Social media and criminal justice The Bar in Society

CBQ

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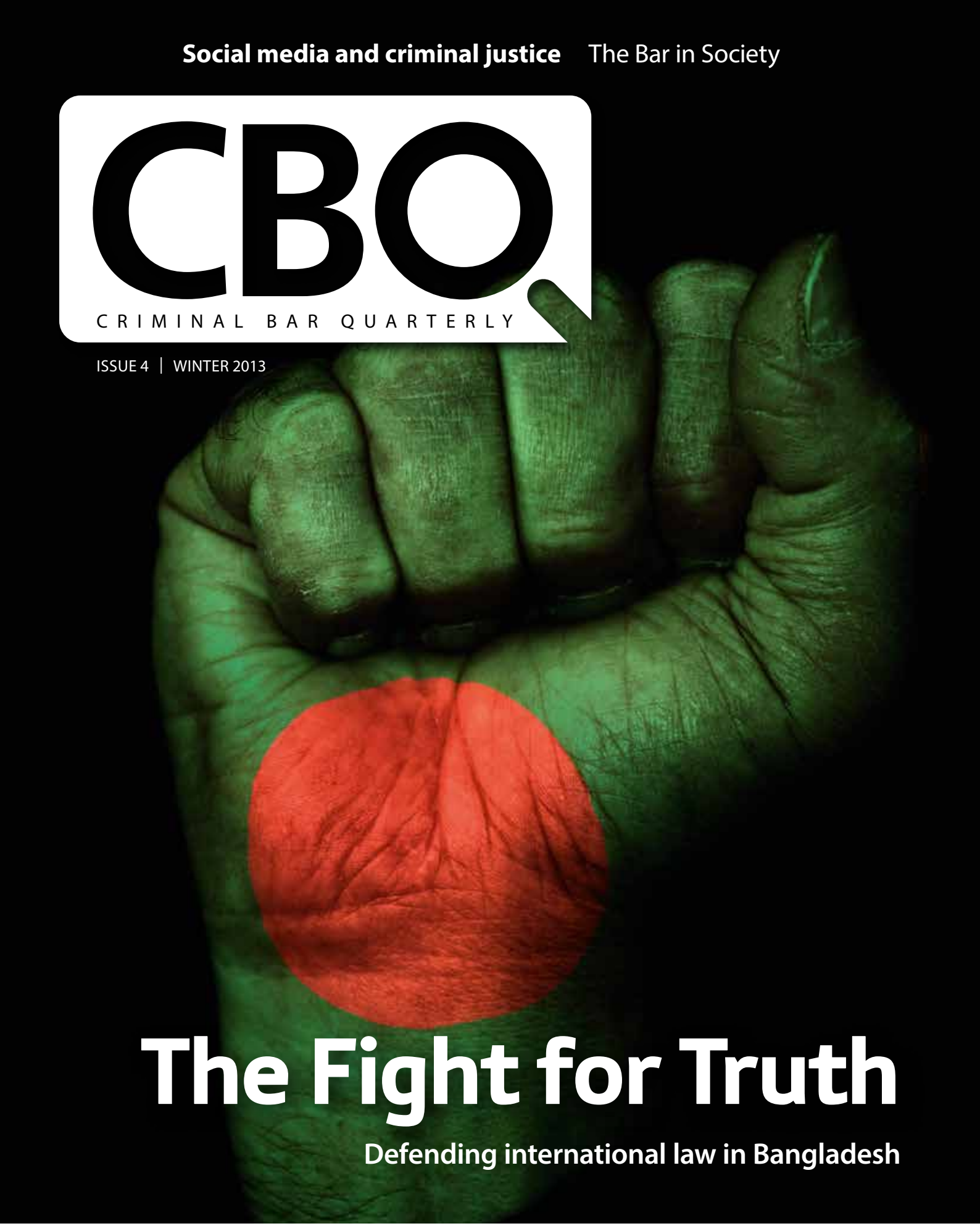

The Fight for Truth

Defending international law in Bangladesh

Prosecuting child abuse: not rocket science

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Lights, Camera, Action …

EDITOR
John Cooper QC

After many years of debate, cameras have at last been allowed into the Court of Appeal.

It is a long overdue development.

When we have to recognize that countries such as China, Russia, America, France and Italy regularly allow court proceedings to be broadcast, however edited in some cases, the view that we should not broadcast our own proceedings has become increasingly unarguable.

After all, the public is already allowed into the courtroom in the majority of these cases and on the simple principle that all the cameras are doing is further opening up public justice, must be the clinching point.

The old arguments have repeatedly been wheeled out, including the tired old suggestion that advocates will play to the camera.

That was used when cameras in Parliament were being considered and simply has not come to pass. In fact proceedings in Parliament are often described as boring, as are those in the Court of Appeal.

Again this misses the point. The cameras in both chambers are not there to entertain but to provide access and information for those who seek it.

The broadcasting of proceedings comes along at an important moment in the history of the Criminal Bar. It is an opportunity to show the public that those like Grayling who deride our work are nothing more than opportunists using the select reporting of the media in the odd notorious case to undermine the rank and file at the Bar who, day in, day out, do a service to the criminal justice system.

We should grasp this opportunity with both hands and send Grayling the recordings. ■

25 Bedford Row

The views expressed here are not necessarily the views of the Criminal Bar Association.

The Situation So Far

CHAIRMAN'S COLUMN
Nigel Lithman QC

Remembrance

I am writing this on Remembrance Sunday after the silence observed for the fallen. As it is also the 75th anniversary of Kristallnacht when Germany stepped up its pogroms that led to the final catastrophe of the holocaust, this is the weekend for such remembrances.

Having recently suffered the bashing in the south of England delivered by the storms, I was transported in my recollections back to one of the worst winter days in the 1980s. The snow had become compacted into ice. I made my way from London to Canterbury to continue the trial I had begun. Common sense told me that the chances of the trial continuing were exceptionally low, whilst the chances of having an accident in the car were exceptionally high.

I made my way down the A2 terrifying myself. I looked out at the bleak scene and across at one of the few other cars on the road. There on the back shelf of another vehicle was a red robe bag.

Who else on a day like this would be battling their way against hopeless odds to do their professional duty other than a member of the bar? But why wouldn't they? It was second nature to them. They had worked incredibly hard to achieve this career and excelled no doubt in being given their red bag by a leader who had been impressed with their contribution in a case.

They had toiled long hours for reasonable financial reward and were excited and exhilarated by the profession they had chosen. It was all of this that made that suicidal journey seem worthwhile.

That was then. This is now.

Being Chairman of the CBA leads one to embark on a steep learning curve. Trying to deal with government – in the form of the Lord Chancellor and the Attorney General, as well as trying to understand the machinations of both the Lords and the Commons since the tabling of the statutory instruments that spell out our ruination, is no easy task. There is of course also inter-relations with our regulators, the Bar Council, Circuit leaders and solicitors and above all the necessity to keep a cool head.

Two months in

Where are we now, two months into my office? The ship is steering a steady course, albeit with icebergs on either side. Be careful, the water is freezing and with killer whales within.

