereafter at nine-hourly intervals (s. 40 PACE).

**Question 7**

The basic human rights to which a suspect is entitled are set out in Code C paras. 8 and 9. They include the right to an adequately heated, cleaned and ventilated cell. Access to toilet facilities must be provided. If a detainee’s clothing needs to be
removed, he should be supplied with adequate replacement clothing. The detainee should be provided with two light meals and one main meal in any 24-hour period. Drinks should be provided at meal times and upon reasonable request. The above safeguards underline the importance of the custody record in evidential terms. It should be a complete record of the detainee’s time in detention and it should record any complaints made by the detainee (C 9.2).

In accordance with Code C 12.2, in any period of 24 hours, a suspect is entitled to a continuous period of eight hours’ rest, normally at night, and under C 12.8, a suspect is entitled to breaks from interviewing at recognised meal times. Interviews should break for refreshments at two-hour intervals.

**Question 8**

An interview, according to Code C para. 11.1A, is the questioning of a person regarding their involvement or suspected involvement in a criminal offence which, under Code C para. 10, must be carried out under caution. Such an interview must be carried out at a police station unless the very strict conditions in Code C para. 11.1 are made out.

**Question 9**

Paragraph 9.5 of Code C is important. If a detainee appears to be suffering from physical illness, or is injured, or appears to be suffering from a mental disorder, or appears to need clinical attention, the custody officer must make sure the detainee receives appropriate attention as soon as reasonably practicable. Paragraph 9.13 provides that where a health-care professional is called to examine or treat the
offender, the custody officer shall ask for their opinion about any risks or problems the police need to take into account when making decisions about the detainee about when to carry out an interview and the need for specific safeguards. Note 9C offers the following guidance:

‘A detainee who appears drunk or behaves abnormally may be suffering from illness, the effect of drugs or may have sustained injury, particularly a head injury which is not apparent. A detainee needing or dependent on certain drugs, including alcohol, may experience harmful effects within a short time of being deprived of their supply. In these circumstances, when there is any doubt, police should always act urgently to call an appropriate health care professional.’

Code C 12.3 is all-important. Before any detainee is interviewed the custody officer shall assess whether the detainee is fit to be interviewed. In appropriate cases, the custody officer will take this decision in conjunction with a health-care professional.

An omission on the part of the police to spot and deal with a particular vulnerability renders any resulting confession vulnerable to challenge under ss. 76 and 78 PACE.

**Question 10**

Code C para. 11.5 provides an important safeguard in relation to confession evidence by prohibiting officers from offering inducements to the suspect. It provides that no officer interviewer shall indicate, except to answer a direct question, what action the police may take if the suspect adopts a particular course of action. If the suspect asks a direct question, the interviewer may inform the suspect of what action the police propose to take, provided the action is itself proper and warranted.

The safeguards associated with the conduct of interviews of mentally vulnerable
individuals are covered by Code C 11.5. Note 11C is worth considering:

‘Although juveniles or people who are mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person’s age, mental state or capacity. Because of the risk of unreliable evidence it is important to obtain corroboration of any facts admitted wherever possible.’

Aside from the numerous safeguards already identified, juveniles and the mentally ill and mentally vulnerable are entitled to have an appropriate adult present during an interview (Code C 11.5).

**EXERCISE 2: ANALYSIS OF LENNY WISE’S CONFESSION**

The admissibility of Lenny’s confession should be challenged under s. 76(2)(b) PACE (unreliability) and s. 78 PACE (unfairness).

The admissibility of Lenny’s confession would be determined at a pre-trial hearing. A *voir dire* would need to be conducted, at which the judge would hear evidence as to how Lenny’s confession was obtained. The prosecution would have the burden of proof under s. 76(2)(b). The prosecution would need to call the custody officers who supervised Lenny’s detention, as well as the interviewing officers. In this instance, the prosecution would also need to call Dr Ghulam, who examined Lenny while he was in detention. The custody record would be an important piece of evidence at this hearing.
Given Lenny’s recent psychiatric history, the defence might explore the possibility of obtaining a psychiatric report to shed light on Lenny’s state of mind during his detention and in interview.

The burden of proof under s. 76(2)(b) rests on the prosecution. The prosecution would point to the fact that Lenny was offered a solicitor but declined. Furthermore, attempts were made to contact Lenny’s sister. Lenny was fed and refreshed. He was given rest and his detention was properly reviewed. When the officer in charge was made aware of Lenny’s mental state, he was allowed to see a doctor, who subsequently administered Lenny’s medication and pronounced him fit to be interviewed. On the face of it, the prosecution would have to concede there had been a breach of the requirement to ensure access to an appropriate adult, under Code C para. 3.15, having been made aware of Lenny’s mental condition. However, they can still contend that the breach did not result in an unreliable confession, nor is it one that would be unfair to admit. It is not Lenny’s first experience of custody and he may be taken to know the procedures.

The defence would make much of the fact that Lenny was unrepresented at the police station and did not have the services of an appropriate adult. On oath, you would need to ask the custody officer who opened the custody record if he undertook a risk assessment of Lenny Wise in accordance with the requirement under Code C paras. 3.6–3.10 and if he did, why Lenny’s vulnerability was not spotted immediately. It may be that Lenny lied to the officer and simply did not make the officer aware of his particular needs. When searched, Lenny was not found to be in possession of his medication.

The defence would want to explore whether the police fully complied with s. 58
PACE. Code C para. 6.5 requires the police to be proactive in ensuring access to a solicitor. The absence of a solicitor is made worse by the fact that Lenny was not provided with the services of an appropriate adult. Having made the police aware of his mental condition, and having been examined by a police doctor, it must be put to the custody officer that there was a blatant breach of Code C 3.15. A suitable appropriate adult in this case would have been Lenny’s sister. The police only tried her number once while Lenny was in custody. Furthermore, the defence would be able to point to a breach of Code C 11.15 which stipulates that a vulnerable suspect should not be interviewed in the absence of an appropriate adult for the reasons highlighted in Note 11C.

The defence would need to explore Lenny’s behaviour while in custody. Did no one pick up on the fact that Lenny did not sleep and had very little to eat? Such behaviour is indicative of someone with depression. In addition, it should be put to the officers that Lenny made it clear he wanted a cigarette and that it was suggested to him that if he co-operated, his release from custody would have been speeded up. Reliance might be placed by the defence on the case of *R v Aspinall* [1999] Crim LR 741. The facts are not dissimilar.

The defence can easily establish a link in terms of cause and effect. Had a solicitor been present, the outcome for Lenny would have been different. Given Lenny’s mental state and the fact that he was desirous of escaping the confines of his custody, coupled with the very serious omission to ensure access to an appropriate adult, further compounded by the lack of legal advice, Lenny’s confession is both unreliable and unfair to admit. If the confession were to be excluded, a principal component of the prosecution’s case would be lost.
You can chart the progress of Lenny’s case through our case study, the complete version of which is provided on the Online Resource Centre.

EXERCISE 3

This scenario raises the issue of unlawfully obtained evidence. The illegality relates to the manner in which Ranjit was stopped and searched under s. 1 PACE (see Chapter 3). The search may be illegal for several reasons:

• Was the decision to stop and search Ranjit based on reasonable suspicion as required by Code A (paras. 2.2–2.11)? This seems doubtful.

• Did the officers provide Ranjit with the required information before commencing the search as required by Code A para. 3.8?

• Was the manner in which the search was conducted (removal of outer clothing, socks and shoes in public) lawful, having regard to Code A para. 3.5?

As a result of the actions of the police, a quantity of cocaine is found. If the search was unlawful, can the evidence obtained as a consequence be excluded under s. 78 PACE? Certainly the defence advocate should consider such an application. Given the restrictive interpretation of s. 78, however, it is highly questionable whether the evidence would be excluded since it is relevant and reliable.

Ranjit may have a defence to the allegation that he assaulted a police officer in the execution of his duty if it can be established that the officer was not in fact acting in the execution of his duty at the time he initially approached Ranjit and grabbed him by the shoulder. Additionally, Ranjit may state that he acted in self-defence.
CHAPTER 7

OBSERVATIONS ON THE IDENTIFICATION ISSUES RAISED BY R v LENNY WISE

There are three eye-witnesses in Lenny’s case. We will deal with each of them in turn.

Lillian Kennedy

It is important to realise that Mrs Kennedy cannot assist the prosecution in providing any evidence as to the identity of the man who entered her property by the unlocked back door. She is able to provide a description of the burglar’s accomplice, but she is not able to identify him. She does identify Lenny in a street identification. This would appear to be in compliance with Code D 3.2 as the police would not have had a known suspect in mind at this point in time. Mrs Kennedy’s evidence will be that a man (whom she states was Lenny Wise) approached her some 30 to 60 minutes before the burglary and offered her assistance with her shopping bags. This evidence (assuming she correctly identifies Lenny as being that man) does no more than place Lenny in the vicinity, though crucially not at the relevant time. Her evidence is of marginal relevance. She is able to describe what the man who offered her help was wearing, and makes specific reference to the white trainers. When she points Lenny out to the police, he is not, however, wearing white training shoes. A pair of white training shoes were subsequently recovered from Lenny’s flat.

