

Minutes of the Bar Council Meeting held on Saturday 3 March 2012 at the Bar Council Offices

Present:

Rt. Hon. Dominic Grieve QC MP - Attorney General
Mr Edward Garnier QC MP - Solicitor General
Michael Todd QC - Chairman
Maura McGowan QC - Vice-Chairman
Stephen Collier - Treasurer
Keir Starmer QC - Director of Public Prosecutions

63 further members of Bar Council attended, plus three substitutes.

1. Apologies

Apologies for absence had been received from Catherine Addy, Lesley Bates, Julia Beer, Ian Bugg, Gregory Bull QC, Alex Carington, Lord Alex Carlile QC, Henry Carr QC, Lucy Frazer, Manjit Gill QC, Suzanne Goddard QC, Martin Griffiths QC, Lieutenant-Colonel David Hammond RM, Edward Henry, Nichola Higgins, Nicholas Lavender QC, Christina Michalos, Lucinda Orr, Amanda Pinto, Hefin Rees, Robert Rhodes QC, Bernard Richmond QC, Neil Rose, Muhammad Saley.

2. Approval of the Minutes

The minutes of the 14 January 2012 Bar Council meeting were approved.

3. Matters Arising

Barrister Connect and Practising Certificate renewal: A query was raised as to whether the letters to the profession providing instructions for practising certificate renewal had been issued. Oliver Delany (OD) replied that the last batch of letters _ including passwords _ had now been despatched. The system for online renewal was not yet fully live due to software issues and the system requires robust testing before it can be launched. There is recognition that this problem foreshortens the period available in which practising certificates can be renewed (the deadline being 1 April 2012) and if problems continue there will be support for any proposed extension to the deadline. Michael Todd QC (MTQC) stressed that despite some initial problems, it is a strongly-held belief that the new database will be efficient, effective and in the interests of the profession. He thanked Bar Council staff for their dedication, including weekend working, to get the system up and running.

4. Officer Elections Timetable

The meeting noted the elections timetable for 2012, attached to the agenda at Annex 2. MTQC encouraged Bar Council members to give consideration to whether they wish to run for election to an Officer position.

5. Nomination of ICBET Trustees

The meeting noted the further nomination of ICBET Trustees, attached to the agenda at Annex 3.

6. Statement by the Chairman

Michael Todd QC (MTQC) thanked the Law Officers and the Director of Public Prosecutions for attending the meeting, as well as all Bar Council members who travel to this Saturday meeting and whose attendance is greatly valued. Consistent with the last meeting, MTQC had circulated [his statement](#) in advance in order to create time at the meeting for relevant discussion.

MTQC noted the sad loss of Lord Emlyn Hooson QC, who died on 21 February. He was a former leader of the Wales and Chester Circuit, had been the Liberal Member of Parliament for Montgomeryshire and was a highly principled advocate. Lord Carlile of Berriew QC is absent from this Bar Council meeting as he is attending the funeral.

MTQC asked those gathered to join him in congratulating Bar Council member Taryn Lee on her appointment to Queen's Counsel and Richard Marks QC on his appointment to Senior Circuit Judge at the Central Criminal Court. Congratulations were extended to all practitioners who were appointed Queen's Counsel this week.

MTQC was delighted to announce that this is the first Bar Council meeting at which crèche facilities have been available; there are two children registered for childcare today. MTQC encouraged those with childcare responsibilities to use the service and to let it be known that the facility is available; there may be those who do not stand for Bar Council because their childcare responsibilities prevent them from attending the Saturday morning meetings, so it is important that the service is advertised.

Questions on the Chairman's Statement

HMRC and LSC late payments: Fiona Jackson noted with disappointment that it took so long to get a response from the Exchequer Secretary, David Gauke MP, on the topic of LSC late payments and the implication on tax returns, only for him to

refer the Bar Council to another member of government. This response was not only far too late but was also offensive to those practitioners who, whilst being owed up to £100,000 by the Legal Services Commission, are also being chased for payment by HMRC.

