

President's Report



The Annual Report outlines the wide range of activities in which the Association has engaged throughout the financial year.

One notable subject of attention was the increasing numbers of unrepresented litigants and the corresponding demand for pro bono assistance.

Participation in pro bono work is a significant part of a barrister's professional obligations. The Association has conducted its Legal Assistance scheme for many years. That scheme provides either reduced fee or pro bono assistance. The Association also conducts a Duty Barrister Scheme in both the District and Local Court and the Australian Industrial Relations Commission.

In early 1999 the Association established the Federal Court Pro Bono Scheme. The Scheme (outlined in Order 80 and in the Protocol, which can be found on the Association's web site) operates on the basis that judges can refer an unrepresented litigant to barristers on a Bar panel for assistance when they are of the opinion that representation is appropriate in the interests of the administration of justice. In April 2000 an identical scheme was established in the Supreme Court (Supreme Court Rules Part 66A). Recently, the District Court Rules Committee adopted the Supreme Court rules, establishing the scheme there too.

As is made clear in the Protocol, none of these schemes is intended to be a substitute for legal aid. It is significant to note that the demand for them came after the Commonwealth imposed restrictions on legal aid funding.

The year has also seen increasing numbers of unrepresented litigants, particularly in the Family Court. The Association is concerned that unrepresented litigants

will most probably not be able to do justice to their cases. The Legal Assistance and court pro bono referral schemes are intended to reduce the possibility of that occurring.

Further, unrepresented litigants also present difficulties for the judge who is concerned to ensure that the lack of representation does not prejudice the litigant but equally concerned to ensure the case is, and appears to be, resolved impartially. Appearing against unrepresented litigants can also present difficulties for counsel. The Association is preparing guidelines to assist barristers appearing against unrepresented litigants, which I hope we will be able to distribute this year.

Bar Charity

The Association's charity for the 2000-2001 financial year is the Aboriginal Medical Co-operative at Redfern - the first Aboriginal community controlled health service in Australia. It has a proven track record, having been established in 1971. It provides innovative community health care programmes to the approximately 45,000 Aboriginal people living in the Sydney Metropolitan area. It is an extremely worthy beneficiary of as much largesse as the Bar can afford. I urge all members to give and give often to this charity now and in the coming months.

GST

GST and the New Tax System occupied a great deal of attention. Many column inches of *Bar Brief* were devoted to giving preliminary information about the likely practical operation of the tax in a barrister's practice. Seminars were held in Sydney, Parramatta and Newcastle to provide the Bar the opportunity to hear from, and question, members of the Bar's GST committee. The NSW Bar Association assumed responsibility for preparing the *Practical 'GST' and 'PAYG' overview for Members of the Australian Bar Association*, which was distributed to all Australian barristers.

Submissions were made to the appropriate authorities to ensure that GST could be added to both legal aid and Compensation Court fees.

There were a couple of teething problems, one as yet unresolved. The Commonwealth decided barristers it briefed could only add GST at 9.5 per cent, despite both the NSW and Victorian Bars providing information demonstrating that the effect of the introduction of the new tax would be to increase, rather than decrease, barristers' expenses. The only wrinkle yet to be resolved is the issue of some solicitors suggesting that, due to accounting and cashflow considerations associated with the introduction of the GST, barristers should send memoranda of fees directly to the client. The Bar Association is working with

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the Law Society of NSW and the Australian Taxation Office to try to resolve this issue.

No doubt the real test of all the preparation will come in October when the first Business Activity Statement has to be filed.

Workers' Compensation

On 8 June 2000 the Special Minister of State, The Hon. John Della Bosca MLC, made a ministerial statement in the Legislative Council in which he announced his intention to develop a 'robust and comprehensive reform package [for workers compensation] which will deliver a scheme that provides appropriate long and short-term social and economic policy objectives'. He identified the key issues requiring attention as:

- the need to maintain premiums at an affordable level while addressing the WorkCover scheme deficit;
- the need to improve injury management processes to improve return to work outcomes;
- the need to develop a benefit structure that enables workers to return to work as early and safely as possible; and
- the need for an efficient and fair dispute resolution system.

In relation to the last mentioned objective, he said that the Government was guided by the principle that 'the level of disputes should be reduced, and legitimate disputes should be resolved as quickly as possible and at minimum cost'.

I had a meeting with the Minister prior to his statement. He assured me the Association would be consulted in relation to the development of any new strategy. A Working Group (Katzmann S.C., Cooley, Perry, Ferrari, Stone and Robert Taylor) has been established to participate in that consultation process. The Working Group will be available for consultation with the Minister and his staff in matters relating to any proposed changes to the WorkCover scheme. In September, speaking in the Legislative Council, the Minister confirmed his intention to consult extensively in relation to any workers' compensation reforms, including with the Bar Association.

District Court transcripts

A perennial topic at meetings with the Attorney General, Chief Judge of the District Court, The Hon. Justice R O Blanch, and representatives of the Attorney General's Department is the minimalist approach in the District Court's jurisdiction to the provision of transcripts. Their absence makes the conduct of any case going more than a day or two extremely difficult for judge and practitioners

alike. An attempt early in 2000 to enable parties to procure private transcript services was met with resistance from within the Court Reporting Service. His Honour Judge K V Taylor AM RFD has now been appointed to negotiate a new transcript service agreement on behalf of the Court. Members of the Bar's Common Law Committee are meeting with the Court Reporting Service to advise it of the Bar's needs for transcript in that jurisdiction.

Legal aid fees

Years of submissions by successive Presidents finally bore fruit with legal aid fees in criminal matters being increased by 17.5 per cent. Negotiations are continuing to try to secure an increase in Compensation Court fees which, like legal aid fees, have not been increased for the Bar for many years.

East Timor

In the last Annual Report Barker QC wrote of the horrors of East Timor and expressed the hope that 'perhaps, as lawyers, we will help pick up the pieces of their society, if enough of the East Timorese survive to require a system of law'. Recently the Bar Council resolved to provide funding to assist a young East Timorese lawyer to further his qualifications through a Master of Laws. That assistance will be provided in the form of funding to enable the student to undertake an English language course before commencing his Masters degree at the University of New South Wales. The University will be assisting with funding for his Masters degree.

Bar Association

Barker QC was President for the first half of the financial year. He guided the Association's activities for his two-year term with a clear focus and firm hand. His commitment to the principled application of the rule of law, particularly in the area of criminal justice, was manifest in his many powerful public comments on the topic. We were fortunate to have had him as our leader.

The Bar Council works extremely well. It regularly chews through an enormous agenda at its monthly meetings. Spirited debate takes place, but good relations are maintained by all.

The various reports from the committees indicate the wide range of activities they undertake on the Bar's behalf. It would not be possible for members of the Bar Council alone to perform the vast amount of work, which the Association undertakes on behalf of its members. The committees are essential to ensure the Bar Association can fulfil its objects, some of which the Executive Director, Philip Selth, has set out in his Report.

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I am grateful to both the Bar Council, committee members and the many members recruited to assist on an ad hoc basis for their hard work and assistance.

Philip Selth's report presents an overview of the activities of the Bar Association and its staff. His report is unduly modest in relation to his own contribution. While the Bar Council and Association members may initiate policies, programmes and the like, much of the hard work of ensuring they are implemented successfully lies in his hands. Philip's prodigious work on behalf of the Bar is reflected in the success and efficiency with which the Association's activities are conducted.

The Association is also extremely fortunate in having the services of highly dedicated and hard-working members of staff.

Both Philip and our staff deal patiently with the many demands of members. Regrettably a few inquirers lose sight of the fact that they are dealing with the Association, rather than cross-examining a recalcitrant witness. Those inquirers, too, are dealt with courteously.

We are profoundly indebted to Philip and all the Bar Association staff for all that they do on our behalf.

Running Start

The calendar year started with the amendments to the Supreme Court Rules intended to inaugurate a new standard for civil procedure. The guiding principle identified in the statement of overriding purposes is, as is by now well known, the 'just, quick and cheap resolution of the real issues in civil proceedings'. As Chief Justice Gleeson has said, the positioning of the comma is all-important. Complementary amendments were made to the New South Wales Barristers Rules.

Both sets of amended rules have now been operating for approximately six months and, as yet, the Association has received no reports of members failing to comply with their spirit or substance. Equally, there have been no reports from members of Supreme Court judges failing to recognise the significance of the position of a comma in the statement of overriding purpose. No doubt that is because the judges still embrace the proposition that:

The role of our judicial system is to dispense justice and not to dispatch business. The speed at which a case progresses is not, thankfully, the true measure of whether justice has been done... curing Court delay must be done without destroying the quality of the end product.¹

These words are worth remembering, if for no other reason than to ensure that statistics demonstrating a high rate of case disposition do not become a greater badge of honour than the delivery of justice.



Ruth McColl S.C.

President

¹ R. Janata, 'The Pros and Cons of Jury Trials' (1976) 11 The Forum 590 at 592.

Executive Director's Report



A question sometimes asked of the Bar Association and its staff, occasionally by members and prospective members, is: 'What does the Bar Association do'? A frequent follow-up question is: 'What do the staff do'?

The formal answer is set out in section three of the Bar Association's Constitution, which came into effect on 1 January 2000 (a copy of which is available from the Association's office or on the web at nswbar.asn.au at 'Publications'). In summary form, some of the objects listed under the 'Statement of Objects' are:

- to promote the administration of justice;
- to promote, maintain and improve the interests and standards of NSW barristers;
- to make recommendations with respect to legislation, law reform, rules of court and the business and procedures of courts;
- to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community;
- to arrange and promote continuing legal education;
- to promote fair and honourable practice amongst barristers;
- to maintain lecture rooms, libraries, reading, meeting, dining and other rooms; and
- to promote or conduct or cooperate in the promotion or conduct of activities of a professional, educational, cultural, sporting and social nature amongst members of the Association.

In listing only these objects I in no way am implying the others are not equally worthy. Rather, my intention is to show the very wide range of activities undertaken by the Bar Association.

To support these activities, the Bar Association relies on its various committees and sections, individual members of the Bar, and its staff. The work of the committees and sections is set out elsewhere in this report. However, what is not specifically recorded is what the individual members of staff do. A detailed account of the work of the staff would fill many pages. However, in summary, in support of the objects in the Constitution, staff, sometimes working with committees and individual members:

- provide a high-quality Library and legal research service;
- administer the Association's Legal Assistance Scheme to assist persons unable to meet some or all of the cost of the provision of advice and representation by counsel;
- support the work of the professional conduct committees;
- administer a fee-recovery service for members of the Bar where solicitors have failed to pay barristers' fees;
- support the conduct of the Readers' courses and continuing legal education seminars;
- provide administrative support to the committees and sections;
- arrange the Association's various social events, and the management of the liquor bar ;
- prepare and distribute a wide range of information circulars to members of the Association and others;
- prepare, or assist in the preparation, publication and distribution of the Association's media releases, *Bar Brief*, *Bar News*, Annual Report and miscellaneous other publications;
- issue practising certificates and documents required for a member to be admitted in another jurisdiction;
- endeavour to answer dozens of questions each week from members and others on a vast range of issues;
- administer the Bar Association's membership records;
- administer the Benevolent Fund and management of its funds;
- provide administrative support to the Barristers' Sickness and Accident Fund under an arrangement with that Fund;

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- conduct the annual Bar Council election;
- provide administrative support to the President and Bar Council;
- work with State and federal parliamentarians, members of Government, government officials, statutory office holders and others to endeavour to ensure the views of the Bar Association are known and taken into account in the preparation of policy and legislation; and
- work with the Law Council of Australia, the Australian Bar Association and other bodies to advance the interest of justice and of the legal profession.

Much of this work is not seen by all members – and in some cases nor should it be. Nonetheless, it is important, and almost invariably well done. Mistakes are made, but given the large volume of work, the complexity of some of

the work and all too frequent unreasonable deadlines, the errors are surprisingly few. They are quickly fixed when we are told of them. I continue to be impressed, and grateful, for the hard work and support of the staff, who do so much to assist the advancement of the Association's Objects and to assist individual members.

I am grateful for all the assistance and support the Bar Association staff and I receive from the Bar Council, committees, sections and individual members. I encourage members who would like to know more about the work of the Bar Council, committees, sections and staff to bring their interest to notice.



P.A.Selth

Executive Director

Office Bearers and Association Staff

Office Bearers

The Office Bearers and members of the Council as at 30 June 2000 were:

President	Ruth McColl S.C.
Senior Vice President	Bret Walker S.C.
Junior Vice President	Ian Harrison S.C.
Treasurer	Anna Katzmann S.C.
Secretary	Michael Slattery QC

Ex-Officio member

Attorney General of New South Wales

The Hon. Jeff Shaw QC MLC*

Members

Inner Bar

Donald Grieve QC
Brian Donovan QC
Dennis Wheelahan QC
Philip Greenwood QC

Outer Bar

Peter Maiden
Jeremy Gormly
John Fernon
Kate Traill
Stephen Odgers
Chrissa Loukas
Jane Needham
Justin Gleeson
Jacqueline Gleeson
Andrew Bell
Lloyd Babb
James Renwick

* Under the *Constitution of the New South Wales Bar Association*, which took effect on 1 January 2000, the Attorney General of New South Wales is no longer an ex-officio member of the Bar Council. Consequently, The Hon. Jeff Shaw QC MLC was the last ex-officio member.

