

# Contents

<b>Section 1</b>	<b>About us</b>	
	Our aims	2
	History of the Bar Association	2
	Bar Association office bearers	3
	Bar Association staff	4
	Membership statistics	5
	Practitioners statistics	6
<b>Section 2</b>	<b>The year in review</b>	
	President's report	7
	Executive Director's report	9
<b>Section 3</b>	<b>Appointments</b>	
	Committees of the Bar Association	14
	Sections of the Bar Association	17
	New South Wales members appointed to the Bench	17
	Bar Association representatives on educational bodies	18
	Court committees and working parties	18
	Statutory appointments	19
	Other appointments	20
	Court liaison members	20
<b>Section 4</b>	<b>Reports</b>	
	<b>Promoting the interests of practising barristers</b>	
	BarCare	21
	Management Committee of the Barristers' Benevolent Association	22
	Contributors to the Barristers' Benevolent Association	22
	The Bar Library	26
	Equal Opportunity Committee	27
	Indigenous Barristers' Strategy Working Party	29
	<b>Arranging and promoting continuing professional development</b>	
	Education, training and professional development programmes	30
	<b>Making recommendations and promoting the administration of justice</b>	
	Family Law Committee	32
	Criminal Law Committee	33
	Personal Injuries Litigation Committee	34
	Mediation Committee	35
	Public Affairs	36
	<b>Promoting access to justice</b>	
	Legal Assistance Referral Scheme	39
	Pro bono schemes	42
	<b>Questions as to professional conduct</b>	
	Professional Conduct Department	45
	Professional Conduct statistics	51
<b>Section 5</b>	<b>Financial statements</b>	
	Concise financial statements	55
	Barristers' Benevolent Association of NSW	78
	The Barristers' Superannuation Fund	84

## Highlights

### 2003

#### July

2003 Tutors & Readers Dinner

#### August

Bar Practice Course 02/03 begins  
Irish Bar Conference  
held in Sydney

#### September

High Court Dinner

#### October

Senior Counsel appointments  
Bar Council elections begin

#### November

Annual General Meeting  
Bar Exams

#### December



### 2004

#### January

Indigenous Pre-Law Day

#### February

Sir Maurice Byers Address  
Executive visit to Lismore  
Bar Practice Course  
01/04 begins

#### March

Executive visit to Orange  
and Wollongong

#### April

Bar Council and Parliament  
social function  
Executive visit to  
Parramatta & Newcastle

#### May

Bench and Bar Dinner  
PDD regional conferences  
in Canberra, Parramatta, Wollongong  
& UTS

#### June

PDD regional conference  
in Newcastle  
Bar Exams

## Aims

The New South Wales Bar Association is a voluntary association of practising barristers. Our aims, as expressed in our Constitution, include:

- promoting the administration of justice;
- promoting, maintaining and improving the interests and standards of practising barristers;
- making recommendations with respect to legislation, law reform, rules of court and the business and procedure of courts;
- seeking to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community;
- arranging and promoting continuing professional development;
- promoting fair and honourable practice amongst barristers; suppressing, discouraging and preventing malpractice and professional misconduct;
- inquiring into questions as to professional conduct and etiquette of barristers;
- conferring and cooperating with bodies in Australia or elsewhere representing the profession of the law;
- encouraging professional, educational, cultural and social relations amongst the members of the Bar Association; and
- making donations to charities and such other objects in the public interest as determined from time to time by the Bar Council.

## History of the Bar Association

In July 1896 an association of barristers was formed in New South Wales to consider and report upon all matters of current legislation, enunciate and enforce rules of professional discipline and to foster social and professional liaison amongst the members of the Bar.

On 9 June 1902 the old association was dissolved and the first annual meeting of a new body took place. It was called the Council of the Bar of New South Wales.

On 22 October 1936 the New South Wales Bar Association was incorporated and the first meeting of the Council of the New South Wales Bar Association took place. The Memorandum and Articles of Association noted that the Bar Association would make suggestions on legislation, court rules, procedure and business. The memorandum also noted that a library would be established together with reading, meeting, and dining rooms, and power to undertake law reporting, printing, publishing and bookbinding.

Over the years, both the judicial and executive branches of government sought the advice of the Bar Association regarding Bills and rules of court. By 1960 the number being sent to the Bar Association had increased markedly. In 1962 the association formed a standing Law Reform Committee to deal with the increased workload. By 1968 there were 14 standing committees of the Bar Association including the Ethics, Finance, Fees, Accommodation, Liaison with the Law Society, Bar History, Law Reform, Continuing Legal Studies, Barristers' Benevolent Association, Reading, Membership, Listing, Library and Housing committees.

In 2003 there were 17 standing committees. A considerable number of barristers are appointed as members of court liaison committees, government working parties and statutory authorities, providing their skills and expertise for the public benefit.

Thirty two presidents and one hundred Bar councils later, the association has grown from strength to strength. In 1961 Bowen QC, then president of the Bar Association commented:

The Bar as a community has entered upon a period unlike anything experienced before...We have not been afraid to speak out, if need be publicly, on matters of general concern on which the community might fairly look to the Bar as an experienced professional body for guidance.

The statement remains true today.

## Bar Association office bearers

As at 30 June 2004

Ian Harrison SC was elected President of the New South Wales Bar Association in November 2003. He was educated at the University of Sydney University, where he graduated with a Bachelor of Arts degree in 1972 and a Bachelor of Laws in 1975. He lectured at the University of New South Wales Law School between 1975 and 1980.

Ian was called to the Bar in 1977, where his principal areas of practice have been common law and equity. He took silk in 1995. Ian Harrison has played an active part in the affairs of the Bar Association. He was elected to Bar Council in 1994 and 1995. Between 1998 and 2001 he was chairman

of the Professional Conduct Committee #4. In 1999 he was treasurer of the Bar Association. In 2000/2001 he was junior vice president, before rising to senior vice president in 2002/2003.

He has also served on a range of other legal professional bodies and inquiries. In 1995 he was made a member of the Costs Assessors Rules Committee. Between 1998 and 2000 he was a member of the NSW Legal Profession Admission Board. In 1996-1997 Ian conducted the Australian Federal Police Corruption Inquiry for the Commonwealth Attorney-General.



**President**  
Ian Harrison SC



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1. Michael Slattery QC  
Senior Vice President
2. Anna Katzmann SC  
Junior Vice President
3. Tom Bathurst QC  
Treasurer
4. Robert Toner SC  
Secretary
5. Philip Selth  
Executive Director



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1. Bernie Coles QC
2. Larry King SC
3. Geoff Lindsay SC
4. Philip Greenwood SC
5. Virginia Lydiard



1	2	3	4	5
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1. Stuart Torrington
2. Chris Simpson
3. Kate Traill
4. Andrew Colefax
5. Lachlan Gyles



1	2	3	4	5
6				

1. Simon Kerr
2. Angela Pearman
3. Rachel Pepper
4. Presh Khandhar
5. Michael McHugh
6. Dominic Toomey



## Bar Association staff

As at 30 June 2004

### Office of the Executive Director

#### Executive Director

Philip Selth BA (Hons) LLB

#### Executive Assistant

Kathy O'Neill

#### Projects Officer

Kim Kemp LLB

### Administration Department

#### Administrative Support Manager

June Anderson

Adele Connor BA LLB MPS

#### Administrative Officer (Records)

Kim Ellis

#### Reception Officer

Barbara Coorey B Comm

#### Administrative Officer

Patrina Malouf

#### Bar Manager

Tony Mitchell

### IT Consultants

Darren Covell

Matthew Vickers

### Library

#### Librarian

Lisa Allen B App Sc(Info) M Inf Stud

#### Assistant Librarian

Jennifer Hughes BA DIM

#### Library Technician

Alice Uribe BA Grad Dip IM

Jeanine Metcalf BA

### Finance Department

#### Finance Manager

Basil Catsaros B Comm ACA

#### Deputy Finance Manager

Tess Santos B Sc (Bus Admin)

#### Certification Officer

Barrie Anthony JP

### Legal Assistance Referral Scheme

#### Legal Assistance Manager

Heather Sare

#### Administrative Assistant

Lisa West

### Professional Conduct Department

#### Director, Professional Conduct

Anne Sinclair BA MLM

#### Deputy Director, Professional Conduct

Helen Barrett LLB

Karen Mobbs BA LLB

#### Assistant to the Director, Professional Conduct

Lorraine Haycock

#### Assistant

Barbara Stahl

Denisha Govender

### Professional Development Department

#### Director, Professional Development

Chris D'Aeth LLB (Hons) MBA

#### Deputy Director, Professional Development

Anita McNally LLB(Hons) Grad Dip Mgt

#### Professional Development and Events Officer

Travis Drummond

#### Education Assistant

Irene Puntillo

### Public Affairs

#### Public Affairs Officer

Chris Winslow BA(Hons) MINTS DIM

## Statistics

As at 30 June 2004

The New South Wales Bar Association is a voluntary Association of practising barristers. Being a member of the Bar Association and holding a NSW barrister's practising certificate are distinctly separate. The following is a statistical profile of both membership of the Bar Association and barristers who hold a NSW practising certificate.

### Membership statistics

There are 2600 members of the New South Wales Bar Association.

#### Ordinary members

**Class A and B(i)\* holding NSW practising certificates (including members based interstate & overseas and life members who have a current NSW PC)**

Male	1829
Female	300
<b>Total</b>	<b>2129</b>

#### Number of senior counsel (QC or SC)†:

Male	310
Female	10
<b>Total</b>	<b>320</b>

#### Number of 'junior' barristers‡

Male	1519
Female	290
<b>Total</b>	<b>1809</b>

† Senior counsel (QC and SC) are commonly, called 'silks'. SCs 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 SC). 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.

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

#### Practising address of ordinary members

##### Class A and B(i)

New South Wales	1962
Victoria	1
ACT	42
Queensland	96
South Australia	1
Western Australia	3
Northern Territory	1
Tasmania	1
Overseas	22
<b>Total</b>	<b>2129</b>

#### Number of honorary life members & ordinary members

##### Class B(ii) and B(iii)\*

(including members interstate & overseas)

Male	403
Female	68
<b>Total</b>	<b>471</b>

(Includes 26 honorary life members who do not have a current NSW PC)

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

#### Occupation of ordinary members

##### Class B(ii) and B(iii)

Judge	162
Magistrate	12
Statutory/government officer	5
Judicial officers	6
Member of parliament	2
Academic (non practising)	17
Interstate barrister	96
Overseas barrister	13
Former barrister	78
Former judge	74
Law student	2
Miscellaneous	4

## Practitioner statistics

As at 30 June 2004

### Practitioners holding NSW practising certificates

(including practitioners based interstate & overseas)

Male	1874
Female	302
<b>Total</b>	<b>2176</b>

### Number of practitioners who are senior counsel

(QC or SC)

Male	312
Female	10
<b>Total senior counsel</b>	<b>322</b>

### Number of junior barristers

Male	1560
Female	292
<b>Total junior barristers</b>	<b>1852</b>

### Practitioners holding NSW practising certificates

By location

	Juniors		Silks		Total
	Male	Female	Male	Female	
New South Wales	1412	278	278	9	1977
ACT	33	6	5	0	44
Victoria	1	0	0	0	1
Queensland	93	6	22	0	121
South Australia	1	1	2	0	4
Western Australia	5	0	0	0	5
Northern Territory	1	0	0	0	1
Tasmania	1	0	0	0	1
Overseas	13	2	7	1	23

### Overseas practitioners by country of residence

	Juniors		Silks		Total
	Male	Female	Male	Female	
USA	1	0	0	0	0
UK	2	1	4	1	8
Hong Kong	1	0	3	0	4
New Zealand	5	1	0	0	6
Fiji	1	0	0	0	1
Solomon Islands	1	0	0	0	1
Bermuda	1	0	0	0	1
Kazakhstan	1	0	0	0	1
<b>Total</b>					<b>23</b>

## President's report



For reasons which no-one has ever been adequately able to explain to me objectively or rationally, the Bar seems constantly to be under attack from one source or another. Sometimes these sources are well known and expected. On other occasions attacks come unexpectedly from previously unknown areas. Often the attacks warrant the marshalling of a sturdy defence. On still other occasions they expose themselves to be of no substance. Understanding this phenomenon has become part of the perennial work of Bar councils and the executives of this association.

At about the time I came to the Bar the then current controversy centred around whether or not barristers should continue to wear wigs and gowns. That debate was often informed by public resentment. The continued existence of that resentment is evidenced today by carping letters to newspaper editors in which members of the public feel constantly in need of referring to horsehair or silk. Sarcasm drives these attacks. They are fuelled by jealousies and envy and are easy to deflect. They should, however, never be under-estimated or forgotten. They are sometimes held by those with the power to make the greatest changes.

Earlier this year I wrote in *Bar News* that barristers are not important people, but that they are important to some people from time to time. I have also said that political leaders in the past had, and will continue in the future to have, a need to use barristers. As a matter of pure coincidence, as I write this report the Premier of New South Wales is himself the beneficiary of representation by a member of the Inner Bar before a commission giving consideration to whether or not he should be dealt with for contempt. Unusually for me, the words I wrote were mildly prophetic. So if barristers are useful, and if they attain a personal importance from time to time, why is there such enthusiasm abroad for the possibility that they might become an endangered species?

The *Civil Liability Act 2002* was not introduced specifically to target lawyers in general or barristers in particular. It was thought to be a necessary legislative response to the declining fortunes of insurance companies faced with a litigation crisis. That debate has long been lost. Who will forget, however, the emphasis placed by some interest groups upon the perception that the so-called crisis was largely driven by barristers' fees and other legal costs. But we were not the real losers and litigants generally are, to my observation, suffering deeply. The perception of self-interest prevents us as a professional body from adequately representing the now disparate voices of so many would-be plaintiffs.

The start of the year saw as well the disbanding of the Workers Compensation Court. Predecessors to that court had survived in New South Wales since 1926. It seems fair to say that that court also went the way of much civil litigation ahead of the crush of hysterical opinion and successful lobbying. Many of our members whose practices consisted entirely or predominantly of work in that court are now either under-employed or potentially lost to the Bar.

One of the most significant assaults on the Bar has come in the form of the steadily increasing premiums for professional indemnity insurance. There is no doubt that compared to say, 20 years ago, current premiums are significantly higher for equivalent amounts of cover in adjusted terms. Compared to other professions, these rates of premium are still very modest. Indeed, there has been a retraction in premium expansion in most categories of cover. There are a number of reasons for this. It is necessary to mention at least two of these. First, the work done by Philip Selth, the Executive Director of the Bar Association, in persuading ultimately four insurers to offer cover to the Bar in the current market. A few years ago attracting even one insurer looked doubtful. Secondly, this year as in previous years, Tony Meagher SC has been critical to our dealings with the insurers in settling with insurers the terms of policies eventually approved by the government, which met the needs of all groups. He is to be thanked once again for his tireless efforts.

Continuing professional development is now an accepted aspect of practice at the New South Wales Bar. Its introduction was not without its difficulties, although it would be fair to say that any so-called controversies attending its arrival were displaced by a general recognition of its necessity. This was largely facilitated as well by the quality of the courses offered and the ready availability of them both in Sydney and the regional areas. The programme seems now to be humming like a well-oiled machine under the expert guidance of Chris D'Aeth and those in his department whose dedication and pride in this programme is one of the secrets of its success.

The association's application for approval of a scheme applying to barristers under the *Professional Standards Act 1994* is on the verge of approval. There remains some hope that approval will be forthcoming prior to the end of 2004, or if not, almost certainly prior to 30 June 2005. Barristers wishing to take advantage of the scheme will no longer be limited by reason of the nature of their particular practice in the way described in this report last year. This is particularly significant for the Bar generally and is in no small way the result of the generous efforts of Brian Rayment QC, his committee and Kim Kemp of the Bar Association for coordinating our very important preparation to gain approval of the scheme.

One of the traditional roles of the president of the New South Wales Bar Association has been to provide comment and criticism where necessary on issues involving the judiciary and in particular to defend the courts and the judges from unfair and unwarranted attacks. Just as with the Bar, these attacks come from various directions and place unfair pressures on members of the court concerned who are historically unable and sensibly unwilling to respond to them. No level of court is immune from these attacks. The New South Wales Court of Criminal Appeal has come under intense scrutiny on sentencing issues and appeals concerning controversial convictions in sexual assault matters. I have myself been criticised for my criticism of journalists with only an ear for victims of crime. I will continue to defend the criminal justice system in this state and those who administer it. Far too often it is written about by those who have had no involvement with it. Undoubtedly a clear voice comes from quarters representing those who have suffered at the hands

## President's report – continued

of criminals. A voice of equal clarity is to be heard from people whose rights to a fair trial, natural justice, the presumption of innocence and due process have been trammelled by rowdy voices clamouring to increase prison populations without so much as a second glance.

The tasks of the New South Wales Bar Association could not continue without the fine work done on its behalf by the several committees made up of our members. The work is voluntary and time-consuming and often personally troubling. Even so our members line up year after year to perform these tasks. May I extend my sincere thanks and appreciation to all involved for performing the work which keeps us running.

The staff of the New South Wales Bar Association is, however, the backbone which keeps us standing. These loyal servants work continuously in unappealing and more often than not subterranean environments churning out the work of performing our annual statutory, regulatory and social functions without a hitch. This annual report is no less than a history of their work for the last financial year. My thanks to the staff, although traditional, should not on any account be thought to be hackneyed or perfunctory. Having worked closely with these people on an almost daily basis I continue to have nothing but the highest praise for their dedication and loyalty. It is unfortunate that so often the only contact which they have directly with our members is to solve a problem or to convey unpleasant news. Members of the association would do well at such times to recall how unproductive it is to shoot messengers!

Finally, we are now in the era of so-called voluntary membership. At the point of inviting requests for renewal of practising certificates I encouraged applicants to renew membership of the association even though there was no compulsory connection between practising certificate renewal and membership. Philip Selth has outlined the success of our attempts to recruit membership renewals elsewhere in this report. What is largely unknown is the extent of the work done by Philip Selth in effecting the seamless transition from the previous system into the present one. Once again we are called upon to acknowledge his outstanding efforts on our behalf.

I look forward with some optimism to the coming year. I have been most gratified to receive the positive comments coming the way of the Bar Council and the Executive from all quarters of the Bar. I personally wish to thank this year's Bar Council for their own wise counsel and unfailing support for me in my role as president.

Ian Harrison  
President

# Executive Director's report



In my 2003 report I reported in some detail on the Bar Association's involvement with three law reform projects which were of immediate – and direct – relevance to the legal profession: the national practice model laws project and amendments to the *Legal Profession Act 1987* and *Legal Profession Regulation 2002*.

