

Minutes of the Bar Council Meeting held on Monday 10 December 2012 at the Bar Council Offices

Present:

Michael Todd QC - Chairman
Maura McGowan QC - Chairman-Elect
Mr Oliver Heald QC MP - Solicitor General
Keir Starmer QC - Director of Public Prosecutions

1. Apologies

Apologies for absence had been received from the Rt. Hon. Dominic Grieve QC MP, Stephen Collier, Natalia Levine, Nick Cusworth QC, Charles Cory-Wright QC, Tim Devlin, Alexander Learmonth, Dr Mirza Ahmad, Zoe Saunders, Andrew O'Byrne QC, Robert Lawrie, Adam Hiddleston, Sarah McCann, Michael Soole QC, Lucy Frazer, Felicity Gerry, Martin Griffiths QC and Charles Hale.

2. Inaugural Speech of the Chairman of the Bar for 2012

Michael Todd QC welcomed everybody to the last official meeting under his chairmanship, at which Maura McGowan QC, the Chairman-Elect, would deliver her inaugural address. The Chairman thanked Ms McGowan and said that it had been a pleasure to work with her. He has every reason to believe that she will make her mark.

The Chairman-Elect delivered her address.

Engaged and in control

"Taking control" is the theme of today's speech and the plan for the year ahead. Not me. But all of us taking charge; taking control.

We need to be trusted to take control.

- As I see it, we are trusted by the public. We cannot take that trust for granted. At a time of a collapse of public confidence in politics and other institutions we have to earn and maintain their respect by better informing the people we

represent, whether as clients or as citizens on whose behalf criminal and many public law cases are prosecuted and pursued.

- As a Council we need to be trusted by the profession. We have to re-build that trust by better informing practitioners about what we are seeking to achieve and how we are acting and re-acting.
- By our regulators. Regulation is a fact in the life of any modern profession. We have to establish a relationship that is not based solely on the resented imposition of more and more rules, the purpose of which is not or cannot be understood. We regulated ourselves very efficiently and successfully for hundreds of years. We can play a positive and valuable part in our future regulation. We have nothing to fear from proper and sensible regulation.

Taking control requires us all to become engaged and involved in seeking to determine how the future of the profession develops. By all I don't mean we few, we happy few. I mean the entire profession.

- This is a Council that represents one profession united in standards but divided in practice. Employed and self-employed. Commercially funded and publicly funded. Senior and junior. The driving purpose of the profession is the maintenance of the rule of law through our skill, our integrity and our excellence.
- We do what we do better than anyone else; we need to re-build our confidence and to have trust in ourselves.

The Rule of Law depends upon effective access to justice for all. In whatever discipline, we enable people to gain access to justice. From the most powerful commercial organisations or wealthy oligarchs to the least powerful, the most vulnerable and disadvantaged.

- Currently the areas that are thriving are typically those which have the least direct involvement with Government and are the least dependent on public funding. Those who occupy the opposite position are suffering the greatest difficulty. Ironically they are the areas of practice that publicly demonstrate the best qualities of the Bar - independence, integrity, and courage - applied in the most difficult and demanding circumstances.
- I cannot identify that problem without acknowledging its principal cause. The priority of the Government is and will remain the inadequacy of public funds properly to meet the demands placed upon them. That leads to the necessary acknowledgement that liberal state funding of expert representation in some proceedings is a thing of the past.
- How do we take control of that problem? In my view it has to be met head on. The country's financial position will not improve in the immediate future.

- What are the consequences? We know the removal of legal aid from some areas of work and the reduction of fees paid in other areas.
- The better question is, how can the consequences best be managed and influenced?
 - I am determined that these are questions for the whole profession, not just for this Council. For too long too many have felt remote from decisions that affect their professional future, in effect disenfranchised. In consequence they felt that their only recourse was to complain long after such decisions had been taken.
 - We must all seek to play a part in shaping what happens by taking control of our future. Easier said than done, but we have the capacity to look beyond simply trying to turn the clock back. We are resourceful and innovative. We have been forced to face change in the past and have adapted and thrived. We have to look forward, accept change where necessary or inevitable, build on it and continue to work in the best interests of the public.

In determining how that might be achieved we might start by identifying or reminding ourselves who we are and what we represent.

