



**Minutes of the Bar Council meeting
held on Saturday 08 July 2017 in the Large Pension Room, Gray's Inn**

Present:	Andrew Langdon QC	Chair
	Andrew Walker QC	Chair Elect
	Lorinda Long	Treasurer
	The Rt Hon Jeremy Wright QC MP	Attorney General

Apologies for absence

Apologies for absence were received from: Dr Mirza Ahmad, Robin Allen QC, Nicholas Bacon QC, Steven Bramley CBE, Richard Brent QC, Simon Broomfield, Robert Buckland QC MP, Sydney Chawatama, Tom Cockroft, Ivor Collett, Anita Davies, Tim Devlin, Guy Fetherstonhaugh QC, Manjit Gill QC, Birgitte Hagem, Alexandra Healy QC, Paul Hopkins QC, Richard Hoyle, Fiona Jackson, Richard G Jones, Sean Jones QC, James Keeley, Rachel Langdale QC, Philip Marshall QC, Eleanor Mawrey, Duncan McCombe, Andrew Morgan, Bill Mousley QC, Gordon Nardell QC, Peter Petts (alternate attended), Richard Posner, Robert Rhodes QC, Ben Rowe and Nigel Sangster QC.

The following did not attend and did not send apologies: Colin Andress, Charles Burton, Anna Macey and Francesca O'Neill.

63 further members attended.

1. Minutes of the last meeting and matters arising

The Chair welcomed members to the meeting. Addressing the Attorney General, The Rt Hon Jeremy Wright QC MP, who was also in attendance, the Chair congratulated him on his electoral victory in his constituency and said that he was delighted that he could attend.

The Chair welcomed Katherine Duncan, a new member of Bar Council in the 'self-employed Junior under seven years' in practice' category, who was attending her first meeting. He apologised for an error in the Chair's Statement at Annex 2 which had incorrectly stated that she had been appointed to the employed Junior under seven years' in practice' category. It is in fact Birgitte Hagem, not in attendance at the

meeting, who has been elected into the employed category for a term of 1.5 years while Katherine is elected into the self-employed category for a term of 6 months.

Referring to a sporting event happening the same day between the Wales and Chester and Western Circuits, the Chair thanked members from those circuits who had forgone this to attend the Bar Council meeting.

Speaking about the new Lord Chancellor, David Lidington, the Chair said that time will tell if some of the grittier issues are high on his agenda. Noting that there are also 'changes at the top' at the Bar Council, the Chair reminded members that this was to be the last meeting of the Chief Executive, Stephen Crowne, who is retiring in August. Malcolm Cree, his successor, will be assuming the Chief Executive role from 1 August 2017.

The Chair reminded members that the Bar Council are holding a reception at Temple Church on Thursday 20 July from 5.30pm. He asked anyone wishing to come but who had not yet confirmed attendance to let Natalie Zara, Head of Governance, know as soon as possible.

With the Legal Pride March due to take place later that afternoon, the Chair said that he was looking forward to the event and he drew the members' attention to a couple of good interviews that the Bar Council have placed online, in particular one with Simon Robinson of Five Paper Chambers. In his interview, Simon Robinson uses the phrase 'challenging the narrative' and the Chair noted the changes in the discussion and language about tolerance that have taken place over the last 20 years. Simon Robinson also speaks of the 'muscle behind the glitter'. Referring to this the Chair made the point that equality and diversity issues are not just about tolerance, inclusion, but also about getting the best out of others, thereby enriching the profession.

The minutes of the meeting on Saturday 20 May were approved.

2. Statement by the Chairman

Turning to the Chair's Statement at Annex 2, the Chair reported that the Employed Bar Awards had taken place the previous Friday at the Tower of London. Describing the event as a 'fantastic occasion that celebrated what the Employed Bar do', the Chair informed members that some 200 people 'in high spirits' had been in attendance. Camila De Silva was the recipient of the Employed Barrister of the Year award and the Chair congratulated all those who won in their respective categories.

The Chair said that he wished to highlight two other items in his statement: AGFS and Flexible Operating Hours.

AGFS

The Bar Council provided the Government with a redesigned scheme two years ago, after a lot of hard work. The Chair said that he is depressed about amount of time that has passed since then with little movement. The Government has not yet responded to the consultation though it has listened and subsequently sought to re-jig some areas where the consultation process had revealed that further money needed to be injected into parts of the scheme. This causes a problem as the Government was clear that it wanted cost neutrality but these changes will inevitably result in increased costs. The Chair has made it clear that the Government needs to factor in costs from this year and last year but has been informed that this cannot easily be done as the most recent figures are complex. The Government have agreed to look at the most recent figures. Frustrated that 'the whole thing grinds on', the Chair said that he desperately wanted to see this improved scheme in place, particularly as it is something that is 'close to my heart'. He said that, although he is hoping for a constructive outcome, 'only time will tell'.

Flexible Operating Hours

The Chair reported that his inbox has been filled to capacity with emails on this topic. He assured members that he has done his best to convey how unhappy the Bar is about the proposals that will set back diversity and impact further on the retention of woman at the Bar should the schemes come into play. However, the most recent news is that the Government will launch six pilots in September or October 2017.

