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THE PURSUIT OF CRIMINAL JUSTICE

CRIMINAL CASES REVIEW COMMISSION ANNUAL LECTURE

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(1) Introduction¹

1. It is a privilege to have been asked to deliver the inaugural Criminal Cases Review Commission lecture. The CCRC has become one of the critical safeguards for our human, and thus fallible, criminal justice system, stepping in where things might have gone wrong. I very much hope – and anticipate – that this new lecture series will help to stimulate a lively and important debate around how that system, or as I prefer to call it, series of systems, operate.
2. I am mindful that this speech follows the highly successful conference held to celebrate the 20th anniversary of the CCRC in November and the lectures which dealt with the work of the CCRC and its undeniable importance. In the circumstances, I will endeavour not to tread over the ground covered by those eminent speakers. Instead my subject today is the pursuit of justice in crime a pursuit which is, of course at the core of what the CCRC does.
3. My starting point is John Rawls. In his *Theory of Justice* Rawls developed a distinction between three kinds of procedural justice; the basis on which a justice system could be viewed to provide a fair process. Two are relevant.² They are perfect and imperfect procedural justice. He illustrates the former by reference to cutting a cake. The question is how do you divide it fairly between two people. There is a criterion for determining what is fair: did they get an equal division of the cake. That is independent from the procedure devised to ensure its divided fairly. In Rawls’ case, the answer is to ensure that the person cutting gets the last slice.

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² The third is pure procedural justice: see J. Rawls, *A Theory of Justice*, (revised edition, 1999, Harvard) at 75.

Assuming the cutter can do the job properly, it is possible to devise a procedure which always produces the fair, the right outcome.

4. Rawls contrasts this with imperfect procedural justice. Moving away from culinary examples, he illustrates this concept by reference to the criminal trial. He says this,

*'The desired outcome [of a criminal trial] is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design legal rules so that they always lead to the correct result. A trial, then, is an instance of imperfect procedural justice. Even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome. An innocent man may be found guilty, a guilty man may be set free. In such cases we speak of a miscarriage of justice: the injustice springs from no human fault but from a fortuitous combination of circumstances which defeats the purpose of the legal rules. The characteristic mark of imperfect procedural justice is that which there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.'*³

5. I am afraid that we have to admit that injustice can spring and has sprung from human fault – in some cases, exceptionally serious fault – and examples abound but the truth underpinning Rawls' argument is well-recognised within our criminal justice system. Prosecutorial independence. The presumption of innocence. The allocation of the burden and standard of proof. The right to know and to be able to respond to the case put against you. The right to legal representation. The right to an impartial and independent tribunal. Rules of evidence that are fair. The right to appeal against conviction and sentencing. And, of course, the invaluable role the Criminal Cases Review Commission plays investigating when complaint is made about things going wrong at trial and in the Court of Appeal, ultimately able with perceptive analysis to expose injustice. All these factors, and more, taken together are the conditions which secure a fair process, procedural justice.

³ J. Rawls, *ibid* at 75.

6. The pursuit of criminal justice, is not about the pursuit of perfection, or of infallibility. No justice system is or can be infallible. It is simply not possible, as Rawls understood, to devise laws, practices and procedures that guarantee the correct outcome. What we can do – and what we seek to do – is to devise those laws, practices and procedures so that we minimise, as far as we humanly can, the risk of error. A fair process is one best calculated to minimise error. That is the best we can achieve. It is the very least we must strive for.
7. In tonight’s lecture, I want to explore some of the ways in which we try to ensure that justice is done. How have we developed the criminal justice system to minimise the possibility of error? What are some of the adverse consequences caused by those developments, and what lessons we might learn from them as we continue our pursuit of criminal justice in the 21st century, perhaps so that we might have to rely less on the CCRC.

