

## **Minutes of the Bar Council Meeting held on Saturday 8 May 2010 at the Bar Council Offices**

### **Present:**

Nick Green QC - Chairman  
Peter Lodder QC - Vice-Chairman  
Andrew Mitchell QC - Treasurer  
David Hobart - Chief Executive

### **1. Apologies**

Apologies for absence were received from Attorney General, Solicitor General, Michael Bowsher QC, Stephen Cobb QC, Gareth Evans QC, Susan Grocott QC, Christopher Hancock QC, John Howell QC, Maura McGowan QC, Stephen Nathan QC, Robert Rhodes QC, Winston Roddick QC, Keir Starmer QC, Lucy Theis QC, Michael Todd QC, Jeremy Barnett, Marc Beaumont, Julia Beer, Jonathan Bellamy, Esme Chandler, Michael Collard, Stephen Collier, Amanda Jane Field, Peter Grieves-Smith, Edward Henry, Tricia Howse CBE, Fiona Jackson, Taryn Lee, Fiona McCreath, Christina Michalos, Zoe Saunders, Shamran Sharghy and Kevin Toomey.

### **2. Approval of the Minutes**

The Minutes were approved, subject to an amendment to the second sentence of Item 7 which should read 'Tim Devlin suggested that when faced by a PCF increase, some people opt out of paying the BRF in protest, and that the Bar Council e-mail to 1738 non-payers did not address their real concerns'.

### **3. Matters Arising**

No matters arose.

### **4. Bar Council Members 2010**

The Chairman noted that the Solicitor General had lost her seat at the General Election, and hence that Vera Baird QC was no longer an ex-officio member of the Bar Council. The meeting noted the list of Bar Council Members at [Annex A](#).

### **5. 2009 Annual Report and Accounts**

The Treasurer paid tribute to the conscientious work of the Chief Accountant, Brian

Buck, in the progressive development of the substance of the Annual Report and Accounts in recent years. The quality of presentation of the Report for 2009 was of a high standard, and consistent with the profession's need to demonstrate clearly its representative and regulatory functions. He drew attention to the individual reports written by the Chairman, the Chair of the BSB, and the Treasurer.

Turning to the Consolidated Income Statement (p.54 of the Agenda) and the explanatory Note 4 to the Accounts, he described it as the "but for" report. The trading balance between income and expenditure was healthy, and but for the pension situation the Bar Council would be in a relatively strong financial position. The detailed Note 14 to the Accounts on the pension scheme highlighted the relatively larger increase in liabilities than in assets during the year, but this reflected the difference in two distinct processes. The Trustees and the Auditors were using different assumptions to calculate the Scheme liabilities in accordance with, respectively, the Scheme Specific Funding model and the Financial Reporting Standard (FRS) 17. We hoped to marry up some of the assumptions, but some differences would remain. This was very much work in progress for the Bar Council and our pension advisers, Bluefin, as we sought to reduce our future liabilities for past service. The next pension levy at the end of 2010 would still be necessary.

The Bar Council approved unanimously the 2009 Annual Report and Accounts.

## **6. Statement by the Chairman**

The Chairman postponed any discussion of Legal Aid and ProcureCo issues until the corresponding agenda item. Following the inconclusive General Election, the Chairman spoke of the prospects for the Bar of working with a Conservative or Conservative/Lib-Dem government. The Bar Council had had earlier dialogue and an open discussion with the Conservative team, including Dominic Grieve QC and Henry Bellingham. The make-up of the Liberal Democrat legal team was uncertain, still less so in any arrangement with the Conservatives, and a vacuum in Westminster and Whitehall seemed likely for a while yet.

The Chairman would join the forthcoming Law Society/Bar Council delegation to China and Hong Kong. He pointed out the attractions of good co-operation between the English and Welsh, and Hong Kong bars. He would be working closely with the Hong Kong Bar - whose new Chief Justice and new Chairman were both members of our Bar - in facilitating a project to permit some specialist Hong Kong barristers to work with high calibre hosts in the UK. It should be in our interest to expose the Hong Kong Bar to the skills available from the best of our practitioners, and this was a good example of the Bar Council seeking to help the non-publicly funded Bar. We had agreed with the UK Borders Agency that we would act as a sponsor for some visiting barristers from Hong Kong and elsewhere, which we believed would be a

low risk commitment for us.

