Minutes of the Bar Council Meeting held on Saturday 23 January 2010 at the Bar Council Offices

Present:

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

1. Apologies

Apologies for absence had been received from Simon Barker QC, Susan Grocott QC, John Howell QC, Richard Salter QC, Tony Shaw QC, Michael Soole QC, Colin Andress, Julia Beer, Esme Chandler, Rex Howling, Fiona McCreath, David Nicholls, Pavlos Panayi, Kevin Toomey, Shelley White and Nicholas Worsley.

2. Approval of the Minutes

The Minutes of the Inaugural 2010 Bar Council meeting held on 8 December 2009 were approved, after noting that Robert Rhodes QC and John Elvidge had sent their apologies.

3. Matters Arising

No matters arose from the Inaugural 2010 meeting.

4. Statement by the Chairman

The Chairman pointed out that the agenda had been structured to accord with the BSB's practice of setting time limits for each item. A note on Bar Council suggested working practices would be distributed to Members.

The main issues in which the Chairman had become immediately involved at the start of his term were the future of Quality Assurance for the profession; the Costs Study by Jackson LJ; the MoJ and LSC consultations on VHCCs and RAGFS; and the business structure roadshows around the country.

The Bar Standards Board (BSB), the Solicitors Regulatory Authority (SRA) and the Institute of Legal Executives (ILEX) had produced a joint Consultation on the future Quality Assurance of advocacy. This had followed the Legal Services Commission's efforts to seek accreditation for advocates. A major element of those efforts had included a two-year LSC project conducted by the Cardiff Law School, which had hit the buffers in December. In the

public interest, the three regulatory bodies were aiming to set common standards for advocacy. It was very much to the advantage of the professions that their regulatory arms grasped this issue. The setting of standards was likely to lead to accreditation for advocates, initially in the area of criminal law which was already familiar with CPS accreditation, but rolling out eventually to other areas of legal practice. This regulatory approach would have little in common with the LSC's stalled programme, which showed little understanding of the characteristics of advocacy. The Chairman repeated that the regulatory consultation envisaged the involvement of all areas of advocacy - a startling proposition perhaps for privately funded practitioners - and he urged all Members to consider responding to the consultation paper.

There was considerable political and judicial support for the Jackson LJ Costs Review, and one might expect that any push-back against unpopular measures would be limited. There remained a range of problems to be worked out. Michael Todd QC would be leading our response, and would talk later to the agenda item. First impressions indicated that the Law Society was hostile to the outcome, but that Jackson was not necessarily bad for the Bar. Personal Injury practitioners had major concerns, and muted criticism had been heard from the Clinical Negligence Bar. Referral fees had been damaging to the legal sector, and it was recognised that CFAs had been abused. It was hoped that a joint Bar/Law Society working group would take forward the work on alternative finance arrangements for access to justice, such as a Contingency Legal Aid Fund (CLAF). There had been a deal of interest from the City institutions in market driven funding.

Paul Mendelle QC would speak later on the tale of the VHCC and RAGFS consultations. There would be a joint CBA/Bar Council response to the proposed 17.9% cuts to the Carter outcome - itself a far from generous settlement, but one that the Bar had understood to be a stable basis for the future of publicly-funded criminal advocacy. The Chairman emphasised two themes. First, we would consider the possibility of Judicial Review of the unfair consultations, in which the unsustainable Option 2 was contingent on the outcome of a further consultation on One Case One Fee. Second, some clarity would be helpful on the topic of concerted action. Members would recall that when senior practitioners had declined to sign VHCC contracts, we had been accused of concerted strike action. Self-Employed barristers were not employees, and thus were incapable of strike action. We were simultaneously colleagues and competitors. Any action that practitioners might take would be irrational until it was fully informed. It would be up to individuals to take legal advice, and any unilateral action would be for individuals, not for the CBA or the Bar Council.

Five business structure roadshows in England and Wales had taken place so far, with more to come. The Chairman, accompanied by a BSB Member at every roadshow, had visited 16 Sets and spoken to some 650 barristers. He would speak further on this topic under the agenda item.

5. Bar Council Members 2010

The meeting noted the list of Bar Council Members at Annex A.

6. Representative Committees for 2010

The meeting noted the latest position on the appointment of Chairmen to the Representative committees at Annex B.

