



The Bar Council

Mark Fenhalls QC, Chair-Elect of the Bar Council

Inaugural Speech

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****CHECK AGAINST DELIVERY****

Welcome. I am delighted so many of you have been able to join us this evening for what is the last Bar Council meeting of the year and very nearly the start of my own term of office as Chair of the Bar in 2022. To those who may be watching later on “catch up” thank you also for joining.

I am not going to take up too much of your time this evening. I am under no illusions that the reason we have such a good turnout is that everyone wants to get to that part of the evening when we can enjoy the hospitality and each other’s company. Either that or some may want to get home for a few hours rest before the start of the Ashes.

I am hugely grateful to both Gray’s Inn and the staff for hosting us this evening and for the work of all those at the Bar Council involved in the organisation tonight.

Before I go any further, we need to conduct the formal business of the evening. There are two short papers in the hands of Bar Council members.

Only Bar Council members can vote. Please can the rest of you bear with us for a moment. Those with long memories will recall that last year Derek taught us to vote

with a doodle poll. This year we have emerged from the online world and can return to a show of hands. An example perhaps of something that might be possible online, but better done in person.

- Approval of committee chairs
- Casual vacancies

Thank you to those who have served on the Bar Council with such distinction – in particular as Committee Chairs - and thank you to those who continue or are now taking up their new roles.

This has been another long year, albeit one in which we have begun to live our lives again. It was almost exactly a year ago that the first positive news about the vaccines began to emerge. In January we faced a third lockdown. But as the year went on, and the vaccines worked, we have been able to see more of family and friends. Travel has occasionally been easier. To our immense relief our children have spent more time back at nursery, school, college, and university.

In the last two weeks, the news has not been as good. None of us know yet what level of threat omicron may represent and how it may affect our lives in the year ahead. But while we face a new set of risks to assess, and though we may have a bumpy winter, I am confident that whatever we face, we will adjust and adapt. Just as we have done repeatedly over the last 20 months.

Each of you here tonight has played a part, alongside many colleagues, in keeping the wheels of the justice system turning. Judges, officials, court staff, lawyers, volunteers – everyone's efforts have been remarkable.

Barristers have learned new techniques and skills in the way we have conducted cases in courts and tribunals. Organisations like the Bar Council are exploring how we best operate in the hybrid world of video and in person. What once seemed remarkable has become commonplace. It has become routine for us to hold hybrid events – like the hugely successful and recent Bar Conference. And many more, like the Pupillage Fair, have been online; extending our reach and making events more accessible. Driven in part by Derek’s technical enthusiasm, we have experimented with a variety of formats for meetings, and we will continue to explore what works best for the profession – always looking to encourage the most effective engagement in the work of the Bar Council.

Before I say any more, I want to thank our outgoing Chair Derek Sweeting QC, and the Chair of the Young Barristers’ Committee Joanne Kane. I will not repeat the tributes which were paid to them by so many at our last meeting. But all those who were fortunate enough to listen to Derek and Joanne at the Bar Conference a couple of weeks ago will know how lucky we have been to have them at the helm at such a turbulent time.

I am delighted to welcome Nick Vineall QC as Vice-Chair of the Bar, Michael Polak as Chair of the Young Barristers’ Committee and Lorinda Long who continues as Treasurer. I am very sorry that Lorinda cannot join us tonight. I look forward to working with you all as well as with our Circuit Leaders, committee chairs and the leaders of the Specialist Bar Associations.

There are several areas I want to speak about this evening. The first concerns how we train and support pupils, young tenants and each other later in our careers. Matters that I suppose might be loosely described **under the banner of “culture”**.

Like many in this room my training was distinctly analogue. Some 30 years ago I was at the old Inns of Court School of Law just on the edge of Gray’s Inn, without a mobile

phone or a computer. For all practical purposes the internet did not exist. If I wanted to make personal phone calls in pupillage, I walked up Essex Street to the phone boxes outside the RCJ. Since then everything has changed; and in the last two years the pandemic has accelerated and consolidated this transition to the digital world.

A measure of how far we have come is perhaps that today I was at Southwark Crown Court calling a witness though a live link to Cumbria, and he was using an iPad carrying all the jury materials. Making it all happen was not easy... but an elderly man with a heart problem did not have to travel and it shows what we can do when the resources are available. But it is not all good – my chair is held together by duct tape.

