PRESIDENT OF THE
QUEEN'S BENCH DIVISION

SIR IGOR JUDGE, PRESIDENT OF THE QUEEN'S BENCH DIVISION

THE CRIMINAL JUSTICE SYSTEM IN ENGLAND AND WALES
GREATER EFFICIENCY IN THE CRIMINAL JUSTICE SYSTEM
TIME FOR CHANGE?

SYDNEY, AUSTRALIA

AUGUST 2007

This talk is concerned with the criminal courts, the criminal courts dealing with the heaviest crime, not summary courts, and it is directed only to courts and the court process, not to the police, to investigators, or to prosecutors, or decisions whether to prosecute or not.

Perhaps I should emphasise what greater efficiency in the criminal justice system means to me, as I believe it would to any other judge. I mean the efficient doing of justice in the courts. I am not merely concerned to judge efficiency by output or numbers. Obviously output and numbers must be as high as they can, but they must in the end produce a criminal justice process that is fair and a result to the process in each case that represents justice.

The Criminal Justice System in England and Wales is in a state of change. It always has been and always will be in a state of change. The important hieroglyphic in the subtitle to my lecture is none of the letters, but the question mark. That is, to use an archaic word, the mystery.

Legal systems everywhere are notorious for their conservatism. Critics say they reflect accurately the aphorism written by Lord Falkland in 1641, "When it is not necessary to change it is necessary not to change". Mind you, Clarendon's later History of the Great Rebellion observed that Lord Falkland was "so enamoured on Peace that he would have been glad the King should have bought it any price". For Clarendon, Lord Falkland was the classic appeaser: nevertheless in his aphorism there is this essential kernel of truth, apposite to any legal system. "If it ain't broke or breaking, don't fix it."

Those who criticise lawyers and judges suggest that we are smugly content with what we have always known, thinking that if it was good enough for our fathers, it will be good enough for our children. That is not how I see: it is not how the vast majority of my colleagues in England and Wales see it: I should be astonished if any of you saw it like that.

We all are heirs to the common law. The common law did not fossilise in 1189. Perhaps its greatest strength throughout the centuries has been it flexibility and capacity for development and change, and reinvention and reincarnation in countries far away from a tiny island on the edge of Europe where it began. When I was speaking in India some 18 months ago, I was addressing judges who understood exactly not only the words that I was using to express my meaning, but concepts of the common law with which they were entirely familiar. A fossilised system could not have survived so successfully or served our different communities so long and so well. And indeed, it could have been thrown off when the other trappings of imperialism were dispensed with. Yet it was not. And now we find that the common law is enriched by contributions from far-flung places, not least here in Australia.

I was called to the Bar in England in 1963. We knew about injunctions. In those days those of us who had even heard the word *certiorari*, had no idea how to pronounce it: *mandamus* was a little clearer, because we all had to learn Latin in our youths. *Prohibition*, we understood, although it was mixed up with our film going days and crime in parts of alcohol-free America. Yet the revival of these medieval remedies by the judges has enriched the ability of citizens to take on and insist on the lawfulness of government action, and indeed actions by all those who would otherwise be in authority. That is not innate conservatism.

- Civil actions were tried by juries. Now there are hardly any such actions, and they are confined to a very limited field, itself open to question if the sheer bulk of the papers, and so on, make the case unsuitable for jury trial.
- The criminal justice system included the Assizes. On my old circuit the High Court judge would travel from Aylesbury to Bedford, then to Northampton, Leicester, with a possible stop-off in Oakham, then on to Lincoln, then finally back to Nottingham, delivering the gaols. We no longer have Assizes, nor a system in which virtually every case was concluded – that is from the very start to a verdict – in a day or less.
- It was entirely acceptable for the defence to be able to ambush the prosecution, by suddenly conjuring together an alibi: the opportunities for ambush are steadily being reduced.
- The defendant could make a statement from the dock, instead of giving evidence and being cross-examined. And the jury was directed to take account of it. That entitlement has gone.
- The defendant was entitled to speak before he was sentenced: that entitlement, too, has gone. Now indeed it is the victim who has a say at that stage, and the judge is informed of the impact of the crime on the victim, not, I emphasise the wishes of the victim about sentence, simply the impact of the crime.
- None of us questioned the rule that if he was acquitted, the defendant could never be tried again: Dunlop was recently convicted of a murder of which he was acquitted a good few years ago. There was no cataclysm. The absolute ban on double jeopardy has gone. The court may give leave, and that court involvement is an essential feature of the process.

