

## Meeting of the Bar Council



The Bar Council

### Minutes of meeting

Tuesday 25 April 2023 at 4.30pm

via MS Teams and in person at the Bar Council offices, 289 – 293 High Holborn,  
London WC1V 7HZ

#### Present

Nicholas Vineall KC	Chair of the Bar	NVKC
Samuel Townend KC	Vice Chair of the Bar	STKC
Lorinda Long	Treasurer	LL
Malcolm Cree CBE	CEO, The Bar Council	MC
Kathryn Stone OBE	Chair, The Bar Standards Board	KS
Mark Neale	Director General, BSB	MN
Jo Martin KC	Leader, Western Circuit	JMKC
Eleena Misra KC	Chair, Law Reform Committee	EMKC
Rebecca Wilkie	CEO, Advocate	RW
Shyam Papat	Chief Operating Officer & Director of Casework, Advocate	SP

#### Members in attendance (listed alphabetically)

Paul Adams; Shazia Akhtar; Stuart Alford KC; Elaine Banton; Michael Bellis; Michael Bowsher KC; Minka Braun; David Bunting; Nick Cherryman; Ben Close; Ivor Collett; Celina Colquhoun; Barbara Connolly KC; Melissa Coutino; Dilpreet Dhanoa; Rebecca Dix; Sarah Fearon; Cathrine Grubb; Nick Grundy KC (Alternate for Faisel Sadiq); Michael Harwood; Richard Honey KC; Winston Hunter KC; Shobana Iyer; Anneka Jenns; Saira Kabir Sheikh KC; Stephen Kenny KC; Ruth Kirby KC; Kate Lumsdon; Louise McCullough; Cait McDonagh; Martyn McLeish; Lucinda Orr; James Paterson; Jason Pitter KC; Michael Polak; Paul Powlesland; Caroline Rees KC; Simon Regis; Zoe Saunders; Jo Sidhu KC; Paul Sissons; Hannah Smith; Kate Spence; Gordon Stables; Heidi Stonecliffe KC; Philip Stott; Leanne Targett-Parker; David Taylor; Linda Turnbull; Emma Walker; Guy Williamson; Charlie Woodhouse KC; Luke Wygas.

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**THE BAR COUNCIL**

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## Subscribers in attendance

Amrit Dhanoa; Andrew Mitchell KC; Laurie Scher.

## In attendance:

Sally Burnell	Director, Communications & Marketing	SB
Carolyn Entwistle	Director, Services	CE
Nikita Feifel	Public Affairs Officers	NF
Kian Goodsell	Policy Analyst	KG
Sarah Kavanagh	Head, Media & Communications	SK
Stuart McMillan	Policy Manager	SMM
Phil Robertson	Director, Policy	PR
Sarah Richardson	Head, Policy (Regulatory Issues & Law Reform)	SR
Jamie Shaw	Head, Strategy, Planning & Governance	JS

**Minutes** Yvonne Treacy Executive Officer YT

## Apologies were received from:

The Attorney General and the Solicitor General; Dr Mirza Ahmad; Simon Atkinson; Kirsty Brimelow KC; James Corbet Burcher; Neil Hawes KC; Kim Hollis KC; Amanda Jepson; Joanne Kane; James Keeley; Christina Michalos; Faisal Sadiq (Nick Grundy KC attended as Alternate); Andrew Twigger KC.

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### 1. Conflicts of interest

With reference to the debate on the cab rank rule and the 'Lawyers are responsible' declaration, Paul Powlesland asked that anyone who has profited from working for the fossil fuel industry to declare this. The Chair explained that he had acted for and against oil companies. However, this did not present a conflict of interest for a debate around the cab rank rule. Stuart Alford KC said that he is a partner in a law firm and has engaged with fossil fuel companies. The Chair did not feel that this represented a conflict of interest and therefore disclosure was not necessary.

### 2. Minutes of the last meeting

The minutes of the meeting held on 4 February 2023 were approved as an accurate record.

