



The NSW Bar Association | Sixty Third Annual Report | **1999**

President's Report



The Bar Association remains apolitical, but the horrors of East Timor and our response as a nation to them are too close to be ignored. By the time this is published the 'peacekeepers' may be there. They will need to include a large contingent of gravediggers. Perhaps, as lawyers, we will help pick up the pieces of their society, if enough of the East Timorise survive to require a system of law.

At home the State Labor Government survived another election. The usual law and order auction ran its usual course. I hope we will hear no more about the Coalition's grid sentencing proposal. I doubt we will hear more about the Government's sentencing guidelines legislation: *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998*. It was an election ploy: nothing more. The *Motor Accidents Compensation Act 1999* (which was not an election issue), dressed up as a boon to the poor motoring public, further erodes the already restricted right of people to be compensated for the wrongdoing of others. The fact that more than half the population, including children, do not own motor vehicles, and gain nothing from the legislation, seems to have gone unnoticed. Premiums may go down, as promised. You may safely bet they will go up again, but the restrictions on claims will be set in concrete. Insurers may be quietly proud at the influence they have on the Government of New South Wales. What was never said during the debate, at least publicly, was that the Government costed the new scheme on the basis that 90% of people injured in motor vehicle accidents would receive nothing for general damages. We now know that is the aim; only the worst one tenth will be compensated.

On 2 July 1998 the Council made Sir Maurice Byers CBE, QC

an honorary life member. Sir Maurice was admitted to the Bar in 1944. To our sorrow, he died on 16 January 1999.

The Council broke with tradition in September 1998 when it resolved to meet monthly and not fortnightly. The result has been a more effective handling of issues determined by the Bar Council, in particular the follow-up to its decisions, and less administrative work for the overworked staff.

At my request, Trevor Morling QC reviewed the protocol for appointing senior counsel. He noted the lack of any general dissatisfaction by members at the system. If there is any such dissatisfaction, it has given way to apathy. We are still talking to the ACCC about the system. My thanks to Heydon QC, Walker S.C. and Comans for their assistance in dealing with the issues raised.

The Bar's annual charity remains an important feature of the Association's activities. The 1998-1999 charity (Neuroscience Institute of Schizophrenia and Allied Disorders) received \$37,660 from members. I urge you to be generous to our current charity, The Motor Neurone Disease Association of NSW. It may not be testing the friendship too far to ask you to also give to a charity assisting the East Timorese.

We continue to exert what influence we have in respect of problems of District Court listing and the user-unfriendly Maddison Tower. I congratulate the Government on the appointment of five additional permanent District Court judges. Eventually, there may be no need for acting judges. The Association's view on that issue has been expressed often enough not to need repeating here.

In March 1999 the Association established the Barristers' Resolution Service, which provides a daily list of barristers available to be mediators. My special thanks to Mary Walker for her unstinting work on developing procedures for alternative dispute resolution. *Pro bono* work continues unabated. In addition to the existing service, we are co-operating in the Federal Court's *pro bono* scheme.

Legal Aid (or the lack of) remains a big problem. There are now insufficient funds to run a reasonable scheme. The dismissal of the Managing Director, Mike Cramsie, and the manner of his dismissal, did not leave us with much confidence in the future of the Legal Aid Commission. It is the subject of continuing talks with the Attorney General.

McColl S.C., Garling S.C., Meagher S.C., and the Professional Affairs Director, Helen Barrett, prepared changes to the Attorney General approved professional indemnity insurance policy to take account of recent legislative developments and improve the coverage. The Executive Director then persuaded three insurers to adopt the changes. However, the liability of

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barristers for negligence remains uncertain, and whilst we can insure for up to \$20 million, disaster insurance is not available, at least at a reasonable premium. Members need to be extremely cautious in giving advice in conference, particularly in non-litigious matters.

The Executive Director went to literally hundreds of meetings during the year, including attending with me at meetings of the Australian Bar Association and Law Council of Australia, and meetings with judges, politicians and public servants. Whilst we differ with state and federal governments in some matters of policy, the efforts of Mr Selth enable the Bar Council to maintain harmonious relations with individual politicians on both sides and others with whom the Bar Association must work.

The Articles of Association for the Bar Association, originally drafted in 1936, are unsuitable for today's Association. For a long time the Executive Director and the Association's solicitor have been working on a new constitution. The exercise is complicated by the fact that the Association is a registered club, but I expect a new draft constitution will be available to be considered by members in the near future.

We are indebted to Gzell QC, Slater QC, Durack S.C. and Richmond for their work for members in respect of the looming GST. Barristers will be able to lodge their GST returns on a cash receipts basis and solicitors will not be required to withhold any tax from fees paid to barristers.

During the year the Benevolent Fund paid out \$98,000 in gifts to seven people and \$50,000 in loans to two people. The payments were to members and families of members. The Association is grateful to those who donated to the Fund. The Fund's Management Committee was dissatisfied with the investment advice and administrative support provided by the trustee company, so now the Bar Association staff administer the Fund, acting under the direction of the Management Committee, which in turn takes advice from an external investment adviser.

I express thanks to all the Committees and Sections for all their work. It is gratifying that so many members so willingly commit themselves to the considerable work required to keep the system going.

My profound thanks to our Executive Director, Philip Selth and the whole of the staff of the Bar Association for their dedicated work. I apprehend members do not always appreciate the time and effort required to run the Association's affairs, including the education courses, the issuing of practising certificates, the library, the professional conduct and other committees, the financial control, the endless

agendas and minutes, legal assistance referrals, implementing decisions and trying to keep up with pending legislation, to say nothing of social events and of the issues concerning the dining room and liquor bar. We are fortunate to have and retain the people who work for us. Be kind to them.

The Bar remains strong and in demand because it produces skilful advisers and advocates. Barristers have the right to accept work directly from clients but, whatever the views of the ACCC, the plain fact is we will survive as a Bar only so long as solicitors choose to give us work. Essentially, we remain a referral profession. Let us not forget it.

On a personal note, it has been a privilege to be President. It has also been frustrating, depressing and at times enjoyable. My term ends in November. In the two years some barristers died, some became judges, some retired and some joined us for the first time. To quote Kipling overstates the case, but I will do so anyway, in the process tearing him out of context:

I have eaten your bread and salt
I have drunk your water and wine
The deaths ye died I have watched beside
and the lives ye led were mine



Ian Barker QC

President

Executive Director's Report



In the Executive Director's Report for the 1997/98 annual report I said that one of my priorities for the Bar Association's administration was 'to enhance the work being undertaken by the staff of the Bar Association, and to introduce further efficient, effective and client-focused services for individual members, the Bar Council, committees and bodies such as the Parliament and the courts, as well as the public sector, business community bodies with whom we have (or ought have) contact'.

That remains a priority.

One of the ways in which we went about first identifying, and then addressing, what members wanted from the Association, was the Membership Survey undertaken towards the end of 1998. A summary of the 587 responses to the 1,545 survey questionnaires sent to members – a response rate of 38%, well above the expected return rate of 25% - was published in the February 1999 *Stop Press*. In subsequent issues of *Stop Press* the various administrative departments of the Association have responded to matters raised in the survey responses. While there was a gratifyingly high level of satisfaction with the various services provided by staff, problems were identified and suggestions for new or improved services made. Most of these suggestions have been addressed. One area in which work is continuing is the development of 'preferred supplier' arrangements with suppliers who are prepared to enter into arrangements to the benefit of members, for example travel and accommodation. Suggestions as to what services might be developed are welcomed.

One issue about which more obviously needs to be done is the enhancement of members' knowledge of what the Association,

and individual staff, do for members. There were a number of suggestions for something to be done that is already established practice. There were a few comments about staffing levels, which indicated the respondent was unaware of work undertaken by Association staff. This comment is occasionally also made direct to staff or to me. If any members do wish to know in more detail what the Association, and its staff, does on their behalf, I invite them to let me know.

The Bar Association last year put considerable resources into upgrading the support it provides to its various committees. A substantial part of the committees' work is providing comment on proposed legislation and reports to or by government and parliaments that are expected to lead to legislation or new court and administrative practices. As a result of our submissions, a significant number of changes have been made, to the benefit of the justice system and the community more generally.

Because details of the proposed legislation are provided to the Association in confidence, it is usually not possible to advise all members of details of what is proposed. However, once the legislation is public, a copy of the submission is sent to members who we know have a particular interest in that matter and at times others, for example the Opposition and Crossbenchers in the Parliament.

A large amount of effort was put into developing closer links with regional members, including visits by Bar Councillors and me to our five 'regions'. We have appointed an Assistant Education Manager, whose major duties include an enhanced continuing legal education program and a regional advocacy-training program.

The service provided by the Bar Association's Library has been further enhanced, with particular attention being paid to the provision of material to members outside the CBD. The Bar Association's web page is continually being upgraded, again, with special attention being given to providing information to members who practise outside Sydney.

In 1994 the Association and D W Thorpe published the *New South Wales Barristers Directory*. A second edition was published in association with Butterworths for 1997/98. There is also an electronic version of the Butterworths directory. This commendable initiative is now past its 'use by' date. There are major problems in ensuring a directory that is published by someone other than the Bar Association is always current. Accordingly, work is underway to replace the Butterworths directory with a Bar Association on-line version that can be updated daily, if necessary.

The Bar Association has registered the domain name *nswbar* for e-mail and its web page. Arrangements are being made to give

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members access to the *nswbar* address for e-mail services, should they so wish.

A lot of time has been spent in developing the working relationship the Association has with state and federal court administrations, the NSW Attorney General's Department, Law Society of New South Wales, Office of Legal Services Commissioner, Legal Aid Commission of New South Wales and the NSW Motor Accidents Authority. At times there have been strong differences of opinion; nonetheless there has continued to be a good professional relationship between us and those with whom we have dealings. Similarly, the work being carried out last year in developing working relationships with members of the NSW Parliament and individuals and bodies in the state and federal sphere with whom the Bar Association has not traditionally had dealings, both whose activities, directly or indirectly, are of concern to the Association. This background work that has been carried out in particular by members of the Bar Council and Association staff bore fruit towards the end of 1998 when the Legislative Council rejected the Government's attempt to impose a fee scale for work done by the profession for victims of motor accidents.

Unfortunately, however, at the end of this financial year the Government had before the Legislative Council the *Motor Accidents Compensation Bill 1998*, which will seriously adversely affect the rights of most motor accident victims. On this occasion the Bar Association, working with the Law Society, has been unable to persuade a majority of Crossbenchers that the Bill deserves to be rejected.

In the 1997/98 report I referred to the Articles of Association being revised because they neither conform with current law, in particular the *Registered Clubs Act 1976* and the *Liquor Act 1982*, nor the way in which the Association has operated in practice for some years. Ensuring we abide by the law and the Articles yet at the same time carry out both the wishes and administrative necessities of the Association is not always an easy task. The task of preparing a new constitution has taken longer than expected, but it should be possible to circulate the draft for members' consideration by about September 1999.

During the year the Association received literally hundreds of requests for advice and assistance from individuals, government agencies, parliaments and others. It would not have been possible to respond to these requests without the very strong support of the committees and individual members of the Bar. I am grateful for all their help – and tolerance – especially given the, at times, most unreasonable timeframe in which both the Bar Association and they are asked to provide the assistance.

I continue, too, to be grateful for the assistance and support the Association staff and I receive from members of the Bar Council and the committees and sections for which we provide administrative support.

I finished my 1997/98 report as follows: 'I should also like to here record my appreciation for the work of the Bar Association staff. Few outside the office realise the amount of work undertaken by the staff, and the inordinately long hours many put in to provide a quality service to members and others. At times mistakes are made. However, I continue to be impressed, and grateful, for the hard work of the staff.'

I have no reason to say anything different in this report.



P A Selth
Executive Director

Office Bearers and Association Staff

OFFICE BEARERS

The Office Bearers and members of the Council as at 30 June 1999 were:

President	Ian Barker QC
Senior Vice-President	Ruth McColl S.C.
Junior Vice-President	Bret Walker S.C.
Honorary Treasurer	Ian Harrison S.C.
Honorary Secretary	Anna Katzmann S.C.