These three projects continued to occupy many hundreds of hours of staff time in 2003-2004, not to mention the time given by the Bar Council in addressing policy issues that needed to be considered as part of the drafting process.

## The National Practice Model Laws Project

The National Practice Model Laws project has involved the Law Council of Australia and its constituent bodies working closely with the Standing Committee of Attorneys-General (SCAG) to introduce greater levels of consistency in the relevant state and territory legislation.

The most recent available data on the size and composition of the Australian legal profession is the Australian Bureau of Statistics survey of legal practices 2001-2002.

- At the end of June 2002, there were a total of 11,494 legal practices in Australia, comprising 7,566 solicitor practices, 3,670 barrister practices, 41 patent attorney practices, 18 government solicitor/public prosecutor organisations, eight legal aid authorities and 191 community legal centres.
- There were 36,124 solicitors and barristers in Australia working in these practices at the end of June 2002.
- All up, 93,753 people were employed by the 11,494 legal practices in Australia.

A statistical profile of the New South Wales Bar, and of the Bar Association, appears elsewhere in this annual report.

The profession is regulated under state and territory laws and by the courts. In most jurisdictions, there is a system of co-regulation that involves both the government and the profession in the regulation of legal practitioners. However, there is little consistency in the governance of the way in which barristers and solicitors work. This creates very real problems for practitioners (and their clients) wishing to practise in more than one state or territory. Hence the National Practice Model Laws Project.

In August 2003 SCAG endorsed a Model Bill as the basis for consistent laws for the regulation of Australia's legal profession.

- The regulation of legal practice remains a responsibility of state and territory governments and courts.
- The focus is not on achieving 'one size fits all' regulatory structures, but rather that different regulatory structures operating at the state and territory level will apply nationally consistent standards of regulation.

## Provisions of the Model Bill

The 300 page Model Bill contains 'core uniform' provisions that are intended to be enacted in each jurisdiction in a form that is textually uniform to the maximum extent possible: the definitions of 'professional misconduct' and 'unsatisfactory professional conduct' are two examples. There are 'core not uniform' provisions that are intended to have counterparts in each jurisdiction, though not necessarily with textual uniformity, for example the provisions concerning suitability to hold a practising certificate. The imposing of conditions on practising certificates has been defined as 'not core': that is, a matter for each jurisdiction to determine.

The Model Bill is undergoing yet further attention by the Law Council and its constituent bodies, primarily to try and remove, or at least ameliorate, problems that are in the Bill. These problems mainly have their origin in the fact that the Bill is very much the compilation of a range of views of state and territory officials, along with the views of each of the Law Council's constituent bodies. The experience (and lack of experience) in each jurisdiction, and the very different legislative provisions, has not been easy to reconcile.

## The basis for a new Legal Profession Act

The next step in New South Wales is for the *Legal Profession Act 1987* to be repealed, and a new Act enacted based on the Model Bill. This new Bill is scheduled to be introduced in the Spring 2004 sittings of the parliament. Before that happens, however, there is the massive task of trying to reconcile the Model Bill with the Legal Profession Act, which in recent years has undergone considerable amendment to take account of court judgments and the experience of the Bar Association, Law Society, Legal Services Commissioner and practitioners generally in its day to day administration.

Officers of the Bar Association have made a major contribution to the work of the Law Council in the preparation and refinement of the Model Bill. The Bar Association has strongly supported the concept of the national practice model laws project. There is, however, a significant difference between concept and implementation. Walker SC and I, and more recently Harrison SC and I, have on a number of occasions met with the Attorney General and his staff, and with the Director General of the Attorney General's Department, Laurie Glanfield AM, who is also secretary to SCAG, to discuss the Model Bill. A particular concern is that some provisions in the Bill are administratively more cumbersome than the existing provisions in the Legal Profession Act, will set a lower standard than is now the case, or introduce new terminology which will inevitably need to be considered by the court, for no apparent gain.

The Attorney General and the Director General have both given the Bar Association an assurance that in implementing the Model Bill in New South Wales there will be no lessening of the standards required of the profession, not the imposition of unnecessary administrative requirements on practitioners and the Bar Association and Law Society. The public interest will be paramount.

## Executive Director's report - continued

In my 2003 report I referred to the work of a working party I convened at the Attorney General's request to draw together in one (very large) report the raft of amendments to the *Legal Profession Act 1987* and the *Legal Profession Regulation 2002* that had been sought by the Bar Association, Law Society, Legal Services Commissioner and others over a period of years.

The Attorney General agreed to virtually all of some 100 proposed amendments to the Act and Regulation. Since then, the Bar Council has sought further amendment to the Act to resolve problems that have come to light, principally concerning the issuing of practising certificates and the complaints and discipline regime.

Many of the proposed amendments to the Act will be picked up in the rewrite of the Act that is now being undertaken as part of the Model Bill Project. The proposed New South Wales Bill will also pick up recommendations of the New South Wales Law Reform Commission's 2001 Report No. 99, *Complaints against lawyers: An interim report*, and recommendations in the Attorney General's Department's 2002 report, *A further review of complaints against lawyers*.

### The need for interim amendments

Some proposed amendments, however, were more pressing, and so on 2 June 2004 the Attorney General introduced into the parliament the *Legal Profession Amendment Bill 2004*.

This Bill addressed several issues where, while the intent of the parliament was clear, some practitioners had argued the toss in its implementation, for example notifying relevant events in an application for a practising certificate that had occurred prior to the practitioner's admission. The requirement that a practitioner had to consent to a reprimand was removed, thus giving the Bar Council and the Law Society's Council the option

of a reprimand rather than having to refer a minor matter to the Administrative Decisions Tribunal where the practitioner had refused to agree to being reprimanded. The time the councils have to institute proceedings in the tribunal has been extended from 28 days (determined by the tribunal's Rules) to a statutory six months. A practitioner's breach of an undertaking to the Legal Services Commissioner or a council in relation to a complaint can now be capable of being unsatisfactory professional conduct or professional misconduct.

It is not often that the legal profession receives the recognition it is due. By and large the media finds it much easier to criticise the profession – or mock it – than it does to record the enormous contribution the profession makes to society generally, and to its clients in particular. Comments made in the parliament during the debate on the *Legal Profession Amendment Bill 2004* therefore warrant repetition here.

The Attorney General, the Hon Bob Debus MP, stated:

It is in the nature of our society and the way our media, and indeed the parliament, work that misdemeanours by lawyers are given vastly more publicity and receive much more public attention than the things they do well. The fact is that no profession is more relentlessly devoted to achieving accountability and high standards of ethical practice than the legal profession. Certainly the legal professional bodies, the Law Society and the Bar Association, have been devoted to the idea that the legal profession should perform its work to the highest standards of effectiveness, efficiency and ethical value. ... I congratulate those legal professional bodies on their approach.

The Shadow Attorney General, Andrew Tink MP, noted that much of the content of the Bill was work of members of the Bar Association and Law Society. He went on to say:

It is important to point out that although some elements of the legal profession experience difficulty from time to time, overwhelmingly that is not the case. The majority of the profession, both barristers and solicitors, are committed to making every effort to ensure the best professional practice is observed. Both professional bodies are committed to that goal and carry out their roles in the disciplinary regime to the best of their ability to satisfy the public requirement for a properly functioning legal profession. Their commitment to that goal is 100 per cent.

The fact that both the Attorney General and the Shadow Attorney General hold a New South Wales barrister's practising certificate, and are members of the Bar Association, in no way diminishes the importance of their comments.

The Legal Profession Amendment Bill 2004 was assented to on 6 July 2004. It came into effect on 13 August 2004.

In April 2004 the *Legal Profession Regulation 2002* was amended by the *Legal Profession Regulation 2004*. This amending Regulation picked up a number of suggestions for amendment that had been made by of the association at the time the Regulation had originally been drafted, but which for administrative reasons had not been included in the Regulation



Photo: Nick Moir / Sydney Morning Herald

## Executive Director's report - continued

at that time. Two provisions in particular warrant comment. New clause 137(2) provides that a failure by a legal practitioner to disclose information relating to an offence is capable of constituting professional misconduct or unsatisfactory professional conduct, even if the offence is not an indictable offence. Amended clause 142, which sets mandatory continuing professional development requirements, has been expanded so that equal opportunity, discrimination and harassment and occupational health and safety issues can be dealt with in a broad context, including the management of a legal practice.

### The Bar Association's dealings with the Australian Taxation Office and the Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

The second reading debate on the *Legal Profession Amendment Bill 2004* was not the only place where the integrity of the vast majority of the legal profession was given due recognition.

Unfortunately, since Paul Barry's articles in the *Sydney Morning Herald* in February 2001, 'Rich lawyers dodging income tax' and 'Crackdown on lawyer tax dodgers', in some quarters the terms 'barrister', 'bankrupt' and 'tax avoider' have become almost synonymous. There is a belief in some quarters that the Bar Association, knowing that some barristers were abusing the taxation and bankruptcy legislation, failed to act to prevent this abuse. These views are incorrect and unfair, and usually an indication of the ignorance or intellectual laziness of the author of the comments.

In May 2004 the federal Attorney-General issued an 'exposure draft' of the *Bankruptcy Legislation Amendment (Anti-avoidance and Other Measures) Bill 2004*. The Bill, targeting 'high income earners' and designed 'to stop bankrupts living the high life', was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs for inquiry and report.

The rationale for this ill-considered, draconian legislation was quickly sheeted home to the actions of a few New South Wales barristers. As Attorney-General Ruddock told the Insolvency Trustee Service Australia's 5<sup>th</sup> National Bankruptcy Congress, 'I know the reforms have been criticised on the basis that they represent a disproportionate response to the actions of a small number of barristers. My response is I would encourage such critics to rail against those abusing the system - not the government! It was the action of certain debtors that undermined the bankruptcy laws. The government is simply restoring the integrity and intent of the legislation.' The *Australian Financial Review* referred to the 'recent use of bankruptcy laws by high-profile people, including some New South Wales barristers'.

Little regard was paid to the Bar Association having taken appropriate disciplinary action at the time against offending barristers. There was no mention to the association's continuing but unsuccessful efforts since the beginning of 2001

to persuade the Australian Taxation Office to provide the association with information on the *public record* but which would not generally be known to the association about the tax and bankruptcy problems of a very few offenders.

The Standing Committee on Legal and Constitutional Affairs received 180 submissions. Apart from the submissions of the Australian Taxation Office, Insolvency Trustee Service Australia and the Attorney-General's Department, only one other submission supported the package as presented. Regrettably, a significant part of the evidence given to the committee by the government officials, in particular by officers of the Taxation Office, concerned 'the non payment of tax, and the use of the bankruptcy and family law acts to avoid payment of tax, by certain members of the New South Wales Bar from about the mid to late 1990s'.

At the request of the President, I took up this distortion with both Mr John Murphy MP, Deputy Chair of the committee, and with the senior officers of the Taxation Office who had given evidence to the committee. In a letter I wrote to Mr Murphy immediately prior to meeting with him, I said:

The association is concerned that the evidence given by ATO officers to the parliamentary committee gave the impression that the Bar Association, knowing there was a problem, did nothing until publicity forced it to do something about these barristers, and that the ATO had worked closely with us in remedying the problem. Neither of these propositions is correct.

I appreciate that the matter before the committee was not how The New South Wales Bar Association handled the 'bankrupt barrister' scandal that was exposed by Paul Barry in February 2001. However, the 'bankrupt barrister' problem (which is now all but a thing of the past) has been cited by the government (and the ATO) as a major reason for the proposed legislation.

In none of the comments I have seen that seek to justify the proposed legislation where reference has been made to the 'bankrupt barrister' scandal has recognition been given to:

- the numerous requests made by the Bar Association over a number of years (at meetings with the ATO and in writing) for specific information which is in the public domain about barristers who may be misusing the tax and bankruptcy laws - and our repeated request for an amendment to section 16 [of the *Income Tax Assessment Act 1936*];
- the fact that at no stage has the ATO ever given the association information that would allow us to take action against barristers for misusing the tax and bankruptcy legislation. This is despite our request that the ATO lodge formal complaints about barristers so that we would be in a position to investigate;
- the fact that where the association did come to know of problems with individual barristers concerning tax, we took action in the courts, e.g. the cases of *Harrison* and *Hamman*;

## Executive Director's report - continued

- that it was not until the *Sydney Morning Herald* articles (which drew on information given by the ATO to Paul Barry, but not to the Bar Association) that we knew of problems with specific barristers; and
- that the amendments to the New South Wales *Legal Profession Regulation 1994* and the *Legal Profession Act 1987* to enable the association to take action against certain barristers were driven by the association working directly with the New South Wales Attorney General.

Both Mr Murphy and the Taxation Officers agreed that the record should be set straight. Accordingly, when the committee reconvened, the Second Commissioner of Taxation, Mr Greg Farr, told the committee that:

Finally, as I said in the previous hearing, we have been in contact with the barristers in particular – with the Bar Association – for some period of time. I think it is fair to say, for the committee's benefit, that the Bar Association has been extremely frustrated by our inability to provide them with information that would allow them to go about their job of addressing any issues that they see in that profession. They have asked us over a number of years to provide information regarding individual bankruptcies. Our advice is that we cannot do so, so it is a frustration on behalf of the association but also on the part of the tax office. We would like to do so. We have got legal views and we have begun to share some of those legal views, hopefully to find a way that we will be able to do that, because it is, I think, in both our interests for that to occur.

The President and I gave evidence to the committee. The President made clear the Bar Association's concerns with the draft bankruptcy legislation and the way in which the profession was being denigrated for the past actions of a few.

**Mr Harrison:** I am indebted to this inquiry for the opportunity to make any comments at all. I suspect that my remarks need principally to be limited to a concern on behalf of barristers generally that remarks that preceded the exposure draft and that to some extent perhaps had been aired during evidence before this inquiry suggested that as a general population barristers were tax defaulters and that this legislation was driven in some respects by reference to a perception in the past and an anticipation in the future that that would continue. My major concern is to draw it to the attention of the inquiry, if it has not been already been drawn, that the defalcations that became notorious at the end of the nineties and the early part of 2000 had not, prior to that, come to the attention of the Bar Association as a body or barristers as a group, nor did we have legislative or regulatory powers to anticipate that these defalcations might occur. Any suggestions, therefore, that the Bar Association as a representative body had in some sense failed in an obligation it had or failed to take an opportunity which it had to anticipate these bankruptcies or to take steps against barristers so that they did not occur are misconceived.

I am indebted to Mr Farr for the evidence he has given, at least today, which clearly corrects the record. The New South Wales Bar Association has acted assiduously from the very first moment that any material has been drawn to its attention. As the chronology that Mr Murphy has referred to-prepared in detail by Mr Selth and his assistants-demonstrates, we have worked consistently and in a timely way to make sure that any defaulting barristers were dealt with promptly and, to the limited extent that we have the power to do so, that it does not occur again.

Finally, I might say that I noticed, Madam Chair, your reference earlier this morning to the exposure draft of the legislation as 'highly oppressive'. I have no argument with that description of the legislation.

In response to a comment by the committee chair later in the hearing concerning the association's lack of knowledge of the taxation affairs of individual members of the Bar, the President made it very clear that he took 'particular exception' to the 'pejorative comments ... that you will see it time and time again in articles that refer to barristers-make a sniping reference to bankruptcies as something that is lurking in the background'.

The Bar Association has offered its assistance to the Australian Taxation Office to try and overcome the difficulties the office has with section 16 of the *Income Tax Assessment Act 1936* and the provision to the association of publicly available information, for example being advised of a scheduled (or past) court appearance by barristers being prosecuted for a taxation offence. (The association has provided the Commissioner of Taxation with an advice from senior counsel that the section already allows this to be done. The Taxation Office's advice is to the contrary.)

On 23 July 2004 the standing committee tabled its report. Prior to doing so, the committee issued a media release advising that it had concluded 'that there was no justification for a legislative amendment which would effectively quarantine creditors from risk and place that risk on the family of the debtor. Nor has a case been established to render illegitimate transfers that had been undertaken years ago.' The committee recommended that sub-section 16(4) of the *Income Tax Assessment Act 1936* be amended to allow the Commissioner of Taxation to provide publicly available information to prescribed industry or professional organisations. There was now wide-spread recognition that the proposed legislation was seriously flawed and much of it unnecessary. On the same day, the federal Attorney-General announced that the *Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* would be withdrawn and redrafted.

### The Bar Association staff

In each annual report I have drafted since I took up duty with the Bar Association in November 1997, I have written of the association's staff putting in long hours of very competent, dedicated effort to provide a quality service to members and others, a service that usually goes unappreciated. It is

## Executive Director's report - continued

probably *de rigueur* for the chief executive officer of any organisation to thank his or her staff in the annual report. This is not such a case. Neither the Bar Council nor I could carry out our responsibilities without the support of the staff the association is so lucky to have.

### Further thanks

In addition to the association's staff, the Bar Council and I rely upon, depend upon, the extraordinarily large amount of assistance we are given so willingly by members of the Bar. Literally hundreds of members contribute to the association in various ways each year, be it as committee members; in the preparation of submissions to governments, law reform agencies, parliament and other bodies; in briefing parliamentary committees; providing pro bono assistance to members of the public; giving continuing professional development seminars; assisting with the Bar Practice Course; and in so many other ways. I am grateful to them all.

I also wish to acknowledge and thank the 2003 and 2004 Bar Councils, and in particular the presidents, Walker SC and Harrison SC, who have done so much more than it is generally known to advance the interests of the Bar Association, its members, the wider legal profession and the community generally. Much of their work cannot be publicised, for that would detract from its value. I am very grateful for all their support and assistance - and at times simply for lending a sympathetic ear.

P.A. Selth  
Executive Director



# Appointments

## Committees of the Bar Association

As at 30 June 2004

The Bar Association's committees regularly advise and assist The Bar Council in the preparation of detailed submissions regarding draft legislation and current issues in the administration of justice. The expert commentaries of Bar Association committees are sought by governments and opposition political parties, as well as law reform agencies.

The committees are comprised of Bar Association members, who volunteer for service and give generously of their time. Some committees include members of the community in their ranks. An indication of their hard work may be seen in the committee reports, beginning on page 27.

