**Speech to National Police Chief’s Council Criminal Justice Conference 13th March 2019**

I am honoured to have been invited to join so many distinguished speakers to address this conference to give a defence perspective on the critical theme that this conference is addressing. It is extremely apposite that you have chosen this theme for your criminal justice conference this year, it is undoubtedly true that confidence in the system has been the focus of a lot of attention recently. Confidence in our justice system is, in my view, a fundamental requirement of maintaining a democratic state in which the rule of law is seen as paramount. Confidence is also fundamental to maintaining our international reputation built over many years of having a justice system which sets the gold standard to be followed and aspired to by other countries. This is not simply a matter of national pride but is also a significant contributor to our economy. The criminal justice system is the shop window to the world for our whole justice system and the legal sector presently contributes some £27 billion to the economy generating some £4 billion of exports. Put simply confidence cannot be over looked.

In considering the question of confidence in our system it is undoubtedly true that overall confidence is the sum of many different parts which stem from different experiences and different perceptions. My task today is to give the view from the defence side. I’ve chosen to focus on a few issues which I think are the most pressing which need addressing if we are to build and maintain confidence in our criminal justice system.

As I have been contemplating this address and the issues which I would like to highlight one word above all has continually come into my thoughts. That word is **respect**. Respect is an important word because it addresses attitudes and thoughts rather than simply processes and procedures. If we are to build confidence that must come from what we like to describe as cultural changes and to my mind those cultural changes are dependent on creating respect for our system and those within it.

A starting point is respect for the presumption of innocence. It must be recognised that as individuals first come to the attention of the investigating authorities they are innocent people and must be treated as such. It is not for investigators nor defence lawyers to determine a person’s guilt or innocence, that is a matter for the courts and we must recognise that and act accordingly. With this in mind I remain troubled with labelling of complainants as victims. I understand the tensions about respecting a complainant and not being seen to rush to judgement over their complainant but in my view this does not require the pre judgement of their status as “victim”. I say this because I think it does feed into some of the cultural issues we need to address, after all if in say - an assault case where the identity of the alleged perpetrator is known then the issue may well be whether assault occurred at all or which the one party was the aggressor and which was acting in self-defence. If the first person to contact the police is labelled “the victim” or even “the injured party” this must imply that the suspect is the perpetrator of the crime. Logically it has to be. This must feed into the approach taken to the suspect and the investigation. Surely it is better at such an early stage to maintain the terminology and therefore mind-set that those involved are the complainant and the suspect and the purpose of the investigation is to determine whether there is sufficient evidence to put the matter before a court where there remains a dispute as to the suspect’s innocence or guilt.

Respect for that person’s situation should also lead to respect for the individual’s rights. For confidence to be maintained, suspects, and those looking at the position of suspects, must believe that they are able to effectively participate in the process, that they are participants who have not been judged already but will be listened to and given a fair opportunity to meet the allegations that have been made against them and to present their case to an open minded investigator. This process starts with the interview.

The interview is the suspects first opportunity to understand the allegation that has been brought against them and, if they so wish to answer that allegation. The experience of defence practitioners is that whilst there have been changes to the law to provide for better pre-interview information through the implementation of EU directive 2012/13 in the form of PACE Code C 11.1A

nonetheless the amount of information actually provided is frequently inadequate to allow defence lawyers to properly advise their clients, in a recent article addressing some of the issues raised in the Lammy report the current President of the London Criminal Courts Solicitors Association, John Black, wrote “over the past 15 years full disclosure prior to police station interview has become the exception rather than the rule and accordingly decisions as to whether to comment in interview is often proportionate to the level of disclosure.” And Dr Tom Smith in his 2018 Criminal Law Review Article, “The "near miss" of Liam Allan” wrote, “Police disclosure is thus treated as an adversarial negotiation tactic rather than an obligation directed at truth-seeking”

