FIRST DIVISION ASSOCIATION AGM, LOUGHBOROUGH 28 3 12.
MAX HILL QC, CHAIRMAN CRIMINAL BAR ASSOCIATION

Thank you for having me. I was surprised but pleased to be invited. You don't need me to tell you that the legal system, in the publicly funded sector, is in a state of crisis and change. I represent a small profession of about 4000 souls who have never had it so bad. Some of us have come from private practice to join you. This is no time to stop talking to each other, just because we are on opposite sides of the fence. The credit is all yours today, for inviting me here. I will listen to anything you want to say, and to any message you want to send to the criminal Bar. I have not come here requiring or expecting compliments. I have not come here, either, to paper over the cracks there may be between us. Where there is criticism, I would not be doing my duty to my membership if I failed to deliver it fair and square. Please feel free to do the same to me in return. I wont take it personally, depending on just how personal you may want to be. That is up to you. I think we can join forces in finding a number of common causes, in fact. That is ultimately why I am here. So thank you again, and here goes in my assessment of the issues we face.

FEES

Can we start with fees? Politicians and the media generally groan when lawyers talk about money. But I am amongst fellow professionals here, so I have no doubt we can enjoy a sensible debate. GFS Scheme C is in. Many of you will have heard about my take on that, as delivered to the DPP when he came to Bar Council earlier this month. I hope it is worthwhile for me to reprise some of the detail, because I want to take the opportunity to get the Bars message across. So lets start with that right now.

'It is our view that, if these rates are implemented, there is a substantial risk of significant harm to the public interest in that the pool of independent advocates of sufficient experience and ability willing to prosecute, at these rates of remuneration, is likely to diminish significantly'. That from our letter to the DPP on 1st March. Fat cat barristers solely interested in cash, or a dedicated profession interested in upholding the public interest? You decide.

What has been the Director's response: in a letter dated 2nd March, and in a stance he maintained at Bar Council the following day, he claims that the CPS have merely implemented the Scheme the Bar suggested and wanted, which, to quote my speech on 3rd March 'demonstrates mastery of the art of being economic with the actualite, given that you know how often the Bar team has written since December to say that Scheme C if implemented will not be with the Bars approval or consent.'

Is the actualite getting through to you, in the engine room of the CPS? Apparently not, because I have seen 'Keir's Diary' dated 12th March on the CPS Infonet ; 'I attended the Bar Council meeting… the CBA presented a report, including some rather uncomplimentary comments about our new fee scheme. I was invited to take the floor and to respond – and I did so, gently reminding those present that the new fee structure was put forward by…(yes) the Bar itself. A lot of questions followed, and although the going was tough at times, it was well worth it'.
I read this sort of coverage in despair, I really do. It leads me to ask this; if you were sentenced to death, but were given a choice between lethal injection and the firing squad, and you chose the latter, could it be said that you had asked to be shot? I know there was a consultation on assisted death cases last year, but this is too much.
Lets get real over fees. We know that many have lost their jobs in the CPS; we know the headline figures of the service slimming down from 8800 to 7100 over the past 2 years. But you have survived. You are not as far as we know suffering round after round of pay cuts. The criminal Bar is being starved, and it will end in disaster for the entire system.
So I make this plea to you. Be aware what you are asking counsel to do when they are instructed. Be aware that their goodwill is stretched to breaking point. Be aware when old cases are converted to new lower rates on 1st August, and do something about it. Paper-heavy cases can and should be moved onto VHCC contract. Your organisation may shrug its shoulders and say to the Bar; tough, get on with it, there are further cuts coming. But you are the case lawyers. You will recognise the following scenario as typical of many; I used this in my speech to the Director ; 'an experienced junior wrote to me yesterday evening in these terms: my clerks have drawn up the fee note in a case I finished last week and have done the same using Scheme C to compare. It makes horrific reading; £17k down to £7k for a significant amount of work on a relatively paper heavy Grade 4 case but which, under the new criteria would not qualify for VHCC.' I am sure I need not remind you of the vast difference between professional fees for the self-employed, subject to many deductions for expenses etc thereafter, compared to salary for staff.

INSPECTORATE REPORT

Lets move on, to the HMCPSI report this month. I have to say that the correlation between the CPS Advocate Panel, introduced in the same month as these ruthless fee cuts, was not lost on any of us. This combination of events has contributed greatly to the creation of a hostile atmosphere in which counsel are not only angry but mistrustful of the CPS, which cannot be good for you or for us. We need to work together in the interest of an efficient criminal justice system. Members of the Bar

dedicate their working lives to prosecuting for you, and they are being kicked in the teeth. But the correlation between Panels and Scheme C is one thing. I must say I was surprised to see the Inspectorate report, which came out the week after the Bar Council meeting, and the week after the start of Scheme C: those at the top of your organisation must have known it was coming, yet no mention was made of it until the day it landed. Perhaps that is because there are people who are – to borrow a phrase from the Justice Minister though I don't want to do that too often – who are 'in cloud cuckoo land' when they pretend all is well on the good ship CPS, and the Bar should simply put up with the treatment.

