LESSONS FROM HISTORY

I was called to the Bar in 2005. In 2006 the Carter review recommended a 'revised advocates graduated fee scheme' for the remuneration of advocates in the crown court.

The RAGFS was set out in the Criminal Defence (Funding) Order 2007 SI No.1174, which took effect from the 30th April 2007.

It was introduced by the (then Labour) government with a prediction by Lord Carter that a saving of 20% would be achieved in the first four year of the reforms. The targets were the so called 'fat cats', criminal silks earning in the £600k-1m bracket from public funds, and, an explicitly stated intention at the time, was in tandem with other reforms intended to reduce the number of solicitor firms undertaking criminal work. And it succeeded. To put that into real terms, the reforms were estimated to have resulted in a reduction of expenditure for criminal legal aid of £100m in those first 4 years. As we now know, and was universally predicted by the Bar at the time, it didn't just remove the fat cats, it impacted the whole food chain.

In April 2010 the government announced a reduction of 13.5% over a three year period in remuneration for criminal graduated fee work. As a consequence, graduated fees were cut by 4.5% in April 2010, 2011 and 2012.

In 2016/17 (the last year for which data is presently available) spending on AGFS was c.£226m including VAT (can I just repeat that: including VAT). Barristers practising in criminal law are estimated (by the MOJ) to number 5000. HCA's slightly less (4700). We therefore number around 10,000 criminal advocates practising in the crown court overall. Albeit many of us combine prosecution work with an AGFS income and some of us do private work, you do the maths; the AGFS pot is now spread rather thin.

Our sister profession faired worse, in consequence of which HCAs moved into the crown court, in the early days pushed by the financial imperative of solicitor firms struggling to survive. It is estimated that 40% of crown court work is now undertaken by HCAs and on the numbers analysis set out above that is probably right.

In the interim, Lord Chancellor after Lord Chancellor has berated us (there have been 5 holders of the office of Lord Chancellor in the last 5 years, 8 since I was called to the Bar, a point I will return to) on our obstinately atrocious retention and diversity figures. All set out their 'strongly held conviction' that 'we must to better' to 'support women to attain the highest positions of judicial office.' Each closes their eyes to the reality: that cutting remuneration pushes too many women off the ladder at the point at which they start a family, and bars too many talented entrants from the profession, for us to make significant inroads into the 'pale

male' gentlemen's club that still exits at the top. (The BSB predicted in 2017 that on current trends we are a century away from BAME that reflects the UK and half a century away from parity for women).

Bar Council data for 2017 makes the point: retention in the 10-15 year call bracket, down by 10%, in the 5-10 year call bracket down 20% and in the 0-5 year call bracket down by 30%.

This is the soundtrack to the last decade of our professional life.

THE PROPOSAL – A CUT NOT A GAIN

In Garden's Courts response to the consultation that ultimately resulted in Statutory Instrument No. 220 of 2018 aka 'The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018' (introduced on 1st April 2018) (see www.gardencourtchambers.co.uk/garden-court-chambers-response-to-the-agfs-consultation my chambers, and I, made the following points:

1/ The Government's consultation on 'reform' of AGFS was in fact a consultation on cuts to AGFS.

2/ Our experienced fee clerks team (dedicated solely and exclusively to the billing and collection of criminal fees) crunched the numbers and established the following average reductions for offence brackets (on the proposals at that time):

Fraud : -19.3%

Firearms : -10.1%

Drugs : -48%

Terrorism : -9.2%

Murder : -14.6%

Sex offences : we accepted that in some instances there may be increases but noted, this did not offset (or come close to offsetting) what would be eye watering reductions in chamber's income overall (see above).

3/ We compared annual fee income of a representative sample of members of chambers at all levels of call. We found reductions in fee income under the proposed scheme within the following ranges broken down by level of call:

QC:- 0.3-4%

Senior Junior: -10 to -32%

Mid ranking juniors (15 year call bracket) -10.2 – 45%

Juniors under 7 years call : 0.7 – 21%

Contrast those figures with the Government's own predicted figures contained within the original consultation paper:

QCs- increase of 10%

Leading Juniors : decrease of 6%

Led Juniors : increase of 1%

Juniors: decrease of 1%

We were not the only Chamber's to do the figures and reach the conclusion that the Government's purported 'cost neutrality' was a complete misrepresentation of the facts.

