Bar Conference November 2012- Sir Anthony Hooper, Fulcrum Chambers LLP

Both this government and the last government have decided that the costs of criminal legal aid must be substantially reduced.

The government cannot leave those arrested on suspicion of a criminal offence or being tried for a criminal offence to fend for themselves, as so many others in this country are being forced or will be forced to do. At least the government cannot do so whilst still obliged to comply with the European Convention of Human Rights, and particularly Article 6.

To achieve the cuts, spending on criminal legal aid has both been frozen and savagely cut. On the horizon is one case one fee.

The second chosen way of achieving the cuts to criminal legal aid is, in the words of Ken Clarke to the House of Commons to introduce a “competition strategy” for crime “once the key components of our legal aid reform package, the regulatory changes allowing alternative business structures, and the introduction of the Quality Assurance Scheme for Advocates have had time to bed down.”

The competition strategy involves a substantial reduction in the number of providers and may well involve the likes of G4s being given a contract not only to run the prisons, the court escort and probation services, but also to provide legal assistance from police station to appeal court with competition from other providers substantially reduced or eliminated.

I leave it to accountants to decide whether in fact the overall costs of the criminal justice system will be reduced. Has the law of unintended consequences been taken into account? Michael has spoken about that.

The consequences of the savage cuts is obvious to see. Senior criminal practitioners are in large numbers seeking judicial appointment as an escape from an impossible life at the criminal bar. In a recent competition for Heavyweight Crime Circuit Judges, there were 126 applicants of which 25 were recommended for appointment. In anther recent competition there were 274 candidates for the post of circuit judge of which 30 were appointed. Meanwhile in a recent competition for recorders there were 1,430 applicants for about 100 positions.

A second and much more serious consequence is that less experienced barristers are now doing work which a few years ago would have been done by silks and senior juniors. Whereas the complexity of defending serious crime and the penalties on conviction have increased (not least because of the Criminal Justice Act 2003), the level of experience of those defending in such cases has lowered. Significant cuts to prosecution budgets (as well as the increasing use of in house advocates) have had a similar detrimental effect upon the level of experience of those prosecuting. I don’t think there can be any doubt about that.

The young barrister, faced with no work because the easier work is being done by in house advocates or offered only badly remunerated less serious work, may well take more serious work for which he or she may not have sufficient experience. That work would in the past have been done by more senior barristers for whom the work is no longer financially viable. The young barrister may take the more serious work even though the Bar Code provides that a barrister must not undertake any task which the barrister knows or ought to know he or she is not competent to handle.

The third and most pernicious consequence of the savage legal aid cuts is the growth of the use of what I shall call compendiously “referral fees”. By that I mean a reward which the defense litigator demands of the trial advocate in exchange for the advocate representing the client at trial, being a reward which corruptly influences the litigator’s choice of the trial advocate. Such fees are unlawful and unprofessional. But professionalism is at risk in the face of the cuts which both branches of the profession have suffered.

These fees or rewards may take many forms. First a fee paid by an advocate to a litigator. Secondly, a service provided by a group of advocates to a litigator and demanded by the litigator in exchange for work. For example- you will only be instructed by us to do Crown Court work if you do the pre-trial work in the Magistrates’ Courts free. Thirdly, under the current criminal defence service funding regime, the advocate attending the PCMH in the Crown Court by default becomes the instructed advocate. He or she will receive the advocacy fee and may be responsible for paying, out of that fee, another advocate who conducts the trial. That arrangement has the potential of leading to a “referral fee” in the sense that I have used that phrase. The fourth form is, I believe, a common one- the litigator whose client has the benefit of legal aid for two advocates requires the trial advocate to use an in house advocate from the litigator’s firm as the junior in exchange for receiving the instructions to conduct the trial.

The consequences of introducing a “competition strategy” leading to a substantially reduced number of providers are likely to exacerbate the problems to which I have referred, particularly if the likes of G4s are given the monopoly or near monopoly of providing criminal legal aid. Many barristers and solicitors will be forced for economic reasons to move in house. Defendants will be denied legally aided access to the independent bar, which, for so long now, has provided fearless service to those charged with serious criminal offences. A defendant may well be assigned an employee whose responsibilities for the defendant, for other defendants and for the employer have to be carried out only between 9.00 am and 5.00 pm. Whereas no barrister in independent practice will hopefully ever arrive late for court or unprepared, will the same apply to employees? If the likes of G4s cannot get prisoners to the court on time, what chance of getting legally trained employees to the court on time?