Association Staff

As at 30 June 2000

Association Staff

Executive Director	Philip Selth
Executive Assistant	Karen Pritchard
Finance Manager	Basil Catsaros
Deputy Finance Manager	Tess Santos
Membership Officer	Barrie Anthony
Administrative Support Manager	Lynne Colley
Assistant to Administrative Support Manager	Robert Miks
Administrative Officer (Bar Council / EO Committee)	Shanthini Govindasamy
Administrative Officer (Social Functions)	Claudia Munoz
Administrative Officer (Records)	Kim Ellis
Administrative Officer (Reception)	Barbara Coorey
Administrative Officer	Patrina Malouf
IT Consultant	Darren Covell
Public Affairs Officer	Chris Winslow
Education Manager	Kelly Wright.
Assistant Education Manager	Stacey Hatch
Education Assistant	Alicia Munro
Legal Assistance Manager	Heather Sare
Executive Assistant to Legal Assistance Manager	Anne Maree Watt
Librarian	Lisa Allen
Assistant Librarian	Position Vacant
Technical Services Librarian	Larissa Reid
Technical Services Librarian	Jennifer Hughes
Professional Conduct Director	Helen Barrett
Professional Conduct Deputy Director	Elizabeth Maconachie
Professional Conduct Senior Secretary	Barbara Stahl
Professional Conduct Junior Secretary	Shae Baxman
Liquor Bar Manager	Tony Mitchell

Standing Committees of the Bar Council

As at 30 June 2000

Advocacy

Peter Taylor S.C. (Chair)
Her Hon. Judge Ann Ainslie-Wallace
Brian Donovan QC
Nigel Cotman S.C.
David Higgs S.C.
Brian Preston S.C.
Greg Laughton
Peter Miller
Chris Simpson
Kate Traill
Craig Leggat
Peter Berman
Paul King
Rashda Rana
Mario Sindone
Ingmar Taylor

Arbitration

Brian Donovan QC (Chair)
Arthur Leslie QC
Michael Finnane QC
Larry King S.C.
Ray McLoughlin S.C.
Campbell Bridge S.C.
Ross Letherbarrow S.C.
Andrew Lidden
Peter Dooley
Robert Hunt
Stuart Torrington
Kerrie Leotta

Bar History

Geoff Lindsay S.C. (Chair)
The Hon. Dr. James Macken
Anthony Hewitt S.C.
Peter Kennedy-Smith
Robert O'Neil
Bill Walsh
Frank Holles
Francois Kunc
Carol Webster
Prof. Ros Atherton
Prof. Bruce Kercher

CLE Advisory

Clarrie Stevens QC (Chair)
Rashda Rana
Rachel Pepper
Chairs of Committee
Convenors of Sections

Common Law

Dennis Wheelahan QC (Chair)
Brian Murray QC
Desmond Kennedy S.C.
Andrew Morrison RFD S.C.
Anna Katzmann S.C.
Ross Letherbarrow S.C.
Phillip Perry
Brian Ferrari
Andrew Stone

Criminal Law

Tim Game S.C. (Chair)
Kenneth Horler QC
Tony Bellanto QC
Malcolm Ramage QC
Clive Steirn S.C.
John Nicholson S.C.
Senior Public Defender
Paul Byrne S.C.
Terry Buddin S.C.
David Buchanan S.C.
Peter Johnson S.C.
Bob Greenhill S.C.
Elizabeth Fullerton S.C.
Glenn Bartley
Mark Marien
Peter Berman
Daniel Howard
Phillip Boulten
Stephen Odgers
Chris Hoy
Chrissa Loukas
Lloyd Babb
David Re

Duty Barrister

Kate Traill (Chair)
Ingmar Taylor

Education

Clarrie Stevens QC (Chair)
Bruce Collins QC
Peter Hastings QC
Peter Taylor S.C.
John Nicholson S.C.
David Nock S.C.
John Graves S.C.
Richard White S.C.
Luigi Lamprati
Ross McKeand

John Fernon
Greg Laughton
Paul Blackburn-Hart
Carolyn Davenport
Jennifer Stuckey-Clarke
Janet Oakley
Igor Mescher
Rashda Rana
Bruce G Smith
Rachel Pepper

Equal Opportunity

Michael Slattery QC (Chair)
Mullenjaiwakka
Sylvia Emmett
Chris Ronalds
Chrissa Loukas
Dominique Hogan-Doran
Angela Pearman
Philippa Gormly
Rachel Pepper
John Bowers
Louise Byrne
Michelle Painter

Family Law

Grahame Richardson S.C. (Chair)
Robert Lethbridge
Jan Stevenson
Peter Maiden
Richard Bell
Lesley Gaye Wong
Michael Errington
Greg Johnston
Brian Knox
Richard Schonell
Anne Rees
Neill Macpherson
Neil Jackson

GST Committee

Ian Gzell QC (Chair)
Anthony Slater QC
John Durack S.C.
Holger Sorensen
Peter Fraser
Mark Richmond

Standing Committees of the Bar Council

Human Rights

Nicholas Cowdery QC (Convenor)

Legal Aid

Stephen Odgers (Chair)

Peter Bodor QC

John Nicholson S.C.

Geoff Lindsay S.C.

Tim Game S.C.

Anna Katzmann S.C.

Elizabeth Fullerton S.C.

Robert Quickenden

John Spencer

Chris Hodgekiss

Keith Chapple

Phillip Boulten

Robert Hulme

Chris Whitelaw

Jane Needham

Richard Schonell

Paul King

Dean Jordan

Library and IT Reference Group

Paul Donohoe QC (Chair)

Peter Taylor S.C.

Mark Dempsey

David Robertson

Greg George

Michael Lawler

Ingmar Taylor

Tim Moore

David Newhouse

Mediation

Robert Angyal (Chair)

Steven Rares S.C.

Alexander Street S.C.

Richard Bell

Jeremy Gormly

Mary Walker

Geraldine Hoeben

Ian Davidson

David Knoll

PCC Committee #1

Anna Katzmann S.C. (Chair)

George Palmer QC

Peter Bodor QC

Stephen Austin QC

Stephen Robb QC

Ross Letherbarrow S.C.

Michael King

Jan Stevenson

Elizabeth Cohen

Robin Margo

Christopher Simpson

Christine Adamson

Andrew Bell

Vickie Hartsein

Angus Ridley

Dr Christine Parker (Academic)

Susanne Weress (Lay member)

Kate Nacard (Lay member)

PCC Committee #2

Michael Slattery QC (Chair)

Ian Temby QC

Francis Douglas QC

William Dawe QC

Stephen Walmsley S.C.

Murray Aldridge S.C.

David Arnott

Hugh Marshall

Lindsay Ellison

Jeremy Gormly

John Fernon

Kate Traill

Andrew Colefax

Justin Gleeson

Jane Needham

John Blount (Lay Member)

Prof. David Barker (Academic)

PCC Committee #3

Dennis Wheelahan QC

Martin Einfeld QC

Peter Hastings QC

David Davies S.C.

John Sheahan S.C.

Peter McEwen S.C.

Philip Dowdy

Robert Quickenden

James Bennett

Martin Blackmore

James Stevenson

Brian Knox

Jacqueline Gleeson

Simon Kerr

Jonathon Priestley

Peter Brereton

Michelle Painter

Dr Richard Klugman (Lay Member)

Les McCrimmon (Academic)

PCC Committee #4

Ian Harrison S.C.

Paul Webb QC

Robert McDougall QC

Stephen Rothman S.C.

Philip Hallen S.C.

Peter Johnson S.C.

Grahame Richardson S.C.

Bill Kearns S.C.

Mark Williams S.C.

Chris Leahy

Colin Cook

Phillip Mahony

Rhonda Henderson

Daniel Howard

Lloyd Babb

Dr. James Renwick

Sally Dowling

Prof. Derek Anderson (Lay Member)

Phil Marchionni (Lay Member)

Francine Feld (Academic)

Note: Bar Association Committees were re-organised at the beginning of 2000. These lists do not include members who served on committees between July 1999 and January 2000.

Sections of the Bar Association

As at 30 June 2000

Administrative law

Convenor: Alan Robertson S.C.

Secretary: Stephen Lloyd

Common law

Convenor: Anna Katzmann S.C.

Secretary: Andrew Stone

Constitutional law

Convenor: David Jackson QC

Secretary: David Knoll

Construction law

Convenor: Glen Miller QC

Secretary: Geoff Underwood

Corporations, securities and insolvencies law

Convenor: Tom Bathurst QC

Secretary: Rodney Smith S.C.

Criminal law

Convenor: Tim Game S.C.

Environmental, local government and valuation law section

Convenor: Peter McClellan S.C.

Secretary: Josephine Kelly

Family Law

Convenor: Grahame Richardson S.C.

Secretary: Greg Watkins

Intellectual property law section

Convenor: David Yates S.C.

Secretary: Richard Cobden

Maritime, air and transport law section

Convenor: Brian Rayment QC

Secretary: Gregory Nell

Trade practices and consumer protection law section

Convenor: Jeffrey Hilton S.C.

Secretary: Andrew Ogborne

Arbitration Committee

The Arbitration Committee carried out a number of functions during 1999-2000. The first was the appointment of arbitrators to the Bar Arbitration Panel. For this purpose, a sub-committee was formed, which will make the recommendations to the Committee who will, in turn, refer these to the Bar Council. For this purpose a new form has been prepared to include greater detail.

A letter was received from the Chief Judge of the District Court, The Hon. Justice R O Blanch, asking for the Association to indicate in which areas of work an arbitrator was experienced. The Association was not able to respond of its own knowledge. However, a further section in the form has been included to allow for the barrister to set out his or her experience and these details will be conveyed to the District Court.

The Committee has received confidential complaints and comments concerning arbitrators from time to time. Some of these complaints have come through the Law Society. There is a protocol between the Association and the Law Society that governs these issues.

The Committee looked at ways to increase the involvement of barristers in arbitration, particularly in the sphere of building and engineering. The Committee considers that it is important for the Bar to be fully involved in these matters. Robert Hunt of Wardell Chambers, who is the President of the Institute of Arbitrators and Mediators Australia, was recently appointed to the Committee.

The Committee also, from time to time, recommends appointment to the panel of barristers who have come to the Bar halfway through the year. Usually this involves barristers who have reasonable experience in litigation and arbitration and are returning to the Bar after a period away from practise. This is not done as a matter of course, but in particular circumstances the Committee will take this action.

Bar History Committee

Throughout the course of the year, the Committee has worked with Macquarie University for the purpose of promoting research on topics relating to the history of the NSW Bar. Principally, this has involved negotiations over the terms of a post-graduate scholarship. As part of this cooperative process, the President of the Bar Association appointed to the Committee, Professor Ros Atherton and Dr Bruce Kercher, both of Macquarie University Law School.

In March 2000 the Committee made a submission to Bar Council to obtain funding for the proposed scholarship. This request was subsequently approved by Bar Council.

The Committee's Oral History Programme has moved towards the identification of suitable subjects for interview and the selection of qualified interviewers. Funding has been allocated to cover administrative costs, and the project will be undertaken in cooperation with Macquarie University.

The Committee has undertaken a number of other tasks during the year. In April 2000 the Committee adopted a pro forma 'Acknowledgment of Gifts to the Bar Association'. This agreement specifies terms and conditions under which the Bar Association may receive gifts of historical interest.

The Committee continued to work in cooperation with Provenance Consulting on the Association's records management systems. On 15 February 2000 that the Committee recommended to Bar Council that the final report by Provenance Consulting be adopted.

During the final months of the financial year, the Committee did preliminary work to determine the suitability for publication of the diary of Judge Callaghan, a NSW District Court Judge during the 1840s.

Criminal Law Committee

The principal activities of the Committee have been directed towards making submissions and representations on a wide range of legislative changes and initiatives in the area of criminal justice. These have included submissions on:

- *Customs Legislation Amendment (Criminal Sanctions & Other Measures) Act 2000* (Cth);
- *Criminal Procedure and Amendment (Sexual Assault Communications Privilege) Act (NSW)*, which effectively overturned the decision of the Court of Criminal Appeal in *Young v R* (1999) 46 NSWLR 681;
- Evidence (Audio and Audio Visual Links) Amendment Bill 2000 (NSW);
- Crimes Amendment (Firearms and other Offensive Weapons) Bill 2000 (NSW). This was a private members Bill introduced by The Hon. John Tingle MLC and opposed in our submissions;
- Forensic Procedures (DNA Database) Bill 2000 (NSW);
- Child Protection (Excessive Punishment) Bill 2000 (NSW); and
- Proposed legislative changes to the Independent Commission Against Corruption.

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The above list is by no means exhaustive. There were many other drafts and proposals which have been the subject of consideration and representations by the Committee during the year. On occasions, such representations have resulted in significant amendments to proposed legislation, for example: the Evidence (Audio & Audio Visual Links) Amendment Bill (NSW). On other occasions, the Committee's representations have not been successful, for example: in relation to the DNA database provisions of the *Crimes (Forensic Procedures) Act 2000 (NSW)*. Once again, however, the Committee is particularly grateful to those members who have prepared submissions during the course of the year.

One of the important, ongoing issues in relation to criminal trial process concerns pre-trial disclosure. The Committee continued to be represented by Stephen Odgers on the Pre-Trial Disclosure Working Committee. The Criminal Law Committee and its Law Society counterpart have attempted, with some success, to ameliorate those aspects of the proposed pre-trial disclosure regime which significantly impinge upon the fundamental rights of an accused person.

On a general level, the Committee has also maintained liaison with both the Law Society and the courts with respect to matters of mutual concern, particularly, those concerning listing and pretrial procedures.

Duty Barristers Scheme

Overview

The Duty Barrister Scheme continued to provide a vital community service throughout 1999 – 2000. The Scheme, overseen by Kate Traill, includes 90 names and rosters three barristers on each sitting day.

Principal 1999 – 2000 Activities

- The brochure on the Duty Barristers Scheme was 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 regularly received the Association's brochure about the Scheme, to be distributed to anyone seeking assistance.
- During the year the matters considered included committals, larceny, driving offences, bail applications, appeals, apprehended violence orders and assault charges.

- In early 2000 the Advocacy Committee organised a course, specifically designed for the Duty Barristers. Forty attended the seminar at the Downing Centre on bail applications, Apprehended Violence Orders and pleas presented by senior Silks, such as Ian Temby QC and Tony Belanto QC.
- A Duty Barrister Scheme in the Australian Industrial Relations Commission was launched in July 2000. Ingmar Taylor organised the scheme to appear for unrepresented litigants before the AIRC at the call-over, which determines certain jurisdictional issues in the course of proceedings. Fifty barristers volunteered for the Scheme.
- During the latter part of 2000, the Duty Barrister Scheme hopes to expand into Parramatta Court and the Children's Court.

Education Committee

It was with real regret that the Committee accepted the decision of Justice Lindgren to resign as Chair of the Education Committee in November 1999. Justice Lindgren had been Chair of the Committee since 1993. During the period of his chairmanship, the work of Committee had developed extensively. The judge was a hard working and encouraging Chair whose informal approach belied the meticulous professionalism with which he guided the work of the Committee. Clarrie Stevens QC took over as Chair of the Committee in February 2000.