Ahead lies the perfect storm storm that we may have to steer through rather than go around.

Where do we want to get to?

The last two months have seen the busy CBA calendar. In conjunction with the Kalisher Trust the lecture of Lord Justice Pitchford was inspirational as indeed was the Ann Goddard Memorial Lecture, given by the former Lord Chief Justice, Lord Judge.

There was also the CBA Workshop as part of the Bar Conference at which our panel were the Attorney General, Mukhal Chowla QC and Paul Mendelle QC, each delivering addresses and then opening the questions to the floor. We all agreed that the Attorney General deserved praise for stepping into the lions' den, which potentially exposed him to unbridled hostility. Fortunately the call for decorum has always been honoured and as predicted within a calm atmosphere, the most positive results were achieved.

I suppose the most telling moment was when the Attorney General was asked whether he expected the same standards of excellence to be attracted to the criminal Bar in the future as were present when he was in practice. Unflinchingly and unashamedly, he replied "no"! A terrifying admission.

Where are we trying to get to? To a position whereby money is not at the top of the agenda, but a profession secure in its well-being is able to continue the education and justice programme, for which it is noted. As I have said before, at the moment it is like an individual or institution that, being told is terminally ill, is asked what else is on its mind.

QASA

The judicial review proceedings are on the November 27, for two days. We are represented by Dinah Rose QC, Tom De La Mare QC and Mark Trafford all acting *pro bono*. Our regulators are on the other side of the argument. They are represented as far from *pro bono* as one gets, with fees that make the criminal Bar's eyes water. Not for them the view that in a matter that has been considered and argued for many months the courts should be asked to adjudicate with each side bearing their own costs.

This all of course arose as the BSB refused to listen to our requests to implement a system of evaluation of which we approved. Two ironies have arisen.

The Lord Chancellor himself has said to us that the idea of plea only advocates is wholly inappropriate.

Meanwhile the Law Society, with whom our relations are strained as a result of their Chief Executive accepting that fee cuts are inevitable, had chosen to join with us in supporting the claimants, in saying that the scheme is unlawful.

This is a mad, mad world.

The cuts

I have seen the Lord Chancellor for the second time. This time with a delegation of another six barristers,

representing a cross-section of the bar. I stressed that we did not feel we were being listened to and that we were able to assist in trying to make savings where we could, but this could not be done by cutting fees. There was no meat left on the bone.

Those whocame with, set out other arguments. There is of course the perfectly reasoned statistical argument ably set out by Chris Henley of Carmelite that, if the correct figures are used the needs to make the proposed savings disappear and if we were given a moritorium this would prove correct.

Another special mention goes to Alexandra Healey QC who has, along with her role on the Remunerations Committee of the Bar Council, assisted the CBA in all of it's dealings.

Whilst I'm about it, may I also thank Mark Fenhalls, Ed Vickers, Emma Nash and James Vine, who attended that difficult appointment.

Quality

Within the last month I have also met with the senior judiciary at the Old Bailey and our very own supremo Lord Chief Justice Thomas. They both rightly raise the question of quality and what we can do to ensure standards are maintained and rise over the next five years.

Of course the reality is that as the cuts come into play quality goes out of the window.

In the immediate future the courts will have to recognize that the refusal to work at these rates brings an immediate decline in the certainty of the survival of the system. But in any event the morale-sapping events of the last couple of years mean that people simply will not do this work at these rates and professional work should only be done for reasonable professional fees.

Hence I have e-mails every day saying how people are leaving the criminal justice system. Until the rot is stopped, quality is on a downward spiral.

So we must dedicate all of our energies to the fight ahead.

The Fight in Parliament

The Houses of Parliament are not incapable of taking steps against the laying of the statutory instruments and all of the unhappiness that they bring. Lord Carlile of Berriew CBE QC, forgive my inexactitude in terminology , prayed against those statutory instruments. In so doing attempts are being made to harness opposition, particularly in the Lords, that will lead to a debate and give the government the opportunity to think things through.

We have broken with tradition of such approaches by getting some professional help to deal with them and we do have assistance from PR teams working both inside and outside of Parliament.

I continue to take the stepped approach to opposition to these measures.

VHCCs

The profession has decided to return all VHCCs due to be undertaken at a 30% cut. There is no profession, vocation or trade that could afford to operate under such conditions. The imposition of such cuts shows little more than contempt for us.

The response from the heads of chambers round robin was all but unanimous, people indicating that they would not do this work.

The transitional steps issued by the MoJ and spoken to by the Legal Aid Agency revealed an unwillingness even to respect ongoing contracts. Merely through embarrassment and in an attempt to stave off the collapse of immediate ongoing cases, dates have been given after which they will bite. Again an obvious feature has been overlooked. Many cases that have been running for months or years are due to start after April 2014. They will not be done by the Bar. Even as we speak a press release from the CLSA has said they will not do them either.

AGFs

The VHCCs are in the vanguard of our protest. They arise first. Counsel involved in them are often more senior than those doing purely grad fee work. Hence it is for us to lead the protest. But it is on the understanding that we are all resolved not to work on AGFs at reduced fees that we recognize that these fights stand or fall together.

Funds

Remember that I was born in the '50s (the 1950s for those amongst you with more sardonic wits) and hence I was taught by my parents that money was not a seemly topic. Of course it has always been a seemly topic for those without it.

The CBA coffers had some money for a rainy day. You may have noticed continuing the meteorological metaphor that it is pouring. This of course has come about due to the assaults upon us from the various quarters.

We have launched an appeal that is being conducted through heads of chambers so please ensure your chambers are engaged.

Thanks

I do not say thank you often enough to your CBA team. At its heart is Tony Cross QC, Dermot Keating, Thomas Payne and Toyin Salako.

The next structure currently is an action group with a membership of 15 and above them is the executive with a membership of about 32.

If Tony is at the heart of the CBA, Aaron Dolan is its soul.

Above all of us is you and I am able very much to react to what you want to do. Thus far the messages have been quite unequivocal.

