SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

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Avon and Somerset Constabulary

Perspectives on the Criminal Justice System

March 18th 2014[1]

Introduction

1. It is a great pleasure to be here, at the invitation of the Chief Constable whom I had the pleasure of first meeting some years back and to contribute to the Avon and Somerset Guest Lecture Series. I have taken as my topic tonight, "Perspectives on the Criminal Justice System".

2. Without compromising our respective independence, I believe we have much to learn from one another, as professionals in the CJS. We have very different roles, but we each have a strong commitment to justice and I think it is of real value to share our thoughts and views, and most importantly, what we can do to make things better. My role as Senior Presiding Judge requires me to have a constant focus on how we can improve what we are doing for the benefit of the system as a whole, but it cannot be done alone – the Criminal Justice System ("CJS") is an inter-connected system and depends on all interested parties doing what they are obliged to do.

3. I should make one matter clear at the outset; though in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary is homogenous and has only one view on any topic, is simply unreal.

4. Returning to reality, there is much of which we can and should be proud. Complacency would be unforgivable but excessive navel-gazing is unhealthy. We can properly lay claim to a society in which the rule of law prevails, upheld by a Judiciary of unquestioned probity and independence. We have in our Police a Service tracing its proud history to the reforms of Sir Robert Peel, brilliantly described in Douglas Hurd's biography[2] and which furnished the country with a

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[1] I am grateful to Sara Carnegie, Legal Secretary to the SPJ, for her assistance.

[2] See, *Robert Peel: A biography*, Douglas Hurd (2007), esp. at pp. 71-2, 103 – 107.

police force which was not military in nature – indeed its establishment served to ensure that in the case of disorder, the army was not called in prematurely (thus assisting in preserving stability in the tumultuous year of 1848 when other European States were tottering).

5. Against this background, I take as my three principal themes this evening:
   i. the Rule of Law and the independence of the judiciary;
   ii. maintaining public confidence in the CJS;
   iii. work in progress.

(i) The Rule of Law and the independence of the judiciary

6. The rule of law is central to our system of values in the United Kingdom[3]. Let me be clear. It is not an optional extra; nor is it a nuisance or a sideshow. We should never take it for granted; think for a moment what it entails, whether as a citizen or an investor, to live in a country where it does not prevail. The rule of law is of the first importance in assisting and promoting the conduct of business. It defines the society in which we live. It is at the heart of our Justice System overall and of course the CJS.

7. What does "the rule of law" mean? We can take as a working definition that offered by the late Lord Bingham, in his excellent work, *The Rule of Law* (2010), at p.8:

   > "*The core of the ….principle is….that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*"

   An "inescapable consequence" of the rule of law is that ministers, officials and public bodies are successfully challenged in the courts, which, as Lord Bingham went on to observe (p.65), does not endear the courts to those on the receiving end. But a moment's thought reveals that, as Lord Bingham put it:

   > "*There are countries in the world where all judicial decisions find favour with the powers that be but they are probably not places where any of us would wish to live*."

8. It is, I think, self evident that the rule of law cannot survive without an independent judiciary. Let me be clear about that too. The Judiciary are not simply another group of senior officials or office-holders; though the separation

[3] Though my jurisdiction is, of course, England and Wales (and not Scotland or Northern Ireland), from time to time I will refer to the United Kingdom ("UK"), either because it is appropriate (as here) or for brevity.

of powers in this country has always been more practical than theoretical, the Judiciary comprise the third branch of the State. The independence of judges is protected in a number of ways, including the following:

(i) The tradition that Judges are independent of the legislature and executive. The force of tradition should not be underrated. It would be unthinkable for any government minister to seek to dictate or influence the outcome of a judicial decision. That does not mean that we do not need to remain vigilant; it is unwise ever to be complacent on such matters. Moreover, it is necessary to remain alert to such matters as judicial control of listing (politicians and governments cannot decide who hears which cases) and guarding against a culture of adjournments (so often in some countries a route for corruption). It is a corollary of judicial independence that Judges do not become involved in political debate.

