CRIMINAL BAR CONFERENCE

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RIDDELL HALL, QUEEN'S UNIVERSITY BELFAST

EFFECTIVELY & EFFICIENTLY DEALING WITH DELAY IN THE CRIMINAL COURTS

Lady Chief Justice

Conference Session: New initiatives to avoid delay in criminal proceedings

Thank you for inviting me to speak at today's conference. It is a welcome development that we are able to meet in person again. Hopefully it will not be long before we see more of each other in person in our courtrooms. I will start with mention of Covid-19 recovery plans as there are understandably questions you will have about the way forward.

As you have already heard this morning, the Northern Ireland Courts & Tribunal Service is reviewing the social distancing measures in all courthouses. I expect these to be revised so that capacity can be increased across the court estate. My office has shared draft Guidance on Remote, In Person & Hybrid Attendance that aims to balance the efficient dispatch of business and the interests of justice, both while the public health guidance applies and beyond, as it is important that courts adopt the learning opportunities brought about by the pandemic. Taking on board any feedback we receive, I plan to issue the Guidance before the end of this term.

I would like to thank you all for adapting to the new ways of working developed to deal with the health advice and social distancing restrictions. Almost overnight, the Covid-19 pandemic made our traditional way of working no longer possible. It required us to stop, reflect and quickly adapt how we worked. With the support and expertise of court service staff and you in the profession, the court system was able to move quickly to remote and hybrid working in ways that we would not have contemplated before. It is worth reminding ourselves of this because, two years later, it is easy to forget or minimise how much we changed our working practices in such a short time. How adaptable we proved ourselves to be.

I know many of you will have found the ability to work remotely, whether from the Bar Library or from home, of great benefit, allowing you to perhaps manage your caseloads more efficiently with less time taken getting between different court venues. Others may have struggled to create a work-life balance and faced the challenges of home-schooling or caring responsibilities. This pandemic has thrown

up many challenges, but I am impressed how we, as a profession, have managed to keep cases progressing – without our collective 'can-do' attitudes, the delays in the criminal justice system would be much worse than they are today.

You will have heard from this morning's speakers of the many reviews, reports and recommendations made and considered over the years to reduce delay in the criminal justice system. Delay was certainly exacerbated by the restrictions, and our road to recovery will require collaboration, co-operation and innovation.

It is important that courts adopt the learning opportunities brought about by the pandemic. The newly available technology and the increased digital experience will be a platform for wider reforms to improve access to justice - but the greatest benefits will only be gained where the underlying practices and procedures are modernised and streamlined and not just computerised in their current format. I am in the process of establishing a new Judicial Advisory Group to develop the requirements outlined in the Judicial Modernisation paper I published in September, which informed the NICTS Vision 2030 modernisation programme.

In addition to judges from across all court tiers and business types, I will be asking the Young Bar and Young Solicitors Associations to nominate three members each who will act as "digital leaders" and work alongside the judiciary to effect culture and practice change.

Looking ahead as we emerge from the pandemic, we need to consider how much of the court process should continue to be conducted remotely. In doing so, we must be mindful that justice has to be accessible to all. Not all cases are suitable for remote hearings and there are instances where it is important for a person to be present in court. It has long been the case that the first procedural hearing in the Crown Court is an opportunity for a defendant to meet counsel and discuss the evidence. This can lead to a plea at an earlier stage than might otherwise be the case, something which is to the advantage not only of the defendant but also the courts, because court time is optimised, and so the victims, defendants and overall administration of justice benefits. It is clear therefore that future arrangements for courts must be sufficiently flexible to meet the needs of all court users, including those newly called to the Bar who must have found it incredibly difficult to hone their craft while distanced from their masters.

I particularly want to reassure the Young Bar that I understand how difficult it has been for you. I am also aware of a fear among you that you may with remote working lose out on work that would traditionally have been passed to you. I hope that will not happen as in the finest traditions the more senior members of the Bar will support the junior members given where we all started.

I am also aware of an accessibility issue post pandemic and want to emphasise that all of us need to think about ourselves, turning off computers and keeping an eye on welfare given how exhausting and stressful recent years have been.