Since the Bar Council published its Sitting Hours Protocol, it has received an extraordinary amount of support from those inside, and outside, the profession and many judges have signalled their approval. Recalling the most recent exchange with the Chief Executive of HMCTS, Susan Acland-Hood, the Chair sought to provide members with a flavour of the discourse by quoting from a letter written by Susan Acland-Hood, "Fixed Operating Hours will make swift and efficient justice harder to deliver in the high number of cases which could be resolved at a police station without the defendant or witnesses having to visit court." Making clear his frustration, he acknowledged that although there are some highly intelligent and well-intentioned people at the top of the initiative, they are unfamiliar with the courts.

The Chair said that had struggled to imagine a scenario in which a 'video barrister' (e.g. a barrister conducting from home) could properly build a relationship with a client who is in prison. Barristers are not luddites, but it is impossible to imagine a future where the family and criminal Bar do not physically meet with their clients.

In terms of moving forward, the Chair said that he is of the opinion that the Bar Council should continue to engage constructively. There is a need to ensure that the Flexible Operating Hour pilots are conducted properly and robustly. The Bar Council has accepted an invitation to join a Board whose role it is to oversee the evaluation process. The Chair suggested that the best way of ensuring that the pilots are appropriately conducted is to remain involved especially given that the pilots will only effect six small parts of the country.

Paul Mendelle QC asked the Chair whether he could give an indication of time with regards to the implementation of AGFS and asked about progress on the defence panel scheme. Taking the defence panel scheme question first, the Chair replied that it is high on the Bar Council's agenda for matters to discuss with the new Lord Chancellor, however, it cannot be claimed that progress has been made. The MoJ is in receipt of all the information. The government are hesitant about introducing a panel scheme at the same time as potential cuts to the (Litigators' Graduated Fee Scheme) LGFS are being negotiated.

On the topic of AGFS, the Chair explained that it is likely that the Government are wondering which one to respond to first. He set that, regrettably, he did not expect an outcome until Autumn.

Fenner Moeran QC, attending on behalf of Rachel Langdale QC, enquired as to whether the Bar Council could tender itself to carry out the flexible working hours pilots evaluation. The Chair replied that, although he liked the idea, it is not going to happen! The Criminal Bar Association have indicated that it wants to carry out its own evaluation and the Chair suggested that the other Specialist Bar Associations (SBAs) might want to do the same.

One of the members asked whether everyone who has contacted the Bar Council regarding the Flexible Operating Hours Protocol has been in support of it. The Chair replied that one or two male barristers, whom the changes might suit, had signalled some support and he acknowledged that there will be some people who find the opportunity to work early, get back to Chambers and then 'get in a second shift' attractive.

Athena Markides asked whether the Bar Council has liaised with the courts and the court staff. She made it clear that she is horrified by the proposed hours. The Chair replied that he is aware that their union is exercised by it but acknowledged that the Bar Council could take steps to link up with the relevant staff union.

3. BSB report

Naomi Ellenbogen QC, Vice-Chair of the BSB, spoke to this agenda item. She was joined at the meeting by Sir Andrew Burns, Chair of the BSB and Vanessa Davies, Director General of the BSB and Wilf White, BSB Director of Communications and Public Engagement.

Naomi Ellenbogen QC said that the BSB Report covered two themes, the intersection of old/new technology and the importance of the promotion of diversity.

Parental leave

On 26 May the BSB announced a change to the BSB's equality rules to ensure parental leave for all self-employed barristers in chambers, regardless of whether or not their spouse takes parental leave. This change has been supported by the Bar Council and a majority of respondents to the consultation. The BSB hopes that the rule change will be approved by the LSB. It will be for individual chambers to work out the best way forward but the overarching aim is to help the Bar to retain those with parental responsibilities by making it easier for self-employed barristers to combine work and family life.

New Chair

On 26 May the BSB announced that it will be seeking a new Chair. This will take effect from the date at which the term of the current Chair expires in December 2017.

Delivery models

The BSB has published its report into the current and future provisions of legal services by barristers. This follows an online survey which found that newer business models are emerging and the clear answer from the survey is that these new models enable people to offer fixed fees, are likely to have more agile and flexible governance structures and make greater use of technology to support service delivery. It is also clear from the survey results that the chambers model is not a bar to competition of innovation in the market.

New declaration rules

On 12 June the BSB published a consultation on a new set of proposals to require barristers to declare a range of information about their practice when applying for their practising certificate. The BSB would like barristers to declare the areas of law in which they practise, or what proportion of their income derives from each area to the regulator. The BSB believes that it will enable the BSB to have a better understanding of the Bar and that it will assist in developing and monitoring appropriate CPD plans. This is not an onerous requirement and the Bar proposes a similar approach to that

used by the Bar Mutual Indemnity Fund when self-employed barristers apply for the professional indemnity insurance.

The BSB is also seeking views as to how it should introduce the compulsory registration of Youth Court practitioners, following its recent review. This will help the BSB to ensure that barristers who are working in proceedings involving young people have the necessary specialist skills, knowledge and attributes.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 are now in force and they include a requirement for the BSB to ensure that the risks of money laundering and terrorist financing are identified and assessed in relation to those barristers undertaking work that engages the Regulations. A meeting between representatives from the BSB and Bar Council is taking place before the end of July.

