LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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Lord Chief Justice of England and Wales

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"Constitutional Reform: One Year On"

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Introduction

On April 3rd 2006, almost exactly a year ago, the position of the Lord Chancellor as head of the judiciary of England and Wales passed to me. The empire for which I became responsible included the Judicial Studies Board. And so it is perhaps particularly appropriate that, one year on, I should be giving this lecture – at least that was the sales pitch of David Keene when he persuaded me to do so many months ago. Even without the sales pitch it would have been difficult to decline an invitation to give what has become one of the most prestigious lectures of the year. I am conscious that I am following in the shoes of Bill Wade, Gordon Slynn, Tom Bingham, Harry Woolf and Anne Owers. In this lecture I propose to look back at the working of the new regime over the past year. First, however, I want to set the scene.

When I was Master of the Rolls, I persuaded Lord Woolf that it would be a good idea for the most senior members of the judiciary to go away for a long week-end with the most senior civil servants in the Lord Chancellor's Department to discuss aspects of the administration of justice that were of mutual interest. We chose as our venue a conference centre based at a delightful old pub called the Swan in the village of Minster Lovell on the edge of the Cotswolds.

There it was that news reached us that the Government had decided to make some radical constitutional changes. The Lord Chancellor and with him the Lord Chancellor's Department was to be abolished. In its place would be a new Department for Constitutional Affairs, headed by a Secretary of State, who would have no judicial functions. The Lord Chancellor, Lord Irvine, was standing down, to be replaced by Lord Falconer, who would be the first Secretary of State for Constitutional Affairs. He would also, *pro tem*, hold the Office of Lord Chancellor until that office was abolished. There was to be established a new Judicial Appointments Commission to select the judiciary.

The Judicial Committee of the House of Lords was to be abolished, to be replaced by a new Supreme Court.

This news came as something of a shock to those assembled at Minster Lovell. With the possible exception of the Lord Chancellor's Permanent Secretary, Sir Hayden Phillips, none of the civil servants had an inkling that their Department and its Head were about to be abolished. Certainly we judges were unaware of this. Lord Woolf had not been consulted. Indeed it is said that not even the Queen had been informed of the imminent demise of the official who had, for a millennium or more, been the sovereign's most senior Officer of State.

We still do not know precisely what chain of events led to the sudden decision to introduce these dramatic constitutional changes.

We shall perhaps have to wait until Lord Irvine or Tony Blair publishes his diaries – the latter seems the more likely event. A prominent member of the House of Lords described the changes as "cobbled together on the back of an envelope".

Lord Woolf was quickly on the phone to Lord Falconer. He learned that, pending the abolition of the office of Lord Chancellor, Lord Falconer did not propose to sit judicially. "That means", said Lord Woolf, "that you can no longer be head of the judiciary". Although at that moment I believe that Lord Falconer agreed, the proposition later became a matter of debate – perhaps a somewhat arid debate. It seemed to me that so long as Lord Falconer continued to appoint and to discipline judges, and had the right to sit as a judge, he had a fair claim to the description 'head of the judiciary', even if he did not choose to exercise his right to sit.

In the event it proved less easy to abolish the office of Lord Chancellor than had been appreciated. He had a huge portfolio of statutory functions. Primary legislation was required and when the Constitutional Reform Bill was debated in the House of Lords the proposal to abolish the Lord Chancellor was not received with enthusiasm.

Lord Falconer himself changed his mind about the desirability of abolishing his office, as he recently explained to the House of Lords Committee on Constitutional Affairs. Ultimately the office was preserved, but stripped of its judicial functions. This followed six months of negotiation between Lord Woolf, who had delayed his retirement for this purpose, and Lord Falconer in relation to the division of functions between his office and the office of the Lord Chief Justice. This resulted in a document termed 'the Concordat', which formed the basis of the Constitutional Reform Act 2005. A working party, headed by Lady Justice Arden, provided invaluable assistance with the details of the Concordat, and later with the arduous task of giving effect to the provisions of the Act.

The Role of the Lord Chancellor

The first topic that I want to talk about is the role of the Lord Chancellor and his relationship with myself and with the judiciary. The first section of the Constitutional Reform Act provides:

> *This Act does not adversely affect-*
> *(a) the existing constitutional principle of the rule of law,*
> *or*
> *(b) the Lord Chancellor's existing constitutional role in relation to that principle.*

Section 3 provides, among other things:

> *(1) The Lord Chancellor, other Ministers of the Crown and all with Responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary……*
> *(5) The Lord Chancellor and Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.*
> *(6) The Lord Chancellor must have regard to-*
> *(a) the need to defend that independence;*
> *(b) the need for the judiciary to have the support necessary to enable them to exercise their functions;*
> *(c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.*

As part of the oath that any future Lord Chancellor will take, he or she will swear to 'discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible'.

