



Statement by Chair and Vice-Chair of the Bar

Having sought the views of its members, the Criminal Bar Association has today issued its statement on the state of the criminal justice system and on the funding of criminal legal aid. This sets out the stance of both the leadership of the association and of the Criminal Bar at a grass roots level.

As Chair and Vice-Chair of the Bar Council, we stand by the Criminal Bar Association and the Criminal Bar in striving for the proper funding of the criminal justice system, as we stand by all others who strive for the proper funding of other parts of our system of justice.

We stand by them, too, in seeking to secure a future for the Criminal Bar, whose dedication and commitment are essential to ensure that we can deliver justice fairly and efficiently. Legal aid across the board - including criminal legal aid - requires sufficient funding from the Government. There is just no alternative if we want to achieve effective, fair and efficient justice. The current level of funding is just not sufficient.

Slashed funding for justice

The Ministry of Justice (MoJ) budget has been slashed across the board in the last decade. The effects, in every area, are becoming ever clearer: courts and prisons in a deplorable state of repair, leading to unacceptable conditions; litigants struggling to deal with their own cases without legal help in the most trying of circumstances; overloaded courts and judges; increasing delays; and judicial morale at rock bottom, to name but a few. Previous programmes of reform have failed to produce the intended benefits through a lack of funding and political will. While the current investment in the court reform programme is substantial, it cannot hope to reverse all of the harm that has already been done, and continues to be done, and its focus is really elsewhere. When the required annual savings of nearly £260 million are taken out of the system, then these latest reforms may also falter; and if the intended efficiencies are not achieved, then it may even add to the current problems.

Those who suffer from all this are the public; the most vulnerable; the victims of crime; witnesses called to give evidence; and those who are innocent of the offences

with which they are charged. This can only lead to miscarriages of justice - the conviction of the innocent and the acquittal of the guilty - which harm both the public and the rule of law of which we are, and wish to remain, so proud.

Much of the brunt of this underfunding has been borne by the publicly funded Bar, through an ever growing workload, worsening working conditions and a deterioration in the quality of our working lives. That has not been met - as anyone else might expect - by increases in pay to compensate for the changes which have been imposed: quite the contrary.

Criminal legal aid

The main fixed fee scheme which pays for most criminal defence advocacy was first introduced in 1997. Between 1997 and 2007 there were no increases, only cuts. Inflation over that time was 26%. In 2007, following Lord Carter's review, the Government was finally persuaded to increase those fees, but the increase was only 18% overall: still 8% short of inflation. The repeated cuts to criminal legal aid since then add up to an overall fall in fees of more than 40% in real terms since 2007. The result is that the Bar has suffered two decades of falling fees in real terms for criminal defence work. We are not aware of cuts of this magnitude in any other area of public service in the UK.

The system staggers on only through the dedication, commitment, resilience and goodwill of the Criminal Bar. If the Criminal Bar feels that this situation cannot continue, that is hardly surprising. **The low level of morale was revealed in a recent Bar Council survey. More than a third of those criminal barristers who responded were dissatisfied with their careers and either considering alternatives or planning to leave the Criminal Bar soon. That was more than double the rate reported in other areas of practice, with the main reasons given (both in private practice and in the CPS) being poor income and work-life balance. If criminal barristers choose individually to take action to make their feelings clear to those in Government who hold the purse-strings, while remaining true to the ethos of our profession, then we believe that they will have the support of their colleagues across the Bar.**

The revised AGFS

The process that led eventually to the revised Advocates' Graduated Fee Scheme that is to be brought in as from 1 April 2018 began life in response to a threat of a yet further cut of 8.5%. That would have resulted in a halving of fees since 2007. While that final cut may now have been averted, the Bar has always made it clear that even before that cut, the fee levels on offer vastly undervalued what is required of the Criminal Bar, and were causing real harm to its long-term future. As so many Heads of Chambers have told us, this remains the case today, and we have sought

their support for gathering further evidence of this.

At no time has the Bar accepted that current levels of funding were adequate - quite the contrary.

At no time has the Bar accepted that fees should stay the same, year on year, becoming steadily eroded by inflation - quite the contrary.

We recognise, however, that levels of funding are different from the structure of any fixed fee scheme. The final structure of the revised AGFS is not the same as that proposed by the Bar in 2015, but the MoJ's recent announcement about the new scheme confirms that a key aim remain; that the Bar should be paid for the work that we actually do, with the iniquities of 'bundling' removed.