### **Bar News Committee**

Justin Gleeson SC (Chair)

Keith Chapple

Rodney Brender

Rena Sofroniou

Terry Ower

Chris O'Donnell

Andrew Bell

Anthony Lo Surdo

Ingmar Taylor

Michael Kearney

**Bar Association staff member**

Chris Winslow

### **Criminal Law Committee**

Stephen Odgers SC (Chair)

Anthony Bellanto QC

Malcolm Ramage QC

Paul Byrne SC

Tim Game SC

Peter Johnson SC

Paul Conlon SC

James Bennett SC

Brian Knox SC

Robert Hulme SC

Philip Boulten SC

John Stratton SC

Glenn Bartley

Linda McSpedden

Greg Scragg

Carolyn Davenport

Gregory Smith

Chris Hoy

Richard Button

Mark Buscombe

Sally Dowling

Matthew Johnston

Gaby Bashir

Michael Coroneos

**Bar Association staff member**

Adele Connor / June Anderson

### **Equal Opportunity Committee**

Virginia Lydiard (Chair)

Angela Pearman (Deputy Chair)

Angela Bowne SC

Liz Olsson SC

Robert Newlinds SC

Mullenjaiwakka

Julia Baird

Phillipa Gormly

Rashda Rana

Sandra Duggan

Ingmar Taylor

Rachel Pepper

Sally Dowling

John Bowers

Kate Eastman

Louise Byrne

Michelle Painter

Cameron Moore

David Price

Tony McAvoy

**Bar Association staff member**

Adele Connor

### **Family Law Committee**

Grahame Richardson SC (Chair)

Robert Lethbridge SC

John Berry

Christopher Simpson

Margaret Cleary

Andrew Givney

Warwick Tregilgas

Greg Johnston

Paul Sansom

Richard Schonell

Judith Housego

Neil Jackson

Doug Timmins

**Bar Association staff member**

Adele Connor / June Anderson

## Committees of the Bar Association - continued

As at 30 June 2004

### Legal Aid Committee

Tim Game SC (Chair)

Geoff Lindsay SC

Peter Zahra SC

Angela Bowne SC

Phillip Boulten SC

John Stratton SC

Linda McSpedden

John Berry

Stephen Hanley

Paul King

Dean Jordan

Mark Buscombe

Anthony Iuliano

Luke Brasch

### Bar Association staff member

Adele Connor / June Anderson

### Mediation Committee

Robert Angyal (Chair)

Steven Rares SC

Michael Eagle

Richard Bell

Ian Bailey

Mark Brabazon

Mary Walker

Geraldine Hoeben

Katherine Johnson

Susan Phillips

David Knoll

Hugh Stowe

Harry Woods

Dominic Williams

### Bar Association staff member

Kim Kemp

### Personal Injuries Litigation Committee

Larry King SC (Chair)

Andrew Morrison SC

John Agius SC

William Kearns SC

Stephen Campbell SC

Philip Doherty SC

Ian Cullen

Brian Ferrari

Jim Gracie

William Fitzsimmons

Greg Grogan

Terry Ower

Julia Lonergan

Andrew Stone

### Bar Association staff member

Kim Kemp

### Professional Conduct Committee #1

Anna Katzmann SC (Chair)

Stephen Robb QC

Steven Rares SC

Larry King SC

Phil Greenwood SC

Michael Bozic SC

Stuart Torrington

Lindsay Ellison

Michael Loewenstein

Mark Speakman

Richard McHugh

Vicki Hartstein

Angela Pearman

Frank Veltro

Philippe Gray-Grzeszkiewicz

### Community members

David Kaye

Helen Steptoe

### Academic member

Dorne Boniface

### Committee Secretary

Karen Mobbs

### Professional Conduct Committee #2

Robert Toner SC (Chair)

Ian Temby AO QC

Geoff Lindsay SC

Paul Conlon SC

Robert Kaye SC

Geoff Underwood

Kim Morrissey

Phillip Mahony

Kate Traill

Andrew Colefax

Richard Weinstein

Christopher Millard

Rachel Pepper

Rhonda Bell

Vahan Bedrossian

### Community members

Anna Fader

Sue Thaler

### Academic member

Michelle Sanson

### Committee Secretary

Helen Barrett

### Professional Conduct Committee #3

Tom Bathurst QC (Chair)

Martin Einfeld QC

John Maconachie QC

David Davies SC

John Sheahan SC

Hayden Kelly SC

James Stevenson SC

Chris Simpson

## Committees of the Bar Association - continued

As at 30 June 2004

Gregory Smith  
 Dominique Hogan-Doran  
 Peter Brereton  
 Louise Byrne  
 Michael McHugh  
 Dominic Toomey  
 Elizabeth Frizell  
 Paul Bolster

### Community members

John White  
 Nicholle Nobel

### Academic members

Bernard Dunne

### Committee Secretary

Karen Mobbs

### Professional Conduct Committee #4

Bernie Coles QC (Chair)  
 Peter Graham QC  
 Philip Hallen SC  
 David J Russell SC  
 James Bennett SC  
 Virginia Lydiard  
 Josephine Kelly  
 Chris Hoy  
 Lachlan Gyles  
 Simon Kerr  
 Patrick Griffin  
 Carol Webster  
 Sigrid Higgins  
 Paresh Khandhar  
 Kevin Andronos

### Community Members

John Girdwood  
 Matthew Smith

### Academic members

Francine Feld

### Committee Secretary

Helen Barrett

### Taxation Committee

Anthony Slater QC (Chair)  
 Holger Sorensen  
 Kevin Connor  
 Mark Brabazon  
 Christopher Bevan  
 Igor Mescher  
 Peter Fraser  
 Mark Richmond  
 Narelle Butler

### Bar Association staff member

Kim Kemp

### Young Barristers Committee

Hugh Stowe (Chair)  
 David Ash  
 Rhonda Bell  
 Cameron Jackson  
 Andrew Campbell  
 Louise McManus  
 Harry Woods  
 Vahan Bedrossian  
 Stephen Loughnan  
 Stephanie Fendekian  
 John Pickering  
 Mark Gunning  
 Alastair Vincent  
 Jacob Horowitz  
 Margaret Holz  
 John-Paul Redmond

### Bar Association staff member

Travis Drummond

### Indigenous Barristers Strategy Working Party

Chris Ronalds (Chair)  
 Chris Hodgekiss SC  
 Mullenjaiwakka  
 David Frearson  
 Andrew Haesler  
 Tony McAvoy  
 Lincoln Crowley  
 Professor David Barker (UTS)  
 Professor Larissa Behrendt (UTS)  
 Associate Professor Jill Hunter (UNSW)

### Bar Association Staff Member

Travis Drummond

### Limited Liability Working Party

Brian Rayment QC  
 Tom Bathurst QC  
 David Davies SC  
 Andrew Bell  
 Alister Abadee

### Bar Association staff member

Kim Kemp

## Co-ordinators

### Human Rights Co-ordinator

Nicholas Cowdery QC

### Downing Centre Duty Barrister Scheme Co-ordinator

Kate Traill

### Industrial Relations Commission Duty Barrister Scheme Co-ordinator

Ingmar Taylor

## Sections of the Bar Association

As at 30 June 2004

### **Administrative Law**

Convenor: Alan Robertson SC  
Secretary: Stephen Lloyd

### **Family Law**

Convenor: Grahame Richardson SC  
Secretary: Greg Watkins

### **Common Law**

Convenor: Anna Katzmann SC  
Secretary: Andrew Stone

### **Intellectual Property Law**

Convenor: David Yates SC  
Secretary: Richard Cobden

### **Constitutional Law**

Convenor: Stephen Gageler SC  
Secretary: David Knoll

### **Construction Law**

Convenor: Glen Miller QC  
Secretary: Geoff Underwood

### **Maritime, Air & Transport Law**

Convenor: Brian Rayment QC  
Secretary: Gregory Nell

### **Trade Practices & Consumer Protection Law**

Convenor: Jeffrey Hilton SC  
Secretary: Andrew Ogborne

### **Corporations, Securities & Insolvency Law**

Convenor: Tom Bathurst QC  
Secretary: Rodney Smith SC

### **Criminal Law**

Convenor: Peter Johnson SC  
Secretary: Glenn Bartley

### **Environmental, Local Government & Valuation**

Convenor: Malcolm Craig QC  
Secretary: Josephine Kelly

## News South Wales members appointed to the Bench

As at 30 June 2004



### **Supreme Court of New South Wales**

The Hon Justice R C McDougall

The Hon Justice R W White

The Hon Justice J D Hislop

### **Land and Environment Court of New South Wales**

Chief Judge, the Hon Justice P D McClellan

### **District Court of New South Wales**

His Hon Judge M Marien SC

His Hon Judge R D Ellis

His Hon Judge B R Maguire QC

### **Federal Magistrates Service**

Giles Coakes

## Bar Association representatives on educational bodies

As at 30 June 2004

### College of Law, Board of Directors

Michelle Painter

### Legal Practitioners Admission Board

Peter Taylor SC

Jeremy Gormly SC

### Legal Practitioners Admission Board, Legal Qualifications Committee

John Fernon SC

Janet Oakley

Dominic Toomey

### Legal Practitioners Admission Board, Law Examinations Committee

Michael Christie

### University of Sydney, Faculty of Law

Peter Garling SC

### University of Sydney Law School Advisory Board

Jennifer Stuckey-Clarke

### University of Technology, Sydney, Faculty Board

Geoff Lindsay SC

### University of NSW, Faculty of Law

Rachel Pepper

### University of Wollongong Faculty of Law, Visiting Committee

Bruce Collins QC

### University of Sydney, Law Extension Committee

Chrissa Loukas

Anthony O'Brien

## Court committees and working parties

As at 30 June 2004

### Commonwealth courts and tribunals

#### Federal Court of Australia Court User Committee

Malcolm Oakes SC

#### Federal Court Electronic Filing Working Party

Michael McHugh

#### Family Court Case Management Committee

Grahame Richardson SC

#### Migration Review Tribunal/Refugee Review Tribunal Liaison Committee

Nick Poynder

### State courts and tribunals

#### Court of Appeal Users Committee

Russell McIlwaine SC

Guy Reynolds SC

#### Supreme Court Rule Committee

Michael Slattery QC

Jeremy Gormly SC

#### Supreme Court Commercial Users Committee

Robert Macfarlan QC

Steven Rares SC

Noel Hutley SC

Glen Miller QC

Michael Rudge SC

Rodney Smith SC

David Hammerschlag SC

James Stevenson SC

#### Supreme Court Common Law Division Criminal Users Committee

Tim Game SC

Stephen Odgers SC

#### Supreme Court Common Law Division Civil Users Committee

Peter Deakin QC

Cliff Hoeben AM SC

#### Supreme Court Company List User's Group

Malcolm Oakes SC

Robert Newlinds SC

James Thomson

James Johnson

#### Supreme Court Probate User's Group

Michael Willmott SC

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

Leonard Levy SC

#### Supreme Court Registry Users Group

Mr John Hennessy

Mr Michael Meek

#### Supreme Court Working Party for Expert Witnesses in Criminal Trials

Ian McClintock

#### Land & Environment Court Users Group

Jeffrey Kildea

#### Land & Environment Court Information Technology Implementation Group

Jeffrey Kildea

## Court committees and working parties – continued

As at 30 June 2004

### **Industrial Relations Commission**

#### **Users Group**

Peter Kite SC  
Trish McDonald

#### **District Court Rule Committee**

Ross Letherbarrow SC

#### **District Court Civil Business Committee**

Peter Deakin QC  
Larry King SC

#### **District Court Criminal Listings Review Committee**

Kate Trill

### **Compensation Court Rules Committee**

Brian Ferrari  
Gregory Beauchamp

### **Dust Diseases Tribunal Rules Committee**

Brian Ferrari

### **Local Court (Civil Claims) Rule Committee**

Andrew Kostopoulos

### **Local Courts (Civil Claims) Court Users Forum**

Andrew Kostopoulos

### **St James Local Court Users Forum**

Kevin Laphorn

### **Local Court Rule Committee**

Kate Trill

### **Children's Court Advisory Committee**

Greg Moore

## Statutory appointments

As at 30 June 2004

### **Administrative Decisions Tribunal**

#### **Legal Services Division**

Robert Macfarlan QC  
John McCarthy QC  
Sharron Norton SC  
David Officer QC  
Lionel Robberds QC  
Wendy Robinson QC  
John West QC  
Alison Stenmark SC

#### **Equal Opportunities Division**

Jane Needham

#### **General Division**

Jane Needham  
Mark Robinson

### **Council of Law Reporting**

Naida Haxton (Editor)  
Lee Aitken (Consulting Editor)  
Francis Douglas QC  
Bret Walker SC  
Christopher Birch SC  
Noel Hutley SC  
Ian Jackson SC  
Christine Adamson  
Timothy Castle

### **Motor Accidents Authority**

#### **Senior Assessors Service**

Peter Capelin QC  
Larry King SC  
Ross Letherbarrow SC  
Maragaret Holz

#### **Claims Assessment and Resolution Service**

Robert Quickenden  
William Fitzsimmons  
John Tancred  
Robert Tonner  
Margaret Holz

### **Legal Aid Commission**

#### **Board members**

Geoff Lindsay SC  
Alternate: Phillip Boulton

### **Legal Aid Commission – Legal Aid Review Committees**

#### **Committee No.1**

John McCarthy QC  
1st alternate: Paul Menzies QC  
2nd alternate: Paul Blacket SC

#### **Committee No.2**

Winston Terracini SC  
1st alternate: Anne Healey  
2nd alternate: Mark Buscombe SC

#### **Family Law Legal Aid Review Committee No.1**

Gregory Moore  
1st alternate: Richard Schonell  
2nd alternate: Anne Rees

### **Legal Profession Advisory Council**

Philip Greenwood SC  
Jeremy Gormly SC

### **Law and Justice Foundation**

Bret Walker SC

### **Law Week Board**

Philip Selth

## Other appointments

For the year ended 30 June 2004

### **NSW Attorney General's Department working parties**

**Evidence Act working party**  
Stephen Odgers SC

**Civil procedure working party**  
Michael McHugh  
Greg George

**Australasian Dispute Resolution  
Centre**  
Richard Bell

**Public Interest Law Clearing House**  
Peter Maiden  
Rachel Pepper  
Hugh Marshall  
Philip Selth

**Australian Advocacy Institute**  
Elizabeth Fullerton SC

**Fair Trading Tribunal - Home  
Building Division Consultation Group**  
Simon Kerr

**NSW AGs Department, Legal  
Technology Reference Group**  
Jeffrey Kildea

**Motor Accidents Assessment  
Service Users Group (MAAS)**  
Ross Letherbarrow SC  
Hugh Marshall  
Andrew Stone

### **Law Council of Australia committees**

**Access to Justice Committee**  
Christopher Whitelaw

**ALRC Working Group**  
Bret Walker SC

**Public Liability Reference Group**  
Ian Harrison SC

**Australian Young Lawyers  
Committee**  
Hugh Stowe

**Alternative Dispute Resolution  
Committee**  
Mary Walker

**Advisory Committee on Indigenous  
Legal Issues**  
Michael Slattery QC  
Anthony McAvoy

**Criminal Law National Liaison  
Committee**  
Tim Game SC (Chair)  
Bret Walker SC  
Stephen Odgers SC

**Equalising Opportunities in the  
Law Committee**  
Louise Byrne

**Healthcare Liability Committee**  
Michael Slattery QC  
Colin O'Connor QC

**Model Equal Opportunity Briefing  
Policy Committee**  
Michael Slattery QC

**National Profession Reference Group**  
Bret Walker SC

**National Profession Working  
Groups for Admission, Practice,  
Complaints & Discipline**  
Philip Selth

### **Law Society of New South Wales committees**

**Criminal Law Committee**  
Matthew Johnston  
Michael Coroneous

**Personal Injury Committee**  
Andrew Stone

## Court liaison members 2004

As at 30 June 2004

### **Federal courts and tribunals**

**High Court**  
David Jackson QC

**Federal Court**  
Malcolm Oakes SC

**Family Court**  
Grahame Richardson SC

**Migration & Refugee Review  
tribunals**  
Nick Poynder

### **State courts and tribunals**

**NSW Court of Appeal**  
Donald Grieve QC

**Supreme Court of NSW -  
Common Law Division**  
Richard Burbidge QC

**Supreme Court of NSW -  
Equity Division**  
Robert Forster SC

**Supreme Court of NSW -  
Possessions List**  
James Stevenson

**Supreme Court of NSW -  
Defamation List**  
Steven Rares SC

**Supreme Court of NSW -  
Criminal Matters**  
Tim Game SC

**Supreme Court of NSW -  
Admiralty List**  
Sandy Street SC

**Land and Environment Court**  
Malcolm Craig QC

**Industrial Relations Commission  
of NSW**  
Max Kimber SC

**Local Court**  
Kate Traill

# Reports

## Promoting the interests of local practising barristers

### BarCare

For the year ended 30 June 2004

BarCare is designed to guide barristers through emotional and stress-related problems, including family or marital problems, drug or alcohol dependency and practice pressures. BarCare offers members of the Bar an opportunity to discuss with a specialist professional counsellor any personal problem that is interfering with work or family life.

BarCare is available to all members of the Bar Association and their immediate families. The assistance is provided in strict confidence. The Bar Association covers costs associated with the initial consultation, assessment and referral to a specialist practitioner by the BarCare counsellor.

In September 2003 a large poster drawing attention to the scheme was distributed to barristers' clerks.

#### Survey of BarCare consultations

During the year the counsellors completed a questionnaire designed to provide an indication as to how the scheme was working. The responses were as follows:

Number of members seen:	21 (an increase of three from last year)
Female:	6
Male:	15
Most common age bracket:	45 – 54 years (same as last year)
Most common length of time in practice:	11 years +
Most common locality of practice:	Sydney CBD
Most common types of problems:	overwork, financial and marital/relationship
Number of family members seen:	None
Number of members who continued with treatment after the initial consultation:	11

The counsellors were of the opinion that the system was working well. As one member of the panel said: 'The programme continues to benefit those who utilise it – all barristers appreciate the opportunity to have BarCare as a backup / emergency resource.'

A senior member of the Bar Association staff has dealt with a small number of enquiries received through the BarCare helpline: (02) 9230 0433.

#### The history of BarCare

In July 2000 the Bar Council Executive recommended to Bar Council that an independent counselling service be established along the same lines as LawCare, the Law Society's system of providing counselling and medical treatment to solicitors.

After a series of meetings with the New South Wales Medical Board, medical practitioners and members of the Bar, the structure of the scheme (four panel members, with the initial consultation paid by the Bar Association) was agreed. In May 2001 a brochure describing the new scheme was distributed to members. A formal announcement of the introduction of the scheme was made in the May/June 2001 edition of *Bar Brief*.