In terms of digital updating of courts, of the 69 courtrooms in the court estate, 59 have been upgraded to provide audio and video technology. The remaining courtrooms are to be upgraded by December 2022 – delayed only due a world-wide shortage in computer 'chips' I am told. Wi-Fi is now available in all courtrooms. This has enabled increased use of live-links which are no longer limited to those granted special measures, and are now used for the giving of evidence remotely by police officers, experts and other witnesses, where the judge is content that physical attendance at court is not necessary.

First appearances in the magistrates' courts are being conducted by live link from police stations. PSNI estimates that the use of remote evidence from police stations will save them ten million pounds in the next five years. Remote pleas and sentencing are taking place also. No doubt, we have some way still to go to schedule witnesses more efficiently whether they attend in person or remotely, but these are valuable initiatives that I wish to see continuing post-pandemic, where appropriate, and while maintaining the integrity and structure of the court.

There are obvious benefits to citizens, and the public purse, if experts such as health professionals, social workers, psychiatrists, psychologists, forensic scientists etc are not called away from their roles to wait in the vicinity of our courts until they are called to give evidence, which may often be for a short period of time and uncontroversial in nature. Indeed, they may not be called at all, where a change of plea is entered, or a trial collapses for an unforeseen reason. Where such evidence can be agreed and read for the court record, this should be encouraged. As judges, we are aware that it is becoming increasingly difficult to obtain expert psychiatric reports due to the scarcity of psychiatrists who with deal with those accused of serious criminal offences, and that this can cause significant delay. However, judges have also reported that requests for psychiatrists occur at a late stage, and it should be possible to identify the requirement much earlier. We all have an important part to play to use these experts more efficiently.

Pre-pandemic in 2019, Sir Declan Morgan established a series of Crown Court Cases Performance Groups as a means to bring together key Crown Court stakeholders at a local level to identify and discuss issues, as part of a wider programme of work ongoing throughout the justice system to tackle delay. I consider that these groups, led by divisional judges, can add real value by sharing and informing best practice from the ground up; taking a collegiate approach to tackling delay in Crown Court cases; identifying the key issues causing delay, and looking at, and implementing, measures which could be effective in addressing the issue.

One important initiative to minimise delay was the issue in November 2019 of Practice Direction 2/2019 – Case Management in the Crown Court, which sets out the necessary steps and timelines to be undertaken by legal representatives to ensure that cases are managed effectively, and proceed to plea or trial at the earliest opportunity, with all issues having been resolved in advance of the trial date.

The Practice Direction also introduced two new protocols for vulnerable witnesses and defendants which brought together best practice and key recommendations of the Gillen Review into Serious Sexual Offences. Unfortunately, this was shortly followed in March 2020 by the onset of the Covid pandemic, and did not have the opportunity to become embedded in practice, but I would urge you all now to ensure that you are well versed in the requirements, which are expected and will be applied with more focus as we move out of the pandemic. The Recorder, His Honour Judge Fowler, will speak more to the detail in his presentation.

Despite the title, I would also point out that the principles equally apply to those appearing before the magistrates' court. Many of the actions contributing to successful case management in the Crown Court commence long before committal while the case is progressing through the magistrates' court. It is imperative that you assure yourselves when engaged as counsel that these have been properly completed. The judiciary and all those involved in the justice system have responsibility for ensuring the timely progress of cases. The Public Accounts Committee in May 2021 recommended the introduction of a legislative requirement for "a general duty of engagement and pre-hearing communication between the prosecution and defence in all Crown Court cases." It is important to recognise that the system requires all those involved to play their part.

The use of two new Remote Evidence Centres (REC) for vulnerable witnesses has enabled Crown Court trials to proceed when they might otherwise have been adjourned. These are a welcome addition to the twelve victim and witness rooms available across the courts estate, and the NSPCC facility in Bishop Street, which were largely out of use to free up space for essential staff. I know that some counsel may have been inconvenienced when trials had to move location to another court venue to ensure they could run on the date listed however this was for the greater benefit of the vulnerable witnesses, mostly in serious sexual offences cases, who had prepared themselves for giving evidence and may have been traumatised further by an avoidable delay.