7. BSB Issues

Baroness Deech wished Nick Green QC every success in his year as Chairman, and she noted how much she had enjoyed working with Desmond Browne QC.

The BSB had taken some profound decisions on 19 November 2009, resulting in new permissive business structures such as Legal Disciplinary Practices. Some caution had been merited, with a number of important consumer interests at stake. The desirability of reducing legal costs for the consumer remained, and the BSB would welcome good ideas. The support of the Chairman of the Bar was important in arguing that a good Bar was a pro-consumer Bar.

The BSB had contributed to all of the business structure roadshows, and had sought to test opinion by asking barristers what they wanted. The use of a short questionnaire had helped, but she saw the need for a substantial piece of research work by survey, perhaps by IPSOS/MORI who had done an excellent survey on public attitudes to the Bar. This would be expensive - £20000 or thereabouts - and she urged all barristers to reply in due course to the new survey. We now awaited the approval by the LSB of the business structure rule changes in the Code of Conduct. At this stage, the BSB had not formally addressed the question of the 'Procureco', but would be willing to do so when asked.

Education, education, and education remained the priority. The first of three studies by Derek Wood QC, this one leading to the creation of Bar Professional Training Course, had been completed. Two of the aspirant course providers had already been rejected. Course enrolment would be carried out online. An aptitude test for the course was vital, and we expected to pilot a suitable test soon. The set-up and pilot costs would come to some £15000. Turning to pupillage, Derek Wood QC's second study would report in Spring 2010. His final study, on the future of CPD, was gearing itself up, and would involve much consultation with the profession.

John Cooper asked about the rejection of two of the BPTC providers. Baroness Deech replied that one had submitted a late application and the other had not demonstrated the required quality. She expressed her considerable irritation that the contractual arrangements with the providers had been insufficiently stringent to prevent one or more of the providers from over-recruiting students, and thereby putting at risk the expected quality level delivered by

the providers. The future arrangements for limiting the number of students that each provider could recruit would be tighter. Stephen Leslie QC recounted the example of a BVC provider failing a candidate for plagiarism, and then charging the candidate a new fee for a re-sit. Baroness Deech would pass on this anecdote to her Education team. The future BPTC exam must be organised to be plagiarism-free.

Robin Tolson QC questioned the relationship between QA and the need to commit to a single set of standards. Baroness Deech felt it was premature to take a view on this before the Advocacy Training team of the Inns of Court had considered the issue. Quality remained at the top of the BSB's agenda. Marc Beaumont drew attention to the difficulties faced by a general common law practitioner, in the sense that he might need separate accreditation for each of the areas of law he covered. Baroness Deech acknowledged the point. Tim Devlin asked whether the BSB could consult on whether barristers should be able to sue for their fees, but the Baroness thought this was a problem for the representative Bar Council to address. Jalil Asif gave a brief resume of the depressing progress on default contractual arrangements for the Bar, ending with the hope of LSB approval for rule changes in 2010. Eleanor Mawrey spoke of the difficulty of finding on the website the BSB's policy on CPD during career breaks, and particularly for maternity leave. Mandie Lavin agreed that the guidelines should be clear, and she referred to a previous Bar Council meeting at which the BSB's intention to rebalance its charging regime had been discussed. Fiona Jackson raised her concern that the CPD Review should look to ensure in future that accreditation would be given for lectures which offer barristers, for example, important advice on undertaking pro bono work and presenting oneself best in applications for silk and judicial appointment. She expressed her disappointment and that of her fellow members of the Bar that, notwithstanding the Bar Council and BSB's stated commitments to equality of opportunity and diversity in career progression, CPD accreditation had been refused for a number of workshops on these topics that she had sought previously to organise for the Bar Conference and committees such as the Association of Women Barristers. These points were noted by the Director of the BSB.

8. PCF Update

The Treasurer gave a New Year progress report on Practising Certificate Fee income, prefaced by a cautionary reminder to Members that we needed to stay within the 2010 budget. There would be no new money, and several pressures on the existing provision.

PCF income, including the LSB and OLC levy, was coming in much as expected. It was too soon to be sure how many practitioners would not be renewing their certificates, as at this early stage of the year it was routinely difficult to distinguish between deliberate non-payers and those taking a New Year holiday. Although we were still short against budgeted income, we would not know the true overall picture until after the Employed Bar income came in for the 1 April renewal date.

