

## **‘NO RETURNS’ GUIDANCE 2022**

### **INTRODUCTION**

1. Over the last 5 years, the Criminal Bar of England and Wales has lost approximately a quarter of its full time juniors and full time QCs. According to the Bar Council, by 2019/20 there were only 2,273 full time criminal barristers working in our jurisdiction.
2. As a result, there are an increasing number of hearings, including trials, which are being adjourned due to the lack of available barristers to prosecute or defend.
3. Low remuneration and high levels of stress are the two predominant factors which have driven the exodus of barristers from criminal work in recent years.
4. It is clear that the majority of those criminal barristers who have remained feel that they are no longer able, through goodwill, to sustain a criminal justice system which is in crisis.
5. Further to the ballot which closed 11<sup>th</sup> March 2022, 94.34% (1800 of 1908) of the members of the Criminal Bar Association who voted, signified their intention to adopt ‘No Returns’ in relation to AGFS cases with effect from 11<sup>th</sup> April 2022.

### **WHAT ARE ‘RETURNS’?**

6. A ‘return’ in the Crown Court is any instruction to appear in any hearing, in relation to any case, in which another advocate is, or was, instructed as the trial advocate.
7. The criminal justice system relies heavily on barristers covering hearings for their colleagues, including but not limited to trials, when the court has listed more than one case for the same barrister at the same time ie. a clash of listings.

8. These returned cases are usually re-allocated very close in time to the scheduled hearing, often late in the afternoon when the courts confirm the cases that will be heard the following day.
9. Consequently, returned cases generate disproportionately more last minute, high stress, out of hours work for the newly instructed barrister. The amount of work involved is often wholly disproportionate to the fee, relative to the work involved for a similar type of hearing in a case in which the barrister has been instructed from the outset.
10. The willingness to accept returns is an act of goodwill that maintains the smooth and efficient running of the Crown Court.
11. By refusing to accept returns in the Crown Court, a criminal barrister is not refusing to work. They are simply limiting their caseload to their own cases with respect to which they will fulfil their professional obligations and act in the best interests of their clients.
12. Continuity of representation at all times is preferable for the smooth running of every case. Achieving this requires a properly funded criminal justice system and enough barristers who are not so overburdened by poorly remunerated work that they become unavailable for cases in which they are instructed as a consequence of being double booked.

#### **WHAT DOES 'NO RETURNS' MEAN?**

13. The ballot concerned only AGFS cases.
14. AGFS cases are publicly funded defence cases. Under AGFS only the instructed advocate can make a claim for payment.
15. Returns as referred to in the ballot, are therefore any instructions to appear at any hearing (including preliminary hearings, PTPH, mentions, sentences and trials) for any AGFS case, where there is a Representation Order in force for which another advocate is nominated as the 'instructed advocate'.
16. Consequently, 'No Returns', as referred to in the ballot, means refusing to accept instructions in the above mentioned cohort of cases from 11<sup>th</sup> April 2022.

#### **WHAT ARE THE PROFESSIONAL CONDUCT IMPLICATIONS?**

17. There should be no professional conduct implications if any individual barrister, of their own volition, determines that they will no longer accept returns and follows the Code of Conduct in relation both to cases that they are returning, and cases that they decline to accept as a return.

18. Rule rC26(3) states that:

*“You may cease to act on a matter on which you are instructed and return your instructions if:*

*(3) you are a self-employed barrister and:*

*a) despite all reasonable efforts to prevent it, a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available; or*

*b) illness, injury, pregnancy, childbirth, a bereavement or a similar matter makes you unable reasonably to perform the services required in the instructions.”*

19. Guidance gC83 accompanies Rule rC26 and states:

*“In deciding whether to cease to act and to return existing instructions in accordance with Rule rC26, you should, where possible and subject to your overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance.”*

20. The purpose of the ‘cab rank’ rule (rC29) is to prevent barristers from refusing cases because of the identity of the client, the nature of the case, or any belief or opinion they may have formed in relation to either.

