

Minutes of the Bar Council Meeting held on Saturday 12 March 2011 at the Bar Council Offices

Present:

Rt Hon Dominic Grieve QC MP - Attorney General
Peter Lodder QC - Chairman
Michael Todd QC - Vice-Chairman
David Hobart - Chief Executive

1. Apologies

Apologies for absence had been received from The Treasurer, Malcolm Davis-White QC, Chantal-Aimee Doerries QC, Gareth Evans QC, Susan Grocott QC, Christopher Hancock QC, Christopher Kinch QC, Stephen Leslie QC, Paul Mendelle QC, Ian Pringle QC, Robert Rhodes QC, Mirza Ahmad, Kerry Bretherton, Nicholas Burn, Georgina Cole, Melissa Coutino, Fraser Coxhill, Amanda-Jane Field, Peter Grieves-Smith, Charles Hale, Edward Henry, James Hines, Fiona Jackson, Rebecca Major, David Nicholls, Christopher Rose, Stephen Thompson and Nick Worsley.

2. Approval of the Minutes

The Minutes of the 22 January 2011 Bar Council meeting were approved.

3. Matters Arising

No matters arose from the 22 January 2011 meeting.

4. Bar Council Membership 2011

The meeting noted the list of Bar Council Members at Annex B to the Agenda.

5. Statement by the Chairman

The Chairman started in a sombre tone, noting that a number of Bar Council members had attended the memorial of Carol Tolson, and were attending today a service in the West Country celebrating her life. Her shocking death came from an otherwise unremarkable fall on a family skiing holiday. Robin Tolson QC had earlier decided to stand for Vice-Chairman of the Bar Council, but would now be resigning from his Bar Council positions to spend time with his daughters. His energy and

commitment would be missed, and the Tolson family were in our thoughts.

The Bar Council had four new Silks. Philip Bennetts had move from self-employed practice in October 2009 to join the CPS, and had joined the Bar Council in 2010. Andrew Walker remained our very own gatekeeper on questions of constitutional change. Gregory Jones was a representative of the Constitutional and Administrative Law Bar Association, and Richard Atkins was the mouthpiece of the Member Services Board and the reveller of the Midland Circuit. The Chairman passed on the Bar Council's hearty congratulations.

The Chairman informed the meeting that there would be a Service of Thanksgiving for the life and work of the Rt Hon Lord Bingham of Cornhill KG, to be held in Westminster Abbey at 6pm on Wednesday 25 May 2011. Members wishing to attend should write, enclosing a stamped addressed envelope, to Mr M Arnoldi, Room 25, the Chapter Office, 20 Dean's Yard, London SW1P 3PA. Tickets would be posted out by 16 May. All were welcome to attend.

The Chairman continued to grapple with the major issues of the day. Only ten days earlier he had been enjoined by a Blackberry message to write an outraged letter to the BBC about the unbelievable drama series 'Silk'. Other major issues, such as our responses to the Legal Aid consultation and the Jackson proposals, had been dealt with in a quieter and more effective tone, and we owed a considerable debt of gratitude to Stephen Cobb QC, Chris Hancock QC and Mark Hatcher. The scale and scope of the legal aid and civil litigation funding consultation papers painted a stark and disturbing picture of what access to justice might look like in this age of austerity. The proposed withdrawal of legal aid from entire areas of civil law would be a frightening prospect for the many vulnerable people who relied on public funding to exercise or protect their legal rights. Our responses were on the Bar Council website, and the Chairman emphasised three themes. First, whether the government's proposals would cost more than they would save. Second, the effect that the legal aid and civil litigation proposals, in tandem, would have on access to justice. Third, how we might be able to work with the government to find workable savings in the system which would be less harmful to access to justice.