Shirley Lewis

Having a known suspect in mind, the police acted correctly in arresting Lenny Wise
and arranging an identification procedure. It would have been wholly wrong for the police to have shown Mrs Lewis photographs of convicted offenders (including Lenny), having a known suspect in mind.

The evidence of Shirley Lewis is important. She purports to be able to identify Lenny Wise as being the man she saw in Mrs Kennedy’s back-garden at the relevant time. She provides the police with a description of which a written record is kept in accordance with Code D 3.1. She specifically mentions the white training shoes worn by the man she observed in the garden. She subsequently attends a video identification procedure which the police state was conducted in accordance with Code D Annex A. In the course of the video identification procedure, Mrs Lewis picks out Lenny Wise. He is number 7 in the video line-up. Look through the video identification parade record (and remember you would be entitled to a copy of the video images). Look at the words used by Mrs Lewis when she selects Lenny’s image: ‘I think it is number 7. I can’t be one hundred percent sure—yes 7—I recognise him now. I have seen him before.’

Was the video parade compiled in accordance with Code D Annex A? Can you point to specific breaches of Code D which could form the basis of a challenge under s. 78 PACE 1984 to the admissibility of Mrs Lewis’s identification evidence? Lenny states he did not understand what was happening as regards the video parade, and that no one explained to him why he could not have an identification parade. The most disturbing aspect of Lenny’s detention is that he did not have access to legal advice. He does not appear to have been present when the video parade was compiled and, as such, it will be extremely important for you to review the parade’s composition in an attempt to assess its fairness.
Harold Finney

The final eye-witness is Harold Finney. Again, he is able to provide a description of the man he observed close to the time of the burglary walking past his window and going over to a black car in the street (which the prosecution contends belongs to Lloyd Green, the suspected accomplice). Mr Finney’s description is consistent with Lenny’s appearance. He also mentions that the man was wearing distinctive white training shoes. Mr Finney also attends the video identification parade. Significantly, he is unable to identify Lenny.

The other evidence linking Lenny to the crime is of course his interview with the police which is considered in the context of Chapter 6 self-test questions and the circumstantial evidence relating to the footwear found in his flat. This constitutes expert opinion evidence, which is considered in Chapter 17.
CHAPTER 8

Question 1

1a. It is likely that, on the facts, the evidential test is satisfied assuming the prosecution is satisfied that each witness is capable of giving reliable, independent evidence. A common defence submission in a historic sexual abuse case such as this is to challenge the reliability of the witness’s recollection of the incidents giving rise to the charges. The prosecution case may also be challenged by the possibility of collusion between the prosecution witnesses. If these potential difficulties are overcome, in view of the seriousness of the charges (and notwithstanding that there has been a long delay between the offence taking place and the date of any trial) it appears to be in the public interest for Gerald to be charged and prosecuted even after taking into account Gerald’s age. Gerald’s defence solicitor will want to draw the prosecution’s attention to the fact that Gerald has a serious heart complaint. If (as should be the case) medical evidence can be obtained which suggests that a trial probably would have a deleterious effect upon Gerald’s physical health, this may persuade the prosecution to re-consider whether it is in fact in the public interest to prosecute Gerald.

1b In Debbie’s case, the evidential test appears to be satisfied as the store detective will testify at trial and there is a security video tape of the alleged offence. It is difficult for Debbie to deny the actus reus element of the offence of theft, although she may have a defence based on a lack of mens rea. Debbie’s solicitor may, however, submit that given Debbie’s domestic circumstances, state of mental health, the fact that the offence is not particularly serious and that Debbie is of past good character,
that it is not in the public interest for Debbie to be charged with theft. The prosecutor might consider that this is a case which could be disposed of by a simple caution or a conditional caution. However, to be eligible for either, Debbie would have to admit the offence.

1c. This is clearly a case of domestic violence as it comes within the term used to describe a range of behaviour often used by one person to control and dominate another, with whom they have or have had a close or family relationship. The offence includes physical, psychological and emotional violence on Patrick, by Frank, his father. It is also motivated by homophobic hatred. Even though Patrick does not want any further action to be taken against Frank, there might be a danger that if a prosecution is not undertaken, Frank may commit further serious offences against Patrick. It is difficult to see how Frank’s solicitor can argue against prosecution in these circumstances.

**Question 2**

To ascertain the disclosure requirements, firstly determine the classification of the offence Barry is charged with. Rape is an indictable-only offence.

The CPS will comply with its common law disclosure duties under DPP ex parte Lee (1999) to disclose anything that might reasonably assist the defence with the early preparation of their case or at a bail hearing. Following Barry’s initial appearance before magistrates’ court, his case will be sent forthwith to the Crown Court. Within 70 days of the case being sent the defence is entitled to disclosure of the prosecution’s case (used material). This is likely to comprise the witness
statements of Tina, Kelly, Leroy, relevant staff at the care-home to whom she made the complaint, the medical and forensic evidence, the statement of the investigating officers, the record of interview with Barry and any items of real evidence.

Let us say that the medical/forensic evidence reveals traces of seminal fluid inside Tina and on her clothing. DNA extracted from the seminal fluid matches the known sample of DNA taken from Barry. The medical evidence also shows Tina to be eight weeks pregnant at the time when the alleged incident occurred.

On taking Barry’s further instructions in the light of this evidence, Barry now admits to his solicitor to having had sexual intercourse with Tina, but only with her consent and in return for payment in the public toilets. After having sex, Barry states Tina rejoined her friend, Kelly. Barry denies pestering Tina for sex. His reason for lying to you in the first place is that he is embarrassed to admit to having had under-age sex with the girl. He did not think she would make a complaint.

Having served the ‘case-sent bundle’, the CPS will provide the defence with a schedule of ‘unused’ material as defined under s. 3 CPIA. At this stage the prosecution discloses that Kelly, Tina’s friend, has a previous conviction for theft and that Leroy has previous convictions for public order offences and theft. Such information satisfies the test of evidence that might reasonably be considered capable of undermining the case for the prosecution.

The pre-trial disclosure of the evidence in this case has helped to narrow the facts in issue in that the act of sexual intercourse is admitted but what is in dispute is whether Tina consented.

As this matter is indictable only, Barry will need to file a defence statement (s. 5 CPIA). It needs to be drafted carefully (see Chapter 13). In his defence statement,
Barry will indicate his intention to plead not guilty to rape on the basis that Tina consented to sexual intercourse and that sexual intercourse was offered to him by Tina in return for payment on one occasion only. He will deny any suggestion that he has been pestering Tina for sex. The defence statement will need to go so far as to suggest Tina is falsely accusing Barry of rape and that Barry believes she has made a proven false allegation against another male in the past. If the defence wants to obtain further disclosure on this, it needs to be articulated in the defence statement.

Service of the defence statement will cause the prosecution to look again at disclosure to see if there is anything that might reasonably assist Barry’s defence as articulated in his statement (s. 7A CPIA).

Barry’s defence statement clearly raises issues to do with Tina’s credibility. As a child in the care of the local authority there will be a social services file on her which should contain an account of the alleged incident involving the male care-worker together with an assessment of Tina’s personality. This is information which lies in the hands of a third party that you would presumably like to have access to. It may in fact be in the hands of the prosecution if the prosecution has sought access to it.

The prosecution and social services are likely to oppose disclosure on the ground of public interest immunity. The information is sensitive. It concerns a child and there are clearly issues of confidentiality. If the material is in the hands of the prosecution, it will need to apply to the court to sanction the withholding of such material. Notice of the application should be given to the defence to enable you to make representations. Representations may also be made by social services. Disclosure will be ordered if the judge concludes the information contained within the file would help to avoid a miscarriage of justice. If the material is in the hands of social services
with disclosure being resisted, the defence will need to apply for a witness summons against social services. The same issues as regards public interest immunity will apply as in *R v Brushett* [2001] Crim LR 471.
CHAPTER 10

ANALYSIS OF EXERCISES 1 AND 2

You were asked to consider two examples which will require a decision of the magistrates’ court as to whether or not bail should be granted. In each case you were asked to consider the facts from the point of view of the prosecuting solicitor and the defence solicitor. Below is a summary of the arguments likely to be advanced. The prosecution will begin each submission with an explanation of how each defendant came to be charged with the offence for which he appears and an outline of the evidence linking him to that charge. Note the interplay between the grounds for objecting to bail and the factors relied on to substantiate those grounds.

Prosecution submissions in relation to Karl Green—Exercise 1

In relation to Exercise 1, the prosecution is likely to oppose bail on the grounds that Green will abscond, commit further offences and interfere with witnesses.

The prosecution will point to the evidence and to the fact that this is a very serious offence that could still result in a murder charge and that the defendant is subject to a suspended prison sentence. What is more, the defendant is already on bail for an earlier serious offence of violence. The risk of conviction is high, so too is a lengthy custodial sentence. The prosecutor will highlight a fairly recent conviction for failing to surrender and Green’s poor community ties. Taken together, these all point to a substantial risk that this defendant will abscond if released on bail. It goes without saying that the requirement for there to be a real prospect of imprisonment is met.