Roger Owens, Assistant Education Manager, resigned in July 1999. Stacey Hatch was appointed as his replacement. The role of the Assistant Education Manager was altered from being almost exclusively concerned with the organisation and promotion of the CLE programme to encompass the day to day administration of the Bar Practice Course and providing administrative support for the Advocacy Committee, CLE Advisory Committee and Sections. The role of the Education Manager was also reviewed to provide a coordinating and advisory role between all educational activities of the Committee and Bar Association staff, as well as to provide administrative support to the Committee, Examinations and Practising Certificate and Reading Sub-Committees.

Principal 1999 – 2000 Activities

- **Eastern States Legal Education Forum, 22 August 1999 at the New South Wales Bar Association.** Topics discussed included legislation governing each State's Bar Association. Justice Priestley spoke on the work of the Law Admissions Consultative Committee's attempts to develop a National Focus on Practical Legal Training. Chris Roper, Director of the Centre for

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Legal Education, discussed various theories of Continuing Legal Education.

○ **Tutors' and Readers' dinners**

Friday 2 July 1999. The Hon. Justice Virginia Bell was guest speaker and Reader Tony Iulliano proposed the vote of thanks.

Friday 3 December 1999: David Jackson QC was guest speaker and Reader Toni Bartush-Peek proposed the vote of thanks.

○ **Junior Bar Survey**

The survey was targeted to junior barristers who had come to the Bar in 1996 to 1998. The aim was to establish a general profile of a junior barrister; to identify practice expectations; and practice areas. A detailed summary of the survey findings was published in *Bar Brief* and is available on the Association website.

○ **Bar examinations**

November 1999	Practice & Procedure	Evidence	Ethics
No. of candidates	54	53	51
Average mark	80	76	83
Total % pass	85	81	100

Total candidature: 62

Distance candidates: 4 (Fiji, London and Canberra)

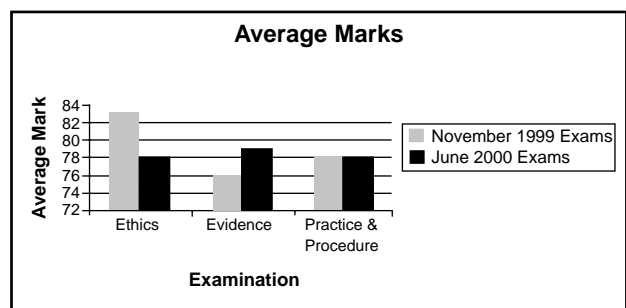
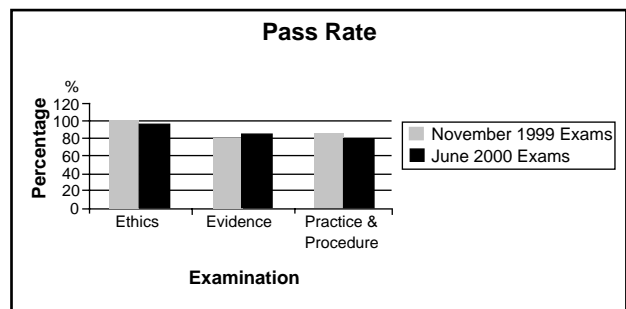
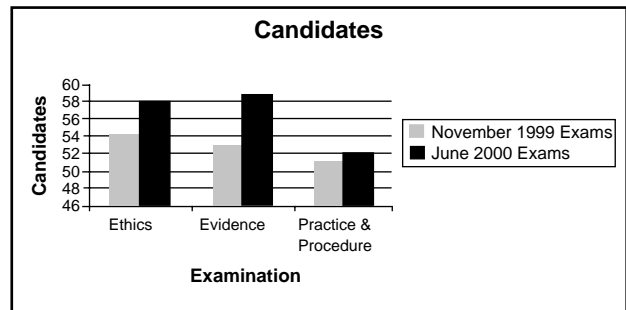
Elizabeth Frizell achieved the highest aggregate mark and was the winner of the P. Blashki Award. The award comprises a custom-made robe and jabot.

June 1999	Practice & Procedure	Evidence	Ethics
No. of candidates	58	59	52
Average mark	78	79	78
Total % pass	81	86.4	98

Total candidature: 67

Distance candidates: 3 (Canberra, Newcastle, Eleebana)

Louise Clegg was the winner of the P Blashki Award.



At each of the bi-annual sittings, about fifty members participate in the conduct of the examinations, as markers or moderators or examiners.

○ **Bar Practice Courses**

August 1999: 43 people attended this Course. Of these, the average age was 34.67 years, and 10 of the group were female (23.25 per cent). Most of the group (90.7 per cent) had previously been employed as solicitors

February 2000: In contrast, 53 people attended the February 2000 Course. Again the average age was 34.5 and 23.5 per cent (13) of the group were female. 39 (75 per cent) had previous experience as solicitors.

The Bar Practice Courses are not simply academic exercises. For each of the Bar Courses, the Committee is assisted by about 240 practitioners. These include judges, magistrates, senior and junior counsel. The practical expertise of so many members creates the 'virtual reality' of the Bar Practice Course. Courts' administrators also regularly cooperate to ensure the smooth operation of practical sessions. Our thanks to Robyn Delahunty, secretary to The Hon. Justice D G

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Hill; John Castellon, Deputy Chief Executive Officer, Supreme Court of NSW; Margaret Gaertner, Executive Assistant, Supreme Court of NSW and Ann Hinshelwood, Chief Magistrate's Office, Downing Centre Local Court.

Three innovations to the Bar Course have occurred in the year. These are, the introduction of written aims, objectives and method for most of the teaching sessions; the decision to extend the course from four to five weeks; and the introduction of a Communications Module, written in cooperation with the University of Western Sydney.

At the end of the August 1999 Course, the Course Director, Greg Laughton, proposed that the four week course be extended to five weeks. The reason for this was that many of the readers were not getting enough practical advocacy training in the course and were 'graduating' at a less than satisfactory standard. The additional week would allow more intensive practical advocacy work and also allow the introduction of a new Communications module.

After discussions with two possible providers, it was agreed that the University of Western Sydney, in cooperation with members of the Bar, would design and conduct a four-unit Communications module for the second course in 2000. Units cover Communication Theory, Communication Skills, Oral and Written Communication. In addition, and related to the communications theme, Les McCrimmon, Director of Clinical Studies at University of Sydney, introduced a session on Preparation for Performance. Les is a coopted member of the Bar Course Sub-Committee.

- **The Continuing Legal Education Programme:** The planning initiative in the CLE programme in 1999 – 2000 was the decision to introduce an annual public lecture, entitled The Sir Maurice Buyers Memorial Address. The first Address will be given in November 2000. In the latter part of the financial year, at the request of Bar Council, and with the expertise of the GST Committee, emphasis was placed on GST information for Sydney and regional members.

CLE Programme for 1999 – 2000

- 12 July 1999 'The decision of *Astley v Austrust Limited* (1999)' – Ric Burbidge QC
- 29 July 1999 'Appellate Practice Seminar'
The Hon. Justice W M C Gummow AC
The Hon. Justice Keith Mason
The Hon. Justice M R Wilcox
David Jackson QC

- 16 August 1999 'Goods and Services Tax'
Ian Gzell QC, Tony Slater QC, Philip Durack S.C. & Mark Richmond
- 17 Sept. 1999 'Coroners Court visit'
Professor Hilton
- 13 Sept. 1999 'Issues in Public, Corporate and Industrial Elections'
(Chair) Peter King
His Honour Judge J Moore
Wayne Haylen QC, John McCarthy QC, Stephen Rothman S.C., Alexander Howen, David Godwin, Sue Hooke, Robert Harper and Malcolm Gracie
- 29 Sept. 1999 'Voice and Presentation in Court'
Robyn Fraser
- 18 Oct. 1999 'Negotiating Settlements'
(Chair) Peter Garling S.C.
Robert McDougall QC
- 27 Oct. 1999 'The Report of the Truth and Reconciliation Commission'
CLE Breakfast
His Excellency Dr Bhadra Ranchod, South African High Commissioner
- 28 Oct. 1999 'Prison Visit'
Metropolitan Regional Remand Centre (Silverwater)
- 16 Nov. 1999 'Using Unreported Judgments'
Naida Haxton
- 22 Nov. 1999 'Common Pitfalls of Advocates at Trial'
(Chair) G Richardson S.C.
Justice P Rose
- 24 Nov. 1999 'Conduct of Appeals in the Full Court of the Family Court of Australia'
(Chair) Grahame Richardson S.C.
Justice Ellis
- 1 Dec. 1999 'The Republican Referendum: Where To Now?'
(Chair) Clarence Stevens QC
Kerry Jones, The Hon. Justice K R Handley AO, David Jackson QC, Andrew Robb.
- 2 Dec. 1999 'Practice Management Workshop'
David Nock S.C.
John Nicholson S.C.
Jennifer Stuckey-Clarke

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7 Dec. 1999	'Appellate Workshop' Chris Barry QC
14 Feb. 2000	'Risk Management' (Chair) Phil Greenwood S.C. Ronwen North, Streeton consulting
9 March 2000	'The new Motor Accidents Compensation Act: the future of the junior Bar in motor accident cases' Bruce Smith, Andrew Stone
13 March 2000	'The NSW Administrative Decisions Tribunal' (Chair) Caroline Needham S.C. His Honour Judge K O'Connor
7 April 2000	'Prison Visit' Metropolitan Regional Remand Centre (Silverwater)
10 April 2000	'Guideline Judgments' (Chair) Tim Game S.C. Anthony Bellanto QC
19 April 2000	'Affidavits' The Hon. Justice K E Lindgren The Hon. Justice J P Bryson
1 May 2000	'Goods and Services Tax, Part II' Ian Gzell QC
3 May 2000	'Using Unreported Judgments' Naida Haxton
19 May 2000	'Coroners Court visit' Professor Hilton
30 May 2000	'Voice and Presentation in Court' Robyn Fraser
8 June 2000	'Goods and Services Tax: Regional' Parramatta: Holger Sorenson Newcastle: Mark Richmond
29 June 2000	'Practice Management Workshop' David Nock S.C., John Nicholson S.C. Jennifer Stuckey-Clarke

General Matters

As foreshadowed in the 1998 – 1999 report, the policy work of the Committee has concentrated on practising certificate conditions and co-ordination of the various education activities. Practising certificate amendments were designed to deal with the issue of the consistent failure of some Readers to complete reading requirements within the reading period. Many attempts to solve the problem have been made over the years, but without

success. Tutors are themselves more aware of the problem and they too have encouraged their Readers to 'do the right thing'. Traditionally, an initial practice restriction was imposed upon all Readers, which was lifted automatically at the end of the first three months of practice. The restriction limited the Reader to junior work unless with the express permission of the tutor. The amendments to the readers' practising certificates, introduced for the August 1999 intake, requires readers to complete Criminal and Civil Reading before the lifting of the practice restriction.

Other policy changes include the widening of the CLE attendance credits policy to include papers presented by readers, and also the formalisation of Criminal and Civil Reading credit areas.

The Committee is acutely aware of the need to constantly review and assess its work in order to achieve a dynamic and cohesive education programme for all sections of the Bar. Every effort is made to avoid staleness through blind repetition. New ideas and comments from members are always welcome, as are comments from exam markers or advocacy instructors on any perceived or potential problems relating to current programmes.

The Education Committee acknowledges its enormous debt to members of the Bar, magistrates and judges who support the education activities of the Association through their contribution to the Bar Examinations, Bar Courses, Reading, Continuing Legal Education and advocacy training. Without this continued support, the education programme simply could not function.

The Equal Opportunity Committee

This year saw an expansion in the membership of the Equal Opportunity Committee. The focus of the Committee's work this year principally has been in three challenging issue areas, women at the Bar, Indigenous lawyers and mobility disability. The Committee's work in these three issue areas has been closely guided since January 2000 by the Committee's Chair, Michael Slattery QC, and Deputy Chair, Chris Ronalds.

Women at the Bar

The Committee has assumed the task of building upon the valuable work already undertaken by the Victorian Bar, in order to promote and achieve real equality of opportunity for women at the New South Wales Bar.

In 1998 the Victorian Bar Council published its report *Equal Opportunity for Women at the Victorian Bar*, which confirmed the long held suspicion by many that women did not have true equality of career opportunity at the Victorian Bar.

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Accordingly, at the request of Bar Council, the Equal Opportunity Committee reviewed the Victorian report and has made a number of detailed recommendations, which have been authorised by Bar Council for adoption in this State. These recommendations include:

- gathering information on entry and attrition by gender;
- encouraging Bar Council and senior members of the Bar to lead the way in discouraging sexism at the Bar;
- attempting to make appointments from the Bar to external bodies alternate between men and women;
- a review of Readers' course materials for gender inclusive language
- a study on remuneration equity;
- elimination of gender discriminatory practices in briefing processes
- voice training/projection workshops; and
- developing networks with commercial organisations and government bodies to provide opportunities for women barristers to be nominated as members of boards.

The Committee is currently working on ensuring the speedy implementation of each of these recommendations. Additionally, there are plans for an empirical court study, along the lines of that carried out in Victoria, to be conducted in order to objectively investigate levels of the representation of female barristers across various jurisdictions and types of court matters.

The Equal Opportunity Committee is also examining several proposals in relation to listing and court sitting times, in order to better accommodate family obligations for both female and male barristers. These will be circulated for discussion within the Bar shortly.

Indigenous lawyers and barristers

Earlier this year, over a quarter of a million people marched across the Sydney Harbour Bridge in support of Aboriginal reconciliation. Indigenous Australians are under-represented generally in the law and their participation at the New South Wales Bar is no exception. As a recognition and implementation of the process of reconciliation, the Equal Opportunity Committee has developed *A Strategy to Assist Indigenous Lawyers to Practice at the New South Wales Bar*. The Strategy, aimed directly at addressing this inequality of representation, has recently been approved by Bar Council and involves three key elements:

- provision of support for Aboriginal law students who show capacities as advocates in their last two years of studying law;
- fostering government assistance for the financial gap between completing law school and coming to the Bar; and
- ensuring Indigenous Australians coming to the Bar are introduced to a network of contacts and work support, which will enable them to develop stable income producing practices.

This innovative scheme has the support of the Deans of the Law Schools of the University of New South Wales and the University of Technology, Sydney. Each year the Deans will nominate Indigenous law students who show potential as advocates for participation in the scheme. The scheme will be piloted at these two universities, which have well-developed programmes of study and support in place for Indigenous law students. It is hoped that over time the scheme will foster and produce more Aboriginal barristers. It will provide a useful model for other jurisdictions to commence similar projects.