### 3. Statement by the Chair of the Bar

The Chair took his report as read but wished to highlight the following:

- i) Two new Bar Council members were welcomed to their first Bar Council meeting – Michael Bowsher KC (Chair of the European Circuit and co-opted member) and Rebecca Dix (elected to the casual vacancy of employed KC / Junior over 7 years).
- ii) The Barristers Working Lives Survey had now been launched and all members of the Bar Council were asked to respond and to encourage others to do so also. The findings are important in that they help to inform the Bar Council’s engagement with stakeholders.
- iii) Former Bar Council member, Eason Rajah KC, was congratulated upon his appointment as a Judge of the High Court, Chancery Division.
- iv) The Chair has recently issued statements on various issues including the Retained EU Law Bill and the National Audit Office progress report on the HMCTS court reform programme and would be happy to take questions on these.
- v) The Bar Council continues to oppose the provisions in the Economic Crime and Corporate Transparency Bill regarding the introduction of a new regulatory objective to the Legal Services Act. It raises difficulties in that it may confuse the role of the lawyer – lawyers are not law enforcement and it is not clear that it is appropriate or compatible with barristers’ duties as a regulatory objective. An amendment has been tabled through the Peers.
- vi) The Pupillage Gateway closed on 8 February with an increase in the number of pupillages advertised to 638 in 2022/23. This year pupillage awards (including earning guarantees) come to £26.5m. This shows that the profession is investing in its future.

#### **4. Bar Standards Board report**

Kathryn Stone, Chair of the BSB, took the BSB report with the agenda papers as read but wished to add the following.

- i) The BSB continue to make good progress in improving the timeliness of its decision-making and this remains a very top priority. Regular reports are received on progress in the open session of all Board meetings which the Bar Council attend.
- ii) The new head of the BSB Contact and Assessment Team, which triages incoming reports, is working closely with an external delivery expert on an action plan to improve operational efficiency and to enhance customer care.

- iii) The BSB has established a new post of Assistant Director for Delivery and Performance in its Regulatory Operations Department and the postholder will join the Director General's Senior Management Team with responsibility for the operational side of the department's work. Their current Director of Regulatory Operations will be leaving in June following which a new Director for Standards will be appointed on an interim basis to take forward the BSB's programme of work on Assuring Competence and the BSB's responsibilities for education and training and for supervision.
- iv) Final decisions on the structure of the BSB will be taken when a number of BSB projects have been concluded, including the current end-to-end review of the BSB's enforcement process, the associated re-engineering of systems as recommended by Deloitte, the review of its approach to gathering collating and analysing intelligence, and the review of its authorisations policies and processes.
- v) The BSB is pleased to see that the reforms to Bar training show some success in making training for the Bar more affordable, more accessible and more flexible while maintain high standards. However, the variation in pass rates between different providers is something which will need to be investigated further.
- vi) The BSB has responded to queries about the "cab-rank" rule in the light of the "Declaration of Conscience". The BSB believe that the "cab-rank" rule continues to be important in ensuring that everyone can have access to legal advice and representation.
- vii) The BSB roundtables with chambers around the country have provided valuable insights into how the BSB and the Bar Council can best support chambers in their work to promote standards, equality and access to justice. The final meetings are in Birmingham on 27<sup>th</sup> April and in Bristol on 16<sup>th</sup> May.
- viii) The BSB has advised Bar training providers who offer online exams of the suspension of the delivery of exams in Bangladesh and Pakistan – with immediate effect pending further investigations of alleged malpractice. This ban has since been extended to all countries.
- ix) One of the BSB's current activities is a year-long digital comparison tool (DCT) market study looking into the use of digital tools at the Bar. DCTs are not just about client reviews but allow for barristers to promote their services and connect with clients. As part of the BSB's market study, the BSB will also evaluate the equality impacts of barristers' DCT services, on both consumers and the Bar.

## **5. Circuit Leader report – Western Circuit**

Jo Martin KC, Leader of the Western Circuit, commenced her report by saying that the Western Circuit represented about 1,000 barristers in the South and South West of England

and that circuits are an important part of life for barristers who are not based in London and thus not close to the Inns in London. Circuits provide support to barristers, coordinate training courses (eg for pupils, newly qualified barristers and CPD courses generally), and host social events such as grand night.