MTQC said that he shared this view and had sympathy for those practitioners in this predicament; he had pressed David Gauke MP for a meeting, but was declined.

7. BSB Report

Baroness Deech reported on the BSB's progress in responding to the first Triennial Reviews of the Legal Services Board and Office for Legal Complaints. The BSB are playing a full part in the review and the response is due on 30 March; all are encouraged to participate and submit their views as it is an extremely important exercise. The theme of the response will be that the oversight regulator should add value, not impede front-line regulators in their work.

The BSB Handbook and Entity Regulation consultation will be launched on 5 March; the handbook replaces the Code of Conduct and is designed to be more streamlined and less prescriptive. It looks to the future to make sure that the BSB can regulate entities in the future and not just the employed and self-employed Bar. It provides risk-based, proportionate regulation. Baroness Deech encouraged everybody to read it and thanked those involved in bringing it together, a piece of work which has taken three years.

Baroness Deech provided an update on QASA, an area of significant activity for the BSB which has taken over the lives of everybody working on it. The BSB has not wavered from the regulatory principles which they believe should drive the scheme, despite pressure from other parties, and has clung to a scheme whereby judicial evaluation is at its heart as the only genuine and realistic option. Assessment centres are expensive and it is not known who will people them; the only proper evaluation can be made by a Judge.

The BSB are still in negotiations with the SRA, ILEX and the LSB about the details and issued a press release yesterday (2 March), urging fellow regulators to join with it in pressing ahead and break the deadlock, stressing the importance of judicial evaluation and grading on "trial experience". The issue of plea-only advocates (POAs) remains a sticking point and the BSB believes that anybody who advises a client should be able to see a case holistically, not just the early stages.

In light of the ongoing negotiations, it is unlikely that QASA will be launched on 1 April as originally intended and a statement will be made in due course about that.

Questions on BSB Report

What are the chances of QASA being extended to civil practitioners? Baroness Deech advised that the BSB will look to see how the process works for the criminal Bar and make an assessment post-implementation. At the moment it is too early to say.

Where is the pilot going to be? The original idea had been to start on the Northern Circuit, but now it is likely to be the South-Eastern Circuit as it is more largely populated, which may prove more useful in terms of evaluating how the scheme works.

How many of the Circuit Bench are on board? Baroness Deech confirmed that they are on board.

Will there be a defining list of the types of work/offences that "count" as criminal? If so, when will this be published? There are some areas of practise e.g. environment and planning and civil practise where there may be an overlap. Baroness Deech said that this level of detail is not yet currently available as the focus has really been to agree the overarching principles of the scheme. It will be available in due course but not yet. Anyone with queries is advised to email [Oliver Hanmer](#) at the BSB. Malcolm Davis-White QC asked whether the SBAs could be consulted on this issue; Amanda Thompson said that she had taken a note of the issues raised and would be taking them back to colleagues.

Baroness Deech conveyed good wishes to Vanessa Davies, who was absent from the meeting following her wedding.

MTQC made some points in response to the BSB report. He and Mark Hatcher had the privilege of going on a Circuit visit to Leeds the previous day and the following points had been made to him during that visit:

- Practitioners he met have no objection to regulation but dislike increased bureaucracy;
- The non-criminal sets were pushing for entity regulation;
- If QASA is going to be introduced, make it rigorous and not just a minimum standard of competence;
- On the POA issue, an advocate should be measured against all competencies (i.e. including trials).

Alistair MacDonald QC noted that surely it is in the public interest to have a rigorous process and therefore have excellence in the field as standard.

8. Criminal Bar Association: Report

MTQC introduced Max Hill QC (MHQC), Chairman of the Criminal Bar Association, to give a report. He would then be followed by Keir Starmer QC, Director of Public Prosecutions who will respond to the points raised and take questions.

