Leader's release – AGFS – 25th March 2018

Dear Colleague,

In the greatest traditions of advocacy, I start at the outset with the conclusion that I invite and hope to achieve: first to unite the profession by ensuring an understanding as to the genesis of the new AGFS scheme and second to show leadership in the fight against the inadequate funding of our profession. We need to act NOW for if we do not, there will no longer be an independent Criminal Bar. We are required to unite to protect our justice system, protect the public and to protect the provision of Legal Aid. Action is required. We just need to be clear about what that action is.

I have been gathering the feedback from the many emails that I have gratefully received from barristers from the Circuit. It seems clear that in some quarters there has been a lack of understanding about the genesis of the AGFS scheme. Some have not read the SEC's releases from my predecessor nor my many messages in the recent months. The same explained the detail and the history of the passage of the AGFS discussions.

The fundamental points that I invite the Bar to please take on board are:

1. The terms of discussion put forward by the MOJ were that there would be no more money put into any scheme. This was never an opportunity for the Bar to rewrite the AGFS scheme with fresh funds to bring proper reward to all barristers on every case. No-one can achieve contented change to all barristers when

the government have expressly and intransigently said that "the scheme must be cost-neutral." I make plain therefore that if the scheme proves NOT to be cost-neutral it has failed its own test and the Bar need say no more to oppose its introduction. We need to collect the precise data and see if it is truly cost-neutral.

2. The MOJ made crystal clear that 'page counts' were to be removed. It was considered an often unjust way of remunerating people. For example, to have a phone download served would often double, if not triple the fee received for a case, but would not double or triple the workload. I accept, of course, that some considered that a half-decent page count went some way to remedying the injustice of poor payments elsewhere, but it was that imbalance that many were hoping to put right.

3. I make it plain that at every single meeting the Circuit Leaders asked not just for more money for the new scheme but for index-linking and a proper regular review. The Bar should have the security and comfort of index-linking so we are not disadvantaged as the years pass and the economy naturally changes. I can understand any Government's reluctance to agree to that, but that does not stop it being reasonable nor should it stop us demanding it. An agreed periodical review of the scheme is welcome but is not enough.

4. The underlying *structure* of the proposed AGFS is in my honest view better, in that there is to be a payment (at long last but forgive me for not rejoicing over something that was an injustice for so long) for day two of trial, payments for mentions and substantive hearings (paid in addition to a brief fee), 40 day trial cut off removed and the focus is removed from page counts but with special preparation still available if the case demands the same. (Of course, historically such claims take some time to prepare, were paid at very low rates and were often largely decimated or refused

altogether.) However, I totally accept the genuine concern raised by many that there may be little merit in a new structure if you make significant cuts to the underlying brief fee, slash the refresher rate (only for some categories of cases) and if there is no guarantee of a proper reward for reading many, many pages of crucial evidence, which as a professional you are obliged to read.

5. The Leaders sought the expertise of Professor Martin Chalkley to carefully crunch the known figures as accurately and faithfully as possible. He helped work out the best way of utilising the limited funds. Within the hugely limited financial strait-jacket that we were forced to operate, I am of the view that the aspirations of the structure to distribute the funds towards those who do the trial work, removing the arbitrary page count measure of payment and to protect the juniors, was laudable. Without proper sums of money being invested in the scheme, how else were we to have achieve that aspiration? No one has, I stress, provided the answer of a better structure within the current strait-jacket. It was for that reason that I considered that the structure of the scheme was hopefully to be better notwithstanding that we all unhesitatingly agreed that <u>it simply needs more money invested.</u>

I consider that what should now happen is as follows.

First, we should await the results of the CBA survey and be led by them as to the course to take. Unity is everything. Whatever steps we take now, we must be united. We must be very careful not to divide the profession. My feeling is that what lies at the heart of this is that **the Bar's commitment to serve the public has now been compromised. The organism of the criminal justice system is in great danger.**

One option obviously to be considered is that the Bar make a further unified, detailed, measured and logical argument, that the

independent Bar needs an injection of at least 20 percent, perhaps towards the brief fee, to make up for the loss of the page counts (perhaps investing 10 percent this tax year and the remaining 10 percent the next, to spread the spend on the government). The same is required to reflect the hard and crucial work that the independent Bar do to make the criminal justice system work and restore the public's faith in it, on all levels. It is a public service we provide, not a selective service.

