

Minutes of the Bar Council meeting held on Saturday 2 March 2013 at the Bar Council offices

Present:

Maura McGowan QC - Chairman

Nicholas Lavender QC - Vice Chairman

Stephen Collier - Treasurer

Rt. Hon. Dominic Grieve QC MP - Attorney General

Mr Oliver Heald QC MP - Solicitor General

Mr Keir Starmer QC - Director of Public Prosecutions

74 further members of Bar Council attended.

1. Apologies

Apologies for absence had been received from Julia Beer, Phillip Blatchly, Michael Bowsher QC, Michael Collard, Charles Cory-Wright QC, Mark Fell, Amanda-Jane Field, Susan Grocott QC, Adam Hiddleston, James Hines, Barnaby Hone, Thomas Jaggar, Michael Kent QC, Ian Lawrie QC, Sarah McCann, Fiona McCreath, Paul Mendelle QC, Christina Michalos, David Nicholls, Neil Ross, Muhammad Saley, Michael Soole QC and Geoffrey Tattersall QC.

The following did not attend: David Anderson, Ayesha Bhutta, Kerry Bretherton, Lord Carlile of Berriew QC, Glenn Carrasco, Alexandra Healy QC, Edward Henry, Robert Lawrie, Alexander Learmonth, Natalia Levine, Nigel Lithman QC, Melanie McIntosh, Sarah Morgan, Hefin Rees, Bernard Richmond QC, Winston Roddick QC, Nicholas Worsley.

2. Approval of the minutes and matters arising

The minutes of the January 2013 Bar Council meeting were approved. There were no matters arising from the minutes of the last meeting.

3. Statement by the Chairman

After welcoming the Law Officers and the Director of Public Prosecutions, the Chairman referred to her [written statement](#) which had been circulated to members; it is a relatively short report on this occasion as she wrote to the profession in February and that communication set out in general terms the policies and strategies being implemented. The Chairman also encouraged members to read her column in Counsel magazine, in which she tries to keep the profession up-to-date with what

she is working on.

The Chairman was anxious to include the edited version of her diary, which is a fair representation of recent media commitments, meetings with parliamentarians and stakeholders and other events. She hopes that this will be useful in answering questions around: "what does the Chairman do for the profession?" In the last month or so, there have been media engagements arising out of the Brewer case in Manchester and the Lord Chancellor's comments about levels of remuneration for Silks. Additionally, there has been continuing work preparing for the imminent Legal Aid review.

The Chairman said that she accepted that nothing is perfect and that criticism will always be made of the Bar Council and any individual Chairman; she is open to constructive and sensible suggestions for improvement. However, to receive uninformed criticism shows that there needs to be better communication between the Bar Council and the profession. For example, on recent Circuit visits, the Chairman was twice criticised - in different cities - for not being visible in the media. This was despite the media engagements as outlined in the report and having secured an article on the front page of The Times that week.

Contrary to some reports the Chairman has seen, there is not and never has been a bar on tweeting from Bar Council meetings. However, the Chairman does urge members to be careful; some of the arguments put forward are more complex than can be expressed in 140 characters. What is put out on the internet influences what people think of the Bar as a profession. There is no embargo, but members are encouraged to consider the effect of only tweeting part of a debate or not expressing it clearly.

The Chairman offered her congratulations to all the new Silks, as announced this week, including Hefin Rees, a member of Bar Council, Matthew Nicklin, a member of the BSB Board, and Baroness Deech. The Bar Council is constantly monitoring the QCA, JAC and all forms of appointments; feedback on these processes is always welcome.

The Chairman expressed her concern that there are still vacancies on the Bar Council for employed barristers under 7 years' call. It is of vital importance to the Council that the employed Bar are properly and consistently represented as they have a valuable contribution to make. The Chairman asked members to use their influence to persuade barristers who fall into that category to stand. Further to a similar plea made at an earlier Bar Council meeting, an expression of interest was received by somebody who wanted to fill one of the vacancies for a year (as permitted by the Constitution). The Chairman was therefore delighted to welcome Malcolm Frost from HMRC, who is keen to work with the Bar Council and the Bar Council are keen

to work with him. The Chairman asked that he be made to feel welcome by other members.

