

Minutes of the Bar Council Meeting held on Saturday 14 April 2012 at the Bar Council Offices

Present:

Michael Todd QC Chairman
Maura McGowan QC Vice-Chairman

50 further members of Bar Council attended.

1. Apologies

Apologies for absence had been received from Rt. Hon. Dominic Grieve QC MP, Mr Edward Garnier QC MP, Keir Starmer QC, Stephen Collier, Mirza Ahmad, Julia Beer, Ayeesha Bhutta, Ian Bugg, Ruth Cabeza, Henry Carr QC, Tamsin Cox, Tom Crowther, Nicholas Cusworth QC, Mark Fell, Guy Fetherstonhaugh QC, Philippe Freund, Peter Grieves-Smith, Martin Griffiths QC, Charles Hale, Edward Henry, Max Hill QC, Tricia Howse CBE, Fiona Jackson, Michael Kent QC, Robert Lawrie, Natalia Levine, Nigel Lickley QC, Melanie McIntosh, Regina Naughton, Adaku Oragwu, Amanda Pinto, Neil Ross, Deana Smith.

2. Approval of the Minutes

The minutes of the 3 March 2012 Bar Council meeting were approved.

3. Matters Arising

There were no matters arising from the minutes of the last meeting.

4. Statement by the Chairman

The Chairman had circulated his statement in advance in order to create time at the meeting for relevant discussion.

Format of the statement

Stephen Leslie QC said that he thinks the new format for the Chairman's statement is fantastic; whilst providing a lot of information, by providing it in writing, a considerable amount of time is saved at the meeting. He said that it is particularly useful and important to understand the purpose and outcomes of the international missions; seeing what happens in detail makes it clear that the work that goes on is of enormous importance to the Bar. Mr Leslie thanked the International Committee for their work and said that the profession should be more aware of it. MTQC emphasised that it is important to set clear agendas for all international missions, setting objectives and identifying deliverables and not just

focussing on some practice areas e.g. commercial and chancery work.

Social mobility

John Cooper QC reported that he had attended a state schools event in March designed to promote social mobility and was disappointed to discover that the teachers had low expectations of what the pupils could achieve; it is as important to work with them as it is the students.

David Nicholls said that a working group is being convened by Gray's Inn to look at the issue of unfunded pupillages and asked for details; MTQC confirmed that a group has met, convened by Sir Michael Burton, Treasurer of Gray's Inn, to look at ways to provide relief to the blockage in the system by the number of those qualifying greatly outnumbering those who secure pupillage. All Inns are represented on the group and Maura McGowan QC (MMQC) will be attending for the Bar Council. It is unclear at this stage what the proposals will be.

MMQC said that the group are due to meet again at the end of the April and in her view may well recommend the relaxation of the rules on unfunded pupillages. The challenge to part-time pupillages is that they do not fit well with all disciplines. MMQC agreed to inform the working group of the Young Bar's interest and also to recommend that a BSB representative is invited to attend.

Malcolm Davis-White QC expressed concern that by being part of the working group, whatever recommendations are made it will seem as though the Bar Council has endorsed them. MTQC said that he and MMQC are alive to this issue and that it is a similar position at Council of the Inns of Court (COIC) meetings, whereby Bar Council are invited but have no vote. MTQC confirmed that GMC and Bar Council would have to be consulted before any endorsement was given to any proposals. MMQC stressed that the work undertaken by the group is extremely well intentioned.

Baroness Deech pointed out that any proposal to relax the rules on unfunded pupillages would have to be put to the Legal Services Board who would definitely reject it. A recent case in which unfunded pupillages were put forward as being discriminatory had failed.

Amanda-Jane Field said that whilst it is important to reach out and encourage diversity and social mobility, it is important to temper that with the financial realities of becoming a barrister. Just looking at the CPS, there are plenty of barristers working not only as advocates but as caseworkers and administrators. It is not helpful to encourage students without a realistic assessment of how many will secure pupillage and tenancy. MTQC agreed.

Esme Chandler supported the idea of educating teachers, as many will not have first-hand practical knowledge of the profession and will not understand anything about it. Colin

Andress asked whether, in fact, teachers are simply being realistic and sensibly advising students not to get into thousands of pounds of debt. MTQC said that he is less concerned about giving realistic advice, as he thinks this is done, but more about dumbing down expectations.