The Department of Constitutional Affairs is responsible for the provision of the infrastructure of the justice system. All officials who operate the courts and who provide services to the judges are employed by the Department.

It is particularly appropriate that the Secretary of State should have a special responsibility for the maintenance of the rule of law and for the protection of judicial independence.

In performing those roles, that Minister's position is strengthened by his retention of the office of Lord Chancellor. Traditionally the Lord Chancellor has been a doughty protector of the rule of law and the independence of the judiciary and the preservation of that office will help to preserve that tradition. Lord Falconer made this plain in his evidence to the Constitutional Affairs Committee. He said:

> "*...in being a defender of the independence of the judiciary and the rule of law within government you are greatly assisted by holding a great historical office*"

He added:

> *"the effect of the Constitutional Reform Act is that I have got an obligation to speak out both privately and, if necessary, publicly to defend the independence of the judges, in particular from attack from within government"*

There are two significant potential sources of attack on the independence of the judiciary. One is Ministerial comment. I would like to make it plain that my experience in office is that Ministers respect the obligation imposed on them by the Constitutional Reform Act to uphold the continued independence of the judiciary. There have been one or two occasions, and I regard them as past history, on which Ministers have commented inappropriately on judicial decisions. There is no embargo on a Minister who is party to a decision that goes against him stating that he does not accept the decision and proposes to appeal against it.

The cases that I have in mind did not fall into that category. The comments were not appropriate but were made, I believe, as a result of a failure to appreciate that fact. The Lord Chancellor intervened publicly, and I suspect privately, to make it plain that the comments in question were unjustified and should not have been made.

Intervention by the Lord Chancellor in a situation such as that is a most valuable constitutional protection of judicial independence. The alternative would be public intervention by the Lord Chief Justice, but I do not believe that a public dispute between the Chief Justice and a Government Minister, with the media coverage that such a dispute would quite naturally generate, is likely to be in the interests of the administration of justice. That is not to say that there may not be situations that call for the Lord Chief Justice to write a private letter of protest to a Minister. I am aware of one occasion on which my predecessor followed such a course.

I have worked very closely with Lord Falconer in relation to many different areas of the administration of justice and am aware of many ways in which he has given support to the judiciary as a whole and to individual judges and their families that has been in the best tradition of the office of Lord Chancellor.

The other potential source of attack on the independence of the judiciary is the media.

A free press is a vital part of the foundations that underpin the rule of law, but sometimes judges receive attacks from the media that are not merited. Here again the Lord Chancellor may well decide to intervene. The question arises of whether I, or some other judicial spokesman, should make a public statement in an attempt to put the record straight. When faced with that question my first port of call is the Judicial Communications Office, and I would like at this point to say something about them. Traditionally the Lord Chancellor's Press Office always dealt, on behalf of the judiciary, with any inaccuracies in media reporting.

The Press Officers who looked after us, and did so with great skill and sympathy, were Mike Wicksteed and Peter Farr. At the same time that the Concordat was being negotiated, but independent of those negotiations, it was decided that the judiciary would have their own, independent Communications Office.

There was a competition for the post of head of that office, and we were fortunate that Mike Wicksteed applied for it.

He, and Peter Farr, his deputy have built up an expert team which has provided an invaluable facility for the judiciary, and in respect of which colleagues that I meet around the world express both admiration and jealousy.

From day one, 3 April 2006, they have provided a full press office service with advice and support available 24-hours a day, seven days a week. That help extends to the whole judicial family, including some 30,000 Magistrates, and even before 3 April the office had to spring into action to provide help to a Magistrate who had been quite unfairly pilloried for granting bail to a man who had gone on to commit a hideous murder, when she was not even the Chair of the Bench that granted bail and where the circumstances had been such that to grant bail was the only decision that the Bench could properly have reached.

The Communications Office offers help and information to the media and is increasingly called on to comment on news stories before they get into print, which tends to ensure that the record is straight rather than needs putting straight. We have always been insistent that the task of the Communications Office is not spin but accuracy.

Our Communications Office does much more than assist us with our relations with the media, and the media with their relations with us. It has been showing us the advantage of fast, effective internal communications. Thanks to sterling work by Phil Golding and his team, I and my senior colleagues are now able to communicate instantly with the majority of the judiciary by e-mail and on the judicial intranet. The Office prepares and publishes *Benchmark*, a judicial newsletter and maintains a judicial website that receives 22,000 hits a month, and growing.

