

MONDAY 11TH DECEMBER 2017



**SPEECH BY ANDREW WALKER QC, CHAIR ELECT,
TO THE INAUGURAL MEETING OF THE
GENERAL COUNCIL OF THE BAR OF ENGLAND AND WALES FOR 2018**

This Council involves the Bar of England and Wales coming together in one body, to represent the whole profession. As such, we owe a duty both to the profession itself and to the public interest at our core. We must honour that duty together. It is a heavy responsibility.

What will it ask of us in 2018? It will, as ever, require us to put all we can:

- 1) Into being the voice of the Bar;
- 2) Into representing, serving, and promoting the Bar; and
- 3) Into engaging with those who regulate us, those who have the power to affect our professional lives, and those who seek to threaten the rule of law.

But what else will we need to achieve in 2018? What are the specifics?

Four aims / themes

Let me start with what I think are four aims, or perhaps themes:

- 1) The first concerns turning points. It seems to me that in several areas we may have reached a turning point, creating an opportunity to be seized.
- 2) The second is to take control – of our standards, our success, and our future – and to take more responsibility for them. In some respects, if you will forgive me borrowing a phrase with some currency in a different context, we need to “take back control”.

- 3) The third is to look ahead. We must focus on the trends and the longer term, looking carefully at where we have been going, getting ahead of what is happening to us and around us, and charting a course for ourselves.
- 4) The fourth is communication; especially but not only with the Bar.

So what do I think these mean in practice?

Regulation

Let me look first at regulation.

I have watched both the birth and growth of our regulators. There is much that I could say about them, and about how I see regulation; but before turning to our aims in this area, let me start with just a few observations on the story so far, particularly as regards the oversight of regulation.

It does not always seem to have been appreciated that regulation of the Bar involves regulation of a profession. We are not simply the providers of a service to customers, never mind in many cases a commercial service.

In business, it is no doubt good practice to have a customer focus, even if in rather too many cases this may need to be imposed from outside: but for us, it is the very essence of what we do. It is both our duty and our ethos to put the best interests of our clients above all others, except for our primary duty to the court. This runs deep in our professional psyche.

If our regulators want to speak to us effectively and persuasively, then they must recognise and appreciate our commitment to our clients and the court. Yet, over the years, this has rarely been mentioned.

The same applies, too, to the objectives of supporting the rule of law, and encouraging an independent, strong, diverse and effective legal profession.

I still see the absence of all this in the ideology and fixations that remain in some quarters to this day.

Not only do these errors and omissions miss a crucial point about the Bar, but they have led to a critical lack of understanding, and a gulf in perception. This is entirely unnecessary and thoroughly unhelpful.

So where is the possible turning point?

I see this in the announcement just last week of the demise of QASA – the Quality Assurance Scheme for Advocates. In killing this off, the BSB has in no way taken its focus away from being assured that the Bar is providing the quality of service that the public expects, and the public interest demands, but it has shown us a direction of travel that we should welcome. That direction is identified in the BSB’s press release, in which they laid down a challenge to us to take greater responsibility for our own learning and development, and to manage our own professionalism and standards in the quality of practice.

The language is theirs, not mine, but it represents a turning point in recognising openly and clearly that the standards in question are our standards, and the professionalism in question is our professionalism. And the opportunity is to take back control of them. If we want to avoid what we see as unnecessary regulatory burdens, we must play our part in making them unnecessary. If we want to avoid the sort of thing that is exemplified by accreditation schemes, some sort of offspring of QASA, or a multiplicity of kite marks, then we must avoid the need for them.

So how do we seize that opportunity? The BSB sees the new regime for Continuing Professional Development – CPD – as showing us the way. We must make it work for us.

We already have a firm base on which to build. The Inns have long delivered excellent training for those starting out in practice, and we have shown what we can do beyond that in the excellent, and internationally renowned, Advanced Advocacy Course, run by the South-Eastern Circuit.

But we are already going further. We now have new training materials from the College of Advocacy¹, on youth court advocacy, expert evidence and statistics. We also have the vulnerable witness training programme, which we are helping to

¹ The Inns of Court College of Advocacy.

coordinate, and which is being delivered through the Inns and the Circuits. There may be a useful role, too, for profession-led panels in criminal defence work.

We also have more opportunities now in ethics. Some Specialist Bar Associations have already been running their own ethics sessions; and our Ethics Committee, under the excellent leadership of Rachel Langdale QC, has been forging ahead, forming partnerships with others to take advantage of our expertise, gained through the work of her committee and our Ethical Enquiries Service.