EX-OFFICIO MEMBER

Attorney General of New South Wales

The Honourable Jeff Shaw QC MLC

MEMBERS

Inner Bar

Donald Grieve QC, Anthony Bellanto QC,

Dennis Wheelahan QC, Philip Greenwood S.C.

Outer Bar

Robert Tonner, Ross Letherbarrow,

Peter Maiden, Jeremy Gormly,

Kate Traill, Stephen Odgers,

Chrissa Loukas, Jane Needham,

Jacqueline Gleeson, Andrew Bell,

Jonathon Priestley, Lloyd Babb

For a full list of members who served on Bar Council during the financial year see page 36

Association Staff

As at 30 June 1999

ASSOCIATION STAFF

Executive Director	Philip Selth
Executive Assistant to Executive Director	Melissa Davis
Administrative Support Manager	Lynne Colley
Administration Officer (Bar Council)	Christine Lancaster
Administration Officer (HR/Committee)	Nicole Hyde
Administration Officer (Social Affairs)	Sharron Smyth
Administration Support Officer	Monika Chudy
Education Manager	Kelly Wright
Assistant Education Manager	Roger Owens
Finance Manager	Basil Catsaros
Deputy Finance Manager	Tess Santos
Legal Assistance Manager	Heather Sare
Assistant to the Legal Assistance Manager	Sue Divall
Librarian	Lisa Allen
Assistant Librarian	Chris Winslow
Technical Services Librarian	Larissa Reid
Library Assistant	Serena-Jo Monzo
Liquor Bar Supervisor	Tony Mitchell
Membership Officer	Stacey Hatch
Professional Affairs Director	Helen Barrett
Professional Affairs Senior Secretary	Barbara Stahl
Professional Affairs Junior Secretary	Kristy Buckmaster
Public Affairs Manager	Kate Southam
Reception Officer	Farida Lim
Reception Officer	Michael Hadusek

Standing Committees of the Bar Council

As at 30 June 1999

ADR & ARBITRATION

Mary Walker (Chair)
 Arthur Leslie QC
 Michael Finnane QC
 Christopher Barry QC
 Peter Jacobson QC
 Geoff Lindsay S.C.
 Steven Rares S.C.
 Alexander W Street S.C.
 Raymond McLoughlin S.C.
 Campbell Bridge S.C.
 Peter King
 Bryan Pape
 Richard Bell
 Stuart Torrington
 Jeremy Gormly
 Robert Angyal
 Ian Davidson

ADVOCACY

Peter Taylor S.C. (Chair)
 Her Hon. Judge Ann Ainslie-Wallace
 Brian Donovan QC
 John Graves S.C.
 Graham Segal
 Paul Conlon
 Greg Laughton
 *Hugh Marshall
 Peter Miller
 Christopher Simpson
 Kate Traill
 Craig Leggat
 Peter Berman
 David Mallon
 Paul King
 Rashda Rana
 Mario Sindone
 Patrick See
 Robert Bellamy

BAR HISTORY

Geoff Lindsay S.C. (Chair)
 The Hon. Dr James Macken
 *His Honour Judge Norman Delaney
 *Wendy Robinson QC
 Sandy Street S.C.
 Robert O'Neill
 *Greg Poole
 William Walsh
 Simon Kalfas
 Frances Grant
 Francis Holles RFD
 Francois Kunc

BAR RULES

Bret Walker S.C.
 Peter Taylor S.C.
 Peter Garling S.C.
 Ian Harrison S.C.
 Simon Kerr

COMMON LAW

Richard Burbidge QC (Chair)
 Brian Murray QC
 Andrew Morrison RFD S.C.
 Russell McIlwaine S.C.
 Anna Katzmann S.C.
 John Sharpe
 Ross Letherbarrow
 Phillip Perry
 Brian Ferrari
 Andrew Stone

CRIMINAL LAW

Tim Game S.C. (Chair)
 Ian Barker QC
 Michael Adams QC
 Anthony Bellanto QC
 *Michael Green QC
 Malcolm Ramage QC
 John Nicholson S.C.
 Paul Byrne S.C.
 David Buchanan S.C.
 Peter Johnson S.C.
 *Virginia Bell S.C.
 Terry Buddin S.C.
 Bob Toner S.C.
 Peter Johnston S.C.
 Virginia Bell S.C.
 Robert Greenhill
 Glenn Bartley
 Michael Ainsworth
 Elizabeth Fullerton
 Peter Berman
 Daniel Howard
 Phillip Boulten
 Stephen Odgers
 Chrissa Loukas
 Lloyd Babb
 David Re

EDUCATION COMMITTEE

The Hon. Justice Kevin Lindgren (Chair)
 Bruce Collins QC
 Clarrie Stevens QC
 Peter Taylor S.C.
 John Nicholson S.C.
 David Nock S.C.
 John Graves S.C.
 *Stephen Walmsley S.C.

Phil Greenwood S.C.
 Richard White S.C.
 Ross McKeand
 Carolyn Davenport
 Chris Hodgekiss
 Sylvia Emmett
 Greg Laughton
 Paul Blackburn-Hart
 Terry Morahan
 Janet Oakley
 Jennifer Stuckey-Clarke
 Simon Kerr
 Rashda Rana
 Bruce G. Smith

EQUAL EMPLOYMENT OPPORTUNITY

Chris Ronalds (Chair)
 *Annabelle Bennett S.C. (former Chair)
 *Wendy Robinson QC
 *Michael Slattery QC
 Virginia Bell S.C.
 John Graves S.C.
 Sylvia Emmett
 Kate Traill
 Richard Cobden
 *Katrina Howard
 Nye Perram
 Dominique Hogan-Doran
 John Bowers
 Michelle Painter
 Louise Byrne

FACILITIES & FUNCTIONS COMMITTEE

Dennis Wheelahan QC (Chair)
 Jacqueline Gleeson
 Lynne Colley (Bar Association)

FAMILY LAW

Grahame Richardson S.C. (Chair)
 *Peter Rose QC (former Chair)
 Robert Lethbridge
 Jan Stevenson
 Peter Maiden
 Richard Bell
 Tim Ostini Fitzgerald
 Michael Errington
 Greg Johnston
 Brian Knox
 Robyn Druitt
 Richard Schonell
 Anne Rees
 Neill Macpherson
 Greg Watkins

*Retired or resigned as a member of the Committee during the year.

Standing Committees of the Bar Council

FEES COMMITTEE

Greg McNalley (Convenor)

GST WORKING PARTY

Ian Gzell QC (Chair)
Anthony Slater QC
John Durack S.C.
Mark Richmond

HUMAN RIGHTS

Nick Cowdery QC (Convenor)

LIBRARY AND TECHNOLOGY

Paul Donohoe QC (Chair)
Peter Taylor S.C.
Selwyn Gibb
Bryan Pape
Ross McKeand
Jeff Kildea
Julian Trebeck
Mark Dempsey
Simon Gregory
David Robertson
Alex Howen
Stuart Bell
Michael Lawler
Jonathon Priestley
Tim Moore
David Newhouse

LEGAL AID

Stephen Norrish QC (Chair)
Ian Barker QC
Michael Green QC
John Nicholson S.C.
Geoff Lindsay S.C.
Terry Buddin S.C.
Tim Game S.C.
Anna Katzmann S.C.
John Spencer
Elizabeth Fullerton
Phillip Boulten
Stephen Odgers
Robert Hulme
Jane Needham
*Lachlan Gyles
Richard Schonell
Paul King
Dean Jordan

PROFESSIONAL CONDUCT #1

Phil Greenwood S.C. (Chair)
* Rick Burbidge QC (former Chair)
George Palmer QC
Wayne Haylen QC

Peter Callaghan S.C.
Tony Meagher S.C.
Terry Buddin S.C.
*Alexander Street S.C.
Michael King
Ross Letherbarrow
Jan Stevenson
Elizabeth Cohen
Robin Margo
Christopher Simpson
* Malcolm Duncan
Christine Adamson
Leonie Flannery
Bob Sorby
Andrew Bell
Susanne Weress (Lay Member)
Kate Nacard (Lay Member)
* Sir John Mason (Lay Member)
* Dr C Parker
Dr Ysaiah Ross (Academic)

PROFESSIONAL CONDUCT #2

Tony Bellanto QC (Chair)
Ian Temby QC
Bruce Collins QC
John Graves S.C.
Stephen Walmsley S.C.
Robert Tonner Murray Aldridge
David Arnott
Hugh Marshall
Lindsay Ellison
Gregory Burton
John Fernon
Kate Traill
Jane Needham
John Blount (Lay Member)
*Professor Deborah Saltman
(Lay Member)
Professor David Barker (Academic)

PROFESSIONAL CONDUCT #3

Dennis Wheelahan QC (Chair)
* Ruth McColl S.C. (former Chair)
Stephen Norrish QC
Martin Einfeld QC
Steven Rares S.C.
* Clifton Hoeben S.C.
David Davies S.C.
Peter McEwen S.C.
Philip Dowdy
Chris Craigie
Martin Blackmore
James Stevenson
* Justin Gleeson
Brian Knox

Jacqui S Gleeson
Nye Perram
Simon Kerr
* Anne Rees
Jonathon Priestley
Michelle Painter
* John Howard
Dr Richard Klugman (Lay Member)
Professor Ivan Shearer (Academic)

PROFESSIONAL CONDUCT #4

Ian Harrison S.C. (Chair)
Paul Webb QC
Robert McDougall QC
* Michael Adams QC
Philip Hallen S.C.
* Anna Katzmann S.C.
Peter Johnson S.C.
Grahame Richardson S.C.
Bill Kearns
Danny Feller
* Rod Mater
Chris Leahy
Mark Williams
* Peter Maiden
* Jeremy Gormly
Phillip Mahony
Rhonda Hendersen
*Daniel Howard
Lloyd Babb
Professor Derek Anderson (Lay Member)
* Rita Shackel (Lay Member)
Phil Marchionni (Lay Member)
Francine Field (Academic)

PROFESSIONAL STANDARDS

Robert McDougall QC (Chair)
Michael Slattery QC
John Agius S.C.
Sylvia Emmett
Douglas Timmins
Anthea Fox

Sections of the Bar Association

As at 30 June 1999

ADMINISTRATIVE LAW

Convenor: Alan Robertson QC

Secretary: Nicole Abadee

COMMON LAW

Convenor: Richard Burbidge QC

CONSTITUTIONAL LAW

Convenor: David Jackson QC

Secretary: Mark Cohen

CORPORATIONS, SECURITIES AND INSOLVENCY LAW

Convenor: Tom Bathurst QC

Secretary: Rodney Smith S.C.

ENVIRONMENT, LOCAL GOVERNMENT AND VALUATION LAW

Convenor: Peter McClellan QC

Secretary: Josephine Kelly

FAMILY LAW

Convenor: Graham Richardson S.C.

Secretary: Greg Watkins

INTELLECTUAL PROPERTY LAW

Convenor: The Hon Robert Ellicott QC

Secretary: David Yates S.C.

MARITIME, AIR AND TRANSPORT LAW

Convenor: Brian Rayment QC

Secretary: Gregory Nell

TRADE PRACTICES AND CONSUMER PROTECTION LAW

Convenor: Dyson Heydon QC

Secretary: Andrew Ogborne

Reports

ADR & ARBITRATION COMMITTEE

Overview

The Committee finalised development of the Barristers' Resolution Service in late 1998/early 1999 and launched the Service on 15 February 1999.

The Service was created to provide greater access to practitioners accredited by the NSW Bar Association to act as Arbitrators, Experts, Referees, Appraisers, Evaluators and Mediators.

A great deal of the Committee's work in 1998 and 1999 involved the preparation of a brochure promoting the Service and the drafting of short form agreements for use in arbitrations, references, evaluations and mediations in the private arena. These agreements were created to highlight the main issues that could arise for practitioners.