To gain an early insight into government thinking, we had had recent separate meetings at the MoJ with the legal aid minister, with the AG, and with the Lord Chancellor. In summary, there would be a continued drive towards competition. The legal aid minister was in favour of a price-based system, as a mechanism to make the most of diminishing funds and an oversupply of lawyers. The AG had understood the Bar's fears about OCOF and the importance of retaining the quality and expertise that the Bar brought to advocacy. We discussed concerns about the Bar's capacity in an extreme form of competition. The AG saw Procureco as representing the likely direction of travel for the future, and an alternative proposal that could not achieve

equivalent savings would not find favour. The Chairman had explained to the Lord Chancellor the Bar's lack of familiarity with tendering, developing new business models, and the anxiety about how the Bar would fare in contracting. Any move to a system based on Price Competitive Tendering would be a significant challenge, both in terms of time and in gaining real experience. The Lord Chancellor was clear that change could not be delayed. He was "sold on competition", and he perceived that many of the larger sets were financially sophisticated and capable of adaptation to win work. However he accepted that the outcome must be a system that worked, and that he did not want a repeat of the family contracting round. The Chairman urged the Lord Chancellor to keep an open mind in framing the proposals setting out the form of competition in the next phase of consultation. Coincidentally, one of the new non-executive Directors of the MoJ was receptive to the argument that good procurement exercises did not place undue emphasis on price at the expense of quality, a point that the Chairman hoped to develop in future meetings planned with Catherine Lee, the new civil servant responsible for legal aid. So the Bar Council needed to press ahead with the Procureco initiative, not to abandon the Bar's position but to ensure it is not left high and dry if the world changed around it. It was vital to dispel the recent robing room stories that Procurecos were suitable for London and Manchester, but nowhere else.

Since the January meeting the Chairman had spoken at many meetings, such as a South Eastern Circuit event, a presentation by the software and business support company IRIS, 'Meet the Chairman', an audience with the Legal Practice Management Association, and discussions with NALP and ILEX on the arrangements for actually running solicitors' offices. He had visited chambers in Manchester, Swansea, and Cardiff where one highly efficient and successful set had caught his eye: 22 strong, with hitech premises; a common area for members to access the internet, email and research material; no library, with not a book in sight; four rooms for meetings, with no tenant having a room; other rooms occupied by the main players in a three-point system of chambers administration involving clerks, a managing executive and a business development manager.

Many government and commercial organisations required certain kitemarks: Barmark, ISO 9000, SQM. Tendering processes typically sought evidence of these minimum standards before accepting any bids. But according to Bar Council Records, a mere 35 chambers out of 330 had Barmark, with five being audited for the first time. Sets without this basic standard would be handicapping themselves in an increasingly competitive marketplace, and could lose out.

Other areas of the Bar had been supported by recent Bar Council visits to St Petersburg and Kyiv. Two very well attended seminars on Dispute Resolution contrasted the merits of litigation in the UK with arbitration using English law and lawyers. The UK embassy in Kyiv noted that we were the first legal delegation they

had received. There was undoubted respect for the quality of English law and lawyers, with the prospect of an enormous amount of work. A separate visit to the Commonwealth Law Association conference in Hyderabad confirmed it was not an easy commercial target, but the new Bar Council brochure on international arbitration was eagerly sought by fellow commonwealth lawyers. Our presence was enhanced by the attendance of our LCJ, MR, the Vice Chancellor and a wide selection of LJs and Justices. Finally, we had the recent chance in Vienna to cement relations, and debate vigorously, with our colleagues at the CCBE. The Chairman singled out Michael Patchett-Joyce for his doughty defence of our national contract law in the face of an attack under the guise of European harmonisation.

At a meeting shortly before the Bar Council meeting, the AG and the DPP joined the Circuit Leaders to discuss the challenges posed by the CPS Panels. The selection process, the size of the Panels, and the need for flexibility in appointing those advocates to their second choice if they were unsuccessful in achieving their first choice, were all of concern. The AG had agreed to meet the Circuit Leaders after the Bar Council meeting to speak directly about the views of government.