In distant times barrister training began with dinners in the Inn. At a most basic level we learned from anecdote and example, from speaking to others. So much of what I still value from my early years emerged from conversations in chambers with people who were not my close friends, nor my immediate peers. But they were people I could trust; and who were happy to be asked. Access to the silks and more senior barristers with their open doors was a fabulous resource. The digital era had put stress on this culture long before the pandemic. People were spending less and less time in chambers, but the last two years have made the situation far, far worse.

The pressures we have all faced have differed over the last two years, depending on whether we are employed, self-employed or have paper or court-based practices. Employed barristers working largely from home share much in common with the self-employed doing largely advisory work. Some may enjoy the relatively solitary life working from a study at home, but many more I suspect think wistfully of the camaraderie of chambers and their offices in times past.

Those who are commuting from home to a court room and back again have for years travelled less into chambers in the evening – the consequence of digital banking, email

and (for criminal practitioners) the Digital Case System.

As a result, everyone is being forced to consider what part the collective plays in their lives. Most importantly, how do we maintain the culture that was built on the face-to-face exchange of knowledge and experience and created the working friendships that have always been such a key component of a barrister's life?

Earlier this year in an online session with the Inns of Court College of Advocacy, I listened to a junior tenant describe what her second six pupillage had been like last year from April to October. She had worked in Magistrates Courts across the Circuit. Of course, all professionals - solicitors, barristers, and court staff faced the same daunting conditions. But pupils finding their feet, anxious about their insecure futures and careers were perhaps in a particularly exposed position. To have endured the conditions she and her colleagues across the Bar faced, I don't say this lightly, was heroic.

We owe our pupils and junior tenants a duty to think again about their training, and how we support them in their early years. Many of us have done our best to help our recent intakes with WhatsApp groups and the like; but it is just not as good. We must ask ourselves how we can recreate that sense of chambers where you could walk in, find people, and knock on any open door.

There are no easy answers. The challenge only grows because the average age of pupils approaches 30 and the average barrister is now approaching 50. So, what can we do? I suspect a common theme will be the need to recognise that spontaneity will not work. There is little point dropping in to chambers as one might have done not so long ago, expecting to bump into any number of friends to have lunch, a cup of tea, or an early evening drink. I think we are all going to have to be a lot more organised if we want the culture of the Bar to survive. And if we are to maintain the highest standards which

we expect of ourselves, and the public deserves.

Across the country chambers will be reflecting on their space. Do they have too much? How can they repurpose it so that it becomes more attractive and easier for barristers to maintain the vitality and health of chambers?

Speaking for myself, my chambers downsizing and returning from the commercial world to being a tenant of this Inn has been a great success. We were lucky with our timing. I suspect we are entering an era where the importance of the Inns to many of us will be greatly strengthened. I know how much support the Inns have offered to the Bar in recent years. The joint contribution to the BBA in April last year was an example of huge fillip to an anxious profession.

The second area I wanted to speak about is **Regulation**.

The Bar Standards Board has published a current consultation entitled: "Our Proposed Strategy for the Next Three Years". Some of you may have participated in round table events that I understand the BSB has organised. I would urge you all to read the document and respond. Last week there was a second consultation launched that we all need to consider too. This relates to the substantial budget increases sought by the BSB for the year 2022/23.

Under the complex system bestowed upon us by the Legal Services Act 2007, the General Council of the Bar is the Approved Regulator. We remain the representative body; but the regulatory function for barristers is performed by the separate BSB.

The GCB is obliged to consult the profession about the planned budget for the coming financial year, and the implications for changes to the Practising Certificate Fee (PCF) before submitting the PCF proposal to the oversight Regulator, the Legal Services

Board, for approval. The consultation on the budget and the PCF covers the business plans of both the Bar Council and the BSB.

If you did not know already, of the money raised under the annual PCF, some 70% goes to the BSB and only 30% to the Bar Council. This is one of the reasons that the Bar Representation Fee is so important to the work that we do on your behalf and why we urge everyone to pay it.

Under LSB rules, the Bar Council cannot accept or reject the BSB's budget. We can seek further information, where there are reasonable grounds to do so, to be assured that the required resources and budget are 'reasonable'.

It does not take much imagination to see that a profession burdened by the stresses and strains of the last few years might be less than enthusiastic about increases in regulatory costs unless there is a reasonable and objective justification. The profession might wish to ask questions about whether or not the Regulators are concentrating, as they should be, on their core responsibilities. Many might reasonably wonder why it is that, unique amongst the professions, we appear to be paying for the regulation of tens of thousands of unregistered people (growing at around 2,000 per year) who have never completed their professional training. The profession might also reasonably want to ensure that the Regulator is not exploring ground that should properly remain within the domain of the representative body.

