

BAR STANDARDS BOARD

REGULATING BARRISTERS

Part 1 - Public**Minutes of the Bar Standards Board meeting**

Thursday 23 July 2015, Room 1.1, First Floor
289 – 293 High Holborn, London, WC1V 7HZ

- Present:** Sir Andrew Burns KCMG (Chair)
Patricia Robertson QC (Vice Chair) – items 10 - 16
Rolande Anderson
Malcolm Cohen – items 6b-16
Justine Davidge – items 7-16
Simon Lofthouse QC – items 7-16
Andrew Mitchell QC
Tim Robinson
Andrew Sanders
Anne Wright
- By invitation:** Keith Baldwin (Special Adviser)
Sarah Brown (Special Adviser)
Nicola Sawford (Board Member designate)
- Bar Council in attendance:** Stephen Crowne (Chief Executive, Bar Council) – items 1-7
- BSB Executive in attendance:** Viki Calais (Business Manager)
Kuljeet Chung (Policy Manager) – items 1-7
Vanessa Davies (Director General)
Joanne Dixon (Manager, Qualification Regulations)
John Hall (Business Support Officer)
Oliver Hanmer (Director of Supervision)
Sara Jagger (Director of Professional Conduct)
Ewen Macleod (Director of Regulatory Policy)
John Picken (Governance Officer)
Pippa Prangle (Regulatory Risk Manager)
Amanda Thompson (Director of Strategy & Communications)
Simon Thornton-Wood (Director of Education & Training)

Item 1 – Welcome and introductions**ACTION**

1. The Chair welcomed members and guests to the meeting. He reported, with regret, that the following individuals will be leaving the Board in the near future ie
 - Simon Lofthouse QC (leaves 6 August 2015)
 - Richard Thompson (leaves 31 August 2015)
 - Sarah Brown (Special Adviser) (leaves 31 July 2015)
2. He paid tribute to the excellent and valuable service that all three members had given to the BSB. He noted, with gratitude, the six year period of office completed by Richard Thompson.
3. Owing to Richard's absence from the meeting, he focused on the contribution made by Sarah Brown and Simon Lofthouse QC. In the former case, he applauded Sarah's clarity of thought and expertise in policy formation from which the BSB had greatly benefitted over the past nine years. In the latter,

he praised Simon's outstanding efforts in chairing the Professional Conduct Committee and his sustained involvement in that area of work which, cumulatively, had totalled over fourteen years. This was endorsed by Andrew Mitchell QC who had served on the Professional Conduct Committee whilst Simon was chair and had been impressed by his leadership skills.

4. The Chair also welcomed John Hall, the newly appointed Business Support Officer, who was attending his first meeting.

5. **Item 2 – Apologies**

- Rob Behrens;
- Adam Solomon;
- Sam Stein QC;
- Richard Thompson;
- Alistair MacDonald (Chairman, Bar Council);
- Chantal-Aimée Doerries QC (Bar Council Vice Chairman);
- Lorinda Long (Treasurer, Bar Council);
- Mark Hatcher (Special Advisor to the Chairman on Representation and Policy).

Item 3 – Members' interests and hospitality

6. None.

Item 4 – Approval of Part 1 (public) minutes (25 June 2015)

(Annex A)

7. The Board approved Part 1 of the minutes of the meetings held on Thursday 25 June 2015.

8. **Item 5 – Matters Arising**

None.

Items 6a & b – Action points and Forward Agenda

Action points and progress (Annex B)

9. The Board noted progress on the action list.

Forward Agenda (Annex C)

10. The Board considered the forward agenda list. Tim Robinson suggested an item be added on HR, specifically the outcome of the 2015 staff survey and the structure of Board appraisals. Both topics were raised in his most recent meeting with the Director of HR.

**JP to
note**

11. The following items will also be added to the list:

- outcome of the fees and charges consultation (cf. min 15d below);
- research on Youth Court advocacy (cf. min 38 below).

**JP to
note**

[note: as suggested by Rolande Anderson, Board appraisals might also feature in future discussions about governance].