(2) Simplicity and a lack of safeguards

8. My starting point then is how at one time we operated a system of criminal justice that was, as Lord Burnett CJ, recently described it was ‘*nasty, brutish, and short*’⁴. It was worse than that. It was a system that took the view that the delivery of criminal justice was a ‘*suitable do-it-yourself activity*’⁵; an activity that was best left as a ‘*lawyer-free contest of amateurs*’⁶. In taking this approach it might more aptly be described as a system of criminal injustice. We should not, however, rush to judgment; do-it-yourself justice might have something to say for itself.
9. It worked like this. Criminal process was essentially a private affair. The starting point was that until the time of King Henry II, criminal conduct was not understood to be a crime against the State. Until then, crime was essentially understood to be a violation of the victim rather than, as it would become, a violation of the King’s

⁴ Lord Burnett CJ, Criminal Cases Review Commission, (2 November 2017) at [2] <<https://www.judiciary.gov.uk/wp-content/uploads/2017/11/lcj-burnett-criminal-cases-review-commission-20171103.pdf>>

⁵ J. Langbein, *The Origins of the Adversary Criminal Trial*, (Oxford, 2003) at 11.

⁶ *Ibid* at 11.

Peace.⁷ Even when crime was re-designated in this way, criminal investigation and prosecution remained primarily private pursuits. The victim of crime was to investigate and prosecute. And they generally did so without any legal assistance even though they had the luxury of being able to act through lawyers. Defendants – then designated prisoners – were prohibited from having legal representation. Trial and prosecution was essentially a lawyer-free zone and therefore necessarily more inquisitorial than today. Absent lawyers, the judge directed the proceedings, examined and cross-examined witnesses, of which the prisoner was one. In their own defence the prisoner was afforded the chance to comment on the evidence.

10. We can imagine the pace of a trial with no lawyers and not really very much law. Trials were concerned with fact and lawyers were understood then to be skilled in law but having nothing positive to contribute where fact-finding was concerned. Under the judge's direction, the parties gave evidence and it was the judge who was primarily concerned with testing that evidence.⁸ Justice was not often long-delayed. From the start to the imposition of sentence, in the 16th and 17th century, trials took little more than 15 to 20 minutes to complete; jury deliberations typically took 2 – 3 minutes. They developed a slightly more leisurely pace in the 18th century, when a trial might last up to 30 minutes. A judge could get through up to 20 full trials a day.
11. The State's role then was minimal, at best. There was one exception to this: that is the trial of felonies. Where the prisoner was accused of committing a serious crime, the State intervened through the Justice of the Peace. They could require the victim to prosecute, examine witnesses and the prisoner. Their investigatory role was not, however, even-handed. Their role was to help the prosecutor. It was not to gather evidence impartially. As one American scholar explains it, their role effectively gave the State the '*opportunity to get whatever information it could from an uncounselled, and frequently frightened and confused defendant.*'⁹

⁷ See M. Umbreit et al, *Restorative justice in the twenty-first century: a social movement full of opportunities and pitfalls*, (2006) Marq. L. Rev. Vol. 89, 251.

⁸ J. Langbein *ibid* at 26.

⁹ W. Stuntz, *The Substantive Origins of Criminal Procedure*, (1995) 105 Yale L.J. 471 cited in J. Langbein *ibid* at 43.

12. What does this tell us? First, criminal justice was quick. In today's language, it was expeditious. It was cheap. Given its minimal involvement, the costs incurred by the State were minimal. And with the absence of lawyers it was likely to be relatively inexpensive for the parties. In today's terms, therefore, it was economical. It could also be said to be proportionate: where felonies were concerned, there was greater State involvement and no doubt greater time and expense involved. It was also certainly simple. It was certainly a system which enabled the State to avoid the difficult question of having, as Langbein and others have put it, to '*confront a nest of divisive issues about financing and controlling a public prosecutorial corps*'¹⁰, or for that matter questions concerning financing a means to secure the adequate defence of defendants. But was it a just system? Was it one calculated as best it could to minimise error? The answer to that question must, of course, be no.
13. We only have to run through the problems that were inherent in this approach. Leaving the prosecution in the hands of a victim, leaves investigation of crime in the hands of someone who neither has the skill nor experience to gather, probe and test evidence. They are unlikely to have the funds to do so properly either. They are likely to have an early and strongly formed view of who the perpetrator is, and will thus approach evidence-gathering as an exercise in confirmation bias. They will, inevitably, play no role in crime prevention, as they will only ever be reactive in the face of an offence. And they will play no real role in crime deterrence, as they will have no general public role in that regard and may well not take any steps to deter their assailant from future criminality by taking no steps to prosecute.
14. The role of the Justice of the Peace was also hardly conducive to what we would understand to be preparation for a fair trial. Placing the resources of the State solely into the hands of the prosecution, to help build the prosecution's case whilst affording no assistance to a defendant, fails to secure even a basic modicum of equality of arms. This, also, would equally pose the problem of investigation as an exercise in confirmation bias.