Mobility disability

The Equal Opportunity Committee has also been active in the field of disability discrimination reform, more specifically in respect of access. Many chambers continue to have restricted access for elderly, infirm or permanently disabled people, particularly those who are required to use wheelchairs.

The Committee is negotiating with Counsel's Chambers Ltd for the provision of a wheelchair ramp at the Phillip Street entrance of the Wentworth/Selborne Chambers buildings so that deficiencies in wheelchair access to those buildings may be rectified in the near future. A request for additional parking spaces in the southern end of Macquarie and Phillip Streets for the mobility impaired was made to the Lord Mayor of Sydney, Councillor Frank Sartor.

A disability access questionnaire was also drawn up by the Committee and distributed to all Heads of Chambers. Its aim is first, to identify chambers where the Committee can assist in negotiations with building owners for the provision of better access and second, to assist the Committee in compiling an information database on disability access. Topics covered by the questionnaire include: wheelchair access to chambers, independently accessible toilets, the provision of designated parking spaces for disabled people in close proximity to chambers and the courts, and general levels of accessibility to such venues. Once the information has been collated it will then

be used by the Committee to identify and prioritise those areas most in need of the Committee's assistance. Replies to the questionnaire are still being received and analysis of the results is underway. Access to justice must at its most basic level include unhindered physical access to chambers and courts by disabled practitioners and clients alike.

Family Law Committee

Throughout the past year the Committee has maintained extensive involvement in all issues concerning practice and procedure in the Family Court.

Consequent upon the Federal Government's substantive discussion paper titled *Property and Family Law - Options for Change*, the Family Law Amendment Bill 1999 has been introduced to Parliament and referred to the Legal and Constitutional Legislation Committee by the Senate on 29 September 1999.

Whilst much of the substantive reform initially proposed by Government in relation to the criteria and manner for determination of disputes in relation to property settlement have been abandoned, the Bill contains substantive reform in relation to the Court's ability to deal with super-annuation entitlements and the ability of parties to enter into binding agreements both before and after marriage, dealing with the disposition of their property in the event of a breakdown of the marriage.

The proposed legislation represents a significant departure from Government's initial proposals consistent with submissions put by the Bar Association and other groups.

The coming year will no doubt involve the Family Law Committee in a process of evaluation and education arising from the new legislation.

Principal 1999 - 2000 Activities

This year has seen the Committee involved in:

- providing representation on a committee with judges of the Family Court reviewing the role and procedure in relation to expert evidence in the court;
- providing representation and submissions to the Family Court Future Directions Committee which is presently undertaking a wide ranging and substantial review of many aspects of the way in which the Family Court undertakes its work;
- providing representation in the Sydney Registry Case Management Committee;
- convening, in conjunction with the Family Court, lectures presented by judges of the court in relation to practical aspects of both trial and appellate advocacy; and

- participating in quarterly meetings of judges and the profession convened by the Family Court.

The Committee has maintained an excellent working relationship with the Family Court and continues to see the opportunity of participating in important reviews of the Court's performance and procedure as a valuable opportunity.

Fees Committee

A total of \$73,506 was recovered on behalf of members for the financial year ended 30 June 2000. This was down from the figure of \$130,371 recovered in the year ended 30 June 1999 and substantially down on the figure of \$214,371 recovered in the year ended 30 June 1998.

During the year, the Association received 43 new complaints regarding unpaid fees, compared to 69 in the previous year. A number of matters relating to the complaints made in the previous years are ongoing. The decline in requests for assistance is due, at least in part, to the cost disclosure provisions of Part 11 of the *Legal Profession Act 1987*.

On 20 July 2000 the Council resolved to abolish the 10 per cent administration fee which previously applied to fees recovered on behalf of members. The fee recovery service will now be delivered free to all members. Previously, the service was free in respect of work performed during a member's first five years in practice at the Bar.

Fees the Association is being asked to collect relate almost entirely to matters in which fees were rendered after the introduction of written 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*. It is necessary to include estimates in disclosures and to revise estimates if there is likely to be a significant increase in costs: see sections 177 and 178 of the Act. This subject was covered in an article, 'Obligation to disclose fees under Part 11 of the *Legal Profession Act 1987* in *Stop Press*, July 1999, page 14 (available in the Bar Library). A comparison of sections 175 and 176 of the Act will reveal that the disclosure provisions are more onerous for direct access.

New South Wales Barristers' Rule 144 provides:

- (1) It would not be reasonable for a barrister to be required to make a disclosure under section 176 and sub-section 177(2) of the *Legal Profession Act* when:
 - (a) the barrister has, whether or not in relation to the legal services to be provided to the client by the

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barrister, given to the solicitor on whose instructions the barrister is acting in writing a statement which remains current and which indicates the basis upon which the barrister charges and his or her rate or rates;

(b) the barrister proposes to charge and does charge for those services in accordance with that basis and rate or rates.

(2) It would not be reasonable for a barrister to be required to make a disclosure under section 176 and sub-section 177(2) of the Legal Profession Act when the costs for the legal services to be provided to the client by the barrister have been fixed by statute or regulation.

[Inserted Gazette No. 66 of 20 June 1997, pp. 4551-2]

A failure to disclose matters which the barrister is required to disclose under Part 11, may amount 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 and should put in place a fall back position. If attendance to the brief prevents a member from fulfilling his or her obligation to disclose the basis on which they propose to charge, they should fax a disclosure to the solicitor immediately. Section 178(2) provides if it is not reasonably practicable to make the disclosure before counsel is retained, it is to be made as soon as practicable thereafter.

Alternatively, in urgent matters, members may wish to consider having a blank disclosure letter available. At the beginning of the first conference with the solicitor and client, the disclosure may be completed by hand and passed to the instructor. A copy should, of course, be kept for the purposes of record keeping.

Any inquiries about the fee recovery system or the operation of Part 11 of the Act should be made in the first instance to the Professional Affairs Director, 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.

GST Committee

In 1999-2000 the Committee assisted the Bar Association and its members during the transition to the New Tax System.

In April 2000, *A practical 'GST' and 'PAYG' overview for members of the Australian Bar Association* was prepared by Dennis Robertson FCA of Weston Woodley & Robertson Chartered Accountants and settled by Gzell QC and Slater QC on behalf of the Bar Association's GST Committee and

the Australian Bar Association. This report was prepared with financial assistance provided by the Commonwealth Government's GST Assistance Start-up Programme. Copies were distributed to all practising barristers around the country who are members of a Bar Association. A copy is also available on the Bar Association's web site.

In August 1999 and again in May 2000, the Committee conducted CLE seminars, explaining the impact of the Goods and Services Tax on the way barristers will need to manage their financial records. In June 2000, Mark Richmond and Holger Sorenson delivered briefings to members of the Bar in Newcastle and Parramatta respectively. These briefings were videotaped and distributed to Bar Council regional liaison members.

In addition to the provision of information directly to members of the Bar, the Committee, in particular its Chairman, Ian Gzell QC, assisted the Bar Association to prepare its financial systems for the commencement of the GST.

Human Rights Committee

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 arising and issues confronted, that have human rights implications. The Committee also acts as a liaison point for the Bar Association 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 human rights issues affecting the legal profession and the administration of the law as they arise.

The Convenor, Cowdery QC, who enjoys the role of 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-Chairman. He is also Human Rights Adviser to the Law Council of Australia and an officer of various other human rights organisations associated with the law.

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

In the year under review, 12 such calls for assistance were dealt with. They were directed at abuse or potential abuse in England and Wales (where there was a move to restrict the money that the Law Society is able to raise from the

profession through the annual practising certificate fee – thereby inhibiting its ability to represent the profession's interests and to provide services such as pro bono representation) and in Bolivia, Brazil, Congo, Egypt, Guatemala, Malaysia, Northern Ireland, Pakistan and Peru.

All members are asked to report to the Association any cases 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.

Constitutional Law

Two Section papers were presented during 1999-2000. On 19 August 1999 Lee Aitken's paper, 'The Ambit and content of Federal jurisdiction in the light of *Re: Wakim*' was delivered. The commentators were Stephen Robb QC and Professor G D Walker.

On 8 June 2000, Kevin Connor delivered a paper: 'Disqualification from, and incapacity for, membership of the Commonwealth Houses of Parliament'. The commentators were The Hon. Jeff Shaw QC MLC, Attorney General of New South Wales [as he then was], and Stephen Finch S.C. The guest of honour for the occasion was The Hon. Justice M H McHugh AC, who delivered a most interesting commentary, almost a paper in itself. The Section's Annual Dinner followed.

The Section thanks those who participated in its activities during the year. During the remainder of 2000, there will be two sessions at which the present constitutional position in relation to industrial law will be discussed.

Administrative Law

During the 1999-2000 financial year, the Administrative Law Section held lunchtime and evening meetings on a range of topics relevant to the practice of the Section's members, including:

- A paper on the High Court decisions in *Abebe v Commonwealth* and *Minister for Immigration and Multicultural Affairs v Esbetu*, presented by Geoffrey Johnson.
- The Hon. J D Davies, retired judge of the Federal Court and an Acting Judge of the New South Wales Supreme Court, spoke of his experience in administrative law matters as a judge of the Federal Court.
- Richard Lancaster gave a paper on recent developments in State administrative law, commenting in particular on the decision of the High Court in the *Corporation of the City of Enfield*.

- Alan Robertson S.C. and Paul Bolster, at that time a senior adviser to the Commonwealth Attorney-General, convened a lunchtime discussion on the Federal Magistrates Court.

In addition, the Section held its Annual Dinner at which His Honour Justice Kevin O'Connor, President of the Administrative Appeals Tribunal, spoke about recent developments in administrative law.

During the year, Nicole Abadee resigned as the Secretary, a position that she held since the Section was established. The Convenor and the members of the Section thank her for her diligent organisational work over many years. Stephen Lloyd accepted the invitation to become the new Secretary.

Professional Standards Committee

The Professional Standards Committee was discontinued in January 2000, when the projects on which it worked were completed. The members of the Committee from 1 July 1999 to 31 December 1999 were Robert McDougall QC (Chairman), Michael Slattery QC, John Agius S.C., Sylvia Emmett, Doug Timmins and Anthea Fox.

The Committee was responsible for publishing a model compliance with New South Wales Barristers' Rule 80 (see March 2000 edition of *Bar Brief*). Members were invited to make suggestions or comments on the model. Some former members of the Committee have reviewed the suggestions received and a revised model will be published in due course.

The Committee also developed a best practice model for settlements, which will form part of the material given to Readers.

Legal Aid Committee

There have been some significant achievements in the 1999-2000 financial year. The Committee has maintained good relations with the NSW Legal Aid Commission and its new Managing Director. It has provided considerable input on structural changes that are taking place within the Commission, designed to maximise the delivery of legal aid services in NSW.

On the financial side, the NSW Legal Aid Commission has agreed that legal aid fees will be maintained, notwithstanding the introduction of the GST. Further, there has been a 17.5 per cent increase in fees for criminal matters, exclusive of GST, as a result of an increase in funding to the Commission in the last NSW Budget. However, this was a relatively modest increase bearing in mind the fact that the last increase was in 1990 and the Bar Association will put the case for a further increase in the

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next financial year. The structure of fees for civil work has also been changed, with net benefits to members of the Bar. However, the fundamental issue confronting the practice of legal aid work remains the substantial cuts in legal aid funding introduced by the Federal Government. This has led to a significant decline in available funds, particularly for civil work, with increasing pressure on the Bar to provide pro bono services. The Committee will continue to support calls for a real increase in legal aid funding to assist the more disadvantaged members of the community.

Legal Assistance Scheme

The purpose of the Legal Assistance Scheme is to provide assistance for persons who cannot otherwise obtain legal assistance without severe financial hardship. Once it has been determined that an applicant meets the financial criteria, the matter is referred to a barrister for an assessment of the legal merit on a no fee basis. After the provision of the initial advice, if further assistance is recommended, the applicant deals direct with the barrister on one of the following bases:-

- the barrister may accept the matter on a speculative basis where the applicant only pays on a successful outcome, and/or the establishment of a costs entitlement, and/or the actual recovery of costs from the other party;
- the barrister may agree to accept the matter on a reduced fee basis;
- the barrister may agree to accept the matter for a fee negotiated at market rates; or
- the barrister may accept the matter for no fee, regardless of the outcome (and hence in the event of success, would not be seeking a costs order, which includes payment of any fee to the barrister).

For the period 1 July 1999 to 30 June 2000, 350 applications for assistance were received by the Scheme. Compared with last year, this represents a 6.7 per cent increase. 120 applications fell outside the guidelines for assistance. Of the remaining 230 applications, Barristers accepted matters in the abovementioned categories as follows:-

No fee	170
Speculative/costs entitlement/ Recovery of costs	25
Reduced fee	35
Market rates	-

In the last twelve months, barristers contributed approximately 4,500 hours of work. an 18.5 per cent increase over last year's figures. Since the Scheme's

inception in 1996, barristers have contributed approximately 15,300 work hours.

The Scheme received more than 500 enquiries about legal assistance and related matters. Many enquiries were made by people calling in to the Bar Association's office. A number of applications were the direct result of a court advising a litigant to seek assistance from the Bar Association.

A survey completed by barristers at the conclusion of each Legal Assistance matter during 1999-2000 showed there was a 98 per cent approval rate by clients for the manner in which their matters were handled. During this financial year there were three complaints made to the Bar Association by dissatisfied applicants. Each of these complaints was satisfactorily resolved.