There are no clear answers, but this debate is going to run and run next year. The budget consultation was launched last week, and I have no doubt that more will be coming down the track from the LSB too. Please read the consultations, discuss them with your colleagues and respond. We need your views.

Thirdly, Capacity and Backlogs – Pressures on the System

Last year we rightly celebrated the re-opening of the spaces in which we could conduct the business of the courts and tribunals. I am happy to applaud the Ministry of Justice for the work it did at the height of the pandemic in 2020 to reopen the courts. But the debate has now moved on, with different emphasis in different jurisdictions. None of you need to be reminded that the backlogs existed long before the pandemic. This was the result of political decisions to spend less and to limit capacity in the system.

Recently I was sent an image from twitter where a non-profit organisation had mapped public perceptions of public spending against the actual numbers. I don't promise you that the statistics are wholly reliable, but they are interesting and may tell an important story. The public thought that in 2019/20 the Government spent 12% of its budget on 'police and crime', while the graph I saw suggested the real figure was 3.9%.

Whatever the truth, as we all strive to play our part in helping the justice system recover, we all want decisions that affect us to be made on the basis of reliable data, rather than perceptions and prejudice.

In the November 2021 Spending Review, the Government announced a £3.2 billion increase in funding for the MoJ by 2024-25 (taking the total settlement to £11.5 bn). If delivered this would reverse a decade of cuts to the justice system.

The Bar Council acknowledged the increased budget announcement, but it remains to be seen how the final settlement is structured and how money will be spent. Even if the figures prove to be accurate, I fear it will take more sustained investment to reverse the effects of decline that a decade of cuts have inflicted on the health of the justice system.

Challenges exist across all jurisdictions.

Starting with civil: You will have heard us say before that five years after the court reform programme began, the county court remains largely paper based. At the start of the programme in 2016 it took an average of 30 weeks for a small claims case to reach a final hearing. Statistics for January to March 2020 (before the start of the pandemic) show that figure increase to just under 40 weeks.

In the period July to September 2021, the impact of Covid on waiting times was marked. The mean time taken for small claims and multi/fast track claims to go to trial was around 12 weeks longer than the same period in 2019 respectively.

This is the sort of litigation in which the vast majority of the public are likely to be involved, and now takes about three months longer than it did five years ago.

In the family courts, the quarter from April to June this year saw a 14% increase in new cases. The average time for a care or supervision case to reach first disposal was 44 weeks in April to June 2021 - up 8 weeks from the same quarter in 2020. 22% of cases were disposed of within 26 weeks – down 11% compared to the same period in 2020 and the lowest since 2012. The Judges and lawyers who work in the family division have done a remarkable job through the pandemic, but these figures show that demand is outstripping capacity.

The jurisdiction that attracts most public debate is the **Crown Court**.

The National Audit Office report “Reducing the Backlog in the Criminal Courts” published in October 2021 exemplifies what every independent inquiry discovers. It identifies the court backlog as having been a pre-existing problem, largely caused by underfunding, and worsened by the pandemic. The NAO warns that the MoJ needs to provide clearer leadership and improve data and information sharing if it is to keep the backlog manageable in the coming years.

Over the weekend you may have seen the Government trail several announcements in the media, focusing on law and order as part of its '**Crime week**'. Thus, we learn of new strategies to tackle the business model of drug gangs, a consultation to enact the Victims' Code into law, and a prisons white paper. At a later point we are told, score cards will be launched which, it is hoped, will shine a spotlight on where there are delays in the system. There is, we are told, likely to be an emphasis on driving up prosecutions and convictions in rape and serious sexual offences.

It is vital that the Bar Council responds to the detailed proposals when they emerge, rather than speculate about the press reports.

At all times the Bar Council will do whatever we can to point out what we think will help achieve timely, accessible justice for all. We will not be shy of explaining what we think might be less successful, or indeed contrary to the public interest.

On television on Sunday, I heard the Lord Chancellor respond to one question (about a possible new offence) by saying "we should enforce the laws we have got". I could not agree more. The answer to so many of our problems in the criminal justice system is not new laws (nor for that matter ever higher penalties for the small proportion of cases that do get prosecuted). Rather we should enforce the laws we already have.