MHQC said that the CBA has a working party, led by Eleanor Laws QC, which is developing a response to the Triennial Review consultation. If anybody would like to offer any input, please contact [Aaron Dolan](#). MHQC also asked the BSB that, if there is going to be an announcement about any delays in implementing QASA, it be made soon.

MHQC then addressed the DPP in respect of the newly implemented CPS Fee Scheme C:

"We wrote to you on 1st March, implementation day for the GFS Scheme C. Everyone has seen the letter, so we can take it as read. It seemed to many of us that it was better to write in advance of this Bar Council meeting. We have not brought you here to stage a hijack.

I therefore select just one sentence, from the second paragraph of the letter, which encapsulates what we say : 'It is our view that, if these fee rates are implemented, there is a substantial risk of significant harm to the public interest in that the pool of independent advocates of sufficient experience and ability willing to prosecute, at these rates of remuneration, is likely to diminish significantly'.

You responded in writing yesterday. The content of your letter may be less well known. You have refused our request to suspend the implementation of Scheme C. You went on to say that you are 'surprised to read comments about criminal barristers nationwide', and you claim 'the new remuneration arrangements go a long way to protect the majority of junior barristers undertaking volume Crown Court casework or a mixture of low-end and high-end GFS casework'.

If you are right, how can it be that an experienced junior wrote to me yesterday evening in these terms: 'my clerks have drawn up the fee note in a case I finished last week and have done the same using Scheme C to compare. It makes horrific reading; £17k down to £7k for a significant amount of work on a relatively paper heavy Grade 4 case but which, under the new criteria would not qualify for VHCC.

Following the apparent logic of your letter in response to ours, do you seriously contend that the old 'swings and roundabouts' approach still applies? And if you say yes, does that mean that dedicated and experienced Grade 4 prosecutors should immediately downgrade their practices to a majority diet of ABHs and burglaries, in order to make up the massive shortfall on the heavy cases? That is no way to sell your Scheme to us, and no way for us to run a

sensible practice.

Your letter goes on to claim that you have merely implemented the Scheme the Bar suggested and wanted, which demonstrates mastery of the art of being economic with the actualite, given that you know how often the Bar team has written since December to say that Scheme C if implemented will not be with the Bars approval or consent. And you go further to tell us that you 'cannot rule out further reductions in fees at some point in the future', and that phrase appears to mean reductions in addition to the 25% real term reduction of which Scheme C is but the first instalment; but you tell us if we are mis-reading the small print.

The Advocate Panel has seen hundreds of barristers lose out. I wonder whether you will admit that in some areas and at some levels, the number of applicants was surprisingly low. That should have been a clue to how 'criminal barristers nationwide_ were feeling. Of those who did apply, hundreds lost their livelihood. Fine, you may say, you have been slimming staff numbers too. But how many of your retained staff were told by you, congratulations, you have a future at the CPS but we are cutting your salary annually from now on, and in the same proportion demonstrated by the barrister who wrote to me last night? Are you really surprised about criminal barristers nationwide, told they are on the Panel but earning substantially less, with no incentive to progress through the levels because the 'money to effort' ratio is worse the higher they go?

The criminal Bar is one of the CPS_ greatest assets. You cannot hope to deal with the national caseload next week without us. You cut some jobs, but not salaries, internally. But for the CPS_ great external lifeline, the criminal Bar, you cut livelihoods and you make deep incisions into income too. When we dare to challenge you, and you really should have taken our letter more seriously, I suggest, your response is that we have the Scheme for which we asked. If that is the reward for negotiation and communication, can you really expect the Bar to continue to talk?

I received another letter yesterday, from Lord Jeremy Hutchinson. The first I have ever received from him. In case you think I have it easy, though anyone who thought that would be deluded, the letter is deeply critical of the CBA, centrally concerned with QASA, but emphasising above all the independence of the criminal Bar. When that is placed under threat, he offers me his view, which is this 'I would have gone straight to the Lord Chief and said 'the criminal Bar are not going to accept this, we shall not cooperate in any way, and you must do something about it'. Who am I to tell the founder of the CBA that he is wrong?"