From a defence perspective the pre-interview briefing frequently sets the tone for the investigation and the possibility of a constructive relationship between the defence and the investigators towards the investigation. I fully appreciate that tactical considerations around the amount of material to be disclosed at an early stage are legitimate, I might even, in an unguarded moment, acknowledge that the withholding of some information is appropriate but the experience of defence practitioners on the ground across the country at this moment in time is that the levels of information provided are an impediment to them being able to properly advise their clients and this will include giving advice that there is such a strong case against them that in the absence of a positive defence being put forward by the suspect their client should consider their position very carefully, which is lawyer speak for “the game is up it’s time to look towards gaining credit for a guilty plea”. If we are all to work towards achieving early resolutions to those cases that will inevitably end up as guilty pleas at some stage it is vital that sufficient information is provided at this early stage. The importance of providing appropriate pre-interview information is only going to grow as we start to consider a more collaborative approach to the issues of disclosure.

Disclosure of unused material is an area which has caused perhaps the greatest undermining of confidence in our system. This goes back over many decades not just years and certainly not months. It is not a new phenomenon. As the Attorney-General’ s disclosure review references we are looking to develop ways of improving disclosure which includes a pre-charge dialogue between defence and investigators and if a constructive and therefore potentially productive dialogue is to be established the approach to the pre-interview briefing will I have no doubt be fundamental to the success of such an exercise.

Having managed to avoid any areas of real controversy so far I fear that I cannot maintain that as we move to the next issue in the chronological sequence of a criminal case. I refer to the issue of police bail and releasing under investigation. I appreciate that this is an area of some difficulty. I further appreciate that I may well have a different view as to the problems caused by the bail reforms that were brought in in April 2017. Nonetheless the issue of what happens to a suspect after they have been formally interviewed is without doubt an issue when it comes to confidence in the system. With not a little trepidation, I will declare now I was in favour of the changes that were made to pre-charge bail. I felt it was right to address the inappropriate use of bail conditions that were so frequently identified by practitioners and subsequently by the Home Office themselves in their consultation concerning the changes. I was also concerned at the lengthy delays that suspects faced in remaining on police bail for frequently excessive periods of time. The imposition therefore of a system which created accountability for extending periods of police bail through an escalating series of authorisations seemed wholly appropriate. The intention of the reforms was to ensure that people did not remain subjects of investigation and in the limbo about their fate for lengthy periods. In this regard the reforms have clearly failed. Practitioners across the country are reporting ever-growing lists of clients who have been formally interviewed and remain without a resolution to the investigation. In my own practice I have experience of what I would consider unacceptable delays in bringing cases to a conclusion. Delays which cause anxiety and distress not only to suspects and their families but also of course to complainants and those who seek to bring allegations of wrongdoing. I am aware of a case which had just five prosecution witness, less than 60 pages of statements and exhibits and no areas of evidential complexity yet which took four years from the defendant’s first interview to him receiving a postal requisition. I have a number a number of clients who have now been released under investigation for over a year. These delays are starting to come to the attention of the press and therefore the general public and these delays are unquestionably challenging confidence in our system. I have no doubt that a large part of the delay is caused by the pressure of resources within your forces. My criticism is that the use of release under investigation disguises the extent of the problem. The requirement of those under police bail to have extended periods of bail authorised by senior offices or the courts allows for public scrutiny and transparency their situations, I for one would like to see consideration being given to similar requirements of an escalating level of authority for suspects to remain under investigation before a matter is concluded. Those time periods may upon reflection be possibly longer than are permitted for those subject to bail recognising that bail, particularly where conditions are attached, is a greater restriction on a person’s liberty and imposition into their personal life than where they are simply awaiting the outcome of an investigation. That wait however is not without stresses and concerns and should therefore be subject to some level scrutiny and transparency. If the imposition of such restrictions highlights the need for greater resources then so much the better, as it will force politicians to make a choice between allowing lengthy periods to elapse between interview and conclusion or providing the necessary resources to ensure that this is not necessary. I have no doubt that reducing periods spent between the initial contact between the investigators and the suspect will improve confidence in our system.