The Chairman added that the Remuneration Committee are holding a conference on 16 March entitled: "Civil Work at the Bar - Making it Pay in 2013". There are some places still available and details can be found on the Bar Council website. The Chairman recommended attendance to those who may find the Jackson reforms difficult to fathom; this conference will assist, guide and offer constructive assistance.

The Chairman referred to R-v-Brewer, a recent case in Manchester; she did not wish to say too much about it as it directly affects individuals, the victim's family and friends, and the defendants await sentencing. The defence barristers have been through an exceptionally difficult time and the Chairman noted that, as soon as the story broke, the Director of Public Prosecutions offered his assistance to the defence team; in the view of the CPS, there were no faults or failings on behalf of the defence. The profession should hold its head up; what needed to be done in that case was done and it was done appropriately.

Any comments/questions arising out of the Chairman's written or oral statement

Employed Bar conference

Melissa Coutino (MC) brought to Bar Council's attention the Employed Barristers' Committee's conference on regulatory law, which will be held on 21 March.

Young Bar

In reference to the call for more employed Bar Council members under 7 years' call, MC wished to highlight a concern for the Young Bar; it is not only at the publicly funded Bar that work is drying up, there are also less opportunities at the employed Bar too. This is evidenced in the Bar Barometer.

The Chairman referred to the large amount of jostling within government over funding; these are not easy times. Hardship falls disproportionately on the junior Bar and the Bar Council must work hard for them. It is all the more reason to have the full complement of employed Bar representatives on Bar Council.

CPS email

The Chairman reminded Bar Council that the Director, Keir Starmer QC (KSQC), was present as well as the Attorney General and Solicitor General. Members will have seen the news about a leaked CPS email, which outlines a practice of briefing cases to the Bar based solely on savings-based criteria as opposed to choosing the right level of advocate. The Chairman heard about the email on 13 February but waited until she had received a hard copy on 14 February before giving it to the

Director at a pre-arranged CPS liaison meeting on 15 February. The Director's immediate reaction was that there would be an investigation; he telephoned within 20 minutes of the meeting having ended to confirm that the investigation was underway and to apologise.

The Chairman invited the Director to say a few words. KSQC confirmed that the practice detailed in that email does not represent CPS policy and should never have been sent. He wished to be very clear about that; the policy is to brief according to quality and capacity, albeit with an eye on value but that should not be the driving factor. KSQC has been in continual contact with the Chairman and Michael Turner QC (MTQC), Chairman of the CBA, and has promised to send them the formal findings of the investigation when it is complete. In the meantime, he has asked for assurances from each of the Chief Crown Prosecutors that this is not a practice that they subscribe to and all have replied to say that it is not. Looking forward, it seems that now is a good opportunity to clarify the position with CPS staff so that they are absolutely clear about the CPS's policy for briefing out. KSQC anticipates doing that in next few weeks or months.

Regina Naughton (RN) stood to say that she is a Crown Advocate with the CPS, who sits on Bar Council as a representative of those members of the FDA. She was a recipient of the email in question and when she did, she almost fainted. She is a friend of the self-employed Bar and is often responsible for instructing them. It is unfortunate. That said, she represents her members and should also say that in-house advocates are entitled to go to court and be supported by the CPS as they develop their skills. There was recently a case at the Old Bailey where an in-house advocate was led by a member of the self-employed Bar and everyone thought that they had done a very good job. RN did not wish to go in to details but said that there are problems in the CPS which need to be taken into account.

The Chairman stressed that, first and foremost, the employed and self-employed Bar are all members of the same profession and have a good deal in common.

Alistair MacDonald QC (AMQC) said that whilst the contents of the email may not be official policy from "on high", it represents common practice. It is therefore heartening to hear the Director say that the official CPS policy will be brought to the attention of CPS staff and he looks forward to seeing it.

4. BSB report

Baroness Deech (RD) referred to the Chairman's earlier suggestion regarding careful tweeting; at a previous meeting when she and other BSB members left the meeting as it went into private session, the tweeting continued. There is little point in being in private session in that case!