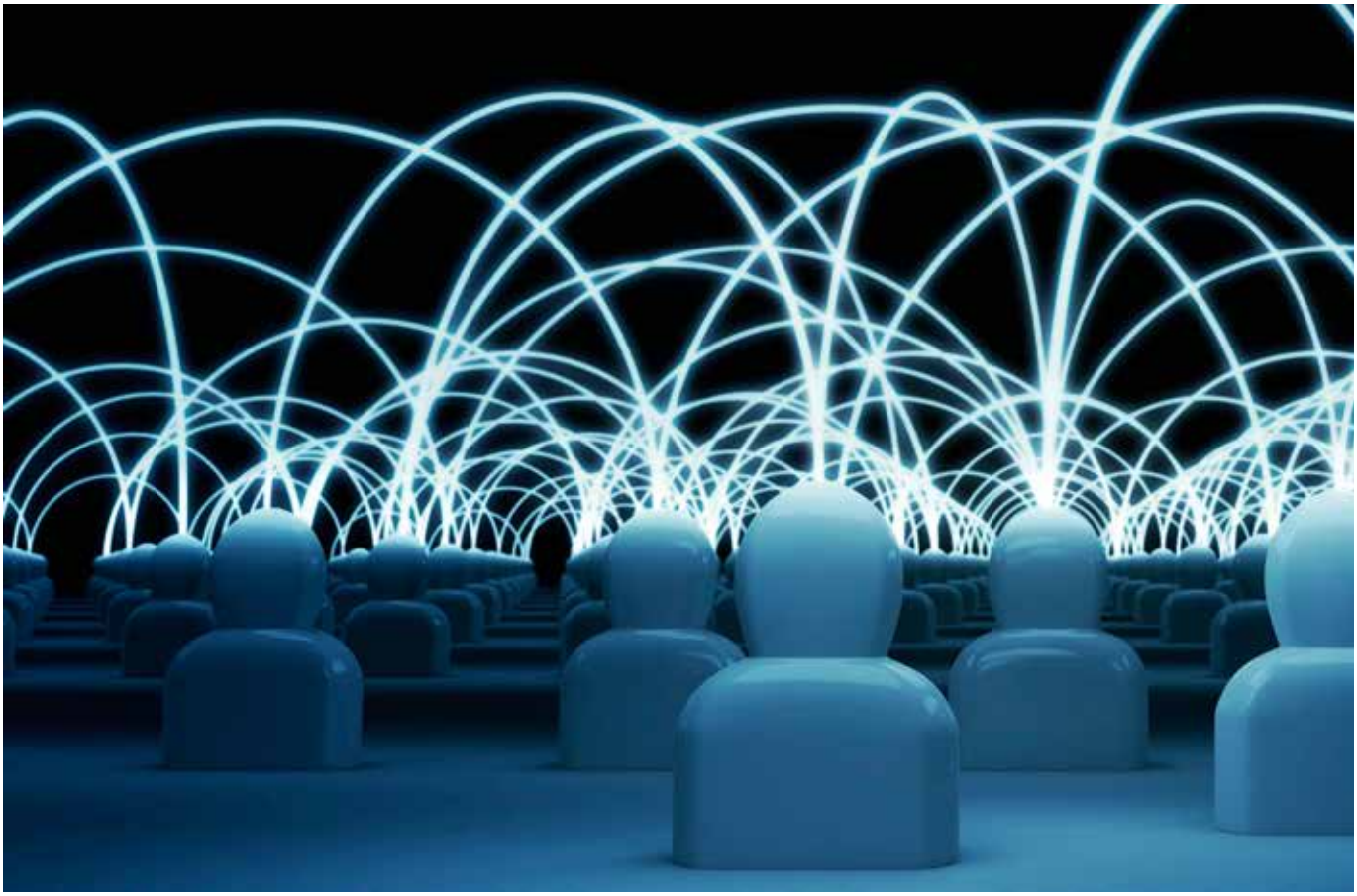
The months ahead

On this Remembrance Sunday of course we all remember that forlorn expression that it will all be over by Christmas. Like that war, I think this battle is unlikely to be either. But the next couple of months will be pivotal. We will know whether we have a battle to continue on QASA and the question of cuts for sure will be unresolved.

We need more than clichés, but nobody can standby whilst others do the work. You must be of good cheer, strong resolve, prepared to make sacrifices and if needs be take risks. Show me an easier way and I'll do it. But this is a great profession and worth the fight.

November, 2013 ■

Social Media and Criminal Justice



Preface

Problems experienced in courts with current social media issues

Contributors

Max Hill QC and **William Davis**

Social media such as Facebook and Twitter have grown at astonishing rate over the last 10 years. They are now the major means of communication for many people. Businesses, charities, governments use them for advertising and campaigning. Facebook was only established in 2004, but in its third quarter 2013 results reported 1.19 billion monthly active users worldwide.

The criminal law has not kept pace with this development. The Malicious Communications Act 1988, the Computer Misuse Act 1990, the Regulation of Investigatory Powers Act 2000 ("RIPA"), and the Communications Act 2003 all pre-date the advent of social media. In this article, we summarize the problems experienced in the courts and we suggest this is an area of the criminal law in need of urgent reform.

Criminal offences

There have been a number of recent high profile prosecutions of users of social media. For example, in March 2012, Liam Stacey lost his appeal against a sentence of 56 days' imprisonment for posting racially abusive messages on Twitter. The messages related to Fabrice Muamba, who suffered a cardiac arrest during a televised FA Cup match. In October 2012, Matthew Woods was sentenced to 12 weeks' detention in a young offender institution having posted a number of "jokes" on his Facebook profile about April Jones and Madeleine McCann. The sentence was reduced on appeal to eight weeks' detention.

On June 20, 2013 the DPP published guidelines on prosecuting cases involving communications sent *via* social media. The guidelines are the result of a public consultation and replace the interim guidelines issued on December 19, 2012. The guidelines identify four categories which are set out in para.12:

(1) Communications containing credible threats of violence to the person or damage to property. Such communications may constitute offences under s.16 of the Offences Against the Person Act 1861 if the communication is a threat to kill; s.4 of the Protection from Harassment Act 1997, if they amount to a course of conduct; s.1 of the Malicious Communications Act 1988; or s.127 of the Communica-

tions Act 2003.

(2) Communications which specifically target an individual or individuals. Such communications may amount to harassment or stalking within the meaning of the Protection from Harassment Act 1997.

(3) Communications sent in breach of orders made under the Contempt of Court Act 1981 or s.5 of the Sexual Offences (Amendment) Act 1992.

(4) Communications which are grossly offensive, indecent, obscene or false. Communications which do not fit into categories (1) – (3) fall to be considered under either s.1 of the Malicious Communications Act 1988 or s.127 of the Communications Act 2003.

Paragraph 13 of the guidelines states that cases falling within 12(1) – (3) should be prosecuted robustly where they satisfy the test in the Code for Crown Prosecutors. However, cases in category 12(4) are subjected to a "high threshold" and the guidelines state that "in many cases a prosecution is **unlikely** to be in the public interest" (original emphasis).

Further guidance on the "high threshold" test is given in paras.33 – 46. It is not sufficient if the communication is merely in bad taste, controversial or unpopular, or even if it might cause offence to individuals or a specific community. The communication in question must be *more than:*

- Offensive, shocking or disturbing; or
- Satirical, iconoclastic or rude comment; or
- The expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it.

The guidelines go on to address the public interest test and state:

A prosecution is unlikely to be both necessary and proportionate where:

a. The suspect has expressed genuine remorse;

b. Swift and effective action has been taken by the suspect and/or others for example, service providers, to remove the communication in question or otherwise block access to it;

c. The communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or

d. The content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.

The guidelines discourage prosecutions in category (4) cases unless there are strong factors requiring a prosecution. It is arguable many previous cases would not now be prosecuted. For example, it is not clear Matthew Woods's case would have satisfied either the evidential or public interest stages of the test.