The Government now concedes that the scheme is not, in fact, cost neutral. They have added, we are told, a further £9m between the consultation and the introduction of the scheme, in light of that fact. They claim to anticipate an additional cost of £9m 'as a result of barristers billing their cases in the highest possible bands'. Which then brings us to the latest offer, a further £15m 'bung', which we cannot properly cost because we do not have the information that would allow us to do so. In any event, the MOJ have not committed to a 'deal'. These are simply proposals, state the MOJ, which will require a further 'consultation'.

The £15m is inclusive of VAT. Incorporating a 1% increase next year it is sold as an overall 'increase' of 6.6%. This would be true if the scheme overall was actually cost neutral, in other words, if the scheme did in fact secure AGFS fees at approximately the £226m mark (and obviously that figure fluctuates year on year in any event, impacted by a variety of factors most notably what prosecutions are brought for what crimes and how many trials take place).Or at least it might be true. Is 2016/17 a typical year? Was it a year of high AGFS claims, or relatively low ones? Have your professional bodies provided you with the information you need to make an informed assessment? In any event, all of the chambers who analysed the initial proposals came to a consensus that this is not a cost neutral scheme. These were cuts being introduced under the guise of reform.

Read footnote 1 of the document entitled 'Revised outline of proposed additional £15m AGFS expenditure' circulated by the CBA (author unknown) in recent days. I quote:

‘The most recent published figures for a full year of expenditure are those for 2016/17. The total expenditure in that year was c£226m (inc.VAT). £15m (inc.VAT) is approximately 6.6% of that total.’

The proposal is that the £15m (inc VAT) is divided in the form of £12.5m up front, so to speak, and the additional £2.5m coming in the form of a 1% increase next April with provisos to allow for over/underspend.

This is not a 6.6% increase to AGFS and nor does it purport to be. It is a 6.6% decrease in the scale of the cuts that the scheme has already introduced.

If you are one of the practitioners facing cuts to your income of up to, and in some instances over, 40% , the two £9m adjustments (about 4% each using the same analysis but with a big question mark attached to the second)and the additional £15m (inclusive of VAT) notwithstanding, means you are still going to be significantly down in your billing during the course of the next financial year. The gains do not offset what you are about to lose. Your income will reduce commensurately in the latter part of that year and into the next. Your chambers rental income will reduce to reflect that reduction, impacting your colleagues, and your employees. That is the brutal financial reality of the ‘deal’.

‘Bank these gains’ say the leadership of the Bar and the CBA. The commerciality reality is that it is rather difficult to bank a reduction in income.

STICKS AND CARROTS

The business model of a chambers is collegiate. If anyone in the food chain earns less, the margins for legal aid sets are now too slim to absorb the commensurate reduction in chambers income. More sets will go under over the course of the next two years if we are not prepared to stand and fight at this juncture. More talented individuals will leave the criminal bar. More talented individuals will decide not to join in the first place. It has been the pattern of the last decade and on our present trajectory it is set to continue. We grow over weaker and, look around you in the robing room, we grow ever older, and ever more tired. We need youth on our side, recruited into our chambers, coming up through the ranks; women and men properly remunerated, talented and with the stomach for the fight ahead.

As ever, to sweeten the bitter pill comes the promise of jam tomorrow. I have now had a decade of promises of jam tomorrow. It leaves me nauseous. And when you are too long in the tooth to be lured by the non-existent carrot, you face the stick. That stick is now all too familiar to me. It has been a feature of every bout of action. If you don’t accept the

recommendations of our ‘leadership’, you are taken to one side, spoken to, invited to face ‘reality’; there will be ‘civil war at the criminal bar’ goes the hyperbole, there will be ‘sets who continue to work, nullifying no returns’ there will be a ‘wholesale withdrawal of goodwill by the Government’. None of it comes to pass such that concerted action is undermined. I have participated in every outbreak of action and voted in favour of it at every stage of this generation’s political awakening. I am repeatedly told ‘not to be naïve, to ‘vote with my head not my heart’, that ‘our solicitors are treacherous and will seek to undermine us’. That ‘the bar is treacherous and will fragment’; ‘any action will come to nothing.’ And now I am hearing it again, including from those who should know better. In fact it is this generation that has shown we do know better. We know that action speaks louder than words. And we are leading, not following. Nice words and gentlemen’s agreements with the Government? No thanks. We are a generation politically hardened and prepared for confrontation. We came up against the odds, thrived in the face of adversity and we will not back down in the face of a fight.