Item 7 – Fees and Charges – consultation

BSB 054 (15)

12. Amanda Thompson commented as follows:

- the paper sets out the principles of a planned consultation on fees and charges with the Bar Council and the wider profession (Annex 1 of the paper);

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- several other BSB consultations are already underway. In view of this, it will be published towards the end of the current year with a view to implementing any changes at the start of the new financial year;
- the paper recommends that the PRP Committee be asked to consider the final consultation document prior to sign off by the Director General. This reflects its previous involvement in discussions on this topic.

13. Members commented as follows:

- there is no reference about the principles that relate to fee waivers. This should be included. The BSB currently offers waivers on the grounds of demonstrable financial hardship. However we should seek views on whether this offer of subsidy should remain the responsibility of the BSB or if it should be the preserve of the representative body or, indeed, if it should be provided at all. Several other regulators do not offer fee waivers;
- in terms of barriers to the profession, we need to look at equality impact assessments across the piece from entry to final qualification.

14. In response the following comments were made:

- the consultation will address fee waivers. This is also likely to be highlighted in the equality impact assessments undertaken beforehand;
- in some respects, the question of whether the BSB or Bar Council operate waivers is immaterial since the source of money, ie the PCF, remains the same;
- notwithstanding the above point, we could seek opinion on whether waivers should be available as a matter of principle.

15. **AGREED**

- a) to approve the approach and timescales to the consultation as set out in the paper providing the above comments about fee waivers are taken into account.
- b) that the Planning, Resources and Performance Committee should consider the consultation document prior to sign off by the Director General.
- c) to delegate authority to the Director General to sign off the final consultation document.
- d) to receive the results of the consultation in early 2016 with a view to deciding on the BSB's fee structure for 2016/17.

AT / VC

**AT / VC to
note**

**VLD to
note**

Item 8 – Insurance requirements for single person entities

BSB 055 (15)

16. Kuljeet Chung reported on the outcome of the consultation on insurance requirements for single person entities. She highlighted the following:

- all 16 respondents (either barristers or representative bodies) supported the option of a rule change to require single person entities to insure with Bar Mutual Indemnity Fund (BMIF);
- despite efforts on the part of the Regulatory Policy Department, there were no responses from consumer representatives;
- the Board needs to decide its course of action in the light of the feedback received and with due regard to the regulatory objectives. An analysis in respect of this is provided in the paper (paragraphs 20-31).

17. Members commented as follows:

- the lack of a response from consumers is, perhaps, understandable given esoteric content of the consultation. It could also be reasonably perceived as concerning the business arrangements of barristers rather

than the interests of consumers, notwithstanding the potential impact on the public;

- the paper gives proper regard to the public interest aspects of this issue and is convincing on this point, particularly in light of the evidence collated. The option for a rule change should therefore be pursued;
- it may help in approaching the LSB to demonstrate our understanding of the arguments in favour of the open market option. The paper presented focuses on the benefits of the mutual model and does not demonstrate enough consideration of the benefits of allowing single person entities to go to the open market. Though our deliberations have been balanced and fair, we need to properly reference this alternative case as a matter of principle.

18. Ewen Macleod noted this point and commented that that further evidence would be incorporated in the rule change application. This will address the open market question more directly but some of its content is confidential so had not been included here for public discussion.
19. Sarah Brown stated that her view on this issue had changed in the light of the evidence provided. She had initially been sceptical of maintaining a monopoly but a closer analysis had suggested the open market approach would not, ultimately, be in the public interest. She highlighted the following:
- in time, the number of providers for single person entities would most likely reduce;
 - many higher risk single person entities would have difficulty in securing insurance at all;
 - should the BMIF then need to withdraw from the market, costs would increase and these would be passed on to clients;
 - clients could ultimately be faced with less choice and higher costs.
20. The Chair asked about next steps and the need for a review process. In response Kuljeet Chung confirmed the following:
- a consultation report and rule change application is required within the next two weeks. This will need further input from the Handbook Working Group;
 - a review of insurance arrangements for single person entities will be included in future work plans. This is also likely to cover multi-person entities as the LSB may expect that to be done as the next logical step.
21. **AGREED**
- a) to note the responses to the consultation.
 - b) to seek a rule change to require single person entities to obtain their primary layer of professional indemnity insurance from the BMIF. **KC**
 - c) to delegate responsibility to the Executive with input from the Handbook Working Group for finalisation of the consultation report and a rule change application to the LSB. **KC to note**