What can be done about this.

The powerful tabloids whose campaigns can stop extradition may well not be interested. Much of the media, softened up by government, still see criminal practitioners as fat cats undeserving of protection or sympathy and defendants in criminal trials as wasting valuable resources by pleading not guilty.

I am very doubtful whether the expensive proposed Quality Assurance Scheme for Advocates can solve the problem.

That leaves the judges. Some say that the judges, whilst complaining privately about the lowering of standards, have not spoken out publicly about the cuts. Perhaps senior judges should do so but that would cause serious difficulties if the lawfulness of the cuts and of the “competition strategy” are challenged by way of judicial review.

So what can the judges do? His Honour Judge David Mole QC provided one solution. Sitting at Harrow Crown Court he stopped confiscation proceedings  against a defendant as being an abuse of process because the law prevented the defendant from paying for his own legal representation and legal aid did not provide him sufficient funding to pay for the necessary representation. A commendable decision. According to the Daily Telegraph[[1]](#footnote-1) more than 30 barristers from London, Leeds and Sheffield had been approached to represent the offender, but refused because they felt the new fixed-rate legal aid fees of £175.25 per day did not justify the complex workload that would be involved. The case would have involved 6,586 pages of documents and a total of 4,548 transactions to prepare for an estimated six-week hearing. Commendable refusals.

In my view judges are going to have to take a more interventionist approach. If the adversarial system is to achieve the just result of the acquittal of the defendant innocent of the charge which he faces and the conviction of the defendant guilty, on the admissible evidence, of the charge which he faces, then both the prosecution and the defence must be competently represented. If trials are to be run in a cost effective manner, the advocates must be prepared on each and every day of a trial. That may involve a great deal of work (often of a collaborative nature) between 4.15 on one day of the trial and 10.00 am on the next.

The Court of Appeal Criminal Division will quash a conviction if the incompetence of those representing a defendant at trial led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.[[2]](#footnote-2) Why should a defendant have to wait for the Court of Appeal to remedy an injustice? Why should victims and the public at large have no judicial remedy if the advocate for the prosecution is not competent? The responsibility of ensuring a fair trial in accordance with Article 6 and the Human Rights Act or at common law rests upon the trial judge and fairness does not just mean fairness to the defendant. As Lord Steyn pointed out:[[3]](#footnote-3)

"The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public".

In the adversarial system fairness can only be achieved by competent advocates.

Thus it is time, I believe, for judges to intervene and ensure both at the pre-trial stage and during the trial that both the prosecution are represented by competent advocates and, where parties are represented by two advocates, that both advocates are competent to continue even in the absence of the other. If a short adjournment can remedy a situation caused by incompetence, then a wasted costs order may be appropriate as well as a report to the appropriate disciplinary or regulatory authority. If a short adjournment cannot remedy the situation then the proper course to take may well be to abort the trial and make appropriate orders for a new trial and in relation to the wasted costs. What the judge should not do, in my view, is to continue the trial leaving the remedy for defence incompetence to the Court of Appeal and leaving no judicial remedy for prosecution incompetence.

A robust approach by trial judges would do much to meet the problems which I have outlined. And if corrupt referral fees are suspected, it is time to involve the police. That should do the trick!

1. [http://www.telegraph.co.uk/news/1930746/Criminal-keeps-4.5m-as-barristers-refuse-to-take-case.html#](http://www.telegraph.co.uk/news/1930746/Criminal-keeps-4.5m-as-barristers-refuse-to-take-case.html) [↑](#footnote-ref-1)
2. Day  [2003] EWCA Crim 1060, para. 15. [↑](#footnote-ref-2)
3. *Attorney-General's Reference (No 3 of 1999)* [[2001] 2 AC 91](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2000/71.html), 118 [↑](#footnote-ref-3)