The Chairman had participated in the biennial conference of the International Council of Advocates and Barristers (ICAB) in Sydney, and had found himself under pressure from other Bar leaders to justify the UK's approach to the Legal Services Act and to the regulation of lawyers generally. All of the common law jurisdictions were watching our developments with attention and some concern, particularly over the relationship between the role of the state, and the independence of legal professions. The Chairman had given a vigorous and balanced account of the English picture, and had contributed even to a keen Australian interest in ProcureCo. It had been agreed that the next ICAB conference would be held in London in 2012, and Stephen Hockman QC would chair the organising committee. This should be an attractive and worthwhile event for the many jurisdictions that were likely to attend.

Circuit Leaders and the Chancery Bar Association had held separate meetings with Baroness Prashar, the Chair of the Judicial Appointments Commission. Discussions had centred on two main areas. First, recent experience had suggested that government was keen to play a more active role in judicial appointment, and this was evidenced by their desire to receive from the JAC more than a single nomination for each appointment. The apparent reluctance of the Justice Secretary to appoint Wall LJ to the Family Division, and his wish for an alternative nomination, had been resisted by the JAC, and Wall LJ had been appointed. Second, the Bar continued to have concerns about the conduct of recorder competitions, shared by some members of the judiciary. The Bar Council would commit its reservations to paper, and seek with JAC to make improvements.

On 10 June, Inner Temple would host an important gathering on the future of the Bar. An invited audience, including all Bar Council members, would hear contributions from the Lords Judge and Neuberger, Etherton LJ as President of COIC, the DPP, the Chair of the BSB and the Chairman of the Bar, followed by a discussion and reception. This event should play a formative part in the long ongoing process to determine the future shape and function of the Bar.

The Chairman, Vice-Chairman and CBA Chairman had met with Carolyn Downs, the Chief Executive of the LSC, for an open and co-operative discussion. Against the background of the Bar having been cut out of the development of contract and fees issues, it was agreed that the Bar would play a full part in all discussions of legal aid policy and provision. The LSC itself would be abolished as a non-departmental public body, and would be re-created as an executive agency. We would in future be presenting to, and negotiating with, the LSC on the linked subjects of contracts and fees. There was now some light at the end of the LSC tunnel as far as the Bar was concerned.

The Chairman recounted the background to the decision to drop the outgoing government's proposal to cap the permissible uplift for defamation CFAs to 10%. Although Jack Straw could have been certain of press support for the proposal, the consultation had been desultory and had lasted days rather than months. The Bar had objected strongly to the apparently random method in deciding on a 10% cap, which bore no known relationship with the actual risk of losing a defamation case. He heaped fulsome praise on Mark Hatcher for masterminding a brilliant parliamentary campaign that resulted in the first defeat of a planned Statutory Instrument for many years. For the government to be faced with the options only of withdrawal or defeat was an achievement worthy of the Bar Council's congratulations.

Finally the Chairman gave notice of his intention to propose changes to the Bar Council constitution to resolve three issues. First, it was important not to constrain unnecessarily the range of barristers who could stand for the post of Vice-Chairman. Some SBA chairmen and Circuit Leaders, otherwise potentially strong candidates for Bar Council office, would lose their Bar Council membership at the end of their SBA or Circuit term in the summer, and would thus be ineligible to stand. Second, there was a need for greater continuity in the leadership of the Bar Council, to deal more effectively with the long gestation of today's complex problems. This problem could be ameliorated somewhat by advancing the date of the election of the Vice-Chairman elect from the autumn to the spring. Third, he questioned whether it was necessary to hold a formal election to permit the Vice-Chairman to become the Chairman. As far as he was aware, there had only been one contested election for the Chair in recent times, and the purpose of that election could perhaps be met in future by the means of a motion of no confidence. The Chairman would bring his formal proposals to a future Bar Council meeting.