The Western Circuit has initiated a number of projects around diversity issues including an outreach programme involving schools and has also been forward thinking by its introduction of the first women's forum on circuit in 2015. The Western Circuit Women's Forum was a very important source of help and support during the pandemic to women who had caring responsibilities. In 2016 the forum undertook research - Back to the Bar - into why women leave the Bar, and she will be approaching the Bar Council to seek assistance with further research. The Western Circuit has also set up a second unique group called Bar None seeking to tackle the issues faced by, and to mentor those, who come from an ethnically diverse or non-traditional background.

JMKC asked the Bar Council to think about the help it can provide circuits in securing better rates for travel and subsistence for those at the publicly funded bar. For those at the junior end of the profession in particular find it very hard to live on the current rates. David Taylor, said that he was a member of the Bar Council's Remuneration Committee, and the committee was looking at travel and subsistence levels will therefore pick this up with JMKC.

## **6. Statement by the Chief Executive**

Malcolm Cree, CEO of the Bar Council, deferred to the detailed Chair's Statement included with the agenda papers, and to the next Treasurer's Report, the next agenda item, but would take questions.

## **7. Treasurer's Report**

Lorinda Long, Treasurer, presented the unaudited March 2023 Year End Accounts. The pre-audit management accounts show a year end surplus of £1,242k. This is an improvement of £1,138k on the original budget surplus of £103k. The major driver of the change has been the release of £1.3m of funds originally earmarked for the DB Pension deficit.

## **8. Compulsory ADR**

The Chair explained that the purpose behind this agenda item was to discuss and hear views on the general issue of compulsory mediation, what the courts' approach to compulsory mediation ought to be and whether it is lawful to require mediation before a case is brought to court. By way of context, the Bar Council has sought permission to intervene in the forthcoming Court of Appeal case of James Churchill v Merthyr Tydfil County Borough

Council which raises the question of whether, and if so in what circumstances, it is lawful to require mediation as a pre-condition to continuing access to court.

The Bar Council position is that it strongly supports ADR and mediation but recognises that the role of the court is to dispense justice which is distinct from the role of mediation which is to encourage compromise. Some would say that it is not possible to compel mediation because it is a breach of Article 6 of the Human Rights Act i.e. right to a fair trial, whereas others are very enthusiastic about ADR. It is about finding the right balance.

The Bar Council is awaiting a decision on its application but assuming it is successful the Chair is planning on presenting for the Bar Council along with Amy Rodgers of 11KBW. He is particularly keen therefore to make sure the views of the Bar Council and also the SBAs, whom he recently wrote to on this issue, are taken into account. It is important that the profession take part in this nuanced debate to ensure it does not lead to problems with access to justice and the protections for vulnerable people.

Eleena Misra KC, an employment silk, said that it is a precondition of bringing most claims to an employment tribunal that you have notified ACAS. The aim is no doubt to encourage conciliation, but the downside is that it has led to many complexities in the process especially in connection with limitation. Litigants in person often find the provisions utterly impenetrable to understand. If there is any compulsion for mediation, then we need to be mindful of potential complexities and unintended consequences such as satellite litigation.

Samuel Townend KC made the point that the previous Lord Chancellor was proposing compulsory mediation in all family cases but with no provision for legal advice. There was also the question of supervision and regulation of mediators which is particularly relevant if mediation were to be made compulsory.

Nick Grundy KC, attending as a member of the Property Bar Association Committee (PBA), asked about the extent to which pre-action protocols has reduced litigated cases. He said the breadth of cases are too wide and diverse for it be likely that the Court of Appeal will find that mediation is compulsory in all cases.

Ruth Kirby KC, a family silk, said that mediation has effectively been compulsory in all private family work for the last 10 years but has not worked. There are ways to get round the compulsion and, in any event, mediation is not suitable for all cases (such as where there are domestic abuse issues). The bargaining power of the parties and the quality of the mediator play a significant part in whether mediation is effective.

## **9. Proposed Amendments to the Standing Orders for Joint Committees**

Jamie Shaw presented the paper to review proposed amendments to the Standing Orders for the Joint Committees of the Bar Council and Bar Standards Board, in particular

concerning the process for adjusting the remuneration of lay independent members of the joint committees. The issue had already been considered and approved at the GMC meeting on 27 February 2023. The Bar Council members were therefore invited to review and approve, by way of extraordinary resolution, the proposed amendments. The amendments were approved.

