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Keynote Speech – Increasing efficiency in a digital age

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Introduction

1. I am delighted to be back here in Belfast and I am grateful for your invitation to speak at the Transforming Justice Conference. Given the overarching themes of this conference are reducing crime, reducing re-offending and increasing effectiveness, I would like to offer my thoughts on increasing efficiency in a digital age.

2. Let me start by repeating a mantra that has been central to my approach for many years. There is no criminal justice system but a series of criminal justice systems – the police, the prosecutors, the defence community and its funders the Legal Aid Agency, the courts including transport services for prisoners, the prisons and probation services all have their own problems, mainly financial, and thus their own agendas. Overarching those involved in criminal litigation is the judiciary, seeking to hold the balance between state and citizen. On top is the executive, designing and implementing its own policy changes. Delivering efficiency in these criminal justice systems requires a consideration of the problems of each one and a detailed consideration of the way in which they interact. In 2015, following a request from the Lord Chancellor and Lord Chief Justice, I published a review into the efficiency of criminal proceedings and made recommendations that could be implemented by procedural improvement and greater efficiency without the need for legislation. Each of those with an interest in criminal justice participated and it was critical that each contributed to the overall result.

Historical overview

3. When I started practising criminal law, nearly 50 years ago in 1970, there were many elements of the system that originated in the 19th century we would recognise today, but there are also areas that have seen great change. A rape trial would involve the statement of the complainant, a corroborative witness – for corroboration was then a legal requirement, a doctor who frequently added little and the statement of a police officer who recorded in his note book, sometimes hours after the interview, that which he asserted the defendant had said when he was interviewed. There was no unused material and, indeed, for summary trials, there was no disclosure of any statements save for that made in writing by the defendant. Committal proceedings could require calling

the evidence or challenges of no case to answer. Sending cases to the Crown Court came much later.

4. Over the years that followed 1970, the photocopier, the printer, fax machines, word processors and other supposedly labour saving devices have all led to a vastly increased dependency on paper and, in addition, many efforts have been made to improve the fairness and balance of our approach to criminal justice, to encompass modern thinking and provide greater protection for victims, witnesses and, indeed, defendants. The result has been a real increase in how much time trials take.

5. Let me recognise immediately that improvements to our procedures have transformed our processes for the better. Thus, in place of summarised interviews recorded by a police officer in his notebook hours after the event, the Police and Criminal Evidence Act 1984 gave us tape recorded interviews all of which are transcribed. Problems about the extent to which the police disclosed material helpful to the defence led to the Criminal Procedure and Investigations Act 1996 and prescribed a system for much wider disclosure of what is described as unused material. The Youth Justice and Criminal Evidence Act 1999 introduced special measures and video recorded examination in chief which must then be transcribed; pre-recorded cross examination of vulnerable witnesses has been piloted and also used to avoid the trauma that many complainants and others experience attending court. The Criminal Justice Act 2003 has admitted evidence of bad character and hearsay. Adverse inferences can be drawn from silence. All these developments require consideration with submissions and rulings of law in areas not always as straightforward as we would like.

6. The effect has been to bolt on new procedures to a pre-existing framework adding to complexity and further adding to length. On top of that, developments in the way that we communicate and record material generate new problems. Cell site analysis, digital downloads of social media and messaging may assist the Crown or the defence so that briefs are now not just a few statements and some other material but potentially box loads of paper and records and grafting new procedures and new sources of evidence onto a system essentially designed in 1898 which was simply not an effective long-term solution to the problems we face in the digital age that is the 21st century. Thus we have developed the DCS or digital case system such that there is no paper in the Crown Court, magistrates work on iPads and the evidence is held on Court Store – all of which will be superseded by Common Platform.

7. Furthermore, that says nothing about the type of crime that has changed: sexual offending, in particular in relation to historic allegations, has dominated our Crown Courts and further work is generated by offences such as child exploitation, terrorism and, as yet in its infancy, cyber crime. Our new and much improved approach to complainants and others mean that the courts have to address the problems of the vulnerable who would never previously have been able to participate in a trial. We have to balance the potential need for intermediaries for witnesses and defendants with a far greater understanding of the difficulties that giving evidence can generate.