(ii) The very considerable *de facto* support for the Judiciary furnished by the Lord Chancellor under his former, traditional role has now gone. However, the *Constitutional Reform Act 2005 ("the CRA 2005")* in a number of respects, serves to emphasise judicial independence. First, the Lord Chief Justice has become the head of the Judiciary. Secondly, appointments became the preserve of the (independent) Judicial Appointments Commission. Thirdly, the Lord Chancellor (as the accountable minister) remains under a duty in section 1, to uphold the Rule of Law[4], further reflected in the oath to be taken by Lord Chancellors under section 17(1) of the Act, to respect the rule of law and defend the independence of the judiciary.[5]

(iii) Appointment and removal of Judges. As foreshadowed, the vast majority of Judges in England and Wales are appointed pursuant to a process (conducted by the Judicial Appointments Commission) independent of the legislature and executive. Moreover, apart from leaving on age and health grounds, judges of the High Court and above cannot be removed from office without an address passed by both Houses of Parliament. Still further, judges are almost entirely immune from the risk of being sued or prosecuted for what they do in their capacity as a judge.

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[4] Constitutional Reform Act 2005, PART 1 THE RULE OF LAW:
1The rule of law
This Act does not adversely affect—

(a)the existing constitutional principle of the rule of law, or

(b)the Lord Chancellor's existing constitutional role in relation to that principle.

[5] Note **Section 1 of the Courts Act 2003** which places the Lord Chancellor under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts.

9A. I should add that, when discussing independence, the operational independence of the Police is itself of the first importance.[6]

(ii) Maintaining public confidence in the CJS

10. For better or for worse, we live in an age where deference is in short supply. Moreover and all the more so with a 24 hour news cycle, long term thinking tends to be the exception rather than the rule. The challenge for all of us involved in the CJS, of necessity concerned with the long term health of the system, is to maintain public confidence at all times – through the short term ups, downs, instant judgments and knee-jerk reactions. In the time available, I take but a few examples to illustrate this theme.

11. *(1) The Police:* I start, if I may, with you, the Police. The difficult nature of your daily duties is such that you, rightly, enjoy a large reservoir of public support and trust. I have no wish to belabour the point but anything which goes to undermine that trust and public confidence is damaging in the extreme. It is therefore essential that you – like us – must do everything possible to ensure that your operational conduct, often in the most trying circumstances, can satisfy public scrutiny without sacrificing proper operational objectives.

12. I steer clear of some high profile recent news coverage, upon which I express no opinion. I can make my point by reference to the example of Out of Court Disposals ("OOCDs").

13. There has been and always will be a place for OOCDs. Not every incident involving relatively trivial unlawful behaviour requires criminalisation through the court process. There must, however, be public confidence in the use of OOCDs.

14. Often, when I travel across the country on visits to the Circuits, OOCDs have been a concern raised by Magistrates. Such disposals are often criticised for a lack of consistency and transparency. On the one hand they are, at times, criticised for use in cases that should have gone to court and, on other occasions, for use in cases where there is concern that the individual made the subject of the caution did not (or not fully) appreciate the consequences.

15. I understand that following on from the review of simple cautions (announced in September 2013), MoJ and the police are leading a wider joint review of OOCDs, with the aim of simplifying the existing complex arrangements. I am told that the 8 week consultation ran until January 2014 and I await the outcome with interest.

16. In the meantime, however, I see merit in the involvement of the Magistracy in retrospective scrutiny of the use of OOCDs. To this end, in June 2013, I

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[6] *A v Secretary of State for the Home Department* [2005] AC 68 at [42].

published guidance for the Magistracy, making it clear that scrutiny will always be retrospective and will not involve magistrates endorsing, rescinding, or otherwise changing individual OOCDs in any way. As I have throughout emphasised, the assistance of magistrates in this way is to support the administration of justice and to enhance consistency and transparency. Under no circumstances should such scrutiny entail an appellate function. I shall be interested to learn over time how this scrutiny is proceeding and whether useful lessons have been learned.

17. *(2) Victims:* I start with terminology. Those who allege that a crime has been committed against them are "complainants". In some cases, where it is common ground that a crime has been committed but the identity of the perpetrator is in dispute, they are plainly victims as well from the outset. In other cases, where the issue goes to whether a crime has been committed at all, the complainant remains a complainant until a verdict of guilty has been pronounced; they then become a victim truly so called. The terminology matters in serving as a necessary reminder that, however heinous the allegation, in our system – and for good reason – the defendant is entitled to a fair trial and is not to be convicted unless or until the Crown has made the jury sure of his/ her guilt. In another sense, however, the terminology matters not: it is incumbent on all those concerned with the CJS to treat complainants, victims and witnesses with respect and dignity and with proper regard to their vulnerability. For my part, I am very firmly of the view that there is no incompatibility between a fair trial for the defendant and a proper regard for the position of complainants and others throughout the proceedings. If I may say so, the increased focus on the position of complainants, victims and witnesses, has been timely and to the benefit of the CJS as a whole – and the work of the Victims Commissioner and others in this regard is to be commended. There is always the danger otherwise that, as in any large system[7], the interests of some times vulnerable individuals may not receive the attention they deserve.

