



The Bar Council

## **Derek Sweeting QC, Chair-Elect of the Bar Council**

### **Inaugural Speech**

**14 December 2020**

#### **\*CHECK AGAINST DELIVERY\***

Welcome to everyone watching. I am delighted that so many 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 2021.

It is a mark of the distance we have travelled in our use of technology that an event of this sort and our successful online Bar Conference and Pupillage Fair now feel routine, even if concerns about whether there will be a technical glitch have not entirely disappeared.

The only business of this meeting is the approval of committee chairs and the address of the Chair-Elect. The short formal part of the meeting is normally followed by a reception. We will not have the pleasure of a social occasion this year but that is no excuse for extending proceedings. So, let me begin.

I would like to start by thanking our outgoing Chair Amanda Pinto QC, the Chair of the Young Barristers' Committee Katherine Duncan, and our Treasurer Grant Warnsby. I will not repeat the tributes which were paid to them at our last meeting. It is enough to say that in a remarkable year we have had remarkable leadership.

I welcome Mark Fenhalls QC as Vice-Chair of the Bar, Joanne Kane as Chair of the Young Barristers' Committee and Lorinda Long as Treasurer. I look forward to

working with you as well as with our circuit leaders, committee chairs and the leaders of the Specialist Bar Associations.

Members of the Bar Council 2021 will need to vote on the proposed committee chairs at the end of this meeting; not with the traditional show of hands but by means of a "Doodle Poll" - another first for this annual meeting.

This has been a long year. A year of absence. The absence of many of the things that bring joy, the physical presence of family, friends and neighbours, the ordinary pleasures of social and civic life not conducted at a distance or under fluctuating restrictions - enforced absence from places of work, places of worship, schools, universities; the full list is lengthy one.

For the self-employed Bar there has been the absence of our core activity: regular advocacy in the courtroom, as well advice given face to face and the many, unplanned, interactions with colleagues, court staff and litigants which make up our daily working lives.

For some there has also been a simple absence of work and income; a struggle to survive which is not yet over.

My own career has, I hope, given me a wide perspective on work at the Bar and what will be necessary for our recovery. The first 15 years were spent mainly in the Crown Court, mostly on the Midland Circuit, followed by a period where much of my work was more commercial, particularly in the Technology and Construction Court; in the last decade clinical negligence, personal injury and the Iraqi Civilians' litigation has been the focus. Some 20 years as a Recorder and Deputy High Court Judge has also given me an insight into the view from the other side of the court.

In the face of an historic challenge, adversity has shown us our strengths. Flexibility, resilience and a shared commitment to keeping our justice system running have characterised the response of the Bar, solicitors, the judiciary, the Crown Prosecution

Service, the Courts and Tribunal service and the many other agencies and organisations which are vital parts of the whole.

The reopening of some Crown Courts by the middle of May, and steady progress in building capacity in the criminal courts through improved safety measures, novel use of the existing court estate and the setting up of Nightingale Courts was a huge collaborative effort often driven at regional and local level. It may even justify the overused term “world beating”.

In other areas technology was able to fill the gap, however imperfectly, and to allow us to carry on working. In some jurisdictions such as the family court, the absolute necessity to hear cases rather than adjourn meant that both practitioners and judges were early innovators. In the higher courts, work resumed at reduced but effective levels.

In March, at the beginning of lockdown, the question was essentially a technical one, what could we do online? There was much debate about the merits of one platform over another and a rapid process of familiarisation.

But things have moved on; as we look forward the question is what should we do online? The limits of technology, its vulnerabilities to the weakest link in the chain, have become apparent, as has the need, in many situations, for important decisions to be taken only when everyone is in the same room.

We now need to take a strategic view of what is to be retained from the working practices forced upon us by the pandemic. The clarity of view from the senior judiciary as to what should be considered a thing of the past is not always, in our experience, widely shared. It should be possible, without encroaching on individual judicial discretion, to have broad agreement or even guidance as to what the starting position should be in striking the balance between in-person and remote hearings.

