

## **THE LAW SOCIETY'S CRIMINAL LAW CONFERENCE**

### **Fighting for Justice: The Battle Lines are Drawn**

*Fighting for Justice, Chancery Lane 4 May 2012*

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#### **Introduction**

In May 2012, the Law Society hosted its annual Criminal Law Conference, this year entitled 'Fighting For Justice'. The conference focused on the future of legal aid funding in criminal law services, particularly criminal defence representation in the police station and courts. What emerged from the conference was the impression of a defence profession embattled by Government reforms and cuts. In this report four of the addresses given will be summarised with critical commentary. The review is broadly divided between two 'sides' – the Government, with its pro-reform approach, and practitioners and academics, critical of the changes that have occurred in criminal funding and procedure in recent years. However, one address attempted to straddle both sides of the argument with interesting reactions. Whichever way the conflict is resolved, there will clearly be significant implications for criminal defence practice and procedure, adversarial justice, and fair trial rights in England and Wales.

Criminal law and practice are unquestionably vital elements of any stable society. In a time of deep cuts to public spending, the administration and delivery of criminal justice has become progressively tougher and the risks to the concept of 'justice' more pronounced. In this context, the Law Society chose to host a fascinating and insightful conference headlined with a keynote speech by the Attorney General, Dominic Grieve. Aimed at practitioners, the conference tackled various issues of significance, but with a golden thread running through all: the challenge of ensuring justice is done in the face of severely adverse economic conditions. An apt feature of the conference was its adversarial nature. Two divided sides clashed over the future direction of criminal services which I will attempt to capture and comment on these divergent strands of thought.

#### **In The Blue Corner . . . The Government**

Dominic Grieve, the Attorney General, represented the Coalition Government's perspective on the central challenges facing criminal services – providing fair and effective justice in a

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time of austerity, and the ongoing conflict between efficiency and quality. He noted that the dominance of technology meant modern life is 'faster' and therefore justice needs to be faster too. He argued that embracing digitalisation and electronic processes – such as using tablets in court – could achieve cheaper and quicker justice in austere times, whilst maintaining quality service. He also cited the Early Guilty Plea Scheme as a contributor to greater efficiency; he argued that since most defendants plead 'guilty' at present, prompt disposals and more cooperation would facilitate 'just and expeditious' proceedings but with firm safeguards retained. The Attorney General pinpointed the problem of poor Crown advocacy, a frustration for both victims and defendants, but hoped that the Quality Assurance Scheme for Advocates (QASA) would help raise standards. Finally, he stressed the importance of securing adversarial justice, a system which he suggested 'delivers qualitatively better fairness'. To survive, supporters of the tradition had to recognise the need for efficiency notwithstanding the defence lawyer's overwhelming duty to the client. He warned that lawyers who 'spin out' proceedings to benefit defendants would 'destroy' the system, and asserted that client obligations must promote efficiency, fairness, and public confidence.

The Attorney General's address followed a familiar pattern in Government policy: emphasis on financial prudence, efficiency, and 'managing' criminal justice. He perhaps over-simplified the projected benefits of technology for efficient and effective justice; one might argue that less paper and more equipment do not compensate for ongoing issues of human error, widespread systemic bureaucracy, or the critical need to consider substantive legal and evidential issues from multiple angles. The inference that using tablets in court will fix these wider problems is equivalent to applying a plaster to a leaking dam. The Attorney General advertised the Government's troubling attitude towards due process and human rights. Justifying cooperation and early pleas because 'most people plead guilty' seems to ignore the fundamental entitlement to put the prosecution to proof, the notion that the prosecution carry the burden of proof, and the fact that miscarriages of justice do happen (an example being the recent case of Sam Hallam<sup>2</sup>). The 'firm safeguards' referred to exist in large part to guard against human fallibility, often the result of too much speed and too narrow a focus at too early a stage – the Cardiff Three being a prime example.<sup>3</sup> Generally, the Government agenda places overwhelming emphasis on price and speed, with an assumption that cost and time in criminal proceedings are by default inefficient and ineffective, and not worthwhile. The accusation that defence lawyers generate cost by 'spinning out' proceedings

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<sup>2</sup> Sandra Laville, 'Sam Hallam Released After Seven Years In Prison', *The Guardian*, 17 May 2012 <http://www.guardian.co.uk/uk/2012/may/16/sam-hallam-released-seven-years>

<sup>3</sup> *R v Paris, Abdullahi and Miller* (1992) 97 Cr App R 99.

triggered some animosity amongst the delegation of mostly practicing criminal defence lawyers. One delegate argued the 'biggest problem' for defence lawyers was CPS inefficiency, adding that fixed fees meant defence lawyers had no incentive to 'spin out' proceedings as it would ultimately be less profitable.<sup>4</sup>