The Government has made strong and clear commitments to restoring public faith in the criminal justice system by increasing the charging and prosecuting of rape and serious sexual offences. The Bar stands ready to play its part in ensuring that these allegations are tried justly.

But we have to ask ourselves if we have the people to meet the public demand? In crime the answer is frankly 'No'. There are not enough judges or barristers. The backlog is not just much bigger than it was before; the extra problem we face is that the

composition of the backlog is far more challenging, as the proportion of complex and difficult, often multi-defendant, trials has increased.

As I said before in a different context, the profession is ageing rapidly, far faster (I suspect) than society. You only have to look at the composition of your chambers. Over the last decade barristers have sought to diversify away from criminal work. And they will not come back lightly. Many of those who remained last year lost six months of income as jury trials stopped. The insecurity borne from the sheer uncertainty of self-employment last year should not be underestimated.

Attracting and keeping high quality people to work in the criminal jurisdiction is vital to the public interest, that cases be tried fairly within a reasonable period. So how can this be done? There are three things I suggest as a starting point. The first two require long term commitments.

- Plan a proper refurbishment of the court estate. It may take a decade to repair the rooves and broken windows, to replace the failing heating and ventilation systems. But the estate has suffered decades of neglect and we have to acknowledge that it will take a long time to fix.
- Persuade Government to invest in a system that would offer all crown court cases a trial date within six months of first appearance. This would, I suspect, vastly increase guilty pleas, and reduce the attrition of complainants and witnesses who otherwise lose heart as cases are delayed for years.

Before I leave this second point, I must say something about the weekend press reports about the Government proposal to expand the availability of section 28 pre-recording of evidence for all rape complainants. We do not know if the Government's intentions are reflected in the press reports. But I am bound to observe that the experience of

most criminal barristers is that the courts are not using the s28 powers we already have. Why? First, because the police and the CPS just do not have the time and resources to prepare the prosecution case and assemble the material that should be disclosed before these hearings can take place. Secondly, the courts are finding the exercise in scheduling these hearings to be causing more delay and trouble elsewhere in the system. We should not assume that more of s28 necessarily works in the interests of complainants.

My third suggestion is one that could be addressed in a far shorter time frame -

- Pay barristers who work in the criminal courts a reasonable rate for the work they do. And stop requiring them to do huge amounts of work for nothing.

This brings me to the **Criminal Legal Aid Review** (CLAR). We understand that Sir Christopher Bellamy's report was sent last week to the Lord Chancellor, and we very much hope it is published before the parliamentary recess next week.

I am the first to acknowledge that we cannot expect a full Government response by then. But it seems to me that it would help both solicitors and barristers alike if the report is published in full and as soon as possible, with more proposals to follow early in the New Year.

The Government must offer proposals that convince criminal practitioners that they have a future. If it does not, then I fear that people will continue to vote with their feet and migrate to other, better paid areas of legal work or leave the profession.

Fourthly, Race. I could not make this speech without referring to two reports. The first is the Bar Council's superb Report: "**Race at the bar: A snapshot report**" published a month ago. The co-chairs of our Race Working Group Barbara Mills QC and Simon Regis have worked tirelessly with the Group, Bar Council staff and many others to

produce a report that I think should be required reading for every chamber's management committee, each Inn - ideally all of us. The data shows us that what we feared from anecdote is true. I would like to quote four key findings:

- The report categorically and definitively evidences, in quantitative and qualitative terms, that barristers from ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar.
- Candidates from ethnic minority backgrounds are less likely to obtain pupillage than candidates from White backgrounds, even when controlling for educational attainment [university ranking, BPTC grade and degree class].
- Even when factoring in practice area, work volume, region and seniority, women earn on average less than men. Black men earn less than White men, and Black and Asian women earn less than Black and Asian men. Black women earn the least. The income differentials vary between practice area but are significant.
- Black and Asian barristers are under-represented in taking Silk (becoming Queen's Counsel). There are just 5 Black/Black British female QCs and 17 male Black/Black British QCs in England and Wales. There are 16 male and 9 female Silks of mixed ethnicity. There are 17 Asian/Asian British female QCs and 60 male Asian/Asian British QCs. This compares with 1,303 White male QCs and 286 White female QCs.

These numbers may shock some of you. But the data is clear and there is no room for inaction. As Derek said in his foreword to the Report: "the overall conclusion is clear; there is a moral and practical imperative for the profession to urgently promote diversity and to be more reflective of the society it serves."

The second publication is the admirable report of the Northern Circuit published on 30 September. It is an excellent piece of work and one that poses similar important questions.