The prosecution will further suggest that Green is likely to commit further offences if
released on bail. In establishing this ground, a court should have regard to the risk that the defendant may do so by engaging in conduct that would, or would be likely to cause physical or mental injury to any person other than the defendant. Green is already on conditional bail for an earlier, unrelated serious allegation of assault and has already answered an allegation that he breached one of his bail conditions. The CPS will invite the court to consider his lengthy criminal record for violence. In short, Green is not a man to be trusted. The defendant lives on the same estate as the injured party and his family. Such a serious assault is likely to engender feelings of hostility on the estate and the risk of Green being drawn into further confrontations cannot be ignored. The CPS can point to the fact that the presumption in favour of bail does not apply in this case. Under s. 14 CJA 2003, bail may not be granted to an individual aged over 18 who is already on bail on the date of the offence unless there is no significant risk of him committing an offence on bail. The provision is in force in relation to offences carrying life imprisonment. Conviction for s. 18 GBH carries such a sentence.

Finally the prosecution is likely to argue that the defendant will interfere with prosecution witnesses. The defendant has a lengthy record consisting of violent assaults and is evidently easily provoked. One of the witnesses is a friend of the injured party who lives in close proximity to the defendant.

**Defence submissions in relation to Karl Green—Exercise 1**

The defence solicitor would be faced with an uphill task in this case. One thing the solicitor should have done is to contact Green’s sister, who lives some ten miles outside the area for confirmation of an offer of alternative accommodation. We will
assume such an offer has been made.

The defence solicitor would remind the magistrates of the fact that they have heard only one side of the case. Green’s intention is to plead not guilty, maintaining he acted in self-defence. It is a defence he put forward at the police station and he has a witness to substantiate his version of events.

Taking each of the prosecution’s objections in sequence and dealing with the risk of absconding, the defence solicitor would point out that Green has had ample opportunity to run and hide between the occurrence of the incident and his subsequent arrest. He has strong community ties, having been born in the area. He has a son he sees regularly and a job which will be lost if he is remanded into custody. He has only one previous conviction for failing to surrender. The defence solicitor should explain the circumstances surrounding this and stress the fact of Green having voluntarily surrendered at the time and in turn receiving a fine.

So far as the danger that he might commit further offences is concerned, again he denies intentionally assaulting the injured party and has not of course been convicted of any offence arising out of the incident at the pub. He cannot deny the fact that he is on conditional bail for a further assault. All that the defence solicitor can say about it is that he accepts some level of criminal responsibility and awaits his deserved punishment. The offence was unforgivable but was committed while Green was very drunk. The defence solicitor will have to try to put a positive spin on Green’s criminal past, highlighting what, if anything, has changed since the offences were committed. Unfortunately some of his previous convictions are fairly recent. The defence solicitor should deal with the earlier breach of bail conditions, stressing the mitigating factors that were obviously accepted by the court. It is not evident that
Green is in the habit of committing offences while on bail.

So far as interfering with witnesses is concerned, the defence solicitor will put forward an adamant denial that this would happen, as Green would not wish to make matters worse for himself.

The best that Green could possibly hope for in this case is the grant of bail subject to stringent conditions. The defence solicitor might suggest a condition of residence at the sister’s address. This would deal in part with the risk of failing to surrender and the risk of the commission of further offences due to possible confrontations. It would also help to deal with the risk of interference with witnesses. No doubt, Green would be prepared to agree with any condition that kept him out of prison including a condition of reporting to his local police station, a condition of no contact with prosecution witnesses and a curfew. In the circumstances, however, bail is likely to be refused.

**Prosecution submissions in relation to Daniel Phillips—Exercise 2**

In relation to Exercise 2 the prosecution is likely to argue that Daniel may abscond, commit further offences and interfere with the injured party. The allegation against Daniel is extremely serious and he is currently subject to a suspended sentence of imprisonment. Once again, the need for there to be a real prospect of imprisonment is met.

The CPS will point to the circumstantial evidence against Daniel Phillips linking him to the crime scene and his no comment interview at the police station. It took three days in which to locate Mr Phillips, as he was not residing at his mother’s address. The risk of conviction is high, as is the prospect of a prison sentence.
So far as the commission of further offences and interference with prosecution witnesses is concerned, the prosecution will make plain the injured party’s feelings in this case. The defendant’s behaviour would suggest he is an obsessive individual with little respect for authority. He is charged with resisting arrest on this occasion and has previously breached a court order. In establishing the risk that the defendant will commit further offences, a court should have regard to the risk that the defendant may do so by engaging in conduct that would, or would be likely to cause physical or mental injury to any person other than the defendant. Daniel is subject to a restraining order preventing him from harassing Ms Hughes. He clearly cannot leave her alone. With the restraining order in force there would seem to be little point in imposing a condition that he does not contact Ms Hughes. The risk that he may seek to harm Ms Hughes or interfere with her is extremely high.

Defence submissions in relation to Daniel Phillips—Exercise 2

On a practical point, if the defence solicitor can persuade Daniel’s new girlfriend and her mother to attend court, so much the better.

The defence solicitor should remind the magistrates of the presumption in favour of bail. The defence advocate should challenge the nature of the prosecution’s case against Daniel. He will no doubt point out that there is no forensic evidence to connect him to the crime scene and that he was advised not to answer questions at the police station on legal advice. The only evidence against him is the tenuous nature of voice identification by a witness who is not certain. He is likely to stress that the earlier access visit went off without any difficulties and that he would have no reason to want to burn down Ms Hughes’s house. What is more, he has an alibi (his
girlfriend and her mother) who will say he could not possibly have been setting fire to
his former girlfriend’s home. Consequently, he will not abscond because he has little
fear of being convicted. He is able to offer a fixed address and has a job, which will
be lost if he is remanded into custody. He will not abscond because his son is
important to him. Furthermore, his new girlfriend is pregnant with his child and needs
his support.

So far as the risk of him committing further offences is concerned, the defence
solicitor will say that these are a thing of the past. He is abiding by the terms of his
restraining order, which remains in force. He is benefiting from the input of the
probation service and is addressing the reasons for his past offending.

The defence solicitor is likely to offer bail conditions to include residing at his
current address, reporting to his local police station and a condition that he does not
contact Ms Hughes or her friend.

**Decision of the court in each case**

In relation to Karl Green, the magistrates remand him into custody and send the
case forthwith to the Crown Court. Their reasons for doing so are the substantial risk
that the defendant will abscond having regard to the very serious nature of the
allegation and the risk of him committing further offences, in the light of his criminal
record and the fact that he is already on bail for a similar serious allegation of
assault. They are not convinced that the imposition of conditions would alleviate their
concerns. Karl Green may consider making an application for bail to a Crown Court
judge in chambers.

In relation to Daniel Phillips, after some deliberation the magistrates decide to grant
him bail conditional on him residing at the address of his girlfriend’s mother, reporting to his local police station three times a week and a further condition that he should keep away from and not try to contact Rachel Hughes or her friend. In their view, the imposition of conditions would alleviate the risk of Mr Phillips committing further offences and interfering with prosecution witnesses.
CHAPTER 11

EXERCISE 1

Gunnar Erikson should be advised to elect trial by jury in any event. He stands a greater chance of being acquitted of this offence before a jury of his peers. However, he may feel he would rather the matter be tried summarily as his ordeal will be over more quickly and with less publicity.

Regard must be had to the allocation guideline and any offence-specific guidelines. The Sentencing Council has issued definitive guidelines on all the offences contained in the Sexual Offences Act 2003. There is a guideline specific to s. 7 SOA 2003 (https://www.sentencingcouncil.org.uk/offences/item/sexual-assault-of-a-child-under-13/). If you consult the guideline, the starting point in terms of sentence which best describes what is alleged to have occurred in this case is a Category 3 (B) offence. This suggests a starting point of 26 weeks in custody with a range from a high level community order to one year’s custody. The offence is arguably more serious in that it involved the touching of the perpetrator’s genitalia (albeit through clothing). It was also committed on a vulnerable victim who was entitled to feel safe on public transport. Erikson’s previous convictions (which are an aggravating feature of the offence) are taken into account for the purposes of determining allocation. It is likely that the CPS will represent that this is a borderline case but that on balance the Bench should decline jurisdiction. Depending on Erikson’s instructions, if he is keen to have a summary trial, his solicitor would need to make representations to suggest that the court’s maximum power of sentence (which would be six months) would be sufficient and that, in accordance with the Allocation Guideline, keeping
summary jurisdiction would not prevent the magistrates’ court from committing Erikson to the Crown Court for sentence if, on conviction, they were to conclude their powers of sentence to be insufficient. The defence solicitor would need to contend that as sexual assaults go, this was not the most serious. It was largely opportunistic and of short duration; it did not involve naked flesh and the victim does not appear to have suffered any harm. The disparity in terms of age is taken into account within the guideline’s starting point. Had the offence been committed six days later, the starting point would have been considerably lower.