Commercially-funded Bar

Its outstanding qualities are internationally acknowledged. Indeed it is sometimes portrayed as being the favourite of the administration given its importance in the attraction of a vast amount of foreign litigation to the benefit of the economy. The commercially funded Bar has built and developed on its expertise to meet the demands of a more astute client base, a vastly different commercial and mercantile market, it is open to change. It has and continues to play a vital role in the proper management of society to the greater public good.

Publicly-funded Bar

Again, its outstanding qualities are internationally recognised. Often, and bizarrely, more abroad than at home. However, it is not seen by anyone as the favourite of Government. It is extraordinary and extraordinarily sad; that the Government's attitude to each seems diametrically opposed and apparently influenced solely by what makes money and what costs money.

- There has always been a symbiosis between these two branches of the profession. Both sides would lose that at their peril.
- The challenge for the year ahead, as always, is how to reinforce the strengths of the successful and start to remedy the problems of those most under threat.

We are recognised as being an institution of imagination and influence. Deservedly so, we demonstrate that by the work we do in the public interest, to assist in the development and refinement of legislative changes. We can better demonstrate our importance to the proper functioning of society by more extensive comment on current issues, by greater exposure of the vast amount of work done for the Law Commission and the like.

- We have always played a wider role in upholding the rule of law. We respond and contribute to Government consultation papers, Law Commission consultations and much, much more. I am personally very proud of the enormous contribution this Council makes to the proper change and development of the law through the Law Reform Committee and its gentle but formidable chairman Stephen Worthington QC. The members of that committee spend hours of unpaid time going through, voluminous and complex publications, seeking to improve, to clarify and to reason their way to proper change and development of the law. The social value of that work has for too long gone unrecognised outside the Bar. Why are we as a profession not given more, or even some credit, for this vital and selfless work? Is it because it doesn't appear to be newsworthy?
- We should make what we do more publicly known and available. It is a service of enormous skill and expertise provided, by us, unpaid for the public good.
- It would be interesting to calculate the financial cost of the benefit that this provides to Government.
- We must become more proactive and creative. Not just in our own interest but in the public interest too. Our interest runs in parallel with that of wider society. I intend to do all I can to offer the opportunity to practitioners to see those arguments being put forward, on their behalf, to the Ministry of Justice and Government.
- In particular I intend to offer the full support of the Bar Council to Lord Justice Lloyd Jones, the new Head of the Law Commission in his struggle to maintain the independence, apparent and real, of the Law Commission from Central Government. It seems to me that the separation from the state of a body set up to comment on and criticise, where necessary, the proposals of the state must as a matter of fundamental principle be maintained.

When I stood for election in the spring of 2011, I said the following in the statement I put out.

"I am very much aware of the need to look for new ways to develop the practices of all practitioners and particularly those at the beginning of their careers. I am deeply committed to the long term future of the Bar.

I am also acutely aware of the importance of maintaining and developing the greater equality and diversity that the Bar has achieved in recent years.

We should all be conscious of the impact that proposed cuts will have on family work, probably with a disproportionate effect on female practitioners, and on crime, probably on BME applicants also and upon the young Bar in all areas of practice. But these problems are not restricted to public funding, civil practitioners relying on CFAs may suffer equally drastic cuts in light of the Jackson review as adopted in the recent Ministry of Justice response.

A great deal of what the Bar Council does is unappreciated or misunderstood, particularly at a time when the profession is so fearful. I have seen the dedication and know of the deep concern of Council members. More constructive communication is essential. "

One of the most important challenges of the year ahead is to ensure that the qualities, the levels of excellence in integrity and skill are recognised and appreciated. I see that as the main focus of my role as Chairman. We cannot be deflected from that by setbacks or defeats. There is no greater certainty than if we give up the task of persuasion we will lose. We are advocates and advisors of the highest standards and abilities. We must meet the challenges facing us all.

Michael Todd QC invited us to invest in our future; I continue to pursue that but in order to do that we all need to be engaged and in control of our present.