Keir Starmer QC (KSQC) responded to MHQC and asked if he could put the position in perspective for Bar Council. The newly implemented fee scheme must be considered in the context of the Comprehensive Spending Review (CSR) 2010, due to which the CPS has been told to make 25% savings over a four-year period. Some of these cuts have already been made but given that the criminal justice system has no control over the number of cases coming through it and that there are no projects to

"stand-down", this is quite a challenge. Effectively, the CPS has to do the same work, to the same standard, with 25% less; even once the CSR period is over, there are no guarantees that there will not be more cuts.

The CPS has taken big decisions to make savings. 42 CPS areas have been reduced to 13 and the number of staff reduced from 8,800 in December 2010 to 7,100 in December 2012. Staff numbers in Headquarters have been cut by 50% and there has been a recruitment freeze for two years already. As Accounting Officer for the organisation, KSQC recognises challenging times during which it is inevitable that no aspect of work undertaken by the CPS can be ring-fenced against the cuts.

In relation to the new fee scheme, KSQC provided the background leading up to its implementation on 1 March. Negotiation on the new fee scheme started in 2008. The Bar representatives expressed a wish to bring the prosecution remuneration arrangements in line with those for the defence; the CPS worked with the Bar Council's working group to try and put together a scheme that did not just make a percentage cut across the board, ensuring that there was a dialogue to try and find an arrangement that both parties could broadly accept.

The two issues in question were: (a) how the scheme would be structured and (b) the rate reduction. In relation to (a), a paper prepared by Professor Martin Chalkley on behalf of the Bar Council was sent to the CPS in April 2011 and, after some minor tinkering, accepted. In relation to (b), the cuts in question are 5% overall; in some parts of the scheme it is 25%, but when averaged out it only comes to 5%, which is significantly less than the savings the CPS have to make.

The CPS opened a consultation period on the new scheme, which ended in December 2011; a number of issues have been raised since then and, despite being outside of the consultation period, have been taken on board and compromises made. However, at the eleventh hour and on the cusp of implementation, the Bar has asked that the scheme be suspended. This is not possible and there can be no more delays; the negotiations have been ongoing for four years already. The introduction of the scheme must also take place in this financial year.

KSQC expressed surprise that objections have been raised at this stage. Naturally, there will be some who are disappointed, angry and dismayed, for example those at the senior Bar who will be losing out to some extent to those at the junior Bar, but this is because a request was made to do a better deal by that former group. That could not be done without taking cuts elsewhere. KSQC noted that the letter to him of 1 March asking for a suspension of the scheme was not co-signed by the Young Bar Committee.

KSQC questioned the efficacy of the governance procedures within the Bar Council

which allow a working group to negotiate on behalf of the Bar, but which does not appear to represent its constituency. This is the second time since KSQC has been DPP that the CPS has worked with the Bar Council on a project, a compromise is found and then it all unravels at the end (the first example being the CPS Panels).

KSQC moved on to respond to MHQC's point about CPS Panels. He does not share the analysis that good people did not apply; 2,500 barristers achieved a place on a Panel through merit. Again, the CPS accommodated a number of requests from the Bar, even up to the appeals process. There was an article in Counsel about what a scrupulously fair process it was. How reasonable is it for the Bar, at this stage, to change the basis of any agreement that has been worked on for so long?

Questions on CBA Report and response by the DPP

Working Group's role in negotiations: Nigel Lickley QC asked whether it would be correct to say that the CPS had not proposed a cut to the current scheme, but cuts to a different scheme altogether -the consequence would have been greater cuts than 24% across three years. Therefore, Professor Chalkley looked at a new model to avoid that and help the CPS make efficiency savings.

KSQC confirmed this but could not promise that there would not be more cuts beyond the 25% stipulated by CSR 2010.

Young Bar: David Nicholls said that whilst his predecessors as Chairmen of the YBC had argued for recalibration for more junior practitioners, it had not been the intention for this to be to the detriment of the senior Bar. It does not encourage career progression if there is not to be well-remunerated work in the future.