Our Communications Office was a valuable optional extra at a time when we were making preparations for the transfer of functions from the Lord Chancellor to the Lord Chief Justice and, indeed, elsewhere. That transfer of functions was a vast exercise. I am going to be talking about judicial appointments and judicial discipline, neither of which have been transferred to me in their entirety, but they, along with those things that have transferred to me, involve me and other senior judges in quite a lot of administrative duties in addition to our normal jobs of being judges.

Some of the more important aspects of my role as Head of the Judiciary of England and Wales are spelt out in the Constitutional Reform Act itself.

I am responsible for:

(a) representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally;
(b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor;
(c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within the courts.

In addition to these duties I inherited some 400 statutory functions. By way of example these include making arrangements for the use of the Welsh language in the courts of Wales and making arrangements for the valuation of British ships.

To manage all of this was going to require a considerable administrative staff. The first task was to recruit the Director of the Judicial Office that we were to form. Here, once again, we were fortunate to have an outstanding candidate in the person of Debora Matthews, who had been Chief Executive of the Judicial Studies Board. She built up a Judicial Office that is about 60 strong. She showed her initiative and negotiating skills by persuading Doug Noon to relocate the staff recreational area from the most wonderful penthouse on the top floor of the Thomas More Building to a dungeon, brilliantly and attractively converted, in the North East corner of the RCJ in order to provide accommodation for our office.

The aim was that the transfer of functions on April 3 should be seamless. That aim was triumphantly achieved. Overnight I found my in tray filled with memos to consider and approve, letters, requests, directions to sign, and a diary studded with meetings with those discharging duties on my behalf or helping me to discharge those which I could not delegate.

It was plain that the functions that were to be transferred to me would have to be shared among my senior colleagues by appropriate delegation if I was to have time to continue to sit as a judge, and all agreed with my determination to continue to do so. I formed a Judicial Executive Board consisting of the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division, the Chancellor, the Vice-President of the Queen's Bench Division, who performs the crucial and challenging function of organising the deployment of the High Court Queen's Bench Judiciary, and the Senior Presiding Judge, who acts as my Chief of Staff and trouble-shooter and, of course, Debora Matthews.

None of us had gone on the Bench because of a love of administrative duties. We viewed the effects of the constitutional changes with more than a little apprehension. This led us to enrol in the appropriately named Judge Institute of Management in Cambridge for a short course on management and leadership, and the Institute allocated to each of us a tutor who shadowed us for the odd day and gave individual advice on the organisation of our management tasks.

I found the guidance of the consultant who shadowed me of great value. Her advice was robust and uninhibited and, with my approval, at the end of my first nine months in office, she consulted each of my senior colleagues and each member of my private office and was able to relay to me anonymised (but sometimes identifiable) comments on areas where I have room for improvement – and there were quite a number of these.

One of the great challenges when so much is happening is communications. The Judicial Executive Board meets once a month, setting aside a full day. It became clear to me that this was not enough.

Too much was happening between each meeting and I was not succeeding in keeping my colleagues abreast of all the developments and my thinking in relation to them. Now we meet informally, over breakfast or a sandwich lunch once a week, and this has transformed the way we work together.

It is important that our activities are not seen as remote from the judiciary as a whole. It is here that the Judges' Council is of importance. There are links between the Judges' Council and the Judicial Executive Board in that I chair each body and the Senior Presiding Judge chairs the Executive Committee of the Council.

I try to keep the Council informed of the issues that concern me and the Judicial Executive Board and I rely on the Council to inform me of the wishes and the concerns of the different sectors of the judiciary. I feel more confident that it is doing this since we tightened up on the structure of the Council, so that it truly represents all the constituents of the judicial family.

One of the first tasks undertaken by the Judges' Council after April 2006 was a survey of the health and welfare needs of the judiciary, which resulted in a comprehensive report that was submitted to the DCA, albeit that it was recognised that some of the items on the 'wish list' were unlikely to be compatible with the available resources. This has already born fruit in the form of a Judicial Helpline, developed with the DCA's occupational health provider, Atos Origin.

As from next month this will be available 24 hours a day, every day of the year, to judges who will be able to seek both practical and emotional support from trained personnel. Initially this will be run as a pilot scheme, inasmuch as it will be available to full time judges from District Bench level up to and including myself, but if it is the success that I anticipate, we will use the experience of the pilot to build more permanent welfare support arrangements for the future.

When I accepted a post that I knew would carry with it a heavy administrative burden I thought that I might very well be in need of a helpline.