### **In the Red Corner . . . Lawyers and Academics**

Greg Powell, defence solicitor and Managing Director of Powell Spencer & Partners, opened his address by suggesting that police misconduct remains a very real problem, and legal advice in the police station is therefore vital.<sup>5</sup> He briefly compared police station advice in England and Wales with European jurisdictions, suggesting that England and Wales has a comparatively well-funded and effective system.<sup>6</sup> However, he warned that the quality and value of the service here would be damaged by current trends. Powell claimed that fixed fees and problematic timetabling had made the job of ensuring advice is available very difficult, concluding that it was hard to be efficient, profitable and effective. He noted that many suspects still do not receive or request advice at the police station, often because police officers suggested it would take too long or that the alleged offence was not serious enough to merit advice.<sup>7</sup> He also suggested that a culture of managerialism had made 'process' an overriding priority. Powell asserted that advice remained of a high quality at the moment and stressed that access to representation continued to sit at the heart of fairness, regardless of economics. He argued that defence representation had 'restricted the police's latitude to slip outside the framework of rights', although they clearly still had the capacity to 'misbehave'.<sup>8</sup> Advice had to be imaginative and probe how vulnerable clients might be under pressure. He concluded that choice, access, independence, continuity and contact will define the future integrity of the relationship between the defence lawyer and suspect.

Powell's address contrasted markedly with that of the Attorney General. The latter focused on cooperation and efficiency; the former, whilst expressing pride in the current system, warned of the serious danger of collapse should over-zealous cost-cutting and obsessive managerialism be pursued. Powell placed great emphasis on the need to regulate the police

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<sup>4</sup> This raises an issue in itself – the notion that profit potentially comes before client needs. Defence lawyers might argue this is about survival: a necessity in the current system. Others might simply argue that 'spinning out' proceedings is of no benefit to clients and thus not part of the role.

<sup>5</sup> See the recent case of *R v Maxwell* [2010] UKSC 48. Delivering the lead judgment, Lord Dyson, stated that the police 'systematically misled the court, the CPS and counsel by concealing and lying'.

<sup>6</sup> For a full discussion of the varying standards of representation across Europe, see Ed Cape, Zaza Namoradze, Roger Smith, Taru Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010).

<sup>7</sup> Only 54% of a sample of police suspects sought legal advice despite the universal right to representation. See Vicky Kemp, *Transforming Legal Aid: Access to criminal defence services* (Legal Services Commission, 2010).

<sup>8</sup> See FN5.

– a history lesson still relevant today.<sup>9</sup> The problem of overt and subtle abusive behaviour by police officers appeared to be underestimated or even ignored in the Attorney General's address. Powell made much of it. This was reiterated by one delegate who pointed out the problem of delays and costs thwarting effective defence work in the police station. He provided the example of the police 'taking their time' and disrupting communication between the client and lawyer, causing the former to decline advice. Powell commented that the police commonly use timescales to subvert legal advice, an effective ploy since defence representatives are 'captured by fee constraints'. Powell's address was undoubtedly pessimistic (and perhaps more realistic) about the future, with a lingering suggestion that 'choice, access, independence, continuity and contact' will be adversely affected.

Following Powell was Jenny McEwan, Professor of Criminal Law at Exeter University. She commenced by asserting that defence lawyers are now burdened with multiple obligations to help the prosecution. She suggested that the defence are effectively obligated to disclose everything they intend to do or say at trial, citing the example of 'identification of the real issues'.<sup>10</sup> She argued that case law had substantially extended the boundaries of what should be disclosed, granting the prosecution the chance to amend or correct its case with the defence's help.<sup>11</sup> McEwan criticised the level of detail required about the defence case – half-jokingly summarising this as 'however much the prosecution need'. Information required includes the nature of the defence, the reasons for taking issue with the prosecution, and all information about any 'technical' issues.<sup>12</sup> As such, she argued that the defence was effectively obliged to supply a pre-ordained and inflexible trial case in advance, with the case statement essentially constituting *the defence*.<sup>13</sup> McEwan highlighted how the courts will re-open cases so that the prosecution can correct 'technical' errors or omissions – and the defence are scolded for failing to disclose knowledge of them.<sup>14</sup> She criticised the impact on

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<sup>9</sup> See *R v Lattimore, Salih and Leighton* (1975) 62 Cr App R 53 – the infamous 'Confait' case. Two children and a young man (Lattimore) were arrested and tried for the murder of Maxwell Confait. Lattimore was convicted of manslaughter, the others of arson. The convictions of all three were later quashed and the police heavily criticised for their investigation and handling of vulnerable suspects. The case led to the establishment of the Royal Commission of Criminal Procedure (1979-1981), the enactment of the Police and Criminal Evidence Act 1984 and the creation of the Crown Prosecution Service.