The Committee recommended that the agreements be amended to suit the specific needs of the parties in each case.

Principal 1998-1999 Activities

- A *Daily List of Available Practitioners* was created as part of the Barristers' Resolution Service. The list was made available through the List Clerks, Duty Judges and Registrars of the Local, District and Federal Courts and directly from the Bar Association's web site.
- An information session about the Barristers' Resolution Service was held for the membership on 8 March 1999 and a session for clerks on 4 February 1999.
- The Committee started work on arranging a lecture series to provide additional information about the Service to barristers. The series is to comprise short presentations by Committee members to individual chambers. The Barristers' Resolution Service will be reviewed by the Committee at that time with the aim of enhancing its operation.
- The Committee started work on selecting the 1999-2000 panels of Arbitrators, Mediators and Evaluators/Appraisers/Referees.
- Submissions were prepared outlining the possible impact of the *Motor Accidents Compensation Act 1999* on court-based arbitration and dispute resolution processes generally.
- Expressions of interest were called for the provision of a mediation course. The Committee will assess the viability of holding several mediation courses in late 1999 and early 2000.
- Continued representation on the Law Society Arbitration Liaison Committee.
- Continued representation on a Taskforce established for the Increased Use of Mediation in the Supreme Court.
- Continued representation on the Australasian Disputes Centre.
- Provided presentations on alternative dispute resolution during the Bar Association's Bar Practice Course.
- Provided a delegate to assist with the Bar Association's *Refresher Course for Arbitrators*. Work also commenced on developing an introductory education module on dispute resolution processes.
- Liaised with the Law Council ADR Standing Committee.
- Liaised with the Australian Law Reform Commission Working Group on Alternative Dispute Resolution concerning the discussion paper - *Review of the Adversarial System of Litigation - ADR: Its Role in Federal Dispute Resolution*.
- Reviewed the criteria for selection of mediators to the Association's panel.
- Provided lists of ADR practitioners to various courts, tribunals and generally through the distribution of the Barristers' Resolution Service Kit.

During the remainder of 1999 the Committee will promulgate the advantages of the Barristers' Resolution Service to courts, tribunals, government departments, commercial entities and industry-based organisations. The Committee will also encourage use of the Service through promotion to the membership.

The Committee is grateful for all advice from members and for enquiries concerning the activities of the Committee, particularly those concerning the development of the Barristers' Resolution Service.

A particular thank you to Nicole Hyde, secretary of the Committee and Kate Southam for their great assistance in the creation of the Barristers' Resolution Service Kit and to Committee members for their continued dedication.

ADVOCACY COMMITTEE

Objectives

The following are the goals set by the Advocacy Committee.

- Provide a forum for maintaining and enhancing a high level of advocacy skills amongst members of the NSW Bar Association.

- Provide advice to Bar Council, as required, on any advocacy issue relating to the membership of the NSW Bar Association.
- Monitor the needs of the membership in relation to advocacy skills and training.
- Develop a program of advocacy training including advocacy workshops.
- Encourage all members to undertake appropriate advocacy training.
- Train members in advocacy teaching skills to enable them to deliver the advocacy components of the Bar Practice Course.

Principal 1998-1999 Activities

- The Advocacy Committee supported the work of the Education Committee in the Bar Practice Course by conducting advocacy training workshops for tutors and group leaders prior to each Bar Practice Course. A process of continuous improvement of the workshop is being undertaken to ensure that members teaching in the Bar Practice Course receive strong and effective support.
- Cross-examination workshops were conducted on the evening of Thursday, 25 February 1999 and on Saturday, 27 February 1999. The workshops attracted fifty participants. Many Senior Counsel took part to provide model cross-examinations and act as workshop leaders.
- An accounting advocacy workshop was conducted on the evening of Thursday, 29 April 1999 and on Saturday, 1 May 1999. Held in conjunction with the Institute of Chartered Accountants, it attracted twenty participants. The workshop paired advocacy trainers from the Bar with experienced forensic accountants.
- An advocacy workshop was the main program event at the first NSW Bar Association Continuing Legal Education Regional Conference. The conference was held in Orange on 21-22 November 1998. The advocacy workshop focused on working with an expert witness and was facilitated by an experienced advocacy trainer.

BAR HISTORY COMMITTEE

Principal 1998-1999 Activities

- The Bar History Committee resolved to recommend to the Bar Council that the Association proceed with the publication of a new *History of the NSW Bar*. The

publication will be prepared during the Association's Centenary Year (2002). Discussions were commenced with Dr John Bennett, the editor of *A History of the NSW Bar* (1969) and other learned works of legal history.

- The Committee was involved in the work of records management consultants, Provenance Consulting, who were retained by the Association to prepare and implement a policy for document preservation and records management.
- The Committee held discussions with Associate Professor Ros Atherton at the University of Sydney Law Faculty about developing a joint project between University research students and members of the Bench and NSW Bar Association.

COMMON LAW COMMITTEE

Overview

Government action during the past 12 months has had significant implications for the Common Law rights of the citizens of NSW and for those NSW Bar Association members, particularly those who practise in the personal injury field.

Legislative change consequent upon the announced intention to reduce Green Slip fees for motorists has resulted in the introduction (effective 5 October 1999) of an entirely new basis for compensation for those injured in motor vehicle accidents.

The salient aspects of the new scheme were described by the President in the July 1999 *Stop Press*. As the bulk of the scheme will be implemented administratively, with access to the courts limited to the 4th stage and subject to severe cost disincentives, it seems inevitable that work for members of the NSW Bar Association from this source will be greatly diminished.

The activity of the Committee in this area has principally involved the preparation of documentation for use by the President, the Executive Director and Bar Council for discussions with politicians and government officials. The Committee's recommendation that Council should go public on the matter was accepted, and the President undertook a round of media appearances, resulting in a greater public awareness and some support from surprising quarters.

If the Government continues to introduce limitations on entitlements and to economise on the legal structures of the state it is likely that more such activity will be required.

Reports

Principal 1998-1999 Activities

- The Committee undertook a survey of members' perceptions of problems in the Supreme Court and the District Court. No complaints of substance emerged in relation to the Supreme Court. A number of concerns were raised in connection with both the infrastructure facilities and procedural problems in the District Court. The survey results were forwarded to Bar Council. Committee member Murray QC chairs the District Court Users' Committee and in that role has been engaged in dialogue with senior judges of the District Court, resulting in significant amelioration of many of the problems. The infrastructure problems are receiving slow attention, as Government funds permit.
- Committee members considered the material put out by the Bar Association in connection with Alternative Dispute Resolution and made a number of recommendations to Bar Council.
- The Committee considered amendments to the District Court rules suggested by Levy S.C. relating to party discovery of medical records, and recommended to Council that it pursue acceptance of those amendments through the Rules Committee.
- The question of structural settlements was raised by the Law Council of Australia, and was considered by the Committee, which supported the LCA initiative. The LCA subsequently joined the Structured Settlements Group, which is pressing the Federal Government for taxation amendments to protect payments under such a scheme.
- The Committee discussed the manner in which some counsel and solicitors employed the contingency provision on fees to charge at a level inappropriate to the complexity of the matter on hand.
- The Committee discussed concepts of courtesy and a recommendation made to Council that this subject be included in one of the lectures in the Bar Course.

As always, members are encouraged to raise matters of interest or concern with any Committee member.

CRIMINAL LAW COMMITTEE

Principal 1998-1999 Activities

- Preparing responses to a number of legislative proposals.
- Addressing issues during the state election.
- Monitoring amendments to the *Evidence Act 1995*.

- Maintaining an involvement in discussions.
- Proposals for, and changes to, pretrial criminal procedure.
- Liaising with the courts in relation to criminal pretrial process.
- Liaising with the courts in relation to criminal pretrial process and listing.

The Committee is grateful for the contribution made by a number of members in relation to the many issues with which it was confronted during the year. In particular, the Committee is indebted to Stephen Odgers and Peter Johnson S.C. for their contributions.

EDUCATION COMMITTEE

Principal 1998-1999 Activities

- Participation in the *Eastern States Bar Practice Forum*, held in Melbourne in November 1998. Committee Chair The Hon Justice K E Lindgren, Greenwood S.C. and the Education Manager attended the Forum, which takes place annually to enable discussion of issues of common interest relating to the Reading Programs of Queensland, Victoria and NSW.
- Tutors' and Readers' dinners were held in November 1998 and July 1999 respectively. The Hon Justice Brian Cohen was guest of honour at the November dinner where Reader George Lucarelli proposed the vote of thanks on behalf of tutors and readers. The Hon Justice Virginia Bell was guest of honour at the July dinner where Reader Jeremy Stoljar proposed the vote of thanks.
- Bar Practice Courses:
 - Greenwood S.C. directed the 2/98 course, which was attended by 52 new barristers. Of the total, 15 or 29% were women. The average age of participants was 34 years and 67% of the group had been solicitors prior to coming to the Bar. Because of the large number of participants, the 2/98 course was divided between two venues - the National Dispute Centre and the Bar Association - so that, in effect, two courses ran concurrently. The two groups of readers were constantly intermingled so that they became a cohesive group by the end of the month. The experiment was a success and the Committee resolved to continue the practice of two main teaching groups to facilitate better communication between lecturer and readers.
 - Also trialled, with success in the 2/98 course was the more

comprehensive and informative system of assessment by group leaders of readers' advocacy performances, as foreshadowed in the 1998 Annual Report. The assessment procedure will be retained and refined as necessary.

- Greg Laughton directed the 1/99 course. Again 52 readers undertook the course. Of that total 14 or 27% were women. The average age of participants was 36 and 39 or 75% had been solicitors prior to coming to the Bar.

- Two Bar Examinations sittings. Results were as follows:

November 1998 Ethics Evidence Practice & Procedure

No. candidates sitting:	56	57	56
Total percentage pass:	96%	70%	88%
Total candidature:	66.		
Distance Candidates:	4 (Perth, Canberra, Orange, Meerschaum Vale)		

Andrew Pickles achieved the highest aggregate mark and was awarded a set of robes courtesy of the Directors of Academic, Civic and Legal Robes Pty Ltd, of Hornsby.

June 1999 Ethics Evidence Practice and Procedure

No. of candidates sitting:	62	65	59
Total percentage pass	93.6%	92.4%	88.5%
Total candidature:	74		
Distance Candidates:	5 (Canberra, Nowra, Perth, London x 2)		

Angus Gemmell achieved the highest aggregate score to win the academic robes.

The Continuing Legal Education program

In November 1998 the CLE Sub-Committee was re-designated the CLE Advisory Committee and membership extended to include Chairs of all Sections. Consequently, the program has become more comprehensive in that it provides programs targeted to the needs of members at the different stages of their career and in a broad range of jurisdictions.

The traditional CLE program was expanded from the traditional monthly Monday evening event to include a *New Barrister Series* and a *Breakfast Series* aimed at more established members of the Bar. Special 'one off' events included a public forum on Family Law and a technology exhibition.

A regional CLE program was introduced during the year with the first program held in Orange in October. The program featured an advocacy workshop and was well supported by members in the region and other areas across the State.