Although the jokes he posted were undoubtedly unpleasant, offensive and in the poorest possible taste, the guidelines emphasize that more is required to justify a prosecution. Mr Woods's behaviour was immature, but the messages do not appear to have been intended for an audience wider than his Facebook friends. It is concerning that the magistrates (and the Crown Court on appeal) must have concluded the offence was so serious that neither a fine alone nor a community sentence could be justified (in accordance with s.152 of the Criminal Justice Act 2003) when it seems unlikely the case would now be prosecuted at all.

The guidelines are a valuable reminder to prosecutors of the need for proportionality in decision making. It is to be hoped that in future prosecutions will be restricted to those cases where there is evidence of real harm caused by the offending communications, rather than simply upset or offence.

Juror misconduct

Juror misconduct on the Internet and on social media in particular is an increasing problem. In *Attorney General v. Davey* [2013] EWHC 2317 (Admin) Kasim Davey was serving as a juror in the trial of a sex offender at Wood Green Crown Court. He posted a Facebook message on his profile which stated: "Woooow I wasn't expecting to be in a jury Deciding [*sic*] a paedophile's fate, I've always wanted to Fuck [*sic*] up a paedophile & now I'm within the law!" The Divisional Court found that by posting the message he committed an act calculated to interfere with the proper administration of justice and which he intended would interfere with the proper administration of justice. Mr Davey had a duty to act fairly towards the defendant but his choice of language made clear his disregard for that duty. He was also in breach of his duty not to discuss the case with anyone other than his fellow jurors. By posting the message on his Facebook profile he invited comment from other users who might see the post. Indeed, two of his friends had indicated their approval of his comment apparently by "liking" his post.

Mr Davey had been warned not to discuss the case with anyone in person or on social media in booklet sent to him in advance, in a video shown the new jurors, by the jury manager, and in six notices prominently displayed in the jury area. In addition the trial Judge gave the standard warnings to the jury after they were empanelled. It is troubling that Mr Davey ignored those repeated warnings when we are frequently told by the Court of Appeal that juries must be assumed to apply faithfully the directions given by trial Judges.

Identification of children or young persons

Section 39 of the of Children and Young Persons Act 1933 confers on the court power to prevent publication of any newspaper report leading to the identification of any child or young person concerned in the proceedings either as a defendant or a witness. The Act was extended by s.57(4) of the Children and Young Persons Act 1963 to sound and television broadcasts. However, in *MXB v. East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB), Tugendhat J observed that there had been no further extension of s.39 to cover any other form of report, such as in social media or on the internet. In *R. v. Jolleys, ex parte Press Association* [2013] EWCA Crim 1135, Leveson LJ noted that the Press Association had indicated it would abide by the spirit of s.39 and would not draw a distinction between publication in news stories or online through micro-blogging sites such as Twitter. Nevertheless it remains the case that s.39 would not prevent other users of Twitter, Facebook or other social media from identifying online children or young persons concerned in criminal proceedings. Leveson LJ said that further developments in this area must be for Parliament. We suggest that urgent action is required to address this gap in the law.

Investigatory powers

The use of evidence obtained from social media in criminal proceedings is becoming extremely common. However, the legislation governing police surveillance powers requires updating. In an important article, [2011] Crim LR 766, Michael O'Floinn and Professor David Ormerod argue that current legislation is ill-suited to regulating police investigations using social media. Although a general Google search of information publicly available on social media raises few difficulties, more sophisticated investigatory techniques may result in the commission by the investigating officers of a number of criminal offences.

In order to access detailed information stored on the profiles of other social media users it will usually be necessary for the officers to create a fake profile. A fake profile may involve the commission of an offence under s.1(1) of the Computer Misuse Act 1990. There is conflicting case law on whether accessing data in excess of a user's authority amounts to an unauthorized act within the meaning of s.1(1) (see *DPP v. Bignell* [1998] 1 Cr.App.R. 1 and *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte United States (No.2)* [2000] 2 AC 216). Thus, it is unclear whether the creation of a fake profile in breach of terms of use would amount to securing unauthorized access, since all persons are entitled to create a profile and use social media. If use of a fake profile did involve securing unauthorized access it is doubtful whether surveillance under RIPA including the creation of a fake profile would be covered by the saving for law enforcement powers under s.10 of the Computer Misuse Act 1990.

O'Floinn and Ormerod also argue that it is unclear on the present state of the law whether the systematic monitoring of public social media profiles constitutes directed surveillance requiring authorization under RIPA. A single "snapshot" view of a publicly available social media profile would not require authorization. However, it is arguable that the systematic viewing of a public social media profile by the police, and the storage of information obtained from it, would result in the obtaining of private information about that person. Snapshot data captures of social media profiles and content are routinely made in police investigations.

There is currently no authority on whether monitoring semi-public comments on a target's social media profile (such as posting on the "wall" of a user's Facebook profile) constitutes an "interception" as defined by s.2(2) RIPA so requiring an interception warrant or a production order for lawful access by the police. Section 2(7) RIPA extends the period of transmission of a message to include "any time when the system by means of which the communication is being, or has been, transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise have access to it".

Evidential issues

In a second article, [2012] Crim LR 486, O'Floinn and Ormerod argue that social media do not raise any major new analytical issues for the law of evidence. However, it appears that in practise the use of evidence obtained from social media is causing problems.

In *R. v. Bucknor* [2010] EWCA Crim 1152, evidence obtained from Bebo and YouTube was wrongly admitted by the trial Judge. The prosecution wished to deploy the material to show that the appellant was a member of a gang involved in a shooting. The trial Judge failed to address adequately the requirements of s.114 of the Criminal Justice Act 2003. There was no evidence called by the prosecution as to the IP address from which the material was uploaded. The trial Judge was therefore unable to determine how many levels of hearsay were involved or how reliable the maker of the statement was. He also wrongly directed the jury to consider whether the appellant himself made the statements when there was no evidence from which the jury would have been entitled to infer that the appellant made those statements.

O'Floinn and Ormerod suggest that business documents provisions of s.117 of the Criminal Justice Act 2003 require review. Although s.117 could be used to adduce statements made in postings on social media profiles, where the ultimate supplier of the information (ie, the person posting on the social media site) cannot be identified the evidence ought not to be admitted through s.117, since there is no power to admit anonymous hearsay under the 2003 Act, (*R. v. Ford* [2011] Crim LR 475).

It seems likely that material from social media will be adduced most frequently in cross-examination of witnesses to demonstrate inconsistency with the testimony being given. This ought to present few difficulties. However, in *R. v. T* [2012] EWCA Crim 2358, the Court of Appeal held that the trial Judge had wrongly refused to allow cross-examination of the complainant on a photograph and Facebook messages which the defence alleged she had sent to the defendant. The existence of this material had not been disclosed in the defence statement. When the complainant denied sending the photograph during a *voir dire* the trial refused to admit it. The Court of Appeal held that the evidence was relevant to the issue for trial and the court had no discretion to exclude it, although the Judge was entitled to require the defence to adduce the whole conversation not merely the responses from the complainant. The failure by the defence to comply with their duty to disclose the material in advance was relevant to the weight to be attached to it, and could have left the defendant open to damaging cross-examination. It was for the jury to resolve the conflict on the evidence as to whether the photograph had been sent by the complainant. This is surely correct. Issues as to the authenticity of material obtained from social media must ultimately be resolved by the jury. Once an evidential basis has been established authenticating the material, evidence relevant to a material issue must be admissible subject to the normal safeguards in s.78 of the Police and Criminal Evidence Act 1984, s.41 of the Youth Justice and Criminal Evidence Act 1999 etc.