18. How can we improve the expectation of complainants, victims and witnesses of the process, while ensuring that we operate fairly with regard to those accused of committing a criminal offence? We have an adversarial process which allows and indeed requires those representing their clients' interests to challenge the Prosecution case. This will necessarily involve asking witnesses difficult and at times, upsetting questions. There are, however, ways that this can be done to minimise the suffering and trauma of the witness. Much has indeed already been done.

19. First, there must be realistic expectations. Complainants, victims and witnesses must be given clear and honest information about what to expect. Regular and supportive communication is essential and if managed correctly can avoid misunderstandings and unnecessary trauma.

[7] Cf elderly patients in the NHS.

20. Secondly, there are a number of special measures that can be used to assist witnesses, both before and during the trial, not least court familiarisation visits, pre-recorded ABE (achieving best evidence) interviews for young and vulnerable witnesses and pre-recorded cross examination of such witnesses, which is being piloted at the moment in Kingston, Leeds and Liverpool, with the first recordings taking place from the end of April. Not only the evidence in chief, but also the cross examination of the child witness will be pre-recorded at separate stages and both will be played at the court during the trial, avoiding the need for the witness to attend in most cases. An early and intensive focus on case management (properly conducted) should help witnesses understand what to expect, prepare for the trial knowing that a date has been set and, one hopes, obtain some reassurance about what can be done to make the process more bearable.

21. Thirdly, with the support of the Lord Chief Justice ("LCJ"), I have recently asked for feedback from judges, the CPS and police on proposed guidance for best practice when dealing with sex offences cases. The aim is to set out the practical steps to be taken, both inside and outside Court, to ensure that the case is handled in the optimum way, avoiding delay.

22. I would like to promulgate this guidance in due course, either as guidance to judges - although I hasten to add that it requires support from the CPS and police - or, if the LCJ considers it appropriate, to be included in the Criminal Practice Direction or Criminal Procedure Rules.

23. Fourthly, the new Family Protocol in respect of disclosure of information in child abuse and linked criminal and care directions hearings took effect from January this year. Third party disclosure is the cause of real difficulty and delay in many such cases across the country. I am hopeful that the new national protocol agreed by the key parties to the process (I am a signatory, together with the President of the Family Division and the DPP) will provide a more timely and consistent national approach, ameliorating – at least to some extent - the third party disclosure problems which have previously plagued the system.

24. Fifthly, the introduction in the revised Victims' Code of the right for victims to read out their victim personal statements creates a further opportunity for victims to be heard. This can undoubtedly prove beneficial, provided the process is properly conducted and that expectations are properly managed. Thus, a victim can give relevant evidence as to the consequences of the crime but can have nothing relevant to say as to the sentence to be imposed. Moreover – and with regard to magistrates' court proceedings – it is essential that a proportionate system is adopted. For example, it is necessary to balance the need for expedition in summary justice with the wish of some victims to be present at sentencing. The Criminal Practice Direction issued in

December 2013[8] makes it clear that Court hearings should not be adjourned solely to allow the victim to attend court to read their statement, although all the circumstances must considered and decided on a case by case basis.

25. *(3) Broadcasting:* I turn to something very different, which is, I suspect, here to stay, even though, strictly, the jury is still out – namely, broadcasting.

26. In October 2013, cameras were allowed into the Court of Appeal to film cases for the first time, with specific conditions and safeguards in place. Although this was a political decision, any process developed had to be agreed by the Lord Chief Justice. I spent some 2 years leading a judicial group (much assisted by Sara Carnegie, here with me tonight) who worked closely with the Ministry of Justice, HMCTS and broadcasters to ensure that the desire for transparency of the court process was achieved without compromising the integrity of the courts or the administration of justice. The public can now see highlights or full hearings from the Court of Appeal on television or via the internet, in respect of cases which broadcasters have chosen to film and broadcast. So far, from a judicial perspective, broadly speaking so good but, throughout, we need to strike an appropriate balance. On the one hand, broadcasting is capable of boosting public confidence in the diligence and integrity of those involved in the justice system. On the other hand, it is essential that such broadcasting as is permitted does not demean the process, produce grandstanding or interfere with the administration of justice.

