



## **Minutes of the Bar Council meeting held on Saturday 19 September 2015 at the Bar Council offices**

Present:	Alistair MacDonald QC	Chairman
	Lorinda Long	Treasurer
	Mr Robert Buckland QC MP	Solicitor General

### **1. Apologies for absence**

Apologies for absence were received from Rt Hon Jeremy Wright QC MP, Chantal-Aimée Doerries QC, Alison Saunders CB, Safira Afzal, Robin Allen QC, David Anderson, Richard Atkins QC, Gary Blaker QC, Richard Brent, Alexandria Carr, Simon Clements, Celina Colquhoun, Elisabeth Cooper, Joseph Curl, Malcolm Dodds, Mark Engelman, Mark Fenhalls QC, Guy Fetherstonhaugh QC, Amanda-Jane Field, Francis Fitzgibbon QC, Manjit Gill, Peter Grieves-Smith, Alexandra Healy QC, Ruth Hughes, Thomas Jaggar, James K Juggapah, Taryn Lee QC, Anna Macey, Naomi Madderson, Gerard McDermott QC, Paul Mendelle QC, Christina Michalos, Gregory Mitchell QC, Gordon Nardell QC, David Nicholls, Alison Padfield, Jeremy Phillips, Penelope Reed QC, Hefin Rees QC, Geoffrey Tattersall QC, David Taylor, Helen Tung, Sundeep Singh Virk, Thea Wilson.

The following did not attend and did not send apologies: Kerry Bretherton, Melissa Coutinho, Michael Duggan QC, James George, Richard Gibbs, Katherine Goddard, James Hampson, Ruth Henke QC, Adam Hiddleston, Michael Jennings, Hannah Kinch, Ian Lawrie QC, Nigel Lithman QC, Dawn Pritchard, Zoe Saunders, Mark Thomas.

The following attended as guests: Sir Andrew Burns KCMG (until item 7) and Vanessa Davies (remained for the AGM).

53 further members attended.

### **2. Minutes of the last meeting and matters arising**

The Chairman welcomed everyone to the meeting and reminded attendees that this was a shortened Bar Council meeting in order to accommodate the Annual General Meeting (AGM) at 11.00.

There were no amendments to the minutes of the last meeting and they were approved.

### **3. Statement by the Chairman**

The Chairman reminded those present that the closing date for nominations for candidates for the 2016 Bar Council was 17.00 on 21 September. Hard copy nomination forms were made available for those attending the meeting; written statements would need to be submitted by email by the closing date.

The Chairman welcomed Katherine Goddard, the new junior representative for the North Eastern Circuit, who was unfortunately not present. He also welcomed Francis Fitzgibbon QC, the incoming Vice-Chairman of the Criminal Bar Association (CBA), who was also not present.

The Chairman reiterated the comments he made in his statement regarding Tony Cross QC, the recently retired Chairman of the CBA. This is a difficult post to hold. It involves making tough policy decisions and there are inevitably those who disagree, and who disagree profoundly. The Chairman praised Tony Cross QC's willingness to step up to the plate and to uphold very important principles.

The Chairman moved on to a recent development and read to the Council a statement by the London Criminal Courts Solicitors' Association (LCCSA) and the Criminal Law Solicitors' Association (CLSA), which was made on 18 September:

*"On Wednesday the CLSA, LCCSA and BFG met with the Lord Chancellor at his request. Also present were representatives from both the LAA and MoJ. An observer from the CBA was present.*

*The Lord Chancellor said he acknowledged that constructive engagement has taken place over the summer, which is something that he welcomes moving forward.*

*The Lord Chancellor advanced the following proposal:*

*"A suspension of the fee cut which would mean that the new fixed and standard fees being introduced on 11 January for police station attendance, magistrates' court representation and Crown Court representation in cases with fewer than 501 pages of prosecution evidence (PPE) would be increased to reflect only the first 8.75% reduction for the three month period. Other fees, where the fee scheme structure remains unchanged (e.g. Crown Court cases with more than 501 PPE, Court of Appeal fees and fees for advice and assistance outside the police station) would revert to the fee levels that applied before the 1 July 2015 changes. The suspension would apply to all work on cases that begin in the three month window, even if a case concluded after 10 April 2016 (i.e. for the life of the case)."*