Listed below are some of the results achieved by barristers taking part in the Legal Assistance Scheme in 1999-2000:

- An unrepresented litigant, referred by Legal Aid, was assisted by a retired judge in a conciliation conference in the Industrial Relations Commission of New South Wales. He had been working at a high profile restaurant for five years and took leave without pay to visit his sick wife in China. On his return he was dismissed without entitlements. The Commissioner awarded \$10,000 to the employee.
- A lender was suing an un-represented holder of a supplementary credit card to recover approximately \$27,000. After a two-day hearing, the Magistrate found for the defendant, represented by a barrister through the Scheme, on the basis that the contract was unjust under the *Contracts Review Act 1980*. The defendant was referred to the Scheme by Legal Aid.
- A family whose son's death was the subject of a coronial inquest was referred to the Scheme by Legal Aid, which had refused aid. A barrister made successful submissions to Legal Aid on the basis that it was in the public's interest for aid to be granted to the family for representation at the inquest.
- A Community Health Centre referred a young woman with two children whose husband had been refused a visa to come to Australia from Lebanon for assistance in obtaining representation in a part-heard matter before the AAT. A barrister agreed to appear at the hearing. The Deputy President ordered that the Department grant the husband a visa in order that he be able to come to join his family.
- An unrepresented litigant from the country was initially assisted in 1995 in his claim from the Roads and Traffic Authority. A barrister convened two

meetings with RTA officers in the Bar Association's offices in an attempt to negotiate a settlement. The negotiations were unsuccessful but pinpointed a better avenue for pursuing the claim. The barrister introduced the client to a large firm of solicitors who initiated proceedings in the District Court against the client's former solicitor. The barrister provided an opinion on limitation issues and prospects of success. Prior to the hearing the barrister represented the client at a Law Cover mediation which produced a satisfactory compensation outcome for the client after five years of involvement.

Volunteers encouraged

The President published two circulars and a *Bar Brief* article exhorting members of the Bar to volunteer their services to the Scheme. The results were heartening. The Executive Director and the Legal Assistance Manager, Heather Sare, spoke to readers at the Bar Practice Course; over half the Readers in the course volunteered their services.

Barristers' Referral Service

The Barristers' Referral Service was established to assist members of the public to contact barristers direct in order to obtain their services. In 1999-2000 the Service handled approximately 600 enquiries in all areas of law.

Federal Court and Supreme Court Pro Bono Schemes

At the request of the Federal and Supreme Courts, the Association has established lists of barristers willing to assist in matters referred by the courts. A significant proportion of these requests seems to be due to difficulty in obtaining Legal Aid.

Interaction with other pro bono service providers

The Bar Association Legal Assistance Scheme works closely with the Law Society Pro Bono Scheme. Not only does the Law Society refer matters requesting a barrister's involvement, but also it is not uncommon for our Scheme to ask for the Society's help in obtaining the services of a solicitor on behalf of applicants where legal merit has been established. Community Legal Centres are a significant source of referrals to the Scheme. The Legal Assistance Manager attends their annual conferences, both National and State. The luncheon hosted by the Association in 1999 for Community Legal Centres enhanced the existing ties between the Scheme and CLCs. The Manager of the Scheme has a close working relationship with Public Interest Legal Clearing House (PILCH) and the Public Interest Advocacy Centre (PIAC). The President of the Bar Association, Ruth McColl S.C., is the current

President of PILCH.

Review of guidelines and administrative procedures

In early 2000, a management consultant was engaged to review the Scheme's administration. This review was undertaken because the formal guidelines under which the Scheme is presently operating were originally put in place in 1996 and because of the ever-increasing number of enquiries and applications. Procedures to ensure that work practices will be capable of properly dealing with this increase (and that expected as a result of the establishment of the Legal HelpLine later this year) are being put in place.

Funding

The Legal Assistance Scheme's staffing costs are substantially met by a grant from the Public Purpose Fund through the Law Foundation of New South Wales. The Association gratefully acknowledges this assistance.

Common Law Committee

Following representations by the President, assisted by the Common Law Committee, the Attorney General approved the addition of GST for practitioners in workers' compensation. The President is in negotiations with the Attorney General with respect to increasing fees generally in the jurisdiction of workers' compensation. The Committee is hopeful of an outcome in the near future.

The Committee was asked by Judge Neilson to make submissions in relation to country loadings. The Committee, through Brian Ferrari and Phillip Perry, is in the process of endeavouring to secure an increase in loadings for areas outside NSW inclusive of GST. The Special Minister of State has proposed amendments to the legislation affecting workers' rights to common law damages. The President established a Workers Compensation Working Party to consider and draft the Association's response to the proposed changes.

The Common Law Committee has been asked by the Australian Institute of Judicial Administration to liaise in areas where they have similar objectives and interests.

Murray QC, Andrew Lidden and Richard Bell have continued to liaise with the Chief Judge and the List Judge of the District Court as the Bar Association's representatives on various Court common law committees. Matters raised have included country circuits and the discontinuation of the appointment of Acting Judges. Matters the committee raised included the failure of the court to make available transcripts in matters transferred from the Supreme Court, jury trials and other long

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matters. This is a major concern to the Bar. Members with comments or complaints in relation to matters that could be taken up by the Common Law Committee or the Association's representatives on the District Court's Users Committee are invited to contact Wheelahan QC.

Effective 5 October 1999, the introduction of the *Motor Accidents Compensation Act 1999* has dramatically reduced the benefits available for persons injured in motor accidents.

The Act introduces a new regulatory regime as well as introducing strict new regulations on legal costs. The Committee has been active in the Association's lobbying of the Motor Accidents Authority and the NSW Government to ameliorate the more draconian effects of the new legislation. Those efforts include participation in various consultative groups set up prior to the introduction of the new legislation as well as ongoing submissions as to amendments that can be made to make the new Act fairer for both claimants and legal practitioners. Letherbarrow S.C. is the Bar Association's representative on the Motor Accidents Council, which is the consultative body to the board of the Motor Accidents Authority. Letherbarrow S.C. and Andrew Stone are members of the Motor Accidents Advisory Committee that appoints the assessors under the Act.

The new legislation introduces a raft of new bureaucratic agencies including the Medical Assessment Service (MAS) and the Claims Advisory and Resolution Service (CARS). Members who intend to continue to advise and practice in the motor accidents area will need to thoroughly familiarise themselves with the new Act and its compendious regulations and guidelines.

Mediation Committee

The Mediation Committee, as its name suggests, is responsible for aspects of mediation of interest and importance to the Bar. Arbitration and early neutral evaluation are dealt with by the Arbitration Committee.

The Committee's objectives for 2000 include:

- the education of the Bar as counsel representing parties at mediation;
- the education of the Bar as mediators;
- the promotion of barristers to represent parties at mediation;
- the promotion of barristers as mediators;
- nomination to Bar Council of barristers for the Bar's panel of mediators; and
- liaison with, and development of good relations with, the Law Society.

Progress towards these objectives so far in 2000 has been steady.

The education of the Bar as counsel representing parties at mediation and the education of the Bar as mediators

New South Wales Barristers' Rule 17A obliges barristers to advise clients on alternatives to litigation. The Committee has written two articles for *Bar Brief* explaining barristers' obligation under the rule.

In November 2000, the Committee will provide a Continuing Legal Education segment on representing clients at mediation. Starting with the Readers' courses in 2001, the Committee will provide an expanded segment on mediation.

After considering tenders from several teaching organisations, the Committee decided that, as soon as practicable, Bond University's Dispute Resolution Centre will present a two-day intensive course for Bar members on how to represent clients at mediation.

The Committee considered whether it should recommend that there be guidelines for barrister-mediators, and drafted sample guidelines. After careful consideration, however, the Committee decided that guidelines were unnecessary and that it was preferable to concentrate on education in mediation, given that styles of mediation vary from mediator to mediator.

On the Committee's recommendation, Bar Council agreed to establish a Mediation Section to provide occasional seminars to the Bar on mediation topics of interest.

The promotion of barristers to represent parties at mediation and the promotion of barristers as mediators

The Committee has investigated how to create and maintain relationships with other professional bodies whose members are in a position to recommend the employment of dispute resolvers and some contacts have been made. Work continues on this.

Bar Council has accepted the Committee's recommendation that the Bar Association's web site include the formal court list of barrister mediators. The names will be hyperlinked to the 'Find a Barrister' database.

Nomination to Bar Council of barristers for the Bar Association's panel of mediators

At the request of Bar Council, the Committee has amended the criteria used for selecting barristers for the Bar Association's panel of mediators. The Bar's criteria require training and experience at mediation, and compliance with the Supreme Court's *Practice Note No. 102*. The Bar Council sends the panel names to the Chief Justice for

consideration. The Court list is used when the Court orders that a matter be referred to mediation.

The Committee has sent all Bar Association members an application form for the Association's panel of mediators for 2001 and will recommend a list of panel members to Bar Council after evaluating the applications received against the published criteria for selection.

Since 1 August 2000, because of amendments to the *Supreme Court Act 1970*, that Court has the power to refer matters to mediation whether or not parties agree to mediation of their proceedings. The Committee assisted the President of Bar Council in making representations to the court and to the Attorney General on the form and content of the amendments, with satisfactory results.

Liaison with, and development of good relations with, the Law Society

The Law Society has had a Dispute Resolution Committee since 1986. The Committee adopted this objective believing there to be potential for mutual benefit resulting from cooperation between the two committees and joint activities. Informal contacts have been made and will be explored.

Professional Conduct

In the financial year ended 30 June 2000 a total of 65 complaints were referred by the Legal Services Commissioner to Bar Council for investigation, including four complaints initiated by the Commissioner himself. This compares with 66 complaints referred by the Commissioner in the previous year. A further three complaints were initiated by Bar Council pursuant to s135 of the Act, as it then was.

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

Senior members of the conduct committees also provide ethical guidance and advice to members, but do not provide 'rulings' or legal advice. Members who require urgent advice should contact a Silk on a conduct committee. The Professional Affairs Director, Helen Barrett, or her Deputy, Liz Maconachie, can provide the names and telephone numbers of senior members of committees available to give guidance.

Bar Council has continued to promote conduct issues of concern in *Bar Brief*. 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. Many of the exam questions have been written by members of the professional conduct committees, based on the issues of concern that arise in complaints.

The NSW Barristers' Rules are published on the Association's web site (www.nswbar.asn.au). Copies are also available from Reception.

In March 2000 the then Attorney General, The Hon. Jeff Shaw QC MLC, made a referral to the New South Wales Law Reform Commission in the following terms:

The Law Reform Commission is to review the procedures for dealing with complaints against legal practitioners under Part 10 of the *Legal Profession Act 1987*, taking into account recent case law on the operation of Part 10 and the practical experience of the operation of the statutory provisions.

On 24 May 2000 the Council forwarded its submission of issues for consideration in the context of the Commission's review. At the time of writing, the Commission is yet to release its issues paper for discussion.

Except in the case of complaints made by Councils, all complaints about legal practitioners (be they barristers or solicitors) must initially be made to the Legal Services Commissioner. Complaints made directly to Bar Council are required to be forwarded to the Commissioner. The Commissioner makes an initial assessment of each complaint and decides which of those complaints will be referred to Bar Council (in the case of barristers), for investigation or mediation. The Commissioner usually handles 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 can, and in appropriate circumstances will, make complaints against barristers. Recent amendments to the *Legal Profession Act 1987* (gazetted 14 July 2000) put Council complaints on the same footing as those made by other persons or bodies. Complaints must be made within three years of the date of the alleged conduct. However, the Council now has the power to make a determination under s137(2) to accept its own complaint 'out of time' if it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay or the complaint involves an allegation of professional misconduct and it is in the public interest to deal with it. Previously, the power to make all such determinations (whether in respect of Council complaints or otherwise) rested with the Commissioner. A copy of any complaint made by the Council must be forwarded to the Commissioner.

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Responding to complaints

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.

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 from the Bar Association's Education Department. A copy is held in the Bar Library.

Important decisions handed down (summaries of decisions are available on the Association's web site):

The recent amendments to the Legal Profession Act came about as a consequence of the decision of the High Court in *Barwick v Law Society of New South Wales and Ors* (2000) 169 ALR 236.

In that case the High Court was asked to determine three questions:

1. Was there a failure on the part of the Law Society to comply with the requirements of the Act in relation to the conduct of an investigation between the initiation of a complaint and the institution of proceedings in the Tribunal? In *Barwick's* case a resolution to initiate the complaint pursuant to s135 (as it then was) was followed immediately by a resolution to institute proceedings in the Tribunal. The High Court answered this question in the affirmative.

The Court found the proper focus of attention is not whether enquiries were made by the Council before the initiation of the complaint (which can occur), or after the laying of the information. The focus of attention should be whether there was an investigation stage which permitted the requirements of Division 5 (investigations) to be satisfied, and the legislative purpose fulfilled. That stage does not necessarily involve the gathering of further information but it must permit monitoring of the investigation by the Commissioner and, at its conclusion, the Council must

address the issues raised under s155 and record its decision and the reasons therefor. Monitoring by the Commissioner is not an empty formality.

2. Does the three year time limit imposed by s138 (now s137(2)) of the Act apply to the Councils and the Commissioner? The High Court answered this question in the affirmative.

The Court held that s126 treated all complaints as complaints 'made': there is no distinction between complaints 'made' under s134 and complaints 'initiated' by the Council under (former) s135. The purpose of (former) s138 was to set time limits, whilst allowing the Commissioner an overriding discretion, to be exercised upon specified grounds, to accept complaints otherwise out of time. That discretion protects the public interest. It must be exercised in every case of an out of time complaint.

The practitioner's need for protection against stale complaints is the same, regardless of the identity of the maker of the complaint. There is nothing in the Act to suggest the Councils were intended to have the same power as the Commissioner to override any need for such protection.

As discussed above, the recent amendments to the Act provide that the three year time limit applies to all complaints but permits the Councils to make a determination to accept their own complaints out of time, subject to the requirements of s137(2) being satisfied.

3. Does the three year time limit imposed by s138 apply to applications to vary an information in the Tribunal pursuant to s167A of the Act? The High Court answered this question in the affirmative.

The Court held that a complaint which is not accepted by the Commissioner under (former) s138(2) has no statutory effect. The consequences of s138 cannot be negated by the exercise by the Tribunal of its power of variation under s167A. What is involved in s167A is a test of reasonableness. It is not intended to subvert the protection given by (former) s138.

The recent amendments to the Act provide that an application to the Tribunal to vary an information pursuant to s167A to include an additional allegation is not precluded because the alleged conduct occurred more than three years before the variation is made. In making its decision, the Tribunal is to have regard to whether varying the information will affect the fairness of the proceedings.

Other decisions members may be interested to read, relating to procedural fairness and disciplinary procedures

are *Carson v Legal Services Commissioner and Legal Services Tribunal* [2000] NSWSC 64 and *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224.