- If at the end of the prosecution case, the judge was over-persuaded to withdraw the case from the jury, again, it never occurred to anyone that there should be a prosecution right of appeal: that no longer applies. I have dealt with two such cases recently, both where the judge's decision was plainly wrong. The interests of justice required a re-trial.
- Sentencing discussions with the judge were anathema: now the defendant is entitled to seek and the judge entitled to give an indication of the sentence he has in mind in the particular case. The Goodyear indication does not represent a "deal" with the prosecution. The process is strictly regulated. The judge, if he is willing, indicates what is in his mind at that stage. We have found that it works. There is now, too, a formalised statutory process, for those who turn "Queen's Evidence" – and indeed for a review of sentence of those who decide to offer assistance after they have been sentenced.
- Experts' reports must now be exchanged, so that the areas of difference can be analysed, and more likely, the usually wide areas of agreement reduced to agreed facts.
- And our lay magistrates, some 30,000 or so, received no training of any kind. That after all was their purpose. They were simply decent citizens, offering their services as volunteers, offering common sense and a healthy dose of reality but certainly not lawyers. My father-in-law was chairman of his local bench. He thought that the training he needed was training in life, and perhaps as one of those who served his country heroically – a word over-used but in his case accurately – he learned plenty about life, and death too. Nowadays training is regarded as essential.

This catalogue is not comprehensive. The list could be endless. You will appreciate that in that catalogue, some changes have been judge-made, some the result of legislation. Some indeed are just linked developments. The legislative process is needed where judicial intervention would amount to legislation by judges. Thus, for example, the removal of the double jeopardy rule was too fundamental for the change to be achieved without legislation. Change in the criminal justice system is commonplace. And so it should be. It is after all a living instrument which must be relevant, and kept relevant, to the changing needs of the community it serves. Each one of these topics is worth a talk or discussion on its own. I shall select a few specific heads for further discussion, but at this stage the list demonstrates the validity of my thesis that, contrary to popular misconceptions, change is a constant feature of the criminal justice system.

One continuing constant feature of any criminal justice system is this, and although obvious to us as judges, it is not always commonly understood. The guilty defendant knows perfectly well that he is guilty. For this purpose I exclude those rare cases where the law itself may be uncertain or unclear. The ambition of this defendant is for justice to miscarry, for an untrue verdict to be returned. He has much to lose by co-operating in a process by which justice is achieved. The innocent defendant, and in this context I exclude the guilty defendant against whom the evidence is not very strong, the truly innocent defendant is desperate for justice to be

done. A miscarriage of justice is a catastrophe for him personally of course, but for justice too. Whichever category the defendant falls into, neither wishes any stone to be left unturned. The judicial system has to cater for both. So far as humanly possible it has to avoid conviction of the innocent, and this means that there are occasions when the guilty defendant is able to take advantage of processes which are designed to assist the innocent defendant. There is no physical sign or mark on the defendant which tells us which of these categories he falls into. In the old Northampton Assize Court, the ceiling superbly decorated by Robert Adams, had a mouth with a tongue perched above the witness box, and the tradition was that when the witness told a lie, the tongue wobbled. I never actually saw it wobble, which means that in Northampton every witness always told the truth.

That court was built long before the typewriter, let alone the computer or e-mail system. There was no telephone. No electric light. These were once "modern technology". We have all these advantages of current modern technology, but this has, in my view, contributed to the endless paper and the increasing length of trials. File after file, folder after folder. This is not confined to the legal system. Ask any businessman: any police officer: any hospital authority: in fact ask anybody about the impact on their professional and working lives of an increased number of processes or increased complication of processes, designed to make use of the advantages of modern technology.

I apologise for quoting words I used in 2003, addressing a meeting of judges.

> "*Time is precious commodity. Resources, judge time, jury time, witness time, police time – these are not infinite. Every case that takes longer than it should delays another case, with its strain on the defendants. And the witnesses. And their victims. And on jurors and magistrates who are, notwithstanding the increased time lag since the alleged offence, still expected to reach a true verdict. This extravagant liberality is pointless. It does not serve to increase the prospect of a true verdict*".

The successful implementation of proposals for improving the criminal justice system depends significantly on judicial commitment. And happily I can claim, boast, or assert that at home there has been a positive response by the judiciary.

The role of the trial judge has changed, and must, like the common law, continue to change. I am not advocating a return to servile judges who believe that their function was to procure a conviction or to judges responsible for remarks attributed to the Recorder of London in the trial of Penn and Meade, where the narrative account attributed this observation to the Recorder.

> "*Till now I never understood the reason of the policy and prudence of the Spaniards in suffering the Inquisition among*

them: and certainly it will never be well with us till something like unto the Spanish Inquisition be in England."

Mind you the narrative was written by Penn and Meade themselves. In the late seventeenth-century no-one in England with a confident interest in old age would have used such words. Remember how Titus Oates a few years later generated shameful mob hysteria by anti-Catholicism. Guy Fawkes was relatively recently dead and poets could talk of the devildoms of Spain.