- **Of our work as specialist advocates and advisors at the highest level of skill. We must find better ways of communicating the quality and value of what we do to the public at large**

When a commercial organisation needs advocacy or advice at the highest level they go to counsel for that advice. They seek the independence and skill of the referral Bar. They choose that expertise because it provides the service they seek in an economic and efficient way. In effect they purchase, at a market rate, a piece of work or advice. Having taken that piece of work or advice the relationship is over. They do not have to employ the barrister with all the attendant costs and responsibilities. Historically exactly the same relationships have been brought temporarily into existence between the publicly funded Bar and its clients. The difference of course, is that the funding is met from the public purse and not the client's pocket. Does that difference, simply as to the source of funds, justify the proposed changes in the relationship between client and barrister? Do the constraints on funding caused by the economic situation justify the possible dismantling of a structure that works and has worked for centuries? The Rule of Law depends on proper access to justice for all. An obsession with cost misses entirely the social importance of an independent

Bar. Constraints on funding should not be driving fundamental changes to a system which has not continued for 800 years simply by accident or indifference. The structure of the referral Bar continues because it works, in the interest of the individual and most importantly in the interest of the wider public. It is not by accident or indifference that it is the one which astute and well informed commercial clients choose as their first preference.

Given my practice I am acutely aware of the profound concern at the publicly funded Bar about the current state of affairs. As Chairman of the Bar I am well aware of how much time and effort on the part of this Council and commercially funded practitioners in particular is devoted to pursuing the interests of the family and criminal Bar. That work and effort will not stop; all that can be done will be done. But I am anxious to ensure that this remains a Council for the whole Bar. All sections of the Bar can only survive through a symbiotic balance.

- **Of redefining our relationship with our regulators**

Independent regulation is here and here to stay but regulation is just that, it is not management and should not determine what we do, rather how we do it. It is not the function of a regulator to seek the total dismantling and restructuring of the system.

Recently I was asked to suggest names of members of the Bar who might become members of the Legal Services Board, the request was couched in terms that I nominate barristers "committed" to change in the provision of legal services. My reply, that surely what they wanted was people "open" to change, was met with stunned and continuing silence.

The LSB is with us for at least the next two years. Its second term was granted after its first review. There is support both in Government and in general for the view that regulation should not be too heavy a burden. As a profession which was recognised for the efficacy of its self-regulation, surely we can work towards meeting the next review by being able to demonstrate that one external regulator is enough.

It is reality that the future success of the profession depends on a successful and efficient working relationship between the regulators and us. We have to work constructively to achieve that, so do they. Regulation must be proportionate to risk, it must provide for public confidence without placing so heavy a burden on the object as to stifle or destroy. We have to work together to make sure the proper balance is struck.

- **Of the fair and reasonable remuneration for work done. The market influences the commercial aspect of practice. The economic climate also influences the publicly funded aspect.**

As specialist advocates and advisors, the ring-fencing of advocacy fees has long been considered to be the best scheme to be applied for the administration of the system in the public and the profession's interest. I intend to pursue this ideal. It has worked and was acknowledged to work in the public interest for years. Again, whatever financial constraints apply, the principle of reasonable rewards for skilled, difficult and vitally important work cannot be sacrificed. There are many sources of information and advice that we can all upon, each other, practice managers, clerks and others. I repeat Michael Todd's invitation of last year to include practice managers and clerks in the work of this Council, in general and in this particular and vital area.

- **I have said that we must all take control, I stand by that but I realise that I cannot abdicate the responsibility of becoming leader by encouraging everyone else to take responsibility for their own future**

I intend to do all in my power to engage with the entirety of the Bar, to listen and to promote the best interests of each and every section of the profession. Over the last year Michael Todd worked his way around the country eating cake in almost every county, certainly on every circuit. Leaving the cake for others, I have begun to work out a programme of visits, not just to each circuit but also to as many of the centres as have local bars as we can manage. I have spent a lot of the last 10 years of my practice working all around the country. I know how isolated some practitioners feel but it is a two-way exchange, we have to encourage greater involvement. I will continue the practice of visiting chambers all around the country but invite all practitioners to contribute in fashioning our approach, our responses and even our initiatives.

1. Of access to our clients. Whether by the traditional referral means or by novel means, for example through direct access. This is a supplement, which will work in some cases for some practitioners. It will make available the prospect of direct instructions from solicitor and commercial clients abroad, largely to the commercially funded Bar.