I have to say that, rather to my surprise, I enjoy the administration, and I believe that this is true of most who are sharing the burdens of duties that go beyond the tasks of trying cases, directing juries, sentencing offenders and writing judgments that we took on when we became judges. Judging is necessarily a solitary task, and can be lonely. It contrasts with the teamwork involved in the administrative duties that so many of us now shoulder. Judges at all levels are working much more closely with members of the Court Service than has ever been the case in the past.

I have been impressed by the dedication of the Resident Judges, the Designated Civil and Designated Family Judges, the Presiding Judges, the Chancery Supervising Judges, and the Family Division Liaison Judges who help to make sure that the administration of justice is running smoothly outside London. They take on a lot of extra work, and yet there is no lack of volunteers for these positions.

The same is true of the Tribunal Presidents and the Bench Chairs. This is not just because of sense of duty, though sense of duty there is. It is because these posts give an added dimension to life that is both challenging and enjoyable.

Each Head of Division has a private office and the lights burn late in those private offices.

The relationship that we have with those who work in them is something that is very special. They have been absolutely critical in our success in meeting the challenges of the last year.

Judicial Appointments

The most significant single function of the Lord Chancellor in relation to the judiciary had been the making or the recommending of judicial appointments. Appointments to the lower tiers of the judiciary, the District and Circuit Bench, were made on the basis of structured competitions, which were run by the Lord Chancellor's staff. The system for the appointment of High Court judges was less transparent.

Potential candidates would be evaluated by the Lord Chancellor's staff, but at the end of the day the views of the most senior judiciary whom the Lord Chancellor consulted, carried very considerable weight and those views depended in part on whether the members of the senior judiciary had personal knowledge of the candidates in question.

In the old days you did not apply for the High Court Bench. You were invited to go on the bench by the Lord Chancellor, and it was an invitation very seldom refused. It marked, and was seen to mark, the apogee of a career in the law.

Then there was a period when some applied and some were invited and it was still rare, though not as rare, for those invited to refuse. Then the rules were changed, and only those who applied could be considered. The fact remained that if the Lord Chancellor tapped you on the shoulder and suggested that you apply, you could do so with every confidence that your application would be favourably received.

This system ensured that those who were appointed were very good. They were appointed on proven track record, and you only have to look at the quality of those who were appointed under that system to appreciate how well it worked – at least in one sense.

The system demonstrably ensured that those who were appointed were good; it did not, however, demonstrably ensure that those who were good were appointed. It was criticised as being a system under which white Oxbridge males selected white Oxbridge males.

The Constitutional Reform Act created a new Judicial Appointments Commission to select all judges in England and Wales. This is an independent non-departmental public body consisting of 15 Commissioners, of which one is the Chair.

An impeccably transparent selection process and a very high calibre of applicants has resulted in an impressive Commission under an impressive Chair – Baroness Usha Prashar, who was born in Kenya, sits on the cross-benches in the House of Lords, served as executive chairman of the Parole Board and then as the first Civil Service Commissioner.

The Act provides that selection of the judiciary by the Commission must be solely on merit. Subject to this requirement, it further provides that in performing its functions the Commission must have regard to the need to encourage diversity in the range of persons available for selection for appointment. The Lord Chancellor has statutory

power to issue guidance to the Commission for purposes which include the encouragement of diversity in the range of persons available for selection.

The Commission inherited quite a number of those responsible for advising the Lord Chancellor on appointments, but Baroness Prashar has been understandably keen that the Commission should devise its own procedures. In order to afford time for this, she agreed with Lord Falconer that he would continue to select High Court judges under the old system for a year to give her Commission time to devise and run its own High Court competition. This the Commission has now done and the results are expected shortly.

Lord Falconer, Baroness Prashar and I are all keen to enlarge the pool and the range of able candidates seeking to go on the Bench. It is not so easy to see how to achieve this. One way is to attempt to remove barriers that may be discouraging women and ethnic minorities from contemplating the bench. Widening the qualifications, permitting part time work and removing the current convention that those who go on the Bench do not return to practice have all been suggested. The judges remain to be convinced that this last suggestion would make the Bench more, rather than less, attractive.

It would not be right to disguise the fact that the new system of judicial appointments has experienced a few teething problems. Some of these have nothing to do with the Commission. They are problems of delay in sending the vacancy notices that are needed to start the appointment process, or of completing formalities after selection has been made. We need to see how we can tighten up these procedures.

I must confess to one concern, and it has nothing to do with the quality or the enthusiasm of the Commissioners.

I fear that life on the Bench may appear less attractive than it used to, particularly compared to rewards at the Bar which, at least in some sectors, are greater than they ever have been. The pressure on judges is greater than it used to be.