<sup>10</sup> Rule 3.2(2)(a), Criminal Procedure Rules 2011/1709.

<sup>11</sup> See *R v Rochford* [2010] EWCA Crim 1928, *R v Gleeson* [2003] EWCA Crim 3357, and *R (DPP) v Chorley Justices & Anor* [2006] EWHC 1795.

<sup>12</sup> See *R v Tibbs* [2000] WL 406 and *Chorley Justices*.

<sup>13</sup> The frequent use of the moniker 'case statement' is, as Hughes LJ highlighted in *R v Rochford*, technically 'erroneous'. Under to ss.1(2) and 5 of the Criminal Procedure and Investigations Act 1996, the 'defence statement' is mandatory in Crown Court cases. It is voluntary in the Magistrates' Court, according to s.6 of the legislation and Rule 22.4 of the Criminal Procedure Rules. Otherwise a Trial Preparation Form is used. For a good summary of current procedures, see *R v Newell* [2012] EWCA Crim 650.

<sup>14</sup> She referred to *Karia v DPP* (2002) 166 JP 753, *Gleeson*, and *Leeson v DPP* [2000] RTR 385.

fair trial rights, suggesting that defendants are effectively compelled to partially incriminate themselves and abandon the right to silence when information is required by the Court.<sup>15</sup> She questioned the recent 'Stop Delaying Justice!' initiative, which seems to pressure defendants to disclose before they fully understand their case or the evidence against them. Finally, she questioned whether prosecutors had an equivalent duty to correct defence errors under the Criminal Procedure Rules, and whether this truly translated into practice.

McEwan's address was combative, raising serious questions about the integrity of foundational aspects of criminal justice in England and Wales. The Criminal Procedure Rules and surrounding case law typify a change in attitude to the role of the adversarial criminal defence lawyer – something McEwan repeatedly highlighted. Cases like *R v Gleeson* and *Chorley Justices* have, through their interpretation of the Rules, substantially re-oriented the defence role. The Rules appear to have catalysed the judiciary, subtly reforming adversarial procedure via the court room, ushering in a significant culture change in English and Welsh criminal justice. This has been achieved through much interpretation and extension; the Rules are littered with vague and malleable expectations. As McEwan highlighted, the 'identification of the real issues' is a primary example, generating concern about flexible interpretation – something judges have embraced. McEwan's address hinted at an imbalance in the applicability of the Rules' case management straight-jacket. The joke about the defence providing 'what the prosecution need' has a ring of truth. Should the Crown's case have omissions or errors, the defence should step in and partially relieve the prosecution burden of proof; if they do not, the prosecution may have a second bite at the cherry. In contrast, the defence must get their case right from the start.<sup>16</sup> This inflexible approach suggests that court proceedings are a 'trial' in name only, as much is pre-determined.<sup>17</sup> Overall, McEwan's address depicted an imbalanced and hypocritical procedural culture, in which the defence are held to a higher standard than their opponents. The judiciary's willingness to push such an agenda causes one to ask whether the 'neutral arbiter' role has been replaced by an inquisitorial-style investigating judge.

### **And In the Middle . . . ? The Law Society**

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<sup>15</sup> See *Firth v Epping Magistrates Court* [2011] EWHC 388.

<sup>16</sup> The somewhat hypocritical tolerance of unprepared prosecutions is well demonstrated in the cases of *Geoffrey Payne v South Lakeland Magistrates' Court* [2011] EWHC 1802 and *R (on the application of Robinson) v Sutton Coldfield Magistrates' Court* [2006] EWHC 307.

<sup>17</sup> Parallels emerge between the obligatory defence case statement and the traditional 'dossier' required by inquisitorial judges prior to the 'trial' in civil law jurisdictions. See Jacqueline Hodgson, 'The Future of Adversarial Criminal Justice in 21<sup>st</sup> Century Britain' *North Carolina Journal of International Law and Commercial Regulation*, 35 (2010) 319-362, p.321.