Until fairly recently, many judges believed that their role was to act as a referee, fairly keeping the balance between the prosecution and the defence, and occasionally blowing the whistle if one side or the other went off-side, or infringed the rules. Many judges would not read the papers before they went into court, genuinely believing that this would predispose them to one side or the other. Nowadays judges have a far more proactive role. Well in advance of the trial, it is their responsibility to get a firm grip of the case, seek to identify the issues, and give directions for the conduct of the trial. Following Robin Auld's recommendation, there is now a Criminal Procedure Rule Committee which is in effect in constant session, and which produced new Criminal Procedure Rules which came into force on 4th April 2005. These rules give courts explicit powers and responsibilities actively to manage cases. We now have what is effectively a criminal procedure code, whereas we formerly had rules in something like 50 separate statutory instruments, and as you hunted for them, all impetus was lost.

Case Management is a relatively new feature, at least in part derived from the Woolf Reforms of Civil Procedure. The rules require that cases are dealt with efficiently and expeditiously and proportionately. The real issues must be identified early. Adjournments should take place only when and for no longer than necessary. The court must actively manage each case, and the parties are required actively to assist the court. To help the court comply with its duties, there are prescribed case progression forms which must be completed by the parties. The parties and the court must each appoint a case progression officer, a named individual, personally responsible for the handling of the case. The directions the court may give includes a timetable, which can include a timetable for the trial itself. The parties may be required to provide a timed, batting order of live witnesses, details of any written or other material to be adduced, advance warning of any point of law, and themselves propose a timetable for the entire case.

The parties must prepare their cases for trial. This includes complying with the directions of the court, ensuring that their witnesses are at court, making arrangements for the efficient presentation of written witness statements, and giving prompt warning to the court and the other parties of any potential problems. In essence, judges are there to manage cases pre-trial, as well as to try them.

Not everyone agrees with these changes but then, with every proposal for improvement or reform, not everyone does, and when opposition is

expressed on principled grounds, it requires careful attention. Thus the new functions of the court were described as "all voguish and modern but ... subversive of the adversarial process, and nobody should be beguiled into thinking that it is going to improve practice. A system in which the judge runs the show does nothing to encourage good practice." Many practitioners are troubled by the possibility of imposing a timetable. Plainly, a rigid timetable that made no allowance for hesitant witness, or the defendant who was not very well, or for the child who needed more breaks than were anticipated, would be flawed. But my colleagues in the Commercial Court assure me that when that court decided to impose timetables, the same outcry was heard. Yet now these cases, and they include the very heaviest cases of major international commercial litigation, are subjected to a timetable, laid down by the judge, after hearing both sides. Another change we have introduced, itself productive of some controversy, is that the judge is entitled to give rulings on preliminary matters after considering written rather than oral submissions. Some decisions can perfectly well be made on this basis, while others, usually more difficult, need a short further oral hearing to help the judge clarify his mind about which of two apparently compelling submissions is correct. Timetables and written submissions are out with our traditions. And it will take time for these and other changes to be accepted as the normal currency of the criminal justice process. But these are changes in progress, and they will come, and in 25 years or so, our successors will look back in amusement at the controversy which the present proposals managed to generate.

I do not propose to go through the current case management rules in detail. You will have a copy of them. I thought it might be useful to show you the case management orders made by Mr Justice Fulford prior to a major terrorist trial which he was due to conduct, and did eventually complete a few weeks ago. The details are significant for two reasons. First, they give you some idea of the wide ambit of the case management responsibilities of the judge. Second, they demonstrate if demonstration was needed, the absolute imperative of the judge being fully in command of the detail of the case if he is to manage it successfully. Let us look at paragraph 10. You cannot, for example, make an order relating to service of evidence concerning 65 Curtis House (re: Saraj Ali) without knowing the significance of the place and its impact on the trial of a named defendant without a close study of the papers. We should not underestimate the huge increased burden that mastery of the papers in this way imposes on the trial judge. And the system has to build in the necessary pre-reading time for preparation. We have found that unless the judge is fully in control of the detail of the case, the case management hearings become no more than or not very much more than cosmetic.

I propose to amplify my concerns about two particular features of the pre-trial process, the two "Ds" – defence case statement and disclosure. The "S" point also needs to be in capitals raises a third problem – sanctions.