The Inspectorate report makes for depressing reading for you as well as for me, I am sure. I have not come here to preach to you, or to crow about what may be wrong with in-house advocacy, I assure you. Nor am I going to stand here and read out sections of the report by rote. But speaking as someone who has prosecuted major cases almost exclusively for the last decade, it is sobering to read (I take small snippets from the executive Summary) 'opportunities are still missed and there are failures to challenge clearly indamissible and prejudicial evidence', and 'despite the amount of non-contested work undertaken, the review found a decline in the quality of crown advocate performance since 2009 and an imporvement in that of self-employed counsel, particularly at the higher level', and importantly this: 'the importance of effective preparation, which enables the advocate to present the case clearly and deal with the issues that might realistically be anticipated, is often hindered by local deployment practices, and remains a weakness'.

I could go, but I wont. I am not here to rub your noses in it, believe me. It does seem to me that the emerging themes may be these:

1. You, who can of course be capable and effective advocates, are not being allowed the time or resources to prepare cases properly, and it shows.
2. You need training. The Good Practice identified at the end of the Executive Summary singles out the need for 'joint local training with chambers in relation to cross-examination skills and speeches'. We can help with that. Surprised to hear me say that? If you are, dont be. We are all dedicated to the efficient and skilful despatch of criminal cases. We can work together in the interest of the system, which is heavily imbued with the public interest bearing in mind what we all do. But there is a condition, and it is:
3. The independent Bar has the skill-set and the dedication to deliver for the CPS. The Inspectorate goes out of its way to identify this

> fact, selecting cases at the higher level as I have indicated. So, I suggest, you need the Bar to deliver on cases large and small, and you also need the Bar to help you deliver your component well, or better than at present.

The criminal Bar is being sorely abused at the moment. That is my political beef with the top of the CPS and with the superintedning Ministers. As an elected national Bar leader, I will pursue that agenda until the last day of my Chairmanship. But it is quite obvious that the independent Bar will not make a living from publicly-funded casework in future; not if you want the high calibre counsel who are singled out for praise by your Inspectorate. If the best at the Bar are to continue to make themselves available for your cases, at fee rates which are universally held to be unacceptable now, the Bar needs to develop income streams alongside those cases.

<u>TRAINING?</u>

One solution could indeed be the provision of training by chambers for in-house advocates. I am open to the discussion. In fact I am to meet Martin Mackay-Smith next week, to discuss access to and input towards the CPS ecollege. Further, I am personally involved in a Home Office Data Communications project which is about to deliver a bespoke training DVD for cell site analysts and CPS lawyers. I hope you like it.

Never let it be said that the CBAs political differences with government stand in the way of communicating with you, to whom we look for our prosecution experience and caseload. Lets talk about joint training. Lets discuss secondments, career progression in future which involves counsel spending time under your roof, then to return to the Bar. But lets set the ground rules first. We will happily deliver training, but you need to discuss cost. You need to consider whether we could possibly be expected to give that training for free, with times as they are. That would be quite wrong. Moreover, we need a clear understanding that secondment is not the same thing as poaching. I have taken the Director to task over any future intent to expand the nationwide percentage of in-house advocacy. He says he will not rule it out. That I understand. I found it a little more difficult to understand, however, when he claimed that the rationale behind future expansion of in-house advocacy may be necessitated by you, the FDA, as a demand for career progression which you have formulated. Is that true? Please tell me. The Inspectorate report, if I may return to it, says clearly ‘CPS areas continue to have more crown advocates than they need to support the business and a further reduction in numbers is necessary’. Fine by us. But then this ‘The CPS’ aspiration

to be able routinely to conduct its own high quality advocacy in all courts, and across the full range of cases, is realistic and achievable'. What does that mean? Please, you need to be clear with us about your intentions. If you can do that, we can find a way of talking to you, training with and for you, and getting along just fine. If not, then I am afraid the rank and file of the criminal Bar will have their worst fears confirmed; the independent Bar is in for the chop. What is it to be?

PAPERLESS TRIALS

Time to change the subject. Paperless Trials. T3. Digital courts. What on earth is happening? I come to you today following the CBA Symposium on Paperless Trials, in London last night. I spoke for my members, and the other speakers were the Recorder of London for the Judiciary, and the DPP plus Ben Widdicombe for you. Is that accurate? Does the Director speak for you? His attitude was a repeat of what I have told you about GFS Scheme C; to the effect that digital trials are being imposed from above, but that all stakeholders have always signed up. Well I have to tell you that the criminal Bar is not quite a 'signed up' as the Director may claim. We were not party to the top table who waved this scheme through two years ago. The closest representatives of the legal profession were the LCJ and the SPJ. I have no word of criticism for the senior judiciary, but they do not hold the brief for the Bar. We were not invited.

So let me give you a flavour of my speech last night, because I very much hope to hear your views on T3 and its prospects of success when it launches in 4 days' time:

'Don't get me wrong. The electronic presentation of evidence is nothing new. We have been doing it for years, in certain cases and at high cost. It works because all parties have the use of the same equipment. It works because the jury are always provided with a core jury bundle with the essential printed materials they may wish to annotate or to turn to at any stage of the trial. And it works because technical staff, specifically contracted for the case, spend countless hours developing the EPE in time for trial.