The dawning realisation on the part of foreign lawyers that if they need an expert opinion or piece of work they can come directly to a member of the Bar, either for their own needs or that of their clients. They don't need to duplicate fees by consulting more than one lawyer. It forms an increasing source of work to certain areas of practice; it is thriving but must be further encouraged.

Almost half the self-employed Bar has trained and is now qualified to accept instructions in this way. That cannot simply be as a result of the difficulties which the publicly funded Bar faces, it must mean that there is a need on the part of clients, domestic and international, to instruct counsel by this route. Further there is a willingness, possibly even enthusiasm, on the part of barristers to receive work in this way. It is a supplementary format, it is not designed nor should it replace the traditional provision and acceptance of instructions. For it to be effective as a means of producing work for the publicly funded Bar it must become permissible for a barrister to accept direct instructions in cases in which a client is eligible for legal aid. I intend to continue to push for that rule change. I will also press for and support stringent regulation of this facility, particularly for the more junior practitioners.

2. Of standards and quality through continuing education

We have the most remarkable facilities available to us, in the Inns. How many members of the Bar have not been back to their Inn since Call? How many only think of going back when considering a venue for a wedding reception or hoping to be made a Bencher? The Inns want and need to become more relevant and we must take advantage of that willingness. They were historically places of education, they should become so again. I intend to bring about the greater involvement of the Inns and the Advocacy Training Council in the provision of continuing education. Whether it's as basic as free or virtually free CPD points or the ideal of seeing the Inns as colleges for life. With all the benefits of education combined with the re-energisation of the Inns. The Bar Council continues to provide an excellent service in the training courses and seminars that it runs and we will work with the Inns and the ATC to provide a greater service to the profession. When HHJ Hilliard QC was Leader of the South Eastern Circuit he proposed and we ran a series of courses on different areas of practice. Not for people who already practised in that field but for those who wished to change their practice or at least diversify. It was a good idea and proved very popular. We will carry on with it and encourage other circuits and SBAs to promote it outside London the South East.

3. Of representation by the Bar Council of the profession

There must be more direct responsibility to our constituents: we should be getting information out and back. I want to see an end to the fact that we have allowed the profession to remain unaware of the vast amounts of work done by the few for the many. This year we intend to start an induction process for newly elected members of the Council. No elected or nominated representative should take the post and continually fail to attend. Each of us must find the means of channelling information in and out of this Council. I have always made the offer and I repeat it, that I am keen to be contacted directly by any member of the Bar who wishes to criticise, inform or praise. However unlikely the latter might be. I don't invite abuse, although

I have been very impressed by the imagination and creativity displayed so far. For some of you, the task of reporting back to your circuit or Bar Association committees is straightforward and no doubt works well already. I see some but not all but will continue to offer to make any contribution to such reports and newsletters, if invited.

For the elected representatives the process is not so straightforward but is equally or possibly even more important. We will assist in any way possible to facilitate that process. But the process must be developed. We must communicate.

4. Of our Bar Council costs

Stephen Collier and his team have done an unbelievable amount of work to make the current situation clear and available to us all. It is a testament to the unity of the Bar Council that, as someone who was recently an employed barrister before he became a company Chief Executive, Stephen fills such an important role on this Council. With Stephen's help and guidance we must be vigilant to ensure we manage our costs in the interest of our subscribers. We must look closely at the costs of regulation and running the Council itself, in particular this building. The appointment of a CEO has been a plan almost continually since the last one resigned. The process has begun; I intend to push it forward. I believe that if we choose the right person for the job, he or she will improve performance and efficiency in the costs of running this organisation. With Stephen in charge I have no doubt that we will ensure the proper and open financial control of the council. We will revisit the budget question at every necessary opportunity throughout the year. The end of year scramble to pass a budget must not happen again.

5. Of our Bar Council income through the PCF

Following on from the consultation on subscriptions we have an opportunity to review the fees paid and once the numbers are crunched we will consult on any changes. We can and we will ensure a fair system for the raising of funds.

6. Of educating the profession who seek appointment to the Bench or silk

With the Members' Services team, headed by the indefatigable Paul Mosson, we will seek to provide training in interview techniques, application form filling and all those necessary skills which most of us haven't used for years.