Once the prosecution papers have been served upon him, the defendant is required by statute to provide a defence statement. The process was

introduced by statute in 1996, and amended in 2003. Essentially the defendant is required to set out in writing what his defence is – alibi, wrongful identification, no dishonesty, lack of criminal intent, or as the case may be, as well as the areas of evidence where issue is taken with the prosecution. The proposal was opposed on the basis that it meant that the defendant could be required to incriminate himself, and that is wrong in principle. If the defendant were required to incriminate himself, it would be, but he is not. He has pleaded not guilty. He knows what the truth of the case is. He knows what the prosecution case is and he knows what his defence is. He knows the elements of the prosecution evidence against him which are disputed, and why. He is being asked to provide that information. It may, of course, be checked. The innocent defendant should normally welcome the provision of such information. If checked, it may exonerate him. It may demonstrate a gaping weakness in the prosecution case, sufficient to bring it to a halt. Whatever else may happen, the contents of the defence case statement cannot be used by the judge to order the defendant to change his plea to guilty, or indeed to direct the jury that they must convict him.

What is at stake here is whether, in complicated cases, the defendant should be able to postpone his detailed answer to the prosecution case in order to give himself time to fabricate a defence which fits in with the facts relied on by the prosecution, or indeed the evidence disclosed by the prosecution under its duty of disclosure. This is how the problem arose in the case recently tried by Fulford J to which I have already made reference. You will see the meticulous care with which he approached the preparation of the trial. At the end of the trial he identified the problem with the current arrangements. They stipulate that the defence must be set out the nature of the defence without having to describe "with any particularity the facts and events that, to his knowledge, will form his defence ... what was ... absolutely essential ... was a description early on, in the kind of detail we eventually achieved very late in the day, of each defendant's narrative as regards the construction of these devices, together with his intentions and plans ... until that was revealed, the prosecution could not anticipate the nature of the case they had to meet and more importantly, they were unaware of which, if any, scientific tests should be undertaken – for instance they did not know whether they should test the main charge material, the detonators, the two together, the efficacy of the containers or such features as the wiring, or none of these things." He went on that he was sure that some of the defendants had "tried to mould their defences to the scientific evidence ... rather than providing information that would enable useful tests to be undertaken at the outset." A judge can only say that after a conviction. If there had been an acquittal, whatever his suspicion, he would have sat silently mulling over to himself the menace of the moulded defence.

This highlights the problems in relation to disclosure. This is a long fraught problem. Many of the cases first referred to the CACD by the then newly formed Criminal Cases Review Commission were based on the failure by the prosecution to disclose material of potential value to the defence or detrimental to the prosecution. This is plainly unacceptable. In

the days when the papers were few, and the police did not take statements from everyone, including those who had nothing to contribute to the enquiry, the principles were easy enough. As prosecuting counsel I would show my opponent any statements which undermined my case, or reinforced his: and he reciprocated when our roles were reversed. Gradually these investigations have grown and grown. Thousands, literally thousands of pages of material are sometimes gathered. The immediate reaction of the prosecution was simple. Very well, let the defence have access to every document, except for those we specifically exempt for PII purposes. We will show these to the judge, and ask him to rule on them. Beyond that, give the defence lawyers the key to the room full of papers. We called it "key to the warehouse". No-one could then complain of concealed evidence. That won't do either. The defence do not always have resources to examine 5, 10 or 20,000 pages of evidence, and they may not do it very well anyway, and if it subsequently emerges after conviction that the jury was not provided with some such material, then the conviction is in jeopardy although the prosecution has not sought to conceal any material at all.

The answer has to be found in leaving the responsibility to disclose material of any possible relevance to the prosecution in the light of the kind of detailed defence case statement to which Mr Justice Fulford was referring. What cannot be right is for the prosecution to do its best without such a statement, or for the defendant thereafter to seek to cobble together some defence, which years later would have been supported by material which had not been disclosed.

In short, both in relation to the proper preparation of the case by both sides, and in order to address the growing problem of the large number of statements taken by the police in the course of any major enquiry, the pre-trial defence statement is a critical ingredient. Its precise ambit is difficult, and there are those who again express principled reservations to any system for defence disclosure. Thus, in the Supreme Court in the United States, where a majority held that a notice of alibi provision was constitutional, Justice Black dissented on the basis that this represented "a radical and dangerous departure from the historical and constitutionally guaranteed right of defendant in a criminal case to remain completely silent, requiring the state to prove its case without any assistance of any kind from the defendant himself". As I have already said, self-incrimination is not on the agenda. Nor is the defendant required to assist the prosecution. It is however at least arguable, and I do argue, that a system which accepts that the prosecution may be ambushed, or which enables the defendant to manufacture a spurious defence, and seeks to address just these problems, does not offend the rule against self-incrimination, nor damage the interests of justice. Surely there is no problem with the principle that the defence and the prosecution must contribute to an efficient trial process designed so far as possible to get at the truth. If the truth hurts one side or the other, so it should. Before you can make up your minds, of course, the final, but essential question, is to identify the consequent sanctions for non-disclosure. The more extreme

they are, the less likely it will be for the process to attract general approbation.