The 1998-1999 program of CLE events were as follows:

July 1998	<i>Stress Management</i> , Dr Ian Chung, LawCare, Paul Menzies QC;
August 1998	<i>Introduction to Expert Evidence</i> , Helen Seabrook; <i>Unisearch</i> , Livingston Armytage;
September 1998	<i>Changes In Company Law</i> The Hon Justice Robert Austin, Supreme Court of NSW;
October 1998	<i>Barristers' Duties To The Court</i> , The Hon Justice David Ipp, Supreme Court of Western Australia Ian Barker QC Ruth McColl S.C. Tony Bellanto QC Regional Conference, Orange James Poulos QC John Graves S.C.
November 1998	<i>Industrial Law</i> The Hon Justice Wright, President, Industrial Relations Commission of NSW Peter Kite S.C. Michael Walton
February 1999	<i>Aspects Of Evidence</i> Dyson Heydon QC <i>New Barristers Series: Getting around the Jurisdictions 1</i> Nicole Abadee Peter King Arthur Moses
March 1999	<i>Alternative Dispute Resolution</i> Mary Walker Stuart Torrington <i>Breakfast Series 1: Election '99</i> Ian Barker QC <i>New Barristers: Voice and presentation In Court</i> Robyn Fraser

Reports

- April 1999**
- Native Title Litigation*
The Hon Justice Beaumont, Supreme Court of NSW
Patricia Lane
- Legal Technology Exhibition
- New Barristers: Institute Of Forensic Medicine*
- May 1999**
- Non-Adversarial Approach at the AAT*
The Hon Justice Dierdre O'Connor,
- Public Forum: Property and Family Law, Options For Change*
The Hon Justice Alastair Nicholson, Chief Justice, Family Court of Australia
The Hon Justice Peter Rose, Family Court Of Australia
The Hon Robert McClelland MP, Shadow Attorney General
Stephen Bourke, Assistant Secretary Federal Attorney-General's Department
- New Barrister Series: Getting Around the Jurisdictions 2*
Robyn Druitt
Josephine Kelly
- New Barristers: Metropolitan Reception and Remand Centre*
- June 1999**
- Res Judicata*
The Hon Justice K R Handley AO, Supreme Court of NSW
- Breakfast Series 2: Recent High Court Decisions*
David Jackson QC
- New Barristers: Law Reporting Workshop*
Naida Haxton

General Matters

- Committee discussions have indicated that there is a need to focus on particular issues in the next year. These are: the pupillage period of the Reading Program, with special emphasis on satisfactory tutor and reader relationships; the conditions attached to practising certificates issued to new barristers; further development of an inclusive and coordinated approach to professional development involving the Bar Practice Course, the Advocacy Committee,

Sections, the CLE Advisory Committee and, researching practice expectations, background and development of new barristers.

The Education Committee would like to express its sincere gratitude to all those who volunteered to assist with the Reading Program, whether as markers in the Bar Examinations, as lecturers or advocacy instructors in the Bar Course, or as tutors during the pupillage period.

EQUAL EMPLOYMENT OPPORTUNITIES COMMITTEE

Overview

In a year of concentrated activity, the Committee welcomed a number of new members and continued to focus on issues affecting all barristers including matters raised by all forms of discrimination and harassment such as on grounds of race, sex, disability and homosexuality.

The Committee's main activity was an examination of the different ways individual members and chambers approached the issue of barristers taking maternity and parental leave.

Through this work, the Committee plans to provide practical information to existing, new and prospective barristers about the potential to juggle life at the Bar with family responsibilities and sustain both at an appropriate level. Once fully collected, the individual personal experiences of male and female barristers will provide a useful database. The material will be used to generate discussion amongst members on useful strategies for dealing with periods of absences from chambers, regardless of the reason. It is anticipated that this will continue to be a focus of work for the Committee.

Principal 1998-1999 Activities

Proposed a gender neutral language document. The document was adopted by Bar Council on 20 May 1999.

Discussion of appropriate mechanisms for formal and informal complaints of discrimination or harassment or inappropriate behaviour or statements from judicial officers and administrative decision makers where these are based on the gender, race, disability or homosexuality of the recipient.

Continued to have formal contact with Readers and discuss with them the combination of work and family responsibilities at the Bar and provide contacts for them if they confront any barriers during their early years.

Contributed to a range of conferences and panel discussions about EEO issues relating to barristers and more general areas

such as the operation of discrimination laws and the public discussion of issues such as women and the law and creating an EEO environment in all aspects of the administration and delivery of the legal system.

FAMILY LAW COMMITTEE

Overview

On 21 December 1998 the Honourable Justice Peter Rose was appointed as a judge of the Family Court of Australia attached to the Sydney Registry. His Honour had previously occupied the position of Chair of this Committee since 1991 and the quality of his contribution is not only acknowledged but also sadly missed. Richardson S.C. was appointed Chair of the Committee.

During the past year the Committee has maintained an extensive involvement in issues concerning administration of the Family Court, trial procedures and case management.

In addition, the past year saw the Commonwealth Government announce its intention to implement wide ranging reforms to the law concerning property settlement involving a major overhaul of the current 1976 legislation.

These reforms have been stated to involve a regime to include binding written agreements that can be entered into prior to marriage, during marriage and after separation subject to requirements for independent legal or financial advice. The Committee sees substantial potential impact particularly arising in circumstances where the requirements of independent advice apparently will not include the mandate for any involvement of any legally qualified adviser.

In May 1999, the Government then released a substantive discussion paper titled *Property and Family Law - Options for Change*. This paper put forward for discussion two discrete options involving either a modified regime of separate property or the adoption of a community property regime.

The Committee formed the view that whilst there was clearly a need for reform in some areas, and that the first option, subject to certain caveats, could be supported, the community property regime implicit in the second option was entirely untenable and was likely to become an instrument of injustice if legislated.

This saw the Committee embark upon a detailed submission to Government and take steps to ensure that Committee members were involved at every opportunity where representatives of Government conducted any public forum or other discussion in relation to the proposals.

The Attorney-General has stated an intention to see these reforms resolved and implemented by the conclusion of 1999 and this will undoubtedly give rise to further significant business for the Committee.

Principal 1998-1999 Activities

In addition to that described above, the Committee:

- actively participated in the Case Management Committee convened by the Family Court of Australia at Sydney together with representatives of the Law Society and Legal Aid Commission;
- made representations to the NSW Legal Aid Commission in relation to fees paid to counsel in Family Law proceedings;
- participated in quarterly meetings of judges and the profession convened by the Family Court;
- provided a delegate to a working committee established by the court to discuss and make recommendations as to the logistics for the court during the period of the Olympics in 2000;
- made representations, in conjunction with the Law Council of Australia, concerning amendments to certain of the prescribed forms; and
- made representations in relation to the adoption of pro forma Short Minutes of Orders.

The Committee endeavored throughout the year to support the Family Court in ensuring the prompt appointment of replacement judges to Registries in NSW. As the court approaches 24 years of existence a period is being reached where the Commonwealth Government must deal with numerous retirements nationally (including several in Sydney and Parramatta). In recent years the Family Court has made substantial progress in reducing the backlog of cases. This success has been most particularly evident in the Sydney Registry and the Committee believes it is a priority to ensure that the Commonwealth Government recognises the need to promptly replace retiring judges if the benefits of this progress are to be maintained.

DUTY BARRISTER SCHEME

Overview

The Scheme, overseen by Kate Traill, continued to be a vital community service throughout 1998-1999. The Duty Barrister roster included 90 names and three barristers were rostered on each sitting day.

Reports

Principal 1998-1999 Activities

- A new brochure on the Duty Barristers Scheme was designed and circulated through the relevant courts, legal centres and police stations.
- The Scheme continued to be promoted to a wide range of community help groups including: Victims of Crime, the Redfern Legal Centre, Australian Consumers' Association, Aboriginal Legal Services, the Department of Consumer Affairs, Domestic Violence Advisory Service, the NRMA Legal Department and the Salvation Army. These groups were regularly sent the Association's brochure about the Scheme for distribution to anyone seeking assistance.
- During the year the matters considered included committals, larceny, driving offences, bail applications, appeals, apprehended violence orders and assault charges.

FEES COMMITTEE

A total of \$130,371 was recovered on behalf of members for the financial year ended 30 June 1999. This was down from the figure of \$214,443 recovered in the previous year.

The administration cost to members of the Association recovering fees on their behalf is 10% of the fees recovered. However, as a result of a decision by Bar Council, the administration fee is not levied in respect of work performed during a member's first five years in practice at the Bar.

During the year, the Association received 69 new complaints regarding unpaid fees, compared to 78 in the previous year. Of course, a number of matters relating to the complaints made in the previous years are ongoing.

Fees the Association was asked to collect relate almost entirely to matters in which fees were rendered after the introduction of fee disclosures on 1 July 1994.

The Association's long stated policy is not to assist in recovery of fees where the member has not complied with the cost disclosure provisions of Part 11 of the *Legal Profession Act*. Members are also reminded of the need to include estimates in disclosures and of the need to revise estimates if there is likely to be a significant increase in costs: see sections 177 and 178 of the *Legal Profession Act*.

Members undertaking direct access work are reminded that the disclosure provisions are more onerous in those circumstances – compare sections 175 and 176 of the Act.

A failure to disclose matters which the barrister is required to

disclose under Part 11 is capable of amounting to either unsatisfactory professional conduct or professional misconduct (Sections 182(4) and 183(2) of the Act).

Members will often be asked to advise or appear on an urgent basis. Members are urged to put in place a fall back position so that if your attendance to the brief prevents you from fulfilling your obligation to disclose the basis on which you propose to charge, your secretary or clerk faxes a disclosure to the solicitor immediately. Section 178(2) provides if it is not reasonably practicable to make the disclosure before you are retained, it is to be made as soon as practicable thereafter.

Helen Barrett, the Professional Affairs Director, performs the day to day work of recovery of fees in the office. Any inquiries about the fee recovery system or the operation of Part 11 of the Act should be made in the first instance to Ms. Barrett. Greg McNally is the Fees Convenor and is consulted about difficult matters. The Association is indebted to McNally for his continuing assistance in this area.

Finally, the Association would like to commend to members the article on fee disclosure which appeared on page 14 of the July 1999 edition of *Stop Press* (available in the Bar Library).

PROFESSIONAL CONDUCT

Background

All complaints about legal practitioners (be they barristers or solicitors) must initially be made to the Legal Services Commissioner. Complaints made directly to the Bar Association are forwarded to the Commissioner. The Commissioner makes an initial assessment of each complaint and decides which of those complaints will be referred to the Bar Council (in the case of barristers) and the Law Society Council (in the case of solicitors), for investigation or mediation. The Commissioner tends to keep in his office those complaints capable of resolution by mediation and those involving complaints about legal fees up to \$2,500. Complaints involving issues requiring investigation or allegations of professional misconduct against barristers are, in the main, referred to Bar Council for investigation.

Bar Council's four professional conduct committees meet either fortnightly or monthly throughout the year.

The following are recommended reading for any member who receives a complaint against them:

- *Conduct of Complaints against Barristers* by Jeremy Gormly, republished in the February 1998 edition of *Stop Press*. The

article is available in the Bar Library and from Professional Affairs Department staff.

- *There but for the Grace of God ...* by Bob Stitt QC and Geoff Lindsay S.C.. The paper is available at a cost of \$10 from the Bar Association's Education Department.

Barristers may be obligated under their Professional Indemnity Policy to notify their insurer of receipt of a complaint about them. Some insurers will refer a barrister to their solicitors for advice/reply. The Bar Council's policy is to require the barrister to personally sign all correspondence relating to the complaint. Where a need for an extension of time for reply can be demonstrated, the extension will be given but barristers are expected to give priority to responding to complaints made against them.

General

In the financial year ended 30 June 1999 a total of 66 complaints were referred by the Legal Services Commissioner to Bar Council for investigation, down slightly on the 70 complaints referred by the Commissioner in the previous year. A further six complaints were initiated by Bar Council pursuant to s135 of the *Legal Profession Act 1987*.

Clients are not always aware of their rights or of the obligations of barristers. In cases where it is apparent to Bar Council (or a conduct committee) that the barrister may be found guilty of either unsatisfactory professional conduct or professional misconduct in respect of conduct not identified by the complainant because of their limited knowledge, the conduct committee may recommend to the Council the initiation of a complaint by the Council pursuant to s135 of the *Legal Profession Act*. Complaints initiated by Bar Council are investigated in the same way as those complaints referred by the Legal Services Commissioner.

Bar Council has continued to promote conduct issues of concern in *Stop Press*. Members will be aware that for many years now Readers have been required to pass an examination in ethics as a pre-requisite to entry to the Reading Program.

The Barristers' Rules were published on the Association's web site in September 1998. Copies are also available from Reception.