The consultation closes on 15 September 2017 and the BSB is keen to hear the views of the members of Bar Council.

BPTC statistics

On 19 June the BSB published its third annual report on student performance on the Bar Professional Training Course (BPTC). This report includes information about students who enrolled in the 2015/16 academic year, as well as those who enrolled on the BPTC in the preceding two academic years. It also includes statistics on student enrolled on the BPTC between 2011/12 and 2015/16 who started pupillage following completion of the course.

The report continues to show that the Bar remains extremely competitive but diversity is improving. Just under 50% of pupillages were awarded to women and just under 20% to barristers from black and ethnic minority candidates.

The new data will help the BSB to ensure that its plans to reform the system of education and training for barristers is informed by the latest evidence. It is also hoped that the new information will enable students to make informed decisions about their chances of success.

Future Bar Training

The BSB is taking forward its current reform plan for Bar training. As part of the programme, on Monday 19 June it hosted a well-attended 'Future Bar Training: Next steps' event. A video recording is available on the BSB website.

Public and Licensed Access Rules

The BSB published a new consultation on potential changes to the rules governing the Public and Licensed Access schemes following the recent review. The review found that both schemes are working well and provide a valuable service, but that some improvements to the rules governing the schemes could result in a better service for clients and deliver greater access to justice for the wider public.

The latest consultation proposes a number of recommendations including simplifying the existing rules, the continuation of the current approach and the possibility of changing the Scope of Practice Rules to allow some charities and businesses to instruct barristers without having to use the Public or Licensed Access schemes.

The consultation closes on 26 September.

CMA Action Plan

The BSB has published, in consultation with others, plans to address concerns in the recent CMA report. The plans focus on improving standards and consumer transparency regarding the services provided by barristers, their fees and the availability of redress. The purpose is to help consumers compare services.

Work has begun on identifying good practice in chambers in this area and the BSB will be piloting new approaches.

New guidance on immigration and asylum

On 30 June the BSB published two new guidance documents on immigration and asylum issues which were developed in collaboration with the Solicitors Regulation Authority (SRA) and the Office of the Immigration Services Commissioner (OISC) after extensive consultation with consumers.

The first document is aimed directly at people seeking legal help and the second is for professional advisors working with people with immigration asylum issues.

Standard of Proof

Naomi Ellenbogen QC reminded members that the consultation as to whether the standard of proof applied during disciplinary proceedings for professional misconduct should change to the civil standard closes on Friday 21 July.

Francis Fitzgibbon QC enquired as to whether the BSB is taking notice of the concerns regarding diversity in the flexible operating hours proposals. Naomi Ellenbogen QC

replied that the BSB recognises the regulatory consequences and will be keeping a close eye on any involvement directly.

A member of the Bar Council asked whether there is any news on QASA and Naomi Ellenbogen QC replied that she had no news to report.

The Chair thanked Naomi Ellenbogen QC and the BSB representatives for attending and presenting their report.

The Chair congratulated Naomi Ellenbogen QC and Nicholas Vineall QC, a member of the Bar Council, on their recent appointments as Deputy High Court Judges.

4. Statement by the Chief Executive

The Chief Executive wished the members of the Bar Council a good morning and said that he had three main topics to cover.

Appointment of an interim Services Director

The Bar Council has recently announced that Dr Isabel DiVanna will be joining us on 21 July as interim Commercial director, succeeding Paul Mosson who left in June. She has been popping in before that to meet the team and to help with the selection of the successor to Carol Harris, Head of Financial Services, following her retirement as well as the maternity cover for Lois Clark, Head of Head of Commercial Services & Development.

Isabel has wide experience at Director level working on commercial strategy and implementation. She spent a few years at the University of Cambridge working on strategic corporate partnerships and executive education. She has been Director of Corporate Relations at a think tank, and most recently Commercial Director at the Royal College of Gynaecologists.

Stephen Crowne said that he was very much looking forward to her joining the Bar Council.

The annual staff survey

This year the staff survey focused on efforts to help the Bar Council staff to work more flexibly so that a smaller office is required in future. The results have now been analysed in more detail and shared with the Senior Leadership Team.

Stephen Crowne reported that the survey had attracted an 80% response rate which is slightly down on last year but still a very good outcome. There is much to be proud of, in particular the scores for management effectiveness are encouraging.

The overall score for staff engagement is 66% positive, slightly up on last year but still 5% short of the average for professional bodies, which is our benchmark. In most respects, we are pretty much at the benchmark or indeed above, excepting one area, 'longevity'.

In answer to the question 'I would still like to be working here in two years' time' – the scores were 34% positive, 35% neither negative nor positive, 31% negative. This drags the overall staff engagement score down significantly.

This result seems to be very much at odds with some very high scores for the way we manage and look after staff, for the overall commitment of staff to the organisation and what it stands for, and for their advocacy for the organisation.

To address this, the Bar Council will be setting up some staff focus groups to investigate further. One explanation may be that we deliberately recruit staff who are planning to move on in any event. For example, those looking for pupillage. Another might be uncertainty about the future arising from the Government commitment to consult on regulatory separation. Yet another might be our predominantly younger demographic, which is more mobile. Nevertheless, there is a need to get behind these statistics as the responses are indicative of a significant issue.