KSQC said that this was an honourable position to take, but how was it envisaged that rates for the young Bar could be increased without cuts to the senior Bar? David Nicholls acknowledged this but said that it was the severity of the cuts which were the problem.

Authority of working group: Rick Pratt QC asked whether the working group had expressly stated that they had the authority of the Bar?

KSQC replied that he didn't know but assumed that they did. He added that they had worked very hard and that any comments he has made today are not meant to undermine them as a group, but there is a governance issue which the Bar Council needs to address.

Negotiations with government: It was suggested that KSQC's comments today were unhelpful, undermining the working group and driving a wedge between members

of the Bar; was it not possible for the Bar Council to negotiate with the government directly i.e. those dealing the CPS the cards?

KSQC replied that people have to form their own views on whether the group has been undermined and, if so, whether it was by him or by those who have raised further issues at the eleventh hour. As DPP, he has probably spent more time talking and listening to the Bar than any of his predecessors.

The Solicitor General explained that negotiations of this kind can only take place directly with the DPP and that it should be borne in mind that the CPS has had to lose 1,700 members of staff due to the cuts; they are not immune. He encouraged adult discussions within the facts, especially as it is likely that the CSR period will be extended to 2015-17. There is an atmosphere developing at the meeting which is unlikely to assist and urged members to try and understand the position the CPS is in, accepting as a Bar that times are changing and that the profession will have to move with them.

Stephen Leslie QC commented that he had been on the negotiating group for the Panel scheme and that it was all undertaken properly and fairly.

Role of the working group: It was asked whether there was anybody from the working group present to comment. Mark Lucraft QC (MLQC), Chairman of the Remuneration Committee, responded. MLQC said that Professor Chalkley had been asked to look at areas where efficiency savings could be made; for example, in 95% of sample cases considered, the page count made no difference to the fee. Therefore, significant administrative savings could be made by not counting pages and this would mean that those savings could be counted against the necessary cuts to be made. Credit is due to the CPS that they did not pocket these savings and make the full cuts anyway.

However, with the transfer of work from other government departments to the CPS following the disbandment of the Attorney General's unified list, cases with significant page counts which do make a considerable impact on the fee have to be considered. Cases such as these were not included in Professor Chalkley's original data set and therefore must be revisited. The CPS has agreed to engage on this.

It is fair to say that the negotiations pre-CSR and post-CSR had a different slant and that the working group tried to put forward a new scheme that sought to redistribute fees with a slight reduction at the top end but not to the extent that the CPS has put forward.

Future of the scheme: Mark Wall QC noted that it is difficult to negotiate with a body who are not coordinated and when the scheme went public at the end of last

year to Circuit Leaders, it was clear that the cuts would be significant, especially in paper-heavy cases which may not have been in Professor Chalkley's data set. The position is now one of discontent: there is no incentive to prosecute these cases, so who will be left to do them? Is it not in the public interest to have cases prosecuted appropriately and by the right people?

KSQC said that the CPS went through all the responses to the consultation at the end of 2011 and made some concessions at the time. However, on some issues e.g. introduction of an "enhanced_ GFS rate at 10,000 pages, there appeared to be some sort of agreement and then minds changed again. However, although the consultation has closed and the scheme is being implemented, the CPS will still listen to issues raised.

Leading Counsel: Richard Atkins QC (RAQC) raised concerns about Silks not being instructed in cases where it would be appropriate to do so in the public interest and asked whether the CPS has a policy not to use Silks or to reduce how often they are used?

KSQC denied any hidden agenda but explained that there had been an issue in the instruction of Silks by the CPS which had been previously overlooked. Whilst there was a process for seeking permission to instruct a Silk in a particular case, there was no mechanism for capturing those cases where there was no Silk instructed in cases which seemed to merit one. This meant that there have been cases where a Silk should have been instructed, but wasn't. This has now been addressed.