The next topic I wish to consider is that of physical access to justice. Since 2010 we have seen half of all magistrates courts closed. There is talk of yet further closures. This programme of court closures is unquestionably driven by a desire to save money. There is nothing wrong in saving money but before embarking on any further closures consideration must be given to the impact of such closures. I have colleagues who practice in rural areas and they have reported instances of defendants changing their pleas to guilty not because they are guilty but due to the transport challenges they face in travelling to and from rural courts. I have also heard instances of where witnesses have indicated that they would not be prepared to travel such distances again to attend courts to give evidence where trials have not proceeded on the first occasion.

For some the answer to this lies in video courts which will allow all of the participants to be physically present in very different locations from the court room and indeed each other. You will all be familiar with the video remand courts that are being piloted and I am sure Mr Blaker will tell you much more about them tomorrow. All I wish to say in regards to confidence is that suspects and witnesses must be assured that the use of video technology delivers a fair system and that they will not be prejudiced in any way by the need to save money. Where technology is seen to be the answer it should only be used where it is appropriate which means that the equipment must be of sufficient quality and, the defence are content for it to be used in that particular instance. If a case is not suitable for a video hearing then there must be provision for a defendant to appear in person.

One of my partner’s has just returned from China where he saw their video courts in action, they have invested large amounts of money in equipment and the difference in the quality of the technology to that which we are using was of the proportion of a chasm such that he reported the experience of being in their video court was that it was as if the defendant was in the court room, too often our technology gives the impression that the defendant is situated somewhere in space!

It must however be recognised that even the best technology does not provide a substitute for personal contact. I’m frequently told that youngsters today are much more comfortable with modern technology and that they communicate by video without question implying that the modern preferred way to communicate is by video. I have to say I see no evidence that the ability to communicate by video has replaced the desire to meet in person. Indeed I know of many instances where international commercial contracts mandate face to face meetings during their currency. This is because face-to-face meetings allow for a level of communication significantly beyond the mere exchange of words and visual representations. This is fundamentally important in establishing confidence between people. I recently found a piece of advice published on an Australian on line business community’s web site it says, “At the crux of it all, there really is no substitute for face-to-face interaction, and this goes for both business and personal relationships. Try to include more in-person meetings if your schedule allows it, and I’m sure you will see the benefits. In the meantime video chatting is always the next best thing”. In social and business terms we are talking of individuals who want to meet and who have a degree of parity in their respective standings. A defendant is not in that position. For a participant in the criminal justice system, who to be frank does not want to be there, establishing trust is a vital issue as identified in the Lammey report and I am afraid for many only face to face meetings with their lawyer will facilitate this. If there is to be confidence in the system then respecting defendants and their needs is vital.

In relation to funding I will say only this, if we are to restore confidence then we must return to a system whereby anyone charged with a criminal offence, which if convicted of would adversely affect their reputation or result in a loss of liberty must be given the chance to be represented and we must ensure that there are sufficient good quality lawyers available to deliver that representation.

Finally as the challenges which we face of operating in a digital age in which vast quantities of material are generated and of creating an efficient system so that time and money is not wasted, are addressed with solutions requiring a more collaborative approach between the parties and participants in the system, we must respect our adversarial legal system.

Our system is based on the principal that the prosecution bring a case against a person and they must prove that case. The defence are there to test that case, to challenge the evidence and where appropriate bring forward evidence of their own to cast doubt on the prosecution’s case. Some have already expressed concerns that recent developments in the way cases are managed are at odds with the demands of good representation and at a recent roundtable discussion on the adversarial system the distinguished solicitor Tony Edwards commented, “The pressures placed on the parties and their lawyers by a system that is under pressure and keen to dispose of their case is undermining the adversarial system” and he went on to say, “It’s my worry that this push towards investigative and inquisitorial justice removes the checks and balances that adversarial justice produces”

The need to respect our adversarial system is clear if we are to maintain confidence, one senior police officer succinctly summarised our system when she said to me, “you are there to make sure we do our job properly” or alternatively we might be seen that piece grit which may irritate but which is necessary to produce the pearl that can be out justice system. Therefore undertaking collaborative approaches to the issues that face us must include respect the role of the defence to be able to challenge and test or else we risk serious miscarriages of justice befalling us yet again.

Richard Atkinson.