#### How it works

Barristers and their families seeking assistance initially contact a BarCare counsellor and make an appointment for consultation. The consultation takes place at the counsellor's professional rooms or by telephone. The Bar Association covers the costs arising from the initial consultation with the BarCare counsellor.

During the initial consultation the counsellor seeks to identify the nature and extent of the problem. With the client's permission, the counsellor may formally consult with a medical practitioner or other health professional of the member's choice to assess the treatment options available – both therapeutic and medical – prior to discussing a treatment programme. The treatment programme may involve further counselling sessions with the BarCare counsellor, and or a referral to a specialist in a particular discipline, or to a specific support programme for appropriate treatment.

The BarCare counsellors have access to a wide network of professionals from different disciplines for referral purposes or to discuss aspects of treatment. These include both general and specialist medical practitioners, social workers, psychologists, stress management consultants, dependency counsellors, as well as qualified people in other professional services.

Participation in any part of the BarCare service is voluntary. Confidentiality is assured.

**BarCare helpline: (02) 9230 0433**  
**[www.nswbar.asn.au/barcar](http://www.nswbar.asn.au/barcar)**

## Report of the Management Committee of the Barristers' Benevolent Association

For the year ended 30 June 2004

Every year there are barristers who encounter personal misfortune or require some form of assistance from the Benevolent Association in order to overcome a major problem.

Sudden deaths, serious illness, accident, mental illness, cancers, suicides, HIV/AIDS, alcoholism, families of deceased members who have some need and serious financial misfortune are all problems which have been addressed by the Barristers' Benevolent Association over the last few years.

The association can respond to calls for assistance without formality and without delays. There are no formal applications, forms, waiting periods, means tests or other predetermined administrative requirements. There have been times when assistance has been provided on the same day as information about a problem became known.

The assistance given is generally financial, but it is not limited to money. Arrangements have been made for legal assistance, for independent psychiatric assessment, for negotiating housing, negotiating with banks, preparing financial position statements, or dealing with other aspects of members' financial problems and intervening with creditors where that becomes necessary.

Every aspect of the operation of the Benevolent Association, from the donations made to the association through notification that a member is in difficulty, assessing and providing assistance is an expression of the collegiate nature of the life of a group of independent individuals collectively operating as the Bar.

In the financial year 2003-2004 the Management Committee approved three grants (totalling \$19,257). No new loans were made, however one person had his loan waived – an amount of \$7,500.

Information that a member is in difficulty can come from any source. The most common source of information is from barristers who are aware that a floor member is in difficulty. Very often clerks will make contact, but sometimes family members will make an approach, either directly to a member of the Bar Council or to the Executive Director. This contact can take the form of a telephone call or letter to the Executive Director or a Bar councillor, and is treated with the utmost confidentiality.

## Contributions to the Barristers' Benevolent Association

For the year ended 30 June 2004

### Contributions \$5,000 and above

Craig Leggat  
Francis Douglas QC

Paul Le Gay Brereton SC  
John Durack SC  
Richard Edmonds SC  
The Hon TEF Hughes AO QC

David Ash  
Anthony McQuillen  
Winston Terracini SC  
The Hon Justice J D Hislop  
Ian Barker QC

Gary Gregg  
Simon Harben SC  
Ian Harrison SC  
The Hon Justice CRR Hoeben AM RFD

### Contributions \$3,000 to \$3,999

Bret Walker SC

Simon Kerr  
John Murphy  
David Raphael  
Michael Slattery QC

Campbell Bridge SC  
David Buchanan SC  
Stephen Campbell SC  
David Catterns QC

Christopher Hoy  
Bennett Ingram  
David Jackson QC

### Contributions \$2,000 to \$2,999

Participants –  
Great Bar Boat Race

Paul Byrne SC  
Philip Doherty SC  
John West QC

John Webster SC

### Contributions \$500 to \$999

Frank Santisi  
Jonathan Hyde

Richard Cavanagh  
Jeremy Clarke  
David Cowan

Gregory Jones  
William Kearns SC  
Larry King SC  
Peter Kite SC

### Contributions \$1,000 to \$1,999

Bruce Collins QC  
Ian Davidson

John Cauchi  
His Honour Judge J B Phelan  
Richard Battley  
Steven Rares SC

Michael Cranitch SC  
Peter Deakin QC  
Robert Driver  
Sandra Duggan  
The Hon Robert Ellicott QC  
John Garnsey QC  
Justin Gleeson SC

Geoffrey Lindsay SC  
Terrence Lynch  
His Honour Judge MC Marien  
David Nock SC  
The Hon Barry O'Keefe AM QC  
Bruce Oslington QC  
Keith Rewell SC

## Contributions to the Barristers' Benevolent Association – continued

For the year ended 30 June 2004

Timothy Robertson SC	Marion Carpenter	Anthony Enright	Graham Barter
Eugene Romaniuk	Brian Ferrari	Stephen Flett	Clive Evatt
Noeline Rudland	Richard Grady	Robert Forster SC	Geoffrey Graham
Stephen Rushton SC	Malcolm Holmes QC	Antonio Gidaro	Richard Johnson
John Sheahan SC	David Hooke	Mark Gilbert	Allen Lakeman
Stephen Stanton	James Johnson	Martin Gorrick	John McDonald
Andrew Stone	Luigi Lamprati SC	Michael Green	Peter Stitz
Robert Taylor	Leonard Levy SC	Robert Greenhill SC	Richard Weinstein
Barry Toomey QC	Robert Macfarlan QC	Trevor Hall	Peter Callaghan SC
Gregory Waugh	Robin Margo SC	Peter Hastings QC	Peter Graham QC
Paul Webb QC	Peter McGrath	Geraldine Hoeben	Ian Butcher
John Wilson SC	His Honour Judge J Nicholson SC	Jeffrey Kildea	Peter Cummings
Elizabeth Wood	His Honour Judge S Norrish QC	Patrick Leary	The Hon Justice J R Dunford
	Anthony John Reynolds	Mark Lynch	John Durack
	Garry Rich	The Hon Dr J Macken AM	Mary Falloon
	Dennis Ronzani	Phillip Mahony	Alistair Henskens
	Terence Rowles	John Mancy	Gregory Laughton SC
	Rashelle Seiden	Nicholas Manousaridis	Mark McDermott
	Julian Sexton SC	Andrew Martin	David Officer QC
	John Thompson	Peter McEwen SC	David Rickard
	Dominic Toomey	Ian McGillicuddy	The Hon Justice P W Young AO
	John Waters	Garry McIlwaine	David O'Neil
	Darryn Kelly	Anthony McInerney	Christian Vindin
	John Levingston	Master John K McLaughlin	The Hon Justice I V Gzell
	Roland Keller	Glen Miller QC	Malcolm Oakes QC
	Wendy Strathdee	Cameron Moore	Oswald Watt
	Her Honour Acting Judge C E Backhouse QC	Brian Murray QC	Peter Biscoe QC
	Mark Boulton	Paul Nolan	The Hon Justice L D S Waddy RFD
	Mark Brabazon	Robert O'Neill	Paul Livingstone
	The Hon Justice J E Brownie	Angela Pearman	Alexander Todd
	The Hon Justice J P Bryson	Anthony Renshaw	Kelvin Andrews
	Gregory Burton	Geoffrey Rundle	Paul Barnes
	Andrew Campbell	Angela Seward	John Bartos
	Peter Capelin QC	Jeffery Sewell	Richard Beasley
	Bernie Coles QC	David Smallbone	Nicholas Beaumont
	Gerard Craddock	Sandy Street SC	Stanford Benson
	Malcolm Craig QC	John Tancred	Dino Bertini
	David Davies SC	Robert Titterton	His Honour Judge A D Bishop
	Matthew Dicker	Her Hon Judge R C Tupman	Phillip Boulten SC
	Kingsford Dodd SC	Julian Van Aalst	Anthony Bowen
	Peter Dooley	William Walsh	Peter Callaghan
	Lindsay Ellison	Geoffrey Watson SC	Grant Carolan
		David Williams SC	David Caspersonn
		Dennis Wilson	

### Contributions \$100 to \$499

Mark Dempsey  
Jane Needham  
Christopher Twomey  
Carol Webster  
John Heazlewood  
Barry Hall QC  
Anna Katzmann SC  
Linton Morris QC  
John Maconachie QC  
James Poulos QC  
Peter Johnson SC  
Thomas Bathurst QC  
Kate Eastman  
Madeleine Gilmour  
Jeremy Gormly SC  
David Kell  
Stephen Longhurst  
Elizabeth Olsson SC  
Jonathon Robson  
The Hon Justice C S Sheller  
John Timbs QC  
Michael Williams SC  
Martin Walsh  
Roy Allaway QC  
Richard Scott Bell  
Paul Blackburn-Hart  
Peter Bodor QC  
Michael Bozic SC  
Stephen Burley

## Contributions to the Barristers' Benevolent Association - continued

For the year ended 30 June 2004

Keith Chapple	John Keogh	Borys Pluznyk	<b>Contributions \$25 to \$99</b>
Michael Christie	Shaun Kerrigan	Joseph Pollak	The Hon Justice R N Madgwick
Stephen Climpson	Stuart Kettle	Kathryn-Anne Poulos	Jonathan de Vere Tyndall
Peter Cook	Geraldene Kinnane	Dominic Priestley	Madeleine Marty
Andrea Cotter-Moroz	Peter Kintominas	Jonathon Priestley	Paul Mason
Gregory Curtin	The Hon Justice D Kirby	Francis Purnell SC	John McKenzie
Matthew Darke	Ernest Knoblanche QC	The Hon Rodney Purvis QC	Kim Roser
Sir Michael Davies	Gemunu Kumarasinhe	Geoffrey Radburn	David Thorley
Francis Davis	Ian Lawry	Gary Roberts	Warwick Tregilgas
Simon Davis	Christopher Leahy SC	Michael Robinson	George Iknors
David Derham QC	The Hon Justice D D Levine RFD	Paul Rowe	Ian Strathdee QC
Hament Dhanji	Michael Loewenstein	Peter Russell	Giovanni Galluzzo
The Hon Justice J R Dowd	James Loxton	Stephen Russell	Michael Heath
Ronald Driels	George Lucarelli	James Sainty	David Jordan
Martin Einfeld QC	Master Richard Hugh Macready	Gregory Scragg	Andrew Kostopoulos
Michael Elkaim SC	Peter Mallon	Patrick See	Anthony Monaghan
John Fernan	Christos Mantziaris	Gary Seib	Michael Rollinson
James Fliece	Michael McAuley	Ian Serisier	Michael Allen
George Fraser	The Hon Justice PD McClellan	Bernard Sharpe	The Hon R T Barbour QC
Michael Gallagher	Terence McGill	The Hon George Sharpe	Neil Newton
Andrew Gee	Gordon McGrath	The Hon Justice J W Shaw	His Honour Mr L J Downs QC
Garry Gillett	Adrian McInnes QC	Christopher Simpson	The Hon M D Finlay QC
Allan Goldsworthy	Gregory McNally	The Hon J P Slattery AO QC	The Hon G Fitzgerald AC QC
John Gooley	Terese Messner	The Hon Justice R F Smart	Alan Hogan
Glen Gould	Robert Montgomery	The Hon Justice H D Sperling	The Hon J B Kearney QC
His Honour Judge G J Graham	Judith Munday	James Staunton AO CBE QC	Ian Archibald
Philippe Gray-Grzeszkiewicz	David Murr SC	Alison Stenmark SC	James Viney
Brendan Griffin	The Hon Acting Judge J A Nader RFD QC	Kenneth Stewart	Hugh Joseph Marshall SC
Anthony Hatzis	Peter Neil SC	Peter Strasser	Malcolm Ramage QC
Brent Haverfield	Trevor Neill	David Studdy	Thomas Dixon
Anne Healey	James Nelson	Terrence Sullivan	Michael Adamo
Terrence Healey	Robert Newlinds SC	Alan Sullivan QC	The Hon C J Bannon QC
The Hon G C Herkes	Gregory Newport	The Hon Justice R N Talbot	Ted Baskerville
The Hon B E Hill QC	Hugh Newton	Julian Trebeck	Robert Beech-Jones
Jeffrey Hilton SC	Peter Newton	Gus Van Der Vlag	Kenneth Bennett
Brendan Hull	Gregory Niven	Christopher Ward	His Honour Judge A M Blackmore SC
Peter Huntington	Bruce Odling	Ralph Warren	Luke Brasch
Richard Jankowski	Gary O'Gorman	Charles Waterstreet	Peter Brewster
Geoffrey Johnson	Michael Perry	Robert Webb	Andrew Bulley
Gregory Johnston	Giuseppe Pesce	James Whyte	The Hon Acting Justice M W Campbell
James Judd QC	Geoffrey Petty SC	The Hon Justice M R Wilcox	
Sheila Kaur-Bains	Kevin Pierce	Dudley Williams	
Terence Keaney		Malcolm Young	Nicole Carroll
James Kearney			

## Contributions to the Barristers' Benevolent Association – continued

For the year ended 30 June 2004

Ross Carruthers	Leigh Stone	<b>Contributions under \$25</b>
James Clark	The Hon Justice T J Studdert	His Honour H H Bell
David Cochrane	Gregory Watkins	The Hon M J Clarke QC
David Day	Alyn Doig	Malcolm Hardwick QC
Ronald Desiatnik	John Jones	The Hon H P Johnston QC
David Dura	Jeffrey Collins	John Milton Stowe QC
Peter Dwyer	Geoffrey Gemmell	The Hon W D Thompson
The Hon Elizabeth Evatt AC	Melissa Gillies	His Honour Judge P R Bell
Maureen Fanning	Ignatius Asuzu	Magistrate J Coombs
The Hon Justice R Flohm	Commissioner T J Moore	Mark Seymour
The Hon M L Foster QC	The Hon Justice R J Peterson	His Honour Judge J R Nield
Geoffrey Gorton	Her Honour Judge A M Quirk	Michael Carey
Jeremy Gruzman	John Papayanni	Michelle Hirschhorn
Roger Hamilton	The Hon W D Hosking QC	Justin Hogan-Doran
Annette Haughton	Lynette Judge	Duncan Inverarity
Louise Henderson	Andrew Jungwirth	William Lloyd
Robert Hewson	John Harris	Roger Quinn
Dominique Hogan-Doran	Mark Dennis	Penelope Sturrock
Robert Hunt	Benjamin Katekar	Iain Todd
The Hon Justice B M James	John Travassaros	James Trevallion
John Kernick	Jenny Baxter	Harry Woods
Peter Lyons QC	Roland Bonnici	John Ibbotson
His Hon Barry Mahoney QC	His Honour Judge T S Davidson QC	Jehane Ghabrial
Todd Marskell	His Honour Judge D J Freeman	Jacob Horowitz
Louise McManus	His Honour Judge C J Armitage	David Shoebridge
Stephen McMillan	Graeme Blank	Wendy Thompson
Aldo Monzo	The Hon B J Cohen QC	Richard Wilson
Peter Mooney	Roger Gillard QC	Malcolm Beveridge
The Hon P R Moran	Leonard Karp	John Fitzgerald
Douglas Murphy	His Honour Judge B R Maguire QC	John Henness
Robert Newton	Justin Patey	Thomas Howard
The Hon Judge J L O'Meally AM RFD	Ben Salmon RFD QC	Scott Miller
Richard Page	Lesley - Gaye Wong	Eugene Wasilenia
Ian Pike	Matthew Wong	Eugene Gramelis
Jason Potts		Mary Lilienthal
Robert Quickenden		John McCaffrey
John Reimer		Nicholas Ulrick
Wayne Sharwood		

## The Bar Library

For the year ended 30 June 2004

During the 2003-04 year, the library continued to offer a wide range of information services to members. In the year 2003-2004, loans averaged 55-60 per day (returns were somewhat less). Almost a third of these loans were textbooks, an expanding area of acquisitions. Demand for loans of CPD videos also rose this year.

In response to the demand for US and UK material, particularly in electronic format, the library has extended its collection of full text external legal databases to include access to Westlaw and Context.

The Collection Development Policy was updated this year to assist in strategic planning of resources for the library. A copy is available in the library.

The library continued to provide a quality reference service, logging 3292 reference enquiries during the year; compared with 3126 in 2003-2004 (this does not include 'ready reference enquiries'; such as 'How do I turn on the photocopier?') The most interesting request during 2003-2004 was for information about 'diverging'; the practice by prisoners, amongst others, of regurgitating and selling their dose of methadone.

The number of responses to reference questions completed by e-mail was 610 last year, 61 per cent increase on the previous year's 380. The provision of information in electronic format is a more efficient (and cheaper) delivery method for both clients and librarians.



A complement to the library's reference service is the orientation and training sessions conducted for readers, barristers and junior clerks. The library conducts orientation tours of the Law Courts Library for clerks and junior clerks as part of the ongoing co-operative arrangements between the two libraries.

The library also holds courses in electronic legal research. This year the course content has been developed and delivered by the legal publishers, Thomson and LexisNexis. Plans to provide this training in-house are well under way and will start in the new year.

At the end of 2003, the library extended its capacity to house archive materials and established an annexe in the old cold store room, formerly used by Table Matters. This new storage area holds old editions of textbooks, encyclopaedia and digests.



Photo: Erin Jonasson / Fairfaxphotos

## Equal Opportunity Committee

In 2004-2005 the Equal Opportunity Committee continued to develop new and existing initiatives designed to promote equal opportunity for any person practising at, or wishing to come to, the New South Wales Bar.

### Barristers with special needs

The committee continues to monitor the needs of disabled barristers, who have been assisted by a number of facilities in and around Wentworth Chambers, including:

- a ramp for wheelchair access;
- two disabled parking spaces;
- the ground floor bathroom; and
- a hearing loop, purchased by Counsel's Chambers.

The committee welcomes information about other identifiable needs and is committed to ensuring that people with disabilities are assisted in every way possible.

### Women at the Bar

#### *Welcome to the Bar*

The 'Welcome to the Bar' visits by final and penultimate year female university students continue as a regular feature in the financial year. Students from the University of Western Sydney visited the Bar on 3 October 2003 and, on 28 May 2004, 25 students from Sydney University attended the Bar Association and spent the morning with a number of female volunteer barristers. They were spoken to by the Hon Justice Branson, the Hon Justice Bergin and the Hon Justice McColl AO, to whom the Equal Opportunity Committee is most grateful for giving up their time. As usual, a number of the students reported back with enthusiasm, expressing their gratitude and wishing to maintain contact with members of the Bar.