RD referred to the BSB statement which had been circulated prior to the meeting. A big concern since the last meeting had been standing up for the cab rank rule following the LSB's report questioning its purpose and relevance. The BSB has been greatly assisted by senior members of the profession who have come forward to write proper studies on the need for the rule. The BSB will go into battle - publicly - soon.

RD invited questions arising from the [BSB statement](#).

Questions to the BSB

Aptitude test

John Cooper QC (JCQC) asked what the rationale is for the level of cost involved in the new aptitude test and requested a financial breakdown which proves that the charge is for the reasons the BSB has given for it. The Treasurer, Stephen Collier (SC), said that he had sat in on all discussions and looked at the full range of options for charging a fee. The option chosen is that which covers costs as a minimum. A huge piece of analysis was undertaken to try and get this right. JCQC asked to see this piece of work.

RD said that the point is to cover costs and not to have to load more onto the practising certificate fee. However, the fee for taking the aptitude test is proportionately very small in light of the £16k or more a student can spend taking the BPTC when they have no chance of passing it.

The Chairman said that she has no interest in excluding anybody from the profession on any grounds, except those who are not good enough. If the test demonstrates to a student that they will be wasting money on fees, we are helping them and the profession.

QASA and serious crime

NLiQC expressed a concern that on his Circuit (Western), there are only 5 or 6 circuit judges who have murder tickets. Most heavyweight crime is covered by the High Court judiciary. Will they be trained in QASA? Vanessa Davies (VLD) said that most judicial training is now complete and this raises the question of eligible judges. She will have to take this away and report back outside of the meeting.

QASA Handbook

AMQC said that the timetable for the QASA rollout indicates that the handbook will not be published until June; are negotiations still ongoing with the SRA? Until the scheme is published, no-one will be able to form a judgment as to whether it meets the public interest.

RD said that the scheme still requires some refinements, arising out of the hundreds of consultation responses received. The public interest is always at the forefront of the BSB's thinking.

BSB costs

Tim Devlin (TD) raised the issue of funding in light of the increased Practising Certificate Fee (PCF), about which many are furious. The letter accompanying the renewal notice shows the increasing cost of the BSB - are there any plans to contain those costs?

RD explained that the budget has been combed through over and over; a very large proportion of the expenditure is not of the BSB's making. People forget that BSB is a small cog in a large wheel and has to do what it is told by the LSB. There is no fat to cut in the budget. It has been the subject of anxious discussion by this body for months; SC has cut all that he can. RD believes that the future lies in a PCF which is levied on the basis of income. She is only too aware of the terrible financial position of so many members of the Bar.

QASA and competitive tendering

Mark Wall QC (MWQ) expressed concern about the timing of QASA; the Government will imminently consult on how defence work will be funded in the future and if this involves competitive tendering, the Bar will not be able to survive in its current form. There is an argument to say that QASA is paving the way for that by giving everyone a grade. Is this the right time to introduce a scheme which aids the demise of the criminal Bar?

RD said that the very last thing that they want to do is contribute in any way to the demise of the criminal Bar. There is never a good time to introduce a scheme and there is not much that they can do about the timing; QASA has been in the pipeline for years and government cuts are always on the agenda. The BSB is trying to keep QASA separate.

Cab rank rule

MMQC said that she has reservations about the quality of the academic research in the LSB's report; one of the authors repeatedly quotes himself as an authority on the topic! The Bar Council submitted a Freedom of Information Act request to find out how much it cost them to commission and produce this report; the answer was £21,367. Bearing in mind that the LSB is funded by practitioners, this is unacceptable and will be mentioned in the Bar Council's response to the LSB's consultation on its business plan for 2013-14. Sir Sydney Kentridge QC is preparing a response to the report (pro bono) on behalf of the Bar Council.

5. Treasurer's update

Stephen Collier (SC) reported that he had three issues upon which he would provide an update, (these being: pensions, financials and premises), and then two other short matters.