This is not an entirely clear-cut decision for the magistrates’ court. However, the recent revisions to the Allocation Guideline stress the presumption in favour of summary trial, unless the outcome would clearly be a sentence in excess of six months or there are legal or factual complexities in the case making it unsuitable for summary trial.

The magistrates’ decision

If the magistrates were to accept jurisdiction to try the matter summarily, the legal adviser will tell Erikson of the court’s view and inform him that if he consents, he can be tried summarily but, if he chooses, he may elect trial by jury instead.

Erikson must also be told that if he is tried by the magistrates and found guilty, he may be committed to the Crown Court for sentence. This procedure is mandatory and failure to follow it amounts to procedural ultra vires. Any conviction obtained in breach of the legal adviser giving this warning is liable to be quashed when challenged in judicial review proceedings. If the magistrates’ court takes the decision to accept summary jurisdiction, Erikson may seek an indication as to whether a non-
custodial or custodial sentence would be imposed in the event of a guilty plea before making a choice.

The legal adviser will then put Erikson to his election by asking him whether he wishes to be tried by the magistrates or before a jury. Only if Erikson consents to trial in the magistrates’ court may the magistrates proceed to summary trial. If he does not give his consent, MCA 1980, s. 20 requires the case to be tried in the Crown Court.

**EXERCISE 2**

All the offences are triable either way. The magistrates’ maximum powers of sentence on conviction for two or more either-way offences would currently be 12 months. It is most likely that the CPS will invite the magistrates to decline jurisdiction on the basis that their powers of sentence will be insufficient and that there are likely to be factual complexities in this case. The sentencing guideline for fraud is available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-bribery-and-money-laundering-offences-Definitive-guideline2.pdf. This is arguably a Category A-Higher Culpability with the Level of Harm just tipping into Category 3. An 18 month sentencing starting point would be about right. Given Sinead’s denial and her complete lack of any previous convictions, she would be best advised to elect trial by jury in the Crown Court in any event.

Based on the sentencing guidelines for the offence of fraud issued by the Sentencing Council and incorporated within the MCSGs, Sinead’s alleged culpability and the amount of money involved points to a sentencing starting point in excess of the magistrates’ court’s sentencing powers. Given these alleged facts, the
magistrates are likely to decline jurisdiction, in which case Sinead will have no choice and the matter will be sent to the Crown Court.
CHAPTER 12

1. Two or more written charges/informations may be tried together in circumstances where the court considers it is in the interest of justice. Guidance on the application of the interest of justice in this context is provided by the decision of the House of Lords in Chief Constable of Norfolk v Clayton [1983] 2 AC 473.

2. The defence advocate will be aware of the prosecution’s case because he or she will have sought disclosure of used material under Crim PR Part 8 (Initial Disclosure of the Prosecution’s. Where a defendant pleads not guilty to a case that is to be tried summarily, the CPIA 1996 requires the CPS to make disclosure of unused material (s. 3 CPIA 1996) that would reasonably be considered capable of undermining the case for the prosecution or of assisting the case of the accused. In a summary-only case where a not guilty plea is anticipated, a Streamlined Disclosure Certificate will be served along with IDPC. The defendant has the option of submitting a defence statement in a summary case (s. 6 CPIA 1996). Any further disclosure which might assist the defence articulated will only be forthcoming if a defence statement has been served (s. 7A CPIA 1996).

3. The attendance of a witness can be secured by the issue of a witness summons under the procedure set out in s. 97 MCA 1980 and Part 17 Crim PR.

4. The role and responsibilities of the legal adviser or justices’ clerk are briefly outlined in Chapter 1, para. 1.8.3. The role of the legal adviser is to advise the magistrates on law, practice and procedure. The legal adviser plays no part in
decisions on fact. The legal adviser will effectively run the court, keeping a written record of the proceedings and offering assistance to unrepresented defendants.

5. A submission of no case to answer is usually made at the close of the prosecution’s case in circumstances where the defence contends there is no evidence to prove an essential element of the charge against the defendant or the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
CHAPTER 13

1. All defendants appear initially before a magistrates’ court. In a case where the defendant is alleged to have committed an indictable-only offence, the magistrates will send the case forthwith to the Crown Court (s 51 CDA 1998). Matters relating to representation orders and the defendant’s bail status in the meantime will be determined at the initial appearance before magistrates.

2. The prosecution must make disclosure of all used material in its case sent bundle. Thereafter it comes under obligations to make available unused material in accordance with the requirements of the CPIA 1996. The requirement to file a defence statement is compulsory in cases to be tried on indictment (s. 5 CPIA 1996).

3. Where the defence concludes that the prosecution’s pre-trial disclosure does not disclose a case to answer, written or oral application can be made under Sch. 3 CDA 1998 (see Part 9.16Crim PR). Oral evidence may be given at this hearing only with leave of the judge.

4. The primary purpose of the PTPH is to allow the Crown Court to arraign the accused and to take a plea. If the plea is one of not guilty, the Crown Court will engage in effective trial management of the case. The parties must complete the PTPH questionnaire in advance of the hearing. The PTPH will identify the issues that are in dispute, make clear what evidence can be agreed and how many witnesses on each side need to attend court to give evidence (perhaps with special
measures). It will cover the need for expert evidence, bad character and hearsay applications and the PTPH judge will make case management directions and set a date for trial on indictment based on an indication as to likely length or for a Further Case Management Hearing... It is possible for the PTPH judge to make binding rulings on any points of law that are in dispute.
CHAPTER 14

1. The bill of indictment is the document that contains the charges against the defendant on which he is arraigned at the commencement of a trial on indictment.

2. More than one offence may be charged in the same indictment where the offences are either founded on the same facts or form or are part of a series of offences of the same or similar nature, r. 9, Indictment Rules 1971. In *Ludlow v MPC* (1970) 54 Cr App R 233, the House of Lords held that for offences to be similar there must be some nexus between them both in terms of law and fact.

3. For a submission of no case to answer to succeed before a Crown Court judge, the defence advocate must satisfy the test laid down in *R v Galbraith* [1981] 2 All ER 1060 (see para. 14.11).

4. There is a strict separation of function between judge and jury in the Crown Court. The jury determines all issues of fact, while the judge determines all issues of law. Whenever a point of law arises it must be aired in the absence of the jury. This protects the jury from hearing what might be prejudicial information regarding the defendant. Generally speaking, most issues of law, particularly disputed evidence, are resolved before trial at a pre-trial hearing. Sometimes, a *voir dire* (or trial within a trial) is required to determine admissibility of evidence.

5. The trial judge oversees the trial process. It is the duty of the trial judge to ensure the defendant enjoys a fair trial. At the conclusion of the trial the trial judge sums up
the case for the jury. The summing-up is important because it represents the last words said in the trial. The judge will remind the jury of the evidence they have heard and, crucially, he will direct them on the law. Any errors or omissions during the summing-up may provide a convicted defendant with grounds for appeal.

6. A litigation or attendance certificate is granted by a judge in the Crown Court and ensures payment by the LAA for the services of a solicitor or other legal representative at the Crown Court attending counsel.
CHAPTER 15

QUESTION 1

The general rule in a criminal case is that the prosecution bears the burden of proving a defendant’s guilt beyond reasonable doubt. It is known as the legal burden of proof and it requires the prosecution to prove the essential elements of the offence charged. The principle is enshrined in Woolmington v DPP [1935] AC 463 and is consistent with the presumption of innocence safeguarded by Article 6(2) ECHR.

QUESTION 2

Reverse onus clauses refer to those instances in which a legal burden of proof is cast on a defendant to effectively prove his innocence. A statutory section may impose a legal burden of proof on a defendant expressly or by implication. A number of different statutes impose a legal burden of proof on a defendant. For this reason, it is always important to research the elements of the offence which your client is suspected of or with which the client is charged.

QUESTION 3

The current guidelines are contained in the Court of Appeal's judgment in Attorney-General’s Reference (No. 1 of 2004) [2004] 1 WLR 2111. Relevant factors include:

- the definition of the offence and the elements the prosecution must prove;
- the ease with which a defendant can establish a particular defence;
- whether the offence is of a regulatory nature;
- the severity of the penalty that conviction carries;
- whether the imposition of a legal burden of proof is proportionate to the aim of the legislation and if it is not, whether it can be read down to impose an evidential burden of proof only.
CHAPTER 16

1. David is charged with sexual assault on his step-daughter, Florence, aged 14. Florence has learning difficulties. David is pleading not guilty. The prosecution have witness statements from Susie, David’s wife, and their son, Aaron, aged 7.

(a) Susie is a competent witness for the prosecution and in view of the offence with which David is charged is also compellable—see s. 80(3) PACE 1980.

(b) Florence will be presumed competent to give sworn evidence under s. 55(3) YJCEA 1999 as she is aged 14.