The one order which cannot be made in a criminal trial, but which can be made in a civil action, is the strike out. Non-compliance with the obligations, however gross, cannot lead to an order by the court that the defendant must be deemed to be guilty, or have his "not guilty" plea struck out, or that he should be denied the opportunity to give evidence at his trial if he so wishes, or to call evidence in support of the defence. The provisions relating to alibi notices were introduced in 1967. Absent an alibi notice, in law the court was entitled to prohibit the defendant from calling alibi evidence. There have been precious few cases where such a sanction was ordered. When preparing myself for this lecture, I could not, off hand at any rate, think of any. Equally, non-compliance does not put a defendant in contempt of court, or expose him to any penalty, or to the risk of any penalty. The only effective proper sanction is to enable the prosecution, or co-accused if there are any, or the judge, to make adverse comment, and for the judge to be empowered to direct the jury about the possibility of drawing adverse inferences against the defendant. That is then evaluated by the jury. If that is the extent of the sanction for non-compliance, the proposal is not disproportionate. The available sanctions included a power in the court to exclude the defence case altogether, all punishment, all separate penalty, objections in principle would be better founded. One last word here, in relation to costs orders. This is always problematic. Often the defendant is impecunious anyway. There are considerable difficulties, and rightly so, with crossing the confidentiality of the relationship between client and lawyer, and on the whole the investigation into the issues can become a form of protracted satellite litigation of its own.

I should perhaps conclude what I have to say by declaring an interest. Perhaps I should have declared it earlier. The views expressed here reflect the terms of judgments in the Court of Appeal Criminal Division in appeals over which I have presided. But we must grapple with these issues and find a principled basis for deciding how in each common law jurisdiction we address the problem of the increasing proliferation of material which is now included in the investigative process. My concerns apply to cases at every level, with investigators building a file for a small case of criminal damage, or public disorder, as complex as it is for major cases. I am told, and do not vouch for the accuracy of the story, that one of the forms that police officers are required to fill is a form which establishes that they have filled in every other form which they are required to fill.

Problems

Our changes to process are not without problems. But then they never are. I have indicated to you that there are principled objections, and they are entitled to proper respect. It would be foolish to pretend that every one of the judges and magistrates sitting in England and Wales shares the views which I express, and rejects the principled objections to my views. The most significant factor in the new approach which judges are invited to

apply, that is to ensure that the case is properly prepared for trial, and properly and fairly tried, is that judges themselves have to be prepared to take on this additional responsibility. That, in truth, involves a process of persuasion and encouragement for those who are among the less certain that the new approach will work, and will work justly. A number of judges have leadership roles, and the gradual acceptance of the new approach demands leadership qualities. It is however no less important for the professions to appreciate that the environment has changed, and that there are obligations on both sides in the process which require the judge to be assisted in the case management responsibilities imposed on him pre-trial as well as the trial itself. Most members of the professions are only too keen to work in an efficient system. As you will appreciate, there is an element of mutual dependence between the Bench and the advocate. Our system works better when the traditional elements of mutual trust and respect are present. Increasingly, though not yet universally, the professions are co-operating.

We are still short of absolute commitment to the identification of an individual from each side, and indeed in the court itself, acting as the case progression officer. It is not so much the absence of a name: it is that the name has a significant number of further responsibilities which in extreme cases mean that there is indeed no more than a name on a piece of paper.

Some of the rules and some of the consequent practices suggested centrally, that is by the Criminal Procedure Rule Committee, do not always work as well as anticipated. Teething problems are inevitable, and they are addressed by all the judges with leadership roles, presiding judges and resident judges, meeting annually to discuss where things are working well, and where not. My own view is that the prime requirement is pragmatism and a slightly sceptical approach to dogma, at any rate to the extent that I have responsibilities for what some regard as dogma.

Special Measures

We have to face the reality. Children, and not only children, but those who are vulnerable adults, are sometimes assaulted and sexually abused, neglected and starved. We all know how difficult these cases are for trial judges and juries, but our tribulations are as nothing faced by the victims of such ill-treatment. And, of course, as ever, the harsh reality is that not every complaint is a true one. Apart from child witnesses – and I shall use the phrase to cover all vulnerable witnesses – as victims, child witnesses can witness crimes both by adults and indeed other children. We also know that children can perpetrate the most dreadful crimes. They too are entitled to a fair trial, fair in the particular context of their vulnerability as children.

I suspect that every generation satisfies itself that it has improved on the process of the previous one.

Listen to this examination into the competency of a 13 year old boy. The date is 1684. The judge is Judge Jeffries, but in this at any rate he was reflecting the understanding of his age.