Melissa Coutino pointed out that some people qualify "creatively" e.g. at the self-employed and employed Bar. She confirmed that the Employed Barristers Committee will be responding to Sir Michael Burton's paper.

Lord Carlile of Berriew QC said that he had been at the Gray's management committee meeting when Sir Michael Burton had put forward his paper, and wished to state that it is very well meaning. However, he understands that there are around 200 students who secured three Cs or less at A Level and who are now studying BPTC. It is time to tell the universities to stop doing these students a disservice and giving them such high expectations.

John Cooper QC said that he agreed with many of the points raised, but would stress that there are plenty of able and gifted barristers of the future out there who are being told that it is not a profession that is open to them; this must change. Zoe Saunders said that as a state school pupil she had been told that she could only ever be a legal executive. MTQC said that he understood that there are conversations on the solicitors' side of the profession about moving away from degrees and instead qualifying via 5-year articles. Perhaps this is something to consider; it would certainly alleviate the debt issue. Baroness Deech said that this will simply move the bottleneck to a different stage.

Richard Salter QC suggested limiting the numbers of those who come out of BPTC to the number of pupillages available; this will solve both the training and access problems. At the moment, it is a leap of faith - students are going in to it with nothing on the other side. Catherine Addy said that she is aware of some instances where students are undertaking the BPTC before realising that they should have already started to try and find a pupillage.

MTQC asked the Circuit Leaders / representatives about the paucity of pupillage places - is the reason that Chambers cannot afford to pay or that there is not enough work? Rick Pratt QC (Northern Circuit) said that there is certainly a lack of criminal defence work at tenancy level; Ian Pringle QC (Western Circuit) and Mark Wall QC (Midlands) agreed.

Action: MMQC agreed to report back on developments and proposals arising out the working group.

Judicial complaints

Referring to page 2 of the Chairman's statement and the Chairman's conversation with Sir John Thomas about judicial complaints, Lord Carlile of Berriew QC said that he has previously been involved in discussions around the introduction of a judicial inspectorate. It

may now be the time to revisit the idea of how to make complaints against the judiciary as there are many ways in which it could be done that would ensure quality but eliminate reticence on behalf of the barrister who may be concerned about appearing in front of a particular Judge again in the future.

MTQC said that the conversation had been quite informal and not about official complaints, but it would be useful if there were a mechanism by which concerns about a Judge (beyond personality) could be brought to someone's attention informally. Susan Jacklin QC said that on Circuit, Presiding Judges will often have a quiet word with a Judge when an informal complaint is made; not everybody is aware of it and it could be made more formal. Chantal Aimée Doerries QC said that the Chairmen of SBAs report back in commercial courts. It was suggested that the system used in Scotland be considered, whereby the Dean of Faculty can go directly to the Judge in question to feedback concerns.

Promoting the Bar

Bernard Richmond QC raised the topic of solicitors advising clients to take in-house advocates and not advising them that they have an option to choose a barrister. It is imperative to make clear that barristers are different and to explain what they do; the Bar Council should deal with this problem. There needs to be a clear message from the representative body that an in-house advocate is not the only option. It was said that Chambers find it very difficult to raise this with solicitors who are giving them work. Nick Lavender QC suggested that an approach is made to the Legal Services Board, asking for it to be enshrined that the solicitor gives each client the option between an in-house advocate and the Bar. This would be more effective than a publicity campaign. Evidence that this option is not currently being given would be required to convince the LSB. A suggestion was made that leaflets be displayed in magistrates' courts and Crown Courts to inform clients of their choice. MTQC asked all Bar Council members to consider this point and to email [Charlotte Hudson](#) with any suggestions on how to take this forward.

5. BSB Report

Baroness Deech reported that the BSB has been working on the aptitude test for three years and now it must be approved by the Legal Services Board. The Legal Education and Training Review is also underway and responses and contributions are encouraged.

Triennial review: The BSB has submitted its response, as has the Bar Council, and a copy is available on the BSB's website. Some points were made quite robustly and there has been some coverage in the press. The outcome is awaited.

QASA: This continues to be a significant area of activity for the BSB; there is still some legal discussion ongoing between the regulators in the background and there is pressure to iron out any issues quickly. The profession may have seen press releases and coverage which showed some tension between the regulators, not least in relation to plea-only advocates.

The scheme has been slightly delayed and the consultation on the final proposals will run between June and September 2012.