In the context of the Chairman's forthcoming visit to China, John Cooper QC supported his aim of representing both privately and publicly funded members of the Bar. But he asked that the Chairman took the opportunity to raise tactfully concerns about China's human rights record. The Chairman agreed that he would do so. Sir Ivan Lawrence QC was uncertain from the Chairman's statement whether the LSC was being wound up, or being revitalised. He was particularly interested in the fate of the claimed £70m annually that could be freed up by the LSC's closure, and he hoped the LSC leadership would speak to the Bar leadership. The Chairman clarified the position that primary legislation would be required to change the LSC from a non-Departmental Public Body to an Executive Agency of the MoJ, but it was certain that the ownership of legal aid policy would move promptly to the MoJ. Carolyn Downs, the new Chief Executive of the LSC, had already expressed her wish to work with the Bar leadership.

## 7. BSB Report

The Chair and Vice-Chair of the BSB gave a joint presentation, taking a regulatory perspective of the future of the Bar. Baroness Deech reminded the meeting that the crucial decisions taken by the BSB on 19 November 2009 had eroded a number of differences between barristers and solicitors, other than for the conduct of litigation and the handling of clients' affairs. She exhorted Members to complete the YouGov survey of the future regulation of the bar, and to encourage others to do likewise. She was concerned that the electronic survey may have been deleted by many recipients, but it was essential that the BSB had 3000 to 4000 replies to make the survey sufficiently significant. She believed that barristers should care who regulated their future business entities, and she asked for a show of hands from those who expected (or hoped) to be in self-employed practice in five years' time. If the Bar could say which entities it wanted the BSB to regulate, then the BSB could do so, subject only to the over-riding public interest. The public good in maintaining a strong profession did not extend to any regulatory protection of the ability of barristers to earn a living.

The Bar had a group of Circuit and SBA leaders who were strong and articulate on the vital issues, such as the role of ProcureCo. But she detected no equivalent view of the future in equivalent organisations such as the Attorney General's area. There was no love for, or understanding of, the Bar in government or in the broader regulatory community. The poor continuity of the Bar Council's leadership, and the need for a longer lead-in for the Chairman and Vice-Chairman, showed up the requirement to foster leadership on the issue of entity regulation. The Bar's identity was at stake, as was its ethical standing and the level of respect felt abroad. There must be no dilution of independence and the cab rank rule, which were attractive characteristics for the recent flow of solicitors joining the Bar.

Bar leaders must look ahead, and look after Reserved legal activities. The BSB wished to retain the Bar's identity in entities, but this was a difficult problem. As barristers became partners, undertook litigation, handled clients' money, this led inexorably to fusion and the end of a distinctive Bar. Not many regulators or members of government cared about the merits of a distinct Bar, in the face of the consumer perceptions of lawyers over-charging public funds. The Civil Service, the regulators, and the public did not value the Bar as much as the Bar's skills deserved.

Sir Geoffrey Nice QC sketched a world of legal activity in which solicitors, the referral Bar, and a collection of minor players were the three inhabitants. This was changing to reflect the evolving market place. The three inhabitants were re-shaping to the extent that the collection of minor players could be expected to migrate towards either the solicitors or to a new model Bar. In effect, the three inhabitants would become two. The solicitors would take a greater number of employed

barristers, and the new model Bar would be a grouping of (a) Barrister-Only Partnerships, (b) ProcureCo/SupplyCo entities, and (c) a smaller referral Bar. Some of the minor players, such as the conveyancers, would encroach on the Bar's area of activity. This legal world of two inhabitants could not easily justify the need for two regulators. But the future model of regulation would depend on the identity, or identities, that the Bar itself wanted. The question had become how best to regulate the entities and the individuals within them.

Baroness Deech spoke of the hard choices ahead for the regulatory models of choice. Should the BSB seek to regulate barristers' Clerks? And Solicitor Advocates? She was confident that the LSB itself would seek to fill any regulatory gaps, and she predicted a diminution in the scope of Reserved legal activities. She concluded with a plea to hear the single voice of the Bar, which would express a clear set of preferences against which the BSB could regulate in the public interest.