The data shows no significant variations in staff responses by the protected characteristics, which is reassuring. There are some general concerns about workload, but these are less than the average for benchmark organisations.

The main findings on flexible working show that we are making good progress, with staff being notably positive about the resources available. There is, however, a however to get to the bottom of a more negative reaction amongst the minority of staff whose work means they must be fully office based. The message is that the staff survey has been a very useful exercise but there is still more work to be done.

Ethics Enquires Service report

Stephen Crowne said that he would like to finish by sharing some headlines from a report on the Ethics Enquiries Service which was looked at the Operational Management Board meeting last week.

This year, the total number of calls received were about 6,500, up from 5,500 last year. This may reflect efforts we have made to promote the Service.

The three most frequent topics were returning instructions, direct access and practising requirements.

In addition, the service received 518 email enquiries.

No formal complaints have been received in the year, though there have been 'a few grumbles'. During the course of the year, the service had two abusive callers, and dealt with a small handful of difficult or inappropriate callers.

The processes have been streamlined to ensure that a caller can always get through to a member of the team and to discourage callers who enquire about 'blindingly obvious' matters. There is now a much better system for dealing with emergency queries that need to involve members of the Ethics Committee.

The team is looking at how the Bar Council can get more qualitative feedback, however, this would require a system that did not impose an excessive burden or undermine the personal nature of the service.

Stephen Crowne said that there was no doubt in his mind that this is a highly valuable and valued service, and expressed gratitude to staff and members of the Ethics Committee who put so much time and effort into this work.

The Chair said that one of the greatest privileges of his role is listening to members of staff assisting barristers with their queries on the ethics enquiry line. He assured members of the Bar Council that if they had the opportunity to listen to the way that staff deal with and help people, they would be satisfied that this service alone would justify the existence of the Bar Council. He noted with interest that the number of calls are increasing.

5. Treasurer's Report

Lorinda Long explained that she had provided a paper for members of the Bar Council as opposed to a slide show on this occasion. She said that the full accounts will be brought to the Bar Council in September but reported that overall the results are better than expected.

Lorinda Long talked through the important features in her report.

The Bar Council's operating results made a pre-tax surplus of £304k. This supports its reserves and funds its cash investments over the near future. Non-operating results showed a pre-tax surplus of £380k.

Despite a £287k shortfall in 2016's PCF collections, a good financial outcome has been achieved because Bar Council acted quickly to reduce expenditure in-year and the BSB identified other income to offset this shortfall.

The amount of PCF funding applied to Bar Council activities in 2016/17 has been steady at £3.2m, 32% of the total. It is expected that this percentage will remain steady for 2017/18.

The PCF collections in 2017 have allowed the Bar Council to collect the planned £1.3m towards the pension deficit reduction strategy and we have reported this in these accounts. We have paid £1m towards the scheme in 2017 and will retain the balance as a ring-fenced reserve to mitigate against future pension deficits. We will report these transactions in the 2017/18 accounts.

Additional reporting around major risks has been included for the first time following implementation of improved risk management reporting in 2016.

6. Queen's Speech

The Chair said that there were two substantial items on the agenda for the meeting. Explaining that the Attorney General had kindly agreed to speak to the first item on the Queen's Speech, the Chair noted the 'extremely valuable' paper drafted by Mark Hatcher. Referring to the second substantial item, the Chair explained that the BSB has issued a consultation on the Standard of Proof in disciplinary proceedings and the Officers are keen to hold a Bar Council discussion to inform a decision as to the position to take in the Bar Council's response.

The Attorney General said that he did not intend to read out the Queen's Speech or repeat what Mark Hatcher had written in his 'excellent paper'. Instead, he said that he would make some general comments.

The Attorney General began by reporting that politics is still in a state of shock following the General Election which has left nobody happy. The Conservative Party lost its majority, UKIP lost most of its votes, SNP a 'fair chunk', and Labour lost the election. There is now a minority government in the House of Commons, as has been the case in the House of Lords for quite some time. Saying that it is worth noting that the confidence and supply agreement covers confidence motions, Brexit, Finance and National Security, the Attorney General explained that accounting for the absence of Sinn Fein, the Conservative Government has a majority of 14 if the Democratic Unionist Party (DUP) votes with it and a majority of four if the DUP abstains. The situation will also affect secondary legislation as in the subsidiary legislation committees the Government may only have a majority or one or none at all so it is unlikely that Government will be able to achieve all that it set out to achieve and this will affect which Bills 'make it in'. The first challenge is can Government successfully get Bills around Parliament and the second challenge is can Parliament resist amendments to Bills it doesn't like.

Saying that the second restriction on the legislative programme is Brexit, the Attorney General explained that Parliament has only so many sitting hours and Brexit will take up many of them. There is the Great Repeal Bill and thousands of statutory instruments that will flow from it as well as many other things that have to be considered as there is less non-Brexit related legislation than anticipated.

