SPEECH BY MAX HILL QC
TO THE CRIMINAL BAR ASSOCIATION'S ANNUAL DINNER
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CHECK AGAINST DELIVERY

"I am not sure how much longer I can continue to practise in criminal law. It is not simply the fact of covering outgoings. To do this job properly requires long hours and dedication at the expense of private life and family life. The cost benefit analysis is therefore not only about covering costs of, for example, child care. It is also about the severe disadvantages of the inability to work part time, or to have predictable and dependable hours.

"The more that those who work in this field are hit by cuts in fees and uncertainty of work and/or a level of earning, the heavier the costs and the more likely they are to outweigh the benefits of stimulation, intellectual challenge and development and the fulfilment inherent in public service."

Not my words, but one of the unprecedented number of CBA members who completed our online survey in March. I cannot improve upon those words, which capture the dilemma for the criminal barrister in 2012. Torn between a love for this great job we all do, this service we perform in the public interest, and the steady erosion of the certainty we all thought our education, training and dedication would provide.

You can tell already, this speech will contain no jokes, no punch-lines, none of the cosy fat cats club which Fleet Street loves to portray. Rumpole is dead. We may be his successors, but we spend our days worrying about paying the mortgage; worrying about how we can ever afford a pension.

I am going to suggest there has been a role reversal here. Who are the guardians of the public interest, the gatekeepers for access to justice and the protectors of the rights of the individual in British society? Politicians like to think it is they who stand for Joe Public, and they who hold greedy lawyers to account. But that is not the truth now, if it ever was before.

Just look at LASPO, the Legal Aid Act which struggled through both Houses of Parliament during the last nine months. The Government suffered defeats well into double figures in the Lords, inflicted by cross-party and Crossbench peers who

upheld the public interest in access to justice for all, only to find that a financially bankrupt government has driven through a Bill which will leave many with no recourse to the law when things go badly wrong, and necessary litigation is being sacrificed on the altar of cost despite all of the right arguments of principle being brought to bear.

And now look at the Government programme for criminal justice and the publicly-funded legal profession. Time and again we find politicians responding to our reasoned arguments in the same way: "we recognise that justice is on your side, but we can't afford to pay for the legal services in this country any longer".

Of course they don't put it so honestly or bluntly. They claim confidence that the Bar will continue to play its vital role in the criminal justice system, when they should be telling the truth, which is: "we the Government are prepared to settle for cheap, partial justice, but we will con the public into believing it is greedy lawyers who are to blame".

In the face of such duplicity, I can and do claim that the role reversal is complete. We at the criminal Bar uphold the public interest in access to justice and the maintenance of a proper criminal justice system, whilst it is the Government who are obsessed by money.

So you are wondering whether I can make good on these claims, or whether you should say, alongside our government, "we know you mean well but you must just rub along as best you can. The criminal Bar has always put up with changing conditions, and we are sure you will cope in the end."

I came into this job, when elected as Vice Chairman two years ago, knowing it would not be easy. I knew that, against a background of financial recession, the new Government would implement the three-year plan for defence fee cuts announced in the dying days of the old Government. I knew that the current administration was set on carving up the publicly-funded legal landscape, and our political masters who made their money on the sunny slopes of the privately-funded commercial Bar were no allies or friends of ours on the cheap side of the street.

But I did not know that there would be such heartache, depression and personal bankruptcy caused by the wanton failure of central Government to shore up the Legal Services Commission in such a way that they might pay us in reasonable time for concluded cases.

I did not know that criminal barristers would email, ring or meet me to tell how they couldn't pay their tax in January, because the earnings-basis assessment for tax produced a payable sum which exceeded last years profit, and which far outweighed the actual payments received in the current year, because the LSC was keeping them waiting month after month.

Neither did I know that the tale would be just as bad on the prosecution side. Whilst you and I might have hoped that there would be some protection in the fact that we provide three-quarters of the prosecution advocacy nationwide, and are therefore indispensable to the efficient dispatch of criminal cases, we have instead found that our self-employed status – I now prefer the term 'non-employed' – means that the CPS will expect us to tolerate a disproportionate level of cuts in comparison to its employed staff. They refuse to come with us to central Government to say "just a minute, we need the Bar or the courts will come to a halt".

So we suffer from all sides. I know that we are not unique in being affected by recession. I know that the CPS has shed a certain percentage of staff. But those who remain in employment are paid the same as before. We who have outsider status have to take cut upon cut. This cannot be right.