The administrative duties that so many of us now undertake may appear as unwelcome burdens, notwithstanding that, as I have described, they can add to the variety and satisfaction of the job. My concern is that these facts and the formalities that applicants for the Bench now have to undertake will discourage some who would have responded positively to a tap on the shoulder from the Lord Chancellor and the suggestion that it was now time to put something back into the system that has served them so well.

I do not believe that there are many judges who regret the change of life.

I was talking to one who was appointed recently who said that one advantage of the Bench that he had not anticipated was the removal of all stress in relation to the outcome of a case. If there are any here who are vacillating about whether to go on the Bench, may I assure you that I have had no regrets, even in my present post. Someone once said to me that becoming a judge was like having a nightmare that you are running to catch a train and then waking up to find that you are the engine driver.

The judiciary at all levels are deeply involved in the selection process, whether as Commissioners, or as chairs of selection panels or as referees and I am grateful to all who participate in this work.

Judicial discipline

As Head of the Judiciary the Lord Chancellor had responsibility for judicial discipline. He could dismiss for misconduct any judge below the level of the High Court. A High Court Judge could, and still can, only be removed by a resolution of both Houses of Parliament, but it was open to the Lord Chancellor to reprimand a judge at any level. In practice he would not exercise his disciplinary powers without consulting the Lord Chief Justice.

It was inappropriate that the Lord Chancellor should retain these powers when he ceased to be Head of the Judiciary. Equally it was not considered desirable that the Lord Chief Justice should have exclusive responsibility for judicial discipline lest there be any suggestion that he was over sympathetic to his judges. The solution that has been reached is to make the Lord Chief Justice and the Lord Chancellor jointly responsible for judicial discipline in accordance with Regulations made in the form of a Statutory Instrument by the Lord Chief Justice. These Regulations run to 23 pages and I shall do my best to summarise them. I shall describe the procedure for complaints against judges. Complaints against Tribunal Members and Magistrates have different procedures for the initial stages.

An Office for Judicial Complaints has been set up to which any complaint about judicial conduct must be made or referred. The Office will dismiss any complaint that it concludes does not require investigation.

Most complaints are dismissed on this ground because they are not about judicial misconduct but about the outcome of judicial proceedings for which an appeal is the proper remedy. Where a complaint is not dismissed, it is referred to a judge, nominated by me with the approval of the Lord Chancellor, for consideration.

The nominated judge will advise either that the complaint be dismissed, or that it be dealt with by disciplinary action without further investigation, or that it calls for a judicial investigation. The Lord Chancellor and I then decide what to do in the light of this advice. If further investigation is called for I nominate the investigating judge, with the agreement of the Lord Chancellor. He carries out an investigation by an inquisitorial procedure that may involve hearing witnesses. He then reports to me and the Lord Chancellor and we decide what, if any disciplinary action is appropriate.

The subject of the disciplinary proceedings is then informed of what we propose and given the chance to make representations to us. Having considered these, we then reach our final decision. The subject of the investigation can then appeal this to a review body of four, two of whom must be acting or retired judges.

This body then considers and reviews the procedure, the evidence and the result, considers representations and reports to the Lord Chancellor and myself. We then make a final decision in the light of the report.

Finally, if the subject of the investigation is not satisfied he can apply to the Ombudsman, as can the complainant if he is not satisfied with the way in which the complaint has been handled.

The Office for Judicial Complaints is ably headed by Dale Simon. She publishes a monthly Report and comes to report to me regularly. So far the procedures have worked well. In the period from April 2006 to January of this year the Office received 1,434 complaints and brought 1089 to a conclusion. A modest number of complaints have been made to the Ombudsman by dissatisfied complainants whose complaints have been dismissed. Of these a very few have been upheld on procedural grounds, but none of these disclosed any serious shortcoming.

I have some concerns about applications for review by the Review Body which seem to be being brought as a matter of course, regardless of merit. The Review Body can, in theory, recommend a more severe penalty than that proposed, but this is no sanction when the proposal is dismissal, and there is no other sanction. I am considering altering the regulations to enable the costs of the Review Body to be recovered from an applicant when an application is dismissed.

The most important point to note is that no disciplinary action can be taken unless the Lord Chancellor and I both agree on it.
This is an important safeguard for the judiciary. There has so far only been one case where we disagreed, and where accordingly the sanction that one of us had proposed was not implemented.

Challenges

The transfer of the Lord Chancellor's judicial functions was seamless, as we had intended that it should be. But one year on I have identified a number of areas of concern.