*The Lord Chancellor is of the view that Two Tier will proceed as planned in the absence of any viable alternative. Any alternative involves some form of consolidation and we are mindful of the individual business structures of our membership which renders reaching a consensus very difficult. This is however something that we are working upon in the hope that we can work towards keeping as many firms as possible in business.*

*We understand that announcements will be made during the week commencing the 28th September 2015.*

*The Lord Chancellor indicated that the suspension was a reflection of the negotiations and good will established over the summer, which he would like to see continue as a consequence of his proposal. He*

*emphasised that if the profession choose to return to action in an attempt to derail two tier then it is likely that the offer of a suspension will be withdrawn and any constructive engagement will cease. We have not yet agreed this because it falls far short of a permanent suspension but we are aware that the suspension given in the past to the Bar remained permanently in place.*

*We do wish to make these points clear:*

*1. The suspension of the cuts (temporary or permanent) do amount to very modest financial savings for all firms whatever happens to TT. They will be lost if rejected.*

*2. At no time have we indicated any support for Two Tier.*

*We are currently reviewing the proposal and seeking clarification before we respond. We report the situation at this stage to allow for complete transparency and to keep the profession updated. We will provide the profession with further information as and when we receive it and welcome thoughtful responses as soon as possible. It might assist if we receive feedback via local representatives where possible”.*

The Chairman remarked that this statement had not been rebutted but the Ministry, so it can be assumed to be true. Therefore, the second tranche of cuts for the solicitors’ profession is not going to be pursued for a three-month period.

Related to this development, the Chairman wished to provide the Council and the Bar as a whole with an update on developments in Bar-led activities in respect of legal aid cuts and criminal justice reform.

Over recent months, he has reported to Bar Council and members of GMC on the progress of discussions with the Ministry of Justice (MoJ) for securing replacements of the AGFS and VHCC schemes, and for ensuring the quality of criminal advocacy for the future. On 10 June, the Government announced its commitment to ensuring a vibrant independent Bar and to protecting the high standard of advocacy, which is a hallmark of the justice system. Having listened carefully to the case put by the profession, the MoJ decided not to reduce planned cuts in advocacy fees covered by criminal legal aid.

The Lord Chancellor regards the Bar of England and Wales as synonymous with a high standard of advocacy. It is clear that he wishes to work closely with the Bar to ensure that standard is protected. It is important to recognise that the same standards must apply to all those who provide advocacy services, whether they come from the solicitors’ profession or from the Bar. The Lord Chancellor intends to consult on a range of measures designed to achieve this objective in the autumn. He is particularly keen to make sure that the highest quality advocates are instructed in all cases.

The Bar Council is currently constructively engaged in a round of discussions with officials at MoJ and the Legal Aid Agency in advance of the planned public consultation. The Chairman expressed his gratitude to all those, representing the criminal Bar and the Circuits as well as the young Bar, who have been working tirelessly to develop the Bar’s response to the challenges faced in what are, for many, difficult and uncertain times. This pre-consultation activity is necessarily ‘work in progress’, but the Chairman offered assurances that headway is being made, on several fronts.

Discussions on a replacement of AGFS, which have been taking place for over a year and involve Professor Martin Chalkley, are well advanced. A document has now been submitted to the Ministry. It is, in effect, a fully worked up scheme for the replacement of the current AGFS arrangements. The need for a replacement of the old scheme, with its reliance on page count, has become increasingly apparent at a time at which papers are served electronically. The new scheme is designed to identify those features of a case which make it more difficult and time-consuming to prepare. By way of example, the involvement of a vulnerable witness will be a factor, which would be taken into account in the fee paid. The Chairman explained that he could not possibly do justice to the intricacies of the scheme in the time available, but offered assurances that it has been worked upon assiduously over many months of arduous discussion and testing.

The Chairman said that it was important that he reminded this Council of the process by which this scheme has been prepared. It is stating the obvious that work of this type cannot be performed by a large committee. As Ross Perot said: "If you see a snake, just kill it, don't appoint a committee on snakes". The Chairman explained that he could not comply with that particular injunction, but instead did the next best thing. Building on the idea of last year's Chairman, Nicholas Lavender QC, a small, yet representative group of people from the Circuits, and of a range of seniority, worked closely with Professor Chalkley, have come together painstakingly to construct a scheme. The Chairman hoped that this Council will accept the fairness and efficacy which underlies the structure of that approach. The result should be that, impossible as it is to consult a Council such as this on every step, the final product will reflect input that is as representative as is possible.