Judge:	*Suppose you should tell a lie, do you know who is the father of liars?*
Boy:	*Yes.*
Judge:	*Who is it?*
Boy:	*The devil.*
Judge:	*If you should tell a lie, do you know what will become of you?*
Boy:	*Yes.*
Judge:	*What if you should swear to a lie? If you should call God to witness to a lie what would become of you then?*
Boy:	*I should go to hell fire.*

The witness passed the test. He believed that if he lied his should be damned forever into hell fire. Good Christians preached this doctrine. John Wesley himself did. By the middle of the nineteenth century eternal damnation was less in vogue. This exchange took place before Mr Justice Maule.

Judge:	*And if you do always tell the truth, where will you go when you die?*
Little Girl:	*Up to heaven sir.*
Judge:	*And what will become of you if you tell lies?*
Little Girl:	*I shall go down to the naughty place, sir.*
Judge:	*Are you quite sure of that?*
Little Girl:	*Yes sir.*
Judge:	*Let her be sworn, it is quite clear she knows more than I do.*

I am indebted to Professor John Spencer of Cambridge University for these extracts.

My thesis is that each generation believes it knows better than the one before. What is more important, perhaps, than the certainty that our current system is the best for dealing with these problems, is that we should all in the best of faith embrace what we honestly believe to be the best practice, conscious that the last words on this topic have not been written, and that certainly in 50 years time, and probably in 25 years, our successors will at best be mildly amused at our best efforts, and at worst horrified by them.

Our current statutory arrangements are found in the Youth Justice and Criminal Evidence Act 1999, which came into effect rather later. Special measures are available for eligible witnesses. Witnesses are eligible on the grounds of age or incapacity. Incapacity includes mental disorder, or significant impairment of intelligent or social functioning, and may extend to physical disability or disorder. When considering whether to make an order, the views of the witness should be taken into account. The court must be satisfied that the quality of his or her evidence is likely to be "diminished by reason of fear or distress" in connection with the process of testifying. Where appropriate, the court may give a special measures direction. That is binding

until further order. The object is that the vulnerable witness will know precisely what system for giving evidence will apply to his or her case, in advance of the hearing.

The process is designed to protect. Thus, taking it very briefly, the evidence of a child witness may be given on the basis of a video recording of the child telling his or her story. The child is never exposed to the sight or view of the defendant. The technology usually works well, but not always. Judges are perfectly familiar with the relatively modest requirements of technological skills.

The controversial question here is whether the use of the television screen in front of the jury reduces the impact of the child's evidence: a number of experienced judges hold very strongly that it can. Others disagree and they also point to the fact that there will be many guilty pleas just because the evidence can be given by the child in this form, and the defendant knows it, and cannot therefore wait, as he might have done in the old days, to see whether the child would in the end come up to proof. The reality is that something of a compromise is going on here. On the one hand there is the aspiration that those who are guilty of crimes against children should be convicted of them: on the other hand there is a countervailing concern that the condition and development of children who have been victimised should not be aggravated by the court process.

This leads me on to a further consideration, again which must be common to all of us. Which should come first, the trial of the defendant, or necessary psychiatric treatment of the victim? If the trial is postponed for too long, and treatment postponed, how much worse will the child's condition be as a result of the delay? On the other hand once the child is treated, then there is an inevitable supervening of the involvement of the psychiatrist with the child, which may impact on the evidence given by the child. Cases of this kind are given a proper sense of urgency, and listed as early as practicable. But we are also trying to develop a system where cases of this kind are first listed before judges who are not merely experienced criminal judges, with the necessary proved understanding of the problems of trials, but are also judges familiar through their experience in family cases of child abuse cases. In the family courts, of course, the welfare of the children trumps everything. In criminal cases the question is whether the defendant's guilt is proved. We are trying to ensure that this sort of case is listed before a judge who combines both groups of experience, so that a judicial decision should be made whether the trial should precede any form of treatment, or whether treatment should come first. The decision is rarely easy. It reflects the inevitable conflict I identified earlier.

We have also, in the context not so much of children as those with disability, often with supervening problems of, say, articulation, been considering the examination of the witness through an intermediary, with such aides to communication as the witness may need. One way of considering the intermediary's role is that he or she is the equivalent of an interpreter. There is, however, more to it than that. An interpreter simply translates exactly what the witness using a foreign language has said. An intermediary may have

to communicate with the witness, outside the immediate words used by the advocate or the judge in order to ascertain precisely what the witness wishes to say. And this process involves rather more than simple or direct interpretation. To some extent therefore the intermediary is interposed between the witness and the questioner. And the reality has to be faced that the fact finding tribunal has no real way of drawing any conclusions whatever from the apparent demeanour of the witness. Thus, for example, the witness who may appear stroppy or difficult or incapable of answering a direct question with a direct answer, may be attributable to the condition from which he or she is suffering.