#### *The mentoring scheme*

The mentoring scheme, which has been assisting women at the Bar since 2001, continues. It is administered on an ongoing basis by a sub-committee of the Equal Opportunity Committee, comprised of Michelle Painter, Sandra Duggan and Rachel Pepper. It is offered to eligible women barristers twice a year – in March and in September. These dates are chosen to coincide with the conclusion of the barrister's first year of practice.

Participation in the scheme is voluntary: either as a mentor or mentored barrister. Those eligible to participate in the scheme are women barristers who are about to enter their second year of practice. Each participant is assigned a mentor, who is drawn from the pool of senior practitioners, including silks. Factors such as the current areas of work and aspirational areas of practice are considered when assigning a mentor.

#### *Equitable Briefing Policy*

In June 2004 Bar Council formally adopted the Law Council's Model Equal Opportunity Briefing Policy for Female Barristers and Advocates, which draws upon a policy drafted by the Equal Opportunity Committee and approved by the Bar Association on

23 October 2003. The committee is planning strategies to disseminate the policy, which can be found on the association's web site, throughout the community. In addition, the committee is exploring ways to make available to the public information about the practices of female barristers.

The chair of the committee, Virginia Lydiard, together with Anna Katzmann SC, will attend the 16th Women, Management & Employment Relations Conference the Hotel Intercontinental on 22-23 July 2004 in order to make contacts for the promotion of the policy.

#### *The Sexual Harassment Policy*

On 17 June 2004 the Bar Council approved a model sexual harassment and discrimination policy for adoption by individual chambers. The policy, which was drafted by Robert Newlinds SC, Rachel Pepper, Dominique Hogan-Doran and Kate Eastman (members of the EO Committee in 2003), provides chambers with the structure to resolve matters of sexual harassment or discrimination that may arise. Members of the Equal Opportunity Committee are planning a CPD programme to educate members as to the operation of the policy, and members of the committee will visit individual chambers for the same purpose on request. The former chair of the Equal Opportunity Committee, Michael Slattery QC, and Kate Eastman spoke about the policy at a weekend seminar at Newcastle in June 2004.

#### *In-Home Emergency Child Care Scheme.*

At a special meeting on 15 April 2004, the Equal Opportunity Committee adopted the recommendations of Jane Smyth of Jane Smyth and Associates in her report to the committee dated 24 March 2004, with respect to the In-Home Emergency Child Care Scheme. The Bar Council unanimously adopted those recommendations on 22 April 2004. On 15 July 2004, Pru Goward, the federal sex discrimination commissioner will launch the scheme, which is designed to assist barristers with young families in the running of their practice and to remove a perceived barrier to women's entry to the Bar. The scheme was conceived of by Jane Smyth, a specialist childcare consultant, who worked with the former chair of the committee, Michael Slattery QC and Rashda Rana in setting up a pilot scheme. She engaged the services of McArthur Management, a child care provider, which now runs the scheme.

The Equal Opportunity Committee is looking at ways of extending the scheme to assist barristers with the care of elderly relations.

### Functions organised by the Equal Opportunity Committee

The committee is conscious of the need 'to nurture and encourage female barristers, especially between five to ten years at the Bar, to ensure that they do become successful leaders and successful role models.'<sup>1</sup> In keeping with those sentiments, the committee has organised two functions specifically designed for junior female barristers.

## Equal Opportunity Committee - continued



Photo: Rob Homer / Fairfaxphotos

On 31 May 2004 the committee organised a Practice Management Seminar, presented by Jillian Talbot, Westpac's NSW Women's Market Business Development Manager, and Paul Hamilton, Senior Manager, Business Development in NSW at BT Financial Group. Jillian Talbot talked about women in business, their concerns, conflicts and contributions. The seminar focused on practice set-up and the following years of junior practice. Paul Hamilton talked about protecting your most important asset – yourself, superannuation and wealth creation.

On 15 June 2004 the committee organised a second practice management seminar at which the guest speaker was Eve Mahlab AO, who has been awarded an honorary doctorate at Monash for her work on KNOWBIZ, a project introducing business principles to students. Eve Mahlab has a passion for both the advancement of women and small business and she discussed with Anna Katzmann SC, Angela Pearman Deputy Chair of the Equal Opportunity Committee and Michelle Kearns, Clerk to Martin Place Chambers, how these principles can translate to a barrister's business at the Bar.

### **Barristers affected by recent legislative changes.**

The Equal Opportunity Committee is exploring ways to assist barristers whose practices have been adversely affected by the recent legislative changes. The committee would welcome any suggestions as to how this can be done.

The Equal Opportunity Committee is grateful for the support given to it by the President and the Senior Vice-President of the Bar Association, Ian Harrison SC and Michael Slattery QC.

<sup>1</sup> 'Why are there so few women at the Bar?' by Justin Gleeson SC and Rena Sofroniou, *Bar News*, Winter 2004, p.30.

## Indigenous Barristers' Strategy Working Party

In January 2004, the President created the new Indigenous Barristers' Strategy Working Party. It grew out of the work of the Equal Opportunity Committee but as the workload grew more demanding, he determined that it was appropriate for a separate structure to be established.

Norman Laing is the latest Indigenous lawyer to join the NSW Bar when he commenced his readership in August 2004. His arrival increases the number of Indigenous barristers currently practising in NSW to four.

The working party has pursued two main areas in the first six months. The first one is to develop fund raising strategies for the Indigenous Barristers' trust The Mum Shirl Fund. The trustees and the working party are honoured that the Hon Sir Gerard Brennan AC KBE has accepted the President's invitation to become the Patron of the Trust. The current trustees are Ian Harrison SC, Mullenjaiwakka, Daniel Gilbert and Chris Ronalds.

With the trust's deductible gift recipient status with the Australian Taxation Office and the relevant charitable fundraising authorisation from the NSW Department of Gaming and Racing finally sorted out, the trust is now ready to start its fundraising activities in earnest. Various activities are planned for later in 2004 and during 2005 to raise the profile of the trust within the Bar and to hopefully increase the flow of donations to it.

Craig Leggat of Martin Place Chambers is making a significant monthly donation to the trust on an ongoing basis and it is hoped that others will follow his generous and thoughtful lead.

The second area of activity of the working party is to develop employment opportunities for Indigenous law students and law graduates within the legal environment, particularly within the Bar. Working with individual barristers for one day per week on a regular basis exposes law students to the practical conduct of the legal system and provides them with invaluable guidance during their studies. Their work also provides them with essential financial support during their studies. The barristers involved also provide some active mentoring and study assistance to the students. The scheme to date has been a successful strategy to demonstrate the practical ways that

individual barristers can play an active role in increasing the number of Indigenous lawyers graduating from NSW universities.

The working party records its appreciation of the employment opportunities provided by Michael Slattery QC, Steven Rares SC, Angela Bowne SC, Robert Newlinds SC, Richard Lancaster and Arthur Moses to some Indigenous law students. The working party acknowledges the important contribution made by the Federal Court in Sydney and particularly the Hon Justice M R Wilcox and the partners of Henry Davis York Lawyers in providing employment for a recent Indigenous law graduate. Andrew Haelser and the NSW Public Defenders Office continue to make a significant contribution during the readership period of each new Indigenous barrister. The Office of the Director of Public Prosecutions continues to provide full time appointments for several recent Indigenous law graduates and part-time employment for an Indigenous law student, providing them with an outstanding introduction to the practice of law.

On 30 January 2004, the 20 Indigenous students from the University of New South Wales Indigenous Pre-Law Program visited the NSW Bar Association. They heard from a number of barristers about the joys and spills of legal practice and then visited the chambers of individual barristers. The Hon Justice B Sully again kindly provided an oversight into the workings of the courts from a judicial perspective and shared some insights with the students into his passage from law student to judge.

The working party acknowledges the generous contributions of BarNet and Silq in providing assistance to recent Indigenous graduates.

As well as the work of the individual working party members, including members from the university sector, the working party is grateful for the support from the President, Ian Harrison SC, and the Senior Vice-President, Michael Slattery QC. The invaluable advice and assistance from the Executive Director, Philip Selth, enables the working party to work in a more efficient manner and we are extremely grateful for his continued support.

# Reports

## Arranging and promoting continuing professional development

### Education, training and professional development programmes

#### Continuing professional development in 2003-04

The Bar Association provided 170.5 hours of CPD seminars in the 2003/04 practising certificate year. Seminars and events were held in a number of new locations, including regional centres such as Wollongong and the Central West, giving all barristers practising in New South Wales an opportunity to access to the programme.



The Professional Development Department expanded upon the mini-conferences offered the previous year and in 2004 coordinated seven mini-conferences in eight weeks, with both Wollongong and Orange added to this year's programme.

The conference at the University of Technology, Sydney again proved the most popular with over 180 barristers attending. Prior to the commencement of the Saturday programme the Bar Association provided a seminar for law students on a career at the Bar. Each session concluded with local members of the Bar on hand to answer student's questions.



A further effort to strengthen the bond between the universities and the association is the establishment of standard Bar Association prizes at all of the nine law schools in New South Wales. Each university now offers four Bar Association prizes in courses that represent the four CPD strands.

The working parties established to assist in the development of the ongoing CPD programme continue to offer valuable support, guidance and assistance to the Professional Development Department. The department also wishes to thank those who presented seminars at CPD events and the Bar Practice Course.

In addition to the programme offered by the Bar Association many floors and chambers have now established their own CPD programme. Bar Council has produced a protocol to assist barristers in establishing such a programme.

#### Bar exams

A record number of candidates registered for the Bar Examinations in 2003/04. One hundred and twenty nine candidates registered for the November 2003 examinations and 107 for the June 2004 examinations. This represents a 33 per cent increase over registrations in 2002/03. The Bar Examinations Working Party, convened by David Davies SC, continues to provide support, guidance and assistance to the Professional Development Department in the implementation of the Bar Council policy in relation to the Bar exams.

#### Bar Practice Course

As a consequence of the record number of examination candidates, 2004 also saw the largest number of readers in a single Bar Practice Course – 68. This was double the number of readers in the August 2003 course. The course placed a large strain on the resources of the Bar Association and the members of the Bar that assisted. This has led to a review of the professional development calendar in order to address some of the resource issues that were faced in 2004. Details on the changes have been published in *Bar Brief* and are on the Bar Association web site.

The structure and focus of the course continues to be guided by Peter Taylor SC, Phil Greenwood SC and Rena Sofroniou.

#### The Reading Programme

In January 2004 Bar Council revisited the conditions that are attached to a reader's practising certificate. Minor changes were made to emphasise the criminal and civil reading elements that are so important in the first few months of practice. The Bar Council also clarified any ambiguity regarding a reader's rights of appearance prior to, during and post Bar Practice Course.

## Education, training and professional development programmes – continued



Bar Council also reviewed the policy relating to tutors and the statutory list of tutors during this period.

### Plans for 2004/05

With the establishment of a revised calendar for 2005/06 planning of CPD events for 2005 is already well developed. CPD events will not be held during the period of the Bar exams and Bar Practice Course, November 2004 and May 2005 respectively. The mini-conferences are scheduled to take place in March and April, with the exact dates to be confirmed shortly. The popular Parramatta (University of Western Sydney) and Downtown (UTS) mini-conferences will be held in early June 2005. These conferences are a final opportunity for barrister to obtain their 10 CPD points prior to renewing their practising certificate.

The working parties responsible for the four CPD strands continue to add content to the CPD programme. An addition to these working parties is the Practice Expansion Scheme under the guidance of Tom Bathurst QC. Seminars designed to assist barristers in diversifying their areas of practice are currently under development.

The Professional Development Department is indebted to the members of the various working parties for their tireless work, creativity and motivation in the past year.

Planning for the 2005 mini-conferences has already commenced. Anyone that is interested in participating in the mini-conferences or any element of the CPD programme is invited to contact the Professional Development Department: [professionaldevelopment@nswbar.asn.au](mailto:professionaldevelopment@nswbar.asn.au)

# Reports

## Making recommendations and promoting the administration of justice

### Family Law Committee

The family law jurisdiction is one of constant change. *The Family Law Rules 2004* commenced operation on 29 March 2004, representing a major reform of almost every aspect of the way in which the court does its business, including procedures relating to expert evidence.

There has been much speculation during the past year regarding government policy initiatives, particularly in the arena of children's proceedings. The committee has maintained a keen interest in these proposals, and has seized opportunities to make submissions where the reforms include the formation of tribunals or methods of determination that exclude legal representation.

The Sydney and Parramatta registries of the Family Court are trialling the Children's Cases Program ('the CCP'): a radical departure in procedure in the determination of parenting proceedings. This is not confined to proceedings absent of legal representation and has involved active participation, on a case by case basis, of judges in:

- defining issues and limiting of evidence;
- modifying procedure; and
- managing the proceedings.

The project is conducted on the basis of consensual inclusion, which is viewed as essential for the waiver of various evidentiary and procedural rules. The CCP will involve 100 cases in Sydney and Parramatta before undergoing a professional evaluation. Brereton SC has represented the Bar on the CCP Steering Committee consulting on this issue.

Aside from the CCP, the Bar Association has, throughout the year, provided representatives to:

- the Family Court's Case Management Committee;
- the Legal Representatives Selection Committee for children representatives in the Family Court; and
- the Legal Aid Selection Committee for inclusion in the children's care and protection panel.

Family lawyers await the coming year to observe the direction taken by the court under the stewardship of the newly appointed Chief Justice, the Hon Justice Diana Bryant, and its Deputy Chief Justice, the Hon Justice John Faulks. Their respective appointments follow the retirement of the Hon Justice Alistair Nicholson, who has been chief justice since 1 February 1988.

The coming year is likely to see extensive reform in family law that will be relevant to those who practice in the commercial and bankruptcy arenas.

*The Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004* proposed sweeping reforms relevant not only to persons engaged in proceedings or pre or post nuptial financial agreements in the Family Court, but to the approach hitherto adopted to various strategies of asset protection planning. In July the Attorney-General announced that the Bill was being withdrawn for re-drafting.

As a consequence of the *Family Law Amendment Act 2003* the provisions of a new Part VIIIA of the Family Law Act titled 'Orders and injunctions binding on third parties' will become operative from 17 December 2004. These provisions involve extensive reform and extension of the power of the Family Court of Australia to make orders in relation to property settlements and injunctions that affect the interests of third parties. The purported effect in many areas will be to significantly diminish the limitations of that court's ability to make orders which will impact upon the legitimate interests of third parties that had hitherto been recognised. These powers have extended ramification; including, for example, the power to make orders limiting a creditors ability to recover against only one party to a marriage or in particular proportions.

The committee proposes to participate in continuing professional education programmes on these developments during 2004-2005

During the course of the year the committee has made submissions to the court in relation to the revised *Family Court Rules*, the CCP and other proposed reforms.

This committee continues to endeavour to impress upon government the importance of the maintenance of the Family Court and the significant service it provides to the community.



Photo: Peter Braig / Australian Financial Review

## Family Law Committee - continued

This year has seen the Hon Justice Chisholm of the Sydney Registry retire; as yet without replacement. Her Honour Justice Boland of the Sydney Registry has been recently appointed to the Appeals Division of the court; meaning that her participation at a first instance level in the future will be limited, if at all. The question of whether she will be replaced in the Sydney Registry at a trial level is yet to be answered. Recent years have seen the advent of the Federal Magistrates Service, which has an extensive jurisdiction under the *Family Law Act 1975*. The Magistrates Court regularly provides up to four magistrates sitting in family law matters at Parramatta, but presently there are no magistrates sitting in Sydney.

The Hon Justice John Ellis is to retire in August. His Honour has fulfilled a distinguished role in the court. He is the longest serving judge, having been appointed as one of the five original appointments to the court on 5 January 1976. His Honour has served in the Sydney Registry for a large part of that time. He has made an outstanding contribution to the court as each a trial judge, judge of appeals and administrator. Again it is to be hoped that government will ensure his replacement in the Sydney Registry.



Family Court building, Goulburn Street, Sydney.  
Photo: Simon Cocksedge / News Ltd Image Library

## Criminal Law Committee

The demands on the committee to respond to proposed changes in the area of criminal law and sentencing, at both commonwealth and state level, are as heavy as ever. Although the committee has a large membership, the amount of time required of individual members has proved to be considerable. In the last twelve months, submissions have been prepared in areas as diverse as:

- the review of the NSW Innocence Panel,
- pre-trial disclosure,
- audio visual links legislation,
- recording of alleged admissions to police,
- the possible establishment of a 'gun court' in NSW,
- Local Court criminal jurisdiction,
- proposed amendments to the *Jury Act 1977* (NSW),
- appeals procedures,
- interlocutory appeals to the Court of Criminal Appeal, and
- bail legislation.

In addition, the committee has made submissions to NSW Sentencing Council inquiries into:

- Local Court sentencing,
- firearms offences, and
- possible abolition of sentences of imprisonment less than six months.

Although all members of the committee have contributed to the work of the committee, it may be noted that Tim Game SC prepared a complex submission to the Law Council on the issue of double jeopardy. A lengthy submission in respect of sec 294A of the *Criminal Procedure Act 1986* (NSW), a controversial provision which prohibits an unrepresented accused from directly cross-examining a complainant in sexual offence proceedings, was prepared by Mark Buscombe.

Most recently, the Australian Law Reform Commission has been given references to review the operation of the *Evidence Act 1995* (Cth) and Part 1B of the *Crimes Act 1914* (Cth). The first review will be conducted in tandem with the NSW Law Reform Commission, which will conduct a review of the *Evidence Act 1995* (NSW). This legislation has very great significance in the area of criminal law and the committee will prepare a substantial submission. Members of the Bar Association who have particular concerns about the operation of the evidence legislation in criminal proceedings should pass these on to the chair of the committee. Similarly, Part 1B of the *Crimes Act 1914*, dealing with sentencing of commonwealth offenders, is a controversial area (particularly with the abolition of sec 16G) and members are invited to raise any matters which they believe should be the subject of a submission to the ALRC. Finally, the committee plans to prepare a submission to the New South Wales Government in respect of the maximum security High Risk Management Unit at Goulburn Jail.

## Personal Injuries Litigation Committee

Throughout 2003/04 the Personal Injuries Litigation Committee met regularly. The recent legislative changes impacting on the area of personal injury litigation have continued to have a significant impact on the rights of individuals in the community and a consequential impact on the practices of those Bar Association members practising in the area of personal injuries.