The decision in *Murray* was handed down in the previous reporting year. The significance of *Murray's* decision is that the Council has revised its complaint handling procedures, even though the comments of Sheller JA in that case are *obiter*. As a result, a barrister who is likely to be the subject of an adverse recommendation by the investigating conduct committee to Bar Council is now provided with an opportunity to see the committee's reasoning and recommendation in advance of it going to Council. The barrister is invited to make submissions in respect of whether the Council would be satisfied there is a reasonable likelihood the Tribunal would find the barrister guilty of professional misconduct or unsatisfactory professional conduct (as the case may be) and, if yes, what penalty should flow as a consequence. In matters where the complainant is seeking compensation or where the barrister has raised new material of a factual nature in making his or her submissions, the conduct committee will decide whether the complainant should also be afforded the opportunity to comment on the barrister's '*Murray* submissions'.

The investigation and decision making process can therefore take longer than was previously the case.

Decisions Involving Barristers

The following court and tribunal decisions involving barristers have been handed down in the reporting period. Summaries of the decisions are available on the 'Tribunal database' on the Association's web site. The full text of Tribunal judgments is available at www.lawlink.gov.au

1. On 29 October 1999 the Court of Appeal handed down its decision in the matter of *Bar Association v Sterling Hamman*. The barrister accepted that he was guilty of professional misconduct in relation to offences of dishonesty (understatements of income for income tax purposes) for which he had been convicted and sentenced following a guilty plea. At issue was whether he should be struck off or suspended from the Roll. The Court held that the barrister's name should be removed from the Roll.

The President of the Court of Appeal was satisfied that the offences occurred when the barrister was busy, that he was well trusted by colleagues, that he had worked for the community and that the affair had brought disgrace and shame on him. However, the legal profession is dependent on the reality of trustworthiness in a barrister. The barrister admitted acting with deliberate dishonesty motivated, in part, by desire for financial gain.

In relation to his tax reassessments, the barrister was criticised by the Court for not making full disclosure of the fact that he had achieved a settlement with the tax office which resulted in a return of the penalties imposed, with interest.

Dishonesty was relevant regardless of whether it occurred in the course of professional practice or privately.

2. *NSW Bar Association v Paul Coe* [2000] NSWCA 13

On 3 July 1997 the Legal Services Tribunal (as it then was) ordered the removal of Coe's name from the Roll of Legal Practitioners. Coe appealed to the Supreme Court. On 29 February 2000 the Court of Appeal dismissed the appeal, with costs.

The Court of Appeal was asked to determine the following issues:

1. Whether the findings of the Tribunal went beyond the scope of the charge? The Tribunal found Coe had signed a false affidavit with intent to deceive. The charge stated that he had sworn a false affidavit.

The President was not satisfied that Coe had brought the case before the Tribunal on the broader basis, even though the drawing of an inference as to intent was raised and was (on the facts) inevitable. The President found it unnecessary to resolve this issue because the narrower finding in accordance with the original charge was properly made and sustained the order of striking off.

Justice Priestly said the fact that Coe did not give evidence before the Tribunal made it virtually impossible for him to succeed in the appeal. Justice Meagher held the Tribunal had to decide whether a false affidavit was sworn, and this they did. The Tribunal speculated as to the appellant's motive in so doing, which they were neither obliged nor forbidden to do. The Tribunal came to the only possible conclusion on the evidence as it stood. The order would not have been any different if the Tribunal had not made this superfluous finding.

2. Leave was sought to adduce further evidence as to Coe's contrition.

The President said an appeal is not an application for readmission to practice.

Justice Priestly said the appeal, as sought to be presented, had more the appearance of an application for readmission than an appeal.

3. *Bar Association v Richard Mitry* [2000] NSWADTAP 9

On 30 August 1999 the Legal Services Division of the

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Administrative Decisions Tribunal found Mitry (formerly a barrister but practising as a solicitor at the time of the Tribunal's judgment) guilty of professional misconduct and ordered his name removed from the Roll. Mitry subsequently appealed to the Appeal Panel (of the Tribunal) which, on 30 June 2000, dismissed his appeal. Mitry has appealed to the Supreme Court. At the time of reporting the appeal has not been heard.

The barrister had pleaded guilty before a Magistrate to an offence of being knowingly concerned in a company known as Red Anchor Resources, financing the purchase of its own shares. The Bar Council initiated its own complaint pursuant to (then) s135 of the Act and resolved to refer the matter to the Tribunal.

The Tribunal was unconvinced by the barrister's evidence that he innocently became involved in the transaction because he wanted to help a friend and because he was suffering from the effects of a depressive illness at the time and did not appreciate what he was doing.

The Tribunal found the investment agreements were nothing but a sham, designed to hide the fact that Red Anchor Resources was providing funds through two companies for a third company for the purpose of buying its own shares.

By letter dated 8 November 1999 the barrister, in his own hand and on his barrister's letterhead, wrote to the auditor of Red Anchor Resources confirming that the investments were genuine and not in breach of the *Companies (New South Wales) Code*. What he wrote in that letter was clearly false and was intended, in the Tribunal's opinion, to deceive the auditor.

The barrister raised as a defence in his amended reply that he should not have pleaded guilty to the criminal charge. The Tribunal found that there was no basis at all for the barrister to claim that he was not guilty of the offence and, in its opinion, what had been done by him was done deliberately and with an intention to help his friend perpetrate a dishonest scheme which involved deceiving an auditor, the Australian Stock Exchange and the investing public.

The Tribunal did not accept that the barrister was at any relevant time affected by any psychiatric condition which could conceivably affect his capacity to give consent to the transactions with which he became involved.

The barrister, and others, gave evidence of his extensive community work and his family life. The Tribunal found that, apart from the matters which were the subject of the complaint, the barrister was a person of good fame and character. Nevertheless, the duty of

the Tribunal is to act in accordance with law, as laid down by the courts. Disciplinary proceedings 'are concerned with the protection of the public'. The court's duty to protect the public is not confined to the protection of the public against further misconduct by the particular practitioner who is the subject of disciplinary proceedings. It extends to protecting the public from similar defaults by other practitioners. Thus, it is relevant to take into account the effect the order will have on the understanding in the profession and amongst the public of the standard of behaviour required of practitioners. In this sense, any penalty imposed should contain an element of general deterrence. (*Foreman v Law Society of NSW* applied).

Mitry appealed the Tribunal's decision (to the Appeal Panel) on four grounds:

1. The findings of fact made by the Tribunal were not capable of amounting to professional misconduct.
2. Whether, if professional misconduct was properly found, the order for removal should have been made.
3. Whether the Tribunal proceedings were flawed because a member of the Tribunal should have disqualified herself because of a reasonable apprehension of bias.
4. Whether the Council had filed its complaint out of time, and the Tribunal erred in permitting the Council to amend it.

The Tribunal dismissed all grounds of the appeal. Mitry has appealed to the Supreme Court.

4 *Bar Association v Henry Di Suvero*:

In this matter the Tribunal handed down its decision on the facts on 5 May 2000 and on penalty on 28 July 2000. The barrister has appealed the decision to the Appeal Panel and there is, at the time of writing, a temporary stay of the Tribunal's orders.

The Tribunal found the barrister guilty of unsatisfactory professional conduct in respect of five charges and not guilty in respect of six charges.

The barrister appeared for an accused in a criminal trial in 1996. The complainants were the trial Judge and the Crown Prosecutor. The jury trial was lengthy and involved considerable stress for all. During the trial there were many hostile exchanges between the barrister and the Crown Prosecutor. There were also angry remarks passing between the Judge and the barrister. Ten particulars of unsatisfactory professional conduct were alleged against the barrister. It is not proposed to deal with each of the particulars here.

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The Tribunal made the following general remarks in the course of its judgment: the courts draw a line between words of counsel spoken to assert an entitlement and duty to see that the client's case is presented fairly and forcefully and words and conduct which is insulting. The words themselves may not carry insult, but body language may. Shouting and belligerence may constitute contempt.

If the conduct alleged against a barrister in proceedings before the Tribunal amounts to a contempt of court, then that may also be conduct which is unsatisfactory professional conduct. However, conduct which is not sufficiently serious to be regarded as a contempt of court could still amount to unsatisfactory professional conduct.

The Tribunal was of the opinion that in NSW the following matters would be regarded as unsatisfactory professional conduct:

1. the making of unsubstantiated allegations of dishonesty against another legal practitioner;
2. the making of insults directed to another legal practitioner or the judge;
3. unsubstantiated allegations of bias on the part of the judge;
4. the unjustified attribution of bad motives to another legal practitioner in the conduct of a trial; and
5. conduct which aims, without justification, to procure a discharge of a jury.

The Tribunal found the barrister held beliefs about the judge and the prosecution which may have been genuinely held, but which were not justified on the facts. The barrister lost objectivity in the trial and became too personally involved in his client's cause. This caused him to say and do things that were not justifiable. The barrister still finds it difficult to accept that some of his conduct was unsatisfactory.

If a barrister's conduct was found to be in contempt of court, then it may amount to unsatisfactory professional conduct. However, although it is not, in a legal sense, contemptuous, it may be unsatisfactory professional conduct.

Courts have made it clear that if a barrister insults a judge, then that may be a contempt of court. Rudeness or arrogance would not necessarily be a contempt of court, but may be sufficient to ground a complaint of unsatisfactory professional conduct.

The Tribunal handed down its decision on penalty on 28 July 2000. The Tribunal accepted the Council's submission that the conduct of the barrister was serious and that the barrister did not display any understanding

that his conduct was wrong or that it was unsatisfactory. However, the Tribunal found that despite his lack of perception of the impropriety of his actions at the time and during the course of the initial hearing before the Tribunal it is unlikely that the barrister would offend again.

The Tribunal accepted the evidence of witnesses that the barrister was of good character, of his competence, courtesy and normal good behaviour. There was no suggestion at all that the barrister was in any way dishonest. Indeed the Tribunal found that the barrister has a reputation for integrity.

The Tribunal was unable to accept that the circumstances of the trial provided some mitigation of the seriousness of the conduct of the barrister. The barrister had already suffered a considerable financial loss in forgoing work to enable him to respond to the various allegations and most of the allegations made against him had ultimately been dismissed. However, the authorities required the Tribunal, when considering the appropriate penalty, to have regard primarily to the need to protect to the public and to consider the principles of general and personal deterrence.

The Tribunal found that the findings of unsatisfactory professional conduct established in this case were serious. The barrister has considerable experience and there is a need to deter him and others who might be minded to engage in similar conduct. The Tribunal accepted that his conduct in this trial had lapsed from the normal standards which he applies.

Taking into account all the evidence in his favour, the seriousness of the conduct and the need to protect the public, the Tribunal was of the opinion that the appropriate penalty was one of suspension of the barrister's practising certificate for a period of three months.

As mentioned, the Tribunal's order is temporarily stayed pending the outcome of the barrister's appeal to the Appeal Panel.

Performance Criteria:

Section 171MB of the Act provides that the Council must develop performance criteria related to the handling of complaints. The criteria must be included in its Annual Report, together with an assessment of the Council's performance against the criteria (see tables which follow).

It is not possible to publish until 2002 an assessment of the Council's performance against some categories of criteria which have been developed, because the necessary computer programming changes have occurred only recently and comparative data will not be available for two years.

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Number of complaints received by complaint type, compared to previous year 1 July 1998 to 30 June 2000

	Year	No	Yr Total	
			Complaints	%
Acting Contrary to/Failure to Carry Out Instructions	1999/2000	3	68	4.41%
	1998/1999	5	72	6.94%
Acting Without Instructions	1999/2000	0		
	1998/1999	3	72	4.17%
Breach costs disclosure provisions Part 11 LPA	1999/2000	0		
	1998/1999	3	72	4.17%
Breach of Confidentiality	1999/2000	1	68	1.47%
	1998/1999	2	72	2.78%
Breach of s152 of the LPA	1999/2000	2	68	2.94%
	1998/1999	0		
Breach of undertaking	1999/2000	1	68	1.47%
	1998/1999	0		
Breached Bar Rule 35 (Clyne case)	1999/2000	2	68	2.94%
	1998/1999	0		
Breached Bar Rule 54 (communicating with another client)	1999/2000	0		
	1998/1999	3	72	4.17%
Breached Bar Rule 74/75 (Barrister's work)	1999/2000	4	68	5.88%
	1998/1999	1	72	1.39%
Breached Bar Rule 80 (direct access)	1999/2000	0		
	1998/1999	0		
Breached Bar Rule 98 (passed brief late)	1999/2000	0		
	1998/1999	0		
Breached Bar Rule - other	1999/2000	0		
	1998/1999	2	72	2.78%
	1999/2000	1	68	1.47%
	1998/1999	1	72	1.39%
Conflict of Interest	1999/2000	0		
	1998/1999	5	72	6.94%
Conspiracy to Pervert Course of Justice	1999/2000	0		
	1998/1999	0		
Delay/Failure to Provide Chamber Work	1999/2000	0		
	1998/1999	1	72	1.39%
Dishonesty/Misleading Conduct	1999/2000	0		
	1998/1999	9	72	12.50%
DisInterest	1999/2000	0		
	1998/1999	0		
Failure to Account	1999/2000	0		
	1998/1999	0		
Failure to Adduce Available Evidence	1999/2000	0		
	1998/1999	5	72	6.94%
Failure to Advise Properly or at all	1999/2000	1	68	1.47%
	1998/1999	0		
Failure to Appear	1999/2000	5	68	7.35%
	1998/1999	3	72	4.17%
Failure to Communicate	1999/2000	0		
	1998/1999	0		
Failure to Comply with Bar Council's/LSC Directions	1999/2000	0		
	1998/1999	0		
Failure to Conduct a Fair Hearing	1999/2000	0		
	1998/1999	0		
Failure to cross examine competently	1999/2000	0		
	1998/1999	0		
Failure to explain terms of settlement (properly or at all)	1999/2000	0		
	1998/1999	0		
Failure to Prepare Competently (read & understand brief)	1999/2000	2	68	2.94%
	1998/1999	0		
Failure to Transfer/Return Documents/Property	1999/2000	1	68	1.47%
	1998/1999	1	72	1.39%
Failure to Use Interpreter	1999/2000	0		
	1998/1999	0		
False Swearing	1999/2000	1	68	1.47%
	1998/1999	0		

