Minutes of the Bar Council Meeting held on 13 March 2010

Present:

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

1. Apologies

Apologies for absence were received from Bill Boyce QC, Stephen Cobb QC, James Dingemans QC, Christopher Hancock QC, Richard Marks QC, Winston Roddick QC, Richard Salter QC, Keir Starmer QC, Michael Todd QC, Robin Tolson QC, Gregory Jones, Melanie McIntosh, Michael Patchett Joyce, Pavlos Panayi, Shamran Sharghy, Kevin Toomey, Christiane Valansot (represented by Tricia Howse CBE), Kris Venkatasami and Shelley White.

2. Approval of the Minutes

The Minutes of the 23 January Bar Council meeting were amended to provide a more fulsome account of Fiona Jackson's comments on BSB Issues under Item 7. The Minutes were approved, after Tim Devlin expressed some disquiet at the accuracy of the statement attributed to the Treasurer under Item 8, the update on the Practising Certificate Fee. The Chairman observed that the Minutes were not intended to be a verbatim record of the meeting, and he noted the Chief Executive's occasional amendments to provide useful context.

3. Matters Arising

No further matters arose.

4. Bar Council Members 2010

The meeting noted the list of Bar Council Members at Annex A, and approved the co-option of Chantal-Aimee Doerries QC to the Bar Council.

5. Statement by the Chairman

The Chairman congratulated Jalil Asif QC, John Cooper QC and John Elvidge QC on their appointment as Queen's Counsel.

The Chairman updated the meeting on his series of roadshows around the country. Thus far he had found the experience valuable, visiting 50 sets and seeing the contrast between those that were suffering and those that were thriving. He had taken David Edmonds, the Chairman of the LSB, on his visit to Bristol, for whom the real problems he heard about were something of a revelation. His comments had been perceptive and he had demonstrated an impressive grasp of the economics of practice. In the first two and a half months of the year,

the Chairman had found that the level of sophistication displayed on circuit about today's practice problems had moved from initial shock to a preparedness to face the difficult questions about the future. We would help wherever we could, in conjunction with the Circuit Leaders' Forums. We would finalise with Field Fisher Waterhouse the ProcureCo model, which would include draft contracts and a useful guide, to act as a toolkit or template for practitioners. But it would not be a panacea for all of today's problems. It would be issued soon, and we had already received good feedback on the draft from a number of clerks and the YBC.

On LDPs, there had already been a number of applications for waivers, some of which could be relevant to the forthcoming LSC contracting round. The LSC had agreed to look favourably on applications involving barristers. This indicated that the Bar had its foot firmly in the publicly-funded door, and that the LSC was ready to co-operate. The LSC was itself in a state of turmoil following the decision to patriate it as an Executive Agency of the MoJ. A new interim Chief Executive had been appointed who had had a successful Local Authority background. The Chairman had written to her to propose an early meeting. The LSC contracting round had just closed on 12 March for criminal contracts, which presented both difficulties and opportunities for the Bar: LDPs could participate, but the rest of the Bar could not. The contract period was three years, with the possibility of a two-year extension, and this was far too long for the Bar to be kept out. However, the likelihood of a '3+2' contract was remote, and the period would almost certainly be shorter. The LSC was prepared to negotiate with the Bar, and 'Bar-friendly' contracts would be developed. A rapprochement with the LSC was in hand.

The Chairman explained the likely structure of future negotiations with the CPS. We would have a high-level Chatham House group, and a separate working group with the necessary detailed skills. There was a long way to go, but we expected to make progress.

The Chairman had enjoyed delving into the various sections of the Bar Council Secretariat, and no more so apparently than in the Archives with Rosa Munoz, our archivist. He had seen for himself the old books and boxes of files going back to 1870, with letters from Chitty J and accounts of various debates and visits to the American Bar Association, and details of our links with the Inns. We would look to scan the list of these treasures and upload it to the website.

Anticipating the crucial agenda item on our future constitutional arrangements, he reminded the meeting that our hands were tied to a considerable extent by the outcome of the Legal Services Act 2007. What was required now was the statutory implementation of the rules to govern the relationship between our future representative and regulatory activities. There would be no rewriting by us of the Internal Governance Rules (IGR) produced under the Act by the LSB. What was needed was a two-thirds approval for the proposed constitutional changes. At the end of April we would be required to certify jointly with the LSB that the IGRs were either in place, or that certain transition arrangements had been agreed; hence the need for the decision at this March meeting. This work had been characterised by the co-operative efforts of a joint Bar Council/ BSB working group, led jointly by Nicholas Lavender QC and Matthew Nicklin, and supported for the Bar Council by Michael Blair QC and Gordon Nardell QC. The Bar Council and BSB had produced complementary responses to the IGR consultation from the LSB, in which there had been agreement on the key issue of regulatory independence. The final proposals before the Bar Council for decision had involved some compromises, but we had reached an agreement. It would require compelling

reasons to unravel it.