Conclusion

This is an area likely to continue to develop rapidly, and which already features heavily in many criminal cases before the courts. The Law Commission is currently considering submissions on issues to be included in its 12th programme of law reform. We suggest that social media, and in particular the legislation governing investigatory powers, provide an ideal topic for intervention by the Law Commission. This may also provide a welcome opportunity to review RIPA more generally. ■

Max Hill QC, 18 Red Lion Court
William Davis, Charter Chambers

Prosecuting Child Abuse: It's Not Rocket Science!

Preface

Making the victim central to criminal proceedings

Contributors

Felicity Gerry and **Lyndon Harris**

Overview

On October 17, 2013, the Crown Prosecution Service (CPS) published guidance on the prosecution of child sexual abuse cases. The DPP said it marks "the biggest shift in attitudes in a generation" in terms of the prosecution of child sexual abuse cases (CSA). He also said that it demonstrates that the CPS - and the criminal justice system - is changing for the better and complainants will be supported and treated, well, like complainants should. Not vilified, not treated as though they are ancillary to proceedings and not treated as an afterthought. In fact, the statement and guideline was remarkably (who'd have thought it) on message with the latest Ministry of Justice and Labour justice policies on making the victim central to criminal proceedings.

So, is it a new approach, that victims can hail as progress? Will it allow for balanced prosecutions and prioritize conviction of the guilty rather than targeting the innocent or is this just slick PR?

The overall test

It must be remembered that these guidelines are not for victims to follow when they consider reporting a complaint. The decision to prosecute or not remains with the CPS lawyer who assesses the evidence and considers the public interest. The guidelines set out the approach that prosecutors should take when dealing with child sexual abuse cases. It follows that the guidelines should be read on the basis that evidence and public interest are still the priority. The introduction states:

> "The guidelines are intended to be inclusive and should be applied to cases where a sexual offence has been committed against a child or young person, unless there are good reasons why not in a particular case and these reasons are noted clearly by the prosecutor. The guidelines also include cases of adult victims of sexual abuse in childhood".

The scope is wide, encompassing all cases where a sexual offence has been committed against a child (including adult victims of sexual abuse in childhood). It is a shocking indictment of society and perhaps of the legislative draftsmen that there are so many potential ways of offending against children in a sexual way. Unlike some European countries, UK legislation breaks down every single allegation into separate and distinct offences. The element of each offence must be proved and this depends on the evidence of the child concerned.

The use of language

All allegations from now on are to be treated as true. The language is presumptive "offence has been committed" as

opposed to "allegation that …". By giving priority to the complaint, the presumption that a person is innocent until proven guilty no longer appears to apply. Of course, like any allegation of any crime, a sexual allegation should be taken seriously and victims treated as truthful unless there is good evidence to suggest otherwise. In no other field of law is there so much scepticism about a complaint. If someone says they have been burgled they are rarely disbelieved. If someone says they have been raped, unfortunately there are still those who are inclined to look for another explanation eg, she is regretting sex and "crying rape". It is these myths that the guidelines are intended to address but, the choice of language does indicate an imbalance. It is to be hoped that this imbalance is not exploited by those who promulgate the myth that all complaints are false.

The guidelines state that they should be applied in all cases, save the exceptional where there is "good reason" not to. Interestingly, there is no guidance as to what that good reason might be.

Cooperation between agencies

Largely, the document is a restatement of good practice and common sense. Part 1 states: "[i]n large or complex child sexual abuse cases there should be early consultation between the police and the CPS." It is obvious that such a procedure should be followed. It is very worrying that it needs to be stated. In a world where victims now have the right to review CPS decisions, it is clearly important to publicly state what the good practice is intended to be from both investigators and prosecutors.

Context and circumstances

Part 2 states: "[c]hild sexual abuse covers a range of offending behaviour and types of offenders (which is defined in more detail in Annex B). It is therefore important that prosecutors have regard to the context and circumstances in which the offending is alleged to have taken place, as this will determine how the evidential case should be built and what are relevant lines of inquiry."This simply appears to be an elucidation of part of the role of a prosecutor, rather than a shift in attitudes towards prosecuting such offences. Again, the guidelines state the obvious. Suggestions in certain cases that the CPS has been ignoring the context and circumstances of CSA allegations are extremely serious. Headlines in the fallout from the recent *Le Vell* trial effectively accused high ranking members of the CPS of improper decision-making. It is plainly with such cases in mind that the new guidelines are intended to ensure that it is publicly known that their lawyers are doing their best in very difficult and challenging times. Not to take into account the context and circumstances of an allegation would be professionally negligent and an absurd way to prosecute such cases.

Credibility

It is on issues of credibility and reliability of witnesses that most child abuse prosecutions turn. Defendants generally argue that allegations are fabricated. In most cases, where the child is a victim, consent is no defence. Part 7 states that: "[w]hen assessing the credibility of a child or young person, police and prosecutors should focus on the credibility of the allegation, rather than focusing solely on the victim". This appears to be another change in focus – can the *allegation* be believed rather than can the *person* complaining be believed? Such questions can only be answered by a thorough investigation focusing, where possible, on what has been said not who has said it. To ignore the credibility of the allegation would be to derogate from responsibilities as a prosecutor. To identify any supporting evidence might demonstrate that a vulnerable victim is a truthful witness although that can only be properly tested in a fair trial where the defendant is given a fair opportunity to test the evidence. The question remains whether the allegation can be considered separately from the person making it.

Keeping victims informed

Part 3 deals with supporting victims and witnesses and states that they should be made aware of what is expected of them from the outset. Part 4 makes it clear that counselling and therapy is not prohibited and Part 6 states that there is no rule against informing a complainant of other allegations made about the same suspect. Plainly it is a "no-brainer" that the vital most witness in a case needs to be supported and kept informed of the progress of the case. Sadly, since the separation of witness care procedures from CPS responsibilities, this is not always achieved. The new guidelines appear to put that responsibility squarely back on the CPS lawyers. It will be interesting to see whether witnesses feel any better informed or cared for as a result.