¹⁰ J. Langbein *ibid* at 12.

15. And what of the trial itself. We can hardly say that the judge and jury provided an independent, impartial or necessarily properly informed tribunal. The judge was meant to be both an independent trial manager and counsel for the prisoner. If effective in the latter role, that would place the prosecution at a disadvantage. If ineffective, it would place the prisoner at a disadvantage; one justification for the prohibition on defence counsel was that the judge was there to ensure that any legal flaws in the prosecution's case was brought to light. Having brought them to light, the judge would then have to rule on them. At least one party might feel aggrieved at that: prisoners, if the judge did not raise them and they later became aware of them; the prosecution if raised and ruled on as they too were without counsel and yet did not have the judge to help them.
16. And would the jury be well-informed? The assumption was that letting the prisoner speak of themselves was the best means of getting material before the court and testing the prosecution evidence. Who better than the defendant to explain what happened? I said explain because they did not give evidence: the testimony they gave could not be given on oath.¹¹ The reason being that it would have been cruel to require the defendant to face a choice of telling the truth or perjury themselves. Better then to not have them give evidence on oath, but simply to provide an unsworn – and hence less reliable – explanation of events.
17. And who better than the defendant to cross-examine their accuser? The fallacy in this is obvious to us. It is all the starker when put into its historic context. As it was described in terms of 18th century criminal trials, *'Men not used to speaking in public who suddenly found themselves thrust into the limelight before an audience in an unfamiliar setting – and who were for the most part dirty, underfed, and surely often ill – did not usually cross-examine vigorously or challenge the evidence presented against them.'*¹²

That must have been the least of it. It could hardly be said to meet the standards of effective cross-examination required by the common law right to fair trial. As a means of eliciting the truth, it was not one that could properly be described as

¹¹ J. Langbein at 51-53.

¹² Beattie cited in J. Langbein *ibid* at 35.

approaching adequate. And before you begin to think that was the worst of it. The prisoner first learnt of the evidence against him or her at trial. They had no time to secure their own rebuttal witnesses or evidence. As with most things during this period, ignorance was seen as a virtue. It was understood to mean that for the innocent their innocence and sincerity would shine through to the jury. Only the guilty would benefit from being able to secure, for which read manufacture, evidence if they were forewarned.¹³

18. These defects can be multiplied. There were difficulties with the standard of proof with no jury directions on the standard of proof, of innocent until proven guilty. On the contrary, the assumption was that, if innocent, you would be able to demonstrate that fact to the jury.¹⁴ Pressure on the jury by judges to reach verdicts. Judicial instructions to juries to convict. The story could go on. The point though, up until the late 18th and 19th centuries, the pursuit of criminal justice was: simple, quick and cheap. Do-it-yourself it might have been. Justice it wasn't.

(3) From simplicity to safeguards

19. From the 18th century the pursuit of justice has steadily moved away from simplicity towards the introduction and maintenance of structural and procedural safeguards that promote procedural justice. I will highlight this in three ways.¹⁵

20. First, the end of do-it-yourself justice. From the early 18th century, two broad trends resulted in the end of the criminal process as a private matter carried out without legal representation. The first trend had little to do with everyday criminal prosecutions. It arose from a number of trials for treason. In such cases the King, as the victim, had to be represented by counsel. He could not appear in his own courts. The defence had to rely on the judge as counsel. Judges were not, however, at that time independent. They served at the King's pleasure.

21. The answer to this type of problem. It was to ensure that judges were to be kept away from political matters and no longer held office at the sovereign's pleasure.

¹³ Ibid at 62ff.