## **10. Law Reform Committee**

Eleena Misra KC, Chair of the Law Reform Committee, took the report as read but highlighted the following.

i) Consultations and briefing: The LRC's capability in responding to the numerous consultations, particularly those with short time frames, is amazing and she is grateful to the committee and the Bar Council staff for their support. However, the committee is keen to be ahead of the curve and anticipate what it is coming down the line and therefore its members are engaging with the Law Commission, specialist bar associations and others to find out what is coming up on the horizon. At the same time, committee members are busy contributing to Parliamentary briefings for example on the Online Safety Bill, the National Security Bill, Illegal Migration Bill. For these reasons it is important to ensure that there is a good balance of expertise on the committee. The LRC would also encourage anyone who is a member of the Bar Council to be its eyes and ears about anything that is gathering traction and reach out so that it is on the committee's radar.

ii) Law Reform Essay Competition & Law Reform Lecture: Both these activities are important pinnacles of the LRC work. Last year's winning essay competition entry was "Crossing the Constitutional Rubicon: Why mediation should be compulsory in all civil disputes" by Emma Meadows. In June, Geoffrey Vos, Master of the Rolls, would be deliver the Law Reform Lecture on artificial intelligence and virtual worlds.

The Chair thanked EMKC for her report and highlighted the importance of considered consultation responses in informing liaison with government ministers and civil servants. This has a positive impact upon the reputation and standing of the Bar Council, the work it does and its engagement with politicians.

## **11. Advocate**

Rebecca Wilkie, CEO of Advocate, and Shyam Papat, Chief Operating Officer and Director of Casework at Advocate, took the report included with the agenda papers as read but wished to use this opportunity to outline the new initiatives Advocate has launched this year; update Bar Council members on Advocate's core casework service and duty schemes; and talk about the national presence Advocate is developing across the Circuits.

RW and SP thanked the Bar for supporting Advocate over the past year. Despite professional and personal pressures that many at the Bar face, barristers have continued to volunteer their time to help those in society in need of pro bono help. There have been many more who have also donated to support Advocate's core work and infrastructure, and it is deeply appreciated.

Advocate launched two initiatives this year: i) the Pro Bono Pledge, which was launched in January, and which encourages barristers, where they can, to pledge 25 hours of pro bono work in the calendar year, and ii) the Chambers Pro Bono Framework launched in February which provides ways for sets of chambers to strengthen and highlight their pro bono ethos.

To date, 136 barristers have signed up to the Pro Bono Pledge including 6 KCs, two Heads of Chambers. 17 have already completed the challenge, completing more than 630 hours of pro bono work this year. Importantly the Pledge recognises all pro bono work, not just that done through Advocate. The Chambers Pro Bono Framework sees sets commit to four actions within 2023 to help integrate pro bono within chambers. Advocate has been delighted with the interest shown with 17 sets already signed up. The reporting function is a valuable way for Advocate to gather more information to better understand the breadth and depth of work underway nationwide.

Advocate's core case work has increased with case work teams spending more time per case and having to act like social workers much of the time and this is something that they are trying to address. However, last year was a good year in terms of the amount of work completed. Advocate also operate a number of schemes in partnership with other organisations including various duty schemes including CLIPS (the Chancery Bar Litigant in Person Support Scheme), NCLIPS which covers Newcastle and the North West and other schemes covering different areas of law such as with Combar and the Court of Protection. The organisation is also looking to increase its reach into the different circuits to engage with the local bar and encourage more pro bono.

Stuart Alford KC, Chair of the Employed Barristers Committee, asked whether there were any reasons why employed barristers cannot sign up to the Pro Bono Pledge? RW replied that employed barristers were more than welcome and that she appreciated SAKC's offer to help encourage sign ups going forward.

On behalf of the Bar Council, the Chair said he would like to welcome the new Chair of Advocate, Sharif Shivji KC, and to express his gratitude to the immediate past Chair of Advocate, Sir Robin Knowles CBE, for his long-standing support of pro bono.