Specific matters that were considered and dealt with by the committee included:

- A test case, *Orellana-fuentes V Standard Knitting Mill Pty Ltd & Anor; Carey V Blasdom Pty Ltd T/as Ascot Freightlines & Anor* [2003] NSWCA 146, questioned the validity of the *Workers Compensation (General) Amendment (Costs) Regulation 2001* made pursuant to the *Workplace Injury Management Workers Compensation Act 1998*. The Bar Association made a financial contribution to the appeal. Unfortunately, the challenge in the Court of Appeal was unsuccessful and special leave to appeal to the High Court was not sought. An article on the case was published in the June 2003 edition of *Bar Brief*.
- A comprehensive submission to the Productivity Commission's inquiry into the 'National workers compensation and occupational health and safety frameworks' was prepared by committee member Jim Gracie and endorsed by the full Bar Council. A further submission was sent to the commission in November 2003 in response to its interim report. The commission's final report was released on 6 March 2004.
- Andrew Morrison SC prepared a paper concerning the fact that sec 76D of the *Supreme Court Act 1970* and sec 61 of the *District Court Act 1973* exclude interim damages to an award of damages under Part 6 of the *Motor Accidents Act 1988* or Chapter 5 of the *Motor Accidents Compensation Act 1999*. Morrison's paper was endorsed by the Bar Council and was formulated into a submission to the Attorney General and General Manager of the Motor Accidents Authority of New South Wales. No formal response has yet been received.
- A submission to the Legislative Council Standing Committee on Law and Justice highlighting specific issues and questions that the Bar Association wished the committee to consider raising with the Motor Accidents Authority and Motor Accidents Council as part of the its review of the exercise of the functions of the MAA and MAC was prepared by Andrew Stone and endorsed by the Bar Council. The Committee expressed its gratitude for the Bar Association's comprehensive submission, which greatly assisted it with the review.
- A submission was sent to the Special Minister of State in August 2003 regarding the review of the existing legal fees structure in the Workers Compensation Commission being conducted by the Hon M J R Clarke QC. The Bar Association understood that the review was to reform the fees structure so as to enhance the prospects of proper advice and representation of litigants, especially injured workers. The committee is awaiting the outcome of the inquiry.
- Andrew Morrison SC brought to the committee's attention to the difficulty faced by a plaintiff who, having brought proceedings against an employer for an unsafe system of work, is faced with a late amended defence raising an allegation that the injury actually arises out of the use of a motor vehicle within the meaning of sec 3 *Motor Accidents Compensation Act 2003*. Given that the plaintiff would not have the required certificate, the allegation if made would cause the statement of claim to be struck out even if the defendant was penalised as to costs – this occurred in *Pender v Power Coal Pty Limited* [2002] NSWSC 925 (Wood CJ at CL). Considerable effort has been made by the Bar Association to have legislation enacted to ameliorate the effects of *Pender v Power Coal Pty Limited*. It appears that those efforts have failed and in any event the time taken for the proposed legislation to go through parliament (the process is not yet complete) has meant that the number of cases still in the system affected by the decision has become very small.
- The committee considered a proposal by the government to introduce a daily fee of some hundreds of dollars which would be payable each and every day a trial exceeds ten days in length. The committee thought that in the first instance the fee would fall upon the plaintiff, although presumably it could be recoverable against unsuccessful defendants. The government appeared to appreciate the potential injustice of a plaintiff being left at risk of having to pay such a fee when, for example, the length in the case was caused by cross-claims. The Bar Association indicated its opposition to the proposal and there have been indications that there will be sufficient judicial discretion built into any such proposal to give protection to all parties.
- The committee had input into a submission prepared by the Law Council of Australia on the ATO draft tax ruling TR 2002/D13, *Income tax: Assessability of statutory personal injury compensation scheme payments*. The draft ruling raised the issue that if the economic loss component of lump sum awards of damages was to be isolated and subject to tax, the response would most likely be to award 'gross' as opposed to 'net' economic loss, which would have knock on effects of pushing up verdicts and premiums. This matter remains under review.

## Personal Injuries Litigation Committee - continued

- The Bar Council asked the committee to consider the *Police Legislation Amendment (Civil Liability) Act 2003* and advise it of any practical issues which may arise as a result of this legislation. The Executive Director met with representatives of the Ministry of Police to discuss the potential practical problems with the legislation identified by the committee. The main concern which is still under consideration is the fact that the plaintiff only has two months from being informed that the crown does not accept vicarious liability for the alleged conduct of a police officer to sue the officer concerned personally. An extension of time mechanism should at least be considered in certain circumstances. This problem has been taken up with the Ministry of Police and the Attorney General's Department.

Numerous other matters not mentioned here were noted, discussed and otherwise dealt with by the committee. It was a busy year and regrettably we have little to show for our efforts. Those efforts will, however, continue and the committee

welcomes contact from members of the Bar Association introducing topics of concern for discussion and action. Although the committee as a whole has performed well and willingly in response to its work load it would be remiss not to make special mention in this report of the particular substantial contributions made by committee members Andrew Stone, Jim Gracie, Andrew Morrison SC and Richard Seton SC and of the untiring and cheerful work of the Bar Association's Projects Officer, Kim Kemp, who co-ordinates and assists the work of the committee. The Bar Association is fortunate to have such a large number of its members who give up their time preparing reports and submissions.

The work of the committee will of course continue into 2004/05. We are currently reviewing the application of the *Civil Liability Act 2002* as decisions on the Act are beginning to come through. If members have experienced anomalies or unexpected curiosities to share in respect of the Act, we would appreciate details and copies of any judgments.

## Mediation Committee

At the first meeting of the Mediation Committee, on 3 March 2004, the Committee adopted a series of objectives:

### 1. Increasing the awareness and understanding by barristers of mediation

- 1.1. Encourage more barristers to become mediators.
- 1.2. Through educational sessions, educate the Bar on the uses of mediation, its effectiveness in settling disputes, and the ways that barristers can be involved as mediators and as party representatives.
- 1.3. Increase the number of mediation courses and make attendance at them compulsory for barristers on the Bar Association's list of mediators.
- 1.4. Increase the legitimacy of mediation in the perception of senior members of the Bar, with a view to their (i) recommending mediation to their solicitors and clients; (ii) appearing as counsel at mediations; and (iii) acting as mediators.

### 2. Promoting barristers as mediators and as counsel appearing at mediations

- 2.1. Encourage barristers being appointed more frequently as mediators.
- 2.2. Deal with the perception that judicial service is necessary or preferable in a mediator.
- 2.3. Identify who selects mediators.
- 2.4. Identify the criteria used by those who select mediators.

- 2.5. Identify any objections to barristers being selected as mediators and how those objections could be addressed.

- 2.6. Create strategies for changing any existing negative perception of barristers' suitability to mediate and implement those strategies.

### 3. Evaluating the performance of barrister-mediators

- 3.1. Consider whether the Bar Association has a role in evaluating the performance of barrister-mediators.
- 3.2. Identify ways in which barrister-mediators could get voluntary feedback from lawyers and parties appearing at their mediations.
- 3.3. Create evaluation kits that parties could use to evaluate mediators.
- 3.4. Ask Bar Council to encourage barrister-mediators to seek feedback by means of a Bar-designed kit.

### 4. Mediation and the courts

- 4.1. Provide information on the need for barrister-mediators to charge normal rates for their services.
- 4.2. Create strategies for promoting mediation through the courts.

### Activities of the committee

The Committee has taken a number of steps towards achieving its objectives.

## Mediation Committee – continued

### CPD Seminars

Bar Council has requested the committee to organise two CPD seminars related to mediation each year. Bar Council also amended its criteria for including barristers on its list of mediators, so as to require at least one hour of training in mediation every two years.

The committee organised a successful CPD seminar on 17 June 2004 in which Micheline Dewdney, a very experienced mediator, spoke on problems in mediation caused by the behaviour of the mediator, the parties, and of their lawyers. Jennifer Stuckey-Clarke of the Bar gave the audience fascinating insights into the complexities and difficulties of mediation of native title claims. The committee has organised a second CPD seminar for 14 September 2004, entitled 'New developments in ADR procedure', which will cover ADR in workers' compensation, mediation-arbitration and time-limited procedures for dispute resolution.

### Articles on mediation for Bar Brief

The committee aims to be regular contributors *Bar Brief* and has fashioned a publication schedule requiring members of the committee to provide the articles.

### Dispute Resolution Service

The committee is developing a proposal to Bar Council for a dispute resolution service using barristers as mediators.

Increasing participation in mediation by senior members of the Bar

The committee is developing a proposal to Bar Council for increasing participation of senior members of the Bar in mediation, particularly as mediators.

### Promoting mediation through the courts

The committee has met at length with her Honour Judge Sidis of the District Court to provide feedback on proposals to increase the use of mediation by that court, particularly in 'long matters'.

Since the last annual report, the Supreme Court issued *Practice Note No. 125* (applicable from 1 January 2004), which provides a protocol for appointment of mediators in matters before the court. The committee provided substantial assistance to the court's ADR Steering Committee in the development of the protocol. The Chair and the Projects Officer of the committee have met with the ADR Steering Committee to consider ways in which use of the protocol can be encouraged and the field of mediators from which parties were selecting broadened.

## Public Affairs

The constitution of the Bar Association includes, as one of its core objects, promoting the administration of justice. In addition to its frequent submissions and recommendations with respect to proposed legislation, the association is often required to provide to the media comments and background briefings on issues which affect public perceptions of the legal profession, the judiciary and the system of justice as a whole.

In his speech at the 2001 Bench and Bar Dinner, the Attorney General, the Hon Bob Debus MP, drew upon his experience as 'a lawyer, then a publisher, then a journalist, then a politician' to make the pertinent observation that:

'There has been a fundamental alteration – a marked increase – in the willingness of newspaper commentators and radio talkback hosts to comment belligerently upon individual decisions and indeed to provide running commentary upon proceedings that are underway'.

During 2003-2004, there has been a continuation of the disturbing trend for the media to breach the line between legitimate criticism of judges' decisions and what the Attorney described as an 'oppressive attack, which may have a tendency to undermine the authority of the legal system'. This was exemplified by criticism of recent NSW Court of Criminal Appeal decisions upholding various appeals and ordering retrials for defendants in a number of highly-publicised sexual assault cases. In its most extreme form, media criticism painted a picture of 'Brahmanism' amongst the legal profession and judges: a pejorative term used by one newspaper columnist to describe those who show too much concern for legal 'technicalities' and are 'out of touch' with community attitudes toward crime or insensitive to the feelings of victims and witnesses.



OCTOBER 10, 2002: Victim C surrounded by media outside Downing Centre District Court 10/10/02 after Mohammed Skaf given 34-year jail sentence for his role in gang rapes in Sydney in 2000. Photo: Chris Hyde / News Ltd Image Library

## Public Affairs – continued

In this instance, the President of the Bar Association, Ian Harrison SC was interviewed by talkback hosts Ray Hadley (2GB) and John Stanley (2UE). The purpose of such interviews is to respond expeditiously in order to dispel misconceptions about appellate cases and the judicial system generally.

Another avenue for response commonly used in public affairs is a letter to the editor. In the case of one columnist's criticism of the judiciary, President Ian Harrison SC responded with a hard-hitting letter, published on 9 March 2004, in which he said:

Victims of horrible crimes have the sympathy and understanding of everybody, including judges. But no right thinking person would feel comfortable with convicting an accused person of any crime if there were the slightest chance of a miscarriage of justice.

How often have we seen the media champion the calls for judicial inquiries into the plight of people thought to have been wrongly convicted? The decision of the Court of Criminal Appeal is a perfect example of the system working.

On other occasions during 2003-2004, members of the Bar Association have provided informed comment for the media on issues such as double jeopardy, plea bargaining and the Innocence Panel.

It is not surprising that media coverage during the trial of someone accused of serious criminal offences often results in 'collateral damage' for the legal profession. In addition to defending the judiciary, the independence of the Office of the Director of Public Prosecutions, or the justice system generally, the Bar Association often has to comment on issues which relate specifically to the public's understanding of what barristers do and the rules under which they work.

Few in the media, particularly in talkback radio, know or understand the 'cab rank rule', and so they question how barristers can 'defend the guilty'. This issue rose to prominence again during the High Court deliberations in the appeal by Alan Baker. Radio 2GB talkback show host, Ray Hadley, gave his views on the subject when, on 4 February 2004, he said:

I often wonder what barristers must think about when they wake, knowing they're representing the interests of people like Alan Baker. If Baker is successful it will have a direct bearing on the men guilty of raping and murdering Anita Cobby and Janine Balding. Those creatures forfeited their right to be on this earth, I think, when they did what they did with those two young women. Today remarkably marks the 18th anniversary I think of the death of Anita Cobby, a tough day for her family, and hopefully, and I say hopefully, justice will prevail in the High Court.

The Bar Association responded within the hour. In a live interview the President told Hadley's estimated daily audience of 94,000 listeners

This is a particularly notorious and awful case, but the principle that underpins all of this is that barristers are required, with some limited exceptions, to take any case that's offered to them within an area of their specialty.



JULY 26, 1996 Press waiting for arrival of Ivan Milat.  
Photo: Michael Amendolia / News Ltd Image Archive

Clearly, Bret Walker is eminently qualified to conduct this case.

The reason that we are bound by that rule is that people who a community might consider awful people, people for whom nobody wants to act, people that everybody thinks ought to go to jail forever, we are required to appear for those people because, in some cases, they will turn out not to be that way.

If Ray Hadley were charged with an awful offence which he didn't commit and couldn't get a barrister because everyone's saying, "I'm not going to appear for Ray Hadley. Why would you appear for that bloke? To be associated with him you'll end up with a bad reputation"—you can rely upon the principle which supports people in the street, to get the best representation so that they go to court for you while you're being maligned

Another area requiring public comment by the Bar Association emerged early in 2004 when the sections of the media became seized of the supposed link between 'no-win, no-fee' litigation and frivolous law suits. In this instance, much of the disinformation originated from columnists in the print media. Harrison SC responded the next day, 10 March 2004, with an opinion page article, in which he explained that:

Many people whose case would never get to court because of their impecuniosity can be thankful that such a system is available. Detractors seem determined to assume that the system operates only or principally for the benefit of lawyers. This is just wrong. There are at least two reasons for this. On the one hand lawyers are prevented from commencing or conducting litigation on behalf of a party if they are unable to form an honest belief that the proceedings have reasonable prospects of success. There are sanctions for failure to comply with the relevant regulations in this respect. These include the prospect that the offending lawyer may be ordered to pay costs personally if the litigation is unsuccessful.

## Public Affairs - continued

Lurking around in the background to this topic is the offensive notion that litigation lawyers are no more than opportunistic predators who survive on the back of other people's misfortune. The false logic in this notion, however, is the assumption that somehow it is lawyers who have control over what cases are commenced and what cases are not. I have a drawer full of letters from former clients at all ends of the economic spectrum expressing gratitude for recovering damages for them as a plaintiff or successfully defending them from allegations which turned out to be false. My experience is not unique. Patients don't get brain tumours only so surgeons can earn a living removing them. Similarly, barristers appear for arguing parties but they don't start the argument.

On this occasion, the article was not printed by the paper concerned, but it was published on the Bar Association's web site.

In the federal and international spheres, the Bar Association plays its part as a constituent body of the Law Council of Australia. There continues to be close co-operation on issues ranging from the detention of Australians Hicks and Habib in Guantanamo Bay, through to publicity for the upcoming LawAsiaDownunder conference in March 2005.

### Proactive public affairs

Issues pertaining to criminal law or personal injury often arise as part of a 'media frenzy'. The Bar Association must, in the public interest, respond. There are, however, strategic measures which have been taken in 2003-2004 which will help the association to be proactive and to respond more effectively.

Foremost among these was media training for the President and Vice President. Early in 2004, the task of conducting a media skills 'workshop' was outsourced to a leading communications consulting firm. Two experienced journalists, in conjunction with the Public Affairs Officer, created a number of 'scenarios' to which the President and Senior Vice President responded in simulated radio and TV interviews. Both believed that the workshop was a resounding success and more than repaid the time and effort. There is the prospect of training being extended in the 2004-2005 reporting year to cover leading members of the Criminal Law Committee, who are frequently called upon to provide comments to the media.

The quantity and quality of public comment by the Bar Association is matched by the equally important contribution made through background briefings. Journalists are often faced with complex issues and extremely tight deadlines, and as a consequence they seek (sometimes desperately) and receive advice from the Bar Association on an almost daily basis.

For many people, their only understanding of the justice system comes from the media. Somewhat more disturbing, is that members of the media have their perceptions shaped by other members of the media. In order to short circuit this process, the Public Affairs Officer in 2004 began a pilot scheme to give selected journalists a background briefing in the court system and the legal profession. The scheme includes a demonstration on how to find judgments on the Internet for the producer of a radio show. The scheme is planned to expand in 2004-2005 after the Olympic Games.

Another important avenue for the Bar Association to propagate informed comment about the justice system and the legal profession is through its publications. During 2003-2004 the journal of the Bar Association, *Bar News*, has published a number of articles and opinion pieces that have helped to define particular issues and influence debate. For example, the lack of women at the Bar has been a perennial source of negative publicity for the Bar, but the Summer 2003/2004 edition, which focused on that issue, was welcomed by journalists and media consultants as a praiseworthy attempt at analysis and open discussion. The benefit for the Bar Association of having a creditable, authoritative journal is that it becomes a convenient vehicle for the president to convey the views of the Bar Association via his or her leading article in the journal.

In March 2004 Bar Council approved the creation of the Bar Association Media Awards for excellence in the reporting of legal affairs. As noted above, a large portion of work undertaken by the Public Affairs Officer involves counteracting popular misconceptions about the justice system: particularly in respect of criminal law. People are losing faith in the rule of law because they do not understand critical elements of it. Part of the way to break this cycle is to give recognition to outstanding journalism in the area of law and justice. There will be one award for print journalism and another for the electronic media. It is expected that the inaugural awards will be made during Law Week 2005.



# Reports

## Promoting access to justice

### Legal Assistance Referral Scheme

For the year ended 30 June 2004

#### The scheme

The New South Wales Bar Association's Legal Assistance Referral Scheme (LARS) aims to provide legal assistance for free or at reduced rates to persons who would otherwise not be able to obtain legal assistance without suffering severe financial hardship. As such, it embodies and reflects the strongly held view of the profession that a person's rights and access to justice should not be diminished because of indigence.

Despite the considerable amount of assistance provided through LARS, the scheme represents only a portion of the pro bono work customarily carried out on an informal basis by members of the Bar (see diagram below). The Bar Association's Legal Assistance Department runs LARS, with the majority of funding for the administrative support provided by the Public Purpose Fund. Since the scheme's inception, barristers have contributed approximately 22,500 work hours.