In light of the experience gained with the interim replacement of VHCCs under the exceptional case payment scheme, the Chairman said that he has every reason to believe that it will be possible to agree the basis of a new, long-term, arrangement for payment in these complex and difficult cases based on the current interim arrangement.

The Lord Chancellor wants to make sure that in every case the advocate has been instructed because they are the right person for the job, and not because of their relationship with the instructing solicitor. Work has been undertaken to prepare proposals to inform the development of the MoJ policy on banning referral fees, drawing on the availability of existing statutory powers and other instruments. If this insidious system of kickbacks from the public purse is to be eliminated, it will need very strong measures. If any room is left by which a referral fee, properly so called, can be disguised, no progress will be made. Views on this have been made very clear to officials at the Ministry.

Efforts have also been made to identify ideas for an efficient and effective mechanism to ensure that the highest quality of criminal advocacy is available to defendants in the public interest.

The Chairman said that he had no doubt that Ministers and officials have a clear understanding of the importance of a healthy independent Bar and of high quality advocacy. After all, the new Secretary of State said as much to, amongst others, the Legatum Institute on 23 June this year and to the Justice Select Committee on 9 July. But, of course, noble sentiments are one thing, actions are another. By way of action, one of the first steps taken by the new Lord Chancellor was to say

that the threatened fee cuts to advocates would not be pursued. The Chairman said that he thought that should give the Bar grounds to believe that the Lord Chancellor means what he says.

Against that background, the goal is to provide the Government with the tools to achieve these objectives. The Chairman said that he thought that good headway was being made and thanked all of those involved in this endeavour.

The Chairman invited any questions. There were none.

#### **4. Treasurer's Report**

The Treasurer, Lorinda Long (LL), explained that she would be presenting an update on year-to-date financial performance and the forecast for the rest of 2015-16. David Botha (DB), Director of Finance, was also in attendance to assist with any queries.

In this financial year, higher than anticipated practising certificate fee (PCF) collections offset reductions in income across all areas. The expected drop in those practising at the Bar did not happen, and the Bar's earnings data was better than anticipated, which led to a greater PCF collection. Demand for training fell, having an impact on income on the representative side; on the regulatory side, some fee increases were deferred and there were fewer student applications for training places.

Staffing costs have risen, in part owing to the cost of recruitment, and insurance costs have also risen.

In light of the trends shown, the end-of-year forecast has been revised and it is anticipated that we will achieve breakeven this year. This forecast anticipates an investment option designed to improve efficiency and improve the quality of information management which, if approved, will cost £98k.

The focus for the rest of the year will include better engagement on the Bar Representation Fee (BRF) so as to improve take-up, seeking to understand and manage the unpredictable regulatory fee income and improving margins across Services. For the longer term, there is a need to ensure a better understanding of PCF drivers including the size of the profession, changes that are arising in the defined benefit pension fund, as well as determining office facility requirements.

The Treasurer invited questions.

Andrew Walker QC (AWQC) commented that the most concerning figures in last year's accounts was the movement in the defined benefit pension scheme. "Understanding changes" is rather a benign intention for something which could technically render the organisation insolvent. The Treasurer conceded that the investment strategy has not worked in the way it had been hoped it would. DB added that whilst it was technically correct that if an organisation's net assets are negative, it is technically insolvent, since the introduction of a new financial reporting standard (FRS17), as long as the employer entity is showing how the pension fund is moving separately from its other assets and there is enough cash being generated to meet the obligations, then the

insolvency issue does not apply. The organisation is taking advice on this and will seek to ensure that good financial management activities are in place.

Laurie Rabinowitz QC (LRQC) asked about the Treasurer's reference to "looking at PCF again". LL clarified that this is in the context of the annual consultation with the profession about PCF levels and how the income is spent. Internally, more analysis is required owing to problems with income, but there is a hope not to increase the PCF rates.