## **12. The Cab Rank Rule – discussion**

Introduced and contextualised by the Chair. Members heard that a recent speech by the Chair (at an evensong service at Temple Church in March on the "Rights and wrongs and



the role of lawyers”) had pointed to the cab rank rule as a key moral underpinning for the justice system. The Chair had been keen to touch on this issue following the general denigration of some lawyers in the media and the politicisation thereof (for example, references to “lefty lawyers”). In his speech he had said:

“The greater good is achieved by the well-established approach we have taken as a profession [...]

- It promotes access to justice
- It recognises that it is for judges and juries to decide and to judge, and that passing judgment is not the role of advocates
- Through the cab rank rule, it imposes an obligation on us to accept work even from those with whom we profoundly disagree, and of whom we profoundly disapprove
- It means that our role and duty as advocates is, and only is, to advise and then to represent”

Whilst preparing his speech he saw a draft of the “Declaration of Conscience” organised by Lawyers Are Responsible (LAR) under which a number of barristers had declared that they would not act if instructed on behalf of fossil fuel company in relation to a new project and would not prosecute climate change protesters. During the Chair’s speech, a member had held up a placard with the words “How many deaths does ‘cab rank’ justify?”. Subsequently there had been substantial media comment and press coverage. Much of the media position was supportive of the cab rank rule but some was not. Faisal Sadiq, Council member, then asked for there to be a debate on the cab rank rule at this meeting. A covering paper was provided which included references to LAR in order to provide context to the operating environment informing the debate. PP has raised objections to some parts of the paper which refer to LAR.

The Chair outlined that:

- i) This is not an oppositional debate between those concerned about climate change and those concerned about the role of barristers and the cab rank. It is about the merits of the cab rank rule and whether there should be exceptions to it.
- ii) There is no motion or resolution to the discussion. It is a debate and an exchange of views to help the Chair judge the public position he has taken against that of the profession. The covering paper seeks to frame the debate around the two issues which it identifies but if those present have other points then please raise them.
- iii) The reason for having included the text of the relevant rules from the Code of Conduct regarding the cab rank rule and the text of the Declaration of Conscience in the briefing paper is to provide information and context.

- iv) PP said that page two of the covering paper contains a quotation which is wrongly attributed to LAR. The quote is taken from a Legal Futures article. The Chair said that if it is a case of misreporting, we stand corrected.
- v) Questions on whether or not there have been breaches of the code of conduct in specific circumstances are a matter for the BSB and not for the Chair of the Bar to take a view.

PP was given the floor first and referred to the LAR submission he had brought with him which he had handed out to those attending and would make available to those joining online. He said was elected to the Bar Council solely on the climate change mandate but would be speaking here today in a personal capacity. He also pointed to the Law Society position on climate change and its new climate change guidance, which he felt was more nuanced and radical than the approach taken by the Bar Council. He also said that more sectors and professions were no longer taking work which did not align with the aims for net zero.

PP said that the climate change crisis is incredibly serious and ongoing, and he questions whether many barristers understand this or its impact on the rule of law. He said that the Declaration of Conscious is framed around not giving services to those who allow new fossil fuel activities. The continuation of society and the rule of law cannot be guaranteed in the event of climate catastrophe and by allowing the professions' services to be used to open new oil and gas fields is deliberately and knowingly causing the deaths of millions of people.

PP asked how the profession should respond as it was his view that continuing to 'make money on the deaths of millions' is a moral obscenity. He has tried to raise these issues elsewhere including with the Inns, and he has made declarations, carried out protests and taken part in debates. He is of the view that the cab rank rule cannot clearly be applied with the same severity and necessity regardless of the work barristers undertake as the profession already takes a position on the merit of different cases. Legal aid, for example, is applied to criminal cases but not for fossil fuel companies to open new oil fields. He ended by saying that he wished to challenge the Chair to a debate around these issues with input from scientific experts.

Leon Kazakos KC, a criminal barrister and South Eastern Circuit Leader, was pleased that this debate was happening and sees PP's arguments as genuine and honest and come from good motives. However, barristers are advocates and not guardians of any particular positions. Most members of the Bar have been brave and robust in the defence of lawyers when under attack for the activities of their clients, most recently on sanctions. The cab rank rule ensures that no one is left without competent legal representation in court – both individuals and corporations - but inroads into rules seem to end up damaging the most vulnerable in society. Those at the criminal bar do not get to choose their clients, relate to

them or agree with their actions, morals or intentions. He went on to say that the cab rank rule is too valuable a protection to sacrifice just because it has come up against a morally hard case such as this. Before moves are made to do away with rules that are for the protection of the public and the bar, the criminal bar in particular, he would ask that it is given anxious consideration, no matter how well intentioned the profession wishes to be.