Pensions

The scheme closed to future accrual on Thursday (28 February); there is still a lot of work to be done to tidy up the closed scheme and evaluate the size of the potential shortfall. There is a meeting with the trustees shortly and the results of the valuation are due over the next couple of months. In 2010, Bar Council signed up to an annual funding rate that will reach £1.4m in January 2014; there is a big step up from January 2014 in what is due to be put in and what is currently being paid in. This will impact future budgets. The numbers are significant and volatile. SC will bring a paper back to Bar Council soon. It is worth noting that SC has been to see those who assisted with the drafting of the opt-out papers that contributed to the current position. They have been invited to contribute to the shortfall and are 'considering their position'.

Financials

We are entering the last month of the financial year, in an organisation with a £13.5m operating turnover and c. 150 staff. At the beginning of the financial year, a £20k loss was anticipated at year-end. Over the summer, Bar Council and Finance Committee agreed to other releases from the reserves which led to a projected financial position of -£700k. Staff were asked to work as hard as they could to reduce expenditure, and the result is a currently forecast deficit of £350k - so an improvement in the year of c£350K. This is due to c. £200k income in addition to what was expected, whilst expenditure has been reduced by £140k. The increased income will probably continue in future years. However, the reduced spend is due mainly to phasing, so will not accrue in future years. This means that Bar Council is running at approximately £200k better than originally thought. There is a meeting after Bar Council to look at 5 year projections from the perspective of practitioners (who have to pay their PCF) and the wider Bar Council.

Premises

At the moment, the Bar Council, BSB and Central Services occupy 8 floors of the building in High Holborn for a rent of just under £900k per year; after rates, service charge and other disbursements it is c. £1.2m+, so almost 10% of total expenditure. This is an enormous amount to spend on a building and there are certainly other options. The Finance Committee has been aware for some time that although the lease ends in March 2019, there is a break clause exercisable in March 2014. To exercise this, notice would need to be given by the end of June this year. The Finance

committee therefore commissioned a working group to look at number of options. There has been positive and constructive input from staff. The options were:

- Everyone stays in the High Holborn office
- Some staff leave the High Holborn office
- Most staff leave the High Holborn office
- All staff move elsewhere

A variety of locations have been considered as well as relocation costs, dilapidations, staff costs and moving costs. The conclusion is that to balance the operational and financial requirements, the best option is compress the presence in this building by losing 3-4 floors (26-38% of square footage and pro rata the same quantum of the rent, rates and service charge). There is still work going on to ascertain the overall feasibility of this, but the timetable dictates that at the next Bar Council meeting a decision must be made. Operationally, it will not be easy but the staff have shown that they are up for it.

AMQC asked whether losing floors in the building will mean refitting those left. SC said that the plan is to exit on a "top down" basis, as reinstatements have to be made and less has been done on the higher floors in the building. AMQC asked whether provision has been made for a better IT system for dialling in to meetings. SC said that he is acutely aware of the lack of quality in telephone conferencing, but this has not been included in this particular piece of work as it was an issue irrespective of the relocation question. AMQC asked SC to bear this in mind as the current phone conferencing system is useless.

PCF consultation

The results of the PCF consultation will be put on the website on Monday (4 March); a second consultation is being proposed and SC will report to the next meeting with an outline of what that will look like. SC is very conscious that PCF renewal letters went out this week; anybody who is unhappy or wants more information is welcome to contact him.

MMQC said that she has spoken to BMIF and they are looking at whether they can provide data of banded earnings e.g. 10% of the profession earns between £xx and £xx; using this information it would be possible to see how levying the PCF by income would work and how much it might cost. Although MMQC is told that the number of those who responded to the consultation is quite high, she is not satisfied and asked everyone to encourage people to reply to the next consultation when it comes out.

Audit Committee: variation to Standing Orders

SC referred Bar Council's attention to a request in the papers to approve a variation

of Standing Orders to allow Audit Committee to co-opt new members. The Chairman of Audit Committee would like to co-opt two individuals; he will exercise his judgement as to who they are to ensure appropriate and suitable.