On 6 October 1998 the Administrative Decisions Tribunal (ADT) was created, with a Legal Services Division. The ADT replaces the Legal Services Tribunal. All matters in the old Tribunal were transferred to the new Tribunal.

In 1998 – 1999 the NSW Attorney General conducted a review of National Competition Policy. Included was Part 10 of the *Legal Profession Act*, which deals with complaints and discipline. The Bar and Law Society Councils and the Legal Services Commissioner all made submissions.

Amendments to Part 10 of the *Legal Profession Act* are presently being sought by the Legal Services Commissioner. The Bar Council supported the proposed amendments it deemed fair and reasonable and opposed those it believed would deny the practitioner or the complainant natural justice.

In the past 12 months the only amendment to Part 10 of the *Legal Profession Act 1987* of interest to the Bar was the introduction of sections 171MA and 171MB.

Section 171MA provides that the Council must produce information about the procedures for dealing with complaints under Part 10. Section 171MB provides that the Council must develop performance criteria related to the handling of complaints. The criteria must be included in the Annual Report, together with an assessment of the Council's performance against the criteria. The Professional Affairs Director has commenced work on developing the criteria.

The Court of Appeal and the Tribunal handed down a number of judgments during the year, some of which are covered in the reports of the four Professional Conduct Committees that follow.

One judgment of particular importance is that of the Court of Appeal in *Murray v Legal Services Commissioner* (unreported, 30 March 1999). The issue that arose for determination in that case was whether the actions of the Legal Services Commissioner in not making available the full terms of the complaint against Murray (solicitor) or stating with reasonable precision just what it was that the Commissioner was investigating led to procedural unfairness.

The Bar Council policy has always been to forward the entirety of the complaint material to the barrister for comment rather than extracts. Nor does the Council seek to put its own interpretation on a complaint. Where a conduct committee has difficulty in precisely identifying the conduct issue or issues, it will ask the complainant to confirm that it has correctly identified the relevant issues.

However, the significance of the decision for Bar Council, and barristers the subject of complaint, lies in a different area. In his judgment Sheller JA said:

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‘... even if the Council or the Commissioner are satisfied that there is a reasonable likelihood that the facts complained of would be made out before the Tribunal, the possible consequences are such that the legal practitioner could reasonably expect the opportunity to advance a case to the Council or the Commissioner that it should be satisfied only that there is a reasonable likelihood that the legal practitioner would be found guilty by the Tribunal of unsatisfactory professional conduct and that the legal practitioner was generally competent and diligent and that no other material complaints had been made against the legal practitioner.’

And later: ‘...the legal practitioner has an interest to press not only against the initial finding but also against the following of one particular course rather than another.’

Stein JA supported Sheller JA in his remarks.

Notwithstanding that these are *obiter* remarks, the Council has resolved to incorporate them in its protocol for complaint handling. The practical effect is that, in future, when a conduct committee has completed its investigation and report (including a recommendation), a copy of that report will (in the event of a recommendation adverse to the barrister) be sent to the barrister to afford the barrister an opportunity to comment on:

- the level of conduct (ie whether it could amount to professional misconduct, unsatisfactory professional conduct or no finding); and
- which particular course the Council should follow in making its decision under one of the subsections of s155 of the Act.

The Committee’s report, the barrister’s submissions and any additional comments by the Committee in light of the barrister’s submissions will then be considered by Bar Council in making its decision pursuant to s155 of the *Legal Profession Act*. If, at that stage, the barrister seeks to raise fresh issues of fact, the complainant (and others) may be invited to comment on the barrister’s submission. In other limited cases, for example where the complainant’s right to claim compensation may be affected, the complainant may also be invited to comment on the barrister’s submission.

Members are reminded that guidance on queries and difficulties concerning ethics is available from senior members of professional conduct committees. However, legal advice will not be given.

Complaints by Result

		% of complaints
Complaint under investigation	36	50.00%
Complaint withdrawn	3	4.17%
Dismiss-s148(2) (lack of particulars)	1	1.39%
Dismiss-s 155(3)(b) (finding of unsatisfactory professional conduct)	3	4.17%
Dismiss-s155(4) (outright dismissal)	23	31.94%
Not proceeded with by complainant	1	1.39%
Refer to Tribunal-s155(2) (on basis of unsatisfactory professional conduct and/or professional misconduct)	3	4.17%
Reprimand-s155(3)(a) (finding of unsatisfactory professional conduct)	1	1.39%
Resolved – mediation	1	1.39%
Total	72	

Complaint Type

Acting contrary to/failure to carry out instructions	5	6.94%
Acting without instructions	3	4.17%
Breach of confidentiality	2	2.78%
Breached Barristers’ Rules 48	1	1.39%
Breached Barristers’ Rules 54	3	4.17%
Breached Barristers’ Rules 66	1	1.39%
Breached Barristers’ Rules 75	1	1.39%
Conflict of interest	1	1.39%
Conspiracy to pervert course of justice	5	6.94%
Delay/failure to provide chamber work	1	1.39%
Dishonesty/misleading conduct	3	4.17%
Failure to adduce available evidence	5	6.94%
Failure to appear	3	4.17%
Failure to comply with Part 11 of LPA (fee disclosure)	3	4.17%
Failure to return brief	1	1.39%
Fees dispute	1	1.39%
Incompetence (in court)	4	5.56%
Incompetence (outside court e.g. advice)	2	2.78%
Incompetence (outside and inside court)	1	1.39%
Misleading the court	6	8.33%
Obstruct/delay proceedings	1	1.39%
Other unethical conduct	3	4.17%
Over zealous cross-examination	2	2.78%
Overcharging/overservicing	5	6.94%
Personal conduct	1	1.39%
Pressure to change plea	1	1.39%
Pressure to settle	5	6.94%
Rudeness/discourtesy	2	2.78%
Total	72	

Complainant Types

		% of Complaints
Bar Council	6	8.33%
Barrister	9	12.50%
Client/former client	31	43.06%
Instructing solicitor	2	2.78%
Legal Services Commissioner	1	1.39%
Opposing client	11	15.28%
Opposing solicitor	3	4.17%
Police	1	1.39%
Relative/friend	4	5.56%
Witness	4	5.56%
Total	72	

Jurisdiction

		% of Complaints
AVO/ADVO	2	2.78%
Bankruptcy	1	1.39%
Civil Litigation – other	16	22.22%
Civil Litigation – Personal Injury	7	9.72%
Common Law	2	2.78%
Criminal	17	23.61%
Equity/Commercial	6	8.33%
Family Law	8	11.11%
Immigration	1	1.39%
Industrial	1	1.39%
Liquor licensing	1	1.39%
Other	4	5.56%
Personal Conduct	1	1.39%
Probate/Family provision	1	1.39%
Workers' Compensation	4	5.56%
Total	72	

Years of Practice

	No of Complaints	% of Complaints	% in Practice at NSW Bar
Silks	8	11.11%	12%
10 years & up to silk	34	47.22%	40%
7-10 years in practice	15	20.83%	13%
5-7 years in practice	5	6.94%	6.5%
1-5 years in practice	10	13.89%	20%
Less than 1 year in practice	0	0%	8.5%
Non-practising	0	0%	-
Total	72	100%	100%

PROFESSIONAL CONDUCT COMMITTEE #1

Rick Burbidge QC served as Chair from 1 July 1998 to mid November 1998 and Phil Greenwood S.C. was appointed Chair in December 1998.

Sir John Mason retired as a lay member in late 1998 having served since March 1992. Sir John's contributions to the work of the Committee were greatly valued. His common sense approach well served the interests of the public in ensuring that complaints were handled fairly, efficiently and within the legislative framework. The Committee wishes him well. The Committee welcomed Kate Nacard in Sir John's place. Many thanks to Ms Nacard, fellow lay member Susanne Weress. Thanks also to academic member Dr Ysaiah Ross, and to Dr C Parker.

For the period 1 July 1998 to 30 June 1999 17 new matters were assigned to the Committee for investigation, all referred by the Commissioner. The Committee had no matters outstanding from previous years.

Recommendations were made to Bar Council which dealt with the 17 matters as follows:

- Six complaints were dismissed pursuant to s155(4) of the Act (no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct.)
- Two complaints were dismissed pursuant to s155(3)(b) of the Act (a finding of unsatisfactory professional conduct but the Council was satisfied that the barrister was generally competent and diligent and there were no other material complaints against the barrister).
- One matter was resolved by mediation.
- Eight matters remain under investigation at the date of writing this report (including one matter referred to an Independent Investigator for investigation and report pursuant to s151 of the Act).

In respect of the six complaints dismissed, one complainant exercised his right to have the decision reviewed by the Legal Services Commissioner. In that matter the Commissioner has confirmed the Council's decision to dismiss.

One of the matters concerned a finding of unsatisfactory professional conduct being recorded in respect of a breach of Barristers' Rule 54. However, the complaint was dismissed because the barrister was found to be generally competent and diligent with no previous adverse finding recorded.

Reports

Barristers' Rule 54 provides that a barrister must not deal directly with the opponent's client unless one of the preconditions contained in the rule has been met. The Council accepted that to breach the rule a barrister must either initiate the relevant dealing or otherwise participate in circumstances which he or she was able to avoid or terminate. In the present case the exchange was initiated by the barrister and the subject matter of the exchange was relevant to settlement negotiations and the cross-examination of the client. The Council took into account the fact that there existed a close relationship between the barrister and the opposing client and that the exchange took place in a social setting, away from the Court. Nevertheless the barrister's seniority and experience and the likelihood of his having encountered similar situations in the past because of the particular jurisdiction in which he practises weighed in favour of a finding against him.

The other matter which led to a finding of unsatisfactory professional conduct but resulted in a dismissal pursuant to s155(3)(b) involved a complaint that the barrister (a Crown Prosecutor) had, without proper cause, made comments in his final address to a jury in a criminal trial critical of his opponent (the complainant barrister), concluding by calling his opponent's conduct 'disgraceful'. The complainant barrister was concerned that the comments made by the Crown could have been damaging to his client, the accused.

The question for consideration by the Council was whether the description was made on proper grounds. The barrister, in his response to the Association, said he did not mean to (nor did he believe he did) personally criticise his opponent.

The Council was of the view that there was no proper ground for the barrister to describe his opponent's conduct as disgraceful. It was further of the view that doing so to the jury had the potential to adversely affect the accused, although in the present case that potential was not realised.

The Council regarded a number of mitigating factors. These included that the comments were made in the closing stages of a reasonably lengthy trial; the incident was an isolated one; and that the complainant barrister had indicated he would have been satisfied with an apology. It was only because no apology had been made that a complaint had been lodged. The barrister eventually made a full and generous apology that was accepted by the complainant barrister.

In response to requests, the Committee provided guidance on a wide variety of topics and Rules throughout the year.

PROFESSIONAL CONDUCT COMMITTEE #2

The Committee would like to express its particular thanks to the lay members John Blount and Professor Deborah Saltman who play an important role in ensuring the integrity of the process as well as to academic member Professor David Barker.

For the period 1 July 1998 to 30 June 1999 16 new matters were assigned to the Committee for investigation. This compares with 24 in the previous year. Of the 16 matters, 14 were referred by the Legal Services Commissioner and two by Bar Council. Three complaints remained under investigation from the previous year. The Committee also reported to Bar Council in respect of a number of applications for readmission by former legal practitioners.

The 16 new matters assigned to the Committee were dealt with as follows:

- Five were dismissed pursuant to s155(4) of the Act (no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct).
- One was dismissed pursuant to s148(2) of the Act (lack of particulars).
- One barrister was reprimanded pursuant to s155(3)(a) of the Act.
- Nine matters remain under investigation at the date of writing this report.

In respect of the five complaints dismissed, one complainant exercised the right to have the Council's decision reviewed by the Legal Services Commissioner. That matter remains under review.