27. *(4) Resources:* Although I reject the notion that the justice system is simply another public service (a topic for another day), it would be unrealistic to expect the CJS to have been exempt from the more general squeeze on public sector finances – and it has not been, as we know all too well. What are the ramifications for public confidence in the CJS? As it seems to me, there are a number.

28. First, the Police, CPS and Probation all operate with reduced resources. To an extent at least, this necessarily impacts on the level of service provided. I say "to an extent" because some times a shortage of resources prompts greater efficiency. But insofar as the selection of priorities becomes acute, I must urge you to treat the CJS as part of your core functions. All the investigatory work undertaken can be rendered useless if not translated into admissible evidence. Trials can be – and, sadly, still are – derailed where disclosure is neglected. The key to an efficient and effective trial process starts with the Prosecution, both Police and CPS. Apparently mundane tasks matter more than might be supposed: proper file build, timely review of documentation, timely compliance with Court orders, proper attention to disclosure, ensuring the attendance of witnesses and so on.

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[8] http://www.judiciary.gov.uk/JCO%2fDocuments%2fPractice+Directions%2fConsolidated-criminal%2fcpd-amendment-no1-as-handed-down-on-101213.pdf

29. Secondly, our adversarial process hinges on assumptions as to the competence of advocates for both Prosecution and Defence. Necessarily, the Judiciary is not and cannot become involved in a dispute as to fees – but we as Judges do have a real interest in the outcome insofar as it impacts on the quality of advocacy in the Courts

30. Thirdly, for Judges, especially in Crown Courts up and down the land, there are daily frustrations when things are not as they should be. Over and above staff turnover and shortages, a backlog in maintenance of court buildings and the like, I frequently encounter complaints as to the need for Judges to do more to make up for the failings of Prosecution and Defence.

31. All of these matters are capable of impacting adversely on public confidence in the CJS. As it seems to me, the case for additional resources is best advanced, not on our parochial interests but rather on the basis of society's need for a properly functioning CJS. It is after all justice which is at stake. Moreover and difficult though it can be, I think the message from all of us in leadership roles is that quality standards must be insisted upon and maintained. There is no alternative. I pride myself that a part of our inheritance is the best CJS in the world – but we will all need to work very hard to maintain that rating.

(iii) Work in progress

32. With such considerations in mind, I am engaged in a variety of projects aimed at improving the efficiency of the CJS; even when judicially led, these efforts are invariably conducted in conjunction with other interested parties in the CJS – as already underlined, the system is inter-connected. Occasionally it is necessary to guard against initiative overload. It is also necessary to maintain an emphasis on achieving practical results; the goal is improved performance not impeccable paper trails.

33. This work includes the following projects, currently underway:

    1. The Review of Disclosure in the Magistrates' Courts;
    2. Implementing a national EGP Scheme;
    3. Piloting the implementation of the recommendations of the Reviews of Disclosure in document intensive cases in the Crown Court;
    4. A performance management pilot on the Midland Circuit.

34. *(1) Review of Disclosure in the Magistrates' Court:* The key element of the Magistrates' Disclosure review is for the court to effectively manage cases from the outset. It recommends that the disclosure process be brought forward, to enable a more proactive approach to case management at the first hearing in anticipated not guilty plea cases. I mention this Review first, because the twin-streaming of anticipated Guilty and Not Guilty cases and the separate timetables for each serve as a starting point for the proposed

EGP Scheme in the Crown Court. Work on implementation of the bulk of the recommendations of this Review is now under way.[9]

35. *(2) Implementing a national EGP Scheme:* The philosophy underlying the promotion of EGPs is straightforward: Guilty pleas should be forthcoming as early as possible, so saving unnecessary work and expenditure – and sparing complainants, victims, witnesses and relatives unnecessary distress. Cases destined to go to trial should be case managed robustly throughout. Both before and following the abolition of committals there were a variety of local EGP Schemes. As the LCJ has (with respect, rightly) made clear, there should be a single national scheme, embodied in the CPR and a PD as appropriate. Moreover, that scheme should seek to minimise pre-trial hearings – without, I would add, sacrificing performance. In seeking to square the circle, we must be alive to the vastly increased use which can be made of technology. Intensive work is currently being undertaken in this regard and I am confident that such a scheme will be up and running sooner rather than later.