The first relates to resources. The 2003 Act imposes an express duty on the Lord Chancellor to ensure that the Courts receive the resources that the judges need to exercise their functions. I understand that duty to be to ensure that the resources are adequate to procure the efficient and effective operation of the court system. The Lord Chancellor receives a single allowance from the Treasury, out of which he has not only to discharge this obligation, but to meet the other demands on his Department, which include the funding of legal aid. If the cost of legal aid exceeds that forecast when the budget was originally set, the Department, including the Court Service, is required to make economies in order to provide the necessary funding. The economies required tend to be imposed uniformly across the board. Expenditure has to be restricted and head-count reduced according to a uniform formula.

Such an approach can impact adversely on the efficiency and effectiveness of the Courts.

Reports that I have been receiving from all over the country show that these economies imposed because of financial stringency are damaging the administration of justice – not dramatically and not to the extent that it can be clearly demonstrated that the Lord Chancellor is in breach of his statutory duty, but damaging none the less. They have led Judge Paul Collins to protest publicly at the problems that resource restrictions are having on the functioning of civil justice in Central London.

Speaking on *Radio 4* he said "I believe that the civil justice system is currently in crisis and it seems to me that the effect of the cuts this year together with further cuts looming throughout the life of the next comprehensive spending review will if visited upon the

County Courts, run the risk of bringing about a real collapse in the service that we are able to give to litigants". The Magistrates' Association has been led to write to the Prime Minister protesting, I quote, that: "the extent of the financial cuts that have been made in recent years makes it impossible for the system to perform adequately".

It is possible to envisage a point being reached at which, as a last resort, I might be constrained to protest to Parliament that the Lord Chancellor was not succeeding in performing his statutory duty to ensure that the courts are properly resourced. I do not say this by way of criticism. He has to live within his means, as laid down by the Treasury, and he has to have regard to his other Ministerial responsibilities.

But I look with some envy on other jurisdictions where the resources needed to run the courts efficiently are protected against competing budgetary demands.

The next challenge that I face relates to the Magistrates. Prior to April 2005 Magistrates operated autonomously in individual local areas. They were then brought together within the single organisation of the Court Service and in April 2006 they became full members of the judicial family under my Presidency. I am responsible for them and proud of that responsibility. They are a cornerstone of the justice system in this country. They deal with well over 90% of criminal cases, albeit the less serious cases, and they share with the Family Court the increasing burden of family work. In both family work and criminal work there are problem areas. In relation to family work the challenge is to see that those Magistrates who are on the family panels are able to sit frequently enough in that capacity to acquire the expertise that this increasingly complex area of our law requires.

At present they have to do this without reducing the time that they sit in the Adult Court below the minimum needed to keep abreast with the fast changing criminal scene. I am at present discussing with the Magistrates Association what the minimum sitting days should be and whether there may be circumstances in which Magistrates can be permitted to sit exclusively in family work.

The other challenging area is that of summary criminal proceedings. The problem is that they have ceased to be summary. There has been an incremental growth in paperwork and procedural formality and of the time that the formalities take to bring a case to trial. So that, in some parts of the country, it has been taking over six months to bring simple and straightforward criminal prosecutions to court. This is one of the factors that has been responsible for the growth of 'diversion' that is the administration by the police of conditional cautions or fixed penalties, so that the lesser offences do not come within the purview of the court at all. Diversion can make sense in the case of some minor offences which do not require to be dealt with on an individual basis. The Magistrates are concerned, however, that there should not be removed from their adjudication cases that call for an individual sanction that it is designed to prevent re-offending. I share that concern, and I am also concerned at the length of time that is elapsing before cases are brought to trial before the Magistrates.

Increasing formality that may have a place in the Crown Court has resulted in preparations for trial proceeding by way of a series of interlocutory hearings with applications for adjournments replacing the diligence required to be ready for trial at the first opportunity.

In partnership with the Court Service we have been addressing this problem, and here I must pay tribute to the superb innovative work that has been done by Lord Justice Thomas, as Senior Presiding Judge, which is being continued by Lord Justice Leveson in that role. What we are putting in place is known colloquially as 'triple S' – simple, speedy, summary criminal justice'. Direction to individual courts is to be given by a leadership team, working together, made up of the Bench Chair, a District Judge (Magistrates Court), the Justices' Clerk or the Clerk's deputy and the Court Manager. I welcome the cooperation being given by the Crown Prosecution Service, the Police and defence solicitors. We are aiming for a change of culture under which defendants plead guilty at the first opportunity, not after waiting to see whether the CCTV has them 'bang to rights', and where not more than one case management hearing is regarded as acceptable between charge and trial. Pilot schemes have shown that this change can be achieved and triple S is now being 'rolled out' throughout England and Wales.