The Attorney General continued by saying that it cannot be assumed that people will vote against Bills all the time, especially as some legislation is needed for underpinning purposes, for example, the Space Industry Bill, some legislation is

needed to keep the system running well, for example, the Courts Bill, and, some legislation is needed to do things that the Government is committed to do. It is likely that other legislation will also be required. People will tire of Brexit and will expect the Government to act on other things that are of importance to them.

Introducing himself as a personal injury specialist, John Paul Swoboda enquired about the scope of the Civil Liabilities Act, asking whether or not the Government intended to go beyond whiplash. The Attorney General said that it is a consequence of the parliamentary arithmetic that some Bills will be less ambitious. That which relates to whiplash has been extracted from another Bill and that is what the Government is responding to.

Francis Fitzgibbon QC said that he is aware from remarks made by the Lord Chancellor and Lord Chief Justice that the provision of legal services will be an important element for the country in the years following Brexit. He enquired as to whether the Attorney General could assure members that the Government's commitment to a fully operating legal system also includes the foundations of that and not just high-level international work. The Attorney General answered that he could assure members of that and acknowledged that money won't be made if the training and entry processes for the legal professions are not right. The Government is aware of the need to review LASPO and is committed to that as it undertook to see whether changes that had been made had resulted in unexpected or unwelcome effects. There are 'lots of hands' out but no unlimited source of money though this doesn't mean to say that nothing can change. However, when the Government gets to the point of the LASPO review, it will need to know about those effects.

Fenner Moeran QC, speaking about the impact on retention of flexible working hours, asked whether the Attorney General could assure members that the retention of barristers and the impact on this issue in particular will be at the forefront when considering this. The Attorney General replied that he had mentioned the criteria for the pilots earlier. Work is being carried out to ensure that this is being assessed in the correct way. However, he noted that if an argument is to be made for longer court hours, then you are conceding defeat on all other things done to improve court efficiency and that is why the Government wants the courts operation more efficiently.

The Chair thanked the Attorney General for speaking to members of the Bar Council saying that he had one last thought. He explained that he has suggested that the mood towards Legal Aid is changing publicly. Lord Neuberger spoke of the defence of the realm and defence of the rule of law and how legal aid had taken a 'wrong turn' back in 1999. It feels as if we are in a different place now than prior to the election. The Chair asked the Attorney General is there is going to be a serious rethink as to priorities. The Attorney General replied that the review of LASPO needs to take place within the arena in which it is set. Parliamentary arithmetic has a huge bearing as, in

the end, the Government requires the support of the House of Commons. Where people feel passionately, there is more leverage. As to change, all the people that have been referred to have said the same thing. Even a 'mean spirited' Treasury Official would need to think about saving money across the system. The Attorney General finished by saying that he wants a review of LASPO and to look those 'extra costs in the corners'. A sensible review will take that, and personal experiences of those affected by the changes implemented by LASPO, into account.

7. Education and Training Committee

Nicholas Vineall QC, a member of the Bar Council and the Education and Training Committee, presented the Education and Training Committee report. The Chair thanked Nicholas Vineall QC for standing in for the Chair of the Education and Training Committee, Guy Fetherstonhaugh QC, who was unable to attend.

Nicholas Vineall QC explained that the work of the Education and Training Committee has little impact on those who are established already but it is of fundamental importance to what the Bar will be demographically in 20 years' time, and the judiciary in 30 years' time.

Nicholas Vineall QC said that he wished to highlight three things:

Future Bar Training

Describing this as a once in a generation opportunity to get the issues right, Nicholas Vineall QC reported that the Education and Training Committee had been disappointed by some aspects of the process of consultation but are pleased by the outcome and pleased that their response had an impact on the BSB's thinking. Broadly speaking the outcome is good. The next steps are 'out of our hands'.

Pupillage Gateway

The timeframe shifted to earlier in the year for the first time this year. The new timeframe means that people know whether they have secured pupillage before committing to 'exorbitant' fees. This move was not universally supported but the Education and Training Committee thought it to be right as only 40% of law graduates ever secure pupillage. Nevertheless, the number of chambers participating is slightly down.

Third six pupillages

Nicholas Vineall QC asked members of the Bar Council to look at the guidelines saying that they are uncontentious and the Education and Training Committee thinks

that they promote transparency and fairness. He asked members to go to the relevant person in chambers and ask them to sign up if they accept the guidelines to be 'a good thing' as this will be beneficial to people in third sixes. This is also an area in which the BSB is likely to take interest if the Bar Council does not 'get its house in order'. It is less likely that the Bar Council will attract attention if it is seen to lead.

Nicholas Vineall QC finished his report by thanking Sam Mercer, Head of Policy: Equality and Diversity and CSR for all her excellent support.

8. Ethics Committee

Fenner Moeran QC, Vice-Chair of the Ethics Committee, presented the Ethics Committee report on behalf of the Chair of the Ethics Committee, Rachel Langdale QC, who was unable to attend.

He explained that the Ethics Committee comprises 26 people. It is a large committee as it covers all areas of practice and therefore requires a number of specialist members. As a result, the Committee is exempt from the usual rules of requiring a specific number of Bar Council members as the committee needs specific expertise.