Review of efficiency

8. When undertaking the review of how to increase the efficiency of our criminal justice systems, the diversity of views from all the different players was integral to the testing of ideas and the formulation of recommendations designed to help improve efficiency and the throughput of work in the system and, critically, which would command support. Those involved were representatives who were encouraged to take the ideas back and seek the views of their constituencies, come back with refinements, improvements or new ideas. It has involved a recognition that unless the system works for everyone it is likely to work for none – because the efficiency sought will not be realised.

9. In total I made 56 recommendations covering areas such as IT, allocation of cases, how cases are listed and how cases are managed in the criminal courts. At their heart was getting it right first time, thereby avoiding the constant reviewing of decisions taken and issues that required resolution. The recommendations were and are being taken forward by agencies across all components of the criminal justice system, co-ordinated centrally by the Ministry of Justice.

10. Of those changes that fall to the judiciary to implement – good progress is being made – some have been changes that the judiciary can easily implement such as the creation of new rules and practice directions. Others depend on collaboration between different players in criminal justice – the police, the CPS, the prison service in relation to prisoner movement and IT facilities in prison require co-ordination and a recognition that although some development might generate cost, the system must be looked at as a whole so that increased efficiency can be achieved by all.

11. The majority of recommendations are already implemented and may well be familiar to you including:

    - Changes to court procedures by placing a duty of direct engagement between the prosecution and defence, ensuring effective and consistent management of cases by judges and extending the ways in which directions can be given by the court.

    - Creating a default position that evidence is served digitally rather than in paper form with routine management hearings conducted in open court over a live link to the prison.

    - The implementation of a Crown Court performance tool for use by judges which presents data in a way that permits better assessment of performance, improved accountability and identification of best practice.

    - Rules to improve the efficiency of jury trials. These revisions deal with issues such as provision of a written route to verdict; provision of a split summing-up (delivered in two parts – the first part prior to the closing speeches and the second

part afterwards); and, streamlining the summing-up to help the jury focus on the issues.

12. A vitally important part of the recommendations was around IT. What has been critical was that we approach the benefits that new technology can provide and not simply build the use of IT into our present systems. Rather, DCS and Common Platform use what technology can offer as the starting point for a fresh approach. In order to run the criminal justice system for less, without losing efficiency or going further into steady, or indeed rapid decline, this is not merely desirable but essential. Putting the same point another way, we could not afford to do things just for the sake of doing them – because they were always done that way; we had to look at how improvements could be made and we have done so. Having said that, the process continues and the judiciary are at the forefront of piloting new processes such as s. 28 pre-recorded cross examination.

13. It has been important to ensure that the resources we have at our disposal right now are being used efficiently and intelligently: that is what DCS achieves. We have undoubtedly needed better, quicker and less costly ways of distributing and accessing evidence without the mountains of paper that have only become larger and larger as the years have passed. That paper had to be created, filed, moved to listing and filed, moved to the judge and filed, with further materials being linked to the correct file which has to be in the right place at the right time.

14. It is not just for judges. We must avoid duplication of work for HMCTS staff (such as "re-keying" the same information). Further, we must find easier and more flexible ways of enabling all those involved in the process to communicate effectively with one another. We must improve the ability for lawyers to be able to communicate with their clients and communicate with the court. Video conferencing is available so that lawyers can confer with clients remanded into custody. Routine applications can be made through the DCS reducing the number of hearings that participants have to attend in person, which is of great benefit to defendants, victims, and lawyers alike. That will allow lawyers to earn the fee for the case – itself much criticised by the professions as too low – with less time spent in travelling to court or waiting to be heard.

15. A considered, well-functioning IT system is the heart of being able to deliver all of the changes that I have discussed but it is important to underline that it will also have to cater for litigants in person and those who cannot access a computer to read material on line: they will need paper so the systems must work in parallel.

16. In addition, we will have to move to case progression on line. In crime, the Common Platform is being developed to ensure a digital end to end process. The police will be able to upload statements and exhibits to the Common Platform rather than to the CPS electronically. Information in a case will only need to be typed into the system once. The CPS lawyers will be able to review charging decisions on-line and request further information electronically. Already, the Digital Case System has removed an enormous amount of paper from the system.