For many years I thought the right thing to do as a well-meaning, liberal, privileged white male was to be colour blind and treat everyone equally. To say nothing and almost disregard the question of race. I now believe I was wrong. All of us have a responsibility to ask difficult questions of ourselves – what are we doing to address this? In 2022 I will do everything I can to continue to drive this action forward and promote greater diversity at the Bar.

Part of this process involves the outreach work that so many institutions at the Bar are engaged in. And there is much to celebrate that is undertaken by the Inns, the Circuits, the SBAs, many Chambers, or by a charity close to my heart, The Kalisher Trust. All of us are working to try and improve access to the Bar from under-represented communities. And as far as the Bar Council is concerned much of the vital work we do in this area is funded by the annual contributions made by the Inns. We are ever grateful for their support.

Our regulators have also carried out and plan work in this area. We welcome all input, but the task of regulators is to set and enforce minimum acceptable standards. The role of the professions is to identify and promote excellence and best practice as the Bar Council and Northern Circuit Reports have done. That is, after all, the purpose of a profession. It is often a difficult boundary. But it is an important one in all areas for two reasons. First to avoid duplication and unnecessary increased regulatory costs. Second, because the steps we need to take are far more likely to succeed if the profession sees them as desirable and necessary, voluntary rather than imposed from the outside.

Fifthly, **Net Zero by 2030**

In a similar vein you may think it is time for the profession to be considering what it can do to achieve net zero by 2030. Some may remember a discussion paper circulated to Bar Council at the beginning of the year, prepared by the Pro Bono and Social Responsibility Committee.

The Bar Council already runs the Bar Sustainability Network, which helps chambers and other organisations 'Measure, Target and Reduce' their carbon footprints. In addition to setting its own targets, I hope that early next year the Bar Council will encourage all Chambers to set ambitious targets, and to reach Net Zero by 2030. And as part of this process, where carbon cannot be reduced, we should explore an offsetting fund that will enable chambers to offset both historical and current emissions.

Sixthly, lastly, **the Rest of the World**

We have left the EU, but we remain close to our counterpart associations across Europe and the rest of the world. This co-operation will continue at many levels. Only last Saturday the YBC held an excellent event in conjunction with The American College of Trial Lawyers and the American Bar Association Litigation Section.

The Bar of England and Wales is known and respected for its huge contribution to a multitude of European law projects, including those in competition law, company law, human rights as well as in many other fields. That reputation for offering a world class service should not be lost. It is a source of wealth and influence for our country.

These contributions will continue, and the Bar Council will continue to work to ensure the Bar has as few barriers as possible to practising abroad (in EU and worldwide) and that there are no unnecessary obstacles in the way of lawyers who wish to practice here.

And of course, we shall keep a watchful eye on **rule of law violations and threats worldwide**. As the Bar Council reported in 2020, the pandemic has been used as an excuse for attacks on the rule of law in many places; we shall continue to monitor unjustified threats and attacks on the legal profession, and we will work with the Bar Human Rights Committee and foreign Bar associations to uphold the rule of law and the independence of lawyers. The treatment of lawyers varies enormously – from attacks that involve a politically inspired ‘twitter pile ons’ to far worse. Maintaining the freedom of lawyers to practise, to allow their clients to use the courts to seek redress, if their rights have been infringed, is essential to the rule of law.

Early in the year we faced the unprecedented situation where a nation (China) sought to impose sanctions against individual lawyers and others in wholly unjustified circumstances. In August we were all shaken by the rapidity of the collapse of Afghanistan. The Bar Council worked behind the scenes to try and assist judges and lawyers in their evacuation efforts, while the coalition airlift continued. Many of you will have heard Mrs Justice Maura McGowan being interviewed by the BBC in October describing the work she and others have been doing throughout 2021. We applaud the work of all those who have sought to assist people who have made it to the United Kingdom and hope that the Government will make every effort to help the many that still remain in Afghanistan who are in desperate need.

Finally

In the run up to tonight I have been asked several times **what my priorities are for next year**. The truth is that most of all, I think we all need a quiet year where not much happens. One where we can all start to take a little more pleasure in our jobs again. One where we can see enough of our friends and family.

I fear however that this ambition is a little whimsical and the pressures will not ease. So, I will just conclude by thanking all the barristers all who have contributed so much

of their time to the Bar Council. I'd also like to thank the Bar Council staff who have worked so hard in 2021. I wish you all the best possible break as we reach the end of the year.