The verdict

It is sad that the guidelines needed to be issued at all, but to do so demonstrates the commitment of the CPS to proper prosecutions based on reasoned decisions. Whilst "the public interest" has always weighed in favour of prosecuting child sex offences (despite some of the decisions made in the past), the public themselves are currently very interested. Outrage at the failures of certain agencies in Rochdale and Oxfordshire concerning paedophile rings and the furore caused by a prosecutor and Judge recently describing a victim of child sexual abuse as "predatory" has brought this to the fore. The anger of the public has at times been almost palpable and the popular press have used this as a very large stick with which to attempt to beat the DPP. Victims' groups and children's charities have long been saying that attitudes need to change and this has now been echoed in the press. It really followed that the DPP and the CPS needed some good PR, and the public needed to be reassured that prosecutors will do their best. It is a tall order to expect CPS guidelines to "shift attitudes" and with rumours of case-overload and failing administration the ability of the CPS to implement these guidelines is yet to be tested. ■

The second edition of *The Sexual Offences Handbook* is due for publication in early 2014 and will deal with all the law, practice and procedure in relation to sexual offending from 1957 to the present

Felicity Gerry, 36 Bedford Row
Lyndon Harris, co author *Sentencing on Banks*

Lawyering, Lobbying & Politicking

Preface

"Courts try cases, but cases also try courts"

Justice Robert Jackson, Nuremberg

Contributor

Toby M. Cadman

The traditional role of an advocate is to promote and protect, by all proper means, the lay client's best interests without regard to his own interests or to any consequences to himself or to any other person. Furthermore, an advocate must not act to bring the process into disrepute. However, the predicament arises when it is the Government that has brought the process, through its own conduct, into disrepute. This presents the advocate with a serious moral dilemma. Is he to continue fighting the case solely in the courtroom, knowing full well that the insurmountable hurdles placed in front of him will lead his client to the gallows, or does he seek to protect the interest of his client outside the courtroom by engaging the media, advocacy groups and interested foreign governments.

For the past three years I have had to grapple with this dilemma. In July 2010, I was invited to speak, as a member of the IBA War Crimes Committee, at the House of Lords on the Bangladesh International Crimes Tribunal. The meeting was hosted by Lord Avebury of the All Party Parliamentary Group on Human Rights and attended by members of the Bangladesh community and human rights NGOs. I was invited to address defence rights under international law. At this stage I had little knowledge of the legal framework or the trial process that was about to unfold. I was unaware of the politics and oblivious to how this first meeting would transform my career and force me to use politics and media with the law.

In January 2011, I was formally instructed to represent a number of accused in Bangladesh, along with Steven Kay QC and John Cammegh. It was envisaged at this time that our team from 9 Bedford Row would exercise rights of audience before the Tribunal, as the rules permitted the appearance of foreign counsel. This hope was short lived and our applications to appear before the Tribunal were summarily denied and in August 2011, I was unceremoniously thrown out of the country upon the order of the Bangladesh Minister for Home Affairs. I was subsequently put on a black list and have been prevented from travelling to Dhaka ever since. The reason for this is principally based on our team's criticisms of the process.

It is important to recognize that the criticisms raised over this process goes much further than the usual defence quibbles over an imperfect system. The system in Bangladesh is so far below even the minimum standards of fairness that it does not deserve

to be called a judicial process. It is not an international tribunal. There is nothing remotely international about its practice. There are also serious questions raised as to whether it constitutes a national institution, as it sits outside of the law – seemingly in a black hole.

When one looks at the various "scandals" that have plagued the Government over the past three years, scandals that we have exposed in the international media, it is astonishing that it has clung on to power. The scandals have included widespread judicial and prosecutorial misconduct, Judges being replaced at will, witnesses disappearing, members of the Government directly implicated in the coercion of prosecution witnesses, the PM meeting directly with the Judges, judgments drafted by members of the Justice Ministry, and prosecutors serving as active members of victims groups. It would not be an overstatement to suggest that a trial before any other court would have collapsed long ago and brought down the Government as well. However, in Bangladesh the trials proceed unabated as death penalties continue to be handed down.

In early 2011, when I first started to "lobby" on behalf of my clients I was repeatedly asked why should we care what happens in Bangladesh, particularly to a group of Islamists. It is this notion that has made it quite difficult to educate a western, Islamaphobic, audience that we really *should* care. The argument I made then, and have repeated ever since, is that my clients are members of a mainstream, albeit conservative Islamist political party. They serve as the firewall between fundamentalist politics and secularism. To remove the firewall will ultimately promote extremism in a highly volatile part of the world. This is precisely what is now playing out.

Now, I do not adopt my clients' politics. The truth be told I disagree with much of their ideologies. However, that is really not the point. Their policies should not be on trial. It is also quite irrelevant whether they opposed liberation and advocated politically for Pakistan to remain as a unified Islamic state. These trials should be about whether they, as individuals, bear criminal responsibility for crimes of an international character committed during the 1971 War of Liberation, namely war

crimes, crimes against humanity and genocide. Regrettably, these trials have shown to have very little to do with 1971 and even less to do with justice.

Recognizing that our team from Chambers would never get to see the inside of the courtroom we were forced to adopt a different strategy – a public advocacy campaign. This required frequent trips to the United Nations in Geneva and New York, the European Union and European Parliament in Brussels, and briefing governments in the corridors of Whitehall, Washington DC, Kuala Lumpur, Riyadh, Doha, Dubai, Jakarta and Ankara, briefing them as to the events unfolding on the streets of Dhaka.

The result of our public advocacy is that statements of concern have now been issued by a number of UN Special Rapporteurs and Working Groups, the US Ambassador for Global Justice, members of the House of Lords and House of Commons, members of US Congress and Senate, European Parliament, International Commission of Jurists and the International Bar Association. Further, a number of human rights NGOs including HRW, International Center for Transitional Justice, No Peace Without Justice, Amnesty International, have led the call for the internationalization of the process.

Recently, Sir Desmond de Silva QC, a veteran of international justice, wrote that he declined an offer to assist the prosecution in Bangladesh because; in his view "Bangladesh does not have the independent judicial and investigative capacity to conduct trials of international crimes". This was followed by a letter from Lord Carlile QC, that was co-signed by eight peers and several leading members of the legal profession including Sir Geoffrey Nice QC, Karim Khan QC and Sir Henry Brooke CMG, former Vice President of the Court of Appeal, in which it was stated, "The British government is publicly committed to end executions worldwide. However so far it has remained shamefully silent on this matter. The state-sponsored execution of political opponents prior to an election is completely reprehensible. It has created a highly charged and divisive political landscape. The situation is very serious."

The response of the Bangladesh authorities to the mounting criticism has been one of attack. When our team in London raised legitimate concerns over impartiality of the Chairman of the Tribunal, the Government of Bangladesh filed a formal complaint with the Bar Standards Board – a complaint that was promptly dismissed. I last travelled to Dhaka on August 5, 2011. This was to be my sixth visit in as many months. I was presented by the immigration authorities with a weighty intelligence dossier bearing my name and an order by the Home Minister ordering my immediate deportation.

One of the most fervent critics of the process has been Human Rights Watch. In a statement issued following the conviction of one of my clients, Professor Ghulam Azam, in which the trial process was termed a fundamentally "flawed process", the Prosecution responded by filing a contempt notice alleging that HRW was a discredited organization, conducted poor research, supported CIA rendition and had ties with both Nazi Supporters and Islamic Fundamentalists. It remains unclear what bearing any of this had on the proceedings or HRW's report. This contempt citation follows similar attacks on the media (*The Economist* also faces contempt charges) and human rights groups (a leading Bangladeshi human rights NGO was arrested for reporting on State sponsored crackdowns on demonstrators that left scores dead).