Forgery	1999/2000	0		
	1998/1999	0		
Inadequate/poor advice re settlement	1999/2000	0		
	1998/1999	0		
Incompetence in and out of court	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%
Incompetence (in court)	1999/2000	3	68	4.41%
	1998/1999	5	72	6.94%
Incompetence (outside court eg. advice)	1999/2000	0		
	1998/1999	1	72	1.39%
Intoxicated when appearing or seeking to appear	1999/2000	1	68	1.47%
	1998/1999	0		
Misleading Conduct/dishonesty	1999/2000	15	68	22.06%
	1998/1999	0		
Obstruct/Delay Proceedings	1999/2000	0		
	1998/1999	1	72	1.39%
Other Unethical Conduct	1999/2000	7	68	10.29%
	1998/1999	3	72	4.17%
Otherwise Negligent	1999/2000	1	68	1.47%
	1998/1999	0		
Over Zealous cross-examination (harranging a witness)	1999/2000	1	68	1.47%
	1998/1999	2	72	2.78%
Overcharging/Overservicing	1999/2000	3	68	4.41%
	1998/1999	6	72	8.33%
Personal Conduct	1999/2000	5	68	7.35%
	1998/1999	1	72	1.39%
Practising without a PC	1999/2000	0		
	1998/1999	0		
Pressure to Change Plea/ Plead Guilty	1999/2000	0		
	1998/1999	0	72	1.39%
Pressure to Settle	1999/2000	3	68	4.41%
	1998/1999	5	72	6.94%
Rudeness/Discourtesy	1999/2000	3	68	4.41%
	1998/1999	2	72	2.78%

Number of complaints received by complainant type, compared to previous year

1 July 1998 to 30 June 2000

	Year	No	Yr Total	
			Complaints	%
Attorney General	1999/2000	0		
	1998/1999	0		
Bar Council	1999/2000	3	68	4.41%
	1998/1999	6	72	8.33%
Barrister	1999/2000	5	68	7.35%
	1998/1999	9	72	12.50%
Client/Former Client	1999/2000	21	68	30.88%
	1998/1999	31	72	43.06%
Government Department/Statutory Law body	1999/2000	1	68	1.47%
	1998/1999	0		
Instructing Solicitor	1999/2000	1		
	1998/1999	2	72	2.78%
Judge/Magistrate	1999/2000	1	68	1.47%
	1998/1999	0		
Judicial/Quasi Judicial Officer	1999/2000	0		
	1998/1999	0		
Juror	1999/2000	0		
	1998/1999	0		
Law Society	1999/2000	0		
	1998/1999	0		
Legal representative on behalf of another	1999/2000	0		
	1998/1999	0		
Legal Services Commissioner	1999/2000	4	68	5.88%
	1998/1999	1	72	1.39%
Member of Parliament	1999/2000	0		
	1998/1999	0		
Opposing Client	1999/2000	10	68	14.71%
	1998/1999	11	72	15.28%

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Opposing Solicitor	1999/2000	12	68	17.65%
	1998/1999	3	72	4.17%
Other	1999/2000	7	68	10.29%
	1998/1999	0		
Police	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%
Relative/Friend	1999/2000	1	68	1.47%
	1998/1999	4	72	5.56%
Witness	1999/2000	0		
	1998/1999	4	72	5.56%

**Number of complaints received by jurisdiction,
compared to previous year**

1 July 1998 to 30 June 2000

	Year	No	Yr Total	
			Complaints	%
Appeal	1999/2000	0		
	1998/1999	0		
AVO/ADVO	1999/2000	3	68	4.41%
	1998/1999	2	72	2.78%
Bankruptcy	1999/2000	0		
	1998/1999	1	72	1.39%
Children's Court	1999/2000	1	68	1.47%
	1998/1999	0		
Civil Arbitration	1999/2000	1	68	1.47%
	1998/1999	0		
Civil Litigation - Other	1999/2000	17	68	25.00%
	1998/1999	16	72	22.22%
Civil Litigation - Personal Injury	1999/2000	2	68	2.94%
	1998/1999	9	72	12.50%
Costs Assessment	1999/2000	1	68	1.47%
	1998/1999	0		
Criminal	1999/2000	15	68	22.06%
	1998/1999	17	72	23.61%
Equity/Commercial/Contract	1999/2000	6	68	8.82%
	1998/1999	6	72	8.33%
Family Law	1999/2000	8	68	11.76%
	1998/1999	8	72	11.11%
Immigration/Federal Court- other	1999/2000	1	68	1.47%
	1998/1999	1	72	1.39%
Industrial	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%
Land & Environment	1999/2000	2	68	2.94%
	1998/1999	0		
Other	1999/2000	4	68	5.88%
	1998/1999	5	72	6.94%
Personal Conduct	1999/2000	1	68	1.47%
	1998/1999	1	72	1.39%
Probate/Family Provision/ De Facto Relationships	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%
Victim's Compensation	1999/2000	0		
	1998/1999	0		
Worker's Compensation	1999/2000	2	68	2.94%
	1998/1999	4	72	5.56%

**Number of complaints received broken down by
years in practice, compared to previous year**

1 July 1998 to 30 June 2000

Category	% of each category in practice at NSW Bar	Year	No. of complaints in year	% of complaints in year
	12.00%	1998/1999	8	11.11%
10 years & up to Silk	38.20%	1999/2000	33	48.53%
	40.00%	1998/1999	34	47.22%

7-10 years in practice	12.20%	1999/2000	14	20.59%
	13.00%	1998/1999	15	20.83%
5-7 years in practice	6.80%	1999/2000	8	11.76%
	6.50%	1998/1999	5	6.94%
1-5 years in practice	24.40%	1999/2000	4	5.88%
	20.00%	1998/1999	10	13.89%
Less than 1 year in practice	6.40%	1999/2000	3	4.41%
	8.50%	1998/1999	0	0.00%
Non practising		1999/2000	2	2.94%
		1998/1999	0	0.00%
Total		1999/2000	68	
		1998/1999	72	

**Number and percentage of matters commenced in the
period and currently under investigation which have
been open for**

1 July 1998 to 30 June 2000

	Year	No	Remaining Under Investigation	
			No	%
1. Less than 6 months:	1999/2000	28	39	71.79%
	1999/2000	8	39	20.51%
3. Between 9 and 12 months:	1999/2000	3	39	7.69%

**Outcome (by result) of investigations commenced in
the period, compared to previous year**

1 July 1998 to 30 June 2000

	Year	No	Yr Total	
			Complaints	%
Complaint Under Investigation	1999/2000	39	68	60.29%
	1998/1999	36	72	50.00%
Dismiss - s148(2)	1999/2000	0	68	
	1998/1999	1	72	1.39%
Not Proceeded with by Complainant	1999/2000	0	68	
	1998/1999	1	72	1.39%
Resolved (Mediation)	1999/2000	0		
	1998/1999	1	72	1.39%
s155(2) Refer to Tribunal- Unsatisfactory Prof. Cond./Prof. Misconduct	1999/2000	1	68	1.47%
	1998/1999	3	72	4.17%
s155(3)(a) Reprimand - Unsatisfactory Prof. Cond.	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%
s155(3)(b) Dismiss - Unsatisfactory Prof. Cond. but otherwise competent and diligent	1999/2000	2	68	2.94%
	1998/1999	3	72	4.17%
s155(4) Dismiss	1999/2000	23	68	33.82%
	1998/1999	23	72	31.94%
Withdrawn	1999/2000	1	68	1.47%
	1998/1999	3	72	4.17%

**Investigations commenced and completed in the
period, compared to previous year. i.e. complaints
referred for investigation in the period and the subject
of a final Bar Council resolution in the same period**

1 July 1998 to 30 June 2000

	Year	No	Yr Total	
			Complaints	%
1. Completed in less than 6 months:	1999/2000	7	68	10.29%
	1998/1999	15	72	20.83%
2. Completed in 6 to 9 months:	1999/2000	10	68	14.71%
	1998/1999	9	72	12.50%
3. Completed in 9 to 12 months:	1999/2000	2	68	2.94%
	1998/1999	1	72	1.39%

Balance of complaints remain under investigation (71% of the balance have been open for less than 6 months).

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Outcome (by result) of matters dealt with in the period, i.e. matters the subject of a final Bar Council resolution in the period

1 July 1999 to 30 June 2000

	Year	No	Yr Total Complaints	%
Discontinued	1999/2000	1	56	1.79%
Not Proceeded with by Complainant	1999/2000	1	56	1.79%
Resolved (Mediation)	1999/2000	1	56	1.79%
s155(2) Refer to Tribunal- Unsatisfactory Prof. Conduct/Prof. Misconduct	1999/2000	5	56	8.93%
s155(3)(a) Reprimand - Unsatisfactory Prof. Conduct	1999/2000	7	56	12.50%
s155(3)(b) Dismiss - Unsatisfactory Prof. Conduct but otherwise competent and diligent	1999/2000	1	56	1.79%
s155(4) Dismiss	1999/2000	37	56	66.07%
Withdrawn	1999/2000	3	56	5.36%

Professional Conduct Committee #1

Phil Greenwood S.C. served as Chair from 1 July 1999 to mid November 1999. Anna Katzmann S.C. was appointed Chair in December 1999.

Many thanks to the lay members, Kate Nacard and Susanne Weress. Their contributions to the work of the Committee are greatly valued. Thanks also to academic member Dr Christine Parker, from the University of New South Wales.

For the period of 1 July 1999 to 30 June 2000, 20 new matters were assigned to the Committee for investigation, including two complaints initiated by the Commissioner pursuant to s136 (as it then was). The Committee had eight matters outstanding from previous years.

The Committee is presently considering one application for readmission as a legal practitioner.

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

- Five complaints were dismissed pursuant to s155(4) of the Act (no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct).
- Fifteen 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 fifteen complaints dismissed, no complainant has exercised the right to have the decision reviewed by the Legal Services Commissioner.

The committee wishes to stress the importance of responding in a timely fashion to communications received from instructing solicitors, and clients (in the case of direct access). Failure to do so can lead to complaint.

One barrister, the subject of a complaint about delay, thereafter failed to respond to the Legal Services

Commissioner (initially) and Bar Council. The Act provides that failure to respond to a s152 Notice (being a request for information) is professional misconduct.

Members who have a genuine difficulty in responding to a complaint or a request by a conduct committee for additional information should communicate that fact to the Professional Affairs Director, Helen Barrett or her Deputy, Liz Machonachie. All reasonable requests for extensions of time will be granted.

Time limits are also imposed on complainants and other parties from whom information is sought. It is in the best interest of all parties to have complaints dealt with as expeditiously as possible.

Professional Conduct Committee #2

The Committee would like to express its gratitude to its lay member, John Blount. His contribution to the work of the committee over the years has been considerable. So too has been the contribution of Professor David Barker, Dean of Faculty of Law, University of Technology.

For the period 1 July 1999 to 30 June 2000 17 new matters were assigned to the Committee for investigation, including one complaint initiated by the Legal Services Commissioner and one by Bar Council. Sixteen complaints were referred to the committee in the previous year. Nine complaints remained under investigation from the previous year.

The Committee reported to Bar Council in respect of a number of applications for readmission by former legal practitioners.

The Committee also reported to Council in respect of two applications to be provided with an exemption pursuant to s48K(2)(a) of the *Legal Profession Act*. Bar Council resolved not to approve one application and approval of the other was limited to approval of the applicant's current position with a firm of solicitors.

Section 48K(2)(a) provides that it is professional misconduct for a barrister (or solicitor) to have an associate who the barrister knows to be a disqualified person or a person who has been convicted of an indictable offence and who does not hold a current practising certificate. 'Associate' of a barrister includes a person who is employed or paid in connection with the barrister's practice.

The 17 new matters assigned to the Committee were dealt with as follows:

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

- One matter has been referred to the Tribunal on the basis the Council is satisfied the barrister would be found guilty by the Tribunal of professional misconduct.
- Eight matters remain under investigation at the date of writing this report.

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

One matter currently under investigation involves an allegation that a barrister operated a 'trust account' for his direct access client and then allowed, or caused, money to be taken out of the trust account and transferred without authority to an account controlled by the barrister or his business partners.

The barrister was notified of the complaint, he responded and the complaint was being investigated at a time when the barrister applied for registration as a legal practitioner in Victoria. In support of his application the barrister submitted a statutory declaration in which he swore that he was not the subject of disciplinary proceedings in any jurisdiction, including any investigation or actions that might lead to disciplinary proceedings.

On being informed of the terms of his application, Bar Council initiated a complaint against the barrister alleging false swearing. Bar Council has now referred its complaint to the Legal Services Division of the Administrative Decisions Tribunal on the basis that the Council is satisfied the barrister would be found guilty by the Tribunal of professional misconduct.

In respect of the same barrister, Bar Council also suspended his practising certificate as a barrister pursuant to s37(1)(a) of the Act for his failure, and continuing failure, to provide an explanation satisfactory to the Council in relation to the initial complaint.

The Committee wishes to emphasise the importance of frankness and honesty and draws attention to an article, which appeared on page 10 of the May 2000 edition of *Bar Brief*.

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

Professional Conduct Committee #3

The committee is indebted to Dr Richard Klugman for his continuing participation as a lay member. His input is both probing and insightful. Thanks also to Professor Ivan Shearer, from the Faculty of Law, University of Sydney

who retired from the committee as its academic member in November 1999. His colleague, Mr Les McCrimmon, joined the committee in June 2000.

In the period 1 July 1999 to 30 June 2000 the Committee was allocated 13 new matters, down from the 21 matters it dealt with in the previous year.

The Committee continued to investigate 11 matters initially referred in the previous year.

Of the 13 matters:

- Seven complaints were dismissed pursuant to s155(4) (i.e. no finding of unsatisfactory professional conduct or professional misconduct).
- One complaint was withdrawn.
- Two complaints were dismissed pursuant to s155(3)(b) of the Act, on the basis that, although there is a reasonable likelihood the barristers would be found guilty by the Tribunal of unsatisfactory professional conduct, the barristers are generally competent and diligent and no other material complaints have been made against them.
- Three complaints remain under investigation.

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

The Committee has also undertaken related work: in one matter advising Bar Council in respect of an application for a practising certificate; in another, monitoring disciplinary proceedings in Queensland which led to a strike off order by the Queensland Court of Appeal. The Prothonotary has agreed to seek an order to have the same practitioner's name removed from the Roll in NSW.