Research into whether special measures for vulnerable and intimidated witnesses are working is not entirely optimistic. The particular concern is whether witnesses who are potentially vulnerable are identified early enough in the process by the investigating police or the Crown Prosecution Service. Obviously this does not apply to children, whose age speaks for itself, but to others. Controversial, too, is the increased power of the court to order hearings in private. The power can only arise in proceedings for a sexual offence where there are reasonable grounds to believe that individuals other than the accused himself has sought or will seek to intimidate the witness. Even so, such a direction does not apply or would not apply to a named person who was the representative of news gathering or reporting organisations. The principle that the press should be admitted has been retained.

In passing, I should like to acknowledge the valuable illumination of Jim Spiegelman's lecture on the principle of open justice given in London in September 2005. At heart, the fundamental question is whether we are prepared to have individuals convicted and sentenced behind closed doors. It is very dangerous for judges to use the word "never" simply because events can always turn up something extraordinary, so that "never" becomes "well, just this once": but I doubt if anyone here would disagree that one fundamental principle of the common law, in all our jurisdictions, is that citizens shall not be tried in secret courts, and convicted and sentenced behind closed doors.

The summing up is an essential ingredient of the common law system of trial by jury. But the summing up has become longer and longer and directions of law have become more and more complicated, and have turned, in some instances at any rate, into disquisitions in jurisprudence.

In part the problem is created by decisions of the Court of Appeal and House of Lords. We shall shortly have to address failures by trial judges to leave alternative lesser verdicts to juries when neither side wish them to be left. Not all alternative verdicts that amount to possible defences, such as provocation as a possible defence to murder, but, for example, where a charge is attempt murder, and intent to kill is the only issue, should the jury be asked to consider whether the defendant might have intended to do no more than cause grievous bodily harm? The House of Lords appears recently to have suggested that all possible alternatives should be left. That is the argument on behalf of the appellant. I am not addressing the argument, simply reflecting

that this is an example where, if the argument is right, summings up will inevitably get longer rather than shorter.

The other problem arises from overmuch attention to Judicial Studies Board specimen directions. I can speak about this from personal knowledge. Let me start at the beginning. At first, newly appointed High Court judges were given nothing at all. Then the Lord Chief Justice of the day, sent a newly appointed judge who sought assistance, a list of five or six subjects to be addressed in the summing up. It was literally a short list and included, functions – judge/jury: burden of proof: standard of proof: ingredients of the offence. I cannot remember the others. Then we decided at the Criminal Committee that this should be spelled out in a little more detail. So it was. Thereafter specimen directions were established, and from time to time approved by the Court of Appeal. Once a direction was approved, its omission became a major flaw, producing an argument that the safety of the conviction was undermined. And so, like Topsy, the summing up has grown.

One approach is that many matters of law currently requiring directions are no more than matters of common sense. But, and it is a very big "but," we have in our summing up to address issues where common sense would produce injustice. Let me give a simple example. We all know about the problems with visual identifications. Jurors might perfectly well believe as a matter of common sense than nothing could be safer than an identification by someone who knows you well. Yet we know, and they do when it is pointed out to them, that mistakes are not uncommon. If that is not dealt with by way of a direction – how should it be dealt with?

At the same time our knowledge is steadily increasing. So let me offer you a further example for the future. In violent sexual assault cases victims, almost always women, may well agree in cross examination that after the ordeal was over she said something like, "thank you". This enables an argument to be developed that that is an expression indicative of consent. Actually, as we know, it is no more than an expression of relief that the ordeal is over, that the victim is not dead, that the assault took one particular form rather than another. So we are considering allowing expert evidence on the subject. Maybe we can deal with it by way of directions.

The problem of lengthy summings up is a difficult one, not least because a summing up should reflect the judge's assessment of what is needed in the particular case to assist the jury to reach a true verdict. That involves a measure of his or her individual judgment. What we really cannot have is a formulae incantation nor successful appeals based on the omission of some words "approved" by the Court of Appeal. In my view we must be, and we are being, very much more robust on this general topic, and so we should.

The Criminal Cases Review Commission is one of the recent success stories of our criminal justice system. It was created in the context of public concern about wrongful convictions, following IRA atrocities. Perhaps I should observe that the courts that did not quash as well as the courts that did quash convictions based their decisions on an assessment of the evidence actually before them. At the time there was pressure for having a body of the great and

good who would somehow know which defendants were rightly convicted, and which convictions were unsafe and unsatisfactory. That could not do. Constitutionally only a court can interfere with the verdict of a jury. Viscount Runciman produced the solution. An independent body would be created which would conduct its own investigations where necessary and refer any conviction to the court where there was a real possibility that it was unsafe. After the reference, the court would decide. The Commission is ten years old this year. It has been a great success. The relationship of the Commission and the Court of Appeal Criminal Division is working well. On occasions the court can ask the Commission to examine problems which occur to the court, which neither side may wish to have investigated, or which it would be better to have investigated by an entirely independent body. The Commission has been of huge assistance to the court.