The resignation of the Chief Executive had created an opportunity to look at decision-making within the Bar Council, and to suggest improvements. This would be a wide-ranging Review, to include the role of the Chief Executive, the role of the Chairman, and a number of other issues that affected the continuity and efficiency of Bar Council decision-making. It would consider the interaction of the Bar Council with the BSB, but would not examine the BSB's decision-making processes; the fundamental principle of regulatory independence would be respected. Membership of the Group would be Nick Green QC (Chair), Maura McGowan QC and Andrew Walker QC(des) who were elected Bar Council members, Richard Thompson and Emily Windsor who were BSB representatives, and the Group would be supported by Ariel Ricci and Amanda Thompson from, respectively, the Chairman's office and the Chair BSB's office. The Group intended to report to the BSB and Bar Council by the end of July, and hopefully a final report would go to the July Meeting. GMC would be kept abreast of progress throughout the Review.

This was a tight timetable, but should be achievable. Information would be gathered in writing, by holding interviews, and by use of surveys. Feedback would be sought from Bar Council members, staff, former Chairmen, and some external organisations; for example, the DPP and the AG, in due course. The Group had now met twice and, with the timetable in mind, all Bar Council members should be alert for emails from Ariel Ricci. Confidentiality would be respected, and all contributions would be valued. The Chief Executive would leave in May and for the interim period of the Review his functions would be carried out by the three Directors who would continue to meet weekly. Each would play the role of a rotating Chair, to avoid prejudicing the outcome of the Green Review.

Finally, the Chairman reinforced the need for practitioners to abide by their obligations to provide suitable protection for the electronic and paper-based material they used in practice. A practitioner had recently had her papers stolen from her car overnight, and faced the possibility of a substantial fine. The Chairman would be writing soon to the profession, setting out where we stood on these matters.

6. Legal Aid Consultation Response

Stephen Cobb QC reminded us that we all had a book in us somewhere. In his case the aphorism came true, and it was entitled 'Response of the Bar Council of England and Wales to the Consultation Paper CP12/10 : Proposals for the Reform of Legal Aid in England and Wales'. The Executive Summary had been included in the Agenda, just in case anyone had questions. He paid thanks for the high quality contributions he had received from the SBAs and the Circuits, and modestly he characterised the Bar Council's efforts as those of combining the contributions and highlighting some themes, such as access to justice. He singled out for particular mention the research work of the Strategic Society, and he lauded the additional efforts of Bob Young and Professor Martin Chalkley.

7. BSB Report

The Director BSB, Vanessa Davies, gave a brief summary of recent regulatory activities. The Entity Regulation consultation had now closed, and the BSB would be considering the responses in detail in April. This would lead to a further consultation with the profession before any major decisions were taken.

The difficulties faced by practitioners in notifying lay clients of the complaints process they might wish to use had led to further talks with the LSB, at which the Bar's view had been clearly heard. However, the onus remained on the profession to satisfy the lay clients' rights, though it was accepted that this could be problematic. The first step should be a letter to the lay client, if possible. Failing that, the lay client should be informed at the first available opportunity. Failing that, the professional client should be informed. The BSB hoped soon to be able to issue sample guidance to barristers, after discussions between the BSB and a number of SBAs. A monitoring period for the new arrangements, 12 months perhaps, might be helpful.

Good progress was being made on QAA, with a useful Roundtable involving the CPS, LSC, LSB and the frontline regulators in early March. The full description of the scheme would be complete by July, with initial implementation in October. The Law Society and Bar Council interests were being handled respectively by Michael Caplan QC and Philip Mott QC. The scheme would operate at four levels, with typical cases being assigned to each level, and barristers accredited accordingly.

Further meetings of stakeholders would continue to refine the details.

Work of chambers monitoring was continuing apace, with 631 responses received. The majority of these were compliant, and assessed as low risk. However, 41 sets had failed to respond at all, and would be chased up with a written warning.

Finally, the BSB's stately progress towards a lay majority would reach its intended destination by the imminent recruitment of four new lay members.