6. BSB Report

Baroness Deech had two main issues to address. First, the changes following the 19 November 2009 BSB decisions to relax some of the structural constraints on practice at the Bar, and second, the merits of the BSB's new constitution.

Following the 19 Nov decisions, the proposed changes had been submitted for the LSB's approval. She had sought to persuade David Edmonds that the LSB should confine itself to a high-level look, without the need to delve too far into the detail. The LSB had taken longer than the BSB had hoped, but she noted that this was the first time that such far-reaching issues had fallen for decision by both bodies, and that the BSB had requested a huge number of changes. The BSB had worked closely with the LSB. There had been 14 applications for waiver for practice in LDPs, of which 13 had been approved. There was no doubt that barristers were changing, and were now actively seeking to take advantage of the potential new freedoms. For some, no change was necessary or desirable, but the 19 Nov decisions had been validated by those that did want change.

The BSB would soon be conducting a comprehensive survey to ask Chambers where they expected to be in terms of development, and how they expected to practise, in three to five years' time. Would Chambers expect to be regulated by the BSB, or by the SRA? Would the future direction of the self-employed Bar be clearer, and would it encompass litigation? The BSB would need a massive response from the Bar to this survey. A mere 1500 barristers would be only 10% of the Bar. She believed that more than a 30% response was necessary, and perhaps up to 75%. A consultation paper on this would follow soon.

The new constitution would be a giant leap for the BSB. The cuckoo had flown the nest, and the proposed constitution was a good new arrangement. Thanks were due to Nicholas Lavender QC and Matthew Nicklin, with BSB support from Vicki Harris and Amanda Thompson. This extensive piece of work had taken only four months, which was quick. The constitution was the right step for the BSB in its work with the profession for the public interest. And this would contribute to a strong Bar, which itself was in the public interest. It was right for the BSB to be able to control its own structure and committees in future, and in that respect the BSB and Bar Council were ahead of the SRA and the Law Society. The Press had been watching our robust debate, with plenty of to-ing and fro-ing, and rewriting and compromise over the key topics of the balance between regulatory independence and Bar Council supervision, and the balance of lay and profession involvement. We would collectively re-visit the BSB's constitution in three years' time. Overall this was an excellent outcome, and would permit us to achieve dual-certification by the end of April of a satisfactory level of regulatory independence.

Sir Ivan Lawrence QC also thought this was an excellent outcome. But he bemoaned the prospect of a low response rate to the BSB's survey. The Bar had only itself to blame for this, e.g., fees' surveys, and he agreed that it was vital to achieve an overwhelming response for the BSB. It was a perfect opportunity for the large criminal sets to engage with the Bar Council and the BSB. Baroness Deech praised this notion, and noted the engagement that would be necessary to plan interviews between those conducting the survey, and a number of barristers and clerks. Lucy Theis QC suggested making greater use of the SBAs, and Stephen Leslie QC said much the same for the Circuits. Tricia Howse thought the Employed

Barristers' Committee had a helpful role to play in encouraging an active response. Baroness Deech supported all of these suggestions.

7. PCF Update

The Treasurer noted that some 80 barristers had replied immediately to the PCF survey. He thanked Alexander Learmonth, Mark Hatcher and Oliver Delany for their work in putting together the survey, and looked forward to responses from across the full range of practitioners.

On the Bar Council pension he mentioned the imminent work of the consultants Bluefin in preparing a report on the options for de-risking the past service liabilities of the Scheme. He made the point that the money raised by the pension levy would be a great help to the burden faced by the future profession.

Turning to the 2010 PCF itself, he spoke of the 12,226 self-employed barristers who had paid the PCF, of whom 1836 had not yet paid the Member Services Fee (MSF). This was slightly up from the position in 2009. E-mails would be sent to prompt payment by current non-payers.

He encouraged Bar Council members to persuade their constituents to pay the MSF. There was an overall risk to income from PCF and MSF at the moment of approximately £1million and, if payment was not forthcoming, that money would have to be found from elsewhere. By the next meeting on 8 May, the risk should have declined somewhat, as the Employed Bar PCF and MSF payments should have come in.

Finally, the Treasurer drew attention to the on-going discussions with the LSB about the 'permitted purposes' under LSA 2007 for raising money via the PCF.