All of this involves us taking responsibility for our own standards and ethics, and taking back control of how we keep ourselves up to date and performing at our best. I want to see us doing more of this; we need to be doing more of this; and our dreaded CPD plans will be that bit easier, and that much more worthwhile, if we do. This Council must lead the profession in making sure that we seize the opportunity, as well as contribute our expertise.

Turning to my other two aims, I would like to see regulation that is wise, mature, sophisticated and effective. For me, whatever else it might involve, it ought to involve the following:

- 1) A proper understanding of the Bar.
- 2) A proper dialogue, based on respect, understanding, discussion and persuasion; not diktat, coercion or constricted formality.
- 3) An acknowledgement that the regulatory objectives in the Legal Services Act 2007 are not exclusive to regulation, or for our regulators alone – the responsibility is a shared one.
- 4) A proper understanding that the public interest is at the heart of those objectives, and that this is why encouraging an independent, strong, diverse and effective legal profession is absolutely a part of what our regulators must be doing. A profession with those characteristics is quite simply essential to the public interest.
- 5) A recognition that regulation neither requires nor benefits from the profession being distanced from it, artificially and illogically.
- 6) Proper account being taken of what we are already doing; and a real focus on whether something more or different is really required and, if so, from whom.

We have already taken a first step towards greater understanding with the LSB. I want us to work on that further during 2018. I hope, too, that they will give us the space to work more effectively with the BSB, who I think do appreciate much of this, and with their new Chair, Baroness Blackstone, and that they will allow us to do this without unnecessary and resource-sapping distractions.

Other priorities

So much for regulation. Where else do I think we need to be putting my four aims or themes into practice? As a priority, I think there are eight areas, and I propose to give just a few minutes over to each of them.

1) Where and how we work

Technology has enabled us – and perhaps encouraged us – to work ever more from home. That may be a positive decision, but it may also be because it is now harder to find time for our families; or because we need to reduce our overheads. So we find ourselves in chambers less often. We see less of our colleagues, and spend more time on our own. Even in chambers, financial pressures have led to looser arrangements and ‘leaner footprints’. Those with court-based practices still see each other in courts and robing rooms, but that is not quite the same.

When we do communicate, it is often in much less personal ways – by email or Twitter, rather than face-to-face or even by telephone. And streams of e-mails now follow us everywhere, demanding to be read and responded to at any time of day or night, while deadlines become ever shorter.

It seems to me that these changes have implications, particularly for our wellbeing but also for our shared culture, our ethos and our sense of identity as a profession, and of what it really means to be a barrister.

We have thrived through being able to share experiences; to seek and to offer informal advice to each other; to try out ideas, or to help us get things straight in our minds; and to work out the right, ethical response to a tricky situation. There is no better way to learn ethical principles than to see and hear them being put into action. Will this still be the case in future?

We ought to be encouraging the Bar to acknowledge these trends and implications, and to take responsibility for finding ways to address them. Support from the Inns and the Circuits is likely to be crucial: both already mix opportunities for training with social ones, and chambers and others may wish to follow suit.

In terms of action for ourselves, though, there are two steps to be taken:

- 1) We must persuade our regulators to recognise the importance of this.
- 2) We must keep up the impetus behind our wellbeing initiative. We all now appreciate the importance of wellbeing, and I am proud of the work that work that we have done, led by Rachel Spearing and Sam Mercer, in bring this about. Many of the measures being taken to address this might now be seen as having an added benefit in reinforcing our shared culture.

2) International reputation

In recent years, we have established a reputation for ourselves internationally that is widely envied. We have converted this into significant earnings, but this is not just a matter of earnings, nor has our reputation been earned only by providing an excellent quality of service and skills to clients across the globe. It is as much a matter, and the result, of how our legal system is perceived, and of the lead we have taken in upholding and encouraging the rule of law, both at home and overseas.

We already work hard to build and reinforce that reputation through work that can only be done, or facilitated, at Bar Council level. Much is not particularly glamorous. I know that there are those who question this work; but to them, I say three things:

- 1) This has made a real difference to the practices of a significant number of barristers, not just in more commercial areas but also in a growing number of others, such as family law and especially crime.
- 2) Just as importantly, I do not believe that we can put to one side our commitment to the rule of law by ignoring either its weakness or what is happening to it, or to our fellow lawyers and judges, abroad.
- 3) There are already developments taking place internationally that have implications for the rule of law at home. We need to meet these in their

international birthplace, alongside colleagues in foreign bars, for otherwise, it may be too late to avoid them.