The matter resulting in a reprimanded involved another example of a breach of Barristers' Rule 54, which prohibits dealings directly with the opponent's client unless certain preconditions are met. In addition, Barristers' Rule 76 provides that a barrister must take reasonable steps to avoid the possibility of the barrister becoming a witness in the case as a result of correspondence or any dealings with persons other than the client. In this particular case, the barrister sent an email to the opposing client, the husband in Family Court proceedings for variation of a child support agreement, seeking information about the services offered by a company to which the husband acted as a consultant and its fee structure. The husband replied to the email. During the course of cross-examination of the husband the barrister used a version of his email. Objection was taken to the use of the email by Counsel

for the husband and the barrister informed the judge he did not propose to ask any further questions relating to the husband's response to the email message.

The barrister, in responding to the complaint, admitted that he later realised sending the email may have contravened Rule 54. He was regretful and apologised.

The Bar Council recognised that the barrister's apology was sincere but found that a barrister of his seniority ought to have been aware that the sending of the email was inappropriate. The Council inferred so much from the fact that the barrister used a version of his email in cross-examination which did not disclose that he was its author. The barrister had no previous complaints against him. He consented to the reprimand.

The Administrative Decisions Tribunal handed down a judgment dismissing an Information filed by Bar Council alleging a barrister had condoned one witness suggesting to a prospective witness the content of evidence which the witness should give in proceedings. The Information also alleged the barrister had, in the absence of special circumstances, conferred with more than one lay witness at a time, at two separate conferences.

The Tribunal found that the first matter was not made out. The evidence that the prospective witness gave in the Tribunal about what had occurred was found to be confusing and unreliable.

Regarding the second ground, the Tribunal found that in respect of the first conference the barrister had reasonable grounds for believing that special circumstances existed when he held the conference with two lay witnesses for part of the time because of the barrister's lack of knowledge of a country property the subject of the proceedings, the shortness of time available and the limited role he arranged for one of the two witnesses. In respect of the second conference, the Tribunal found that the status of the witnesses were as professional officers reporting on matters pertaining to their professional duties, about which the barrister had reasonable grounds for believing were not contentious. The presence of the lay witnesses at the conference was necessary for factual direction. Further, the need to confer was urgent and time limited.

PROFESSIONAL CONDUCT COMMITTEE #3

Ruth McColl S.C. retired as Committee Chair in November 1998 due to her commitments as Senior Vice-President. Dennis

Wheelahan QC was appointed Chair in December 1998.

The Committee would like to express its particular gratitude to John Howard, who retired as a lay member in late 1998 having served in that capacity since March 1992. His contribution to the work of the Committee over the years has not only been considerable, but sensible, thoughtful and always mindful of his role in the protection of the public.

Thanks also for the valuable contribution made by lay member Dr Richard Klugman and academic member Professor Ivan Shearer.

In the period 1 July 1998 to 30 June 1999 the Committee was allocated 21 new matters, the same number that it dealt in the previous year. Of those, 18 were referred by the Legal Services Commissioner (including one complaint initiated by the Commissioner pursuant to s136) and three were referred by Bar Council, pursuant to s135 of the *Legal Profession Act*.

The Committee is continuing to investigate one matter initially referred in the previous year.

Of the 21 matters:

- Six complaints were dismissed pursuant to s155(4) (ie no finding of unsatisfactory professional conduct or professional misconduct).
- Two complaints were withdrawn (including the complaint referred by the Legal Services Commissioner).
- Two complaints were referred to the Administrative Decisions Tribunal pursuant to s155(2) of the Act, on the basis there is a reasonable likelihood the barristers will be found guilty of either unsatisfactory professional conduct or professional misconduct.
- At the time of writing this report 11 complaints remained under investigation.

Of the six complaints dismissed, one complainant has applied to the Legal Services Commissioner for a review of the Council's decision. That matter remains under review as at the date of reporting.

In the past year there have been two complaints made relating to the interviewing of under age witnesses and a third complaint involving the interviewing of an intellectually disabled witness. In all three cases the interviews were conducted without an instructing solicitor (all three were direct access matters) or other appropriate independent adult being present. The Committee cannot stress enough the

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importance of proceeding with extreme caution in such circumstances, both as to the manner in which initial contact is made with such witnesses and in the conduct of any interview. Members should consider in all such cases the need for an independent person to be present.

There were, as has been said, two matters referred to the Tribunal.

The first matter referred to the Tribunal involves an allegation that during a criminal trial the barrister was abusive and aggressive in a sustained way towards the Crown Prosecutor and the Bench, including allegations that the presiding Judge was biased against the barrister's client and incompetent to hear the matter and that the presiding Judge and the Crown were anxious to secure a conviction against the barrister's client and were acting together to that end. In the course of the investigation the barrister indicated that it was his intention, although he conceded he should have made it clearer, to include in an apology which he made to the Judge in the course of the trial an apology for his remarks about the Crown Prosecutor. However, other matters proffered by the barrister led the Council to form the view that the barrister did not appreciate the seriousness of his conduct. An Information has yet to be filed.

The second matter referred to the Tribunal involves allegations a Crown Prosecutor has breached Barristers' Rules 20, 57A, 62, 64 and 65. The Council was of the view that the barrister's conduct of the trial, which included misleading questions, submissions contrary to the evidence and reliance upon matters for which there was no evidence, acted unfairly to the complainant (the accused). An Information has yet to be filed.

A complaint which had earlier been dismissed by Bar Council but taken on review to the Legal Services Commissioner was referred by the Commissioner to the Tribunal for hearing and determination. The Tribunal handed down its judgment in respect of that matter in April 1999.

The Information filed by the Commissioner had alleged that the barrister had breached an undertaking to the Court. In the alternative, the Information alleged that the barrister had improperly put to the jury in a criminal trial that there was no evidence on certain matters where, with the express assent of the barrister, evidence had not been led by the Crown as a direct consequence of an objection taken by the barrister that the leading of such evidence would prejudice his client.

The Tribunal found that no express or implied undertaking was given by the barrister and there was no impropriety in the way the barrister conducted the defence. Further, there was no arrangement that precluded the barrister putting his submission to the jury.

The Committee has been asked to give guidance on a number of occasions about conflicts of interest/confidentiality. Members are reminded to ensure they are familiar with the terms of Barristers' Rules 103-111, and in particular with Rule 107. As a general rule, if in doubt, don't take the risk of being in a position where you are exposed to an allegation that you have disclosed confidential information. While you may, for a number of reasons, wish to retain the brief, remember it is your client who is likely to foot the bill for any legal argument on the question. You, on the other hand, may end up having to respond to a complaint made against you.

PROFESSIONAL CONDUCT COMMITTEE #4

Anna Katzman S.C. retired from the Committee at the end of 1998 due to her commitments as Secretary of the Association. Michael Adams QC (as he then was) served as a member of the Committee until his appointment to the Supreme Court on 28 July 1998. The Committee is indebted to both of them for their hard work over a sustained period.

The Committee would also like to extend its thanks for the valuable contributions made by lay members Professor Derek Anderson and Phil Marchionni, Rita Shackle retired during the year as the academic member and was replaced by Francine Field.

For the period 1 July 1998 to 30 June 1999 18 new complaints were assigned to the Committee for investigation, compared with 19 in the previous year.

The Committee continued to deal with five matters still under investigation at the time of writing last year's report. The Committee continues to investigate four complaints, which are in excess of 12 months old. All the professional conduct committees aim to deal with complaints to finality within six months of receipt by the Association. For a variety of reasons, that is not always possible.

The 18 matters referred were dealt with as follows by Bar Council, following recommendations by the Committee:

- Six complaints were dismissed pursuant to s155(4) of the Act (no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct).

- One complaint was dismissed pursuant to s155(3)(b) of the Act (a finding of unsatisfactory professional conduct but the Council was satisfied that the barrister was generally competent and diligent and there were no other material complaints against the barrister).
- One complaint was withdrawn.
- One complaint was not proceeded with by the complainant.
- One complaint was referred to the Administrative Decisions Tribunal pursuant to s155(2) of the Act, on the basis that there is a reasonable likelihood the barrister will be found guilty of unsatisfactory professional conduct.
- Eight complaints remain under investigation at the time of writing this report.

The matter which was dealt with by recording a finding of unsatisfactory professional conduct against the barrister but otherwise dismissing the complaint on the basis that the barrister is otherwise competent and diligent and has no other material complaint against her, involved the disclosure by the barrister of material which had come to the barrister's knowledge by inspection of records produced pursuant to a subpoena. The complainant (a police officer) was a Crown witness in a criminal trial. The trial was ultimately stayed. Following the success of the stay application the barrister was returning to court for the purpose of fixing a date for hearing an application for costs. The barrister spoke to a number of police officers outside the court and made a remark to the effect that she had been looking forward to the complainant's cross-examination about the contents of a video (the contents of which were referred to in the records produced pursuant to the subpoena). Although there was a dispute between the barrister and the complainant as to the offending words used by the barrister, it was evident the barrister did not dispute access to police files, production of which was required on subpoena. Although the files were not formally produced, access was arranged informally and it was clear to the barrister that access was being given as though the documents were produced on subpoena.

The Council was of the view that the barrister should have appreciated that the documents were confidential and that she was not entitled to make their contents public.

The barrister was under an implied duty of confidence in relation to the documents. The obligations of barristers in respect of documents produced on subpoena are serious.

People who produce documents on subpoena are entitled to believe that their documents will be treated as confidential, unless and until they are tendered or otherwise used in open court, properly for the purposes of the proceedings. In this matter the barrister apologised formally in writing to the complainant in a form approved by the committee and the Council dismissed the matter pursuant to s155(3)(b), having recorded a finding of unsatisfactory professional conduct against the barrister.

The complaint referred to the Administrative Decisions Tribunal involved a number of allegations, namely: the barrister had, until just before the adjourned hearing date, left the clients with the impression that the court had jurisdiction to hear the case, changing his mind at the last minute and without explanation; the barrister failed to inform his instructing solicitor of his revised opinion and failed to seek instructions from his instructing solicitor on seeking a non-suit and the question of any consequential orders for costs; an offer of settlement was never considered by the barrister even though the offer was included in documents sent to him by his instructing solicitor; and the barrister failed to make a written or oral report to his instructing solicitors following his initial appearance, despite many attempts by the solicitor (and complainant) to inquire as to the outcome of that hearing.

While the matter has not yet been heard in the Tribunal, the Committee would like to convey a cautionary message about the need to keep your instructing solicitor (particularly a country solicitor, as in this case) informed about the outcome of court hearings. It goes without saying that counsel should always keep the instructing solicitor in the loop when compromising, or attempting to compromise, a case.

A matter, referred to the Tribunal in late 1997, became the subject of orders by the Tribunal during the year. The barrister's solicitors had, earlier, sought to know the Council's attitude in the event that the barrister pleaded guilty to unsatisfactory professional conduct, agreed to repay fees to the complainant, to apologise privately to the complainant and to certain other orders. The Council agreed to the course proposed by the barrister and sought no other penalty be imposed. Ultimately, the matter was disposed of by the Tribunal on that basis.

The substance of the charge against the barrister was that in acting on behalf of the complainant in criminal proceedings the barrister provided advice which was inadequate with respect

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to a charge under s99 of the *NSW Crimes Act 1900* and wrong in respect of a charge under s196 of the *NSW Crimes Act 1900*.

This case underscores the fact that the giving of wrong or inadequate advice by a barrister may amount to unsatisfactory professional conduct.

Section 127(2) of the *Legal Profession Act 1987* provides:

‘unsatisfactory professional conduct includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.’

PROFESSIONAL STANDARDS COMMITTEE

On 22 October 1998 Bar Council resolved to strongly support the proposal by the Committee to develop a best practice model for settlement and for compliance with Barristers’ Rule 80.

Those areas were specifically identified by the Committee as requiring attention, in the first case because of the number of complaints about settlements and in the second case because it is apparent that in the majority of complaints involving direct access there has been no, or no effective, compliance with Barristers’ Rule 80.

In some complaints involving direct access it is clear that there have been communication problems about the nature of work the barrister is or is not entitled to perform. Indeed, in a number of matters it appears the barrister has been as confused as the client.