Item 9 – Standard contractual terms and the list of defaulting solicitors: undertaking to the LSB

BSB 056 (15)

22. Ewen Macleod highlighted the following:
- the paper sets out the Working Group's recommendations in the light of responses to the BSB's consultation on standard contractual terms and the cab rank rule (rule rC30.9.c). It also refers to the list of defaulting solicitors which the Board had previously asked the Working Group to consider further;

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- the undertaking required that we review these rules from first principles. This was reflected in Working Group's approach which assumed these rules would not continue unless it was necessary in the light of the regulatory objectives;
- given the limited response from consumer groups, the Working Group analysed each option described in the consultation using the Legal Consumer Panel's toolkit for consideration of consumer interests. This is set out in Annex D of the paper;
- since the paper had been drafted, the Working Group had further considered the impact of the proposal on the professional principles (which were not addressed in its analysis of the regulatory objectives at annex E). In this regard, it is important to note that an effective cab rank rule stops self-employed barristers from being tied to particular clients and therefore is important for independence as well as access to justice;
- the Working Group has recommended retention of the status quo in relation to the standard terms. It considered in depth the effect of the alternative options in relation to the regulatory objectives, in particular a variation of "alternative 2", which would require barristers to publish their own terms for the purposes of the cab rank rule;
- it concluded that:
 - ❖ a reliance on self-published terms provokes a risk that barristers may use these to frustrate the cab rank rule;
 - ❖ to allow "reasonable" solicitors' terms as a legitimate alternative would unfairly restrict the barristers' freedom to contract. This is because the barrister would be subject to a professional obligation to accept those terms whereas the solicitor would not, possibly to the detriment of our regulatory objective to promote an independent, strong, diverse and effective legal profession;
 - ❖ in either case, the BSB could be drawn in to adjudicate in disputes about "reasonableness" of terms, which would absorb significant time and resources thereby adding to regulatory costs with no identifiable public benefit;
 - ❖ the prospect of regulatory action after the event would be of little benefit to clients. The harm done by delay may already have caused them to miss out completely on the opportunity to instruct their choice of barrister;
- the Working Group had considered the option of approving other standard terms. Whilst others exist it is not realistic to assess every alternative and there needs to be a default "reasonable" option that enables the cab rank rule to be consistently applied. The objections of the Law Society to the standard terms relate primarily to payment terms ie that solicitors must accept liability for barristers' fees and that payment must be made within 30 days of the issuing of an invoice. The first is a necessity when seeking to instruct under the cab rank rule (and the scope of this review did not cover this point). The second needs to be viewed in the context of what is fair and reasonable to both parties, without placing barristers at risk of financial hardship in cases where they are obliged to accept work (which would otherwise have a negative impact on the regulatory objectives);
- The Board needs to consider whether the Working Group has reached the correct decision, in particular whether it is right to reject the alternative proposal of mandatory publication of terms by a barrister for cab rank rule purposes, and, if standard terms are necessary, whether the current terms remained appropriate;

- notwithstanding the above, the future governance of the standard terms is an issue for the Board to consider. The Bar Council is responsible for publishing the terms and could seek to amend these in future. The BSB therefore needs to be able to impact assess the effect of change on our regulatory arrangements and ensure that it has appropriate oversight;
- the Working Group agreed that reference to List of Defaulting Solicitors be removed from regulatory arrangements on the grounds that this is the proper preserve of the representative arm. In consequence, it prepared a tightly drafted guidance note for barristers in support of a more outcome focused rule (paragraph 45 of the report refers). This constitutes a change to rule rC30.7.b and will need the approval of the LSB.