Laurie Scher, Co-chair of the Bar Council's Pro Bono and Social Responsibility Committee, referred to the Bar Sustainability Network and the Climate Crisis Working Group, both Bar Council initiatives, which were providing strategy guidance to reach net zero emissions at the Bar by 2030. He talked about the concept of "lawyered emissions" which the working group in particular was considering. However, the working group has not taken the view that the cab rank rule should be changed. Instead, its focus was on the profession's own energy consumption, premises and travel where the profession can make an immediate difference.

Stephen Kenny KC, Chair of Bar Council's Ethics Committee, said he would like to draw the debate back to the core functions of the profession and that it was not necessary to go too far beyond that. The Bar ought not to regulate how its members conduct themselves in non-professional contexts except where it may bring the profession into disrepute. Essentially, barristers are advocates and its core ethical rules are about the conduct of advocacy, and therefore caution should be exercised when drawing up rules which are not related to the discharge of advocacy and the giving of advice to clients. The cab rank rule is our equivalent of the Hippocratic oath, in that members of the profession guarantee advice and representation to anyone who needs it and that ought to be the ethos of the profession. Barristers do not choose their clients and it is important that everyone is guaranteed the best available representation both in criminal and civil matters.

SKKC went on to say that the cab rank rule is important also in civil practice. He referred to the Bar Council's Ethics Hub, where there is written advice given against the acceptance of general retainers. Because of the cab rank rule, a barrister cannot agree *not* to act against particular clients and cannot accept instructions subject to any similar condition. The cab rank rule ensures that insurance companies, banks etc. do not have a monopoly on the best advocates: they cannot "scoop the pool" by retaining permanently all the best. It ensures that very good advocacy is available to all those that need it.

SKKC concluded that the way the barristers' profession operates is completely suffused by its understanding of the cab rank rule and it would be ill-advised to water it down. However, there is an exception, a "safety valve", which can be found in the BSB Handbook, rC21.10, which precludes accepting or continuing with instructions where there is a real risk that independence cannot be maintained, e.g., where the barrister will feel so genuinely afflicted by conscience that it would be impossible for them to act. However, that is an extreme position to be in. It would be unlikely to apply to barristers who would simply prefer not to prosecute climate change protesters. Just because you have sympathy with or

agree to some extent with a defendant's cause, that should not make it impossible to do your job as a prosecutor. But it would be a matter for the BSB, as the profession's regulator, to take a view on such cases, and on whether the barrister had been genuinely so afflicted by conscience as to be incapable of acting.

PP disagreed with the suggestion that the Bar represents anyone who needs it. For example, at the civil bar the profession represents those who can afford it; often the other side in a case does not have representation because they lack the funds. The profession, in his view, is more concerned with the principal of the cab rank rule and not its practical application.

Saira Kabir Sheikh KC said that this was not a debate about climate change but about the role of barristers who are there to represent, not judge. In so far as the point is made about the costs of environmental litigation there are useful provisions in the White Book that enable claimants to address these concerns by capping their costs liability.

The Chair thanked everyone for their contribution.

### **13. Any Other Business**

Sally Burnell, Director of the Communication and Marketing, informed Bar Council members that they will be receiving an email from the Bar Council the following day regarding the Bar Council annual conference and to please keep a look out for it.

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

The next Bar Council meeting will be on Tuesday 20 June at Inner Temple, London, followed by the Bar Council Summer Reception, also at Inner Temple.

### **15. Upcoming Meetings**

Saturday 9 September 2023	Bar Council offices, 10am start. This is followed by the AGM, in person only at the Bar Council offices, at 11am
Saturday 25 November 2023	Bar Council meeting on Circuit (Leeds), starting at 11am.
Wednesday 6 December 2023	First meeting of the Bar Council 2024', online only for the purposes of announcing committee chairs and co-options, 4.30pm start