We are uniquely well placed to perform those roles, and I believe that we must continue to do so.

But threats to our position and reputation are emerging. Competition is nothing new; but it is growing; and much of it is now being targeted directly at us. This brings further priorities for 2018:

- 1) We must do all we can to salvage those parts of the EU justice arrangements that have brought real benefits to our citizens and the Bar.
- 2) We must help the Bar to seek out new opportunities; and we must work with the Government to identify where they can help in opening up new markets after Brexit.
- 3) We must take more control by working for court reforms that help us to stay ahead of the competition.
- 4) We should join with a former Chair of this Council – the Chancellor, Sir Geoffrey Vos – in encouraging the Bar to play its part in making the common law of England and Wales the law of choice for technological developments, just as we did in the past for international trade and banking.

3) Rule of law at home

I need hardly remind this audience of our duty to speak up in defence of the rule of law in our own nation too; and to that end, I see at least three further tasks next year:

- 1) We must continue the work started by this year's Chair, Andrew Langdon QC, on indefinite detention and administrative decision-making. Both are scandals.
- 2) We must stand up and be counted on other, specific challenges. Brexit gives rise to them, of course, but there are other examples too. To give just one, there are threats emerging that may encroach upon legal professional privilege in a number of areas. It will fall to us to take a stand in its defence.
- 3) We must try to do more to educate the public about what the rule of law means, and how fundamental it is to a civilised society. Our work with the Citizenship Foundation to bring the rule of law into schools in the context of Article 50 was

an excellent example of what we can achieve in partnership with others, and I should like to see us do more.

But the rule of law also depends, of course, on access to justice; and this inevitably raises the questions of legal aid and investment in our justice system.

More money would go a long way, but we are under no illusion about the prospect of this government – or any government – changing the habits of decades. There are three areas, though, in which we may yet make some headway.

First, we may be at a turning point in political will and mood, even if only a minor one, on some modest changes to LASPO². We must give this a push in the right direction. This will require the injection of money; but as the Bach Commission has pointed out, £0.5 billion more was saved as a result of LASPO than was ever intended; and it is inexplicable that the Government has failed to take any account of both the evidence and the sheer logic that for every £1 spent on legal aid, far more is saved elsewhere.

If you think that this is simply a domestic concern, think again. Our competitors are already seizing on our attitude to our justice system as another reason for litigants to go elsewhere. This is not just deeply embarrassing, but it undermines the Government's own campaign to tell the world that our "Legal Services are Great". "Great for some" is more difficult to be proud of.

Second, we will press the Government to bring forward a regime and funding so that those giving evidence of abuse or violence in family proceedings do not have to face being cross-examined by very people who are alleged to have abused them. We will press for this in the current parliamentary session.

Third, we must continue to argue for the court reform programme to deliver in a way that truly supports the rule of law. There are many concerns here which have yet to be resolved, and I will spare you a summary. Each will require our continued attention.

² The Legal Aid, Sentencing and Punishment of Offenders Act 2012.

4) The junior Bar

The number of practising barristers is still rising, but the number of more junior barristers has fallen significantly in the last ten years. We have now reached the point at which the number up to five years' call is back to where it was when I was called, 26 years ago.

We cannot allow this to continue. We need the junior Bar. And I see at least four tasks for us here in the coming year:

- 1) We must delve more deeply into the data to try to identify all of the factors that are driving these trends.
- 2) We must focus on what more we can do to make a career at the junior Bar viable and sustainable.
- 3) We must work with chambers, solicitors, and the Legal Aid Agency, to find ways to improve the cash flow of junior criminal barristers, particularly with respect to fees for defence work in the magistrates' court.
- 4) We must help our self-employed juniors, in particular, to find their entrepreneurial side, and to use it to identify new markets, and to secure more work in existing markets, including where we have lost it to others. This may call for some new skills, but we are more than capable of learning them, and I hope that our employed colleagues will be willing and able to help.

With the whole of the Bar in mind, we need also to look harder at how the Bar can keep pace with technological developments, if not get ahead of them. The junior Bar may well be in the vanguard of this.

5) The publicly funded Bar

Whatever else may have caused the fall in numbers at the publicly funded Bar, it is difficult not to lay much of the blame at the door of successive governments, and those who have supported them in Parliament.