The Chairman of the Audit Committee, Michael Jeans (MJ), explained that the problem is that he can nominate people to join but the terms of reference say that this has to be done in accordance with the Nolan Principles. This will take a long time and in the meantime it is almost impossible for the meeting to be quorate. This is an interim measure.

Jolyon Maugham (JM) asked what happens if something goes wrong? It would be very embarrassing to have appointed people not in line with the Nolan principles. Why is it so difficult to comply? SC explained that trying to recruit outside of the process will cost approximately £20-30k and the "window" to do so (May - July) will not fit with the time of year when the annual accounts are brought to Audit Committee (July). The committee has to be quorate and in shape before then. The proposal is to nominate two members as a short-term measure whilst simultaneously trying to recruit in line with Standing Orders.

Bar Council approved this course of action.

6. Legal Services Committee report

Richard Salter QC (RSQC), Chairman of the Legal Services Committee, presented this item with reference to Annex 5 on the agenda. RSQC explained that the LSC's remit is to "defend the Bar's turf and make the life of the practising practitioner easier". LSC also coordinate and supervise the work of three sub-committees: Alternative Dispute Resolution (ADR); Access to the Bar Committee (ABC) and the IT Panel.

RSQC picked out some highlights in relation to the committee's continuing work:

- Winning the fight in the Supreme Court in R (Prudential) v HMRC (in which Charles J declined to extend the scope of legal professional privilege to tax advice given by accountants) despite the active opposition of the LSB. RSQC thanked Bankim Thanki QC other members of their team who, which Field Fisher Waterhouse solicitors, gave their expertise and time pro bono.
- The "remunerated McKenzie Friend"; it appears that people are putting themselves out as McKenzie Friends for £50 an hour. There are members of the junior Bar who would be very happy to do this work, so a group led by Robin Tolson QC and working with the FLBA and YBC are looking at how to make this possible.

- The Bar Nursery is almost ready to start; the contract negotiations have finished. RSQC thanked Fiona Jackson for her commitment to this project.
- The committee has looked at whether or not BMIF remains competitive and has concluded that it does.
- LSC is working with Amanda-Jane Field to devise a mentoring scheme to assist members of the employed Bar to apply for recorderships and Silk. This is now being widened to assist members of the self-employed Bar apply for jobs at the employed Bar.
- Jacqui Reid and the IT panel have issued very useful guidance to the Bar, especially in relation to information security guidelines.

RSQC thanked the committee's executive secretary, Jan Bye, whom he described as indefatigable.

The Chairman expressed her thanks to RSQC and the committee.

7. Professional Practice Committee report

Andrew Walker QC (AWQC), Chairman of the Professional Practice Committee, presented this item with reference to Annex 6 on the agenda.

AWQC began by expressing gratitude for Nicholas Lavender QC's leadership of the committee.

AWQC explained that most of what the committee does is confidential, so he cannot go into details but he can give an overview. The number of calls to the ethical enquiries line every year is equivalent to 40% of the Bar; the vast majority of these calls are dealt with by Bar Council staff. A debt of gratitude is owed to all of them for their hard work.

The number of calls is to the profession's credit. Practitioners are identifying ethical issues and want to get it right; this is a key part of an ethical structure. If the Bar are trying to get it "right first time" then it means that the BSB need not be so active.

The committee has seven new members this year, including two very senior employed barrister members. AWQC is keen to provide the same service to the employed Bar as to the self-employed Bar and to get their perspective.

The committee responded to a number of consultations, including the BSB Handbook and Entity Regulation consultation.

The committee continues to deal with large number of queries about referral fees; AWQC urged members to continue to take the message about the ban on referral

fees out to practitioners.

Members of the committee recently met with members of the BSB's Standards Committee to discuss the provision of guidance by both BSB and the Bar Council in an attempt to have a cooperative relationship. Further work in relation to this issue is currently being undertaken by both committees.

The new Handbook is due to come into effect at the beginning of 2014. The committee will work with BSB to educate the profession and revisit all guidance to ensure that it accords with and refers to the new Handbook.