¹⁴ J. Langbein ibid at 57

¹⁵ The following account is drawn from John Langbein's magisterial account of the development of the English criminal trial.

Security of tenure secured an independent judiciary: that much was secured by the Act of Settlement 1701. And more broadly, statutory intervention provided for defence counsel to be permitted in treason trials. No longer was the judge to be counsel for the accused in such cases. With that the dam had broken. And during the course of the 18th century, defence counsel edged their way into all criminal trials. They were supported in this by two other factors effecting the quality of criminal justice.

22. The first of these was the growth in prosecutorial misconduct. In the absence of a professional police force, the government incentivised the effective prosecution of offences by offering financial reward to those who came forward to give evidence. From that grew what might be described as a perjury industry. One way in which that could be combatted was to permit the accused to have the benefit of defence counsel, such as William Garrow, to challenge and test prosecution evidence. As with treason trials, abuse brought a corrective in which counsel played an increasing role. Defence counsel could now test evidence.

23. The second factor has been the growth in rules of evidence and procedure. Again, their development by the judiciary can be traced to concerns about the quality and nature of prosecution evidence during this period. And again, as such rules develop they introduce law into the trial process. Remembering the distinction I noted earlier, that one rationale for the do-it-yourself trial was that it involved matters of fact and not law. Since the law of evidence began to develop and was introduced into the trial, the do-it-yourself approach became less and less tenable. It required legal analysis, the assessment whether prosecution evidence fell foul of an exclusionary rule, submission and argument on the point. The parties were not competent to do this. Only counsel could do it effectively.

24. This did not just help to embed the role of lawyers into the process, as both defence and prosecution would need representation to argue the finer points. It can be seen to push the trial judge further away from any mixed role of judge and advocate for one party. And it has a fundamental impact on the role of the jury. Under the do-it-yourself system trials could move quickly because the jury would be in court all the time. As soon as argument on the law and on exclusionary rules starts to develop,

the jury cannot remain to hear the argument. Thus, they must leave the court as continues to happen today when a matter of law arises.

25. Each of these, and other innovations during the 18th and 19th century such as the final realisation effected by the Criminal Evidence Act 1898 that the accused should be able to give sworn evidence, arose in the face of flaws in the system, flaws which undermined the quality of decision-making. But each introduced greater complexity, cost and delay. Effective cross-examination takes time. Legal argument during the trial takes time. They are essential safeguards of the quality of the process, but through introducing complexity that previously was absent, they also introduce additional cost into the system. And inevitably with complexity both comes an increased prospect of error. And with error comes the need for an appellate structure, introduced as the final piece of the structural reforms that created the modern, lawyer-led and quality assured, adversarial criminal trial in 1907 following a series of miscarriages of justice, such as the wrongful conviction of Adolf Beck in 1896.¹⁶

26. Trials were still comparatively speedy. In my first years of practice in the 1970s, it was not uncommon to complete two trials in a day – that might, of course, say something about the type of work that I was sent! But, more seriously, there were many very straightforward Crown Court trials. Meanwhile, however, change and substantial reform was in the air and driven by the scandals of the Birmingham Six, Guildford Four and Maguire Seven prosecutions in the 1970s and the Brixton Riots in 1981. These events brought to light the need to put the investigation of crime on a sure and clear footing, one that clearly set out how the police were to carry out their investigatory role lawfully. Its aim, put into effect by the Police and Criminal Evidence Act 1984, was to improve standards in police work, and minimise the possibility that such miscarriages of justice could occur in the future. So no longer the note of an interview recorded in the officer's notebook hours after the event, the words of which were always asserted to be totally accurate. Tape recorded interviews, originally opposed by the police but later enthusiastically embraced,

¹⁶ See <<https://www.oldbaileyonline.org/browse.jsp?id=t18960224-name-287&div=t18960224-277#highlight>>. An early form of appellate procedure had previously been introduced in 1848.

meant lengthy transcripts and much more nuance in what was said. Challenges to 'verbals' in interview became a thing of the past.