36. *(3) Piloting the implementation of the recommendations of the Reviews of Disclosure in document intensive cases in the Crown Court:* Issues of disclosure have long bedevilled the criminal justice system. I spent 2 years looking into this in great detail, leading to the Gross Disclosure Reviews I and II (the second conducted with Treacy LJ) which were published in 2011 and 2012, which no doubt you have all read from cover to cover. These looked at disclosure in more complex cases in the Crown Court and made a number of recommendations for improvement. I have heard from the CPS and police that training has and is being improved and closer working relationships will deliver a better service. All concerned are agreed as to what should be done; that is not the same as doing it. The pilots are designed to prod movement from good intentions to delivery.

37. *(4) The performance management pilot on the Midland Circuit:* The CJS generates the regular provision of statistics, going to performance – for example, the rates for effective, ineffective and cracked trials, timeliness and

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[9] There is a more radical self contained proposal in the background: namely, that consideration be given to legislation for the disclosure of all unused material (save for privileged material) in cases to be tried in the Magistrates' Court. If pursued, there would be a clear distinction between cases heard at the magistrates' court and those sent to the Crown Court. All Crown Court cases would remain within the CPIA regime, while a pragmatic and proportionate new approach would apply in respect of those that fell under the jurisdiction of the magistrates' court, thereby removing a cause of significant delay and inefficiency. A further benefit is that the proposal would appear to be cost neutral. This is a matter for future consideration; the plus would be the effective elimination of disclosure as an issue in the Magistrates' Court; the minus (or at least concern) would be a different system of disclosure in summary trials from that prevailing in the Crown Court.

productivity. The aim of this pilot is to ascertain whether a more structured and formal approach to the use of this data can achieve improvements in performance. The idea is to utilise the current reporting lines between Resident Judges ("RJJ") and Presiding Judges ("PJJ") and those between PJJ and me. The intention is to encourage PJJ to take responsibility for improving performance across the Circuit and RJJ to do likewise in respect of their Crown Courts.

Conclusion

38. All systems, no matter how venerable, must adapt to changed circumstances. Our CJS is no exception. The true challenge is to preserve its essential values, within the limits of affordability. On 4th March this year, the LCJ, Lord Thomas of Cwmgiedd, spoke at a conference organised by Justice[10] about the need to reshape our processes to deal with a substantially reduced budget. The LCJ's speech was essentially directed to Civil and Family Justice but, as I hope this talk will have indicated, the CJS must ask the same questions.

39. In this regard, it is right to flag that the LCJ has also recently asked Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review to identify ways to streamline and modernise the process of criminal justice and reduce the total length of criminal proceedings. This is a major undertaking and I very much look forward to supporting Sir Brian in his task; indeed, I think it is fair to say that the initiatives of which I have spoken fit neatly with this theme.

40. I am conscious that tonight, in many respects, I have only scratched the surface. I have not, for instance, said anything about the major and distinctive contribution made to our CJS by its lay elements – our much valued Magistracy and our juries. As I have frequently said, elsewhere, I am a strong supporter of the Magistracy, as well as of the District Bench. So far as concerns juries, the recent and increased attention to jury utilisation and how well juries are looked after is both welcome and timely.

41. Why, you may ask have I spent so much time on practicalities and efficiencies? The answer, first, is that it is my duty to do so. Under the *Framework Document*[11], the shared aim of the Lord Chancellor and the LCJ is "To run an efficient and effective courts and tribunals system, which enables the rule of law to be upheld and provides access to justice for all". Secondly and more than that, when money is scarce it is incumbent upon all of us to preserve the essential foundations of the CJS; in that regard, there can be no compromises. But to do that, we must make our processes as efficient as we can or, indeed, alter them where necessary.

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[10] The all-party law reform and human rights organisation whose work aims to strengthen the justice system (administrative, civil and criminal) in the United Kingdom.
[11] April 2011, cl. 2.2

42. Thank you every much again for inviting me to speak this evening.

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