The work of the Ethics Committee fits broadly into three categories:

The ethical enquiries hotline
General information to the Bar about ethics
Representation of the Bar on ethical issues

Ethical enquiries hotline

Fenner Moeran QC acknowledged that, of the three, it is the ethical enquiries hotline with which members of the Bar Council are most likely to have had dealings with the Ethics Committee if at all. 6500 calls were made to the helpline in the last year which is a massive increase from 10 years ago though this is slightly reflective of moving away from a 'chat' with senior barristers so a more formalised and professional assessment of matters. As to be expected, there has been a big increase in resources. Where there used to be four members of the secretariat running the hotline, there are now ten – soon to be eleven. All those who work the hotline are well-trained and the Committee is extremely grateful to the them. Most of the questions are relatively standard and the team have guidelines. However, the more serious queries are accelerated to members of the Ethics Committee and a successful cascade system has been installed so that it is possible to contact an Ethics Committee member within a handful of hours. An educational video about the ethical enquiries hotline is available on the Bar Council website.

Guidance on issues more generally

Fenner Moeran QC informed members of the Bar Council that the Chair of the Ethics Committee, Rachel Langdale QC, is particularly strong on this aspect. The Committee is consistently publishing guidance, the old FAQs have been replaced by specific guidance and there is a rolling programme to update guidance. In fact the first full rolling process to ensure compliance with the Handbook has just been completed.

The Ethics Committee has a quarterly column in Counsel magazine and a regular slot in Bar News which replicates the old written model in a more 'media savvy' way. The Ethics Committee also run a series of roadshows and seminars and numbers have doubled this year.

Representation of the Bar on ethical issues

The Ethics Committee deals with changes to the Handbook, guidance and consultations about the Code of Conduct. Therefore, the Committee has been involved in the Money Laundering Regulations and Authorisation to Practice consultations and will no doubt get involved in the Standard of Proof consultation.

Fenner Moeran QC finished by saying that the Ethics Committee had received a flurry of emails on the courts sitting protocol and its impact on the cab rank rule which it is currently considering.

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Alison Padfield suggested that one of the reasons for the increase in calls to the hotline might be that calls to the hotline, concerning serious misconduct, benefit from an exemption from the duty to report to the BSB other barristers' serious misconduct. Fenner Moeran QC confirmed that callers to the hotline don't have a reporting obligation and acknowledged that this might have had some impact, however, he noted that the calls were increasing before the rule change. In addition, under the BSB Handbook, barristers are only obliged to report serious misconduct and few of the calls relate to this.

Alison Padfield agreed but made the point that many callers would not know whether the misconduct was potentially serious or not. She also praised the guidance produced by the Ethics Committee but made the point that it is very difficult to find on the website as the search function does not really work, and suggested this might also be a reason why so many calls are being made. She said that this must be costing the Bar Council money in terms of staff answering calls which would not be made if

the guidance was easier to find on the website, asked if anything could be done to improve access to the guidance, and suggested that this would save money overall. Fenner Moeran QC reassured members of the Bar Council that the website is very much on the Ethics Committee's agenda. Stephen Crowne added that is on a long list of 'things to do' for the Communications and Marketing Team but explained that it will require significant expenditure. Plans are, however, being developed to 'revamp' the website. The Chair informed members of the Bar Council that he will look to see whether the issue of making ethics guidance easier to access can be dealt with separately and sooner.

9. The Standard of Proof Applied in Professional Misconduct Proceedings

The Chair announced that the Bar Council would now turn to its discussions on the standard of proof applied in professional misconduct proceedings. He thanked Sarah Richardson, Head of Policy: Regulatory Issues and Law Reform, and Natalie Darby, Senior Policy Analyst, for volunteering to set the discussion going. Explaining that that Sarah and Natalie comprise the Regulatory Issues and Law Reform Team, he praised their valuable work in an important area and said that they have carried out a lot of work on the subject of the standard of proof in light of the BSB's consultation. Both the Chair and Chair Elect have met with Sarah and Natalie to discuss the issues.

Natalie Darby said that she would keep her presentation brief as a paper explaining the research was available to members of the Bar Council at Annex 6. The current standard of proof in professional misconduct proceedings is the criminal standard and the BSB is proposing to change this to the civil standard. The Regulatory Issues and Law Reform Team have met with a number of BTAS panel members, prosecutors and people involved in the professional misconduct proceedings procedure to discuss their experiences and gather their thoughts. She asked member of the Bar Council for their views on whether or not they think the application of the civil standard would make a difference and whether or not they think that the facts are often in dispute.

Sarah Richardson, taking over from Natalie Darby, said that she wished to give a flavour of the issues and provide members of the Bar Council with a summary of the findings so far. With the exception of a couple of the people that the Team have spoken to, all those consulted thought that there was no need to change to the civil standard. Almost all were agreed that it would lead to the same outcome as it is rarely the decisive factor. Barristers are normally acquitted due to insufficient evidence and the facts are rarely in dispute.

The arguments against changing the standard of proof are that the public is already protected, barristers who pose risk are not being 'let off', barristers are vulnerable to clients, the argument for found no favour amongst those consulted, there is a lot at stake for barristers and their reputations, a change to the civil standard might have an

impact on the way a barrister interacts with his/her clients and might impact on the publicly funded family and/or criminal cases the most. There was a sense that it is wrong to treat barristers and solicitors differently as currently the Solicitors Disciplinary Tribunal (ADT) also apply the criminal standard.