The pension levy had raised some £1.7million so far. This had no budgetary effect one way or the other, as the money was raised solely to derisk the pension scheme. The possibility of an EGM to debate a Directive Resolution seemed to have faded for the time being, but we were faced now with the possibility of an application by a barrister for Judicial Review of some aspects of the Bar Council's October 2009 decision to mandate the levy. We had instructed solicitors, and would seek a strike out. The JR apart, one or two anomalies had surfaced in the pension levy attribution; for example, a very few barristers had disbarred themselves to become solicitors, and had returned to the Bar several years later. Arguably, a pension levy based on years of Call would disadvantage late re-joiners to the profession.

At this stage 1738 barristers had not paid their Member Services Fee. This number was slightly up from last year, but again it was too soon to be sure. What was clear was the need for barristers to learn and understand what the MSF did for the profession, and for Bar Council members to encourage payment from their colleagues in Chambers and elsewhere. A £100 MSF was not a credible tipping point for barristers facing difficulties at the Bar, and we would be writing to all 1738 explaining our purpose.

We would take account of the profession's feedback before deciding the size and distribution of the next pension levy, and we would consult before any final decision. The Treasurer would report back to Bar Council on the pension levy.

Richard Atkins argued that we should make a greater effort to let people know what the MSF does for them, and the Treasurer agreed. Andrew Walker enquired as to the size of any shortfall in the LSB and OLC levy, but it was too soon to be sure. In the context of the MSF discussion, Melissa Coutinho observed that it was unclear from the Bar Council website what services were available to the Employed Bar.

9. Business Structure Roadshows

The Chairman had taken a small team including a member of the BSB to roadshows in Cardiff, York, Birmingham, Winchester and London, with further roadshows to be held in Manchester and London. The main objectives were to explain the BSB's rule changes and to seek a dialogue on Chambers' ambitions and concerns.

Much of the conversation had centred on the role of a Procureco, and the Chairman had used an example to explain its relevance to the business structure debate. Imagine a Local Authority with typical Health and Safety, and Environmental responsibilities that generate some 50 cases a year at a cost to the Authority of £1.2 million annually. The Authority might want to replace its in-house team by offering the 50 cases for, say £1milllion. This might appeal to a number of local firms who could take the cases, and keep as much advocacy as possible for themselves. But it did not presently appeal to Chambers who were in no position to take on much beyond the advocacy and some advisory work. A Chambers Procureco could have a panel of solicitors to do the non-barrister work. This, together with

the BSB's permissive approach to barristers doing more solicitors work - correspondence, for example - would have potential to reverse the barrister-solicitor relationship. A range of practice possibilities would be opened up by a permissible combination of Procureco, Barrister-only Partnerships and LDPs, together with the possible freedom of practitioners to have dual capacity, i.e., to be able to work routinely as either Employed or Self-Employed barristers.

The publicly funded Bar was troubled by the encroachment of HCAs and legal aid cuts, and was feeling increasingly cut out. Some were thinking about radical change. The core of the Bar still had Chambers as its nucleus, but novel ideas were appearing around the fringes. There was increasing pressure for defence barristers to be able to compete with solicitors, particularly in crime. Family law pressures were different, and seemed to run some two years behind crime. At the Civil Bar, some practices were fine, but the need for substantial change in some areas of civil practice was becoming apparent; for example, the potentially greater role for direct access. The Chairman welcomed the helpful contribution made by the Circuit Leaders' new forum for debate on these matters. The Bar Council would be working up a model Procureco, to add some flesh to an embryonic concept. And the BSB would be gathering a coherent picture of the Bar's concerns by means of questionnaires for practitioners who attend the roadshows.