John Cooper QC questioned progress on using the member services card for identification purposes, and wondered whether the BSB might look again at permitting the card to be used as evidence of Authorisation to Practice. Tim Devlin suggested that when faced by a PCF increase, some people opt out of paying the MSF in protest that the Bar Council e-mail to 1738 non-payers did not address their real concerns. The Treasurer referred to the July and October Bar Council meetings that had addressed and voted on the components of the PCF, and which had so far raised over £1.8m for the pension Scheme. The core fee was to be contained, and for the future could be linked via s.51 of LSA 2007 (the 'permitted purposes' section) to work that is presently paid for from the MSF. He repeated that Bar Council members should explain these points to their constituents. Tim Devlin countered by asking why the Bar Council could not save money from elsewhere. Sir Geoffrey Nice QC enquired whether former judges and members of the Bar Council had contributed to the pension deficit. The Treasurer confirmed that they had paid £8000 so far. The Chairman added that the Bar Council and BSB were supported by a Secretariat of 100 people, which was lean in comparison to many other professional bodies. There were limits to what could be done in lieu of Secretariat support; it had been calculated for the Clementi Review that the profession already contributed annually some 22,000 hours in pro bono activity for representative and regulatory activities.

8. JR Report

The Chairman briefed the meeting that a pre-action protocol letter had been sent by our solicitors, Bindmans. He reminded everyone that the Carter settlement had addressed 10 years of frozen fees, and that now we were faced with a 17.9% reduction in the not-generous rates recommended by Carter and accepted by government. The Prime Minister had recently imposed a 0% increase for salaries of senior civil servants, which rather made the point that there was one rule for public sector employees, but a different rule for public sector services. In response to any claim for fair treatment, we should be expect a 'fat cat' line of argument.

We were working on JR correspondence with the Treasury Solicitors. The MoJ had re-opened the consultations until 1 April, and this made the timing potentially critical. If the Statutory Instrument (SI) was made and laid, there would be 40 days of parliamentary time for members of either House to seek to quash the SI. That 40 days would probably straddle a General Election, and we were examining the possibilities open to us.

Sir Ivan Lawrence QC believed that an immediate rebuttal was required to clarify the true position for the 'Top Ten' list of publicly-funded criminal practitioners issued by the LSC. Subject to Sir Ivan 's belief that the individuals might have Data Protection concerns, the Chairman agreed that such a rebuttal should be in suitably vigorous language.

9. Internal Governance Rules

A six-page covering note summarised the task of implementing the Internal Governance Rules made by the Legal Services Board in December 2009. This is attached for reference at Annex B.

Nicholas Lavender QC introduced this substantial and complex item with a number of preliminary points. First, he thanked everyone who had contributed to this project, and particularly Matthew Nicklin and Andrew Walker. Secondly, he apologised for the volume of material involved for Members to study, but this was caused largely by the absence of any full documentation of the position at the start of the project. Third, he added a precautionary warning about the inevitability of possible typos in so large a piece of work, and he likened the drafting problem to that of spotting the missing 'not' in the Seventh Commandment in the 1631 edition of the 'Wicked Bible'. He drew attention to Annexes B1 and C1 of the separate bundle as master summaries of the proposed changes. Fourth, he commented that the IGRs were compulsory, and that the existing constraints on the BSB's freedom to govern its internal processes must go. Fifth, he said that these decisions of the Bar Council would permit the signature of the dual certification certificate by the deadline of 30 April. Sixth, he had received no queries from any Bar Council members since the paperwork had been distributed electronically and in hard copy. Finally, he rehearsed the post-Clementi position: we can regulate, but we delegate it to ourselves - independent but part of us; like the Holy Trinity: Father, Son and Holy Ghost.

He took the meeting through the extensive bundle, pausing to emphasise a number of significant features. With reference to the manuscript page number in the bundle, he started with the principle of regulatory independence (p9, and the duties of an Approved Regulator (p11 to p12). He noted that para 9b on pages 11 to 12 addressed the need for transitional provisions to move from non-compliance to compliance.

Turning to the proposed Constitution of the Bar Standards Board (pages 138 to 152), he then covered the Bar Council intentions (p138 Preamble); BSB membership (p138 to 139) which

catered at para 3(1)(b) for the possibility of appointing someone like Baroness Deech who was neither a practising barrister nor a lay person; Functions of the BSB (p139); Duties of the BSB (p139 to p141); Powers of the BSB (p142 to p143); and Schedule A of the Constitution dealing with the Appointments Panel (p146 to 149).