At the date of reporting the Committee has completed its drafting task in formulating guidelines for settlements. Bar Council will consider those guidelines shortly.

A number of drafts of a model compliance with Barristers’ Rule 80 have been considered and the Committee is close to finalising that model.

Members are invited to submit to the Committee ideas about areas of practice, which they believe could be improved by the development of guidelines/models.

LIBRARY AND TECHNOLOGY COMMITTEE

Principal 1998-1999 Activities

- Assisted the NSW Bar Association to design an e-mail project to enable barristers to be identified by the common

email address @nswbar.asn.au. The address will identify each barrister as a member of the NSW Bar Association and reroute their mail from their own ISP (or a service such as Rocket Mail or HotMail).

- Disseminated Y2K information.
- Informed the Bar about the implications of the NSW Chief Justice’s Practice Note 105, *Use of Technology in Civil Litigation*.
- Developed a full text database in the Bar Library to hold CLE and Section papers.
- Formulated web page strategies with regard to library and technological developments.
- Contributed an occasional column on technology to Stop Press.

Members of the Committee also worked with and/or provided submissions to:

- The District Court *Technology in the Courtroom* project.
- The NSW Supreme Court’s *Report of the Working Party on Records Management*.

LEGAL AID COMMITTEE

Objectives

The following are the terms of reference and goals set by the Committee in 1999.

- Facilitating the development and maintenance of an equitable system of legal assistance.
- Advancing the interests and addressing the concerns of members of the Association in respect of both the availability of legal aid and fair remuneration for members of the Association as well as access to decision making of legal aid providers.
- Fostering a meaningful dialogue between the Association, the NSW Legal Aid Commission and the Attorney General in respect of the Association’s concerns.
- Promoting public awareness of publicly funded Legal Aid legal assistance schemes.
- The Committee continue to liaise with both the Criminal Law Committee and the Family Law Committee to assist the President, the Executive and the Bar Council Association when responding to policy initiatives of the Legal Aid Commission or making representations to the Commission and the State and Federal Governments.

Overview

The principal task undertaken by the Committee during the year was to assist the President in drafting representations to the Attorney General requesting his support for supplementation of funding for the Legal Aid Commission to redress the failure of the Commission to increase fees in Criminal Law matters over the last nine years.

Although the State Government had provided continuing financial assistance to the NSW Legal Aid Commission, the constrictions of funds in areas of Commonwealth responsibility, particularly Family Law, (reported upon last year) continued to be a major problem for the community and justice system and one which worsens each year.

During the year the Committee met regularly to discuss a range of issues of importance to members of the Association. The critical issues included:

- Federal and State Government funding for the NSW Legal Aid Commission;
- counsel's fees, particularly in the areas of Criminal Law and Family Law; and
- appropriate policies for the preparation of fees in Criminal Law matters.

The Chair would like to thank all members of the Committee for their assistance throughout the year. Particular thanks to J. Needham, the Association's representative on the Law Council's Access To Justice Committee, Katzmann S.C., the Association's nominee to the Legal Aid Commission, Lindsay S.C. for his thoughtful advice and Game S.C. with regard to his understanding of the work of the Criminal Law Committee. The Committee is extremely grateful for the continuing interest and activism of the President with regard to legal aid issues.

The Committee would also like to thank Lynne Colley for her administrative and other assistance in the preparation and conduct of meetings.

LEGAL ASSISTANCE

Overview

The Law Foundation of NSW provides the majority of funding for the Legal Assistance Scheme run by the Legal Assistance Department of the NSW Bar Association.

The Department also administers the Barristers' Referral Service. The Service was established to deal with the increasing

number of requests received by the Association from members of the public seeking assistance in obtaining the services of a barrister. A panel of four clerks advises on barristers who specialise in the area of law for which a referral is sought. The membership of the panel is rotated, each clerk being appointed to the panel for a period of at least three months.

The Federal Pro Bono Scheme was launched on 24 May 1999. A joint invitation for members to volunteer their services to the Scheme was issued through the May 1999 edition of Stop Press by the Chief Justice of the Federal Court, The Hon M E Black AC and the President, Barker QC. Department staff provide assistance to the Federal Pro Bono Scheme by recording the names of members who wish to participate and then electronically transferring those names to a Registrar of the Federal Court.

Principal 1998-1999 Activities

- During the period 1 July 1998 and 30 June 1999 240 matters were referred to the Scheme - the same figure as the previous year.
- Barristers contributed approximately 2,600 hours of work to the Scheme. Since its inception, barristers have contributed approximately 10,000 hours of work to the Scheme. Compared with the previous year's figures, this represents a 53% increase in the number of hours.
- The number of applications processed for the period 1 July 1998 to 30 June totals 328.
- As at 30 June 1999 there were 50 ongoing matters.
- In November 1998 a lunch was held in the Bar Association conference rooms to thank participants in the Legal Assistance Scheme as well as organisations that refer matters to the Scheme. The lunch, attended by 60 people, also saw the launch of the Legal Assistance Scheme brochure, designed to explain how the Scheme operates. Lunch guests included representatives from Community Legal Centres, Legal Aid, Law Society of NSW, Law Foundation of NSW, welfare groups and members of the Bar, from the most junior to the most senior.
- In May 1999 members responded to a general request for them to volunteer their services to the Legal Assistance Scheme. Names were entered into the database to streamline the administrative procedure of making a

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referral. It is anticipated that the request will be made annually as a result of the strong response by members.

- Based on return forms completed by barristers at the conclusion of each matter, there has been a 96.5% approval rate amongst clients regarding the manner in which their matters were handled by barristers since the Scheme was established in.
- Whilst remaining popular with solicitors from the CBD and country NSW, the Service attracted interest from interstate and overseas practitioners. The Internet is playing a role in relation to increasing requests from overseas for referrals.
- For the period 1 July 1998 to date, the Service handled 550 enquiries for referral of barristers in all areas of law - an 83% increase over the previous year. The most common enquiries concerned criminal, family, industrial relations and property matters. The previous year 300 enquiries were received.

Listed below are some of the results achieved by barristers taking part in the Legal Assistance Scheme in 1998-1999.

- An unrepresented litigant referred by a non-instructing solicitor was successful in the High Court (3-2) in overturning a decision of the NSW Court of Appeal in relation to civil contempt proceedings. The applicant had been sentenced to six months' imprisonment with bail refused. A bail application in the High Court was successful. The High Court found that the applicant was not guilty of contempt for breaching an order of the District Court freezing the client's assets, as the Court did not have the power to make the order.
- A young couple referred by Legal Aid was successful in settling a dispute in the District Court with a former landlord in relation to unpaid rent for a restaurant they leased in a large commercial shopping complex. The matter was settled as the Defendants had a substantial cross claim for misleading and deceptive conduct, misrepresentation and deceit on the part of the landlord.
- A mother estranged from one of her sons was successful in equity proceedings in the Supreme Court in defending an application for possession of a property in which she was an equitable licensee for life. A significant part of the case turned on the credit of witnesses. In this regard the effective cross-examination of the son by Counsel for the mother was acknowledged by the Judge in his reasons for judgment.

- A young mother was successful in her all grounds appeal to the District Court quashing a conviction in Parramatta Local Court for Larceny of a Stroller. With two young children and carrying a baby in her arms, it was alleged by a large shopping outlet that the mother had stolen a stroller which she had brought back to the store to exchange. The Judge found that she had simply forgotten to declare the stroller to the cashier as she had many things on her mind.

PUBLIC AFFAIRS

Objectives

Public Affairs provides assistance to the President, Bar Council and Executive Director in the areas of media relations, publications, sponsorship, events management, the Duty Barrister Scheme and the preparation of speech notes.

Principal 1998-1999 Activities

- Provided assistance with the drafting and distribution of media releases on a range of issues including motor accident legislation; the *Justices Legislation Amendment (Appeals) Bill* and the proposed reopening of Parramatta Jail. The Bar Association also made public comment on the law and order policies announced by political parties during the 1999 State election campaign. A media release was drafted and issued to promote the launch of the Barristers Resolution Service.
- Worked with other legal organisations to draft and distribute information to the public including the Australian Bar Association and the Law Society of NSW.
- In February 1999 events management was brought under the umbrella of Public Affairs. Events organised in 1998-1999 included several '15 Bobbers' and the tribute dinner for Porter QC, McAlary QC and Hughes QC.
- Worked with the Bar Association's Education Department to promote its Continuing Legal Education program. Media attended the first CLE breakfast seminar and reported the President's speech widely. The media also attended a Family Law CLE held in the Common Room which featured a speech made by The Hon. Justice Alastair Nicholson AO RFD, Chief Justice of the Family Court of Australia. Public Affairs also attended the first regional CLE, which was held in Orange on 21-22 November, and featured the event in the December issue of *Stop Press*.
- Public Affairs provided assistance to update the Duty Barristers Scheme brochure and create the Barristers Resolution Service brochure.

- Public Affairs, responsible for the production of *Stop Press*, made several improvements to the newsletter including changing the grey ink to black for greater clarity and encouraging the inclusion of more features and stories of practical use to members.
- The daily operation of the Duty Barristers Scheme.
- Provided coordination and production assistance to the editor of *Bar News*.

GST COMMITTEE

The GST Committee was appointed in February 1999 to advise the Bar Council on how the GST would affect members of the Bar. The first task of the Committee was to comment upon a submission prepared for the Law Council of Australia.

Of immediate concern to the Committee was the provision requiring any one with an annual turnover of \$500,000 or more to account for GST on an accrual basis. The Commissioner of Taxation has discretion to permit such a person to account on a cash basis. The Committee wrote to the president of the Australian Bar Association recommending that a deputation call upon the Commissioner at an earlier stage to see if he was prepared to issue a blanket ruling with respect to barristers generally.

The Australian Bar Association, having received no response to its written submission to this effect, and the GST Committee organised a meeting with the Commissioner of Taxation at short notice and obtained a favourable response from him. The day after the meeting, the Commissioner issued a press release indicating that any person with an annual turnover greater than \$500,000 lodging income tax returns on a cash basis may elect to return on the same basis for GST by simply ticking a box on the GST registration form which every barrister will need to lodge before July 2000.

The Committee has also provided a number of articles for *Stop Press* and conducted a seminar on how the legislation will affect a barrister's practice.

A second issue of significance to the Bar arose under the Pay As You Go (PAYG) legislation. A provision aimed at labour hire firms was so widely drawn that it would require a solicitor to withhold tax from a fee payment to a barrister and would require a barrister to withhold tax from a payment made to another barrister for devilling.

The Committee made representations to the Prime Minister, the Treasurer, the Attorney-General, the Commissioner of

Taxation and officials in the Treasury Department responsible for drafting amendments to the proposed legislation. Copies of the submissions were sent to the Law Council of Australia, the Australian Bar Association, the NSW Law Society, the Taxation Institute of Australia, the Institute of Chartered Accountants, the Australian Society of Certified Practising Accountants and the Australian Council of Professions seeking their support for the submissions.

A response was received from the Treasurer assuring us that it was not the Government's intention to require a solicitor to withhold tax from payments to a barrister and that instructions had been given to draft amendments to confine the provision to entities who are in the business of supplying contract labour directly to clients. A close liaison was kept with the Treasury official responsible for this drafting process.

On 2 September 1999 *A New Tax System (Tax Administration) Bill 1999* was introduced to the House of Representatives. It contains an amended provision requiring a withholding of tax by an enterprise which is in the business of arranging for persons to perform work or services directly for clients of the entity or the enterprise includes a business of that kind that is not merely incidental to the main activities of the enterprise. The new provision contains a statutory example of a solicitor who regularly briefs barristers to represent his clients. It states that since briefing barristers is merely incidental to the solicitor's main activities there is no requirement to withhold tax from payments made to barristers.

HUMAN RIGHTS COMMITTEE

Objectives

The role of the Committee is to advise and assist the President and the Bar Council, with the assistance, where appropriate, of others who have volunteered to help, on matters and issues with human rights implications.