Maura McGowan QC asked for an explanation of how a Procureco would work for a typical criminal set with a number of solicitors providing work. The Chairman noted that the present rules prohibited direct competition between barristers and solicitors. Some solicitors see an advantage in joining with good sets. A Procureco would enable an alternative competitive structure to suit the Bar. The BSB had already received a number of applications for rules' waivers, and two applications for the formation of LDPs for the purpose of contracting with the LSC. We did not yet know if this would work, but it opened up possibilities of a more competitive commercial structure. Gregory Jones from ALBA spoke of the wide gamut of specialist areas covered by many Local Authorities, and he wondered whether sets could band together to bid for work. The Chairman saw no reason why Procureco could not apply to any number of barristers or sets. 'Mix and match' seemed the likely way forward. Lucy Theis QC questioned the preparedness of the LSC to contract with a Procureco. The complex nature of the LSC's contracts with solicitors was a concern. The Chairman said that we were meeting with the MoJ and LSC to explore this feature; in 2009, the Chairman of the LSC had seemed keen on the idea.

Belle Turner expressed the qualms of the Young Bar about modifying the Self-Employed status of many barristers. Her constituents were opposed to Barrister-only Partnerships for fear of exploitation, but also because the Self-Employed status was a key attraction for people joining the profession. The Chairman saw it as likely there would be a trade-off between volume and price of work, and that the Young Bar's interests might best be served by assured work at a lower price. The aim of a revised business structure would be to remain competitive at a lower price. Exploitation was a risk, and we would look to avert it.

Belle Turner was fearful there would no longer be a structure to determine a fair price, and the Chairman agreed the necessity of monitoring the rules. Michael Bowes QC speculated that individual barristers might be able to become LLPs, to take the resulting tax advantages, but the Chairman thought that being an entity like an LLP would itself require regulation. It was premature at this stage. Tom Crowther asked how a Procureco would differ from a firm of solicitors with HCAs. The Chairman agreed that the Procureco might look very similar to an LDP made up of solicitors and barristers, and to that extent it risked looking like fusion between the professions. But in many publicly funded areas it seemed probable that the Bar would not survive purely as a referral profession in its present form. Structural change would be essential for many sets.

10. VHCC/RAGFS Roadshows

Paul Mendelle QC gave an abbreviated history of the VHCC and RAGFS processes, starting with the 'Red Corner' forms of yesteryear, and culminating in the position last year when it appeared that (a) the Carter settlement had produced a stable and predictable means for the LSC to control the great majority of advocacy carried out in the Crown Court, and (b) the VHCC working group was heading towards a solution acceptable to the MoJ and LSC, and to the profession. We were now faced with either a single 17.9% reduction in RAGFS defence fees or a staged reduction at 4.5% annually. For VHCCs, neither of the two options in the consultation paper were acceptable, whereas the one option worked up consensually by the working group and the LSC - 'GFS Plus' - had now been relegated to an Annex of the consultation, and was not being consulted on. Worse still, a linkage had been drawn by the MoJ between the affordability of Option 2 (one of the unacceptable options) and the outcome of a future consultation on 'One Case, One Fee'. This contingent consultation made a mockery of the purpose and means of honest consultations.

Sir Ivan Lawrence QC decried the public myth that barristers earned a fortune. In a recently published list of financially rewarding occupations, he suggested that a typical publicly funded practitioner was now 74th on the list. He characterised the Bar Council's handling of the relationship with the MoJ and LSC as one of looking for the 'least worse case' for the future. He was adamant that 'least worse' was never going to work for the Bar. In any future Bonfire of the Quangos, it might cost some £70m to abolish the LSC and to redeploy the 1700 staff to do something else. The work of the LSC might easily revert to where it had come from, pre-LSC; namely, it was managed by solicitors, barristers and the courts. It ought to be possible to save a net £20m to £40m, to be redistributed to make the criminal justice system work as once it had been hoped. Paul Mendelle QC saw savings resulting from the abolition of the VHCC contract managers that would flow from adopting GFS Plus, and more would come from Sir Ian Magee's axe to the LSC. Marc Beaumont reminded Members of the forthcoming address by Domini Grieve MP to the Public Access Bar Association (PABA). This would be an ideal occasion for such a dialogue. Eleanor Mawrey spoke enthusiastically of the effect on local MPs of a joint visit by constituency solicitors and barristers. She offered to help if necessary. Fiona Jackson observed that talk of 'negotiations' was misguided, as it

implied a consensual process.

The Chairman felt that the recent NAO report on the LSC did much to support Sir Ivan's broad criticisms of the LSC. A new government might be attracted to a review of the LSC en route to repatriating it back into the MoJ as an Executive Agency. A £50m saving might be possible.