The arguments for changing the standard of proof are that the civil standard is well-established in most of the other comparable regulators, it might make a difference to some outcomes, there is an example of a barrister who was acquitted because of a lack of conclusive evidence despite the panel believing him to be guilty and disciplinary proceedings are more akin to civil proceedings.

In its consultation, the BSB asks about taking risks and there is a question around whether to wait for the SDT to change its standard of proof first. The BSB's consultation states that the prevailing view amongst both the non-legal and legal professions is that the civil standard is the appropriate standard to apply in disciplinary proceedings but it has been suggested that there could be different standards for barristers and solicitors.

The Chair informed members of the Bar Council that the deadline for responses to the BSB's consultation is Friday 21 July. He explained that it is important that the Bar Council puts forward a view. Saying that some might argue that barristers ought to get up to speed with others, the Chair questioned whether or not barristers are really different from doctors. Around the world, all commonwealth jurisdictions have made the change to the civil standard. In many cases, well-documented case in New Zealand whereby a dentist accused of indecently assaulting clients was acquitted on the criminal standard, led to the change being made. If the Bar Council argues against the change, there will inevitably be an argument of protectivism.

Kerim Fuad QC said that he thinks barristers should fit in with dentists and doctors and must be seen to be on par with them. He made the point that those who are looking at allegations probably already apply a higher standard, even if the civil standard is used.

Chris Kennedy QC noted that there appears to be a classic divide between the case for change being, so far, unproven and the political pressure to change in line with others. He was clear that the Bar Council cannot have a different standard from the solicitors. It was noted that the Solicitors Regulation Authority (SRA) has the civil standard but the SDT applies the criminal standard. The SRA is in favour of the change.

Neil Mercer, a legal assessor, made the point that the standard of proof only really makes a difference in serious sex cases (in terms of outcome). In 99% of cases it makes no difference. Saying that his main concern is about protecting the public, Neil Mercer explained that his only concern is that barristers and solicitors are different. It is very rare for solicitors and barristers to face the same charges. He was clear that there is

nothing to fear as more evidence will be found in more unusual cases. Resistance will be seen as protectionism by barristers and therefore the change should be made.

Melissa Coutinho, another legal assessor, said that she has seen the changes and there has been little difference with the exception of a few cases. There is no reason for the Bar Council to change simply because the solicitors think that the change should be made.

The Chair said that this is an important issue for the Bar. He made the point that it may impact the BSB's decision to bring charges if the standard is lowered. The consequence might be that more cases are brought and the long-term costs of insurance need to be considered. He cautioned that the changes, once made, will never be reversed.

Alison Padfield, who prosecutes for the BSB, said that she would echo the Chair's comments. Even if a change would not make a difference to the outcome of many cases, it will make a difference to a prosecutor deciding whether to bring charges and she said she is of the opinion that there will therefore be more cases brought before the tribunal. She referred to comments that had been received by the Bar Council which suggested that facts are not often in dispute, and said that in her experience, the facts are often hotly disputed, but that might be because she tended to deal with more serious cases. She said that the fact that other professions had adopted the civil standard of proof did not mean that the Bar should do so, as barristers work in an adversarial context, have an opponent and are more vulnerable to complaints. They also have an obligation to be frank and fearless and the public interest may suffer if barristers feel inhibited for fear of complaints being made. BMIF does not automatically cover defence costs at BTAS; only where there is likely to be an impact on a potential civil claim; and a number of offences relate to the administration of chambers and BMIF would have no reason to pay defence costs in these cases. Alison Padfield then questioned the impact that a change to the civil standard would have on a barrister's willingness to be involved in chambers management because they take on more onerous duties and might have to defend themselves without the benefit of insurance cover. Having a previous conviction may also have an impact on sentencing if a barrister is prosecuted a second time. She said that if the Bar Council thinks that solicitors and barristers should be subject to the same standard of proof, that is not a reason to change if it thinks that civil standard is wrong, but the Bar Council should instead seek to persuade the SRA to adopt the criminal standard.

The Chair thanked Alison Padfield for her input and acknowledged that it is not an easy issue to deal with. Obviously, the Bar Council does not want practitioners who are behaving dishonestly to be able to continue practising.

Fenner Moeran QC (non-member, attending to report), who favours a change, said that he could see the point about the possibility of more prosecutions but was clear that the overriding consideration is protection of the public. Barristers that are

probably being dishonest or have committed sexual misconduct should not 'get off' because of a higher standard of proof and he suggested that it would be nice to be on the 'front foot' with this issue. The BSB will look closely at the regulatory objectives and will impose the civil standard regardless. With regards to insurance he thought it unlikely that premiums would rise as it is unlikely insurance would cover certain areas. He suggested that the Bar Council speaks to BMIF and looks in detail at the legal representation fees. Referring to Alison Padfield's statement that barristers are frank and fearless, he said that, this being the case, barristers should 'suck it up and do it right' and protect the public. Lastly, addressing Alison Padfield's points on barristers being less willing to be involved in chambers management, he acknowledged that a change could have an impact but made the point that someone with a series of accumulative findings is not a person that a chambers would want in charge of its administration.