Traditionally the Lord Chief Justice sat principally in the Criminal Division of the Court of Appeal. I decided that I would sit equally in the Civil and Criminal Divisions. I have, however, found myself particularly preoccupied by the criminal jurisdiction. For eight years before I became Lord Chief Justice I had no involvement in criminal law.

On returning to it I have found two aspects that have particularly concerned me. The first is the summing up to the jury. There are very different approaches to this in the different common law jurisdictions. In this jurisdiction it has become customary to remind the jury of the evidence that they have heard. I am inclined to think that sometimes this is done at too great length. Judges certainly spend much less time on this in Scotland. But what I am more concerned about are the directions that are given as to how to approach the evidence. Of course a judge has to direct the jury on the law, and they have to be given a careful direction on the burden and standard of proof. But there has grown up a large body of directions that it is considered necessary to give to the jury that are no more than advice as to how to apply common sense to the evidence. Indeed in the past some directions have been contrary to common sense.

It may well, of course, be helpful to a jury to draw attention to matters of common sense. Whether it is or not depends on how such directions are used.
There is a tendency to download all the Judicial Studies Board's specimen directions that are, or may be, relevant on the facts of the case and to recite these to the jury at the start of the summing up. This is thought to have the merit of making the summing up appeal proof.

All too often it results with the jury sitting with glazed eyes, unable to place the guidance that they are receiving in its context. The number of specimen directions has grown incrementally over the years and the requirement to give such directions has come to be treated as if it is a requirement of law, so that a failure to give a direction is automatically treated as a ground of appeal.

I have asked the President of the Queen's Bench Division and the Vice-President of the Court of Appeal Criminal Division to review these directions and to consider the extent to which the current practice in relation to them accords with the demands of a fair trial.

My other current preoccupation in the criminal field is sentencing, and here the interface between Parliament, the executive and the judiciary is particularly important. It is also one that merits a reasoned debate. How to prevent criminal behaviour and

how to punish it are legitimate preoccupations of government. Action to do each of these is expensive and the resource implications should be an important consideration when government policy is formed.

Parliament has recently played an increasing role in setting a framework within which judges must perform their sentencing duties. As the European Court of Human Rights has recognised, it is for judges to decide the appropriate sentence in accordance with the requirements of the law. Guidance to the judges as to how to perform their sentencing duties is provided both by the Criminal Division of the Court of Appeal, over which I preside, and by the Sentencing Guidelines Council, which I chair. That guidance must accord with the requirements of the law, as laid down by Parliament.

Currently the prisons are full to capacity. Predictions indicate that the pressure on prison places is set to increase. This is a matter of grave concern to the Home Secretary, whose Departmental responsibilities include the prisons. It is a matter of grave concern to prison governors, who have to run the prisons and who are keen to provide the rehabilitation that is today an important aspect of imprisonment. It is a matter of grave concern to the judiciary, including the magistracy, and indeed to all interested in the administration of justice. Prison overcrowding is an evil; so is prison overflowing, which leads to prisoners being detained in police cells or even cells at the courts.

Prison overcrowding is a result of a mismatch between supply and demand. Government is responsible for the supply of prison places. A number of factors contribute to the demand for prison places.

These include crime levels and detection rates. They include penal policy, which is essentially a matter for Parliament. They include the readiness with which judges and magistrates send people to prison and the length of sentences imposed. This in turn is influenced by guidance given by the Criminal Division of the Court of Appeal and the Sentencing Guidelines Council. Subject to such guidance and to the requirements of statute, the individual sentencer tries to administer the sentence that he or she thinks accords with the requirements of justice.

The influence of Parliament on prison sentences has been cutting in two directions, and this can be seen by consideration of the Criminal Justice Act 2003. Section 142 of that Act lays down the purposes of sentencing to which the court must have regard and these include punishment, the reduction of crime, the rehabilitation of offenders and the protection of the public. To cater for the less serious offences and to make provision for rehabilitation the Act lays down a detailed scheme of community sentences that enable the offender to be both punished and rehabilitated in the community.

So far as protection of the public is concerned, the Act introduces a regime under which indeterminate sentences will be imposed on dangerous offenders if, indeed, they are not sentenced to life imprisonment; the IPP or indeterminate sentence for the protection of the public. The judge specifies the term that the offender must serve in order to punish him or to deter others.

This term does not however do more than determine the minimum time that the offender will remain in prison. The offender will not be released unless and until the Parole Board is satisfied that he no longer poses a danger to the public. It is misleading

to suggest that a prisoner is going to 'walk free' as soon as the minimum term has been served.