He mentioned a number of changes to the Bar Council Standing Orders (p89 to p119), including (p93 to 94) a number of duties on the Bar Council, its committees, and on its Officers and Chief Executive to promote and protect the regulatory independence of the BSB, and to exercise the responsibility for oversight and monitoring of the BSB. The arrangements for ensuring that the Bar Council exercised its responsibilities to provide such resources as are reasonably required for its regulatory functions were at para 47 on p112, and the production of a Finance Manual setting out the key financial procedures was required by para 50h on p113. The Emoluments Committee was dealt with from paras 52 to 55 on p115 to 116, and resourcing the BSB budget was dealt with from paras 56 to 66 on p117 to 119. The new Chairmens' Committee, to keep under review all aspects of the Bar Council/BSB relationship was authorised at paras 67 to 69 on p119.

Finally he expressed the view that the changes to the Introduction and the Constitution of the Bar Council were relatively minor, and needed no further scrutiny by the meeting. He summarised that what was required of the Bar Council was a vote by a two-thirds majority for the Extraordinary Resolution to amend the Introduction and Constitution of the Bar Council, and a vote by a simple majority to amend the Bar Council Standing Orders, and to make a Constitution for the BSB.

Andrew Walker expressed his doubt that some aspects of the IGRs may be ultra vires, but this was not the occasion to take that thought forward. The work that had been done in proposing to amend the Bar Council Constitution, Bar Council Standing Orders, and to make a new Constitution for the BSB, was the result of putting our faith in the right people. He supported the outcome of the work. Baroness Deech also supported the outcome of this work. Sir Ivan Lawrence QC recalled the longstanding debate about lay versus barrister majority on the BSB, and he remembered that the Bar Council argument had been swayed by the belief that lay members tended to be more pro-Bar than the Bar itself. On the basis of these proposed constitutional changes, he wondered if it would ever be possible to reconsider this issue. The Chairman contrasted the various positions. The Bar Council and the BSB believed that a 'best person for the job' was compliant with LSA 2007. The LSB took a different view. A Judicial Review of the LSB's stance might be the only way for the Bar Council and BSB to force a change. Andrew Walker suggested we should put down a marker for our belief that the LSB was acting ultra vires.

Marc Beaumont referred the meeting to the terms of reference of the Access to the Bar Committee, of which he was the Vice Chairman, and he noted that the BSB were reconsidering the Public Access Rules that had been approved in July 2009. He felt that the BSB had excluded the views of the Public Access Committee, and were not interested in hearing from them, despite their specialist credentials. As a result he stated that the Committee would be forced to produce its own guidance, and he thought this was a nonsensical position. He posed the question as to whether there was anything in the revised constitutional arrangements that might prevent BSB arrogance, and might also compel the BSB to recognise the Bar Council's skills. The Director BSB briefed the meeting that the Public Access rule changes had been amended in July 2009 and sent for approval by the MoJ. In turn, the MoJ passed them for consideration by the LSB from January 2010 onwards, but

the approval process has now been reformatted to include the need for an Impact Assessment of the rule changes. The BSB had no wish whatsoever to be obstructive to Public Access practitioners, and she would take up the issue straightaway. The Chairman noted that the BSB had consulted on the subject, and had formed rules as a result. It was open to the Bar Council or an SBA to issue guidance (see para 9f on p93), but only after consulting the BSB. The Chairman felt that generally the BSB were much more professional than the GMC had been in making rules, and he was keen that any guidance we issued was done in consultation with the BSB. The Director BSB offered to meet with Marc Beaumont.

The Bar Council voted unanimously to amend, by Extraordinary Resolution, (a) the Introduction and Constitutions of the General Council of the Bar et al., and (b) the Constitution of the General Council of the Bar, as set out in the summary of the proposed changes at Annex B1 (hard copy distributed with agenda)

The Bar Council agreed to amend the Bar Council's Standing Orders, as set out in the summary of proposed changes at Annex C1 (hard copy distributed with agenda)

The Bar Council agreed to make a new Constitution of the BSB, attached at Annex D (hard copy distributed with agenda)

The Bar Council noted that the implementation of the IGRs would require new Standing Orders for the BSB, a new Finance Manual, and a certificate of compliance with the IGRs.

Matthew Nicklin spoke for the BSB in thanking the Bar Council for its decisions. He paid a generous compliment to Nicholas Lavender QC, and looked forward to further co-operation with the Bar Council.

10. Information Security

Tony Shaw QC introduced the findings of the Bar Council Working Group on Information Security that was set up to address the concerns of a number of barristers about the burden of complying with the increasing constraints placed by government on the storage and processing of electronic data. In the wake of a number of highly publicised data losses, a Security Policy Framework had been issued by the Cabinet Office in late 2008, requiring the adherence of all government departments and agencies and their contractors. The latter included barristers instructed by any government body. Implementation of security policy within departments was supervised by the Cabinet Office, and departments must report their compliance regularly.