So I learned from the first months in this job. I am not here to carp about previous strategy and leadership. We are surrounded by those who gave their time and effort, for nothing, doing their best for the criminal Bar. I regularly call on them for guidance on what to try myself. But a change of direction was obviously necessary, because without it everything past leaders and I have stood for would simply be washed away. Criminal practice would be left to those who either had private money, or those whom the other branches of the Bar rejected.

Together with your Officers and Committee, I decided to use the word 'No' far more often. To abandon traditional deference for those outside our number, with plans for a new streamlined and asset-stripped legal world.

I spent the entire autumn saying NO to the impending consultation on One Case One Fee, and NO to a Quality Assurance scheme which failed to embody the right principles to make sure that good advocates remained in court and bad advocates are thrown out of court.

The quality assurance scheme, scheduled for roll out starting in December, was delayed. It was delayed again from April.

The OCOF price competition consultation was pulled on 1st December. We have another year or two.

Should we be rejoicing at the power of saying NO? Well, hardly. Firstly, because I don't take credit for the OCOF delay in December. I am not that naïve. But secondly, because I think the delay robbed us of our best chance to make a stand. I think it is a pity the government blinked, because if you remember what I said at the Bar Conference on 5th November, I invited the Government to call our bluff.

Our greatest weakness, I am sure, because of our self-employed status combined with our dedication to the system we serve, has always been a reluctance to use our heavy weaponry. A reluctance to use the ultimate weapon; namely stopping the

courts, rather than being the backbone of the court system which we are year in, year out.

So it followed that we needed to test your view, and your resolve. The survey was designed to give every member of the CBA a platform to air your individual views on the hot topics. We ran the survey for four weeks. It must have been quite difficult to ignore the bombardment of repeated emails, together with messages cascaded through the chambers structure; urging you to complete the online survey.

The result was unprecedented. Let us remind ourselves of the basic statistics.

1638 members completed the Survey.

82% have suffered delayed payment i.e. have waited more than 9 weeks for payment in completed graduated fee cases.

87% would not agree to a Quality Assurance scheme in which Plea Only Advocates were a permitted grade.

93% would not agree to a scheme without a unified code of conduct to regulate all advocates

92% disagree with the introduction of One Case One Fee on the basis that the advocacy fee is not ring-fenced.

89% do not consider the current level of fees for publicly funded defence work is proper and fair remuneration.

85% say the same in respect of prosecution fees.

88% of defence advocates and 77% of prosecution advocates are prepared to refuse to accept new instructions.

89% are prepared to take direct lawful action.

All of them powerful statistics. But many did not respond to the Survey. There is, I am sure, a silent workforce, who believe there is no alternative but to grin and bear it. Understandable, of course. But what about the very strong message indeed from those who did respond?

We need to use that message. I intend to start this evening. We must make it our task to get that message onto the front pages. Take our argument to the public. Matters cannot be any worse than they are now. I can put it no better than this member who responded to the Survey:

"Awareness needs to be raised as to what criminal barristers do, the true level of their fees, the fact that they are not co-criminal conspirators (ie they do not represent

and connive with their clients who they 'know' are guilty), and they are an independent protection of the fundamental need for citizens of the UK to have access to quality legal advice and representation at the point of need to which all, regardless of means, have proper access. The media representation of barristers, particularly defence barristers, needs to be challenged to prevent the continued perpetuation of myths which make us unpopular with the public." Quite.

So let us fight, and let us remember the option to strike. Use the momentum of the past year and of the survey. Demand better treatment. No more cuts, I say, either for the defence or the prosecution. Do not allow them to say that we must take our share of future cuts demanded by the Comprehensive Spending Review. The criminal Bar suffered cuts by stagnation in our fees for fifteen years before the Spending Review. Did public sector wages stand still from the mid-nineties? Of course not. But our fees did. And when that argument meets with a hostile reaction, as it will, be ready to strike. Those of us who completed the survey owe it to the silent workforce to encourage them to come forward too. If we can change the public perception of what we do, we can persuade the whole of the criminal Bar that our careers are worth the fight. That is the near future, looking at it this evening.