As these vulnerable witnesses are not within the court venue during the trial, it is important that both prosecution and defence take this into account and ensure that the trial runs as smoothly as possible, for example, by promptly being in attendance at the time scheduled and arranging for any physical exhibits to be in place at the REC in advance of the witness giving evidence. An interim evaluation of REC facilities will be presented to the Criminal Justice Board later this year and I am hopeful that in the coming months, RECs will be more widely used and will continue to prove to be an important benefit to victims, and help to reduce attrition and overall delay. As you have heard plans to deliver a bespoke REC for central Belfast are well advanced and we hope this facility will be ready for use by the end of the year for cases across the jurisdiction.

I know that you will have been impressed with the results of Judge Smyth's initiative to expedite serious sexual offences involving children under 13 years of age. The reduction in median time taken from report to conclusion of these cases from the 986 days reported by Sir John Gillen in 2019, to just 272 days for cases progressed in line with the protocol is commendable. While these figures must be viewed with some degree of caution, as case numbers have been low and statistics are retrospective and include only cases fully dealt with by sentencing or acquittal, this clearly demonstrates what can be achieved when all those involved in the criminal justice system and supporting voluntary organisations, work together to bring about change.

I am assured that the Department will continue with the Justice Minister's commitment to move the under 13's protocol onto a permanent footing and extend it to all areas, subject to securing the necessary funding for legal aid and additional resources within PSNI, PPS and the voluntary sector. Plans are also underway to pilot pre-recorded cross-examination in Belfast protocol cases, and the Bar's representatives on the Department's working groups should keep you informed of developments.

Other speakers this morning, not least the Chief Inspector of Criminal Justice Jacqui Durkin, and Acting Director of the NICTS Glyn Capper, will have emphasised the significant, and appropriate, scrutiny on the speed of the criminal justice system[1], and the many recommendations aimed at reducing avoidable delay. The Public Accounts Committee at its meeting on 20 May 2021 found that the Comptroller and Auditor General's report "Speeding up Justice: avoidable delay in the Criminal Justice System",

> ".. highlighted a number of structural issues within the justice system that contribute to a poor service to the public in respect of Crown Court cases, and results in significant financial waste. Cases take too long to complete, bedevilled by a culture of adjournment in courts that leads to inefficiency and waste. In the Committee's view, 'justice delayed is justice denied' is not an empty slogan and it is deeply concerning that these longstanding issues persist, with little effective action to address them for at least a decade".

These are harsh words, and some may disagree with the sentiments expressed. What is clear though is that we can, and must, do better to streamline and improve our criminal justice system, identify where issues arise and put in place procedures to address these where we can. Judicial initiatives, with the support of the profession, have already driven much of this change without the need for changes in legislation.

[1] Recent developments include, an inquiry into delay by Stormont's Public Accounts Committee (May 2021) and a number of other relevant inspections and reports in recent years, such as Sir John Gillen's Review into the law and procedures in serious sexual offences (2019), a NI Audit Office Report on Avoidable Delay (2018) and a number of reports from Criminal Justice Inspection NI (CJINI)

One of the recommendations of that report which my office will be leading with the support of NICTS is to "establish a robust system to record and report adjournments and their causes and to identify the extent to which adjournments are avoidable." The monitoring and reporting of adjournments is a complex business, and one which does not lend itself to simple statistical measurements between two dates, or recording whether the application can be attributed to the prosecution, defence or court. It is important to analyse and apply business sense when interpreting the data gathered in order to identify any common issues and develop actions to address these. Of course, if case management procedures are applied robustly, there should be less instances of trials being adjourned.

The Criminal Justice Board is also planning to conduct a 'deep dive' into the issue of delay in the coming months, and the Crown Court Case Progression Groups will report what is happening in each division to help speed up the system, highlight progress and plans agreed as well as issues of concern, as appropriate. Your involvement and co-operation will help ensure these reports are accurate and meaningful.

The Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 received Royal Assent on 7th March. The changes that this will bring about have been called for over many years and are well overdue, but the provisions will take some time to bring about. Present discussions are focussing on implementing the provisions, which will abolish Preliminary Investigations and mixed committals and the Department is discussing with my office amendments required to court rules to support these changes by the end of this year. The direct committal process provided for in the Act is more complex and represents a significant change to present committal processes. To allow sufficient time to put in place the necessary arrangements, which include court rules, IT changes and legal aid, the estimated timeframe for implementation is likely to be 2024.

It is therefore important that the Indictable Cases Process ('ICP') implemented in May 2017 continues to be applied to all Crown Court cases involving serious assaults all drugs cases, murder/manslaughter cases and conveying a 'list A article' into or out of prison. The ICP approach was developed in response to a report into delay commissioned by Sir Declan Morgan and carried out by the Criminal Justice Inspectorate. The report found that, while there are issues at each stage in criminal proceedings, the majority of delay occurs during the investigation and preparation stage. The ICP approach requires enhanced early engagement between the PPS and PSNI at key points, together with the other criminal justice organisations, to improve the quality and timeliness of the investigative stages. The process also contains measures to maximise the opportunities for early guilty pleas and, in addition, has specific interventions in relation to the preparation and management of contested cases. Early engagement and information sharing with the defence has shown that ICP cases are concluded significantly faster than the average for all Crown Court cases.

I have touched on the many challenges we face and while enthusiastic for future opportunities, I am acutely aware of the absence of an agreed budget, which will impact on all business as usual services, covid recovery and our ambitious modernisation programme. The legal aid budget is also a critical factor, as is the turnaround time for payments to the profession, which I know has been raised with the Department. Addressing delay in our criminal courts is a key issue for me and one that I will continue to prioritise and address.

I am now going to examine some recent case law in this jurisdiction dealing with the effect of delay in criminal cases. The overarching theme is that delay does not lead to a substantial reduction in sentence but should be taken into account. Delay in entering a guilty plea is also relevant in determining the level of credit to be given. I will examine these two points as follows.

The leading case in Northern Ireland on this issue is DPP's Reference (No. 5 of 2019) Harrington Legen Jack [2020] NICA 1. In that case our Court of Appeal explained that the requirement under article 6(1) of the European Convention on Human Rights is that there is a hearing within a reasonable time of any *criminal charge* against a defendant. The court stated at paragraph [42] that that raises the question as to when for the purposes of article 6(1) does a person become subject to a criminal charge?

The test for a criminal charge in relation to the reasonable time requirement was set out by Lord Hope at paragraph [36] of O'Neill v HM Advocate (No2) [2013] UKSC 36 in the following terms:

> "It is not enough that the appellants were being subjected to questioning in circumstances that might have affected their right to a fair trial. The question is whether they were charged on that date, in the sense indicated by *Eckle v Germany* 5 EHRR 1, para 73, as explained by Lord Bingham in *Attorney General's Reference* (No 2 of 2001) [2004] 2 AC 72 , para 27. Were they officially notified that they would be prosecuted as it was put in *Eckle v Germany*, or officially alerted to the likelihood of criminal proceedings against them as it was put by Lord Bingham, when they were being interviewed?"

Our Court of Appeal confirmed in Harrington Jack that this is the test that should be applied when considering the question as to when for the purposes of article 6(1) a person become subject to a criminal charge.[2]

Once the date is identified the next question the Court of Appeal found to be determined is whether the time between the criminal charge and the hearing is

[2] DPP's Reference (No. 5 of 2019) Harrington Legen Jack [2020] NICA 1, paragraph [42]

unreasonable. The court relied upon a previous Northern Ireland Court of Appeal decision in 2019, the case of R v Dunlop[3], and reiterated,

"… At paragraph [29] McCloskey LJ stated that the "most important general principles to be distilled from the binding decisions of the House of Lords and UK Supreme Court" in relation to whether the time between the criminal charge and the hearing is unreasonable include the following:

> "(i) The threshold of proving a breach of the reasonable time requirement is an elevated one, not easily traversed.
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> (ii) In determining whether a breach of the reasonable time requirement has been established the court will consider in particular but inexhaustively, the complexity of the case, the conduct of the Defendant and the manner in which the case has been dealt with by the administrative and judicial authorities concerned. The first and third of these factors may overlap.
>
> (iii) Particular caution is required before concluding that an accused person's maintenance of a not guilty stance has made a material contribution to the delay under consideration.""