However, that is not to say that there are particular categories of case where a Silk will always be used. There is information on the website (and a decision-tree) which shows the process.

Response by MHQC: MHQC thanked KSQC for his contribution.

In respect of the 25% cuts mandated by the CSR, MHQC said that he had never understood this to mean that there had to be a mandatory cut year-on-year and therefore the implementation of the fee scheme did not have to be fixed to happen this year. KSQC said that unfortunately this is not true and that the budget is reducing year-on-year in real terms and this is the second year.

MHQC clarified that the letter to KSQC of 1 March had not been intended as an eleventh hour attempt to throw the scheme back at the CPS, but to request the suspension of the revised GFS scheme **pending discussions** between the Bar and the CPS with a view to a joint submission to Government in the interest of maintaining the vital work of the criminal justice system.

MTQC extended his gratitude to KSQC for attending and noted from his own experience that the CPS is in "listening mode". He encouraged practitioners with concerns to channel them through the CBA or their Circuit. He also acknowledged the points made by KSQC about internal governance issues and how any group can represent an entire constituency; this will be picked up by the ongoing Structure Review. He asked all Bar Council members to think about the issue of whether the Bar Council should take forward negotiations on behalf of any given area of the Bar and how to make sure it is done properly; one could argue that it is a job for the SBA in question.

MTQC also extended his thanks to the Remuneration Committee and the fees working group for their hard work and commitment.

9. Any Other Business

Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO)

Stuart Jamieson (SJ) thanked the Chairman and others for their trip to Leeds on Thursday and Friday, which was very effective and helpful in the Bar Council communicating with the local Bar.

In relation to the Civil Litigation proposals within the LASPO Bill, in these times of deficit reduction these reforms in Part 2 of the bill will actually cost government approximately £70 million a year. The proposals will particularly hurt deserving Claimants with difficult cases, especially of lower value, i.e. on the fast track and lower end of the multi-track. If one takes, by way of example, a family with a single breadwinner who suffers injury that results in that person being off work for 6 months, then that family have an acute need to be able to seek recompense. However the proposals as they stand will significantly inhibit their access to justice, particularly when their case is less straightforward or liability is disputed. PIBA has done a great deal to try and work with the government and their purported aims of the Claimant having a stake in keeping costs low. This section of the Bill does not seek to or achieve any revenue savings for government, and indeed will have the reverse effect.

The PIBA alternative proposal -for the Claimant and Defendant together to contribute equally to the CFA success fee -gives the Claimant a stake in keeping their costs low whilst also providing a little more of the access to justice that the LASPO bill is otherwise lacking. The proposals within PIBA's recent briefing paper prepared by James Rowley QC and others at PIBA are recommended as a means of refining and improving this part of the LASPO Bill.

MTQC thanked SJ for his contribution and said that these issues had been rigorously

pursued through the LASPO Bill Group, noting that the Bar has been at the forefront of the campaign against LASPO.

Crèche facilities

Charles Hale said that his daughters were upstairs being cared for in the crèche facility provided; when people say that the Bar Council is incapable of moving with the times, they are clearly not correct!

Referral fees

Nigel Lickley QC (NLQC) raised the question of the possibility of criminalising referral fees and asked the Law Officers if they can explain the thinking behind the Ministry of Justice's reluctance to do so? The Attorney General confirmed that he believes referral fees to be dreadful and it seems that the Ministry has adopted what it believes to be the easiest way of dealing with them, especially as they do not want to create any more criminal offences. The Attorney said that he would raise the issue with the Lord Chancellor.

10. Date of Next Meeting

MTQC thanked Alistair MacDonald QC for organising his Circuit visit to Leeds, which was very useful; he is eager to visit other Circuits as it is imperative to understand what is going on outside of London. There is a continued view that the Bar Council is London-centric and he would like to change that view.

MTQC thanked the Law Officers and KSQC for attending.

The next meeting will be held at 10.00 on Saturday 14 April 2012, in the Bar Council offices.