Meanwhile, we must grapple with QASA, the Quality Assurance Scheme for Advocates. Some crucial battles have already been won. Judicial evaluation for all advocates is now written into the scheme. For those who quite wrongly argue that judicial evaluation is a sign of protectionism of the Bar by former barristers now serving as judges, I say that judicial evaluation is a necessary price paid by the Bar, many of whom do not want it and resent the notion that independent advocates of any kind should have to curry favour with judges. There is much force in that, but even more force in the fact that, without judicial evaluation, there will be no proper check on bad advocacy, whether provided by barristers or solicitors.

That is why we have to concede that judges – an increasing number of whom are former solicitors, not barristers – are the only ones who observe courtroom advocacy every day, so they must be the ones to evaluate it. This has nothing to do with the Bar protecting their own. The good survive; bad advocates need not apply.

That takes me to Plea Only Advocates. Do we have a weapon here? Yes, the judges again. There is an understandable reticence to come forward and risk being painted as Bar protectionism. But we can move on this. The Plea Only Advocates issue is all about quality. Let us consider Plea and Case Management Hearings: what do they entail? If there is a Not Guilty plea, the PCMH is a trial preparation and management hearing. So only trial advocates can assist the judge in that task.

And for the avoidance of any doubt, allow me to spell it out. The Instructed Advocate is identified at the PCMH. Solicitors perform a useful task in every case between charge and PCMH, but they cannot conduct the PCMH if they are not trial advocates.

The evil lies in some who deliberately identify themselves as the IA, because that keeps their hands on the purse strings of the case. But it is an abuse of the system. I want to see every judge stopping every PCMH unless a qualified trial advocate is present. This is the only way, and I suggest the only way of there being proper compliance with the Criminal Procedure Rules.

We are lucky to have many amongst the senior judiciary here tonight. To you, and to the Council of Circuit Judges, I say please be vocal now. And when the next QASA consultation comes over the summer, make it clear: POAs cannot be allowed.

What else can we do?

Referral fees. What do the general public make of a system in which legal aid money goes to one lawyer, the solicitor, who is not qualified to conduct the case in court, but who forces the barrister who is able to conduct the trial into paying a percentage from their fee back to the solicitor, as a thank you for the case?

This is emphatically not market forces at work; it is an abuse of the legal aid system. Yet we know it is happening time and again. The Government has failed to act on this, but we must. The answer lies in telling every member of the public who appears in court that they are entitled to a barrister to represent them, and the public money to pay for that service must go only to the person who provides the service.

I favour an amendment to Plea and Case Management Forms, by adding a box to the effect that nobody involved in the case has paid a referral fee or otherwise entered into a referral arrangement affecting the case. Let us put a stop to this corrupt practice once and for all. It is only if we draw national public attention to this scandal that it will stop.

Restrained assets. Our campaign to ensure that wealthy defendants with frozen assets need not and should not be a drain on the legal aid fund has continued throughout the year. LASPO debates in the Lords were useful, with Ministers in government and in Opposition conceding that they should have looked at this long ago.

I am pleased that the Ministry of Justice undertook to consider the issue, but deeply suspicious that all they will do is look to strengthen the already watertight benefit and confiscation provisions of the Proceeds of Crime Act. What they should be doing, in the name of access to legal aid for those who really need it, is amending the legislation so that frozen assets can be taken into account when assessing means to pay for legal representation.

This would be simply done, and would reinstate the position pre-POCA, also giving parity with civil proceedings where frozen assets are routinely released to pay for litigation. So when the Government says that we lawyers just want more money from them, our answer is we want less, in the sense that we take these high value

cases out of legal aid altogether. It makes sense, and the country should be made to understand what the government continues to resist.

In these and other areas, the time has come to bypass our political masters. If they won't listen to us, let us go to the public, because that is where governments are vulnerable. Our causes are just.

In all things, I say we should do what we do so well in court already, every day. Fight without fear or favour.

I had to make a decision when elected to this job. Try to preserve a criminal Bar, a smaller, neater model? Just try to keep the best? Or represent all at the criminal Bar and do my best for all? It is very clear to me what is right. Election to this post means something. This is the only job at the criminal Bar where there is direct election by the national membership. I am proud to serve and to serve all. I shall keep going, every day.

Michael Turner and I spent time recently with our Founding Chairman, Lord Jeremy Hutchinson. Two things said by him stand out. Firstly: "I would go straight to the Lord Chief Justice and tell him the criminal Bar will not stand for this". Well my Lord, you heard it here. You are a friend of the criminal Bar. Please do everything you can. And secondly: "there was always so much good will"; amongst the Bar and towards the Bar, he meant. That has gone. We stand up and fight in court. We can do the same out of court.