Andrew Langdon QC (ALQC) commented that income from the BRF is £300k short of what was anticipated and asked how much optimism there is in achieving that target. The Chief Executive responded that a range of measures have been put in place to make it a more attractive proposition, as well as being easier to pay (direct debit has recently been introduced). The BRF must be marketed more effectively. There is a lot more to do, but the number of those paying the BRF is going up slowly.

The Chairman added that, in his view, one of the problems is that chambers renew their practising certificates en bloc and do not give instructions to opt in to the BRF. He requested that all Bar Council members do their bit to increase awareness. In his view, there are some services provided by the Bar Council which should only be available to those who pay the BRF; anyone who disagrees with that proposition is welcome to express their opinion on that.

Louisa Nye (LN) expressed concern about recruitment costs and spend on temporary staff. The Chief Executive explained that the organisation has a high staff turnover, which has been in part due to restructuring. There is a strategy in place to improve retention, but the turnover is not surprising in the context of a restructure for business benefit. It is important to attract the right calibre of people.

Paul Stafford (PS) said that he had been looking at the figures for the defined benefit pension scheme; there are large swings from deficit to surplus. If this is due to the decline in long-term bond rates, what steps are being taken to ensure that there is not an increase in the deficit? The Treasurer confirmed that the organisation is working closely with the pension trustees and the investment managers to look at how the markets have been moving. Recent events in Greece and China have had an impact on the equities market; that kind of movement is uncontrollable but as much mitigation as possible needs to be put in place. DB added that this is a long-term problem, which is not going to be solved overnight. There will be a formal valuation in October and a review of this next year in order to form a view, in conjunction with the trustees, to agree a funding plan over a longer period.

Tim Devlin (TD) observed that since about 1998, barristers have had no choice but to pay to be members of the Bar Council. The PCF is a tax on being a barrister. The change in the levy from being based on seniority to ability to pay has been welcomed by those in publicly-funded practice. However, those who still find £800 or £900 a year for their PCF a considerable burden will not pay the BRF as it is optional. If there is a surplus at the end of the year, practitioners have a right to expect that their tax will be reduced, not spent on something else. It is not the Bar Council's money. Just as the Government is expected to keep taxes down, so is the Bar Council.

The Treasurer replied that it is the organisation's intention not to increase the PCF, but it certainly cannot, in the short-term, look to reduce it. While there was a surplus at the end of 2014-15, it is likely that in 2015-16 the Bar Council will only break even and that isn't guaranteed. TD added that he was not suggesting that practitioners should not pay it and noted that efforts to reduce costs across the organisation have been commendable, but it would be interesting to make payment of the PCF optional for a year and see how many people pay it. The Treasurer responded that statute requires the fee to be levied.

The Chairman assured members that it is at the forefront of the Bar Council's mind where the funds come from.

## **5. Chief Executive's report**

The Chief Executive, Stephen Crowne (SCr), started with an update which related directly to the value of the BRF.

In July, the Bar Council entered into a commercial partnership to provide a new website which allows consumers and businesses to go directly to a barrister for legal services. Two barristers, Pru Beever and Mike Whyatt on the Northern Circuit created the website and approached the Bar Council to seek its collaboration for their Direct Access Portal (DAP) which will now become the "go-to website" for consumers looking for a barrister. The parties have collaborated and set up a partnership. The portal, which acts as an online register, will replace the Bar Council's existing direct access register as the main hub for consumers seeking to find a direct access barrister. SCr is hopeful that DAP will become the predominant portal for this kind of work.

The portal is free for customers. Direct Access barristers who pay the Bar Council's Bar Representation Fee (BRF) of £100 per year will be able to list on the portal for free. This is an additional benefit to those who pay the BRF.

Gregory Jones QC asked whether there is a clear policy statement on what are core Bar Council activities and what are 'add-ons'? What is a practitioner entitled to just by paying their PCF? The Chief Executive explained that what qualifies for support from PCF income is clear in statute and demonstrated in the accounts (known as the 'permitted purposes'). He conceded that the Bar Council could do more to explain why things are in different categories.

John Elvidge asked for a web address for DAP ([www.directaccessportal.co.uk](http://www.directaccessportal.co.uk)). It can also be accessed via the Bar Council website. ALQC said that he and others attended direct access training and were shown the website; the Bar Council should be congratulated for its involvement in it. It really is very good.