(c) We are told that Florence has learning difficulties. If there is reason to doubt her competency to give evidence, the test that needs to be satisfied is laid down in s. 53(3) YJCEA 1999. The court will need to ascertain whether Florence can understand questions put to her and give answers that can be understood. In determining these questions, the court must treat Florence as having the benefit of a special measures direction under s. 19. As Florence is over 14 she will give sworn evidence. If it transpires, however, that she is competent in accordance with s. 53(3) YJCEA 1999 but is unable to satisfy the test for sworn evidence (she does not have sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth—s. 55(2) YJCEA 1999—she will be permitted to give unsworn evidence under s. 56 YJCEA.

(d) As Aaron is under 14, s. 53 YJCEA 1999 presumes that he is competent to give unsworn evidence under s. 56 YJCEA 1999.

(e) Both witnesses will be eligible to give evidence under a special measures direction under s. 16 YJCEA 1999. Aaron is a witness under 18, as is Florence.
In addition, Florence suffers from a mental disorder with the result that her evidence is likely to be diminished as a consequence. Where the court considers that a special measures direction is likely to improve the quality of the evidence given by the witness, the court must make the appropriate order (s. 19(2) YJCEA 1999). Additionally, both fall within the definition of a child witness triggering special protection within the meaning of s. 21 YJCEA 1999. This provision makes video-recorded examination-in-chief and further examination via live link a requirement of the special measures direction.

2. Generally no—leading questions are not permitted in examination-in-chief except by agreement and most often in relation to introductory matters at the beginning of a witness’s evidence.

3. Under s. 139 CJA 2003, a witness is entitled to refresh his or her memory from a document while testifying provided the document was made or verified by the witness on an earlier occasion and the witness states in his or her oral evidence that the document records the witness’s recollection of the matter at the earlier time; and the witness’ recollection of the matters about which he or she is testifying is likely to have been significantly better at that time than it is at the time of the oral evidence.

4. Cross-examination has a number of purposes including obtaining factual evidence from the witness that supports the case of the cross-examiner. It also enables the advocate to test the truthfulness of the evidence the witness has given in examination-in-chief or to cast doubt on the witness’s evidence; and to undermine
the witness’s credibility.

5(a) Unless the prosecution agree to the defence adducing evidence of Ben and Chris’s previous convictions, leave of the court under s. 100 CJA 2003 will need to be sought. Arguably, the evidence does have substantial probative value in relation to a matter of substantial importance having regard to Kyle’s defence.

5(b) Yes. The main protagonists contradict each other. Their respective veracity is therefore a matter of substantial importance. A single conviction for perjury arguably shows a propensity to lie on oath. Account would have to be taken perhaps of the reasons why the offence was committed. Nevertheless, on the facts, the conviction has substantial probative value on a matter of substantial importance in the case.

**CASE STUDY R v LENNY WISE**

The only witness who may be considered eligible for a special measures direction is Lillian Kennedy, the 84-year-old victim of the burglary offence. She might come within the definition of an intimidated witness if the court considers that the quality of her evidence is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings (s. 17 YJCEA 1999). Regard will be had to Mrs Kennedy’s age in determining this. If the court considers a special measures direction is likely to improve the quality of the evidence given by the witness, the court must make the appropriate order (s. 19(2) YJCEA 1999).
CHAPTER 17

SCENARIO

Stefan was represented at the police station. However, there does not seem to be any dispute arising out of the composition of the video parade. The only concern is that the victim was shown photographs prior to the video identification procedure. If (as it seems) Stefan was a known suspect, Code D 3.3 prohibits a witness from being shown photographs where the suspect is known and available. The police may suggest that they were concerned about the victim’s condition and the delay in securing a positive identification; however, this would appear to be a prima facie breach of Code D. The defence advocate will want to make a submission under s. 78 PACE 1984 that the victim’s evidence of identification be excluded (see Chapter 8).

The CCTV footage constitutes real evidence from which the jury is able to draw its own conclusion. Is this a situation in which the jury would benefit from having expert evidence? It depends on the quality of the CCTV stills. If the footage is blurred, expert evidence may be admitted to assist the jury. Would Sergeant Taylor be deemed competent? This would be a matter for the judge. It will depend on the sergeant’s experience (see R v Clare and Peach [1995] 2 Cr App R 333). It will be a matter for the jury as to how much weight it chooses to attribute to the sergeant’s opinion evidence.

Assuming the trial judge refuses to exclude the evidence and the matter is left to the jury, a full Turnbull warning will need to be given. This is a case in which Stefan disputes the identification of him. He relies on alibi to suggest he was somewhere other than at the scene of the crime at the relevant time. If the judge concludes the
evidence of identification is weak but is supported or, indeed, if the evidence is good, he can safely leave it to the jury, directing them in accordance with the Turnbull guidelines. Evidence that supports the correctness of the victim’s identification in this case could come from the evidence of Andrew, the co-accused, and from the refusal by Stefan to answer questions at the police station (s. 34 CJPOA 1994—see Chapter 5). A specific weakness with regard to the evidence in this case would include the fact that it had been obtained in breach of Code D. The judge would need to explain why this is an important factor for the jury to have regard to (see R v Forbes [2001] 1 AC 473—Chapter 7).

Is this a case which calls for a corroboration warning? Did you consider that Andrew’s evidence might be regarded as tainted? Andrew is an accomplice. He is jointly charged with the offence but has chosen to plead guilty to a less serious offence and has given evidence for the prosecution, directly implicating Stefan in the more serious offence. Stefan suggests Andrew is lying and that in addition, because of his sister’s involvement with an officer in the case, he is motivated to give false evidence against Stefan. The defence advocate will no doubt suggest to the judge that there is an evidential basis in this case, in accordance with the principles in R v Makanjuola [1995] 3 All ER 730 for a corroboration warning to be given. It is a matter for the trial judge as to whether he gives such a warning and what form that warning will take.

**R v LENNY WISE**

This is a case *par excellence* where a Turnbull warning would be appropriate if the matter were to be left to the jury. You will recall that we have previously considered
the evidence of identification in this case (see Chapter 7).

As Lenny disputes the eye-witness identification of him, the trial judge would be required to direct the jury in accordance with \( R \ v \ Turnbull \) [1977] QB 224.

Expert evidence features in this case. Consider the statement of Sarah Hardacker (disclosed in the committal bundle) and the statement of Dr Samantha Leighton (disclosed as part of unused material under the CPIA 1996). Both of these witnesses are experts in their particular field. Ms Hardacker’s s. 9 CJA 1967 statement lists her qualifications and experience. The primary facts from which Ms Hardacker provides her opinion (the lifted set of prints) are proved by the evidence of Carol Jane Lawton, a scene of crime officer. Ms Hardacker’s evidence is required in this case as the process of comparing the print with the shoes found in Lenny Wise’s property is a matter falling outside the competency of the court. Ms Hardacker’s conclusion that the shoes are responsible for leaving the prints outside the burgled property is strongly expressed. However, the evidence of Dr Leighton must be borne in mind. Lenny Wise states he has never worn the shoes found at his flat. Dr Leighton, an expert in DNA evidence, was unable to find any of Lenny’s DNA in the shoe.
CHAPTER 18

For the prosecution to rely simply on Duane’s written statement creates a problem of hearsay. Hearsay evidence is generally inadmissible unless it can be brought within a common law or statutory exception.

The relevant statutory provision would be s. 117(4) CJA 2003 as this is a statement prepared in contemplation of criminal proceedings. The reason for the witness’s unavailability would be due to the witness’s fear. Duane is clearly an identifiable witness and we will assume he had the requisite capability at the time he made the statement. As the prosecution would be relying on fear as the condition for admitting Duane’s written statement, fear needs to be proven and leave to admit the statement would be required. Under s. 116(4) CJA 2003, leave will only be granted if the court considers that it would be in the interests of justice to admit the statement having regard to:

(a) the statement’s contents;

(b) any risk that its admission or exclusion will result in unfairness to any party (with particular reference to how difficult it will be to challenge the statement if the relevant person does not give evidence);

(c) in appropriate cases to the fact that a special measures direction could be made in relation to the relevant person;

(d) any other relevant circumstance.

If leave is granted, Duane’s written statement will be admissible under s. 117(4). We are told that Duane is an important witness in this case. Would the admission of his evidence prejudice a fair trial? Regard would be had to the safeguards applicable.
The defendants can of course give evidence themselves or call evidence of alibi. Wayne’s credibility can still be attacked if there is evidence available to undermine his credibility. The judge retains discretion under s. 78 PACE 1984 to exclude the evidence if he concludes its admission would prejudice a fair trial and in directing the jury, the judge will stress the limitations of evidence that has not been subject to cross-examination. The prosecution would need to establish and the court would need to be satisfied that every effort has been made to persuade Duane to give evidence with the benefit of special measures. On the assumption that Duane’s evidence is not the only evidence in the case against the defendants, his evidence is likely to be admitted as hearsay.
CHAPTER 19

1. The prosecution would seek admission of Aaron’s previous conviction under s. 103(1)(a) CJA 2003. It is relevant to an important matter in issue in that it is deemed to establish a propensity to deal in drugs. It makes Aaron’s defence less credible in the circumstances. The defence should oppose its admission. The defence could argue that one previous conviction does not amount to a propensity and that the circumstances surrounding the earlier offence do not indicate a propensity to supply on a commercial basis and that it would therefore be unfair to admit the evidence. The scenario is in fact taken from the case of R v Atkinson [2006] EWCA Crim 1424 in which the Court of Appeal concluded the evidence ought not to have been admitted as it did not disclose a propensity on A’s part.