27. Meanwhile, the Attorney General had issued guidance in relation to unused material and in particular, save in certain cases, in relation to the names of witnesses whom the police had interviewed but not used. This was replaced and substantially widened by the Criminal Procedure and Investigations Act 1996 which mandates disclosure of unused material which might assist the defence or undermine the prosecution case to be assessed both initially and after service of a defence case statement. Since then, many additional developments both in relation to admissibility of evidence and procedure have been introduced. These include special measures, ABE interviews, s. 28 pre-recorded cross examination and intermediaries/ISVAs and IDVAs in relation to witnesses and hearsay and bad character in relation to evidence. Each modification has had the best of intentions and the list continues. It is often said that the road to hell is paved with good intentions; in the context of criminal justice, the result has been considerably increased complexity and increased cost. On their own, they are simply not an effective long-term solution to the problems we face in the digital age that is the 21st century

28. The third factor arises from social changes. The pre-trial and trial process is not complex simply as a consequence of safeguards necessary to secure a fair trial process. Over the last thirty years it has become increasingly complex due to the changing nature of crime and the means to investigate crime.

29. As for the nature of crime, we have become increasingly familiar with the explosion of reported sexual crime, often historical but which frequently requires detailed consideration of decades worth of personal records. Child exploitation follows in its wake. Counter terrorism generates complex and time consuming investigation on both sides and lengthy trials. The increasing prevalence and ubiquity of the Internet, creating not just complex new variants on well-known forms of criminality, such as financial fraud, but also new forms of criminality that did not exist before the Internet, such as data theft. And of course, where CCTV, GPS tracking data, emails, text messages, Instagram and WhatsApp, internet use are

themselves central to very many prosecutions today, we find vast amounts of material for both the prosecution and defence to investigate, examine and assess. That takes painstaking effort. And brings with it its own cost.

30. The means of investigation has become more complex due to the development of scientific knowledge, and the use of, for instance, DNA analysis. Both of these factors however add to the complexity and cost of investigation and the trial process. Both require expert scrutiny by lawyers and forensic examination of evidence before trial and during the trial. They require skilled presentation and testing of the evidence to enable the jury to reach its verdict. This complexity is reflected in initiatives such as those being carried out by the Royal Society and Royal Society of Edinburgh with the judiciary which has involved preparation of expert primers on settled areas such as Forensic DNA Analysis,¹⁷ and also on statistics, but also less clear science such as Forensic Gait Analysis,¹⁸ all to provide judges with an expert grounding in these areas.

31. Each of the three categories of change that I have outlined, and there are more, have played a central part in ensuring that our criminal justice system is a fairer one than it has been in the past. They have each called for greater process, for greater involvement of lawyers to ensure the process operates fairly, and for greater scrutiny of the process of investigation and prosecution; thus, increased cost. They have each played a part in how we seek to minimise error. That is an inevitability if we wish to maintain a system that seeks to minimise error, so that it convicts the guilty and acquits the innocent.

(4) Improving the quality of criminal justice

32. The question comes then, how then do we improve the operation of the system accepting its complexity both an inevitable consequence of the nature of the law and society and as the means by which we minimise the possibility of procedural error?

¹⁷ See <<https://royalsociety.org/~media/about-us/programmes/science-and-law/royal-society-forensic-dna-analysis-primer-for-courts.pdf>>.

¹⁸ See <<https://royalsociety.org/~media/about-us/programmes/science-and-law/royal-society-forensic-gait-analysis-primer-for-courts.pdf>>.