17. Massive changes have already taken place with judges leading innovation, training themselves and others and writing the manuals. And the changes will continue: Clickshare allows material to be loaded to the cloud and viewed in court without the police officer bringing a tape or DVD which is incompatible with court equipment; we will be seeing more from body worn cameras and more evidence will be presented in digital form. Jurors will be able to review such evidence in their jury room without returning to court. In fact, it is all happening now and it is vital that it does. For me and perhaps for a number of my colleagues, using digital formats has been a struggle, but it is not for the next generation. They have lived out much of their lives on electronic devices. They expect to get information off a computer, tablet or smart-phone and to communicate with people on-line.

18. But we have to be careful. In the Court of Appeal, the default position is that the appellant appears by video link. For the court, this can take longer as links fail or the appellant is not available. And that is where the appellant plays no part in the process. It would be even more complicated if a defendant has to give instructions during the course of any hearing as will be the real likelihood in case managing for trial.

Challenges

19. What about the challenges? Aside from some of the problems I have touched upon already, and the constant requirement to keep costs in check, there are a number of issues with which the CJS will have to grapple both as a result of increasing efficiencies, as well as more wider developments.

20. IT changes whilst bringing benefits do raise questions which we shouldn't shy away from. I have mentioned a number and trials will still require everyone to come together. Even in relation to special measures for complainants and witnesses, giving evidence over a live link, it is important to ensure that we do not lose an indefinably important human element so the positioning of the camera and the ability to see the impact of evidence remains vital.

21. Speaking of IT challenges – one of the issues in relation to disclosure is the sometimes incredibly vast amounts of data with which the prosecution has to deal. In *R v R,* arising out of Operation Amazon, some 7 terabytes of data had to be appropriately managed under the disclosure obligations which are a fundamental part of a fair criminal justice system. I made the point that "the proposals were misconceived with regard to the stage of initial disclosure, imposed upon them under protest and led the parties and the case onto the wrong road". It should be clear that there needs to be strong cooperation between the prosecution, defence and courts in order to get it right the first time.

22. Examination for relevant unused material – such as would undermine the prosecution case or assist the defence case – has also to be seen in the light of what constitutes a reasonable line of inquiry. In *R v E,* a question around accessing data on the mobile phone of a young woman who complained of sexual assault. Because the police had not seized the phone and it was then lost, the trial was stayed as an abuse of process. Making such an order is a last resort and only (in relation to this category of abuse) in

circumstances where a defendant cannot receive a fair trial. In that case, investigating the phone was no more than a fishing expedition and the stay was lifted. What both cases reveal, however, is the need carefully to consider what is a reasonable line of enquiry and to go no further.

23. Attempts to force open the warehouse doors (often attractively presented as the fairest option) risk submerging everyone in far too much data and can lead to the argument that a fair trial almost impossible. An example of succumbing to that type of approach came when a judge, probably in exasperation, ordered the police to download the contents of an iPad: it took 19 police officers working solidly through a weekend to do so. Such an approach must be resisted but I have little doubt technology will assist: there are now sophisticated search engines which, in time, will only improve. The argument will then move into the territory of identifying appropriate search terms that are broad enough to throw up relevant material but not so broad as to encompass everything.

24. There are many aspects of this problem including the need to ensure that appropriate disclosure goes no further than justice requires. As the police pursue complaints from vulnerable witnesses, so their records potentially become open to investigation and then disclosure: this may be medical or social service records. Having said that, however, the Article 8 privacy rights of the complainant also fall to be considered. These are the challenges that judges face every day but I repeat that it is only material that potentially undermines the prosecution or assists the defence that falls to be revealed. There can be no question of trawling through the entire social life of someone who complains of a sexual offence in the hope of something; the strictures of s. 41 and restricted cross examination of complainants must be rigorously enforced.

Conclusion

25. As I stated at the beginning of these remarks – efficiency in the criminal justice systems in which we operate is work in progress. I am sure that the various observations that form part of this conference will reinforce how much has changed in the CJS over the last years and demonstrate the fact that each part of criminal justice systems that come together to form an overall system are dynamic and can respond to the challenges we currently face: in fact, they must and I have no doubt that they will.

26. Thank you.