Andrew Walker suggested that the scope of professional membership did not align directly with the scope of professional regulation. For example, there were differences in the ethical standards and responsibilities of barristers and solicitors. Baroness Deech acknowledged the difficulty in seeking a distinction based on ethical standards. Sir Ivan Lawrence QC noted some ambiguity in the questions in the email survey. It was unhelpful to ask him whether he saw himself as self-employed in five years' time. He expected to be employed, but he did not wish to be; this would depend on his income and circumstances. Much as practitioners valued the independence of the self-employed Bar, they could not survive without income. Regulation was a secondary issue for the self-employed Bar. Baroness Deech believed that many self-employed barristers had no interest in leaving the self-employed Bar, but some wanted the possibility of working in a different structure. Hence the BSB would work to create a barrister-friendly regulatory structure. She invited Sir Ivan and all other self-employed barristers to complete the BSB survey. The Chairman predicted that this topic would be widely covered at the symposium on 10 June.

## **8. International Affairs**

James Dingemans QC briefed the meeting on the work of the International Committee which promoted the work of the Bar internationally, supported the Rule of Law, and contributed to the programmes of trans-national and international organisations such as the International Bar Association.

The Committee had received 23 requests for overseas assistance, but there was a serious shortfall in the resources needed to meet the demand. The Advocacy Training Council (ATC) needed more support and funding, and needed to attract the assistance of the many additional excellent advocacy trainers at the Bar. It was

hoped that a solution to the ATC's problem could be reached by the end of 2010, with the Inns capable of meeting some of today's unmet demand. Additional trainers were needed to support the promotion of the Rule of Law, the work of barristers overseas, and the need for liaison with overseas Bars.

The Committee was working with the SBAs on a scholarship programme for practitioners under 7 years Call, designed to attract them early in their careers, and to keep them interested for many years thereafter. The scholarship funding came from the Bar Council and the SBAs, with the individual barristers also paying a proportion of the costs.

Our engagement programmes with China, India and the Gulf region were regularly retailed in *Bar News*, and the Chairman would be leading a joint Bar Council/Law Society visit to China in early June. A Rule of Law conference with Russia and Germany was being planned, and the 17th Commonwealth Law Conference would be held in Hyderabad in February 2011.

Finally, James Dingemans QC spoke of the difficulties in arranging immigration to this country for overseas pupils and qualified barristers of modest means. The Chairman had spoken of the benefits of exposing Hong Kong barristers to the Bar of England and Wales (see Item 6 above), and the Bar Council had become a so-called Tier 5 sponsor under the rules of the UK Border Agency to facilitate the low-risk entry to the UK of a manageable number of overseas barristers. Christian Wisskirchen at the Bar Council Secretariat could advise interested Members of the relevant details.

Stephen Leslie QC offered members of the International Committee the opportunity to observe the Keble College Oxford South-Eastern Circuit advocacy training, to demonstrate the excellence that was available. But for some countries - Kenya for example - there could be no effective substitute for help in the jurisdiction itself. The Chairman expected a number of initiatives from the ATC: first, to draft a proper budget for the medium-term; second, to participate in future standards setting throughout the profession; and to garner support for continued pro bono activity. He hoped the ATC and Bar Council could create jointly a moot court facility, whilst the Inns played a greater role in the co-ordination of advocacy training.

## **9. ProcureCo**

The Chairman gave a brief summary of where we stood on ProcureCo. Since 26 April, when the ProcureCo documentation was uploaded to the Bar Council website, the legal press had followed up with a number of articles. Several sets were working to develop the basic model to suit their circumstances, and he had continued to run breakfast and lunchtime seminars for all-comers. The seminars were still

oversubscribed, and each had demonstrated the great interest and considerable range of ideas from Chambers. He intended to carry on with the seminars until the demand fell off, and he expected to build on the London experience by conducting some seminars out on Circuit. He was sure that the tax and VAT consequences of ProcureCo could now be solved, and it was only a matter of time before one or more barristers sought incorporation as a positive financial step. The Institute of Barristers Clerks and practice managers were familiar with working with the Bar Council, and were quick to see the possibilities. He expected a subtle change in our relations with the Law Society as both parties found new ways of working together.