Nichola Higgins asked when practitioners would know the likely costs of the QAA process. The Director BSB thought the costs would become known by July. Mark Bryant-Heron noted that the impact of the complaints handling process would fall most heavily in the Magistrates' Courts where the Young Bar were prevalent. The Director BSB invited the YBC to attend the planned meeting with the SBAs on 22 March to look constructively at the way forward.

8. Bar Council Officer Election Timetable

The Bar Council noted the new timetable for the nomination and election of Officers for 2012. Nominations would open on 4 April 2011, and the election process would be completed by 27 May 2011.

9. Bar Council Communications

Mark Hatcher spoke briefly to the Bar Council Communications Update, included at Annex E to the Agenda. Since early 2010 the Bar Council had made the transition from a heavy reliance on Weber Shandwick, via an interim support arrangement, to a largely in-house capability. The new Communications Department, two staff rising soon to three, had taken on responsibility for a broad range of communications activity including public affairs and Government relations, media relations, marketing communications (including the website, which he described as currently resembling a "big bulging filing cabinet") and internal communications. The Department, headed by Toby Craig, worked closely with the Chairman's Office and key Bar Council decision-makers to reflect the importance of promoting regular, strong, clear and consistent messages externally and to the profession.

The Department had developed the Press Office, including an out-of-hours capability, and had successfully provided high profile coverage for some recent key events, such as the 25th Annual Bar Conference, the Inaugural 2011 Bar Council meeting and the submission of the Bar Council's responses to the Government's recent consultation on Legal Aid Reform and Civil Litigation funding. It had driven the 'Prepare for Change' initiative to provide timely updates on the potential for direct contracting at the publicly funded Bar. It had launched a phased social media

strategy, starting with Twitter, and to be followed with greater engagement with LinkedIn and, potentially, Facebook. Within three months, [@thebarcouncil](#) had attracted over 600 fellow tweeters, including journalists from The Times and Guardian, and from the legal press.

Additional tasks had included the redevelopment of the role of the Public Affairs Committee to reflect the new internal structure. The PAC would now meet quarterly, with two meetings out on Circuit. A wide-ranging public affairs programme would provide regular communication with the MoJ, the Law Officers and the Legal Services Commission. The Bar Council would now be equipped to deliver its message at Party Conferences, and to a wide range of opinion formers, including the Justice Committee and parliamentarians in both Houses.

For the future, a new Bar Council website would be delivered in 2011, building on the experience of over 500,000 hits in 2010. The first of a series of Bar Debates, on prison reform, would be held at the Old Bailey on 7 April as part of a public discourse on those issues to which the Bar could contribute an informed view. Finally a new working group led by the Vice-Chairman and supported by the Communications Department would seek to improve the Bar's relationship with the City of London.

10. Pensions

The Chairman invited staff members to leave the meeting, to permit a full and frank discussion of the issues of most concern to Bar Council members.

Richard Salter QC spoke to his tabled paper on the Bar Council pension scheme, which is attached at [Annex A](#), and suggested the best way to alleviate the pension black hole was to stop digging. He observed that in a traditional Defined Benefit (DB) pension scheme the employer guaranteed the output, whereas in today's increasingly numerous Defined Contribution (DC) schemes the employer guaranteed only the input. In the first, the risk was held by the employer; in the second, by the employee.

Three factors explained the predicament the Bar Council faced. First, the length of time that benefits would be paid to a pensioner, i.e., the longevity factor. Within 25 years, it was possible that pensions might be required to last a further 50 years. The youngest Bar Council employees on the DB Scheme might not retire for another 40 years. Second, rates of return were declining for safe investments such as gilts, i.e., the investment risk. Third, pension schemes were being required by law to hold a greater proportion of assets compared to their liabilities, i.e., the regulatory risk.