#### Eligibility

The scheme has in place a set of strict criteria for determining an applicant's eligibility for assistance. For example, personal injury, medical negligence, neighbourhood disputes and Apprehended Violence Orders are excluded from the scheme. Further, LARS will not consider matters refused assistance by other legal assistance providers due to a lack of legal merit. The income threshold for applicants has been quantified at a gross income not exceeding \$1000 per week.

Further information about applicants' obligations, as well as the nature and criteria for grants of assistance may be obtained from the Bar Association's web site under 'Legal Assistance'. Once an applicant has financially qualified for assistance, an attempt is made to refer the matter to a barrister for an assessment of the legal merit on a no-fee basis. After the provision of the initial advice, if further legal services are recommended, the applicant may deal 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 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).

#### Review of 2003-2004

As in previous years, the scheme received in the order of 550 enquiries about legal assistance and related matters. Many enquiries were made by persons visiting (unannounced) the Bar Association's office.

During 2003-2004, 258 formal applications for assistance were received and processed. This is 100 less applications than the previous year. Of these, 119 were eligible under the scheme's guidelines for a referral to a barrister. All applications, whether ultimately referred or not, involve considerable time and resources in their assessment. The breakdown of those applications not referred to barristers is set out in the accompanying statistical report.

There were some points to note from an analysis of the activities of the scheme:

- The downturn in the number of applications. With the exception of the Federal Magistrates Court, District Court of New South Wales and various tribunals, there was a notable decrease in the number of matters received and referred in all courts. At least in part this is due to the increased awareness by the judiciary and administrative staff of the existence of the court-appointed pro bono schemes, which are supported by the Bar Association.
- The drop in the number of matters referred in the original jurisdiction of the High Court of Australia, attributable, presumably in part, to the High Court's decision to remit refugee applications to the Federal Court of Australia.
- The number of referrals from LawAccess doubled.
- Seventy six per cent of the applications to the scheme were refused Legal Aid as being outside the commission's guidelines.
- Seventy two per cent of the matters referred to barristers were considered to have legal merit/prospects of success

For the period in question, barristers contributed approximately 2,250 work hours through the scheme with 20 matters still in the court system.

Since the scheme's inception, barristers have contributed approximately 22,250 work hours.

There were two complaints made by applicants dissatisfied with the manner in which the scheme dealt with their matters. Each of these complaints was resolved to the satisfaction of the applicant and the Bar Association.

Listed below are some results achieved through the scheme:

- A community legal centre referred a young woman to the scheme in relation to charges she was facing in the local court for fraud. The barrister to whom the matter was referred advised that:

## Legal Assistance Referral Scheme - continued

Five charges were laid against E. for obtaining over \$25,000 in Austudy and NewStart payments to which she was not entitled over a period of about three years. E. was addicted to drugs and alcohol at the time of the offences. A time line of her life showed that on becoming sober she had completely turned her life around, paying back the money, studying, working and volunteering in welfare. Her childhood had been fraught with the alcoholism, drug addiction and suicide of family members. That she could make such a success of herself against such odds moved me. There was a real possibility she could go to gaol. I could not let it happen. I felt it could very well break her spirit and ruin her life.

I agreed to represent her for \$15.61 per hour, being what she was paid per hour to ensure she was serious. She paid \$300 up front and the rest of the money went in to paying off her debt. We worked hard, preparing the time line, obtaining a pre-sentence report, references, affidavit from her employer and proof of how much money had been paid back to Centrelink. The thrust of my submissions was that E. had done all she could to help herself and repay her debt to society and that the only thing left for the court to do was to punish her in the name of general deterrence. This had to be balanced with the need to encourage and reward the kind of recovery she had made.

Ultimately the magistrate sentenced her to 100 hours of community service. Having devoted upwards of 50 hours to the case, I had done half that in preparation. It is a great feeling to know that I gave such concrete and effective help to this young woman in need, who can now get on with living her life.

- A woman, in a very distressed state, contacted the scheme one week prior to a five day coronial inquest to be held on the south coast into the death of her husband. There was a possibility she could face charges. A Sydney barrister agreed to appear at a substantially reduced rate. The coroner found that the wife had no case to answer and made recommendations to the Police to address standard operating procedures in relation to the involvement of PoIAir. Including preparation, the barrister contributed 97 work hours over the period of the inquest.
- A non-instructing solicitor referred a young family man to the scheme in relation to a part-heard matter in the Consumer Trader & Tenancy Tribunal. The young man had entered into an agreement with a lawn mowing franchise business after raising a loan of \$30,000. The loan included a hire purchase loan for a new truck to be used in the business. He found there was no client base to the franchise and could not service the loan or the hire purchase agreement. In order to avoid eviction from his rented house, he was forced to move in with his wife's family. The barrister who agreed to assist sought permission from the tribunal to appear as his next friend and prepared and tutored the client

in the submissions he was to make. On the day of the resumed hearing, after having received the submissions, the franchisor agreed to settle the matter for \$25,000 (the maximum amount recoverable in the jurisdiction).

- Ten days before Christmas 2003 a Syrian woman in detention in Port Hedland sought assistance from the scheme for a matter to be heard mid-January 2004 in the Federal Magistrates' Court in Melbourne. A Sydney based barrister (about to go on annual leave) agreed to assist. Following is the barrister's account of the case:

In 2000 WAJK, and her husband and children, came to Australia from Syria. WAJK's husband made an application for protection visas for the family, based on his claims of religious persecution. WAJK expressly disavowed having any claims of her own. The husband's claims were categorised as claims of political persecution by the Refugee Review Tribunal but (in any case) were not accepted by the RRT.

In 2002 WAJK made application for protection visas on grounds of persecution for political opinion. The RRT raised with WAJK, and determined, that the contradiction between WAJK'S earlier disavowal, and her later claims, cast doubt on her credibility. Accordingly, her application was refused.

On review of the RRT'S decision, the Federal Magistrates' Court held that WAJK had not been given a reasonable opportunity to respond to the "contradiction" issue, which may have been explained by WAJK'S understanding that Australia was not sympathetic to claims of political persecution. Hence the family had limited its claims to claims of religious persecution (albeit mistakenly categorised). The Federal Magistrates' Court remitted the matter for review by the RRT.

### *Volunteers encouraged*

The manager of the scheme spoke to readers about the scheme at the bi-annual Bar Practice courses, with a pleasing response in both instances. The President and the Executive Director, by circular and personal representation, have also encouraged members to participate in all schemes administered by the Bar Association and in the various court appointed pro bono schemes.

### *Barristers' Referral Service*

The Barristers' Referral Service is aimed at addressing the increasing number of requests to the Bar Association for assistance in obtaining the services of a barrister. Enquiries have been directed to the association's website under 'Find a barrister' which has been visited approximately 55,000 times over the last twelve months. This category of assistance is invaluable for many applicants who have not qualified for

## Legal Assistance Referral Scheme - continued

assistance through LARS on financial grounds. If the enquirer does not have access to the internet, staff fax or post a list of barristers in the relevant area of practice.

### *Duty barrister schemes*

The manager and staff of LARS manage the operation of the duty barrister schemes which operate at the Local and District courts at the Downing Centre and the Australian Industrial Relations Commission.

Barristers are rostered to attend each day at the courts. A barrister spoke to readers at each of the Bar Practice courses about the scheme, which resulted in additional volunteers being added to the roster.

### *Court appointed pro bono schemes*

The manager of LARS assists with the administration of the court appointed legal assistance schemes in terms of day to day queries which may arise, together with the provision and updating of the list of barristers who have volunteered their services. Barristers now support pro bono schemes in the Federal Court, Federal Magistrates Court, Supreme Court, Land & Environment Court and District Court. The Executive Director has ongoing discussions with members of the judiciary and court staff in relation to these schemes, which impose a significant burden on members of the Bar and Bar Association staff. At present there are no administrative steps in place to quantify the amount of work done by members of the Bar through these schemes. Consideration is being given as to whether there is a simple administrative procedure whereby the data can be collected.

### *The Federal Court of Australia Refugee Review Tribunal Legal Advice Scheme*

This scheme was introduced under the auspices of the Department of Immigration & Multicultural Affairs, the Federal Court of Australia, the Bar Association and the Law Society. It caters for unsuccessful applicants in the Refugee Review Tribunal who receive legal advice as to the prospects of success of an appeal. The Bar Association and the Law Society provide a list of panel members who practise in the area of migration law, judicial review and administrative law to the Federal Court and Federal Magistrates Court. The manager of LARS is responsible for the updating of the list and assists Bar Council's selection committee that determines eligibility of barristers who wish to be members of the panel.

### *Interaction with other pro bono service providers*

LARS works closely with the Law Society Pro Bono Scheme. There is almost daily contact between the two schemes. Not only does the Law Society refer matters requesting a barrister's involvement, but also it is not uncommon for LARS to ask for the Law Society's help in obtaining the services of a solicitor on behalf of applicants where legal merit has been established.

Together with the Pro Bono Solicitor from the Law Society, the manager of the scheme met with LawAccess enquiry officers at Parramatta to discuss LARS and its interaction with LawAccess. The scheme's manager is also a member of the LawAccess NSW Operations Committee. The manager has acted for the Executive Director at Board Meetings of LawAccess and the Pro Bono Disbursement Fund. The Manager, Legal Assistance Referral Scheme, is also a member of the Law & Justice Foundation's Gateways to the Law Committee.

There have been many difficult phone calls, which are often multiple calls from the one person, or from different individuals, which are dealt with by the scheme. Reception staff of the Bar Association also have to deal with the applicants who attend unannounced. There have been several unpleasant scenes where senior staff or security have had to be involved.

The Bar Association continues to bear a significant portion of the costs for the administrative infrastructure needed to support the operation of the scheme. The staffing component of this support, in terms of time and salary, is significant.

### **Conclusion**

The pro bono landscape has changed significantly since the inception of the scheme in 1994. There are now many more organisations, including courts, offering assistance. LawAccess has been able to offer an effective referral service and, in many cases, has been able to deal with the problem on hand on an in-house basis. LARS is a scheme which operates at the coalface of offering legal services to people in need of legal help. We feel that the scheme embodies and reflects the strongly held view of the profession that a person's rights and access to justice should not be diminished because of impecuniosity.

## Pro bono schemes



## Legal Assistance Referral Scheme statistics

<b>High Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
Application for special leave	12	7
Original jurisdiction	29	6
<b>Total</b>	<b>41</b>	<b>13</b>

<b>Federal Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
Full Bench appeals	8	5
Immigration	43	22
Administrative	-	4
Veterans & Social Security entitlements	-	-
Industrial relations	-	-
Trade practices	6	3
Native title	1	2
Bankruptcy	2	2
<b>Total</b>	<b>60</b>	<b>38</b>

<b>Federal Magistrates Service</b>	<b>2002-2003</b>	<b>2003-2004</b>
Discrimination	1	2
Family law - access	1	-
Family law - child support	1	-
Family law - residency	1	-
Immigration	-	4
Bankruptcy	-	2
<b>Total</b>	<b>4</b>	<b>8</b>

<b>Supreme Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
Court of Appeal	4	5
Court of Criminal Appeal	11	5
Common Law	30	27
Equity	38	20
Criminal	5	2
Commercial	-	2
Family provisions	3	-
Administrative	4	1
Defamation	1	1
Professional negligence	4	2
<b>Total</b>	<b>104</b>	<b>65</b>

<b>Family Court of Australia</b>	<b>2002-2003</b>	<b>2003-2004</b>
Full Bench appeals	1	-
Access	4	6
Residency	17	10
Child support	1	3
Spousal maintenance	-	-
Property settlement	8	6
<b>Total</b>	<b>31</b>	<b>25</b>

<b>District Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
Criminal	8	12
Civil	30	20
Commercial	-	5
Medical Tribunal	-	2
Care proceedings	-	2
Defamation	2	1
Professional negligence	1	2
De facto relationships	2	-
<b>Total</b>	<b>43</b>	<b>44</b>

<b>Land &amp; Environment Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
	6	5

<b>NSW Industrial Relations Commission</b>	<b>2002-2003</b>	<b>2003-2004</b>
	6	2

<b>Local Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
Criminal	15	15
Civil	21	11
Family matters - access	1	-
Family matters - residency	1	-
Family matters - spousal maintenance	1	-
Family matters - child support	1	0
<b>Total</b>	<b>42</b>	<b>26</b>

<b>Children's Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
	4	1

<b>Coroner's Court</b>	<b>2002-2003</b>	<b>2003-2004</b>
	2	3

## Legal Assistance Referral Scheme Statistics - continued

Tribunals	2002-2003	2003-2004
Administrative Appeals Tribunal	6	4
Administrative Decisions Tribunal	2	13
Mental Health Review Tribunal	-	1
Consumer Trader & Tenancy Tribunal	7	5
Equal Opportunity Tribunal	-	1
Victims Compensation Tribunal	-	2
Anti-Discrimination Board	-	3
<b>Total</b>	<b>20</b>	<b>28</b>

Referral source	2002-2003	2003-2004
Law Society Pro Bono Scheme	58	40
LawAccess	7	15
Instructing solicitor	51	34
Non-instructing solicitor	13	6
Judge	32	25
Court registrars	9	11
Member of Bar	19	18
Member of public	68	52
Community legal centres	64	41
Members of parliament	4	-
Legal Aid	20	12
Attorney-General's Department	2	1
Welfare / community groups / social worker	10	3
Web site	Approx 1,500 hits	Approx 1,300 hits

Client location	2002-2003	2003-2004
Sydney Metropolitan Area		
West	117	104
North	33	23
South	24	22
East	22	17
Inner City	22	10
Central Coast	9	12
Country	58	38
ACT	-	-
Interstate	11	14
Villawood Detention Centre	32	10
Port Hedland Detention Centre	3	3
Prison	27	5
Overseas	-	-
<b>Total</b>	<b>358</b>	<b>258</b>

Type of work done	2002-2003	2003-2004
Merit assessment	153	119
Advice (over and above initial merit assessment)	61	73
Conferences	120	85
Appearances	60	42
Appearance at hearing	62	51
Other (including second opinion & preparation of submissions)	6	5

Rejection / no action	2002-2003	2003-2004
Outside guidelines	62	46
Too late notification	8	6
No further information received	38	39
Referred to Law Society Pro Bono Scheme/ requires a solicitor	27	24
Funded by Legal Aid	4	4
Referred to Community Legal Centre	8	1
Briefed barrister privately	7	4
Briefed solicitor privately	5	2
Conflict of interest	1	3
Matter settled	3	-
Subject to Federal Court Refugee Review Tribunal Legal Assistance Scheme	2	10
Subject to Federal Court Pro Bono Scheme	2	-
Required a migration agent	1	-
Refused on a discretionary basis	3	-
<b>Total</b>	<b>171</b>	<b>139</b>

Turnaround time	2002-2003	2003-2004
Same day	11	9
Less than a week	33	26
1-2 weeks	52	36
2 weeks plus	57	48

Basis brief accepted	2002-2003	2003-2004
No fee – merit assessment	153	119
No fee – continuing involvement	67	48
Speculative/costs recovery	7	16
Reduced fee	25	21
Market rates	2	-

Refused legal aid on basis of	2002-2003	2003-2004
Merit	22	13
Financial	46	55
Outside guidelines	290	190

Matters considered by a barrister to have legal merit/prospects of success	2002-2003	2003-2004
Yes	101	85
No	52	34

# Reports

## Questions as to professional conduct

### Professional Conduct Department

#### The role of the department

The Professional Conduct Department facilitates the investigation and reporting to the Bar Council of conduct complaints against barristers referred to the council by the Legal Services Commissioner or made by the council itself. The department also performs this role in respect of indictable offences, tax offences, acts of bankruptcy and other notifiable events required to be disclosed to the council under the *Legal Profession Regulation 2002* (notification matters). The department provides advice and policy support to the council in respect of the administration and carrying out of the council's functions under Parts 3 and 10 of the *Legal Profession Act 1987* (the Act), and the preparation of submissions to governments on the disciplinary regime of the profession. One of the key objectives of the Professional Conduct Department is to promote a better understanding of good client service and communication on the part of the Bar Association's members. Such an understanding is imperative if the Bar is to flourish as a respected and efficient provider of legal services to the public. The department also facilitates the provision of advice to members on ethical issues and responds, on a daily basis, to numerous inquiries from the public about the Bar and the conduct of barristers.

It is important to appreciate that the Bar Council has a statutory obligation to deal with all complaints and notification matters regarding barristers. This statutory role is monitored by the commissioner, an independent statutory overseer of the council's statutory duties, and ultimately by the Attorney General.

Changes in the public's expectations, combined with a failure by some barristers to act in accordance with their professional standing, has brought barristers under particularly close scrutiny by the government, the profession and the community in the past few years. The Bar Association and the Office of the Legal Services Commissioner continue to work cooperatively in the referral, investigation and review of disciplinary matters. Should the current co-regulatory system not satisfy either the consumers of legal services or the government, the alternative will be a completely government regulated profession. It is therefore in members' interest to work with the department in the investigation of any complaint or notification matter and to assist colleagues in practising as barristers in such a way as to maintain the integrity of and public's respect for the profession.

#### Work of the department

As shown by the tables appearing at the end of this report, the number of conduct complaints made in the year ended 30 June 2004 is the same as those made in the previous year, with the number of notification matters only marginally less. Fifty conduct complaints were referred by the Legal Services Commissioner to the Bar Council for investigation and five complaints were made by the council pursuant to sec 134 of the Act. Thirty notifications were made to the council pursuant to the requirements for disclosure of notifiable events under the *Legal Profession Regulation 2002*.

Of the 30 notifications, 13 related to tax offences and acts of bankruptcy in relation to which the council is required to make a determination as to a barrister's fitness and propriety to hold a practising certificate under Part 3 Division 1AA of the Act. The categories of conduct complaints and notifications and other statistical information are set out in the tables at the end of this report.

In the 12 months to June 2004, four professional conduct committees met throughout the year to investigate complaints about conduct and notification matters.

In addition to facilitating the investigation of and reporting to the Bar Council on conduct complaints and notifications, the Professional Conduct Department has devoted considerable energy and resources to the handling of complaints against barristers referred by the council to the Administrative Decisions Tribunal, arising from conduct complaints made in previous years as well as in the current year. In a decision delivered on 5 March 2004 in *Council of The New South Wales Bar Association v Christian Roger de Robillard* [2004] NSWADT 45, the tribunal refused an application by the council for an extension of time in which to file its Information and vacated an earlier order made dispensing with the need to comply with Rule 14(3) of the *Administrative Decisions Tribunal (Interim) Rules 1998*, which requires an Information be laid in the tribunal within 28 days. Amendments effected by the *Legal Profession Amendment Act 2004*, which commenced on 15 August 2004, provide that the period within which the council must file an Information in the tribunal is six months. This change will alleviate substantial difficulties that have arisen in the past in filing Informations within the shorter period of 28 days.