Richard Miller, Head of Legal Aid at the Law Society, delivered a controversial but bold address which has generated significant debate amongst practitioners since the conference – as noted by Andrew Keogh’s *CrimeLine* service, which reprinted his speech in full.<sup>18</sup> Miller described the current English and Welsh legal aid system as merely ‘adequate’, which had declined from what he called the ‘high-water mark’ of substantial pay rates for legally aided defence lawyers in the late 1980s. With solicitors claiming that the status quo was ‘killing them’, Miller argued that the profession should be proactive in finding cost-saving alternatives, rather than reacting to Government plans with defiant outrage *ex post facto*. He acknowledged that finding a solution acceptable to all was difficult, but described his address as a ‘kite flying’ exercise where all ideas could be entertained, however painful. Miller suggested three resolutions: more money, lower costs of current work, or less work. More money, he suggested, would not be forthcoming from the Government, but alternatives, such as compelling the CPS to meet dropped case costs, could contribute. He stated that the Government favours reducing current costs; he posited variations on this theme, including a small number of national contracts, reform of the over-supplied London scheme, or the use of Block Contracts. Miller’s most contentious suggestion (describing himself as ‘Devil’s Advocate’) was the scaling back of representation in Magistrates’ Courts, consequently reducing workload. Describing police station and Crown Court representation as essential, he suggested that summary representation could be reduced if it meant saving the rest of the system, particularly in cases of a hopeless nature. He accepted that such a concept seemed unthinkable, but argued that no easy options remain available.

Miller’s address was certainly contentious, but was also brave and has inspired debate amongst the defence community. He essentially volunteered to be the Christian to the conference lions, attempting to mediate between the two opposing sides of the argument in the hope that a realistic compromise might be reached. However, creditable as this was, his ideas require scrutiny. The argument that representation at summary trials are not ‘essential’ (or at least less important than police station or Crown Court work) and that provision should be deprioritised is questionable, considering that this forms the bulk of bread-and-butter criminal cases.<sup>19</sup> Miller pointed to defendants that ‘insisted’ on pleading not guilty, despite overwhelming contrary evidence, as justification. Undoubtedly some defendants seek to ‘play the system’, wasting time and money. However, the system is clearly predicated on the doctrine of ‘innocent until proven guilty’, lending *all* defendants the benefit of the doubt. After

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<sup>18</sup> Andrew Keogh, CrimeLine Updater 563:

<http://us4.campaign-archive2.com/?u=9deb71613e29665da9f2df312&id=65f4d56631&e=3d0812b3ae>

<sup>19</sup> Over 90% of cases are heard in the Magistrates’ Court and virtually all criminal cases (beyond the police station) start there – see ‘Magistrates’ Court’, Judiciary of England and Wales website: <http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court>

all, defence cases deemed 'hopeless' or 'indulgent' have frequently resulted in grave miscarriages of justice.<sup>20</sup> Miller's appeal for both sides to compromise may fall on deaf ears. The criminal defence profession appears to have developed a 'brick wall' mentality towards the Government's increasingly controversial plans. Conceding any ground on core elements of adversarialism is likely to be considered 'caving in', but the difficult propositions set out by Miller illustrate the desperate corner that the defence profession has been backed into. One delegate questioned why the profession should make it easier for the Government to push through its reforms and cuts. In response, Miller described the current administration as 'resistant to reason', fearing such changes could destroy the system. His aim appeared to be mitigation of any potential damage to the system; but, despite admirably pitching a tough sell to a tough crowd, equitable resolution seems only a distant possibility.

### **And the winner is . . .**

Substantial change has been a long-term feature of the modern criminal justice system and this conference represented an important watershed for the debate about criminal defence services. It was frank and full-blooded; the contrasting perspectives fascinating. The conference raised two major questions. First, if quality and efficiency are both achievable, in what balance? Second, if adversarialism remains a priority, how far can reform be pursued before its central concept – an uncooperative and uncompromising duel between the parties – becomes redundant? The Government agenda seems focused on saving money, but the inescapable reality is that adversarial justice, by its nature, is both expensive and time-consuming. The conference offered a chance for both sides of the argument to consider the future funding and structure of such a system. The presence of the Attorney General was of particular importance, allowing the Government to make its case and granting defence professionals the opportunity to question it.<sup>21</sup> The clear message emerging from the conference was that the two sides are polarised. Practitioners and academics think that reform has been fundamentally damaging and that corrective action is imperative. The Government appear to believe that change is painful but necessary. There is undoubtedly a battle ahead for the criminal defence profession. Whether this is to secure their role as adversarial counsel for the accused or simply to secure work at all is unclear. The honest and critical discussion engaged in at this conference should continue – without it, the adversarial defence lawyer as we know it may simply be cut and regulated out of existence without opposition or consultation.

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<sup>20</sup> In the cases of both Lattimore and the Cardiff Three, the police and prosecutors determined that they had 'the right men', despite serious deficiencies in the evidence against them, and fixated on demonstrating their guilt despite alibis and denials.

<sup>21</sup> Although one might note the swift exit of the Attorney General after answering questions – read into that what you will.