33. The starting point must be to understand the importance of a properly effective system of criminal justice. It is the first duty of any society to protect and defend its citizens. The criminal law prescribes minimum standards, the application of which is necessary to enable everyone to live together harmoniously and with respect for others. I am not suggesting that the criminal law is the sole means by which we create such a society. That would be a stark example of an advocate over-stating their case. This is a necessary, but not a sufficient, condition.
34. Our criminal justice system is the primary means through which ensure that the criminal law is capable of being enforced. Society must then provide effective means to both deter and sanction those who would and do break the minimal standards it, through the criminal law, has prescribed. If it does not individuals will ultimately take the law into their own hands; although by doing so it will cease to be the law just as vigilante justice is no form of justice. And if they do, we are back to the world which Lord Burnett CJ's quotation from earlier evoked: a Hobbesian world; one where there is little law and no justice. So, when we ask any question of its operation, of its structure, of the resources we as a society provide the system, that must be given the greatest weight. We cannot, as our predecessors did, duck the tricky questions.
35. In that regard, the explosion of criminal justice legislation has overwhelmed us all. Between 2007 and 2015, there were 25 statutes dealing with criminal justice taking up 1,737 pages in Halsbury's Statutes of England which amended much of the earlier legislation and is so complex as to have become almost inaccessible even to the most able of lawyers. That says nothing about the numerous amendments to earlier legislation, some brought into force, some not and nothing about the torrent of secondary legislation also creating a myriad of offences. This complexity inevitably takes time and effort to unravel with resultant cost, appeals and doubtless leading to references to the CCRC. Parliament must consider how far this improves the safety of the citizens of this country. I must reference the great work that the Sentencing Council has done in this area to simplify and make sense of the complex law in relation to sentencing so we can comply and follow the law in passing sentence. The work that the Law Commission has done to create a simplified Sentencing Code would be a very welcome addition in this area.

36. Further, we must recognise that the success of any system to achieve its aims is a product of the resources it is provided with. This is as true of the justice system as it is of premier league football teams. The question is: do we have the resources for the premier league, for the Championship or non-league football? Resources determine, or at least affect, quality. At the present time, an objective assessment of the criminal justice system's resources might well lead to a number of conclusions.

37. First, the police are operating with stretched resources facing many demands beyond the detection and prosecution of crime. Dealing only with crime, some demands are outside their control. I repeat that the increasing reports of sexual abuse, particularly historical, present issues which have to be addressed as does counter-terrorism. But I have omitted the elephant in the room. We are only just starting to identify the problems of cyber-crime which again will require expertise, time and resources if, as is essential, it is to be addressed. When we look at questions of disclosure of unused material to defendants each of whom will want to interrogate seized computers with terabytes of material, available resources cannot but be a significant factor. The disclosure process, if it is to be carried out effectively, requires expertise, time and money. All require effective funding.

38. Second, although there has been and is room for better use of resources, the reality is that the CPS is also operating with decreasing resources. That is the case notwithstanding an increase in its funding for 2016-2017, when it received £502 million.¹⁹ In 2011 its budget had stood at £615 million and it reduced in amount each year until 2016.²⁰ Of course, technology can and does continue to improve the way we work and it does lead to savings. If, however, it means that there will be fewer lawyers and fewer paralegals, it is inevitable that less time will be spent on each case. In turn, that may mean that it will not be possible to achieve the objective that, in each case, there is an identified CPS lawyer who is available to speak to a

¹⁹ See Crown Prosecution Service Annual Report and Accounts 2016-2017 at 6.

<https://www.cps.gov.uk/sites/default/files/documents/publications/annual_report_2016_17.pdf >

²⁰ House of Commons Library Report, Funding of Crown Prosecution Service, (Number CDP-2017-0002, 9 January 2017) at 2

defence solicitor to resolve issues and make progress in the case²¹. That is how litigation is resolved in every other area of law. From our perspective, the potential difficulties are apparent looking at the disclosure process. Effective review of the schedule of undisclosed material is labour intensive. It takes time and money to carry it out effectively.

39. Third, criminal practice whether for the prosecution or the defence is not seen as attractive a choice of career path as they once were and must be. The Law Society has recently published a heat map showing that the average age of criminal duty solicitors is 47 and, in many areas, the average age of is now in the 50s such that there is acute concern that in 5-10 years, there will be insufficient to service the needs of those investigated for or charged with crime. Furthermore, many chambers have not taken on new tenants to undertake criminal work. Funding is at the core and although I do not comment on the present issues between the profession and the Ministry of Justice, if we are to maintain quality standards now and in the future, it is critical that this work must both be seen to be, and must actually be, an attractive career option for practitioners entering the legal profession. More than that, if we are to maintain the high quality of our criminal judiciary in the future we need to ensure that high quality solicitors and junior criminal practitioners continue both to enter this area of practice and to stay within it. Any failure to act to reverse this situation today, will have long term and detrimental consequences for the pursuit of quality criminal justice in the future and will inevitably impact on the work of the CCRC as failures in the system are exposed, far too late.