Disciplinary panels: Members may have seen reports in the press about problems identified by COIC relating to the appointment of panel members (not all panel members were formally appointed for their second terms). This affects 80 panel members and some 550 cases have been identified which are affected; the BSB are obviously concerned but are managing the situation and COIC are working very hard. The BSB has taken counsel's advice and believes that there is a good case in law that the decisions of the panel members remain valid. However, this is an opportunity to look into the way that COIC is organised.

CPD review: There will be no change to the system for 2012 or 2013. 137 individuals responded to the consultation but there was a wide disparity of views and it was clear that many had not read it properly or had misunderstood the proposals. Further work will be undertaken and proposals issued in due course (although not this year).

Questions / comments on BSB Report

The idea that plea-only advocates can advise a client on how to plead is ludicrous: Baroness Deech explained that the BSB has been opposed to plea-only advocates and has submitted a paper to the LSB and the other regulators about it. The BSB has fought the inclusion of POAs but ultimately an agreement had to be reached or the other regulators would have gone their own way, had their own scheme and therefore there would not have been any limits on the inclusion of POAs at all. As it stands, they have been permitted to be accredited for a preliminary two-year period but it is a core part of the agreement that they have to be identified as POAs and notify the client and the court of their limited powers.

Request for clarity on the status of POAs conducting Newton hearings? Sometimes, these can effectively be trials. Therefore POAs should not be involved in them.

What assurances are there that a review after two years will be useful? The Joint Advocacy Group is looking at that and evidence will be sought to ensure that the review is meaningful.

Which Circuit is QASA likely to be rolled out on first? It is likely to be the South-Eastern Circuit but consultation needs to take place first.

Why can't the Bar have its own scheme? If the Bar has its own scheme, so will solicitors and there would be no say over the way in which solicitor-advocates are quality assured. Additionally, the judiciary would be very unhappy if the Bar went in a different direction and any scheme needs the support of the judiciary to work.

As the talking goes on and on, the criminal Bar will no longer exist. Is there any good news? The BSB has tried to be honest and to uphold quality. If an agreement had not been reached,

it is possible that the LSB would have to impose a scheme. It is far better that any scheme has the input of the regulator.

Why can't there be a unified code for all advocates? This is not currently on the table for discussion.

If QASA does not actually offer any quality assurance owing to those being permitted to be included in it, it is no longer fit for purpose. It is no longer in the public interest. The time has come to take a stand. What is the outcome of taking a stand? A separate scheme for solicitors which allows POAs or an LSB-imposed scheme? Neither are viable options.

6. CBA Survey

This item had been scheduled to be raised as "any other business", but given the discussion around QASA, it was brought forward. Michael Turner QC (MTuQC), Vice-Chairman of the Criminal Bar Association, attended in place of Max Hill QC. Mr Turner presented the results of the CBA survey and circulated the figures amongst those present.

MTuQC reported that 1,638 responded from a membership of approximately 4,000, which he is told is not a bad turn out. In relation to QASA, the BSB may be interested to hear that 87% of those who responded would not agree to a scheme in which there is a place for POAs, and 93% would not agree to a scheme where there is no unified code of conduct. The vast majority had strong views on both issues and MTuQC reported surprise that a unified code is not on the table for discussion.

Unsurprisingly, a large proportion of those who completed the survey were not satisfied with the level of fees and would be prepared to refuse instructions if others did too.

The survey showed that significant numbers feel deeply dissatisfied with past leadership and remain deeply distrustful of the Bar Council. The CBA under its current leadership is viewed generally to be willing and able to represent the views of its membership. MTuQC said that he does not agree with the dissatisfaction aimed at the Bar Council and believes this to be a matter of perception.

There is a "substantial majority" in favour of lawful action, which might include a single day walk outs, Silk-led work to rule, refusal of instructions, a refusal by Recorders to sit or a mass resignation of the same, or all out strike action. The CBA will be holding a Heads of Chambers meeting in May to discuss how to take forward the results of the survey.

Nick Hilliard QC asked how many members of the Bar undertake crime work in total? There is an anxiety that those who responded to the survey are those who are in favour of action and therefore the results may be distorted. MTuQC said that he believed that there are approximately 6,000 barristers practising in crime but that he could not say why some had

chosen not to respond.

MTQC was asked to provide clarity about what will be discussed at the Heads of Chambers meeting; he said that Max Hill QC is away but that on his return an agenda will be sent out. The survey results have only just come out and have not yet been discussed by the CBA committee and time is needed to consider options. Nick Hilliard QC advised that everybody needs time to consider the implications of the results. SLQC warned against any action that leaves the criminal Bar exposed; the figures as they stand represent only 25% of those practising in that area.