To that end, we have been suffering real and deep cuts for so long it has become institutionalised. We have tolerated it for too long, perhaps optimistically but more naively hoping the next government in power would invest properly in the Criminal Justice System. It's plain, in my view, that this is not a party political issue it is merely a political one - no party, whatever their colour, seems to want to invest properly in the system. All have presided over cuts to the system for decades and seen the devaluing of the independent Bar as a force for good.

The increasing responsibilities, stresses and unrealistic time windows in which we are now asked to achieve complex work are huge. Our expertise is simply irreplaceable. The courts expect more and more from us, to sit earlier, to sit later, to work over every lunch-hour so as not to keep the court waiting at 2:05pm (this is in key with a recent CBA initiative regards working over lunch), to email Judges and parties mid-trial and into the early hours. The list goes on . . .

The stellar service we provide at the independent Bar is neither financially sustainable nor sufficiently rewarded.

If that option is taken and if the government do not accede to the Bar's reasoned and documented proposal then (it seems that we can no longer afford to wait and see) those who independently chose to do so, give appropriate notice and stage a series of increasing periods

of days/weeks of action, starting with the "no returns" policy resurfacing and other measures being deployed, leading if necessary to a full downing of tools. I believe that the Bar now realise that they have the courage and Leadership to withdraw their labour. However, if that path is chosen, we must be clear about what it is we are seeking, be ready for the inevitable government spin (the tedious 'fat cat' argument) and crucially we must be united.

I believe that the Bar know that it is the only way to protect the public, the rule of law, our treasured democracy and the interests of justice.

You will have seen from earlier missives what I have hopefully helped to achieve by way of agreement for the Bar's future, in my meetings with Susan Acland Hood at the HMCTS and others regarding other long overdue improvements (ID cards for the Bar to spare the time-wasting rubdowns, canteens for all courts, effective access to list officers, taking counsel's dates to avoid into proper account, getting rid of nearly all mentions, save by email or telephone etc). I await to see if these improvements are introduced.
Of course I concede that these seem trivial compared to the bigger issue we have with inadequate funding.

You will also have seen my views on the embarrassing state of most of the court accommodation.

I have set out already my clearly achievable proposals in my article "Making the crown court work" which I won't repeat here but which every single practitioner, clerk and usher I have spoken to fully agrees with. Time will tell if it comes to pass.

<u>What is the real issue?</u>

This is ALL about money and of course how much an independent Bar is worth to society and democracy. I think with Brexit on the country's

shoulders it should be a major priority. We need to ensure that, in this time of turmoil over Brexit, the fundamentals of society are protected and are seen to be protected - the right to be represented by an independent barrister, to have your case as a victim reviewed and prosecuted by an independent barrister, to ensure the individual is protected from the state.

What price is quality? Has the goodwill of the independent bar been finally exhausted? How much a independent barrister's time, pride and commitment is worth to represent an accused person or victim of crime properly? How much should you pay prosecution counsel to prosecute someone properly for the right offence and not a watered down one on a plea bargain or because it's cheaper NOT to have a trial, or indeed let someone who should be hauled before a court escape with a fixed penalty notice or its equivalent? What is justice worth to a sound democratic system of which we can be proud? Are we to see an independent profession benefit only those who can afford to pay privately? Do we provide a public service or a selective service?

Therefore the proposed structure, whilst sound in its aspiration, needs more money placed into it to make it viable and fair.

In my view there is more money in the system . . . when pushed there is always more money available, it's just that the government don't appear to attach any value to your independent Bar, don't want to let people take ownership of this profession and value it, or don't want to pay for it. The legal aid budget is a relatively modest amount when compared to so many other budgets.

What this boils down to is that we need once and for all to decide <u>as a profession</u> whether we have the courage to stand together and push for a proper investment in what was once a proud and wholly independent legal system.

What next?

We must have a calm, sound, independent and objective assessment of the exact payments of the scheme. That data is being accumulated.

Only then will we be confidently armed with the full information to take our well-founded and reasoned arguments forward, and if necessary, take the fight further. We have always acted with good faith.

I assure you that on the right principled cause I will happily take the lead.

As Andrew Walker QC, Chair of the Bar, said two days ago;

"I have spent much of my time since then discussing both the new scheme and those wider concerns with very many Heads of Chambers and individual barristers, both in London and across the country, with circuit leaders and, most especially, with the leaders of the CBA, Angela Rafferty QC and Chris Henley QC. Both the CBA and the Bar Council have been in contact with the House of Lords Scrutiny Committee and have met with Ministry of Justice officials to explain both the Bar's reaction to the new scheme and the context of the damage caused to the criminal justice system, and to the Criminal Bar, as a result of significant, long-term neglect by successive governments.