40. Fourth, quite apart from the criminal law, there needs to be a proper understanding of the complexity of criminal investigation and prosecution today. It is not only the police that have to deal with effective investigation into counter-terrorism, into cyber-crime, child exploitation, and historic sexual offences. The cases will tend to be contested and they are difficult to prosecute, to defend and to adjudicate. To do all of these things effectively requires individual commitment, expertise, time and

²¹ see Recommendations at 2.2 and 2.3 of my *Review of Efficiency in Criminal Proceedings* (2015). <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

resources; a point underscored in the National Disclosure Improvement Plan that was issued in January this year when it noted that:

‘There is a significant resource implication to be considered concerning digital media collected during an investigation, which is invariably complicated due to the sophistication of mobile devices and the extremely large amount of data that requires capturing, analysing, reviewing and disclosing where appropriate.’²²

When, again as the Improvement Plan noted, resources across the criminal justice system *‘have been stretched’* as a consequence of the evolving nature of crime, recognising the increasing complexity of criminality and its investigation cannot be underestimated, not least when the question of resourcing is in issue. To revert to my football metaphor: what is it that we want of our criminal justice system: premier league; championship or non-league? We all want premier league quality and results.

41. Improvement is not, however, just a question of resources, and in that regard we must remember the significant resource allocation HMCTS has been provided to upgrade the criminal justice system and to implement reforms intended to produce greater efficiency in the system. In part, these flow from resulted from the second of my two inquiries, the one on efficiency in the criminal justice system.²³ It is also a question of approach and culture, bringing our processes up to date for the 21st century. Here we may need to consider our adversarial pre-trial culture. While we do not, thankfully, maintain the pre-18th Century approach where Justices of the Peace acted to assist the prosecution, while offering no help to the defence, the requirement to identify the issues, with greater judicial involvement in case management may reduce, at least to some extent, the worst excesses of an adversarial system. It will allow the expensive court process to concentrate on the real issues in any case. None of this threatens the fundamental principles of our

²² NPCC, CoP, CPS, *National Disclosure Improvement Plan*, (January 2018) at 3. <<http://www.npcc.police.uk/Publication/National%20Disclosure%20Improvement%20Plan%20January%202018.pdf>>

²³ see my *Review of Efficiency in Criminal Proceedings*, (2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>>.

system of justice and the enthusiastic commitment and support offered by the Government for the reform programme can only be welcomed.

42. We can see this reflected in the recent and ongoing debate over the question of the approach that the police should take to victims of crime. Should they automatically believe victims or not? If you start off with belief, do you also then start off looking for facts that support your belief. If you start off with an assumption that something is true, to what extent are you going to consider the converse? Has confirmation bias set in from the start. If, on the other hand, you start with an open mind: all allegations are hypotheses to be tested wherever the testing might lead you do you avoid confirmation bias? As the ACPO Statement of Common Purpose and Values emphasised in 1992, and remains true today, *'The purpose of the police service is to uphold the law fairly and firmly'*.²⁴ If we are to be fair, must we not start with an open mind, one that is to test as it investigates without any presumptions or assumptions consciously or unconsciously guiding our hand?
43. And we can see this also in the approach to unused defence material. The basis of the approach is as we all know the Criminal Procedure and Investigations Act 1996 and the Disclosure Code.²⁵ The Code sets out a fourfold division of responsibility for carrying out the investigation and disclosure process between: the investigator; the office in charge of an investigation; a disclosure officer; and the prosecutor.
44. The first three are police officers. The last is with the CPS; independent of the police. Responsibility for the investigation rests in the hands of the first two police officers, who carry it out. The disclosure officer may form part of the investigating team, or they may not. The clear intention behind their role was that they would bring an independent assessment to the question of disclosure to the defence. If you are part of a team, directly or indirectly, the extent to which you can carry out a genuinely

²⁴ R. Adlam & P. Villiers, *Police Leadership in the 21st Century: Philosophy, Doctrine and Developments*, at 68 (2003); College of Policing, Code of Ethics Reading List at 2 & 4 <http://www.college.police.uk/What-we-do/Ethics/Ethics-home/Documents/Code_of_Ethics_ReadingList.pdf>; The Policing Protocol Order 2011, article 23 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117474/policing-protocol-order.pdf>.