The first matter which resulted in a finding of unsatisfactory professional conduct against the barrister but dismissal of the complaint on the basis that the barrister was generally competent and diligent and had no other material complaints against him involved a breach of NSW Barristers' Rule 56. That Rule provides:

A barrister must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

- (a) the court has first communicated with the barrister in such a way to require the barrister to respond to the court; or

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- (b) the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister.

In the matter before the Committee, the judge had reserved her decision. Subsequently, the party for whom the barrister appeared filed a Notice of Motion seeking orders that the judge disqualify herself. In the course of argument on the Notice of Motion a question under the *Evidence Act 1995* arose and the barrister informed the court he would provide the judge's associate with a copy of the relevant section of the Evidence Act later that day. Her Honour reserved her decision on the Notice of Motion.

The barrister subsequently provided the associate with a three page document which referred to the relevant section of the Evidence Act but went further and made submissions about the substance of the Notice of Motion. This was done without the opponent's knowledge or consent. The barrister forwarded a copy of his submissions to his opponent.

The barrister conceded that he had told the judge what he would do was more limited than what he actually did. The barrister said it was an unintentional oversight and not done to seek an unfair advantage.

In his reply to the complaint the barrister apologised and expressed regret. The committee (and Bar Council) formed the view that the barrister was unaware of the requirements of Rule 56.

The second matter which led to a finding of unsatisfactory professional conduct but a dismissal pursuant to s155(3)(b) involved a complaint by a Clerk of a Local Court that a barrister used on his letterhead a coat of arms/crest which could cause confusion and was suggestive of an affiliation with Government. The Court was concerned it could be misleading of the public and anyone else who was in receipt of correspondence from the barrister displaying the coat of arms. The Council formed the view that the coat of arms could cause confusion. At a glance, the coat of arms bore a close resemblance to the arms of both the State of New South Wales and the NSW Bar Association. The fact that the barrister used the coat of arms in conjunction with a statement that he is a barrister does not sufficiently remove the prospect of confusion. The Council found that use of the coat of arms in advertising material contravened s38J(2) of the *Legal Profession Act 1987*. It was arguable that the coat of arms also contravened s3 of the *Unauthorised Documents Act 1922*. Further, it appeared that the College of Arms had not sanctioned the coat of arms. However, the Council accepted that most people are not familiar with traditional protocols associated with a coat of arms.

The barrister indicated he had no intention of misleading or confusing the public. He offered to redesign the coat of arms and, in the course of correspondence with the Council, dropped its use altogether.

Finally, the committee stresses (as it has in the past) the need for counsel in all jurisdictions to understand the pressures felt by parties in litigation, and particularly in settlement negotiations. If counsel were to take a little more time to explain to clients the terms and effect of a proposed settlement and to listen with more sympathy to their concerns, a number of complaints might be avoided.

Professional Conduct Committee #4

The Committee would particularly like to extend to its lay members, Professor Derek Anderson and Phil Marchionni, its thanks for their valuable input. They continue to serve the interest of the public of NSW cheerfully and more than capably.

Thanks also to Francine Feld, academic member from the Faculty of Law, University of Western Sydney.

For the period 1 July 1999 to 30 June 2000 18 new complaints were assigned to the Committee for investigation including one complaint initiated by the Legal Services Commissioner and two by Bar Council. This represented the same number of complaints as last year. The Committee continued to deal with eight matters still under investigation at the time of writing last year's report.

All the professional conduct committees aim to deal with complaints to finality within six months of receipt by the Council. 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:

- Three complaints were dismissed pursuant to s155(4) of the Act (no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct). One complainant has applied for a review.
- Two resulted in the barristers consenting to be reprimanded pursuant to s155(3)(a), on the basis that the Council is satisfied they would be found guilty by the Tribunal of unsatisfactory professional conduct.
- Thirteen complaints remain under investigation at the time of writing this report.

The first matter which was dealt with by way of reprimand involved a matter in which the barrister appeared opposed to a litigant in person in the Family Court in relation to the

residence and contact of children. In the course of the proceedings the barrister asserted that the complainant was a convicted paedophile. After some criticism by the Registrar about the comment, the barrister withdrew it and later, after a short adjournment, said he 'withdrew the wildly inopportune and stupid remark' he made about the complainant.

The barrister's instructions did not permit him to make such an allegation. The Council took into account that, upon being informed by the Registrar and then realising the seriousness of the remark, the barrister unreservedly withdrew it.

The Council resolved to reprimand the barrister for a breach of NSW Barristers' Rule 35. That Rule provides:

35. A barrister must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:
- (a) are reasonably justified by the material already available to the barrister;
 - (b) are appropriate for the robust advancement of the client's case on its merits;
 - (c) are not made principally in order to harass or embarrass the person;
 - and
 - (d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court.

The Council found that the barrister did not take care to ensure that the allegation was reasonably justified by the material available. In view of his immediate and complete withdrawal of the assertion, which the Registrar accepted, the barrister was invited to and did consent to a reprimand. This was coupled with a written apology to the complainant, in terms satisfactory to the committee.

The second matter resulting in a reprimand occurred as a consequence of a barrister's failure to appear at a country

sittings of the District Court. Having taken only one brief in the sittings the barrister remained in Sydney undertaking other work. The sitting judge notified all parties of the matters he intended to hear the next day on the afternoon on the previous day. The instructing (country) solicitor attempted to convey to the barrister the matter was listed for hearing the next day. The barrister had left for the day. The solicitor spoke to his secretary, who attempted to unsuccessfully contact the barrister at home and on his mobile phone, leaving a message on the latter. The barrister had, in fact, left his mobile phone in chambers and when he entered chambers the next morning he did so unseen by his secretary and later went to court to appear in another matter but without checking his mobile phone for messages. Eventually the solicitor telephoned the barrister's chambers and a member of staff contacted the barrister at court. The matter eventually settled with the barrister giving advice on quantum over the phone. The client was denied the barrister of their choice being present for the hearing/final negotiations.

It is timely to remind members that matters often progress rapidly in country lists, such lists are often taken out of sequence and only short notice is given of the hearing. Barristers who rely on modern technology for communication (whether a mobile telephone or email) must assiduously use it, by ensuring they are accessible and monitoring messages. Particular care must be taken by members who take either one or a small number of briefs in country sittings, and who propose to continue to undertake other work in Sydney during the period, to ensure that instructing solicitors in both country and city matters are kept fully informed, both as to the fact that they are taking other work in each place and as to their movements.

Finally, members are again reminded of the need for compliance with the cost disclosure provisions of Part 11 of the *Legal Profession Act 1987*. Non compliance disadvantages the barrister and, in some circumstances, will also disadvantage the instructing solicitor and client. Remember, too, that estimates of fees must be provided at the outset and continually updated if the case requires more work than was originally contemplated.

Appointments of Members of the NSW Bar Association

As at 30 June 2000

New South Wales Supreme Court

The Hon. Justice Dyson Heydon

The Hon. Justice Anthony Whealy

Land and Environment Court

The Hon. Justice Dennis Cowdroy OAM

New South Wales District Court

His Hon. Judge Ralph Coolahan

His Hon. Judge Kevin Coorey

New South Wales Local Court

Maxwell Taylor

Licensing Court

Sean Flood

Family Court of Australia

The Hon. Justice David Collier

Bar Association Representatives on Educational Bodies

As at 30 June 2000

Centre for Legal Education Advisory Board

Clarence Stevens QC

College of Law Board of Directors

Richard White S.C.

Legal Practitioners Admission Board

Peter Taylor QC

Ian Harrison S.C.

Legal Practitioners Admission Board Legal Qualifications Committee

Clarence Stevens QC

Caroline Needham

Legal Practitioners Admission Board Law Extension Committee

David Nock S.C.

Terence O'Brien

Law Society of NSW Practical Training Exemptions Sub-Committee

Janet Oakley

Law Society of NSW Practical Experience Appeals Committee

Janet Oakley

University of Sydney Faculty of Law

Carolyn Davenport

University of Technology, Sydney Faculty Board

Geoff Lindsay S.C.

University of Newcastle Faculty of Law

Ralph Coolahan

University of NSW Faculty Board

Kelly Wright

University of Western Sydney Faculty of Law Advisory Committee

Igor Mescher

Robert O'Neill (Parramatta)

Peter Dooley (Parramatta)

University of Wollongong PLT Course Advisory Committee

Stuart Hill

University of Wollongong Faculty of Law Visiting Committee

Bruce Collins QC

Members of Court Committees and Working Parties

for the financial year to 30 June 2000

Compensation Court Rules Committee

Gregory Beauchamp
Brian Ferrari

Court of Appeal Users Committee

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

District Court Civil Business Committee

Brian Murray QC
Andrew Lidden

District Court Users Committee

Richard Bell
Anthony Black *

District Court Criminal Listings Review Committee

Kate Traill

District Court Technology in the Courtroom Project

Michael Lawler

District Court Rule Committee

Ross Letherbarrow S.C.
Hugh Marshall (alternate)
Terence Morohan*

District Court Circuit Work Committee

Brian Murray QC
Denis Wheelahan QC
Ross Letherbarrow S.C.
Christopher Hickey
Peter Maiden

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
Louise Byrne *(ex officio)

Local Courts (Civil Claims) Rule Committee

Andrew Kostopoulos

Local Courts (Civil Claims) Court Users Group

Jeremy Gruzman

St James Local Court Users Forum

Kate Traill

Supreme Court Commercial Users Committee

Robert Macfarlan QC
Glen Miller QC
Steven Rares S.C.
Noel Hutley S.C.
David Hammerschlag
Michael Rudge S.C.

Supreme Court Common Law Users Committee

Dennis Wheelahan QC
Steven Walmsley S.C.

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 Company List User's Group

Malcolm Oakes S.C. (Alternate: Tom Bathurst QC)
James Thomson (Alternate: Justin Gleeson)
Robert Newlinds (Alternate: Fabian Gleeson)
James Johnson (Alternate: A. Bell)

Supreme Court Rule Committee

Ruth McColl S.C.
Jeremy Gormly

Supreme Court Working Party for Establishment of Guidelines for Expert Conferences / Court Appointed Experts

Leonard Levy S.C.
Christopher Gee QC

Supreme Court Registry Users Group

Mr John Hennessy
Mr Michael Meek

*Retired or resigned during the year

Statutory Appointments

National Native Title Tribunal

Jennifer Stuckey-Clarke

NSW Cancer Council

Garry Downes QC

Legal Profession Advisory Council

Philip Greenwood S.C. (re-appointed)

Peteris Ginters

Motor Accidents Authority: Claims Assessment and Resolution Service

Senior Assessors Service

Peter Capelin QC

Brian Murray QC

Larry King S.C.

Ross Letherbarrow S.C.

Claims Assessment and Resolution Service

Raymond McLoughlin S.C.

Stephen Finnane

Ian Cullen

David J Russell

Geoffrey Charteris

Administrative Decisions Tribunal

Caroline Needham S.C. (Deputy President)

The Hon. 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.

Elizabeth Fullerton S.C.

Jennifer Blackman

Sharron Norton

Other Appointments

For the financial year to 30 June 2000

NSW Council of Professions

Chris Barry QC*

Peter Maiden

Philip Selth*

1999 Senior Counsel Selection Committee

Ian Barker QC

Ruth McColl S.C.

Bernard Gross QC

Tom Bathurst QC

Malcolm Ramage QC

Association Liaison Members for the Courts

High Court

David Jackson QC

Federal Court

Malcolm Oakes S.C.

Court of Appeal

Don Grieve QC

Supreme Court – Admiralty Division

Alexander Street S.C.

Supreme Court – Common Law Division

Richard Burbidge QC

Supreme Court – Criminal Matters

Tim Game S.C.

Supreme Court – Equity Division

George Palmer QC

Land & Environment Court

Malcolm Craig QC

Industrial Relations Commissions of New South Wales

Peter Kite S.C.

Local Court

Kate Trail

Christopher Millard

Membership

as at 30 June 2000

Ordinary Members - Class A* holding NSW Practising Certificates

(including Members based interstate & overseas):	1919
Male:	1680 (87.6%)
Female:	239 (12.4%)
Number of Senior Counsel (QC or S.C.): [†]	256
Male:	250 (97.5%)
Female:	6 (2.5%)
Number of 'Junior' barristers: [‡]	1663
Male:	1430 (86%)
Female:	233 (14%)

[†]Senior Counsel (QC and S.C.) are commonly, called 'Silks'. S.C.'s have been appointed since 1993 and replaced the appointment of Queen's Counsel. [‡]The term 'Junior' barrister means all barristers except those who have been appointed Senior Counsel (QC or S.C.). A Junior barrister does not necessarily indicate the ability or number of years at the Bar; for example, some 'Juniors' have been practising for 30 years.

Practising address of Ordinary Members - Class A

New South Wales:	1799
Victoria:	3
A.C.T.:	42
Queensland:	47
South Australia:	8
Western Australia:	4
Northern Territory:	1
Tasmania:	0
Overseas:	15

Number of Ordinary Members - Class B*

(including Members interstate & overseas):	418
Male:	369 (88.1%)
Female:	49 (11.9%)

Occupation of Ordinary Members - Class B

Honorary Life Members:	21
Honorary Members:	1
Judges:	171
Retired practitioners: (Retired judges, retired barristers)	98
Academics (non practising):	3
Non practising barristers:	15
Magistrates:	9

Government Officers:	3
Members of Parliament:	1
Interstate barristers:	96
Total number of members:	2337

* For Membership details, see Clause 4 of the *Constitution of the New South Wales Bar Association*, 1 January 2000

Practitioners holding NSW Practising Certificates

Total (including practitioners based interstate & overseas):	2013
Male	1752 (87%)
Female	261 (13%)

Number of practitioners who are Senior Counsel (QC or S.C.):

	259
Male	251 (96.9%)
Female	8 (3.2%)

Number of Junior barristers: 1754

Male	1501 (85.6%)
Female	253 (14.4%)

New South Wales

	1855
Male	1610 (86.8%)
Female	245 (13.2%)
Silks	256 (13.8%)
Juniors	1599 (86.2%)

A.C.T.

	49
Male	41
Female	8
Silks	4
Juniors	45

Victoria

	3
Male	3
Female	0
Silks	0
Juniors	3

Queensland

	71
Male	68
Female	3
Silks	11
Juniors	60

South Australia

	12
Male	10
Female	2
Silks	3
Juniors	9