As ever, time produces its own problems, and now, after ten years, we have had to address the problems which arise from what anyone sensible would accept were changes of the law, as previously understood, rather than the myth that the common law is always developing rather than changing. Where the House of Lords corrects an error, or develops the law, there are always individuals convicted on the basis of the previous understanding of the law. In essence the problem is simple: should their convictions, properly returned on the basis of the law as understood at the time when they were convicted, be quashed? If so, what has happened to the principle that the criminal justice system should be certain?

The appeal process, too, is currently under review. There are proposals suggesting that a conviction may be quashed only if the court concludes that the convicted defendant is innocent or may not in fact be guilty. That is entirely reasonable, until you appreciate that that could require the court to uphold a conviction where the process has been corruptly undermined and the rule of law itself has been threatened. I have expressed myself publicly on the issue, which in fact is a profoundly complicated one, but I should not want to live in a country where convictions obtained through corruption or subversion of the rule of law must be upheld.

Future changes

My basic thesis is that we always have change, and that it is ongoing, and I should like to address a few words about areas which will, in my view inevitably, need rethinking.

Long trials have become common. When I was in practice at the Bar, and I did a great deal of criminal work, I never once participated in a trial that lasted longer than six weeks. That was regarded as extraordinary and exceptional. Six weeks, that is thirty working days, is no longer uncommon at all. We have trials that last months and months and they are not confined to fraud cases. The terrorist trials which have just been taking place have sometimes lasted many months and there will be others that take just as long. Will the jury system survive? The immediate answer is, not as we know it, that is a random selection of citizens coming to court to administer justice. Trials of great length do not take place before a random selection of citizens,

before a selection of citizens who have the available time. That tends to exclude virtually anybody in work, and for example only, mothers with small children. So you have a specialist jury, not specialising in the subject of the indictment, but specialist because the numbers from whom the jury are chosen are restricted. That prospect requires some thought. The alternative is for the system to become much more streamlined. This is the essential thrust of the changes currently under examination. If the jury system as we know it in our generation is to be preserved, the trial process must become shorter and quicker.

In the lecture by Jim Spiegelman to which I have referred, he speaks of the access jurors have to the internet. Nowadays, judges at the outset of the trial among other directions to the jury direct them not to look at the internet in connection with the trial. We assume that the direction is accepted and obeyed, although inevitably, from time to time an individual juror will disregard the direction and make his own private enquiries. In one case we heard recently, there was evidence of consultation of the internet in a rape trial, and the conviction was quashed. On the other hand, we are hardly likely to welcome a suggestion that the modern technology belonging to an individual juror should somehow be vetted or overseen or checked after the trial, to make sure that the judge's directions have not been ignored.

To my mind, however, there is a connected, but longer term problem, which we have not yet faced, but should anticipate having to face. Our system of jury trials depends on twelve good men and women and true coming to court and listening to the case. Orality is the crucial ingredient of the adversarial system. Witness speak and answer questions. Counsel speak and address the jury. Judges speak and give directions.

Look, now, at our young. Most are technologically proficient. Many get much information from the internet. They consult and refer to it. They are not listening. They are reading. One potential problem is whether, learning as they do in this way, they will be accustomed, as we were, to listening for prolonged periods. Even if they have the ability to endure hours and days of sitting listening, how long would it be before some ask for the information on which they have to make their decision to be provided in forms which adapt to modern technology? By modern technology I do not mean technology as we understand it, but the technology which will be available to our successors in, say, 2020 or 2025? I cannot begin to imagine the extent of the changes which lie ahead. In our current process, in major trials involving fraud cases, much material is made available to jurors on screens. But that is material which is essentially written. And that can or should be done without difficulty. But what about the child witness complaining of an indecent assault which the defendant adamantly denies? What process aimed at finding the truth between them, and enabling a jury to decide where the truth lies, will be in place in twenty-five years time?

We shall all have to observe how each common law jurisdiction addresses this problem: but problem it will be, and it will have to be addressed.

Personally, I am a great believer in the oral tradition. But, like Andrew Marvell,

> *"But at my back I always hear*
> *Times' wingèd chariot hurrying near".*

Time, that limited resource, inevitably brings change. And I must end.

R/PQBD/speeches/sydneytimeforchange260907.doc/max