The Committee also acts as a liaison point with other organisations involved in the protection and enforcement of human rights under a just rule of law. In practice, the bulk of the work is in the preparation for the President of correspondence, submissions and reports on relevant domestic and international issues as they arise.

The Convenor (Cowdery QC – who has achieved an ambition to be a one person Committee) is also the Human Rights Liaison Officer to the International Bar Association (IBA) of whose Human Rights Institute he is Co-Chair. He is also Chair of the Human Rights Standing Committee of the Law Council of

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Australia and is an officer of various other legal human rights organisations.

Overview

The IBA regularly enlists the support of the NSW Bar Association in representations it makes to officials in countries where human rights abuses are perpetrated against lawyers and those engaged in legal systems.

In the past year 26 such instances of abuse were reported to the NSW Bar Association. They concerned reports of abuse in Albania, Algeria, Bahrain, Brazil, Colombia, Democratic Republic of Congo, Egypt, Equatorial Guinea, Guatemala, Hong Kong, Iran, Union of Myanmar (sic), Palestine, Pakistan, Paraguay, Russian Federation, Sri Lanka, Tunisia, Turkey, UK (Northern Ireland) and the Federal Republic of Yugoslavia. This was the same number as the previous financial year and included some common repeat offenders.

The Committee also examined a number of issues concerning human rights more generally.

Comment

All members are asked to report to the Association any case of human rights infringements where it may be appropriate for the Bar Council to act. It should be noted that these do not normally include cases of the regular pursuit of legally enforceable remedies.

Sections

The following Sections have provided reports for inclusion in the *1999 Annual Report*:

CONSTITUTIONAL LAW

The Hon Justice Hayne was the distinguished guest at the Constitutional Law Section's annual dinner held on 10 June 1999.

During the financial year the following papers were delivered:

- *The Relationship between the Crown and the Subject – Changes to the Position of the Crown as a consequence of the judicial Process*, delivered by Kate Guilfoyle on 20 August 1998.
- *The Liability of the Government under the Constitution*, delivered by Mark Leeming on 21 October 1998.
- *The Maritime Limits of the States and the Territories*, delivered by Stephen Lloyd on 17 June 1999.

MARITIME TRANSPORTATION AND AVIATION LAW

The Maritime Transportation and Aviation Law Section has had two meetings of its members in the last 15 months.

At the first a paper was given by Nigel Rein concerning a comparison of the operation of the duty of utmost good faith in marine and general insurance, upon which the Hon J E Brownie commented. At the second meeting a paper was given by Peter King concerning recent developments in international arbitration in Australia and New Zealand.

THE TRADE PRACTICES

Trade Practices Section Convenor Deyson Heydon and member Charles Comans prepared a Joint Opinion for Bar Council, dated 23 November 1998, in relation to whether the Protocol pursuant to which Senior Counsel are appointed contravenes the *Trade Practices Act 1974*. The Joint Opinion was provided to the Australian Competition and Consumer Commission.

See also the Common Law, Criminal Law and Family Law committee reports.

Appointments of Members of the NSW Bar Association

for the financial year to 30 June 1999

SUPREME COURT OF NEW SOUTH WALES

The Honourable Justice Michael Adams
 The Honourable Justice David Kirby
 The Honourable Justice Paddy Bergin
 The Honourable Justice Virginia Bell

FEDERAL COURT OF AUSTRALIA

The Honourable Justice Leslie Katz
 The Honourable Justice Peter Hely
 The Honourable Justice Roger Gyles

FAMILY COURT OF AUSTRALIA

The Honourable Justice Lloyd Waddy RFD
 The Honourable Justice Peter Rose
 The Honourable Justice Robbie Flohm

DISTRICT COURT OF NEW SOUTH WALES

Her Honour Judge Megan Latham
 His Honour Judge Gregory Hosking S.C.

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

The Honourable Mr Justice Michael Walton, Vice-President

COMPENSATION COURT OF NEW SOUTH WALES

His Honour Judge Allan Hughes

LOCAL COURT

Magistrate Sean Flood

Other Appointments

David Bennett QC, Solicitor-General of the Commonwealth
 Michael Sexton S.C., Solicitor-General of NSW

Bar Association Representatives on Educational Bodies

for the financial year to 30 June 1999

CENTRE FOR LEGAL EDUCATION ADVISORY BOARD

The Honourable Justice Kevin Lindgren
Philip Selth

COLLEGE OF LAW BOARD OF DIRECTORS

The Honourable Justice Kevin Lindgren

UNIVERSITY OF SYDNEY LAW EXTENSION COMMITTEE

David Nock S.C.
Anthony O'Brien

LEGAL PRACTITIONERS ADMISSION BOARD (LPAB)

Peter Taylor S.C.
Ian Harrison S.C.

LPAB - LEGAL QUALIFICATIONS COMMITTEE

Clarence Stevens QC
*Paddy Bergin S.C.
Caroline Needham

LAW SOCIETY PRACTICAL EXPERIENCE COMMITTEE

Janet Oakley

UNIVERSITY OF SYDNEY FACULTY OF LAW

Christopher Hodgekiss

UNIVERSITY OF TECHNOLOGY, SYDNEY - FACULTY BOARD

Geoff Lindsay S.C.

UNIVERSITY OF NEWCASTLE FACULTY OF LAW

Ralph Coolahan

UNIVERSITY OF NEW SOUTH WALES FACULTY BOARD

Kelly Wright

UNIVERSITY OF WESTERN SYDNEY, MACARTHUR FACULTY OF LAW ADVISORY COMMITTEE

Rob O'Neill
Peter Dooley
Philip Selth

UNIVERSITY OF WOLLONGONG PRACTICAL LEGAL TRAINING COURSE ADVISORY COMMITTEE

Stuart Hill

UNIVERSITY OF WOLLONGONG VISITING COMMITTEE, FACULTY OF LAW

*Paddy Bergin S.C.
Bruce Collins QC

*Retired or resigned during the year

Members of Court Committees and Working Parties

for the financial year to 30 June 1999

COMPENSATION COURT RULES COMMITTEE

Brian Ferrari
Gregory Beauchamp

COURT OF APPEAL USERS COMMITTEE

David Jackson QC
Russell McIlwaine S.C.
Guy Reynolds S.C.

DISTRICT COURT (CIVIL USERS) COMMITTEE

Brian Murray QC
Richard Bell
Anthony Black

DISTRICT COURT CRIMINAL LISTINGS REVIEW COMMITTEE

Kate Traill

DISTRICT COURT TECHNOLOGY IN THE COURTROOM PROJECT TEAM

Michael Lawler

DISTRICT COURT RULE COMMITTEE

*Terence Morahan
Ross Letherbarrow
Hugh Marshall (alternate)

DOWNING CENTRE COURT USERS FORUM

Kate Traill

DUST DISEASES TRIBUNAL RULES COMMITTEE

Brian Ferrari

FAMILY COURT CASE MANAGEMENT COMMITTEE

Grahame Richardson S.C.

FEDERAL COURT ELECTRONIC FILING WORKING PARTY

Mark Robinson

LAND & ENVIRONMENT COURT USERS GROUP

Jeffrey Kildea

LOCAL COURTS (CIVIL CLAIMS) RULE COMMITTEE

Andrew Kostopoulos

ST JAMES LOCAL COURT USERS FORUM

Kate Traill

SUPREME COURT COMMERCIAL USERS COMMITTEE

Robert Macfarlan QC
Steven Rares S.C.
Noel Hutley S.C.
David Hammerschlag

SUPREME COURT COMMON LAW DIVISION CRIMINAL USERS COMMITTEE

Tim Game S.C.
Phillip Boulten

SUPREME COURT COMMON LAW DIVISION CIVIL USERS COMMITTEE

Brian Murray QC
Henric Nicholas QC

SUPREME COURT DIFFERENTIAL CASE MANAGEMENT COMMITTEE

Richard Burbidge QC
Peter Capelin QC
Robert Stitt QC
Clifton Hoeben AM RFD S.C.

SUPREME COURT PRACTICE DIRECTIONS - POSSESSION LIST

James Stevenson

SUPREME COURT RULE COMMITTEE

Ruth McColl S.C.
Jeremy Gormly

*Retired or resigned during the year

Appointments

for the financial year to 30 June 1999

AUSTRALIAN COUNCIL OF PROFESSIONS

Peter Maiden

NSW COUNCIL OF PROFESSIONS

*Chris Barry QC

Peter Maiden

Philip Selth

1998 SENIOR COUNSEL SELECTION COMMITTEE

Ian Barker QC, Ruth McColl S.C.,

Bernard Gross QC, Tom Bathurst QC,

Malcolm Ramage QC

STATUTORY APPOINTMENTS

LEGAL PROFESSION ADVISORY COUNCIL

Philip Greenwood S.C.

CANCER COUNCIL OF NSW

*Paddy Bergin S.C.

LEGAL SERVICES DIVISION OF THE ADMINISTRATIVE DECISIONS TRIBUNAL

Caroline Needham, The Honourable Robert Ellicott QC,

John Coombs QC, Peter Capelin QC,

Linton Morris QC, Barry Toomey QC,

Henric Nicholas QC, Lionel Robberds QC,

Peter Graham QC, Michael Finnane QC,

Christopher Gee QC, Anthony Whealy QC,

Bruce Oslington QC, David Officer QC,

John Stowe QC, Robert Macfarlan QC,

Tom Bathurst QC, Paul Menzies QC,

Brian Donovan QC, John McCarthy QC,

Robert Buchanan QC, John West QC,

Wendy Robinson QC, Dr Annabelle Bennett S.C.,

Jennifer Blackman, Sharron Norton,

Elizabeth Fullerton.

*Retired or resigned during the year

Association Liaison Members for the Courts

for the financial year to 30 June 1999

COSTS ASSESSORS' RULES COMMITTEE

Ian Harrison S.C.

COURT OF APPEAL

Don Grieve QC

FEDERAL COURT

Malcolm Oakes S.C.

HIGH COURT

David Jackson QC

LAND & ENVIRONMENT COURT

Malcolm Craig QC

LOCAL COURT

Kate Traill

Christopher Millard

INDUSTRIAL RELATIONS COMMISSION OF NSW

Peter Kite S.C.

SUPREME COURT – ADMIRALTY DIVISION

Alexander Street S.C.

SUPREME COURT – COMMON LAW DIVISION

Richard Burbidge QC

SUPREME COURT – CRIMINAL DIVISION

Tim Game S.C.

SUPREME COURT – EQUITY DIVISION

George Palmer QC

*Retired or resigned during the year

Membership

There are 1,825 practising Members of the Association (as at 31 July 1999).

In addition, there are 20 Life Members and 420 Ordinary Members (Classes B & C, or Associate Members).

Total membership of the Association is therefore 2,265.

There are 65 practising barristers who have elected not to be a Members of the Association.

The 1,825 Practising Barristers in New South Wales (who are Members of the Association) occupy Chambers as follows:

SYDNEY

Wentworth	250
Selborne	188
Frederick Jordan	98
St James Hall	88
Windeyer	76
Edmund Barton	74
Wardell	73
Garfield Barwick	66
Blackstone	44
Henry Parkes	31
Samuel Griffith	30
Forbes	28
Jack Shand	27
Sir Owen Dixon	27
Sir James Martin	24
University	22
State	21
Sydney	20
Trust	20
Elizabeth Street	19
Chalfont	18
Culwulla	16
Nigel Bowen	16
Denman	15
Latham	11
HB Higgins	8
Queens Square	8
National Dispute Centre	6
Beanbah	4
Bramwell	2
Daniberg	2
Manly	2
Parkview	2
Hyde Park	1
Total CBD Chambers	1,337

SYDNEY SUBURBAN CHAMBERS

Parramatta	
Lachlan Macquarie	24
Arthur Philip	14
Macquarie	2
Total Parramatta Chambers	40
Regional	93
Crown Prosecutors, Public Defenders & Parliamentary Counsel	105
Academics	10
ACT	33
Overseas	15
Interstate	66
Other	86
Total Practising Members	1,825