

## **SERVING THE COMMUNITY**

### **BAR COUNCIL CONFERENCE, GALWAY, 4 JUNE 2011**

It is a great honour to be asked to address this conference of the Bar of Ireland on the subject “Serving the Community” because the function of my Office and the nature of the interaction I have with the Bar is about precisely that – serving the community. It is no harm to remind ourselves that under the express terms of Article 30.3 of the Constitution of Ireland all crimes are prosecuted in the name of the People. We would do well to remind ourselves that it is the People and not the State we represent when we prosecute a crime in the Courts.

I am going to say a little about the interaction between my Office and the Bar of Ireland. For those of you who do not know my history I will explain a little about my background. I practised at the Bar for eight years and for four of those I was the County Prosecutor in Co. Donegal. I then spent eighteen years in the Office of the Attorney General, the last four and a half of them as Head of the Office. Next September I will have spent twelve years as Director of Public Prosecutions.

As I am sure all of you know the DPP is one of the largest consumers of services at the Bar. Last year our Office paid out €14,734,046 in fees to a total of 168 barristers, 53 of them seniors and 115 of them juniors. A total of 97 barristers earned more than €50,000 each in fees. Despite substantial cuts in the rates of fees paid by the State to barristers over the last several years this 2010 payment represents only a marginal reduction in the total expenditure on barristers fees. This in turn is because of the continued expansion of criminal business in Ireland. Despite the economic slowdown, the return of emigration and the collapse of immigration, we have yet to see any of this reflected in the number of serious files being dealt with in my Office.

When compared with other prosecution services around the world the way in which our DPP’s Office uses the services of the Bar is an unusual system – indeed possibly a unique one. In most countries in the world court advocacy in prosecutions is carried out by in-house prosecutors. This is not only the system in civil law countries, where it is universal, but also in many common law countries including the United States, Canada and Australia. The U.K. is probably the closest jurisdiction to ours in how it approaches this matter. In England and Wales roughly 70% of the Crown Prosecution Services advocacy work is done by the Bar and 30% in-house.

There are both advantages and disadvantages to the Irish system. In the first place, the use of a private advocate means that every serious case which is tried on indictment gets a second look from an independent lawyer. The chances of a prosecutor developing tunnel vision and persisting with a case which should have been dropped is thereby lessened. Secondly, our system ensures that when the case comes to trial the DPP can obtain the services of the best advocates who practise criminal law. This is so because since most legal work is done on legal aid the fees payable to the prosecution and the defence are calculated on the same basis. Such a system is by no means the case in every country in the world. I have come across jurisdictions where the prosecution can be severely disadvantaged because the in-house lawyers who prosecute in court are paid much less than the private lawyers who work for the defence and therefore the prosecution finds it difficult to attract the highest calibre lawyers, although even in such jurisdictions there are usually some people who are prepared to work for lesser money because they prefer the work or for reasons of principle prefer to work for the community rather than do defence work.

Incidentally, this raises an interesting question which I have wondered about for many years and never found a satisfactory answer. Why is it that at the national level it is the defence lawyer who claims the title of “human rights defender” whereas when you go to the international criminal courts and tribunals it is the guy who prosecutes the Mladics and Karadics rather the guy who defends them who is on the side of human rights?

At first sight, the use of the services of the private Bar seems more expensive than using in-house lawyers. Certainly the fees paid to barristers are higher than the salaries which would be paid to a recently qualified solicitor. However, such calculations take no account of the fact that the in-house lawyer requires expenditure to provide for pension costs, requires to be provided with office accommodation and various other facilities, benefits and services such as IT, books, training, paid leave, maternity leave, payment while sick, and so forth. Furthermore, when one employs a barrister one undertakes no commitment to give the barrister further work if there is somebody else who can provide a better service. On the other hand, when one takes on a permanent employee one takes on obligations to retain that person even though there might be someone else who could do a more competent job. It is of course difficult to calculate figures precisely, but I suspect that if the true cost of in-house lawyers versus out-sourcing work to the Bar is calculated the financial costs are not that different.

There are of course also disadvantages to out-sourcing work. The lack of opportunity for in-house staff to do advocacy work is a problem. It might be thought that another

disadvantage of using the outside Bar is lack of control of how a case is run in court. However, realistically this does not really seem to me a great disadvantage. In reality, once a case goes to hearing the lawyer dealing with it on his or her feet has to have a great deal of discretion as to how the case is to be run. Whether that person is an outside advocate acting on instructions or a member of one's own staff they may well be faced with decisions which have to be made without seeking specific instructions and in either case the line they run might not necessarily be one which the senior prosecutor in the prosecuting authority would have taken had he or she been there. Of course, one attempts to anticipate what is likely to arise and give general instructions but the unexpected frequently happens in trials and courts for obvious reasons are reluctant to break the flow of a trial to enable lawyers to seek instructions from their clients unless this is absolutely necessary.