Criminal barristers have expressed a range of views to me about the structure of the new scheme, but there is unanimity that the fee levels across the board are inadequate, and there is widespread concern about those types of case in which the fees will be much lower under the new scheme, and about the impact of this on those members of the Bar and sets of chambers who will be most affected. There is also real dissatisfaction at the failure to recognise the work required to deal with the increasing amount of evidential and unused material that has to be considered properly in many types of case.

The inevitable consequence of both Government-imposed 'cost-neutrality' and the absence of index-linking is that we still have a system of payment for the vast majority of criminal defence work in the Crown Court that undervalues the skills of the Criminal Bar, underestimates the amount of work that cases now require, and fails to recognise our crucial role in maintaining the rule of law and in making the administration of justice a reality.

All of this is happening against a backdrop of crises in the justice system. For many years, the publicly-funded Bar (in both criminal and family work) has borne the brunt of an under-funded and over-burdened justice system. We are the ones who have kept cases going by doing the extra tasks, and putting in the extra hours, for ever diminishing fee rates. In crime, we are the ones who have been the last line of defence when failures in the disclosure of unused material have threatened the fairness of criminal trials. I understand the serious concern that we (prosecution and defence counsel) will again bear the brunt of under-funding and failures in the system by being inundated with even more material without being paid anything more for the time we have to devote to it.

Wherever the reaction and decisions of the Criminal Bar may take us, there is work that we want to carry out in any event, but we will need the help of criminal chambers.

While we will in any event hold the Government to its promise to review the effect of the final scheme, ***we must carry out our own assessment of its impacts, based on the most recent full year's data that is available, i.e. 2016/17. We are already in the process of obtaining this data, for the whole of the AGFS scheme, from the Ministry of Justice, and we will be looking very carefully at the impacts on different types of work and different types of practice in crime. But I would echo Angela Rafferty's plea in last week's Monday Message that everyone should look at their own figures carefully (and at more than just a snapshot), so that everyone has a clear understanding of the impact on themselves and their chambers. Once we have the data, we may be able to help a few sets by making an assessment of the impact of the***

scheme on the whole of those chambers' AGFS caseload for 2016/17, as best we can. If Heads of Chambers are able to draw conclusions about the effects on their own chambers, then I need to hear from them. Unless we analyse carefully the effects of the new AGFS, we risk losing focus and the opportunity to address the real and pressing concerns about the viability and sustainability of practice for many at the Criminal Bar. We also owe it to all those who were involved on all sides, and in good faith, in trying to find a way to improve the scheme to make sure we are looking at it fairly. [my emphasis added]

One of my priorities, irrespective of the new scheme, has been to try to establish and prove the long-term effects of what has been happening for years in the criminal justice system on the future of the Criminal Bar. Heads of Chambers have been telling me consistently about the difficulties that they have experienced in recruiting and retaining junior barristers in criminal practice. Although we have been gathering and analysing increasing amounts of data on the young Bar (derived, for example, from our Working Lives Surveys and the Pupillage Gateway system) we need more information. We will soon have the information that the Bar has provided when renewing their practising certificates this year, which will give a clearer picture of the Criminal Bar as it is now, but we need to know more about the trends over the last decade. I would urge all Heads of Chambers in sets with significant criminal practices to respond to the requests for information that we will be making shortly. Their input is vital.

We need to focus on this urgently in order to draw firmer conclusions on which to base further representations to the MoJ about the effects of the new AGFS and the need for proper remuneration for publicly-funded criminal defence work. This affects not just the Bar, but the future of the administration of justice itself . . . '

Let's gather the data and support the Criminal Bar Association.
There must be cohesion behind our elected leadership.

I implore all barristers to answer the survey and all Heads of Chambers to call meetings to promote a forum for calm discussions and to make your views known to the CBA. My Chambers meet this week armed with a full review of internal figures and with a clear agenda.

We need to be calm, clear about what we want and fight this NOW or there will be no independent Bar in 7/10 years' time, or if there is one it will be the rump of a profession catering only for the privately paying and avoiding at all costs the legally aided.

Kerim Fuad QC
Leader of the South Eastern Circuit
Head of Church Court Chambers
25 March 2018