If we act decisively and quickly we, the juniors of the criminal bar, hold the balance of power in our hands. We are the force to be reckoned with. We hold the leverage that is required to move beyond the impasse in the present negotiations. The leadership are right, the current proposals are the best we are going to get: but only if we stop here. If we move to no returns and days of actions, the next offer will come. Leverage is the key component to any wage dispute. And dress it up however you want, that is what we are presently engaged in. We juniors can win the vote because we have the numbers and this time around, we have the backing of many of our Silks. We don’t need unanimity across the country. We need the 51% to stand firm. If we vote to refuse the deal the criminal bar, whatever our differences of opinion, is an honourable profession and has integrity. We may not all agree with the outcome of the ballot, but to a woman, we will all get behind it.

You say you want unity? After the ballot you will have it.

IF WE VOTE NO, THEN WHAT?

We need to know there is a road map in place going forward.

I agree we require an urgent improvement in our working conditions, a topic I have campaigned on. I agree we need to deal urgently with the vexed issue of unused material. I agree that prosecution fees need, as a matter of urgency, to be increased but none of it has anything to do with a pay negotiation on AGFS. This is not an either/or. In any event, Gauke

being the 5th Lord Chancellor in 5 years and the Government facing the pressures that are Brexit we cannot sensibly expect promises made to us now to hold good in the future.

If the statutory instrument that was introduced in April can be amended, as the Government now propose, it can be revoked or suspended. That is the bottom line. That we failed to achieve that at the first Parliamentary vote does not preclude a second. It can be achieved and will be achieved if sufficient pressure is applied, and that is a withdrawal of our goodwill: it means moving to no returns, and fast.

The action so far, and the diligent work of many CBA officials and the Chair of the Bar, has achieved two key concessions:

1/ the government accept the scheme, left as it is, will not be cost neutral

2/ the government have committed to a further consultation.

Those are the gains that we need to bank. Those gains are not going away. The Government having intended to implement a cost neutral scheme, which it now concedes on its own analysis requires amendment in order to become cost neutral, cannot achieve that without a consultation. We can have confidence that for all of the scare tactics, the present reductions in the scale of the cuts will ensue because not even this government would rescind an offer that does no more than purport to achieve it's own stated objective. The next phase of negotiation must be about suspending/ revoking the SI 220 2018, in order to allow time for careful and thorough analysis of the scheme to put right all that has gone wrong in the devising of it. Those are the parameters. And with fast and decisive action it can be achieved before Parliament rises for the summer recess ,on the 24th July 2018, by applying sufficient pressure (no returns and days of action) within that timescale to compel emergency legislation.

It is a coherent position. It is reasonable. It does not face down the Government. It accedes to the need for reform. And it gives our sister profession, who undertake 40% of the work we are presently in dispute about but have been so far denied a seat at the table, an opportunity to participate. The end game is about negotiating reform which is a gain and not a cut; and which as an absolute bare minimum must be index linked to provide sustainability for those joining the profession. By pushing our 'deal' back, we benefit our sister profession who are judicially reviewing the PPE cuts imposed upon them and face similar cuts (also called 'amendments') to LGFS in the next year or so. Those two negotiations need to be in tandem, not separately. As things stand it is wholly foreseeable that any concessions given to us, will be recouped from our solicitors in due course, in order to preserve 'cost neutrality' for the MOJ overall. Our sister profession cannot absorb that. The more they are weakened, the

greater our complicity in the slow but steady dismantling of the CJS, which was accelerated, if not initiated, post 2006. I refuse to be part of the generation that allowed that to happen. I came to the Bar to strengthen the hand of justice, not to connive in undermining her.

Ask yourself whether your chambers can absorb the cost of 'no returns' and if necessary, days of action? Then ask yourself can your chambers, can you, absorb cuts on the scale that we are being asked to sign up to? That is the choice that we face. That is why I am voting No.

Lucie Wibberley

Garden Court

7th June 2018