MTuQC said that he and Max Hill QC had visited all Circuits and the mood is certainly militant; he is unable to explain why members could not be bothered to complete the survey. Maybe there has to be another survey in order to secure a mandate. SLQC suggested re-launching the survey with just one question about direct action.

Lord Carlile of Berriew QC said that the survey is valuable but that it may be advisable to take advice from a trade union perspective and to seek valuable concessions. Silks can show leadership. He advised the CBA to use subtlety. This was rebutted by another member who said that the reason truck drivers get concessions now is because they went on strike ten years ago. The only way to achieve leverage and win is to show strength.

MTQC said that unity must be found before anything can be taken forward.

7. Amendment to Standing Orders: Split of Finance and Audit Committee

Nick Lavender QC (NLQC) presented this item on behalf of the Treasurer and directed attention to Annex 2, which sets out the background to the split of the Finance and Audit Committee (FAC) and the changes to the Standing Orders arising from it. Also, during a previous update, Schedule One was accidentally removed from the SOs and will now be reinstated.

A query was raised as to why FAC has been changed again when its composition was only refreshed two years ago; were the changes made then wrong? NLQC said that the Finance Committee will continue, it is just that the audit function will be managed by another body and this is considered best practice these days.

The changes were approved.

8. European Law Committee: Quarterly Report

Michael Bowsher QC, Chairman of the European Law Committee, welcomed the opportunity to present their quarterly report (executive summary circulated at Annex 3). Additionally, Mr Bowsher encouraged all practitioners to read about European law issues in

Counsel magazine and in Brussels news and also thanked Evanna Fruithof in Brussels for her work.

MMQC told Bar Council that she had never before realised how much EU Law can impact on the criminal Bar, but now realises how important it is to be aware of what is being taken forward and the effect it may have e.g. on competitive tendering.

Mr Bowsher was asked about the issue of pensions for part-time judges; the committee had been asked to provide advice for recorders who may wish to take forward a case for receiving a pension. Before this could be addressed, however, a ruling in the Court of Justice in Luxembourg (CJEU) on 1 March said whilst it was up to member states to define who is a worker for the purpose of the Part-Time Workers directive, and in particular, to determine whether judges fall within that concept, such a determination must not arbitrarily exclude judges from its protection. The case has now been referred to the Supreme Court.

9. Legal Services Committee: Quarterly Report

Richard Salter QC, Chairman of the Legal Services Committee, presented their quarterly report (executive summary circulated at Annex 4). Mr Salter also used the opportunity to remind Bar Council members of the crèche facilities available for Saturday morning meetings and to provide an update on the Bar Nursery; the working group taking forward the nursery plans have now gone outside the Inns to seek premises and assistance as there was some resistance.

Mark McDonald (Lincoln's Inn) said that a working group has been set up to look at retention of women in the profession and that the Inn are taking the issues seriously, but that in relation to the idea of a nursery they share concerns with the other Inns about demand and whether it is economical. Mr Salter clarified that all the Inns are vocally supportive of retention initiatives but do not seem to offer any real help.

10. International Committee: Quarterly Update

Chantal Aimée Doerries QC, Chairman of the International Committee, presented their quarterly report (executive summary circulated at Annex 5). Additionally, Ms Doerries took the opportunity to thank Christian Wisskirchen and his team for their hard work.

There were no questions.

11. Any Other Business

Officer elections MTQC reminded everybody that nominations for the officer elections are due by 17.00 on 27 April.

Housekeeping MTQC also asked Bar Council to take their tea and coffee cups out of the room with them at the end of the meeting.

Bar Council meetings David Nicholls asked why the gap between Bar Council meetings is so irregular. Charlotte Hudson explained that due to the change in the reporting year (the Bar Council has moved from a calendar year to a financial year system), certain meetings have to be held at fixed points e.g. AGM and the meeting to approve the budget. Additionally, the inaugural is at a fixed point (early December). It is then necessary to fit all the other meetings in to the year whilst avoiding the summer, the Olympics, religious holidays, Bar conferences, party conferences, the Opening of the Legal Year and other important events.

MTQC said that this does not mean that business cannot be discussed in between meetings and that he certainly intends to issue an interim statement in early June.

The next meeting will be held at 10.00 on Saturday 7 July 2012, in the Bar Council offices.