This should be part of a wider move to the use of technology within our justice system. The need to move away from paper and to simplify and adapt our procedures could

not have become clearer. The court reform programme should not proceed as if a pandemic had not occurred. We would urge ministers to take the opportunity to consider what now needs to be done, and funded urgently, as a result of the lessons learned.

It has been a real strength this year that the Lord Chancellor and the Law Officers have long personal experience as legal practitioners, as does the Director of Public Prosecutions.

It is why, I suspect, that Bar leaders have had unprecedented access to ministers, officials at all levels and the Crown Prosecution Service. Again, the impact of technology has been striking. Although we have been physically distant, we have been able to work together closely. For the first time, in my experience, there has been a genuine desire to share data and management information and, on some occasions, to change course as a result of our input. We have also been able to understand and support difficult decisions where it was appropriate to do so. That has allowed us to build trust and working relationships. There have been frank exchanges and differences of view, but I think there is now a common desire to ensure that the best aspects of these working arrangements are continued.

So, there are many positives from the response to the pandemic, but the challenges we have faced this year have also uncovered and highlighted weaknesses. They have demonstrated the fragility of a system that has been subject to sustained cost cutting and underfunding.

Whatever differing views there may be as to the size and role of government, it is a core duty of the state to provide a functioning justice system. Instead, we often have courts that struggle to function and are under-resourced, with low-paid staff working in crumbling buildings.

Over the last ten years most European countries have increased their spending on their justice systems. We are among a handful where there has been a steady decrease and we comfortably lead the field in terms of the scale and depth of the cuts.

Over much the same period, criminal barristers have faced reductions to fees of between 30% and 40%. Many are leaving the profession or moving into other areas of work. Advocacy in the criminal courts is increasingly being conducted by an ageing group of criminal barristers and solicitors. Introducing changes to court hours that will exacerbate that trend and may well prove to be discriminatory is not a solution and certainly not one that should be contemplated without clear evidence that it is both necessary and effective.

There are increasing numbers of unrepresented defendants who fall outside the legal aid system. Those who pay for representation can be ruined financially and unable to recover all of their costs when they are acquitted. The backlogs in the Crown Court at the outset of the pandemic were an unenviable starting position; the result of cuts to sitting days which in the peculiar currency of the court service are simply another way of describing cuts in expenditure.

These problems are by no means confined to the criminal courts. Some four 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. The MOJ Civil Justice statistics for Jan to Mar 2020 (prior to the start of the pandemic) show that it now takes just under 40 weeks; low-value litigation, the only sort of private litigation in which the vast majority of the public are likely to be involved, now takes around three months longer than it did four years ago.

Deliberately diminishing the justice system through neglect seems to many to be an entirely fair description of the political decisions that have led to this state of affairs. The social effects of a justice system that does not function properly may be difficult

to measure but they are real. The false economy involved in withholding funding is not difficult to evidence.

The tragedy is that it does not need to be this way. As the Lord Chief justice memorably put it in his recent speech to the Bar Conference the funds required are, viewed across government spending as a whole, comparatively modest: *“little more than a rounding error in [the budgets of] many departments”*.

Perhaps we can begin to see a change of approach. The outcome of the recent Spending Review is that the MoJ budget is to rise by 5% next year with an increase in spending of about £1.4 billion. It is the second year in which there has been an increase, but if we are to rebuild an effective justice system it should not be the last.

We welcome the Lord Chancellor’s recently announced ambition to appoint a Chair for the Criminal Legal Aid Review by the end of the year and to conclude and implement the review during 2021. We hope that the overused term “at pace” means, in this case, quickly and with a sense of urgency.

