LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT HON. THE LORD BURNETT OF MALDON

CRIMINAL CASES REVIEW COMMISSION

2nd November 2017

1. I am very grateful to the Criminal Cases Review Commission for asking me to join you this morning to reflect briefly on your first twenty years of service to the rule of law and cause of justice. As I am first to speak may I thank Linklaters on your collective behalf for their generous hospitality without which this event would not be taking place. It is particularly poignant for me to be here because, as some of you know, I was junior counsel to the May inquiry into the convictions of the Guildford Four and Maguire family and so whilst not quite the midwife to the birth of the Criminal Cases Review Commission was one of those in the delivery room. You have a fascinating day ahead of you and I am only sorry that pressing commitments elsewhere will force me to leave, rather rudely, as soon as I have finished speaking.

2. At one time our criminal justice system operated in a way that was, if I can borrow from Hobbes, nasty, brutish, and short. This is perhaps exemplified by a story told by Sir Henry Hawkins, a judge who was himself no stranger to miscarriages of justice; for some he was one of the very worst judges of the late 19th Century. Rather than recall one of his own criminal trials, his memoirs recount an Old Bailey trial in the early to mid-1840s.

3. The story opens with the accused (not then the defendant) being read the charge. The offence: picking pockets. The plea: not guilty. The witness for the prosecution is called. In short order, prosecuting Counsel summarises what happened on the day in question: you felt your pocket being tugged and your handkerchief was no longer there. Yes, the witness agrees. The handkerchief is then produced. Again, the witness agrees that it is indeed the missing handkerchief. The judge suggests to the accused that he has no questions to ask by way of cross-examination. Without waiting for an answer, the judge calls the next witness.

4. This time prosecuting counsel foregoes a leading question. Nevertheless, the second witness is sure he saw the accused tugging on the victim's pocket and walking off with the handkerchief. Again, the judge asks the accused if he has anything to say to the witness. And again, he doesn't wait for an answer. He moves straight to telling the jury that he is convinced the accused is guilty. The jury agree. Guilty. The judge doesn't hesitate: seven years' transportation. And, of course no prospect of an appeal then. The nascent appeal process on points of law to the Court of Crown Cases Reserved was not created until 1848. The trial length. In total: two minutes fifty-three seconds. Not much more time than it takes to recount the story.

5. We have come a long way since then. Judges don't act as prosecutors. Nor do they tell juries how to decide cases. Prosecutors don't tell witnesses what to say. And defence counsel ensure equality of arms. No system is however perfect. Mistakes can and do happen. It was in response to several particularly egregious miscarriages of justice towards the end of the 19th century that the Court of Criminal Appeal was created in 1907; its jurisdiction passing to the Court of Appeal in 1966.

6. That, as it turned out, was an incomplete solution to such problems. Incomplete because of appeal confirmed in R v Pinfold [1988] Q.B. 462, the principle of finality of litigation required the power under the Criminal Appeals Act 1968 to be read as only permitting a single appeal against conviction. This was the case even where fresh evidence came to light after an appeal had been dismissed.

7. There was however one option that might be tried to bring the matter back before the Court of Appeal. To apply to the Home Secretary, via the Criminal Case Unit of C3 Division of the Home Office, seeking to persuade him to refer the matter to the court under powers then contained in section 17 of the 1968 Act. Failing that, there was always the option of asking the Home Secretary to recommend that the Queen exercise the royal prerogative of mercy. That avenue had however been found wanting in the 19th century. It was no real answer to the problem of fresh evidence, not least because a pardon started from the premise that the person concerned was guilty.

8. An application to the Home Secretary seeking a referral was however no effective answer in most cases either. The reality was that the power was exercised sparingly. From 1981 to 1988

on average 4-5 cases a year were referred. From 1989-1992, this rose to an average of 9 per year. Those referrals came from an average of 700-800 applications to the Home Office a year. The inadequacies of this approach, and the operation of the criminal justice system more broadly, were explored by the May Inquiry and then by the Runciman Royal Commission in the early 1990s. If I may say so it is a particular pleasure to see here this morning Professor Zander, a member of that Commission. My copies of the reports by Sir John May have followed me around since they were published and have always sat within reach of my desk. Yesterday I was able to leaf through them. They tell a sorry story. The report into the convictions of the Maguire family was produced within nine months and led to their successful appeals. That into the Guildford Four took longer because of the need to await action being taken against police officers[1], but the convictions had already been quashed. I look back with professional satisfaction at the part I played in exposing the miscarriage of justice in the case of the Maguire family and the investigation into what went so wrong in the prosecution of the Guildford Four. They were not the only high profile cases at the time which resulted in convictions being overturned and perhaps illustrate how very careful we have to be when dealing with prosecutions of those who, for one reason or another, are seen to be beyond the pale by the public.

9. The weaknesses in the procedures for curing miscarriages of justice exposed by these cases and explored by the Runciman Commission, were eventually three-fold.

10. The first was a structural problem. The Home Secretary was reluctant to refer cases because the statutory power to do so was, properly, understood to impinge on the separation of powers. The executive was understandably cautious before acting in a way which might be seen to interfere with the administration of justice. As such it was a power to be exercised rarely. The second problem was a practical one. The Home Secretary would only refer a case where there was fresh evidence. Absent fresh evidence it was thought improper for the executive to suggest that the courts had gone wrong. Equally, absent fresh evidence, it was thought a referral served no purpose as it would have no prospect of success. Thus, structural and practical limitations rendered the power an ineffective curative. The third was that, dedicated though those who worked in C3 were, they were substantially under-resourced.

[1] See para 1.11 of the Final Report of 30 June 1994 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235647/0449.pdf

11. It was all this which led Sir John May, with his formidable assessors in Professor Sir John Smith, Alistair Graham and Sir Richard Barrett, to suggest an alternative system should be devised. The Runciman Commission spelt out that alternative in its Report of July 1993. It was, of course, the Criminal Cases Review Commission; created shortly afterwards through section 8 of the Criminal Appeal Act 1995. And you started work on 31 March 1997. We are celebrating your birthday a little late.

12. Since your creation you have put the old system to shame. You have been active in the pursuit of justice, where Home Secretaries were reluctant, understandably reluctant, to act. You have acted consistently with constitutional principle. And, most importantly, you have referred over 630 cases for reconsideration by the courts. An average of 30 a year for the past twenty years. And of those, I understand that nearly 70% of referrals have seen an appeal succeed. In terms of applications made to you, you now receive approximately 1,300 a year. It is a sobering thought to reflect on how many miscarriages of justice were going unacknowledged. And it would be naïve to suppose that the current system provides a universal cure.

13. Your continued importance – and centrality to our criminal justice system – was recognised by the House of Commons Justice Committee in 2015. I can only agree. As I said earlier, no justice system is immune from error. Those errors can lead to the wrongful conviction of the innocent. And we cannot forget what US President John Adams once said, expanding on our own Blackstone,

> 'We find, in the rules laid down by the greatest English Judges, who have been the brightest of mankind; We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it is of more importance to community, that innocence should be protected, than it is, that guilt should be punished; . . .'[2]

14. Independent of courts and government, the role you play in securing justice for the innocent is an integral part of the administration of justice, in its broadest sense. It is work of the highest importance to the individuals concerned, to wider society, and our commitment to the rule of law. As such it is work that remains as important today and tomorrow, as it was over the last

[2] *Adams' Argument for the defense* (1770) <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>

twenty years. And just as the Court of Appeal will continue to scrutinise with great care applications referred to it, it is my hope that you will continue to scrutinise the work of the courts with equal care in the coming years. Justice depends upon it.

15. Thank you.