²⁵ Ministry of Justice, Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf>.

objective and independent assessment could be questioned. The unconscious bias of expert witnesses who become part of the team which has instructed them is a well-known phenomenon. To what extent might, unconsciously, a similar phenomenon have an effect on the role played by the disclosure officer?

45. Here we might be able to learn from continental approaches. While we were developing our adversarial, private prosecution model of criminal justice, civil law jurisdictions were developing a public prosecutorial system, the forerunner of today's investigatory magistrates in, for instance, France. Although I am not suggesting that we move to such a system, we might learn from it. It might suggest that where an independent assessment of unused material, for serious offences i.e., Crown Court offences – a proportionate approach then – is needed, should we require the CPS to take a greater role in its scrutiny and disclosure with identified police officers responsible for verifying that everything has been disclosed to the prosecutor with sanctions for failure? The key point though is to ensure independent oversight enabling the police to focus on detection and investigation, while enabling decisions on primary and secondary disclosure to be taken independently as the CPIA 1996 envisioned.

46. Such a reform if taken on its own would suggest that we would introduce more complexity into the system. To safeguard against a new problem, we introduce a further layer into the process. Difficulties in the disclosure process call for scrutiny of the investigatory process, CPS decision-making, the role of the defence which brings the problems to light, and as Lord Judge noted recently it could if left unremedied, undermine the efficacy of criminal trials.²⁶ On the other hand, there is the possibility that the defence can game the system at this point by requesting more and more disclosure in a case. The call not just then for the introduction of a discrete reform; although that may well be necessary. They highlight a common thread, a golden thread perhaps. I repeat that there is no single criminal justice system. It is a system of systems: a normative system, with Parliament and the courts determining the nature of criminal law; a preventive, detective, and

²⁶ Lord Judge quoted in P. Greenfield, *Judge: collapse of sex crime trials could lead to rapists going free*, (The Guardian) (20 January 2018) <<https://www.theguardian.com/law/2018/jan/20/judge-collapse-of-sex-trials-could-lead-to-rapists-going-free>>.

investigative system operated by the police; a prosecutorial system, operated by the DPP and Crown Prosecution Service; an adjudicative system, made up of, and requiring effective access to, legal aid, the legal profession for defence representation, and the courts; and, a punitive and rehabilitative system operating with the Prison Service.

47. As with any ecosystem, its vitality is a product of the effective interaction between its constituent parts and of their individual vitality. A structural weakness in their interaction, a fundamental weakness in any one or more parts, will undermine the system as a whole. Cures to problems in one part of the system may have an adverse impact on the operation of other parts of the system or on the system as a whole. Reform should not be viewed in isolation. It needs to be a co-ordinated, co-operative endeavour. If it is not we run the risk of compounding problems or creating new ones. Where that happens our ability to secure procedural justice will be compromised, and we may then increase the possibility of error.

48. Our pursuit of criminal justice is one therefore that requires us to consider the vitality of each part of the system. It requires us to take all proper steps to ensure that if the system is as strong as its weakest part, we do not countenance the weakening of any particular part. It requires all those involved in the system to meet their obligations, to work together and ensure that the conditions for the optimum operation of the system are put in place where they are lacking and kept in place – are built on – where they are not. We must be holistic in our approach and all those involved in criminal justice must work together; a point I emphasised in my criminal justice efficiency review.²⁷ If we are to minimise the prospect of error and thus minimise the extent to which we rely on the CCRC, if we are to ensure that crime is reported, detected, investigated, prosecuted and defended, adjudicated and, where appropriate, sentenced, this is the least we must do. And this may in turn require us to reconsider the delivery of criminal justice from first principles, at each stage of that investigation asking ourselves the question: is this the best way to secure the truth and to minimise the possibility of error? The alternative is

²⁷ <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

perhaps a slow return to do-it-yourself justice, which as Rawls would say, and I think we would all agree, is no justice at all.

49. Thank you.

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