Some of the ways in which we asked that this be recognised have also survived, such as separate payments for PTPHs, sentencing hearings and the second day of a trial. The new scheme also includes some graduation - although not to the extent for which the Bar argued - reflecting the greater skills and experience required to conduct more difficult cases.

While we should never have been subject to a scheme which lacked these features, it is right that we should recognise that the MoJ accepted the Bar's arguments, and included these features in the new scheme. These features are a significant step forward from where we found ourselves.

Many, on all sides, worked hard to devise a new structure to replace one that was, in so many respects, unfit for purpose. We believe that all those involved, both the officials at the MoJ as well as the many barristers from all quarters and of all levels of seniority, sought to do the best they could to design a better structure, and we thank them for their efforts.

But the process was hamstrung by the requirement that was then insisted upon, at a political level, of 'cost-neutrality'; nor does the final scheme reflect all of the elements for which the Bar fought hard.

Against that background, it is right that we should look fairly and objectively at the structure of the new scheme, but in doing so we need to consider all of its aspects, and we need to do so with care. We also cannot ignore the effects of 'cost-neutrality' on either the structure or on what barristers will actually be paid; nor can we ignore the fundamental question of whether it will have the result that barristers are paid fairly for the work that they have to do in each case.

We are in the process of obtaining the most recent full year's figures from the MoJ

(those for 2016-17), and have commissioned detailed analysis. We will carry that out as rigorously as we can.

What 'unbundling' the fees payable for criminal defence work has already achieved, however, is to show the true level of payment, and it can clearly be seen that the fees are just inadequate. This leaves many of the most talented unwilling or unable to remain in practice at the Criminal Bar. Quite simply they can, and may need to, earn more for their skills and talents in other fields of practice or in other walks of life altogether.

With that in mind will be looking particularly carefully at those areas in which many at the Criminal Bar tell us that there will be real unfairness under the revised scheme. In particular:

- Many have explained to us how the revised scheme fails to achieve the aim of paying for the work that we do in some important respects. Figures that have been shown to me by several sets of chambers seem to bear this out, particularly in those cases in which not just skill and experience are needed, but also very many hours to review and consider large volumes of relevant material that just cannot be ignored or readily condensed.
- In many cases, the recent and developing explosion in relevant electronic data, particularly social media data, has exacerbated this.
- There is real concern that this will now be the situation in even more cases than before, as a result of the widespread failures to deal properly with evidential and undisclosed material.
- Those cases comprise many to which more junior practitioners aspire. If those cases pay inadequately, then that will be another blow to the future of the junior Criminal Bar, which it is just not able to sustain.
- For many senior juniors, particularly women, a small number of these cases make their practices viable. Without them, yet another blow may be struck against improving diversity among the most senior practitioners at the Criminal Bar.

Such concerns cannot be ignored. In particular:

- All cases must be fairly remunerated within the scheme. Where fair remuneration is now absent, increases to reflect the work required cannot be delayed.
- To ensure that this remains the case over time, fees must be index-linked, so that they are not eroded by inflation.
- The likely impacts of the new scheme on the future of the Criminal Bar must be assessed sooner, and more broadly, than the MoJ currently intend.

We would also urge the MoJ to reconsider other missed opportunities to support a healthy future for criminal defence advocacy, such as the package of proposals put

forward under the Lord Chancellorship of Michael Gove.

A common purpose

We understand the concerns across the Criminal Bar. We will continue to work closely with the Criminal Bar Association, under the strong and determined leadership of Angela Rafferty QC supported by Chris Henley QC, the Circuits and Heads of Chambers to support the Criminal Bar as they strive to secure a viable future.

On our side, channels of communication remain open with the MoJ. We believe that many at the MoJ and in related agencies, at both a political and civil service level, understand and share the Bar's concerns about the state of our justice system. We understand that funding decisions are not theirs alone, and that they are not responsible personally for where we now find ourselves. The MoJ will have our support in any arguments they may seek to make in other places to secure greater funding for justice. We urge them to make those arguments.

We remain committed to playing our part in representing and supporting the Bar, and in promoting justice. The Bar and its leaders must stand together to defend the delivery of proper justice, and to secure the funding from Government that is so urgently required.

It is time to frame a fresh campaign for justice across the board around which the whole Bar can unite, and to give new impetus to our lobbying of all those with influence, to secure the rightful place and priority for justice in Government.

Andrew Walker QC, Chair of the Bar
Richard Atkins QC, Vice Chair of the Bar