Is the CPS T3 project an extension of EPE? If it is, perhaps we might have little if any objection to the general introduction of a system providing quick access to all of the core materials. But it is not. Electronic SERVICE of evidence is a very different beast to electronic presentation of evidence. What are the CPS setting out to do? They are spending untold sums of money on this. I challenge the CPS to tell us the total expenditure on the T3 project, nationwide to date; from planning to piloting to implementation, how much have you spent? At a time when the Bar is reeling from real-term fee cuts of 13% across the board under GFS Scheme C, with cuts in some classes of case in the region of 50% if

not more, the CPS spends all of this money on new systems for service of case papers. None of that money has come to us; in fact it is the opposite; through cuts in graduated fees which were already frozen since 1994, the Bar is actually paying for this project'.

'Now ask me whether this is a technological advance which is designed to help the Bar, to help we who deliver three-quarters of the in-court prosecution advocacy nationwide. Ask me whether electronic service of evidence is designed to streamline the process and to help the defence Bar, or whether the truth is that it will save money for the CPS but at the expense of the defence Bar. Ask me whether the CPS have even thought about protecting us from increased overheads and cost, whether we prosecute or defend. Ask me whether we have a modern CPS who have any commitment to the criminal Bar at all.'

So you see, we do have a problem with this project. We are no technophobes. But my members are fed up with being taken for granted. Fed up with being required to do more for less. Fed up with the transferred cost initiatives of the CPS, where streamlining finances at your end simply dilutes the hard-won fees at our end.

And this may be of particular interest, and I would value your comment. The CPS have agreed to provide printed papers for defendants in custody. Surely that is unnecessary, if as we have been told there is a new protocol to get round the provisions of the Crime and Security Act, with the result that prison governors will allow computers in cells and for legal visits to those on remand. What has happened here? Do you know? I suspect that a powerful solicitors lobby has forced the CPS at the top level to capitulate and to provide printed papers, because defence solicitors were refusing point blank to bear the printing costs for clients. If you can shed light on this, please tell me. For the defence Bar, and for the prosecution Bar, there has been no such capitulation; we will all recieve a secure email with ebundle attached, and if we require to work with paper that will be at our expense. Some reward for successfully applying to join the CPS Panel. And an extra insult to add to the fee reductions under AGF Scheme C. This is no way to run the system, I suggest.

<u>QASA</u>

And so, perhaps finally, to regulation. And to QASA. I hope it is accepted by all that the criminal Bar takes a principled stand on quality assurance. If you think we are simply out to protect the Bar, and to say 'get your tanks off our lawn', then say so and I will debate it with you. The lawn is no longer ours, we have to accept. We share a communal garden, where anyone with higher court rights of audience can appear. The Bar cannot and does not try to re-litigate an argument which closed with primary legislation years ago.

Our point, however, is that the conduct of criminal advocacy is first, an acquired skill, and second, a public service which must be done properly or not at all. That is why we say the access rules must be common to all, whether barrister, solicitor or legal executive. That is why we say every advocate must be capable of conducting trials, not merely non-trial or plea only work. And that is why we say that judicial evaluation is paramount for all; the judges are the ultimate observers or 'customers' for in-court advocacy, so they must say when standards fall too low.
I am prepared to give a cautious welcome to the announcements last week by regulators as to the way forward. QASA will not roll out next week, any more I suspect than paperless trials. There will be a further consultation on QASA over the summer. There will be gradual implementation, with judicial evaluation for all. There will be time for reflection during the next 18 months or two years, at the end of which the full and final QASA will emerge. For the Bar, we can and must keep our powder dry during that period. We maintain our determination that Plea Only Advocates must train up in order to apply for the full QASA scheme, or not at all. We all know the myriad reasons why an advocate who is not licensed for trial advocacy can and will come unstuck in non-trial hearings. Equivocal pleas, Newton hearings, and indeed PCMHs themselves. All involve consideration of contested evidence and in the case of PCMHs trial management. Only trial advocates will do. But I suspect the Bar will agree to keep faith with our regulator and to work together in the interest of a universal scheme emerging at the end of the long process.

That completes my attempt at rounding up the key issues from my perspective. I am not sure there is 'one Bar' any more, I have to say. The gulf between the publicly-funded criminal Bar and the privately funded commercial Bar is almost un-bridgeable. Closer to home, there are significant differences between the self-employed Bar, ie me, and the employed Bar, ie you. I do not expect us to agree on everything. But I have worked very hard to gather the views of my members throughout England & Wales, and to ensure that the CBA speaks with one voice. I came here today because it seemed to me that this meeting was most likely to convey the views of in-house prosecutors nationwide. Whatever our differences, you and I – and indeed the commercial Bar – do have shared values and principles as members of a great profession. I shall be very interested to hear your reaction to what I have had to say. Thank you again for inviting me.