A further area where there may be advantages and disadvantages is the Irish practice, which is certainly uncommon if not unique, whereby lawyers appear sometimes for the prosecution and other times for the defence. This has the advantage that the lawyer is likely to be quite objective about the strength and weaknesses of cases in a way which perhaps a full time prosecutor will not. On the other hand, it is not always easy to get counsel to put forward the argument that the prosecution service would wish to see put forward with a degree of enthusiasm if that same lawyer is going to be appearing in court the following day to make the opposite argument. On the whole, however, I feel that Irish barristers do tend to have the flexibility to argue contradictory points of view on different days!

I am sometimes asked what are the great sins which a barrister can commit and which for us as clients cause serious problems. In my book the greatest sin is not following instructions. In particular, the decision to charge and the decision what offences to charge, as well as the decision to drop offences or accept pleas to some offences only, are matters reserved for me and my Office and we do not delegate the function to the counsel appearing in the case to exercise this function without express instructions. Fortunately, in my experience, breach of these instructions is very rare and I can only recall a very small number of cases where this rule was seriously breached. A breach of the rule, however, can have very serious consequences for my Office particularly as we may be put in a position of being unable to explain what on the face of it may be an inexplicable decision.

A second problem is slowness with providing paperwork. Unfortunately, this is something that we frequently encounter. Part of the problem seems to be that many of the barristers who most enjoy doing criminal work enjoy it because of the advocacy, the buzz

they get from being on their feet doing a case, and have a corresponding shyness when it comes to putting their thoughts on paper. Good advocates in criminal law who can also put their thoughts in writing are at a premium!

Another great problem for us is the last minute handover. Unfortunately the listing system in the Irish courts tends to create this problem and very often cases have to be handed over with very little notice not necessarily through the fault of the counsel involved in them. I think this is a particular problem for victims of crime who quite rightly are upset when they discover on the day of the hearing that the barrister whom they have already met is not handling the case.

I would like to say a little about the current economic crisis and the way in which it impacts on my Office and the Bar. Unlike many Government Departments, my Office does not have any programmes which it can cut back or abandon. Our only programme is to prosecute crime. We have little control over the number of files which arrive into our Office and the only real means of reducing their number is to delegate further functions to the Garda Síochána. In my view this is not an attractive option as I think cases are better prosecuted by lawyers than the police in all but the most minor of offences. The vast bulk of the Office's expenditure is on fees to counsel, costs awarded against us (over which we have only limited control) and the wages and salaries bill of the Office. We are under pressure, of course, to find ways of reducing costs to the State.

In my view there are significant ways in which costs could be saved, although not necessarily on my own vote. For example, the annual bill in overtime for Gardaí attending court is €17million. It is quite obvious that much of this bill could be substantially reduced if we can find ways to better manage cases so that Gardaí do not spend time sitting in court for cases which do not get heard on that particular day. However, there is very little the Gardaí themselves can do to save this money. It is, however, possible that the combined forces of our Office, the Courts Service and the Bar, if they were to cooperate in order to improve case management, might be able to produce substantial savings.

The alternative to finding such ways to cut costs is that a Government may decide to impose yet more cuts on the fees I pay to counsel as well as on the wages and salaries bill of my own Office. I know which option I think is preferable and I believe this is an area where there could be cooperation between the Bar and ourselves. Unfortunately, our system of public administration is not well geared to encourage one Department to take steps which result in savings in another, as the system encourages us to operate in our own

hermetically sealed areas. “Joined up thinking” is more talked about than done in the Irish public service

What of the future? Just as we behaved during the boom as if it was never going to come to an end, many people can see no way out of our current problems. However, I am optimistic enough to believe that nothing lasts forever.

While nobody can predict the future, there are nevertheless a number of trends which have continued steadily over the past number of years and which show no sign of abating. It is probably safe to say that among the trends which are likely to continue are a continuing increase in serious crime, a continuing growth in the complexity of the criminal law and of the cases we deal with, a continuing need for specialisation, and an ever growing impact from globalisation on crime and the way in which we do our business. I do not have time in this brief talk to develop any of these themes but I see no reason to believe that any of these trends are going to be reversed any time soon.

The final question which confronts us, and which probably has brought about the single greatest change in my time practising law, is the relationship between the criminal law and the victim of crime. I believe that we have made great strides in the way we treat victims of crime in the past number of years, and in my experience the Bar has become much better at dealing with crime victims than used to be the case. Indeed it is not that long ago that some of the more traditional members of the Bar refused to engage with crime victims at all. I think today there is a much greater appreciation that although we prosecute on behalf of the People, the community as a whole, the victim of crime has a special interest in the outcome of the case although of course we cannot substitute private vengeance for a commitment to public prosecution. Nevertheless a civilised legal system ought to treat its victims in a civilised way and to ensure that they are kept fully informed of what is happening and have the opportunity to put forward their point of view, even if we draw the line at conceding to them the right to make decisions as to how the case should be run or to veto those decisions.

I thank the Bar Council for facilitating this discussion and I look forward to listening to your contributions.

James Hamilton

Director of Public Prosecutions

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