23. The Board unanimously supported the recommendations. The salient points of the discussion were:

- in practice the status quo is a fair balance between the two parties and is the most practical choice given the disadvantages of the alternatives. Moreover, the public interest is best served by minimising delay and uncertainty, both of which would be detrimentally affected by a move away from having standard contractual terms;
- the principles of simplicity and transparency are best met by retaining standard terms as the default option. These principles favour the client and the regulator needs to agree objectively reasonable standard terms in order to protect clients' interests. In addition, the standard terms, as currently drafted, are appropriate. Notwithstanding this, the point about future governance of the standard terms is important and needs to be addressed;
- we need to avoid the BSB acting as arbiter on questions of "reasonableness" as this will be too time and resource intensive as well as a barrier to clients needing urgent assistance;
- the objection of the Law Society about payment terms is not convincing as these same terms are generally accepted as normal business practice in other sectors. Moreover the solicitor would still be responsible for client payments regardless of any change in the standard contractual terms as that forms part of the cab rank rule;
- the removal of reference to the List of Defaulting Solicitors can be supported as the suggested guidance note is comprehensive and properly focused.

24. In terms of formalising governance arrangements, Ewen Macleod suggested either achieving this through the existing protocol between the BSB and Bar Council or that BSB approval is sought on any changes proposed following consultation with the profession. Rolande Anderson stated that there may be times when the BSB itself needs to initiate change to the standard terms. Members agreed with her that the BSB must be able to take an active role in monitoring and reviewing the standards terms as necessary.

25. The Chair invited Stephen Crowne to comment. In response he suggested that, for presentational purposes, the standard terms should remain in the "ownership" of the Bar Council ie be accessed via its website and that any process for review should be able to be triggered by either party but only in a manner which was compatible the BSB's role as an independent regulator.

[note: in practice this can be achieved through the existing protocol between the two parties based on the understanding that the BSB retains the final decision on whether the standard terms remain appropriate for the purposes of the cab rank rules.]

26. The following additional comments were made:
- the BSB should undertake a further review of the standard contractual terms within at least three years;
 - a review of the cab rank rule itself was not part of the undertaking to the LSB but will further investigated as part of a future review of the Handbook;
 - it is likely the LSB will want to see the detail of the BSB's consideration of this matter. In fact much is already in the public domain via our website, but we should seek to be totally transparent in any discussions with the LSB.

27. **AGREED**

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| a) to note the Working Group's consideration of the responses to the recent consultation and its analysis of the options with reference to regulatory objectives and consumer principles. | |
| b) to approve the Working Group's recommendation to retain the current rule rC30.9.c in relation to the standard contractual terms on the grounds set out in the report (paragraphs 29-34). | EM to note |
| c) that the standard contractual terms as currently stated are appropriate for the purposes of the cab rank rule. | |
| d) to write to the LSB by 31 July explaining how the BSB has complied with the undertaking given. | EM to note |
| e) to approve the amended rule rC30.7.b and associated guidance in relation to the assessment of credit risks by barristers, as an alternative to including the List of Defaulting Solicitors in the Handbook as set out in the report (paragraphs 44-46). | EM to note |
| f) to delegate to the Working Group responsibility for agreeing a rule change application in relation to minute 27e above by 31 July 2015: | Working Group |
| g) to institute a further review of the standard contractual terms within three years. | EM to note |

Item 10 – Professional Conduct Committee / Professional Conduct Department Enforcement Annual Report 2014/15
BSB 057 (15)

28. Simon Lofthouse QC thanked Paul Martyn and Sara Jagger for their work in preparing the report. He highlighted the following:
- the report shows that the KPI for concluding or referring to disciplinary action within the eight week service standard has been missed (an actual figure of 69% compared to a target of 80%). The Board has previously been advised that this was a likely outcome due to high staff turnover rates in the Assessment Team and the subsequent impact this had on completion times, particularly in the fourth quarter;
 - the report refers to increased collaboration with other BSB Departments in both managing internal complaints and in seeking to reduce risk of recurrence eg action taken within Education & Training to ensure barristers who complete pupillage actively apply for a practising certificate. This is a positive step forward and should reduce the unexpected rise in internal complaints for the forthcoming year;
 - the Professional Conduct Committee has been greatly strengthened over the years through an increase in the numbers of lay members who have strong regulatory backgrounds. The Committee now has parity between barrister and lay members and is working very effectively.
29. Andrew Lamberti confirmed that a press release will be prepared to accompany the publication of the report on the BSB's website.