2(a) The prosecution could argue that Brian’s previous conviction for unlawful sexual intercourse is an offence in the same category (see Secretary of State’s Order in relation to child sex offences) and that it shows a predisposition on Brian’s part towards a sexual interest in young girls giving him a motive for the commission of this offence. The conviction is relatively recent.

Would the defence advocate apply to have the earlier conviction deemed inadmissible? The defence advocate ought to. In what sense does Brian’s earlier conviction show a predisposition on his part towards rape? Rape implies the use of force. It is not suggested that Brian is predisposed towards the use of violence. It is not suggested that he used violence in relation to his earlier offence. Having been charged and convicted of unlawful sexual intercourse, the sexual acts would have
taken place with his victim’s consent. Arguably the conditions of s. 101(1)(d) CJA 2003 are not met, and even if they are, the defence would strongly argue that the probative value of such a previous conviction in this context would be outweighed by its prejudicial effect (s. 101(3) CJA 2003). It would be pertinent to ask how old Brian was when he committed the offence of unlawful sexual intercourse. If he was a young man, the point made by the prosecution that it shows he has a sexual interest in young girls is not entirely accurate.

The criteria for admission under s. 101(1)(d) CJA 2003 is whether the evidence is relevant to an important matter in issue. The matter in issue is whether Brian’s victim consented. The question the advocate should require the court to ask itself is: Does the earlier previous conviction make it more likely that Brian is guilty of the current charge? The answer the defence advocate will be seeking in this instance is—no.

2(b) The prosecution would strongly argue that it should be. It is an offence of the same description and it arguably shows a predisposition on Brian’s part to the use of sexual violence against females. It is relevant to a crucial fact in issue, namely whether the victim did consent. Equally, the prosecution could argue that Brian’s previous conviction shows a propensity to be untruthful as his defence was disbelieved on an earlier occasion.

In this instance, the defence would have to stress the prejudicial effect such knowledge would have on the jury. The circumstances of each rape would need to be very carefully examined and an important consideration would be the strength of the prosecution’s case without the evidence of bad character (applying Hanson).

3. An accused person cannot be forced to give evidence in support of his defence. If
he chooses not to give evidence without good cause, an adverse inference can be drawn against him under s. 35 CJPOA 1994. Given the nature of Tina’s defence, there is an argument for suggesting that Barry needs to give evidence in order to advance his account. Barry stands to have his previous convictions exposed under s. 101(1)(e) as defined by s. 104 CJA 2003, irrespective of whether he chooses to give evidence or not. Tina’s advocate would argue that Barry’s previous convictions have substantial probative value in relation to an important matter in issue, namely who inflicted the injury to the child and who is more likely to be telling the truth. Given the inevitable prejudice to Barry, the trial judge would have to be satisfied that his previous convictions do have substantial probative value in the context of the case. It would be entirely up to the jury what inference they choose to draw from the knowledge of Barry’s previous convictions if they are admitted.

4. Danielle is entitled to a good character direction in accordance with the decision in R v Vye. It is relevant to the likelihood of her having committed the offence and, if she gives evidence on oath, it is also relevant to her credibility as a witness. The evidential effect of good character would have to be made clear to the jury in the judge’s direction.

R v LENNY WISE

You will recall that Lenny Wise faces an allegation of burglary, which he denies. His defence is mistaken identity. Lenny has several previous convictions for burglary and theft-related offences. Under s. 101(1)(d) CJA 2003 the prosecution could argue that Lenny’s previous convictions show a propensity on his part to commit offences of a
dishonest nature and a propensity to be untruthful. They place Lenny in a class of people more likely to have been in Mrs Kennedy’s back garden at the relevant time than the average member of the public. Lenny’s propensity gives context to his defence.

The defence would need to argue that propensity evidence is simply not relevant to the facts in issue in this case, namely whether the evidence of identification is correct. Even if they assume some relevance, their admission would have such an adverse effect on the fairness of the proceedings (s. 101(3) CJA 2003) that they should be excluded. The defence will want to place reliance on Hanson. The defence will need to examine the circumstances of Lenny’s earlier offences and whether he pleaded guilty or was found guilty having given evidence at trial. A relevant consideration would be the strength of the prosecution’s case. Hanson stipulates that bad character evidence should not be admitted to bolster a weak prosecution case. The question of admissibility would be determined at the pre-trial hearing. Lenny’s case illustrates the potential danger of the new law. If Lenny’s previous convictions are admitted, his chances of being convicted are greatly increased.
CHAPTER 20

1. No—only those communications between a solicitor and client that involve the giving or obtaining of legal advice.

2. The test requires the dominant purpose of the communication to be in connection with pending or actual litigation.

3. Legal privilege vests in the client.

4. The privilege against self-incrimination allows a witness to refuse to answer a question which would expose the witness to the possibility of any criminal charge under United Kingdom law. It also extends to a defendant who has been compelled to answer questions as part of an extra-judicial investigation where, at a subsequent criminal prosecution, the prosecution seeks to use the answers given in evidence against the defendant. Evidence obtained in breach of the privilege against self-incrimination may not violate Article 6 and may therefore be admissible (see the decision in Brown v Stott [2001] 2 WLR 817). Until the Supreme Court delivers a definitive judgment on the point, the law remains uncertain whether documents or items which exist independent of the will of the suspect must be disclosed even though they expose the suspect to a later prosecution—or whether the evidence obtained as a consequence of forced disclosure can be used in evidence against an accused.
CHAPTER 21

Based on the specific sentencing guidelines for a s. 47 OAPA 1861 assault contained in the Magistrates’ Court Sentencing Guidelines (see Appendix 3) this could be classed as a category 2 assault in that there is higher culpability but lesser harm. The higher culpability comes from the fact that the assault appears to have been motivated by racial hostility; Scott was in a group and the assault involved head-butting. The starting point in terms of sentence is a custodial term of 26 weeks with a sentence range reducing to a low level community order and increasing to committal to the Crown Court. Statutory aggravating factors in Scott’s case include:

- s. 143(2) CJA 2003—he has previous offences of a like nature;
- s. 143(3) CJA 2003—he committed this offence while on bail;

The effect of these is to increase the seriousness of the offence. This is a case where the magistrates’ court may consider that its maximum custodial term of six months is insufficient because of the number of aggravating features. It is highly likely that an ‘all options’ pre-sentence report would be requested, specifically preserving the right of the court to commit Scott to the Crown Court for sentence which is clearly within the range of sentence available. In determining the final sentence, regard would be had to any personal offender mitigation Scott might put forward. Scott would be entitled to the maximum sentencing discount available which, in accordance with the SGC’s Reduction in Sentence for a Guilty Plea (Revised) (July 2007), would be in the region of one third. The magistrates’ court could decide to impose a maximum term of six months in custody with the credit for guilty plea being the decision not to commit Scott to the Crown Court for sentence.
ANALYSIS OF CASE STUDIES

R v Roger Martin

Aside from the road traffic offences committed by Mr Martin, he is also pleading guilty to an offence of common assault committed in a road rage context. A guilty plea will of course attract a sentencing discount. Having regard to the guideline for common assault in the MCSGs (note: this particular guideline is not included in Appendix 3, you will need to access through the SC’s website), how would you categorise this assault in terms of culpability and harm? How serious was the injury caused in the context of a common assault? A bruised and bloodied nose and black eye is unpleasant but there does not appear to be any lasting effect. There was a repeated assault as two punches were thrown to the facial area. This indicates greater harm. As regards culpability there was a degree of provocation by the witness and there does not appear to be any premeditation as such. Is it therefore correctly classified as a Category 2 common assault or does the injury make it a Category 3? The correct Category classification makes a big difference to the starting point in terms of sentence. For a Category 2 assault, the starting point is a medium level community order with a range up to a high community order. For a Category 3, it is a Band A fine. Additional aggravating features in the commission of this offence include the fact that it was committed in the context of road rage. A little research on this point will reveal that such matters are taken very seriously by the courts. Consider B 2.3 in Blackstone’s Criminal Practice:

‘In Fenton (1994) 15 Cr App R (S) 682 the offender pleaded guilty to common assault (charges of assault occasioning actual bodily harm and dangerous driving
were not proceeded with). In the course of an altercation between motorists, the offender pushed the victim in the chest. The Court of Appeal said that almost all cases of violence between motorists would be so serious that only custody could be justified. The appropriate sentence was seven days’ imprisonment. See also *Ross* (1994) 15 Cr App R (S) 384.’