Questions regarding the Professional Practice Committee's report

RD said that David Edmonds at the LSB sees the number of enquiries to the ethics helpline as a sign that rules are not working that that a more outcomes-focussed approach to regulation is required. Can AWQC assist in responding to that suggestion? AWQC said that in his view, if there is less by way of rules and guidance, there will be more calls; if the Handbook is too principles-focussed, people are likely need more assistance. RD asked AWQC if he would be prepared to put something to that effect in writing.

JCQC asked if any guidance has been provided in relation to issues with firms like Stobarts. AWQC said that the committee deals with queries regarding a wide variety of new practices and methods of working, but reiterated that everything that comes to the committee is dealt with confidentially unless a problem is so large or widespread that it justifies wider guidance. The difficulty with trying to give more guidance than already exists is the degree of variety and the need to consider the particular circumstances of each suggestion individually.

AMQC asked if there is guidance available on what a referral fee is. AWQC said that such guidance is available on the BSB and Bar Council websites; the Bar Council guidance is in the ethical enquiries section and there has been guidance in place since at least 2008 (although recently updated).

The Chairman thanked AWQC, members of the committee and the staff who answer the ethical query calls. People call in moments of high anxiety so they can be tricky conversations but the service provided is extraordinarily valuable.

8. Rules relating to the List of Defaulting Solicitors and other authorised persons

The Chairman said that she has recently spoken to Lucy Scott-Moncrieff, President of the Law Society, about problems arising out the new contractual terms. They agreed that the Bar needs to work with solicitors, and solicitors need to work with the Bar. If there are problems, they must be resolved. There is a joint willingness to

work together.

Barrie Akin, Chairman of the Implementation Committee, presented this item with reference to annexes 7a, 7b and 7c. All the rules relating to the List of Defaulting Solicitors and other authorised persons have been approved but there are some minor amendments; some are minor typos but there is also a flaw in relation to delegation. The original version does not allow the Chairman to delegate any of their powers in relation to the rules and must therefore do all the work themselves. There are also amendments to the definition of a "publicly-funded case" and an additional clause relating to publicly-funded bodies or agencies.

The changes were approved.

9. Officer elections timetable: to note

The Chairman drew Bar Council's attention to the timetable for the election of Officers 2014 annexed to the agenda, asking members to note and perhaps even take action. The process will be underway by the time of the next meeting, so now is the time for deciding whether or not to stand.

The Chairman said that in her limited experience, these are fascinating and extraordinarily worthwhile positions to hold, but it will not get any easier. A lot of enthusiasm is required.

10. Any other business

Judicial appointments

The Chairman congratulated three members of the profession elevated to the Supreme Court: Lord Justice (Anthony) Hughes, Lord Justice (Roger) Toulson and Lord (Patrick) Hodge. The Bar is an extremely fortunate profession in that it has people of this calibre, quality and integrity who take up these positions.

Communications

The Chairman also wished to thank the Communications Team at the Bar Council, which is sometimes unrecognised and undervalued. They have fought many fires in an understated way and their quality is very much recognised by other sections of the media and the press. They are the people to whom senior journalists come.

Fees Policy Group

The Chairman reported that the Fees Policy Group had its first introductory meeting with the Ministry of Justice yesterday (1 March); there is nothing to report as yet. The timetable for the legal aid review will no doubt be published shortly and she will let everyone know as soon as details are released.

LASPO

The Chairman asked that those affected by LASPO (coming into effect in April) must collect evidence of the difficulties arising in order to have more than just anecdotal evidence to produce to the Government. Nicholas Cusworth QC (NCQC) said that there is no annoyance too minor; it is important that everything is reported.

Zoe Saunders (ZS) said that a suggestion had been made during a recent Circuit visit to Bristol that the Bar Council opens a LASPO mailbox, to which practitioners can send their examples and evidence of problems. These can be analysed and collated. The FLBA would be happy to do it, but it falls wider than family work, so perhaps it is best for the Bar Council to do it. The Chairman said that this was definitely an idea to consider and that she would take it forward.

Leader of the Midland Circuit

Best wishes were sent to MWQC, who was about to celebrate his birthday.

11. Date of next meeting

The next meeting will be held at 10.00 on Saturday, 20 April 2013 in the Bar Council offices.

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