From July 2006 onwards, new staff had been enrolled in a DC Scheme, where

employee contributions of 4% or 8% of salary were matched, respectively, by Bar Council contributions of 10% or 14%. By comparison with many other employers, a possible 14% was a generous DC commitment. Staff joining the DB Scheme before July 2006 were entitled to accrue 1/60th (or 1/80th for a few) of their annual salary for each year of service, and that required the Bar Council to keep paying in.

A triennial valuation had been carried out as at 1 October 2009 conditions, showing a deficit of £6.1m, all of which was for past service liabilities. The profession had now paid two annual levies amounting to some £5m, and the past service deficit was close to resolution. But for future accrual it could cost the Bar Council over 35% of salary to maintain the existing benefits. Everyone, including the staff, recognised that this was an unaffordable level for the future.

At first sight, the simple answer was to stop the Scheme, and incentivise the staff to move to a DC scheme. But any act of stopping the scheme had attendant costs. Simply 'freezing' the Scheme (i.e., closing it to all future accrual, but without necessarily paying off immediately the past service liabilities) would cost an additional £1.2m, caused by the upwards revaluation at 5% annually of pensions in deferment. A greater difficulty might be the combination of staff expectations and the need to seek the Trustees' agreement to any such change. With the Trustees' agreement, we could freeze the Scheme. But if we failed to reach an agreement, and then decided to 'wind-up' the Scheme, the cost of doing so would be much more expensive; some £16m for a 'wind-up' that would probably involve transferring the Scheme assets and liabilities to an insurer. This possibility was included within Option 2 of the Bluefin paper.

Option 1 involved seeking agreement for a lesser cost scheme for the future. Key differences would include employee contributions and a reduction in benefits from 1/60th to 1/80th per year of service. Taken together the various changes could reduce the employer's costs to some 17% of salary, but the Bar Council would retain the risks. One drawback of Option 1 was the proposed 8% employee contribution, which was high and potentially unaffordable to some employees. Before seeking agreement with the BSB, the Trustees and the employees, Richard Salter QC asked Bar Council members to guide him on developing a negotiating position.

Maura McGowan QC asked for the latest Scheme membership, and Richard Salter QC confirmed there were 47 Active members of the Scheme. In response to a question asking how long the need to fund a £16m buy-out might affect the PCF, Richard Salter QC said the answer would depend on the strategies adopted. For example, a successful Enhanced Transfer Value (ETV) exercise would tend to reduce future costs and risks. Any decision to close the Scheme would lead to a revised investment strategy. The closure could be funded by short-term borrowing, but with long-term repayments. Tony Shaw QC asked how soon the decisions should be

made. Richard Salter QC observed that the longer it took to make the decision, the greater the likely eventual costs would be. This could become a factor for a smaller Bar if further pension levies were ever necessary.

Ken Craig had wanted the DB Scheme closed for some years, and with his perspective from the Finance Committee, now the Finance and Audit Committee (FAC), he had watched the past service liabilities deficit grow year on year. DB schemes were closing everywhere, for example in government and the Inns of Court. He did not accept the argument that closure would be de-motivating. The Bar Council must face the realities, and could not afford to carry on as it was. The Bar Council paid good salaries, but could not afford to pay gold-plated salaries. It was important to get out of the Scheme as soon as possible. The Chairman reminded the Bar Council that the purpose of the meeting was to seek clarifications, but not to make the decisions at this stage.

Michael Soole QC asked how the Bar Council compared with other employers for pension provision, and Richard Salter QC pointed the meeting towards pages 21 and 22 of the Bluefin Report, which showed clearly that the Bar Council was a generous pension provider. In response to the earlier comments (above) by Ken Craig, Richard Salter QC commented that the Treasurer had characterised the issue as one to be resolved by negotiation, and that trimming the Scheme to a 17% employer contribution might be a good answer. The question had been posed as to whether the staff had a negotiating body, and whether that body accepted that the existing position was no longer acceptable to the employer. The Chairman spoke of the staff group that had contributed throughout the Bluefin process who, he believed, recognised the status quo was not an option. The Trustees had a role in representing the staff interest, and they too accepted that change was inevitable. Richard Salter QC added that Option 1 had originated from the staff group.