Francis Fitzgibbon QC said that he agreed with Fenner Moeran QC. Barristers might just think twice before indulging in activities if it is easier to secure a conviction.

The Chair raised the point that the lack of witnesses as protection for barristers may have a 'chilling affect' in that an advocate may be less prepared to take risks in a case. He said that all barristers meet with clients, often unaccompanied. Though barristers take notes in these situations, there are no witnesses to what has been said.

Melissa Coutinho said that it is true that the GMC faced a new swathe of cases brought when the standard changed. She thought that the reason for this is that more cases are referred because more issues are reported.

Andrew Walker QC noted that this might be said to be a good thing if it leads to the reporting of issues that ought to be reported. He explained that he has attended a lot of the meetings with BTAS panellists and prosecutors, and while the majority might wish to defend the position, those he has spoken to about it find it difficult to articulate any convincing reasons as to why. All of them have emphasised that the civil burden of proof is unsatisfactory but have conceded the reality of the civil standard is a de facto sliding scale where more evidence is required for more serious charges. He suggested that the Bar Council could respond saying that the difference needs to be understood but questioned what exactly the Bar Council would say. Most of those we have met seem to think the civil standard is inevitable and that this is probably the right thing to do. There is no easy response.

Andrew Walker QC then explained one thing that causes him to pause is the point on witnesses, and, in particular, the way in which the criminal Bar works. The main concern is a one-to-one scenario. In the case of GPs, it has been suggested that a nurse is asked to step in when dealing with a difficult patient. At the Bar, there used to be no conversations held with a client unless a solicitor was present but the reality is that this no longer happens. Andrew Walker QC questioned whether it would be realistic to find an alternative. On the other hand, there has been recent guidance on appeal

cases where there has been criticism of the previous counsel. The guidance suggests that the basic approach is that if a convicted criminal tells the Court of Appeal that their Counsel did or did not do something, the Court of Appeal will require evidence and he surmised that it is unlikely that a disciplinary tribunal will take a different approach. In this context, therefore, it might be said that there is little risk to members of the Bar. A similar point might be made in other areas of practice too, such as family.

A Bar Council member made the point that it is not simply a case of dealing with clients, but dealing with opponents too. Many family cases involve litigants in person and the majority of complaints are made by litigants in person. Therefore, should the standard change, it is likely that more complaints will be made and more investigations brought, even if they don't get as far as disciplinary tribunals.

Introducing herself as a family practitioner, Leanne Targett-Parker, said that a change in standard would impact those who carry out direct access work. As in these circumstances, it is often just the barrister and client present outside of court there would be no protection for the barrister if allegations of misconduct were made. If anyone else were present it would be to support the direct access client. The Chair thanked her for making a good point and noted that the ratio of complaints is higher in direct access work.

Richard Atkins QC was clear that 'rotten apples' should be 'thrown out'. However, he admitted that he had changed his mind several times during the course of the discussion. His first thought had been 'why do we need change', followed by 'we should fall into line'. By the end of the discussion he had decided that he had not heard enough evidence for change. Given the profession bases everything it does on evidence, he said that he would need further evidence to convince him that the public is not being protected. Barristers are particularly vulnerable, particularly those in family and crime, and he suggested that the Bar Council argues that barristers are a special case.

The Chair conducted a vote of Bar Council members. 22 members of the Bar Council voted against supporting the proposed change to the standard of proof and 22 members voted for it.

10. Amendments to the Constitution and Standing Orders

The Bar Council approved the changes to the Constitution and Standing Orders set out in annexes 7a – 7c.

There were three changes approved. The first is an amendment the Standing Orders for Joint Committee of the Bar Council, on behalf of the Audit Committee, to limit the time-period for which an auditor can be appointed without retendering to 5 years, to a maximum of 10 years, and to restrict the Bar Council's external audit firm from providing non-audit services in the same year.

The second is an amendment to the Bar Council Constitution. The Bar Council agreed to the removal of the 'Subscriber elected by the Society of Justices' Clerks' from the composition of the Bar Council as the situation has been vacant for nearly a year and attempts to find another member have failed. There are now fewer legally qualified magistrates' courts clerks and the membership of the Society has changed.

The third and final amendment is to the BSB's Constitution which still refers to the Chairman and Vice-Chairman of the BSB despite these titles not being used in practice. The Bar Council approved the change to Chair and Vice-Chair in line with the recent change from Chairman of the Bar to Chair of the Bar.

11. Any other business

The Chair said that it had been a fascinating meeting. He announced that the AGM will follow the next meeting on 16 September at which the incoming Chief Executive, Malcolm Cree, will be making his first appearance. The Chair asked members of the Bar Council to encourage other barristers to come to the AGM.

The Chair reminded members of the Bar Council that a 'send-off' party for the outgoing Chief Executive, Stephen Crowne, will be taking place on Monday 18 September. Stephen Crowne had been in post for 4.5 years during which he has worked with five Chairmen of the Bar. The Chair said that those who know Stephen Crowne know of the huge contribution he has made to the Bar Council. Acknowledging that there will be an opportunity to say more at the party, the Chair praised Stephen Crowne's quiet authority and reassuring presence and invited members of the Bar Council to show their appreciation with a round of applause.