If a breach is established the next step is that consideration has to be given to the remedy. The court explained this at paragraph [44] of the judgment in Harrington Jack:

> "The appropriate remedy will depend on the nature of the breach and all the circumstances including the rationale which is that a person charged should not remain too long in a state of uncertainty about his fate. As Lord Bingham stated in *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 at paragraph [24] "(if) the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant." The evaluative exercise as to what is just and appropriate or what is effective, just and proportionate should take into account not only the impact of the delay on the offender but also the requirement that offenders are realistically punished for their offences. Those competing private and public interests must be balanced and the balance must result in a proportionate response. In relation to the impact of the delay this must be established in evidence by the offender and must take into account that usually the offender has been at liberty throughout the period of the breach see *Director of Public Prosecution's*

[3] R v Dunlop [2019] NICA 72

Reference (Number 1 of 2018) Vincent Lewis [2019] NICA 26 at paragraph [18]."

Importantly the Court of Appeal has clarified in this case that where there is to be a reduction in sentence, due to a breach of the reasonable time requirement, this should be considered in fixing the starting point before applying the reduction for the plea.[4]

Since the decision of Harrington Jack was delivered in the Court of Appeal in January 2020 there have been a number of cases in which the issue has arisen. In R v Chad Alfred Ferris [2020] NICA 60 our Court of Appeal explained that the purposes served by the reasonable time requirement include, in particular, the attenuation of the period during which the victim or victims of crime are subject to the stresses and uncertainties of an uncompleted prosecution process. Article 6 is also designed to promote the public interest in the promotion of the efficient and expeditious disposal of criminal proceedings. Furthermore compliance with this requirement is capable of conferring benefits on accused persons.[5]

In this case the court found a nexus between the undisputed breach of the article 6 reasonable time requirement and the appellant's recovery from drug addiction which was completed pre-sentence. The court said, "Exceptionally, the appellant chose to use this period of excessive delay in the most productive way imaginable by effectively self-rehabilitating during its currency. This would very likely not have been achieved if the reasonable time guarantee had not been breached by the prosecution."[6]

In the Queen v Gerald O'Hara [2021] NICA 1 the Court of Appeal reaffirmed the principles in respect of delay as set out in R v Dunlop and Harrington Jack. In deciding the first question of whether there has been a breach of the reasonable time requirement the court stated at paragraph [15],

> "The court must make its assessment of this issue. Where there is a concession by the prosecution this is not binding on the court and some circumspection will be appropriate. Furthermore, while arithmetical precision is far from necessary, the court must undertake a basic measurement of any period of delay to be reckoned. The question which the court must have in mind at every stage is whether there has been (in shorthand) culpable delay, to be measured from a determined starting point, in the initiation, pursuit and completion of the prosecution. Self-evidently the court requires all necessary information to perform this exercise."

[4] Paragraph [45] of the judgment
[5] Paragraph [65] of the judgment
[6] Paragraph [66] of the judgment

It was found that the necessary detailed analysis of the relevant period of delay was not carried out in this case in the lower court nor was all the necessary information available to the judge to do so. No consideration was given to section 8 of the Human Rights Act and, in particular, the range of options available to the court. However the prosecution accepted that there had been a breach of the reasonable time requirement and the judge sentenced on the basis that there was, "*… by not imposing the maximum sentence in relation to the most serious offending regarding penetration.*"

The court found if anything that the judge's allowance for the factor of delay was generous and a sentence of the statutory maximum of two years' imprisonment for one or more of the offences of digital penetration would have been neither manifestly excessive nor wrong in principle.

In the Queen v Jeffrey Anderson [2021] NICA 28 our Court of Appeal found that the issue of delay in that case whether on its own or taken together with the issue of youth was not sufficient to establish exceptional circumstances to warrant the granting of a suspended sentence imposed in relation to various sexual offences.

The court however with some reluctance did not interfere with the sentence in the end due to a number of factors to include the history of significant delay, that the defendant had already been sentenced and that he had embarked on recovering his place in society. There was also overwhelming evidence for the proposition that the accused pleaded guilty because he was confident as a result of an indication received from the judge in the lower court of avoiding immediate custody.