7. Of PR and publicity

I will consult with, listen to and carry through all proper suggestions to get the message to Government but more importantly to the public that we are cost effective, skilled and honest and are the right people to act for them in all types of

work. Whether it's by representing them as individuals or by prosecuting on their behalf as citizens.

We have, courtesy of the fantastically good Communications team; under the tireless Toby Craig developed a good, open and honest relationship with many journalists in the print and other media. But for too long we, the judges and anyone who has ever quoted the Human Rights Act, have suffered from being the butt of lazy journalism in certain sections of the Press. Often by Government ministers in search of a quick headline. As individuals it is depressing and irritating but on a wider level it may actually have a far more pernicious effect. Are the fundamental rights of the individual or groups in society actually being damaged by the corrosive effect of coverage which seeks to persuade the public that rights are only ever upheld if pursued by dodgy lawyers in front of incompetent, or even worse, open-minded judges on behalf of the underserving? The reality is very different. Members of the public who come into contact with barristers are, generally, impressed by our skill, our integrity and our capacity for work. That's both the reality and the public perception we must continue to promote. If we are all portrayed as money grabbing and slightly dodgy then the publicity battle to justify the reduction of fees is half won already. We must make the true position known to the public.

8. Of BARCO

This is a truly great example of how when we actually think constructively about the problems or challenges that face us and the solutions that might be available we can adapt the way in which we practise to our own advantage and that of the client. Handling funds on behalf of a client is an area fraught with difficulty, it's an area in which we have no experience but the application of the skill and expertise, for which some of you are famous, came up with a solution which provides a simple, safe and ultimately profitable means of meeting the need. It will facilitate the taking of fees in direct access work in all areas and will enable commercial practitioners to provide a new and innovative service to their direct access clients. Whilst I would like to claim all the credit when the scheme is launched in the spring this has actually been Mike's project and I'm delighted that he will stay on as Chairman of the Committee.

9. Access to justice

The recent Fundamental Rights Conference pointed out the obvious, that in times of austerity the demand for access to justice doesn't decrease, it increases. Access to justice is central to the Rule of Law and to a stable society. Efficient and effective justice is essential but justice cannot simply be measured in cost per case or per litigant. All members of society have basic rights; the right to have a wrong righted whether in a civil matter, a social matter or as the victim of crime or as someone accused of crime.

We have a duty to the public to keep contributing to the development of the law. We have a duty to the public to maintain the Rule of Law by ensuring access to justice for all, especially the most vulnerable. But for today's purposes we must not forget that we have a duty to ourselves, we are right to strive to maintain our reputation for excellence. We can only justify that if we maintain standards, in times of hardship we have to be even more vigilant that those standards continue to be met. In the rare instances when they are not it is us who must expose them.

The service that we provide is best shown in the vast amount of work done in the public interest pro bono. That work is done or supported by the profession and its commitment to social responsibility through the Pro Bono Unit, Free Representation Unit and tirelessly by individual members of the profession who demonstrate their individual social responsibility by their work in law centres and for legal charities. The "old lie" of our self-interest is best highlighted by the response of the profession and the Bar Council to LASPO. Vast areas of private family law, immigration, housing and other areas of welfare law have been removed from the cover of legal aid. That means that those people, the most vulnerable, will not be represented. Instead of simply bemoaning the loss of paid work, the profession has, with others through the Civil Justice Council, set about ensuring through education and advice that that entirely powerless, and perhaps therefore not politically influential, group of people will have some level of support at a time when they are at their most vulnerable. I continue to ask the Bar to help this important work by offering to take on the work. For the juniors, it is useful experience. For others it may be an opportunity to look at other areas of practice. For all it shows what we do and why we do it. Or by contributing to the costs of running this excellent organisation.

10. Sierra Leone

Earlier this year the newly elected President of the Bar of Sierra Leone came to see us, with the High Commissioner, to ask for our help. He is a charming, gentle man who is struggling to re-build the Bar in his country. Life in Sierra Leone is slowly but surely coming back to some form of normality after years of a terrible civil war. The Bar is trying to restore itself, not simply as a group that provides legal services for money but as an institution that can be trusted for its skill, integrity and standards of excellence. A certain amount of irony in coming to us you may think. I want to help him, not at a financial cost to this Council but by inviting individuals to become involved. There are members of the Bar doing this work already and I have to pay tribute, in particular, to Richard Honey who, entirely out of his own pocket, has travelled there to become involved in helping to train the judges and practitioners in ethics and professional standards. I intend with the involvement of Richard, Mrs Justice Dobbs and others to promote this.