The 2003 Act also requires the court to specify the minimum term that a prisoner sentenced to life imprisonment must serve before being considered by the Parole Board for release on licence. The Act lays down three starting points for this exercise – a full life sentence, 30 years and 15 years. 30 years is the equivalent of a sixty year sentence, and 15 years the equivalent of a 30 year sentence, because prisoners are usually released on licence after serving half their sentences. These minimum terms apply regardless of whether the offender poses a danger to the public and many murderers do not pose such a danger, or cease to do so after a lengthy period of imprisonment. Research shows that most murders are committed as a result of a loss of temper, often without an intent to kill.

In fixing the minimum terms as it did, Parliament deliberately set out to increase the length of time that murderers will spend in prison, and it succeeded. The minimum terms now being imposed on many murderers are double those that were being imposed by Home Secretaries, who used to determine these, before the 2003 Act.

In a lecture that I gave to the Law Faculty at Birmingham University two weeks ago I expressed concern about the effect that this would have on prison occupancy many years ahead. I was not suggesting that dangerous prisoners should be released. Of course they should not.

I was questioning whether paying £40,000 a year to detain in prison old men who have served most of their lives there and who no longer pose a danger to the public is the best way of using the limited resources that are devoted to dealing with criminal behaviour. Ultimately, however, this is a matter of penal policy for Parliament and I and my fellow judges, when sentencing, must faithfully give effect to what Parliament has decreed. The effect of the increase in minimum terms effected by the 2003 Act is also likely to lead to an increase in the sentences imposed for offences that come close to murder, or which but for chance might well have been murder, such as attempted murder and intentionally causing grievous bodily harm. This will further increase the pressure on prison places.

What of the offences where the court is not restricted in this way by statutory provisions such as theft and drug dealing, where all that the statute does is to lay down the maximum requirement?

The reality is that if the prisons are full, and prisons cannot be built overnight, supply and demand can only be equated by dealing with more of these offences by community sentences and by reducing the length of sentences served where prison sentences are imposed. Can the Government properly call on the judges and the magistrates to assist in resolving the prison crisis by reducing sentencing levels in these areas or upon the Sentencing Guidelines Council to achieve this?

Let me just remind you of some of the provisions of the 2003 Act in relation to the Council's duties. Section 170 of the Act provides that the Secretary of State, for this purpose at present the Home Secretary, may at any time propose to the Council that sentencing guidelines be framed or revised by the Council in respect of a particular

matter affecting sentencing. That section goes on to specify the matters to which the Council must have regard when framing or revising guidelines. These are:

(a) the need to promote consistency in sentencing,
(b) the sentences imposed by the courts of England and Wales for offences to which guidelines relate – ie current sentencing levels,
(c) the cost of different sentences and their relative effectiveness in preventing re-offending,
(d) the need to promote confidence in the criminal justice system,
(e) the views communicated to the Council by the Panel.

The Secretary of State has not suggested to me that these provisions entitle him to require the Council to revise guidelines downwards in order to tailor prison sentences to the prison places that are available. Legislation was once proposed which would have given the Sentencing Guidelines Council a clear Parliamentary mandate to consider resources in framing its guidelines, but it was not pursued.

When sitting in the Criminal Division of the Court of Appeal I have emphasised that it is particularly important that judges and magistrates have regard to their statutory duty only to impose custodial sentences where the seriousness of the offence leaves no alternative, and to their further statutory duty to impose the minimum sentence that is commensurate with the seriousness of the offence. I have also made it plain that the adverse effect of prison overcrowding on those serving prison sentences, and on providing rehabilitation in prison, are factors to which it is proper to have regard when choosing between a custodial and a community sentence.

This is not by way of response to any Ministerial pressure, but simply because these are matters to which it is appropriate for the sentencer to have regard, and there is a strong line of authority to that effect. I fear however that having proper regard to them is not going to solve the prison crisis.

It is appropriate that I should end this lecture by expressing my admiration for the sterling work that continues to be done by the Judicial Studies Board, under the inspirational leadership of Sir David Keene, who is coming to the end of a most successful term of office, and under the sure direction of Judith Killick and Maggy Pigott and my namesake, John Phillips as Director of Studies. The JSB's duties have been significantly expanded by the addition of the magistrates to the judicial family.

The Board depends on the voluntary input of many members of the judiciary, and the fact that this is provided with so much enthusiasm is part of the explanation for the high reputation that the Board enjoys. Over the last year I have attended both the Criminal Continuation Course, which in my case had to do the task of an initiation course and the Serious Sexual Offences Course, which I and everyone who has been on it, has found of outstanding value.

To sum up, I believe that during the past year we have made a good start in meeting the challenges of the Constitutional changes. This has been a team effort, both within the judicial family and within the Department, and I am grateful to all who have contributed to it.

Ends