Another relevant and most recent Court of Appeal case involving the issue of delay is that of the Queen v WY [2022] NICA 28 in which I delivered judgment on behalf of the court. It involved a DPP reference on the grounds of an unduly lenient sentence in a case involving two counts of engaging in sexual activity with a child under the age of 16 and a sentence imposed after trial of nine months in respect of each count to run concurrently. It was not disputed that this case involved considerable delay as the charges related to events in 2014 and 2015 and during a period between 2016 and 2019 "no further substantive action" was taken on the file until a request for further information was made by the Directing Officer to the PSNI. It was accepted that there had been a breach of the reasonable time requirement which the Court of Appeal found was at the high end and that a reduction in sentence was the appropriate remedy. There was also the associated issue of double jeopardy to consider.

Overall however the need for an increased sentence prevailed over upholding the original sentence. The Court of Appeal considered that the appropriate starting point was two and a half years' imprisonment and applied a reduction due to the delay involved and double jeopardy issue and imposed an increased sentence of 18 months' imprisonment.

The last case I will refer to is an important recent decision of the Supreme Court in a case which came from Northern Ireland, R v Maughan [2022] UKSC 13. Sir Declan Morgan delivered the judgment on behalf of the court. The appeal involved a point in relation to the identification of the first reasonable opportunity to indicate an intention to plead guilty.

Sir Declan Morgan explained that, save where cases are directly transferred to the Crown Court pursuant to Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or Article 4 of the Children's Evidence (Northern Ireland) Order 1995, the Northern Ireland system, compared to other jurisdictions, still requires committal for trial. That means that the vast majority of cases remain in the magistrates' court until all of the papers have been prepared upon which the prosecution will rely at the Crown Court. At that stage the District Judge must determine whether there is a case fit for trial and if so the accused must be committed to the Crown Court.[7]

This means that even where the accused provides full admissions or indicates an express intention to plead guilty the committal process requires considerable administrative work by the police and prosecution services. To that extent it was found that the provision of an early plea in indictable cases in Northern Ireland does not provide all of the utilitarian benefits which are achievable in the other jurisdictions.[8]

Sir Declan Morgan went further at paragraphs [50] and [51] of his judgment stating as follows:

> "[50] Early guilty pleas by those who have committed offences promote confidence in the general public in the system of the administration of justice. The achievement of that outcome is affected by the structure of the system of criminal justice in each jurisdiction. The absence of a mechanism to enable indictable cases to be brought speedily to the Crown Court in Northern Ireland has resulted in long standing and unfortunate systemic delay.
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> [51] The passing of the Criminal Justice (Committal Reform) Bill by the Northern Ireland Assembly on 14 December 2021 creates an opportunity to repair that systemic failure. It provides for the abolition of committal in indictable offences and should ensure that such cases reach the Crown Court promptly…"

The Supreme Court upheld the outcome reached by the trial judge which was affirmed by the Court of Appeal and reiterated that sentencing policy including the amount of credit for a plea is a matter for the Court of Appeal in Northern Ireland. I

[7] Paragraph 27 of the judgment
[8] Paragraph 28 of the judgment

have already touched upon The Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 earlier in this talk and the changes this will bring which the profession should be alive to.

An analysis of the case law I have mentioned illustrates that some guidance has been provided on how to deal with the issue of delay when it does arise. Each case will turn upon its own facts as the cases demonstrate.

There is no doubt, that every effort is made by the various parties involved in criminal cases, which come before our courts, to avoid delay arising given its impact on victims, defendants and those involved. Unfortunately, it still does occur and often due to a wide variety of systemic reasons and in a number of different circumstances.

What is clear to me is that there is significant collective effort being made to improve our processes. We must remain resolute in making a difference. The Covid-19 pandemic has presented many challenges not least adding further delays. However, it has also presented a number of opportunities to improve how we work. I encourage all of you to embrace those changes and build on them so that we can be collectively proud of our response to the pandemic, and be in a position to reflect back on this time as the time we turned things around for the better.

Thank you.