On November 3, 2013 a further event has attracted international scrutiny. A British and a US citizen were convicted in their absence and sentenced to death following a trial that has attracted significant criticism. One of the main criticisms was that despite the many reassurances given to the media, no extradition request was submitted in respect of either defendant and the Tribunal merely proceeded to try them in their absence, where little or no defence was presented, leaving the Government of Bangladesh with little more than a sensationalist victory leading up to the election. There is a great deal of speculation as to why no formal extradition request was submitted. The Government of Bangladesh will be aware that extradition proceedings can take years and all the criticisms made of the process would be laid out in front of an Extradition Judge. The use of the death penalty, complete absence of due process, widespread governmental interference and serious allegations of judicial and prosecutorial conduct would present a challenge for any court. The Government of Bangladesh would have been mindful of these challenges leading up to the election. The response of the international community was best summarized by the UN High Commissioner for Human Rights, Navanethem Pillay in which she stated:

"The ICT should be a very important means to tackle impunity for the mass atrocities committed in 1971, and to provide redress to the victims who have had a long and difficult road to justice … But it is important that the proceedings meet the highest standards if they are to reinforce the rule of law in Bangladesh and the fight against impunity in the broader region." In her statement the High Commissioner urged the Government of Bangladesh not to proceed with the death penalty in cases before the Tribunal, particularly given concerns about the fairness of the trials.

It is unclear how this process will proceed from here. The risk that carrying out a death sentence following such fundamentally flawed proceedings will do nothing to promote reconciliation in the region. The Government of Bangladesh speaks of bringing an end to a culture of impunity. It speaks of bringing justice to victims. It speaks of bringing an end to fundamentalism. Finally, Congressman Steve Chabot, who serves as Chairman of the House Foreign Affairs Subcommittee on South Asia and the Pacific, recently spent several days in Dhaka discussing a range of issues in relation to the current human rights situation. Upon his return to the US he confirmed that a hearing was to be held in front of the Subcommittee on November 20, 2013 to address the current situation in Bangladesh. Commenting, Congressman Chabot said: "This political turmoil has already claimed one victim – Bangladesh's International Crimes Tribunal – resulting in proceedings that do not meet international standards. The United States has a lot at stake in Bangladesh. This hearing will be an important opportunity to examine the cause of Bangladesh's political tensions, the escalation of human rights abuses, and how this all impacts security interests in the region. However, at present it is establishing a very dangerous precedent in international criminal justice and it needs to recognize that this process has far greater consequences than the next General Election." ■

Toby M. Cadman, Barrister, Chambers of Anthony Berry QC

The Bar in Society: A vital force for good

Preface

Maura McGowan's speech to the Bar Council November 2 , 2013

Values of the Bar are Integrity, Excellence and Independence. They are immutable and must be jealously guarded and preserved. They are what make us what we are. But what of what we do? What is the Value of the Bar?

We work to achieve justice and to provide access to justice to every citizen. Our tradition is rooted in Public Service, because we have an intrinsic and instinctive commitment to the Rule of Law, not just because it pays, or in some cases doesn't.

We all seek to provide access to justice for all and to continue to strive to provide access to the profession for all. Our commitment to the Rule of Law requires that we will apply it to ourselves in seeking further to ensure open and fair recruitment, based on nothing other than talent and ability.

That ability must be outstanding but if it is, nothing else; background, ethnicity, gender, nothing else can or should prevent the best joining and rising to the top at the Bar.

"A Bar of all for all" must be our ambition and we must not be deflected or allow ourselves to be deflected from that aim. To that end I would like to see an extension of our policies on Equality and Diversity to add Inclusion. It should no longer be a numbers game, matching statistics, we have to look to the individual, are they good enough? Nothing else matters. Working towards equality of opportunity is only a part, but a vital part, of the contribution we make to society.

And we continue to fight for that equality of opportunity at a time when tuition fees and the reduction of places at the Bar and work to do there are being dramatically reduced.

It is particularly important as we provide the judiciary of the future.

Why is that? Because the tradition of public service is at the core of what the Bar does. It is why commercial practitioners give up very substantial incomes to take appointments. It is why barristers give up working time to sit as Recorders or Deputy Judges. We play an essential part in supporting the mechanism of the criminal and civil courts. A burden not taken up by others and massively undervalued by most.

We are the driving force, the proponents of the development of the law and legislation. We argue cases at all levels, we test the boundaries in all areas. We regularly, in all disciplines, take on cases for free. We represent those convicted and sentenced for crime, often for no fee at all but because we believe there is a wrong to be corrected.

That is our tradition and our ethos. It is increasingly undervalued by politicians, unknown to the public and ignored

by some sections of the press, unless it's about cameras in courts.

We contribute directly as individuals or collectively through groups like the Law Reform Committee of the Bar Council to the unstinting and superb work of the Law Commission, we provide substantial input into Government debate in both Houses of Parliament, we contribute to the public debate on all aspects of the Rule of Law through articles and contributions to those debates in the media. We are currently working to try to alleviate the ordeal of giving evidence for vulnerable witnesses by our plans to design, with the Advocacy Training Council and Barnado's, training for those who do those cases and through the excellent work of the CBA with the NSPCC in this area. We are constantly striving to raise standards in this as in all areas. We realize there is always room for improvement, we have always provided, for free, some of the best 'on the job' training to any group of would-be practitioners.

Despite the quality of training we provide both at the start and throughout barristers' careers, which we continue to improve, we are watched over like naughty children. We enthusiastically welcome the call for evidence and the Government's proposals to look at the way in which we are regulated. It is too cumbersome, too expensive and it does not serve the public in guaranteeing excellence. As we see Check against delivery from the proposed Quality Assurance Scheme for Advocates it only sets out to ensure competence. The advent of the LSB has not driven up standards, it has put more obstacles in the way of those trying to practise well and honestly. We will continue to contribute to the debate on the future of regulation in a sensible and responsible way. We should not be held to account by an oversight regulator whose stated position is, "to look forward to a future when the provision of legal services means more service and less legal".

We, largely through the commercial practice of sections of the Bar, play a huge part in the vast financial contribution the legal profession makes to the economy of this country. We provide larger and larger amounts of revenue at the same time as we see greater and greater reductions in Government spending. But it's not just financial.

More than any other aspect of the country's international trading arm, the legal profession has helped repair the reputational damage done to the City, to London and the UK as a place to do business by the banks and major financial institutions. We have done that by virtue of our continuing reputation for probity and integrity. And we have done all that at a time when banks fail and bankers are prosecuted, when MPs are imprisoned for fiddling their expenses and when some sections of the Press are literally in the Dock for hacking into the phone of a dead teenager.

The underpinning of the Rule of Law by the work and standards of the Bar is what enables politicians to go abroad to sell and promote UK plc. The Bar has and will outlive any political administration. We will continue to provide a much greater and worthwhile contribution to the financial well-being of society.

We are not just professional lawyers working within society, we are much more than that. We are a vital part of the constitutional framework of society.