The relationship between an ETV exercise, and the £1.2m and £16m costs was questioned. Richard Salter QC said any outcome would depend on what might be agreed about Scheme closure. In industry, he suggested that ETV incentives could be offered up to a pre-determined level if agreement on the future could be reached. The Bar Council could do something similar. If the staff were content with the outcome, then it was likely the Trustees would also be. But if agreement broke down on the future of the Scheme, to the extent of forcing a wind up, there would then be no basis for any structured enhancements to individual transfer values. Andrew Walker asked whether the Trustees could force us into closing the Scheme (thereby triggering the wind up costs), but Richard Salter QC replied that this was not within the Trustees' powers if the Bar Council was willing to carry on paying into the Scheme. But if the Bar Council declined to make any further regular payments, the Trustees could in effect close the Scheme.

A final question concerned a comparison between the £16m worst case wind up, and the cost to the Bar Council of running on the present Scheme. Richard Salter QC described such a comparison as a bet on the future, with no obviously correct answer. Tricia Howse passed on her congratulations for the clear paper produced by Richard Salter QC, for which all present were grateful. The Chairman was confident that a harmonious solution would also be the cheapest, and he thanked Richard Salter QC for his work so far.

11. Any Other Business

The Chairman paid a remarkably generous tribute to the outgoing Chief Executive, starting by reminding the meeting that his former career as an Air Vice-Marshal, holding the post of the Assistant Chief of the Defence Staff from 2001 to 2004, was good training for life at the Bar Council. He continued:

"You will know that he is a man imbued with a strong sense of propriety and precision and so it will come as no surprise to you to learn that he still wears his uniform as Gentleman Usher to the Queen and only this week was at a Buckingham Palace investiture with the Queen and Lady Antonia Fraser.

He will be on duty at the Abbey for William and Kate's wedding gently guiding the guest to their seats - much as he does at Bar Council meetings (just a bit more fancily dressed).

He maintains a strong connection with his earlier life and invited one of my predecessors to dinner at the Royal College of Defence Studies in Belgravia (described as a place where David seemed most at home, and where the staircase is made of stone which might feature in an expensive pair of cuff links).

Sir Sherard Cowper Coles (distinguished diplomat and strategist) was the guest speaker and insisted on addressing all assembled (and plenty of 4-star generals) by their service rank. As David raised his arm amongst the glitterati to ask a question, Sir Sherard looked up and said "Yes, Field Marshal, your question?" Even David was temporarily lost for words.

He is also remembered for being able to assist another predecessor with advice on good restaurants in Tripoli, David having been taken to all the best places by the Libyan Head of Military Intelligence, Gaddafi's brother in law.

Giving such assistance might be a greater challenge at the moment.

David is famed for his wisdom, and considerable common sense. He has an excellent sense of strategy and a deep knowledge of the ways of Government; his sharp focus

and clear analysis has guided us through many challenging situations.

But there is also an endearing humanity:

His fondest memory as Gentleman Usher was walking arm in arm with Kylie and Dannii Minogue on the occasion when Kylie got her OBE.

And last year he decided to indulge himself and introduce a little speed into his life so he purchased a Caterham.

He may be the master of the roost at the Bar Council but not at home. The purchase was made while his wife Mandy was away and then hidden in a shed until such time as he could summon up the courage to broach the matter. Fortunately he still has the car, and continues to be married.

Another passion in David's life is the author Anthony Trollope. Which is interesting, given that Trollope once wrote '....an author must be nothing if he do not love truth; a barrister must be nothing if he do'.

But with this in mind (and David's responsibilities with regard to Bar Council cheques) we have this small token of our appreciation to present to him."

12. Date of Next Meeting

The next meeting will be held at 1000 hrs on Saturday 14 May 2011 in the Bar Council offices.