John Cooper QC marvelled at the pace of change. Only 20 years ago it was unseemly for a barrister to have a business card. Now, ProcureCo was the right way forward. The Chairman expected that CrimeCo would be the new workstream to permit barrister-friendly direct contracts with the LSC, and that the Family Law Bar would follow on two years later. When questioned by Ian Bugg on why it would take two years, the Chairman believed a number of factors were at work: first, family fee cuts tended to follow crime; second, the contractual units for crime were in place, but not yet for family practice; third, family practitioners were often better placed to move between public and private work; and finally, there was less HCA trespass in family law practice. Questioned on the potential for conflicts in CrimeCo, he confirmed that the issues had been considered. It was essential that any CrimeCo configuration must not give rise to conflict. A CrimeCo entity would have to abide by the same common law rules as a traditional Chambers.

It was important to remember that the likelihood of One Case, One Fee lay behind much of what we were doing. This was an uncomfortable fact at the moment, but would look less daunting when ProcureCo took the single fee.

## **10. Criminal Legal Aid Cuts**

A Statutory Instrument cutting AGFS rates, by 4.5% annually for each of three consecutive years, had been made and laid on 6 April immediately after Easter. A well-attended meeting of Heads of Chambers had debated the way forward, and it had been agreed that the CBA and YBC should jointly arrange a post-General Election meeting of practitioners. The most likely time and date would be 1300 hours on 12 June which would give Bar Council members and those attending the AGM the opportunity to attend the CBA/YBC meeting. Subject to outcome of the Election, MoJ ministers would almost certainly have taken office by 12 June.

The Chairman reminded the meeting of the constraints on any collective action. The duty to the court under the Code of Conduct paras 302 and 303 was paramount, and practitioners needed to be careful to comply with the additional terms of competition law. A leader's Opinion was needed to update the advice to



practitioners on competition law, but the Chairman believed that any appetite for collective action was muted.

It was important for the Bar to modify its approach to new ministers. We needed to persuade them of the Bar's ability to take a broader view than just pay rates, and that the Bar could help ministers find the last damaging savings, with a percentage of the savings being fed back to legal aid. For example, the relationship between the prison population and sentencing policy offered possibilities. A reduction in the prison population from 85,000 to 80,000 would produce a recurring annual saving of more than £200m. Dominic Grieve QC MP had opined that even a small percentage of any savings returned to legal aid would be a good policy. We would still argue strongly against severe cuts to legal aid, but our arguments would be more than just that.

The Chairman could only entertain permissible measures at the AGM on 12 June, and was obliged by the constitution to reject any measures that would, if passed, be beyond the authority of the Bar Council to implement. Thus the joint CBA/YBC meeting could have a full debate with no constitutional technicalities. Video links could be available if the demand was there, and this would deliver a stronger mandate from the Bar.

Richard Atkins asked about progress on the reported Judicial Review of the flawed MoJ decisions. The Chairman recounted the pre-action letter we had sent arguing that the MoJ and LSC consultations were flawed on two main counts. The original consultations had then been withdrawn, corrected, and re-opened. This had taken the sting out of our legitimate points. We had taken an opinion from leading Counsel who was confident that once the consultations had been corrected we had no prospect of mounting a credible case. To have pursued our weak arguments, with huge implications for costs, would have been foolhardy. Richard Atkins questioned whether the MoJ could have processed so many responses over the Easter weekend, and the Chairman confirmed that the MoJ had indeed had staff working over the weekend to assess over 300 responses. Paul Mendelle QC confirmed that we had asked for full details under the Freedom of Information Act, and the MoJ had provided them. Sir Ivan Lawrence QC expected the new Attorney General to attend the June Bar Council meeting or, in his or her absence, the Solicitor General, to hear at first hand the Bar's reaction to these savage cuts.

## **11. Member Services Fees and Bar Directory**

The Chairman reported to the Bar Council on the GMC's consideration of whether or not the 10% of practitioners who have not paid the voluntary Member Services Fee (MSF) should have their names and details included in the Bar Directory published by Sweet and Maxwell. The GMC had decided by a simple majority that only those barristers who paid the MSF should be listed in the Bar Directory. The GMC had also

decided that the Directory should give greater prominence to the fact that only MSF-paying barristers were included.