And we cannot allow the politicians and the press to pretend that cuts to public funding will not detrimentally affect the social good.

In commercially-funded areas of practice, talent is met by financial reward and the acclaim of the Lord Chancellor. In publicly-funded areas it is met with a contemptuous disregard. Nobody going into publicly-funded work expects to earn as much as their commercial colleagues, they know they will earn a fraction but they did not expect and should not have to tolerate having their already limited income halved in order to make savings which are almost inconsequential in Government budgetary terms.

The denial of funding to litigants and the diminution in the talent of those who work for legal aid can only detrimentally affect the public interest.

We are One Bar, the whole is greater than the sum of its parts. Every section of the Bar works to support the others. But the whole is diminished by an attack on any part of the profession, particularly those parts which ensure access to justice for the most vulnerable. It cannot be justifiable to deny parents represented access to the courts to fight for the custody of their children on the grounds of financial expediency. It cannot be right to drive barristers of quality out of the provision of defence advocacy to those charged by the state with criminal offences. To deny those who would seek to challenge the administrative actions of the state adequate or any funding to seek review is unfair and unprincipled.

We currently have a functioning civic society, all based on the Rule of Law and the vital part we play in its maintenance.

We play our part in the social contract that exists between Government and the people, we take on more than our fair share of that burden. We are entitled to expect the Government to play its part. We have done more than enough to earn the respect of the Government and the public, we deserve to receive that respect and not the contempt shown and often engendered in certain sections of the press by a total inability to refer to any barrister without using the lazy and inaccurate epithet "fat cat". We do not hack the phones of others to sell our services.

We deserve better than the, "well they would say that, wouldn't they", attitude of Government ministers like Lord McNally when a lawyer points out the disadvantage to a litigant of having to conduct their own hearings in court.

We, as a predominantly self-employed profession, make an unequalled voluntary contribution to the fabric of society. Over 40% of the Bar regularly carries out *pro bono* work whether in addition to their practices or in the places where they live. A third of all silks are signed up to work for the Bar Pro Bono Unit. The profession is the only source of funding for the Bar Pro Bono Unit, is a major funder of groups like the Free Representation Unit, of the Bar Human Rights Group and the Citizenship Foundation. Practitioners give up their time and skills for no reward and no recognition. Like those who go abroad to teach advocacy and ethics or to monitor trials in countries where the Rule of Law is ignored, and pay for their own flights and accommodation, against the background of giving up time in which they could be do remunerated work.

There are few professions and no profession of self-employed individuals who can say that nearly half of their practitioners work *pro bono*, out a sense of social responsibility. That's why I'm proud to launch today a publication called, *The*

Bar in Society. Barristers Making a Difference. We should never be ashamed to proclaim clearly the Bar, and the Bar Council's, ongoing commitment to the communities in which we work.

We make a vast contribution to public legal education and citizenship. Through the Bar National Mock Trials competition and the Speak up for Schools project we send barristers into schools in the less glamorous areas, to encourage youngsters with talent to raise their horizons as to what their future might hold.

And what do we get in return?

We are grateful for the primary position that Price Competitive Tendering would not be applied to the Bar but the Ministry of Justice cannot go on pretending that there will be no damage to the public good by the cuts it has, and continues, to make. Nor that the profession will survive these cuts undamaged.

Cost is not the only criterion.

Thomas Edison said, "Vision without execution is hallucination". The Secretary of State must be hallucinating if he thinks saying he wants the independent referral Bar to continue, saying he wants to protect and improve the position of the junior Bar is enough to make it happen.

He cannot maintain a proper system without being prepared to spend reasonable and sensible amounts of money to make it function. Unless he's thinking of a different form of execution for us. We must all be alive to the value of the Bar in society, Chris Grayling should protect it and be proud of it as an institution vital to the proper functioning of a democratic society. But it's not the role he seems keen to take up at the moment.

Conservatives are supposed to believe in preserving institutions. If so, they have an odd way of showing it.

For too long, as individuals, we have fought shy of talking about the *pro bono* work we do. At a time when the entire institution is under threat we should no longer be so shy. We do much more than our fair share to work for society, we deserve better recognition for what we do.

It's easy sometimes to become despondent. To think that it is all too much and that it cannot possibly be overcome. But if you want to see the Bar of tomorrow, look at the young Bar of today. I see a generation of outstanding practitioners, so ably led by Hannah Kinch this year, which will secure this profession's future and values for years to come. We are all privileged to be part of this profession and to have an opportunity to play the role in society which we all strive to fulfill.

As I asked in my inaugural speech, the Bar has become engaged and involved. Our involvement in *pro bono* work has not wavered, despite all that has happened, by way of LASPO and fee cuts.

Our commitment to serve the public has not faltered. We have to continue to fight for the recognition and respect we deserve. There is still so much to fight for and it's worth the fight. ■

Final Word

The law of murder is a mess of compromises. The mandatory nature of the sentence of death (and later life imprisonment) has always meant that there were cases where the moral culpability of the individual did not, in the public's eyes, mean that they should pay the penalty that the law mandates.

In an attempt to cut through this and put homicide sentencing on a rational and principled basis, the Law Commission issued a comprehensive report in 2006. It was envisaged as part of a wider reform of the partial defences, creating two categories of murder with only one, first degree murder, attracting the mandatory sentence. Parliament, not wanting to be seen in any way to be "soft" on crime, shied away from even that, (whilst of course implementing changes to the rules on Manslaughter).

The case of Marine A reignited the debate on the mandatory life sentence. The case has been well covered in the media, but in brief, he was convicted by a Court Martial of shooting a captured and wounded Afghan insurgent. The calls for leniency have come from across the political spectrum (for example, Michael White in the *Guardian* and Boris Johnson in the *Telegraph*).

Whatever tariff is set (the shortest that I can think of historically is for Pt Lee Clegg, who was convicted of murder in Northern Ireland in similarly contentious circumstances and received a two year tariff) the actual sentence passed will have to be one of imprisonment for life. That a mandatory life sentence is lawful is clear , but for how long? If I was a betting man, it would not be surprising if a breach of art.3 is found in the near future.

The case of Sgt Nightingale threw light on the iniquities of the (almost) mandatory five year minimum sentence for firearms offences, but since the public outcry (and subsequent suspended sentence), the Court of Appeal have reverted back to narrowing the exceptional circumstances to a vanishingly small number of cases.

Although sch.21 Criminal Justice Act 2003 (setting the tariff) does not apply to Court Martial sentencing, the court should have regard to it. It is clear that the circumstances of this offence means, however, that the usual starting point of 30 years will not apply, and a sentence lower than that will be passed.

No-one would condone or excuse what Marine A did. However, most people would accept that this is not only a case for leniency, but it is also a good example of where a mandatory life sentence is unjust. When sentenced, he will receive a sentence of life imprisonment. Guessing the tariff is an impossible business, but I would not be surprised if there is a public outcry over the imposition of a life sentence. Perhaps it's time for Parliament to use that to grasp the nettle and do what is obviously sensible – abolish the mandatory life sentence for murder. ■

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