21. There are circumstances in which the cab rank rule does not apply. Rule rC30(2) and (8) of the Code of Conduct states:

*“The cab rank Rule rC29 does not apply if:*

*(2) accepting the instructions would require you or the named authorised individual to do something other than in the course of their ordinary working time or to cancel a commitment already in their diary; or*

*(8) you have not been offered a proper fee for your services (except that you shall not be entitled to refuse to accept instructions on this*

*ground if you have not made or responded to any fee proposal within a reasonable time after receiving the instructions."*

22. On 15th November 2003 the Bar Council decided that, with immediate effect, all cases subject to criminal graduated fees are no longer deemed to be a proper professional fee.
23. If you have decided not to accept returns, you will have concluded that 'returns', as a cohort of cases, because they are late, often last minute, instructions in a case in which you were not previously instructed, bring a level of stress, difficulty, and volume of out-of-hours work, which outweighs the remuneration that you are being offered, such that you are not willing to accept them because you take the view you are not being offered a proper fee for your services. The fact that you are willing to undertake legally aided criminal work, despite it having been 'undeemed', does not prevent you from limiting the amount of such work that you take on.
24. If you decide that a 'return' does not provide a proper fee, there is no professional reason why the instruction cannot be refused. In short, you cannot be compelled to accept a return case for fees that are not adequate to reflect the work that you are being asked to undertake.

#### **WHAT SHOULD I DO NOW?**

25. **You should review your diary now.** This applies whether or not you are intending to undertake 'No Returns' because in the event that you need to return a case, you must consider the impact upon your client of the fact that other advocates are undertaking 'no returns' from 11<sup>th</sup> April 2022 ie. it is foreseeable that after that date, there may not be an advocate available to accept your return.
26. **You should do the following:**
  - a) **Make sure you have entered into your diary, in the usual way, periods when you are not available for work, due to personal or professional reasons.**
  - b) **Identify any possible diary clashes or cases listed for dates when you had already determined that you were not available for work.**
  - c) **Having identified any cases that clash, apply the usual professional rules of priority.**

- d) Immediately inform your instructing solicitor of any potential problems and, if necessary, obtain instructions as you would do ordinarily before applying to re-schedule any hearing.**
- e) Apply to the court to have one of the cases moved, having regard to the respective priorities that you have assigned to your cases and your instructions, in order that you can retain both cases. If your application is refused, consider whether, in all the circumstances, it would be appropriate to apply to move the other case. If so, obtain the necessary instructions.**
- f) Due to the shortage of criminal barristers, an increasing number of returned cases are already not being covered by alternative advocates. This may be a factor that you would wish to draw to the attention of the court when applying to re-schedule hearings and re-list for a date when you are available.**
- g) If you have explored all appropriate and available options but a clash remains such that you cannot retain both cases, return one of the cases to your instructing solicitor, again having regard to the respective priorities that you have assigned to your cases.**
- h) Returning a case ahead of 11<sup>th</sup> April 2022 will increase the likelihood of finding an alternative advocate who is available to accept your return.**
- i) After 11<sup>th</sup> April 2022, in the event that an AGFS funded case is returned the ballot result indicates that it is unlikely there will be an advocate available to accept the return.**

27. 'No Returns' applies to all types of offences, all categories of cases, CVP and in person hearings. In the event you are instructed in a case with a vulnerable defendant, complainant or witness this may be a factor that you consider when deciding which of your cases take priority.

28. Please bear in mind the importance of acting expeditiously; in any applications that you make to the court to ensure your availability; to remove clashes from your diary and by returning cases prior to 11<sup>th</sup> April 2022, in order to limit the impact on each of the respective clients that you presently represent (guidance gC83).

29. It is recommended that every barrister practising in criminal work review their diary for a 10-week period, starting from 11<sup>th</sup> April 2022.

30. For the avoidance of doubt, an end date to 'No Returns' was not specified in the ballot.
31. All Heads of Chambers are encouraged to ensure that their tenants, pupils and clerks have access to this guidance to assist them in resolving diary clashes.
32. The Criminal Bar Association will endeavour to assist with any requests for clarification of this guidance from any criminal barrister.

**Lucie Wibberley, Secretary**

**Mark Watson, Assistant Secretary**

**Criminal Bar Association**

**18<sup>th</sup> March 2022**