Why do I say that? Because of the appalling combination of shrinking fees, plummeting morale, and ever increasing burdens on practitioners, for all of which they are responsible.

New practitioners now come to us with higher debts than ever before, and facing higher housing costs than ever before. Yet the fixed fees on offer continue to fall in value. We have suffered cuts and erosion by inflation, year on year; and most scandalously, a cumulative reduction in criminal fixed fees amounting to some 40% in real terms from what were far from generous fees in the first place. Our solicitor colleagues have suffered similarly.

No-one else has been asked to swallow anything like this. Yet, it was taken for granted that the Bar would keep going in the face of it all, leading to the criminal Bar being pushed to the very limit.

It is not as if the work to be done has decreased in line with the fee rates. Quite the contrary. We are being asked to do more work than ever to prepare for hearings, and during hearings; and we must also bear the brunt of the added difficulties presented and experienced by litigants in person, often in very stressful circumstances, and – in family cases – by the added strains on local authority budgets. Across large swathes of the criminal and family bars, we do all this with a constant diet of cases involving sexual and emotional abuse.

It has been taken for granted that we will continue to absorb all this for those same, shrinking fees; and that we will continue to do so in working conditions that have been left to deteriorate to the point that, in some courts, they are a disgrace.

And in far too many cases, we are left bearing these burdens without any real payment at all. Barristers have given me many examples of criminal and family cases in which they have carried out even many days work, but ended up being paid for only a fraction of their time – or not paid at all – as a result of factors entirely outside their control. Some have even paid for extra child care to do a case, only to find themselves left without a fee to cover this.

This continues to take a heavy toll personally, and collectively. A knock on effect on recruitment and retention of junior practitioners is entirely unsurprising. It would be remarkable if it were otherwise.

So how should we be responding?

First and foremost, we must put the weight of the whole profession behind the publicly funded Bar, to all of whom I say this. The rest of the profession – employed and self-employed – is with you. We are with you because we care. Not just because you are our fellow barristers; and not just because we know that we are far stronger together. Not just, too, because we know that the public’s attitude to the Bar is affected a very great deal by your position and reputation; you are, after all, those who deal most closely with the public in times of personal crisis. As much as all that, we care because we know that, without you, we could not secure proper access to justice in all of those times of crisis.

We still await the Government’s announcement on the Advocates’ Graduated Fee Scheme (AGFS) in crime; but wherever that takes us, there are two further priorities:

- 1) We must continue to argue against any further erosion of fixed fees. There is simply no justification for singling us out, and excluding us from even a modest annual increase against inflation.
- 2) Important as they are, barristers have told me consistently that this is not just about fees. It is also about those growing burdens that are being imposed on them. We need to take back control by finding and promoting some solutions to this.

6) The Court Reform Programme

In that last respect, one window of very real opportunity has presented itself: the £1.1 billion court reform programme. This holds out a possibility of a turning point.

I commend all those responsible for securing such a significant investment. It is a great achievement, even if long overdue. But is it being spent wisely, and is it being spent in all of the areas which need it most?

While the programme has many positive strands, which we welcome, we seem to have been forgotten about.

This has led to impractical, unrealistic, and even misguided, ideas being taken forward, such as the Flexible Operating Hours proposal. It is inexplicable that no-one bothered to ask us about them, and that no-one seems to have considered the consequences that were immediately plain to us.

These ideas have also drawn focus and funding away from what we would see as higher priorities, such as ensuring that existing court hours are used more effectively; and taking steps to combine greater efficiency with the best of our current system and a reduction in the unfair burdens placed on us, our clerks and our solicitors. If we could achieve that, then while the Bar would benefit, so too would everyone else involved in the justice system – clients, witnesses, judges, and the courts and tribunals administration.

We are already engaged with the programme on every front that is available and relevant to us, and HMCTS have in some areas been responding well to our input; but we must now take the initiative, and open up a new front, in which we must press for more focus on what we see the fault lines to be.

7) Communications

Our communications on all fronts have improved significantly in recent years, but I am sure we can keep on improving how, and how often, we communicate with the Bar.

But it has also been a priority for me on a personal level to talk and listen to the Bar, as often as possible, and preferably in person. This will continue to be a priority next year. I will again be crossing the country visiting every Circuit; but please tell me directly if there is something you think I need to know, or extend me an invitation to visit you. I am here to serve you all. Please help me to do so.

8) Who are we, and who do we want to be?