Over the course of my year as Vice-Chairman I have met the leaders of the home Bars. They face many of the same difficulties as we do. The Republic of Ireland recently fought off the most profound challenge to its continued existence in any form by the introduction of Government regulation. We can learn from one another and I look forward to working with all the home Bars in the course of the coming year. Mark Mulholland QC, the leader of the Northern Irish Bar, has kindly accepted our invitation to give this year's Rule of Law lecture. He will speak on global terrorism and the Rule of Law at Inner Temple on 18 December at 18:00. I have no doubt it will be informative and entertaining. Attend, if you can, he is very welcome.

I would like to express my thanks to all the staff at the Bar Council. Their loyalty and dedication is amazing. It is invidious to single out individuals but I must thank the Directors, Vanessa Davies, Oliver Delany and Mark Hatcher for their help, support and unceasing patience.

I must also thank Charlotte Hudson who, with the help of Victoria Carpenter and Sarah Riley, actually runs the Bar Council. I cannot imagine what life was like before the trinity was established but I'm very grateful they're here now.

This is the time between times at the Bar Council: the end of Michael's year and almost the beginning of mine. I stop being Michael's Vice and start having a Vice of my own, Nick Lavender QC. I know that Nick will be a fantastic support and help and I am pleased and relieved that he is here to take responsibility for all that goes wrong next year.

We all owe Michael a huge debt, but in particular I am so very grateful for his making the last year such an absolute delight. There have been times of great difficulty and enormous frustration but it has also been great fun. The Bar Council will miss him, it will certainly be a quieter place.

To conclude

We have a long and proud history of public service. We facilitate access to justice, for all but especially for the most disadvantaged, combined with the integrity borne out of our over-riding duty to the court and the self-imposed ethical standards which have always identified and defined us.

In recent years we have seen massive expansion in the number of entrants to the Bar. That has been a force for good as it has promoted social mobility and greater diversity but it presents real difficulties now as we seek to cope, as painlessly as possible, with a reduction in the volume of work available to the Bar and, for many, substantial cuts in the fees paid for that work. We have to face up to that problem and meet it constructively.

We have to maintain our standards; we must continue to strive to be excellent and to place integrity at the top of our list of our qualities and qualifications.

By engaging in the process and offering constructive proposals we can properly establish ourselves as authors of change not its victims.

We have to get ahead. The Lord Chancellor has recently announced a review of legal aid, we will of course contribute to that. And seek to put forward our case constructively and with determination.

But I would like to see us carry out our own analysis of public payment for legal services. We have worked in and with this system; we do not simply administer it from the outside. We are not simply driven by a desire to cut costs, we can see all along the system, we know where the failings are and can suggest remedies or solutions.

I have met a substantial number of practitioners throughout the country who want to get involved; they want to make the system work for the Bar and for the public. All those people who may now regret it have offered to help and they will soon receive a request calling in those promises. We will, before the end of the year, start inviting practitioners to become involved in suggesting ideas and seeking to design a model that will work in the best interests of the public and of the profession. It may well have many aspects of the old, it may be completely new, we must see and seize an opportunity for changing the system for the better. I do not believe that those of us who profess an interest in the future cannot take charge of it and seek to make it work.

As practitioners and as citizens we deserve a system that operates in the public interest. This may be the last chance to ensure such a system exists and can survive. We all have to take that chance.

The Solicitor General, Mr Oliver Heald QC MP, apologised on behalf of the Attorney General for the latter being unable to attend owing to a conflicting commitment. The Solicitor General said that he recognises that the Bar is going through difficult times, paying tribute to Michael Todd QC's hard work and praising Maura McGowan QC, whom he wishes well, on a thoughtful and wide-ranging speech.

3. Date of Next Meeting

The next meeting will be held at 10.00 on Saturday 12 January 2012, in the Bar Council offices