11. Constitutional and Governance Issues

The Chairman reminded the meeting that the dual certification process, to confirm the degree of regulatory independence required by the LSB Internal Governance Rules for an Approved Regulator and its regulatory arm, was due to be actioned by the Bar Council and BSB by 30 April 2010. Consequently, any constitutional changes might need action by the Bar Council at its meeting on 13 March. The Bar Council team for this work was led by Nick Lavender QC.

Nick Lavender QC gave a concise summary of the issues and the way forward by making five main points. First, Internal Governance Rules (IGRs) was a form of meta-regulation for anoraks inasmuch as it described the process of rules about rules about bodies that made rules. Second, he understood how John the Baptist must have felt, knowing there was a greater One to come. The March Bar Council meeting would make decisions on the Bar Council Constitution and Standing Orders, and on a BSB constitution that would permit the BSB to produce its own Standing Orders. Third, the task of the joint working group was going well, and he was hopeful it would be complete for the March Bar Council meeting. Fourth, he put the work into its proper context by observing that the Bar Council had made the really big decisions years ago with the formation of its regulatory arm. The IGRS were the inevitable next step, and were an exercise in tidying up. Finally, we had no choice but to comply with the delegated legislation under LSA 2007, which required our statement on dual-certification by 30 April 2010.

12. Jackson LJ Costs Review

Michael Todd QC illustrated the contentious nature of the Jackson Review by noting Jackson's original intention to issue advanced copies to a number of stakeholders. This good intention gave way to a blanket ban on any advanced notice to the professions. It had been clear from the launch of the Review report that Jackson LJ had the backing of the senior judiciary: the Master of the Rolls confirmed that Jackson LJ would be also responsible for implementing his own recommendations. The Chancellor had said there would be no cherry-picking; it would all be adopted. Some of the recommendations had implications for the Bar and for the Treasury. Michael Todd QC commended the 10-page Executive Summary of the Review Report, which had been included in the meeting agenda.

Headlines included: an end to referral fees for personal injury cases; success fees to be

capped at 25 %; qualified one-way costs shifting, such that a successful defendant would not get costs from the claimant, but would be required to pay a successful claimant's costs; awards for general damages to be increased by 10%; the terms of contingency fee agreements to be regulated; a move to fixed costs in the fast track for all types of claim; and a green light for a Contingency Legal Aid Fund (if the money could be raised).

At first sight, it seemed to Michael Todd QC that we should concentrate on the arguments for success fees; the implications of Jackson for access to justice; and that we should consider adopting CLAFs as Bar Council policy. Costs management would require additional training for judges, and better case management, with its attendant cost implications for the MoJ and Treasury. Jackson LJ had said that he would engage in no further correspondence on the Review. Now it was all about implementation. In conclusion, Michael Todd QC thought that the outcome would be disastrous for Personal Injury and Clinical Negligence practitioners, and potentially disastrous for the Young Bar. With no ring-fencing of advocacy fees, the opportunity presented itself for solicitors to make greater inroads.

Marc Beaumont drew attention to para 3.4 of the Executive Summary, and questioned whether CLAFs were a good or bad thing. Why should they become Bar Council policy? Ivor Collett was concerned about the effect, day-in day-out, on the quality of advocacy in court, and he suggested that close contact was needed with the County Court judiciary. Stuart Brown QC confirmed the view that the overall effect on the Bar would be disastrous. Given that no legislation was required to implement much of the Review, what would the Bar Council do about it? Christopher Hancock QC felt that ring-fencing advocacy fees might be the only remedial step.

Michael Todd QC spoke of CLAFs as representing an alternative funding path for access to justice. He suggested that we should ask Guy Mansfield QC, one of the original exponents of CLAFs, to advocate CLAFs on behalf of the Bar Council. Michael Todd QC pointed out that he had not yet had the chance to reconvene his Working Group, the members of which were sure to consider the arguments about the limits set by Jackson LJ. He would report back to the Bar Council.

13. Any Other Business

Stephen Leslie QC encouraged members to attend the forthcoming South-Eastern Circuit lecture on libel tourism, to be given by Lord Hoffman.

14. Date of Next Meeting

The next meeting would be held at 1000 hrs on Saturday 13 March 2010 in the Bar Council offices.