Fenton predates the ‘Assault’ guidelines issued by the Sentencing Council. The context of the offence however will be an aggravating factor as will Roger’s relevant previous conviction. Assuming it is classed as a Category 2 common assault, the aggravating factors could lead to a high-level community order and could just cross the custody threshold. There do not appear to be any mitigating factors in the commission of the offence. Given the possibility of a community order and the risk of a short custodial sentence, a pre-sentence report should be ordered.

We will assume that having entered a guilty plea, the magistrates adjourn sentence and order a pre-sentence report, keeping all of their sentencing options open. We ask you to consider Chapter 22 before viewing the final sentencing hearing in relation to Roger Martin.

**R v William Hardy**

As the offence under s. 9 SOA 2003 involves penetration of the victim (albeit with her consent), the offence can only be tried on indictment and the maximum sentence for this offence is 14 years. This is clearly a serious offence.

If you have accessed the Sentencing Council’s website, you will have seen that a revised guideline covering offences under the Sexual Offences Act 2003 has been issued, which came into effect on the 1st April 2014. The guideline would be referred
to in the course of the sentencing hearing.

The sentencing starting point would be determined by which category this particular offence might be placed within. If, as is likely, it is considered to be a Category 1 A offence, the starting point would be five years in custody with a range down to two years and up to 10 years. If it were to be placed within Category 1B, the starting point would reduce drastically to a custodial sentence of one year with a downward range of a high community order and an upward range of two years in custody. This offence clearly involves penile vaginal penetration and has resulted in pregnancy. There is an age difference though it is arguably not a significant difference and there is an element of breach of trust.

A key aggravating feature in this case is the suggestion that the prelude to sexual activity between William Hardy and his victim began when he was providing private tuition to the girl. Arguably he was in a position of trust as regards his victim. This is, however, denied by William Hardy. Importantly the defence and prosecution have been able to agree a basis of plea in which it is accepted that William was not in a position of trust when sexual activity was initiated. Had the basis of plea not been agreed, a Newton hearing would almost certainly have been required. In terms of mitigating features of the offence itself, the age disparity between the two is not that great and their sexual relationship would appear to be within the context of a loving and consensual relationship and had been initiated by the victim. Nevertheless, on the face of things, William is self-evidently in a serious predicament. Credit must of course be given for his timely guilty plea (s. 144 (CJA 2003).

Did you spot the fact that William Hardy will also be subject to notification requirements of the Sex Offender’s Register under the SOA 2003? The duration of
notification will be determined by the nature of the sentence William receives.

A pre-sentence report should be ordered in this case.

We ask you to complete your reading of the chapters on sentencing before viewing the final sentencing hearing in relation to William Hardy.

**R v Lenny Wise**

Domestic dwelling house burglary is a serious matter. This is a case where a pre-sentence report would be ordered to explore relevant personal offender mitigation and to consider what might be regarded as the most appropriate sentence for Lenny given his personal circumstances.

The relevant sentencing guideline for this offence can be found in the Sentencing Council’s guideline on Burglary effective from the 16 January 2012 (see Appendix 3). You need to access the guideline which applies specifically to domestic dwelling house burglary. Having regard to the way in which SC guidelines are applied (see 21.8.1), in which offence category would you place this particular burglary? A Category 1 offence has a starting point of 3 years in custody with a range down to 2 years and up to 6 years. A Category 2 offence has a much lower starting point of 1 year in custody. There are several aggravating features which apply to Lenny Wise which raise his culpability. They include:

- the targeting of a vulnerable victim by means of distraction;
- the fact that the victim was at home;
- the fact that the burglars worked as a group.

Lenny’s culpability would be further heightened by the fact that he has a relatively recent previous conviction for burglary and numerous previous convictions for theft.
In addition, the burglary has clearly had an impact on the victim who was left very frightened. This case arguably falls within the highest offence category (category 1). Had Lenny been convicted of this offence he could expect a custodial term of between three to four years, subject to any strong personal offender mitigation that could have been put forward on his behalf.
CHAPTER 22

1. A custodial sentence is a sentence of last resort and is reserved for the most serious offences. The custody threshold test must be met before a custodial sentence can be imposed. The test under s. 152 CJA 2003 is whether the offence is so serious that neither a fine alone, nor a community sentence can be justified. A court can also impose a custodial term on an offender who refuses to comply with a requirement imposed as part of a community sentence or who fails to comply with a pre-sentence drug test under s. 161(2) CJA 2003. For the majority of offences that are sentenced in magistrates’ courts, the key to determining the seriousness of the offence is the balance of aggravating and mitigating factors in the offence, informed by sentencing guidelines, such as those contained in the Magistrates’ Court Sentencing Guidelines. Likewise in the Crown Court, regard should be had to sentencing guidelines which provide guidance to the court on the appropriateness of custodial sentences (see Chapter 21).

2. The easy answer to the question is the seriousness of the offence to be sentenced. Section 153(2) CJA 2003 provides that the custodial term should be the shortest term commensurate with the seriousness of the offence. The picture is complicated, however, by a number of factors discussed in Chapter 21, including:
   • credit for guilty plea;
   • restrictions on magistrates’ court’s sentencing powers;
   • the decision to impose consecutive or concurrent terms in a case where the defendant stands to be sentenced for two or more offences, or is currently subject to a suspended sentence;
• some statutes require the imposition of mandatory terms of imprisonment;
• special provision made under the CJA 2003 for those who are deemed ‘dangerous’ offenders and those who qualify for extended sentences because of the nature of the crimes they have committed.

3. Under the CJA 2003, a court can choose to impose an immediate custodial term or a suspended term of imprisonment.

**QUESTION 4**

**EXERCISE 1**

Start by looking at the MCSGs for theft from a shop (you can access the Guidelines via the SC’s webpages). The specific guideline can be found at https://www.sentencingcouncil.org.uk/offences/item/theft-general/ Based on the facts of this offence, the starting point in terms of sentence is a Band B fine with other sentencing options ranging upwards to a Band C fine and downwards to a conditional discharge. It is suggested that this particular theft falls within category 4 (C). You need to make an assessment of the seriousness of this particular theft and Celia’s culpability. The mitigating features would be that it was impulsive and unsophisticated. The offence is aggravated by the fact that Celia is subject to a conditional discharge for an identical offence imposed only six months ago. Celia therefore stands to be sentenced for the original theft for which she was given a conditional discharge. For this reason a further conditional discharge is somewhat unrealistic.

Celia will most probably be subject to a Band C fine (most probably charged at that
is 150% of her relevant weekly income. In arriving at the eventual sentence, the court should give her full credit for her guilty plea. She will also be sentenced for the breach of the conditional discharge. The court may extend this or impose a further fine on her for the original offence.

**EXERCISE 2**

Louise is also charged with theft, but there is a crucial difference between her offence and that of Celia. Louise’s theft involves a breach of trust. She has stolen from her employer. Based on the facts of this offence and again, applying the guideline at: Category 4

| Low value goods stolen (up to £500) and Little or no significant additional harm to the victim or others, the starting point in terms of sentence is a low level community order a sentence range up to a medium community level and down to a Band C fine. Try to assess the relative seriousness of the theft and Louise’s culpability.

The aggravating features include the fact that suspicion would have been cast on the other employees and that the offence was committed over a period of time. On the mitigating side of things the amount involved is small: hence this is a Category 4 (B) offence.

This is a case where a fast delivery pre-sentence report should be ordered. Louise has plenty of personal offender mitigation and could well be looking at a low end community order perhaps combining a rehabilitation activity requirement with an unpaid work requirement. She can expect to be ordered to pay £150 in compensation and some or all of the prosecution’s costs. Given her limited means,
priority would be given to the compensation. In arriving at the eventual sentence, the court should give a discount for her guilty plea, perhaps reflected in the length and nature of the community order.

EXERCISE 3
The applicable sentencing guideline for this offence can be found at http://www.sentencingcouncil.org.uk/offences/item/production-of-a-controlled-drug-cultivation-of-cannabis-plant/. Based on the facts, Andrew’s criminal activity arguably falls within a Category 4 offence for a Class B drug based on a lesser role (essentially this is small scale cultivation for personal use and non-commercial supply). The sentencing starting point, based on this categorization, is a Band C fine. Aggravating features include the fact that this is not Andrew's first offence. Mitigating features include the fact that the drug is used to alleviate his partner's chronic medical condition. Subject to any strong personal offender mitigation, the most appropriate sentence, based on the guideline, is probably a low level community order or Band C fine. Andrew is entitled to a sentencing discount on account of his timely guilty plea.

EXERCISE 4
You need to access the s. 89 Police Act 1996 guideline in the MCSGs. It can be found at http://www.sentencingcouncil.org.uk/offences/item/assault-on-a-police-constable-in-execution-of-his-duty/. Assess the seriousness of this particular assault on a police officer, by reference to the harm caused and to Darren’s culpability. Which category of assault would you place it in? Arguably it could be deemed to be a
Category 3 assault (greater harm and higher culpability). This was an intentional assault involving sustained kicking of the officer whilst he was on the ground. Injuries were caused leading to the officer having three weeks off work. On the assumption that it is correctly classified as a Category 3 assault, the starting point in terms of sentence is a 12-week custodial term. Are there any aggravating or mitigating features? Look at the guideline. Darren has two previous convictions for relevant offences and committed the offence whilst drunk. This is not a case where the court would have the power to commit Darren to sentence in the Crown Court under s. 3 PCC(S)A 2000. Do you know why? The answer is because it is a summary-only offence. Given the number of aggravating features, the court may feel that the starting point in terms of sentence ought to be increased.