There is another way in which our justice system is diminished; that is when lawyers are attacked by politicians simply for doing their jobs. Language matters, particularly when it will inevitably be interpreted by some as condoning unacceptable behaviour. It is sad to have seen yet another member of the Bar attacked recently on social media for defending a troubled woman in a murder trial. The fact that the Tweets which were the vehicle for the attack used a derogatory description of lawyers which first appeared in a Home Office Twitter feed tells us all we need to know about the broader dangers of playing to the worst of human emotions. I am pleased to see that there have been firm responses from the Lord Chancellor. I hope a responsible change of tone within Government will follow.

I could not give a speech such as this late in 2020 without saying something about race, inequality and discrimination. The events of last May in Minneapolis ignited protests around the world and highlighted continuing race inequalities in society at

large. They have given further impetus to our efforts to understand and address how these operate in our profession; particularly around the entry and progression of Black barristers.

We must ensure that the momentum towards confronting these issues and securing permanent change is not lost. The work of the Bar Council's Race Working Group is the focus of our efforts. Through its inclusion of so many race-related groups across the profession, such as the Black Barristers' Network to name but one, it is well-equipped to lead change towards a Bar that is truly representative and does not overlook talent because of ethnicity.

We need to keep progress in this area at the forefront of what we do. I have invited Barbara Mills QC and Simon Regis, the Co-Chairs of the Race Working Group, to join the General Management Committee of the Bar Council in 2021.

A year on from the formation of the Working Group, we intend to hold an event in July for all across the profession involved in our work in this area to review progress and look forward. It may well be the first significant in-person event that we conduct in 2021.

We cannot be content with anything other than real change in a timescale which is not measured in decades. We need to set tangible short-term targets and track whether they are being met.

On a personal note, in 2021 I will be mentored by a young Black member of the Bar. That is an individual decision, but I hope that other senior members of the Bar will also consider signing up to the Bar Standards Board's reverse mentoring scheme.

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. That is after all the purpose of a profession. It is often a difficult boundary. But it is an important one in all areas if duplication and increased regulatory cost is to be avoided.

We are careful to take this approach in our working relationships with the Inns of Court, who annually fund work which the Bar Council is well-placed to carry out and which should not be duplicated. We are grateful for their support.

It has been clear from an early stage that the pandemic will have a disproportionate effect on certain areas of the Bar. We know that whilst many criminal sets have prioritised the funding of pupillage, there have been and will be gaps.

We must not accept the exclusion of bright talent from the Bar as an inadvertent consequence. I am pleased to announce this evening that under a scheme administered by the Bar Council, a number of commercial chambers and groups of members of commercial chambers will be funding criminal pupillages which have been postponed, cancelled or which would otherwise not be available as a result of Covid-19. I want to thank members of the following sets for participating:

20 Essex St: Atkin Chambers, 3 Verulam Buildings, Matrix, Brick Court, 4 Pump Court, Blackstone:

Because this scheme has been set up at short notice, as an emergency measure, I know there are other sets which are also likely to join the scheme. Quadrant Chambers is meeting the same need by another route.

Special thanks must go to Keating Chambers and Lucy Garrett QC who started this ball rolling in September and have been instrumental in gathering support from across the commercial Bar. Keating is in the last stages of putting its own arrangements in place with a criminal set.

Next month we finish the Brexit transition period. We leave the EU but not Europe: we shall keep up the excellent relations we have with European institutions and the Bar Council's counterpart associations. 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 should not be lost. It is a source of wealth and influence for our country.

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 we do not put unnecessary obstacles in the way of lawyers who wish to practice here.

As we leave the transition period, the Bar Council is working towards creating a forum for common lawyers in Europe to discuss the future, and we shall put on a major event in 2021 to bring together the Bars of the home countries with those of Ireland, Cyprus and the other common law jurisdictions in Europe.

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 independence of lawyers and the rule of law and to ensure that access to justice is available to everyone.

The true joy of life, as George Bernard Shaw put it, is to be used up in a cause that we recognise to be a mighty one.