Our Working Group had had reasonable success in heading off some onerous requirements that resulted in part from different standards being applied by different organisations, but there was an irreducible minimum that would remain a genuine burden for practitioners. For example, there would be no flexibility on the requirement for departments to report formally, annually, that they and their contractors complied with the policy. Similarly, there would be no relaxation in the policy that required whole disc encryption to be applied to removable storage devices or laptops. Draft guidelines produced by the Treasury Solicitor staff had been circulated to Circuits with a request for feedback to the Bar Council. The Guidelines would be finalised and issued shortly by the Treasury Solicitor.

Major David Hammond RM emphasised that one strand of government concern related to the

failure of responsible people to erase old material from laptops and other portable storage devices. Routine personal data left on laptops in the UK had posed a real threat to servicemen in Iraq, and continued to do so in Afghanistan. Jeremy Barnett was concerned that defence barristers were being saddled with prosecution constraints, and that this could lead to prosecution access to defence barristers' servers. There was a serious implication for confidentiality. Sir Ivan Lawrence QC asked whether password controls were enough, but Tony Shaw QC said that for the future, proper encryption would be an essential starting point, to be supplemented by additional password protection.

11. Personal Injuries Bar Association

The Chairman told the meeting of the concern felt by many defamation practitioners about the precipitate action taken by the Lord Chancellor to reduce to a maximum of 10% the permitted uplift to a defamation case Contingency Fee Agreement (CFA). For the PIBA it was an even bigger issue.

Hefin Rees introduced PIBA's response to the final report of Jackson LJ's review of civil litigation costs. He informed the meeting that PIBA had over 1500 members, amongst whom there was a groundswell of concern at the outcome of Jackson. In addition, the PIBA response, which was annexed to the Bar Council agenda, had also been approved by the Professional Negligence Bar Association (PNBA).

Hefin Rees said that, whilst it should be acknowledged at the outset that not everything about the Jackson Review was bad, there were unwelcome implications for access to justice, and for the quantum of victims' damages. He wished to concentrate on those two issues at today's meeting.

Jackson's proposal to cap success fees at 25% was arbitrary. If such analysis had assessed the range of likely risks involved, it would have found that a 100% uplift would have been appropriate in some cases. The success fee had always been viewed as costs-neutral, in that it was designed to reflect the fact that some cases taken on under a CFA would be lost, and it was important to compensate lawyers who took on such risky cases by awarding up to 100% in some cases.

Who in future would take on the risky cases? The Jackson report had serious implications for access to justice, and would lead to some cases where victims were not able to find a lawyer to take on their case on a no win no fee basis. For instance, cases involving servicemen and the MOD, or child abuse cases, were particularly risky in terms of not being able to establish liability. He had recently taken on a CFA case which involved five weeks of preparation for three weeks in court, and then lost as the judge had found no liability on causation. Who would take on such risky cases in the future if there was a maximum of a 25 % cap? To artificially limit the percentage success fee to 25% was arbitrary. There was a need for more flexibility to reflect the risks, and the present system which allowed a success fee of up to 100% was more appropriate.

Turning to the risk to victims' damages, he reminded the meeting that the losing party presently pays the other side's success fee. If in future the 25% success is to be paid from the claimant's damages, that will mean that victims are under-compensated. He told the meeting that the current system for assessing personal injury damages is based on what is reasonably necessary. This means that there is no excess into which the recovery of a success fee could

be applied. Thus, the effect would be that victims of personal injury will have to bear those costs out of the past losses they had incurred, which would be grossly unfair and in breach of the 100% compensation principle.

PIBA and PNBA intended to lobby across the political spectrum against the consequences of some of the Jackson recommendations. PIBA had already held meetings with various politicians, and would report back in due course following the election on the next steps that will be necessary to take in responding to Jackson's impact on the Personal Injuries Bar.

After Hefin Rees had concluded his remarks, Marc Beaumont enquired whether PIBA had yet met with Dominic Grieve MP. Hefin Rees replied that a meeting was due to take place shortly after the General Election. Marc Beaumont said that, in his view, a Conservative government were likely to adopt Jackson LJ's recommendations.

Hefin Rees noted Marc Beaumont's observations, but said that PIBA were intent on lobbying hard to ensure that these two main criticisms of Jackson's Report were taken on board and would report back to the Bar Council at an appropriate time following the General Election.

12. Any Other Business

There was no other business.

13. Date of Next Meeting

The next meeting would be held at 1000 hrs on Saturday 8 May 2010 in the Bar Council offices.