A realistic sentencing objective in this case would be to avoid a custodial sentence and secure a medium to high-level community order. This will not be easy. There is evidence of regret. You should certainly refer to *R v Kefford* [2002] 2 Cr App R (S) 495 and the question of whether a prison sentence would serve any useful purpose in this case. A custodial sentence would probably result in Darren losing his job and being unable to pay compensation. Darren should be given credit for his early guilty plea. Darren could well be given a custodial sentence in the region of three months. This was a nasty assault on a serving police officer trying to fulfil his public duty. The court will feel the need to punish Darren and send out the right message. If the Bench was feeling lenient, Darren might be made the subject of a community order with a lengthy unpaid work requirement and/or curfew requirement and/or a prohibited activity order. If this were imposed, he would be in a position to pay compensation to the police constable as well as prosecution costs.
CHAPTER 23

1. A common use of s. 142 MCA 1980 is to rectify an obvious mistake during the defendant’s trial and in cases where the defendant was convicted and sentenced in his absence.

2. The Crown Court may impose any sentence which the magistrates could have imposed. This might mean your client could receive a harsher sentence.

3. Any party to the proceedings may appeal by case stated.

4. Yes—leave must be obtained from either the trial judge or from the Court of Appeal.

5. An appeal against conviction will only be allowed where the conviction is ‘unsafe’ under s. 2(1)(a) Criminal Appeal Act 1968.
CHAPTER 24

1. The appropriate adult’s role is to support, to advise and assist the juvenile and to ensure that the police are acting fairly with respect to the detainee’s rights.

2. Yes—subject to the same conditions as an adult applicant (i.e. interests of justice and means—however an applicant under the age of 18 will qualify automatically in terms of means).

3. YOTs undertake the day-to-day administration of youth justice. A YOT is situated in every local authority in England and Wales. The multidisciplinary membership of each YOT is drawn from the police, Probation Service, social services and education, the health authority, housing and drug, alcohol and substance misuse agencies. The YOT identifies the needs of young offenders and manages specific programmes to prevent them offending or reoffending. The YOT also exercises the statutory responsibility of supervising young people in custody and on community orders.

4. If it is decided not to prosecute Remi and evidential and public interest tests are satisfied under the Code for Crown Prosecutors, section 7.1 of the Code requires the Crown Prosecutor to consider the possibility of alternatives to prosecution. Remi may therefore be given a community resolution, a youth caution or youth conditional caution. A community resolution is a disposal that is appropriate for low-level offences and usually involves an element of restorative justice. This might require
Remi apologising to the victim or repairing any damage caused by the offence. A community resolution is, issued directly by a police officer who is satisfied with having identified the parties involved and the nature and circumstances of the offence, as well as the fact that the crime is suitable for such an outcome. The victim’s wishes must be considered and Remi would have to consent. If the resolution is not fulfilled by the offender, the case goes to court. A community resolution will not lead to Remi having a criminal record. An alternative approach would be to impose a youth caution on Remi where the officer has evidence that Remi committed the offence and evidence in the case discloses a realistic prospect of a conviction. Remi must admit to the police officer that he committed the offence and the officer is satisfied that a prosecution is not in the public interest. A youth conditional caution is an option but given the scaled approach to youth offending, the youth caution would be more appropriate if a community resolution is not possible.

5. Charlie admits the offence. It is a serious offence of assault which has resulted in a nasty injury. However, no weapon was used and to some extent it was an impulsive action. Charlie has received a reprimand (abolished in April 2013 and replaced by a community resolution or youth caution or youth conditional caution). The evidential test and public interest test would appear to be satisfied. It is to Charlie’s credit that he had admitted his guilt and expressed remorse. He evidently has a number of difficulties in his life and he is very young. In view of the statutory aims of youth justice to prevent offending or re-offending and to consider the welfare of the young person this is likely to be a case where a youth caution or youth conditional caution could be given.
CHAPTER 25

1. The young person should generally be tried in the youth court, but there are exceptions to this, depending on whether the young person is facing a charge of homicide or a ‘grave’ crime, or is jointly charged with an adult facing an offence which is to be tried on indictment or may come within the ‘dangerousness’ provisions (see diagram at the end of Chapter 25).

2. Tracey is 15 and will therefore appear before the youth court. She faces an offence that is triable either way. Tracey will have no right of election. The youth court will consider whether this case should be sent to the Crown Court under s. 51A(3)(b) CDA 1998 as a ‘grave’ crime, having regard to the seriousness of the offence and its maximum power of punishment, which is a two-year DTO. The justices’ legal adviser will need to give advice on sentencing guidelines for this type of offence. Tracey is not charged with an aggravated offence of arson with intent to endanger life. However, the offence is serious and may attract a custodial sentence. The youth courts’ maximum sentencing power of up to a 24 month DTO should be sufficient.

3. Barry faces a charge which carries a maximum custodial sentence of 14 years in the case of an adult. It therefore falls within the definition of a ‘grave’ crime. It is also a ‘specified’ offence for the purposes of the ‘dangerousness’ provisions. It is likely but not certain that the youth court will decline jurisdiction in this case under the grave crime provisions. You would need to research the specific sentencing
guidelines for the offence of causing death by dangerous driving. The guidance issued by the Sentencing Guidelines Council both for the specific offence and its Overarching Principles for Sentencing Youths (November 2009) would need to be considered. Making an allowance for Barry’s age, and having regard to the offence-specific guidelines, if the youth court concludes that the offence is of such gravity that a sentence \textit{substantially beyond} the two-year maximum for a detention and training order is a realistic possibility, it must commit for trial under the ‘grave crime’ provisions. Although death by dangerous driving is a specified offence within the ‘dangerousness’ provisions, recent case law and CPS guidance provides that a determination of dangerousness can often not be made until the youth court has access to a full risk assessment (which is usually made post-conviction in a pre-sentence report) with the result that there will be few cases in which it will be appropriate to send for trial under s. 51A(3)(d) CDA 1998.
CHAPTER 26

1. The main custodial sentence for a young offender is a detention and training order. The maximum term is 24 months. It cannot be imposed on an offender under the age of 12. In relation to an offender under the age of 15, they have to be a persistent offender (see definition in Chapter 24). The custody threshold test must be met.

2. In the first instance, it largely depends on how serious the youth court views this offence. Unless the youth court takes the view that the offence is so serious that only a custodial sentence can be imposed, the conditions for a compulsory referral order are met (Tracey is a first time offender and has pleaded guilty). Given the serious nature of the offence, such a referral order is likely to be in the region of 12 months. If the youth court is considering a custodial sentence, it must obtain a pre-sentence report. A youth court can only impose a DTO on Tracey if the custody threshold test is met. Really, in the scenario described, the youth court is faced with a straight choice between a referral order and custody.

If Tracey had been found guilty following a trial, then neither the conditions for a compulsory referral order nor for a discretionary referral order would be met. Depending on the content of the pre-sentence report, the youth court might consider a reparation order. If satisfied that the offence is serious enough (which an offence of arson would be), it could impose a youth rehabilitation order (YRO) with requirements. A detention and training order (DTO) can only be imposed if the custody threshold test is met and the youth court concludes that a YRO with either
an intensive supervision or surveillance (ISS) requirement or fostering requirement cannot be justified.

If Tracey pleaded guilty but had several previous convictions then, taking into account the fact that Tracey has failed to respond to previous orders, the youth court might conclude that the offence crosses the custody threshold in this instance. If it does and the youth court concludes that a YRO with an ISS or fostering requirement cannot be justified, a DTO can be imposed. Much will depend on Tracey’s maturity and the risk assessment undertaken in preparation of the pre-sentence report. As Tracey is 15, the youth court would not need to consider whether she was a persistent offender for this purpose. The minimum length of a DTO is four months. Tracey will serve half her sentence in custody and the remaining half under supervision in the community. It is possible that the ‘dangerous’ sentencing provisions could be invoked in this scenario. Arson is a specified offence. Again, the content of the pre-sentence report and the risk assessment undertaken in this regard will be influential. The youth court would have the power to commit Tracey for sentence to the Crown Court under the dangerousness provisions (s. 3C PCC(S)A 2000), if it concluded that the statutory test for dangerousness was met. This seems unlikely on the facts. A discretionary referral order would be a possibility but the seriousness of the offence may prevent this.

Unless the youth court imposes a referral order on Tracey, it must bind over Tracey’s parents or guardian unless it is not in the interests of justice to do so. It is unlikely that the court will consider an award of compensation given the social problems Tracey and her family face and having regard to the sums involved.
3. A young person would need to appeal to the Crown Court. The appeal would be conducted in the same way as for an adult.