Stuart Brown QC introduced his paper which suggested that the Directory discriminated against counsel who decided not to pay the MSF. This put the Bar Council at odds with its own policy of the 'One Bar' ethos. He pointed out that the Directory claimed to be 'official' and 'fully updated', and he objected that the publicity in the Directory was inadequate to inform the reader. He claimed a principled objection that the Bar Council was lending itself to the publication of a claimed 'comprehensive' Directory. He believed that the letter accompanying the annual PCF and MSF invoice was unclear in referring to a 'personal entry in the Bar Directory'. He believed the Directory should be the Directory of all practising members, and that the only real benefit of paying the MSF was an entry in the Directory; the other advantages could be dispensed with. The BSB online register had a regulatory purpose and was not structured to market individual barrister.

The Treasurer spoke of the need to persuade people to pay the MSF. His original proposal had been to include all practitioners in the Directory, but to make it clear which practitioners had not paid the MSF: in effect, name and shame. But the GMC had rejected this because the Directory's audience would only be interested in the name and details, not the reason for the name and details. If all practitioners were included, this would take away the principal reason for anyone paying the MSF. He agreed with Stuart Brown QC's point about clarity, but would resolve it by improving the clarity in the Directory, as GMC had decided. He commented that there had been but one complaint in recent years about the exclusion from the Directory of those that did not pay the voluntary subscription or MSF.

It was noted that the Legal Hub included the names of the non-practising Bar, which included many who had never done pupillage. Ken Craig, the Father of the House, and a long-serving member of Finance Committee and, latterly, the Member Services Board, had never realised that the Directory excluded MSF non-payers, and he believed it was wrong to blackmail people into paying the MSF. We should not perpetuate an incomplete Directory. Robin Tolson QC spoke of the different perception from the provinces, inasmuch as the MSF was thought to provide a less relevant service. It ought to be a core function of the Bar Council to produce a complete Directory. Andrew Walker distinguished between a public service and a service to members. The former was regulatory, but the latter was a representative service for members who should pay for it. Tim Devlin thought the 10% shortfall was more like 15% based on the number of MSF non-payers. He distinguished between the voluntary nature of CBA membership and inclusion in its publications, and the mandatory nature of the Bar Council PCF. The Bar Council should record in the Directory everyone registered as a barrister. Melissa Coutino contrasted the Directory with its commercial rivals such as Chambers Directory. The Chairman

reminded the meeting that the GMC had agreed there was insufficient transparency in the formation of the Directory.

Richard Atkins, the Chairman of the Member Services Board (MSB), explained that the MSF covered more than the functions of the MSB. The MSF paid for the Trade Union function, which was not an MSB issue, but which should be paid for by everyone. The answer was to meet some of the costs of producing the Directory from the resources raised to provide a public service. Tim Devlin supported this line of reasoning. Charles Hale suggested that the MSB should consider the point, and report to GMC. Tom Crowther argued for changing the title to avoid any possibility the reader might believe it was the Official Directory of the General Council of the Bar. Oliver Delany, the Director of Bar Council Central Services, reminded practitioners who renewed their PCF that they signed every year to indicate that they knew they would not get a Directory entry if they did not pay the MSF. Mandie Lavin, the Director of the BSB, offered to assist if the online register could be made more helpful in replacing some of the Directory's functionality.

The Chairman welcomed Charles Hale's suggestion that the MSB should consider the public service point, and report to GMC. Robin Tolson QC was gratified by the helpful change in attitude to the problem. The Chairman invited the Member Services Board to consult with the BSB, and to report back to the GMC. The meeting agreed with this approach.

## **12. Minor Amendments to Bar Council Constitution**

The Chief Executive explained that a number of minor changes were needed to the Constitution, in part to correct past errors, but also to bring working practices up to date; hence a change to permit email notice as an alternative to postal notice when appropriate. Tim Devlin expressed some surprise at the change to eliminate an unnecessary distinction between self-employed barristers and employed barristers in Part II, Regulation 5, but this change was merely for simplification. The Bar Council approved unanimously the Extraordinary Resolution for the minor changes.

## **13. Any Other Business**

The Chairman proposed that Alexandra Healey (9-12 Bell Yard) should be a Bar Council nominee as a Director of BMIF. The Meeting approved the nomination.

## **14. Date of Next Meeting**

The next meeting would be held at 0930 hrs on Saturday 12 June 2010, to be followed at 1030 hrs by the Annual General Meeting, in the Bar Council offices.

Annexes:

A. Bar Council Members for 2010.

B. Abbreviations.