Finally, I should like to say something about an area that concerns me deeply: who we are, and who we want to be.

As a profession, we are committed to dignity, respect, fairness, and, as our motto says, “Justice for all”. This is particularly true in relation to diversity and inclusion.

We have achieved a great deal on this since I joined this Council in 2005; and in many respects, we have been at the forefront of work by the professions; and we should be proud of that. But despite all our efforts, there is still a long way to go.

So we must continue to put two things at the centre of what we do:

- 1) Recruitment of as diverse a group of the brightest and best new practitioners as we can achieve; and
- 2) The retention of as many practitioners as we can, from the early years of practice through to the most senior levels, including into a pool of silks that reflects the full diversity of those who meet the necessary standards of excellence.

So far as the first is concerned, I see two particular tasks for 2018:

- 1) We must delve deeply into the data, and analyse it carefully, so as to pinpoint as accurately as we can all of the reasons why the extension measures that we have already been taking have not yet made enough of a difference. Some of the reasons may be beyond our control, but we must, and we will, continue to work hard to overcome those that we can control.
- 2) As we work to reinforce our shared culture, we must make sure that that culture is as open, inclusive and supportive as we can make it. I do not believe that this requires us to lose our traditions; but traditions are not static. We must develop them in the right ways so as to achieve this aim.

We must also keep our focus on retention. This is a very personal concern for me. I have seen close friends – female friends – build up excellent practices, with the talent and ambition to match, and on course no doubt for silk (and probably before me), make the difficult decision to leave their careers at the self-employed Bar. I have two in mind in particular. They will know who they are. Both have been highly successful in all else that they have done. Both were a huge loss to the self-employed Bar.

I recognise that for some – men and women – the decision to leave the Bar to focus on bringing up a family or caring for others is a choice that they make willingly, even happily. But for too many, the choice is still not one that is free from more than just social pressures. And I fear that the current generation of new practitioners, carrying debt and housing cost burdens far beyond those that we bore, will find it harder still.

We must continue not only to strive for ourselves to make it more feasible for all – and particularly women – to stay in practice, but we must also continue to ask the judges and HMCTS to help us in this endeavour.

In all of these respects, we must also ensure that nowhere do we tolerate any form of improper behaviour. Wherever and whenever it happens, you can be assured that we will continue to support anyone who has suffered, and anyone trying to deal with it.

And to go back finally to my fourth aim – communication – we must talk more about what we are doing. If we do, then we may also manage to take two more steps in the right direction:

- 1) By encouraging potential recruits to see the profession as welcoming; and
- 2) By making us a profession in which everyone knows where we stand on diversity and inclusion, and in which this is as much a part of what we believe and do as our professional standards and our skills in advocacy.

Closing

I make no apology if those aims sound ambitious. We must aim high. But please remember that we are not on our own.

We have the support, first of all, of the whole profession. Throughout my time on the Bar Council, I have been hugely impressed – proud, even – of how so many members of the Bar have been prepared to give us the benefit of their expertise, without hesitation, and without any reward other than our thanks.

But we have the support too of another dedicated, talented and enthusiastic group who labour away, largely unrecognised and unsung. They bring crucial skills, and they develop a deep understanding of the Bar and what we are about. Some are young hopefuls who are still on the path to a career at the Bar; but many are not. I am referring, of course, to the staff at the Bar Council who support us in everything we do. I suspect that few realise quite how much we depend on their commitment. It is they who enable us to keep on track from year to year, and it is they who respond with great skill and understanding to the vast majority of the ethical enquiries that we deal with. Without them, we could not coordinate and focus those thousands of hours given by the Bar as effectively as we do; nor would we be able to deliver on our aims, or to punch so consistently above our weight.

I hope, too, that we may count on those of you here who are not part of this Council, but who have a role in supporting the profession or in pursuing the public interest, and are able to help.

Finally, what can you expect from me in meeting those challenges?

I am a pragmatist; suspicious of ideology. I prefer to focus on our core values and core expertise; and to analyse before reaching conclusions. I want, too, to see results, even if they need sometimes to be incremental gains on the way to something bigger.

And as a former 'awkward squad' member of this Council, you can expect drive and passion, commitment and focus, as much energy as I can muster, and a willingness to speak up for what I believe is right.

So please join with me and with our dedicated staff in meeting all of those challenges, and let us all, in doing so, prove our value to the Bar and to the public interest, and show the Bar that their faith in us is not misplaced.

Ends