The Chief Executive provided an update on the roll out of training for criminal practitioners in cases with vulnerable victims and witnesses. A commitment has been given to MoJ to ensure that barristers are appropriately trained to deal with vulnerable witness. The aim is to complete this training by the end of 2018. An Implementation Group, involving all the parties responsible for delivery, has been set up. This includes Circuit, Inn and ATC representatives amongst others. The focus has been on course development, building on the work of the Rook Group. The plan is for

the training to be six hours in total: three hours' preparation online plus three hours' interactive learning.

A pilot is due to be held on 26 September at the Old Bailey with three groups of 6-8 advocates. Following that, the focus will switch to developing a process to train trainers between October 2015 and January 2016. There will be a presentation on the approach in early November at the Old Bailey, followed by presentations to each Circuit. Training will probably begin in the spring.

The Implementation Group is very alive to the need to get the practicalities right and not taking on something which cannot realistically be delivered. Feedback is welcome throughout the rollout and delivery.

Max Hill QC (MHQC) commended this excellent work. On the circuits in particular, there has been a nervousness in terms of origination and cost. The perception over the last 3-6 months has been enormously beneficial and the programme of training should be welcomed by all. As it can actually be delivered by chambers or at bar mess / circuit level, costs are driven down, as are requirements on time, with no reduction in quality. It shows that the profession can train itself.

The Chief Executive explained that there are c. 6,000 barristers to train. There is a tension to deliver a course which is practicable but which maintains quality. Once those currently in practice have been trained, it is the intention to introduce this sort of training during the vocational stage of training. He thanked everyone involved for their efforts.

## **6. BSB Report**

Sir Andrew Burns (SAB) spoke to the BSB report provided at annex 3.

Further to the Chairman's report, SAB wished to add that the BSB had also been in touch with the Ministry of Justice to express their concern about referral fees.

The BSB has been working over the summer to rethink its internal governance structures which should, in time, reduce the BSB's costs. The BSB is striving to deliver value for money, but of course has statutory obligations which are monitored very closely so there is a balance of what has to be done and doing it well. The BSB is determined to keep standards up but keep costs down.

SAB drew Bar Council's attention to the BSB's annual report, copies of which were provided. He remarked that he hoped that the contents are expressed in a less regulatory manner than they may have been previously.

The BSB has appointed three new barrister members to its Board. The strength of the field was very high; they could have recruited two or three sets.

SAB referred to the list of open BSB consultations. He said that he has listened to the Council's complains about the length and complexity of papers and the BSB has focused on how to offer new opportunities to provide views and make it as easy as possible but still providing all the detail



required. For example, there is a webinar available for those who like those sort of things. The BSB is open to suggestions as to how the profession – and others – prefer to be consulted.

There has been slower uptake on entity authorisation than expected and the BSB would still like to hear from anyone who is interested in setting up a BSB-regulated ABS.

The BSB has become aware that some pupils are poorly informed about the BSB Handbook and some of the duties upon them that it identifies. In particular, there has been a rise in the number of pupils who have not obtained a practising certificate upon completion of pupillage, as some assume that happens automatically, which it does not.

AWQC said that he is aware of new practitioners not being as familiar with the Handbook as they could be, and asked if the BSB feels that training in this area is sufficient. Vanessa Davies (VLD) replied that the BSB is not satisfied with that part of training and drew attention to the section of the Future Bar Training consultation in respect of pupillage. It may take some time to change the BPTC, but there are some things that can be done more quickly and that includes raising awareness of Handbook.

TD expressed concern about vulnerable victims and witness training taking place too early; one cannot prosecute or defend these serious cases in, say, the first 10 years of practice or until one is accepted to the appropriate CPS panel. Daniel Sternberg (DS) disagreed, pointing to vulnerability being present in many different types of case, not just those serious abuse cases. Colin Andress (CA) added that in his first case in the magistrates' court he had to cross examine a 14-year old; he is astonished that students are not familiar with the Handbook by the end of the BPTC.

There were no further questions.

## **7. Any other business**

There was no other business.

## **8. Date of next meeting**

The next meeting of the Bar Council will be held on 7 November 2015 at 10.00 at the Bar Council offices.

**Bar Council**  
**September 2015**