A Call to Arms: Why we Must Hold the Line

"The greater danger for most of us lies not in setting our aim too high and falling short; but in setting our aim too low, and achieving our mark" Michelangelo

1. The ballot is a referendum on the merits of the deal and not on the leadership. We respect Nigel Lithman QC, Tony Cross QC and members of the CBA executive who have worked tirelessly on our behalf and in what they believed were our best interests. The CBA secured concessions but our demands were too limited in the wider context of the criminal justice system as a whole and it would be wrong to agree the terms of this deal.

2. The proposed deal and its aftermath have the potential to be the most positive development of the campaign so far. Holding a ballot and a full and open debate is a sign of strength and should be applauded.

3. We only need to look at the timing of the MoJ's "ultimatum" and the tactics involved to understand just how effective the campaign had been. The Bar was operating a successful "no returns" policy, combined with days of action. VHCC cases (one of the strongest weapons in our armoury) were about to implode within weeks.

4. Solicitors had mobilised: supporting our days of action, placating our lay clients and the courts and voting to join with probation officers for two days of direct action, coinciding with Grayling's birthday (April Fool's Day, we kid you not). Regrettably, despite rank-and-file support from the Bar, the **CBA elected not to support this action and instead to consult with the government. In hindsight, this was a strategic disaster.**

5. Grayling spotted the opportunity to exploit a potential division between the professions and this allowed him to use his infamous "divide and rule" tactics to great success.

6. Unfortunately, we fell into the trap laid for us by the MoJ and did what we had correctly criticised the Law Society for doing: deals behind closed doors. Grayling deigned to offer a 10-minute audience, during which the CBA was told the deal was (paraphrasing) a "one night only" offer and that discussion and the deal itself was embargoed preventing discussion. One only has to ask, why? The answer has been seen by all: the outpouring of rage, disappointment and dissent, *"Not in our name"*.

"Comments are free, but facts are sacred" C.P. Scott

7. For those asking why we want more than the temporary protection of our fees, let us be clear: the independent Bar will be destroyed by the proposed but temporarily deferred cuts. Moreover, justice will be destroyed. Why?

    i. Solicitors face litigation fee cuts of 17.5%.
    ii. Profit margins for firms are between 4.8% and 8.9%.
    iii. 8.75% of those cuts have been implemented.

iv. Even if a firm survives the cuts, the MoJ plans to impose a "dual contract" system: a limited number of duty contracts and then own client contracts for the rest.
v. Duty contracts are too big for 93% of firms.
vi. Those without a duty contract will not survive.
vii. Larger firms who survive will have no choice but to employ in-house advocates and exploit a modest profit margin to offset losses elsewhere.

8. The deal is only a temporary stay of execution of our fees and in 15 months' time, high street firms will have hit the wall (it is happening already). Our professional client base will have disappeared. The temporary protection of AGFS will not matter, because a 0% cut of what will be zero fees is zero. Grayling will have achieved his ultimate aim whilst maintaining a pretence of supporting the independent Bar.

9. Those who believe that this will lead to us being able to negotiate for an increase in our fees in 15 months are, with respect, naive in the extreme and ignore what has gone before. The MoJ will come back when we are in a significantly weaker position than we are now, and will issue the final death blow.

10. The BSB have issued a consultation where the proposals, if adopted, could mean that were the MoJ to impose unilateral cuts in the future, we would be unable to return such work notwithstanding that it may be economically unviable.

"Those who cannot remember the past are condemned to repeat it" George Santayana

11. Proclaiming that the deal protects the junior Bar is short-sighted. There will be no junior Bar. We have been here before.

12. Carter was proclaimed as a big win for the junior Bar. Let us recall back in 2005 that Carter was a response to a call for action with the Bar threatening "strikes". In fact the Bar continued to work and co-operated. To the surprise of the Government, Lord Carter found "a fragmented system that has not historically recognised a duty to deliver justice at an acceptable overall public cost". The fees paid to the junior Bar at the time were seen as too low (the irony!). There was an increase in some fees to make up for the effects of inflation. The "victory" was short-lived: by 2009 the government decided to reduce the fees once again, flying in the face of Carter's findings and an "astonishing volte-face". In the face of opposition from the Bar, the government then threatened One Case One Fee (OCOF) and used it to secure further cuts in fees.

13. A feeling of deja vu:

i. Each government assumes that:
    a. there is a gross over-supply of barristers; and
    b. when "push comes to shove" the Bar backs down.

ii. When the Bar is united, the government offers talks with a view to finding savings. The Bar then works extremely hard to identify savings, which are then absorbed back into the MoJ.

iii. Any apparent concession by the MoJ is then swiftly removed by applying the threat of OCOF. One only needs to recall the current Attorney-General's comments about OCOF at the recent Bar Council conference. The MoJ relies on the Bar agreeing anything to avoid that "doomsday scenario".

iv. "Divide and rule" is fostered by:

a. playing the Bar and solicitors against each other; and
b. playing the senior and junior Bar off against each other (either by Carter "redistributing" top end fees to the junior end or as in the current scenario where VHCC co-operation is part of the negotiation package) enabling the MoJ to say that they are protecting the junior Bar but that the "fat cats" are letting them down.

14. Under the current deal, nothing is on offer at all beyond a temporary stay of execution on fees and, yet again, an offer to discuss ways of saving money for the MoJ. It also represents a betrayal of those undertaking VHCC work who have shown real courage and strength of their convictions over recent months. If any review of VHCCs come to pass, the terms of the deal specify that it has to be within the current budget, meaning that the cuts of 30% are effectively set in stone. They are not on the table.

"Defend the children of the poor and punish the wrongdoer" Psalm 72:4

15. We are fighting to retain a justice system in which those accused by the state are properly represented, in which victims can engage and in which society can have confidence.

16. However, in exchange for a 15-month reprieve with a promise of nothing, we have abandoned our solicitor colleagues at a uniquely united moment in our history, abandoned our future clients to an uncertain but almost certainly unjust future, abandoned any hope of a diverse, vibrant and skilled profession and diluted our credibility in society.

"Fool me once, shame on you. Fool me twice, shame on me" Anon

17. The time to win once and for all is now. There is a perfect storm brewing over Petty France: prisons are rioting; private sector MoJ contracts are in tatters; probation officers are striking; for the first time in history, the Bar is striking; the judiciary overwhelmingly oppose these cuts; Treasury Counsel are in revolt; VHCC trials are on the brink of implosion and members of his own party are "railing against Grayling". He is teetering and now is the time to press home our advantage.

18. We understand that the Northern Circuit is "not for turning" and is maintaining the "no returns" policy. Those on other circuits should respect their decision and show solidarity by

refusing returns in such cases. We salute their courage and frankly, if they hold out, the deal is dead in the water.

19. The question posed in the ballot is not ideal. It ought to have been a straight question about whether members supported the deal or not. The CBA refuse to alter the question and so **we ask members to see this for what it is: a referendum on the deal**.

20. What can be achieved and what price failure? **If you, like us, agree that so much more can be achieved, vote yes.**

    If you vote no we sign our own death warrants and succumb to a lingering death.

    If you vote yes, at the very worst, we go down fighting. This is a time of unprecedented unity within the legal profession as a whole. The prize is a properly functioning and funded justice system with a sustainable future and it is within our grasp: it is our duty to fight for it.

Sam Parham, Garden Court Chambers
Joanne Cecil, Garden Court Chambers

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