30. The Board complimented the clarity and thoroughness of the report. The following comments were made:
- the covering report suggests that an equality impact assessment is “not applicable”. In fact the E&D Committee is working with the Professional Conduct Department to investigate the diversity impact of enforcement decisions;
 - Figures 10 and 11 show low levels of satisfaction among complainants. There has been fall in support compared with last year. There is a reference to this in paragraph 5.4 of the report but the action points (improved web pages) do not seem to give much emphasis to this area.
31. In response to the latter point, the following comments were made:
- there is a strong correlation between satisfaction rates and case outcome with complainants disappointed at the result being inclined to express this in feedback about the complaint process (regardless of how fair and objective it may have actually been);
 - other regulators that do undertake satisfaction surveys have experienced similar responses;
 - the role of the BSB is to maintain standards at the Bar. It ensures complaints about barristers are fairly and objectively assessed. There may be some misconception about the BSB’s role on the part of some complainants and we need to manage these expectations more successfully through better and clearer information;
 - the Independent Observer’s reports to the GRA Committee have documented the very significant effort by PCD staff to give full explanations for the reasons to dismiss a complaint. The correlation described may be understandable but may also be unavoidable.
32. **AGREED**
to note the report and the conclusions and action points set out in the report (paragraphs 5.1-5.6).
- Item 11 – Bar Standards Board Annual Report 2014-15**
BSB 058 (15)
33. Andrew Lamberti circulated some draft hard copies of the Annual Report. He commented as follows:
- the Report is due to be published on 31 July 2015;
 - the PRP Committee gave a clear steer on the tone and level of detail within the Report and this is reflected in the current draft;
 - a final proof read will be undertaken prior to publication and a press release will be followed by messages on social media (Twitter).
34. The Board welcomed the report and complimented the clear style and use of Plain English. Patricia Robertson QC commented as follows:
- we should do more than simply publish on the website and press release. There has recently been adverse comment on the number of consultation papers that the BSB has issued. The Annual Report could help to explain the reasons for this level of activity;
 - contrary to the report, it may be helpful to have some hard copies printed and circulate these to targeted stakeholders eg COIC and the Inns’ Strategic Advisory Group.
35. Nicola Sawford suggested we use LinkedIn as well as Twitter given the number of barristers who use this service.

36. **AGREED**
- a) to publish the Annual Report and promote this through a press release and social media (Twitter and LinkedIn) **AL**
- b) to print a limited number of hard copies and target specific stakeholders as indicated above. **AT / AL**

Item 12 – Chair’s Report on Visits and Meetings – June 2015

BSB 048 (15)

37. The Board **noted** the Chair’s report on visits and meetings.

Item 13 – Director General’s Report

BSB 049 (15)

38. The Board considered the Director General’s Report. Malcolm Cohen asked for a progress update on research about Youth Court advocacy. Oliver Hanmer confirmed that a report is due in August and that the Board will receive a paper either in September or October 2015.

39. **AGREED**
to note the report.

Item 14 – Any Other Business

40. None.

Item 15 – Dates of next meetings

41. • Friday 4 September 2015 (2.00 pm) – single item (governance);
• Thursday 10 September 2015 (4.30 pm) – budget;
• Thursday 24 September 2015 (4.30 pm) – full meeting.

Item 16 – Private Session

42. The following motion, proposed by the Chair and duly seconded, was agreed:

That the BSB will go into private session to consider the next items of business:

- (1) Approval of Part 2 (private) minutes – 25 June 2015 (Annex A);
- (2) Matters arising;
- (3) Action points and progress – Part 2;
- (4) Governance Review;
- (5) Amended Rules for the Inns’ Conduct Committee;
- (6) Any other private business.

43. The meeting finished at 6.00 pm.