Tables setting out the results of disciplinary cases in the New South Wales Court of Appeal and the Supreme Court and proceedings brought by the Bar Council in the Administrative Decisions Tribunal determined in the last three years appear at the end of this report. In 2004, the Bar Council was successful in two applications made to the New South Wales Court of Appeal for the removal of a barrister's name from the Roll of Legal Practitioners. Last year's report referred to the Court of Appeal judgment in *NSW Bar Association v Young* [2003] NSWCA 228 delivered on 19 August 2003 and proceedings involving Clarence James Stevens. At that time, the council's application to have Stevens' name removed from the roll had not been heard. On 9 September 2003, the Court of Appeal found Stevens guilty of professional misconduct, declared Stevens is not a fit and proper person to remain on the Roll of Legal Practitioners and ordered that his name be removed from the roll. The Court of Appeal published its reasons on 18 September 2003: *NSW Bar Association v Stevens* [2003] NSWCA 261. Following the orders made by the Court of Appeal, the appeal filed by Stevens pursuant to sec 38B of the Act against the decision of the Bar Council to cancel his practising certificate was dismissed, without admission of liability, by consent. On 22 October 2003 the Governor of New South Wales revoked the appointment of Stevens as one of Her Majesty's Counsel.

## Professional Conduct Department – continued

Of the nine Administrative Decisions Tribunal decisions in 2004 relating to barristers, in two cases orders were made that the barrister's name be removed from the roll. One of these cases, *New South Wales Bar Association v Amor-Smith* is reported on as a significant case in this report. Orders were made in three other cases for the barrister to be publicly reprimanded. In one case, the tribunal made a finding of professional misconduct but penalty has yet to be determined. Of the three appeals made to the Appeal Panel, two appeals by barristers were dismissed although an appeal to the Court of Appeal has been filed in one matter. One appeal was withdrawn.

In the two Bar practice courses offered by the Bar Association in the past year, the Professional Conduct Department presented sessions on ethics and regulation of the profession in each course. The sessions required readers to conduct mock hearings on three different factual scenarios regarding disciplinary and regulatory matters in respect of which they had drafted pleadings and prepared evidence in group sessions. The sessions were well received and the feedback from readers and the barristers who generously devoted their time to acting as group leaders and/or court members has led to further refinements in the running and presentation of these ethics and regulation sessions. The participation of barristers is highly valuable. The Bar Council and the department are very grateful to those barristers who volunteer to assist in this way.

Towards the end of the year, the Professional Conduct Department reviewed all applications for renewal of practising certificates to address any issues relating to conduct or discipline. Further, in some cases where barristers failed to

complete 10 points of continuing professional development, practising certificates were issued subject to conditions requiring the outstanding points be completed by a certain date. The department monitors compliance with these conditions as well as compliance by barristers who have financial management and in some cases medical reporting conditions attached to their practising certificates. As at August 2004, 24 barristers held practising certificates which are subject to financial reporting conditions requiring the provision to the council of quarterly reports from approved accountants in whose hands barristers have placed control of their financial affairs, and/or reports from medical practitioners

Sections 25, 48B and 48C of the Legal Profession Act provide that barristers must not practise or hold themselves out as a barrister without being the holder of a current practising certificate. The word 'practise' includes any of the activities referred to in Rule 74 of the *New South Wales Barristers' Rules*. It is not limited to advocacy and includes negotiation, representing a client in a mediation, giving legal advice, carrying out chamber work, advising on documents, acting as a referee, arbitrator or mediator and carrying out work properly incidental to the type of work referred to above. In order to avoid inadvertently breaching these provisions, it is important that barristers ensure applications for renewal of practising certificates are lodged in a timely fashion. As clearly stated in the material accompanying renewal forms, applications can and should be lodged prior to securing professional indemnity insurance cover although a practising certificate will not issue until insurance is secured.

### Significant case:

#### **Prothonotary of the Supreme Court of New South Wales v P**

In *Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320*, the New South Wales Court of Appeal, upon certain undertakings being provided by P, held there was no basis for the removal of P's name from the Roll of Legal Practitioners.

In 2000/2001, P, a solicitor, was convicted and sentenced to six months imprisonment (only three months of which was to be served provided she entered into a recognizance to be of good behaviour for the further three months, which she did) for importing into Australia not less than a trafficable quantity of cocaine. The Prothonotary sought declarations that P was not a person of good fame and character and not a fit and proper person to remain on the roll.

In the judgment of Young JC in Equity, with which Meagher and Tobias JJA agreed, ten principles relevant to a determination of fitness established by the authorities are set out. Reference should be made to the judgment which

appears on the Bar Association's web site. The principles enunciated include that an order striking the name of a practitioner off the roll should only be made when the probability is that the practitioner is permanently unfit to practise and the fact that a practitioner has a conviction for a serious offence is not necessarily reason for the making of an order striking that person off the roll. Importantly, the question is one of present fitness, not fitness at the time the crime was committed.

In the judgment it is emphasised that 'the court must keep its eye firmly on the basic feature of the case, which is the protection of the community and the profession should this person continue to be on the Roll of Legal Practitioners.' [para.16] The Court of Appeal took into account the solicitor's rehabilitation, the fact that she had been drug free for almost five years and found the facts of the case were such that the solicitor was not a risk to the public, particularly given the nature of the undertakings offered to ensure that she remained drug free. The Court of Appeal found there was no basis for removing P's name from the roll in order to protect the public.

## Professional Conduct Department – continued

### Legislative changes

During the year, the department continued to provide support to the Executive Director and the Bar Council in the formulation of proposals for amendment to the legislation. With the commencement of the *Legal Profession Amendment Act 2004* on 15 August 2004, some important changes have been effected. The amendments address a number of significant problems in the legislation highlighted through the council's experience in the last few years in exercising its statutory obligations. These amendments are discussed in some detail in the Executive Director's report, as are a number of changes to the Legal Profession Regulation, which commenced in April 2004.

### Disclosure requirements

The April 2004 amendments to the Regulation include an amendment to clause 137 which previously declared failure to notify the council, without reasonable cause, of an act of bankruptcy or a finding of guilt of a tax offence or an indictable offence (required to be notified under clauses 7(g) & (h), 133 and 134 of the Regulation) to be professional misconduct. With the introduction of clause 137(2), failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an offence not being an indictable or tax offence, as required by clauses 7(g) and 133, is capable of constituting professional misconduct or unsatisfactory professional conduct.

As a consequence of this amendment, the extent of the disclosure obligations under clauses 7(g) and 133 of the Regulation has been reviewed. A legal practitioner or barrister is not obliged to notify the issue of a penalty notice and payment of the 'fine' specified without electing to contest the matter in court, and, the issue of an infringement notice as an alternative to prosecution and payment of the penalty specified amount. Similarly, a legal practitioner or barrister is not obliged to notify the imposition by the ATO of an administrative penalty, nor is the Bar Council required to make a determination under sec 38FC of the Act in respect of such a penalty. Accordingly, no question will arise of failure to disclose within the time specified if a barrister were to disclose any of these matters when applying for renewal of a practising certificate, and hence there is no question of potential professional misconduct or unsatisfactory professional conduct pursuant to clause 137(2) of the Regulation.

However, matters which may not formally be required to be disclosed under clauses 7(1)(g) and 133 of the Regulation could still affect a legal practitioner or barrister's good fame and character and fitness to remain a legal practitioner, where the relevant conduct suggests an habitual or systematic disregard of legal and civic obligations. A note addressing this issue has recently been published in *Bar Brief* and is available on the association's web site. The council requires a legal practitioner when applying for a practising certificate or a barrister when applying for renewal of a practising certificate to disclose conduct which may affect good fame and character and fitness to remain a legal practitioner. The Bar Council has determined that the accumulation in the preceding 12 months of 15 or more penalty units, or fines or penalties totalling \$2,000 or

more in respect of penalty or infringement notices or other forms of administrative penalty should be disclosed as a matter which could affect a legal practitioner or barrister's good fame and character and fitness to remain a legal practitioner.

In the context of a barrister's obligations under clauses 7(g) and 133 of the Regulation, it is important to note that where a court finds an offence proved but does not formally record a conviction, for example under sec 19B of the *Crimes Act 1900* in respect of tax offences, there is still an obligation to disclose.

### Significant cases

Two important decisions by the courts exercising their inherent jurisdiction were delivered during the course of the year. Also reported separately in this report is a decision of the tribunal where a practitioner was found guilty of professional misconduct for gross overcharging and an order made that his name be removed from the Roll of Legal Practitioners.

Links to each of these decisions can be found on the Bar Association's web site.

### Listing on the web site of recent Bar Council, Administrative Decisions Tribunal and court decisions

Pursuant to amendments to the Act which came into force on 4 October 2002, under sec 171LB the council must publicise disciplinary action taken against a barrister including the name and other identifying details of the person against whom the disciplinary action was taken. Under sec 171LC of the Act, the Legal Services Commissioner must keep a register of disciplinary action taken against barristers which is to be made available for public inspection on the Internet. The commissioner is required to identify the name of the person against whom disciplinary action was taken and to provide particulars of the action taken. Disciplinary action includes any decision to suspend, cancel or refuse to issue a practising certificate and any orders of the Administrative Decisions Tribunal following a finding of unsatisfactory professional conduct or professional misconduct.

### Assistance to members seeking guidance on ethical issues

The council neither provides 'ethical rulings' nor advice to members. Rather, it assists members seeking guidance on ethical matters by referring the inquiring member to a silk on one of the professional conduct committees. Discussion and advice is available from senior counsel to assist members in reaching a conclusion. Ultimately however the decision and responsibility must be that of the individual barrister. The department's staff are able to provide the names and telephone numbers of senior members of professional conduct committees who are able to give advice or guidance on ethical matters. The names of senior counsel on committees are also available from the association's web site.

### Responding to complaints

Members the subject of a complaint are urged to obtain independent advice before responding to any complaint or correspondence from the department and/or the Legal Services Commissioner. Advice may be available through a professional

## Professional Conduct Department – continued

indemnity insurer's solicitors but, if not, then a silk (who is not a member of a professional conduct committee or council) should be approached for advice. Most professional indemnity policies require a barrister to notify his or her insurer on receipt of a complaint.

The policy of the council is to require a barrister to personally sign any correspondence responding to enquiries from the department. Extensions of time will be granted for replies to complaints if such a need is established but the council expects barristers to give priority to responding to conduct complaints.

Members served with a notice pursuant to sec 152 of the Act to provide information and furnish documents necessary for the investigation of a conduct complaint made against them must respond to such notices promptly. A barrister who fails to comply with a sec 152 notice, without reasonable cause, is guilty of professional misconduct under sec 152(4) of the Act. Such failure can lead to the council making a further complaint against the barrister which may ultimately be referred to the Administrative Decisions Tribunal. A number of decisions of the

tribunal available on the association's web site concern failure to respond to sec 152 notices.

Recommended reading for any barrister against whom a complaint is made is listed on the association's web site.

### Community and academic members

Each of the four professional conduct committees has been privileged to have as participants both academic and community representative members.

The Bar Council and the association express their gratitude to all community and academic members. Their contribution is very important to maintaining the quality of the Bar's complaint handling process. All have been enthusiastic participants in the deliberations of the PCCs and their insight is greatly appreciated.

PCC#1 community members are David Kaye and Helen Steptoe. Dorne Boniface from the University of New South Wales is the academic representative.

### Significant case:

#### **A Solicitor v The Council of the Law Society of New South Wales [2004] HCA 1**

This case was an appeal by a solicitor against a judgment of the New South Wales Court of Appeal in which the solicitor was found guilty of professional misconduct in two respects and that he is not a fit and proper person to be a legal practitioner and an order made that the solicitor's name be removed from the roll.

The first finding of professional misconduct related to convictions in 1998 of four counts of aggravated indecent assault on a person under the age of 16 years. The second finding related to the solicitor's failure to disclose to the Law Society of New South Wales that he had been convicted in November 2000 of further charges of aggravated indecent assault, even though the solicitor was aware the Law Society was then considering what disciplinary action should be taken against him in respect of the earlier convictions. The later convictions were subsequently quashed in April 2001.

The solicitor's failure to disclose was significant. The High Court found that the solicitor's duty of candour in his dealings with the Law Society was a professional duty and its breach was properly declared to be professional misconduct. The appeal against this declaration failed.

It was common ground that the definition of professional misconduct in sec 127 of the Act which specifically includes conduct occurring otherwise than in connection with the practice of law, did not directly bear on the proceedings because it was the inherent jurisdiction of the Supreme

Court, not the special statutory scheme for dealing with complaints and discipline, that was invoked. The High Court found the acts of indecency committed in 1997 did not occur in the course of the appellant's profession and had no connection with such practice. They did not constitute professional misconduct, but rather personal misconduct relevant to a decision as to his fitness. It is clear from the judgment that the characterisation of the conduct as professional or personal misconduct is not determinative of the question of fitness (see para 21) and that it is necessary to consider the whole position. In considering the question whether the misconduct of the appellant demonstrated that he was not a fit and proper person to be a legal practitioner at the time of the Court of Appeal decision (that is, it is a question of current fitness), the High Court found the Court of Appeal appeared to have given insufficient weight to the isolated nature of the 1997 offences and the case made on behalf of the appellant as to his character and rehabilitation, the exceptional circumstances in which the 1997 offences were committed and the appellant's efforts to obtain professional advice and assistance. The appellant's breach of the duty of candour by not disclosing his November 2000 convictions to the Law Society was found by the court to have occurred in extraordinary circumstances. The High Court found that the combined effect of the 1997 convictions and the failure to disclose did not show that at the time of the decision of the Court of Appeal in March 2002, the appellant was unfit to practise.

The declaration of professional misconduct in relation to the 1997 offences, the declaration that the appellant was not a fit and proper person to remain on the roll and the order removing the appellant's name from the roll were set aside.

## Professional Conduct Department – continued

Michelle Sanson of the Faculty of Law at the University of Technology is the academic representative on PCC#2. Anna Fader and Sue Thaler continue to serve as community representatives on PCC#2.

This year the community representatives on PCC#3 were Nicholle Nobel and John White. Bernard Dunne from the Faculty of Law at the University of Sydney continues as the academic representative.

Francine Feld from the Faculty of Law, University of Western Sydney continued as PCC#4's academic member. John Girdwood and Mathew Smith are the community members.

### Barrister members

The council and the department again express their appreciation to all the barrister members of the professional conduct committees. All have devoted many hours of their time on a voluntary basis. Their service demonstrates the continued commitment of the profession to ensuring complaints regarding the conduct of barristers are fully investigated and appropriate disciplinary action taken in the interests of maintaining public confidence in the profession. The participation of the barrister members in this process is vital to setting and maintaining appropriate standards and the work of barrister members in this regard is valued highly.

### Complaints and notifications

#### *Notification matters*

In the financial year to 30 June 2003, a total of 30 notifications were made by 23 barristers. Thirteen notifications related to tax offences and acts of bankruptcy requiring the council to make a determination under Part 3 Div 1AA of the Act. A determination under sec 38FC of the Act must be made by the council within three months of the date on which notification is given to the council. An extension of one month can be sought from the legal services commissioner. The professional conduct committees reported to the council on a total of 32 notifications, 12 of which were made to the council late in the previous year.

#### *Conduct complaints*

Fifty-five new conduct complaints were referred to the professional conduct committees for investigation from 1 July 2003 to 30 June 2004. During the year, the committees investigated and reported to the council in respect of 12 of the new conduct complaints, in addition to a further 48 complaints carried forward from the previous year. Of the total of 60 complaints dealt with by the council during the year, 40 complaints were dismissed pursuant to sec 155(4) of the Act on the basis that there was no reasonable likelihood that the Administrative Decisions Tribunal would make a finding of unsatisfactory professional conduct or professional misconduct. Three complaints were withdrawn. Eight complaints have been referred to the tribunal for hearing and determination. Of the 40 dismissed complaints, 11 have been the subject of an application for review. The Legal Services Commissioner, Steve Mark, has upheld the council's decisions in two matters. No determination has yet been made in relation to the other nine matters under review.

Statistical information collated from the council's investigation of complaints is set out in tables at the end of this report. The information is provided in accordance with sec 171MB of the Act.

#### *Applications to the Legal Practitioners Admissions Board*

It should also be noted that PCC#2 alone reports to the council on applications made to the LPAB for admission or readmission as legal practitioners and applications for early declarations under sec 13 of the Act. PCC#2, having considered an application, makes a recommendation to the Bar Council to oppose or not oppose the application. The LPAB is advised of the council's resolution which it considers prior to coming to its own conclusion as to whether the applicant should be admitted as a legal practitioner. Both the council and the Law Society Council make recommendations to the LPAB about certain classes of applications. In 2004, PCC#2 reported to the council on two applications for re-admission and five applications under sec 13.

### The educative value of the committees' work

The following aspects of a barrister's practice have been identified, via the complaints investigation process, as recurring problem areas.

- Direct access matters

Rules 74, 75, 76, 77 and 80 of the *New South Wales Barristers' Rules* are particularly relevant in direct access brief matters. The absence of a solicitor to file and serve documents necessitates more vigilance on the part of the barrister to ensure that the client or some other person files and serves court documents. The New South Wales Barristers' Rules are on the association's web site.

Sections 175 and 176 of the Act prescribe the costs disclosure required to be made to clients in direct access matters and to an instructing solicitor.

Direct access matters demand direct, effective and timely communication with clients about the nature of the work the barrister is able to perform, and what work might be better performed by a solicitor in light of the client's expectations. The council urges barristers undertaking direct access work to confirm in writing all telephone conversations with the client and all matters which are discussed in conference. Discussions with opponents should also be communicated to the client. Communication (whether oral or written) needs to be clear and expressed in plain language to avoid the possibility of misunderstandings arising.

- Communication with clients

As always, clear communication and provision of quality service in all matters (whether instructed by a solicitor or acting directly) is likely to lead to fewer misunderstandings and, ultimately, to fewer complaints. One area of particular concern is failure to ensure terms of settlement accurately reflect the agreement reached between parties. Another is failure to ensure that the effect of the terms of settlement is properly explained to clients.

## Professional Conduct Department – continued

- *Courtesy*

Barristers should remain courteous at all times in their dealings with others including clients, other barristers, solicitors, mediators, arbitrators and judicial officers.

### Fees Committee

During the year the association received 27 requests to assist in the recovery from solicitors of unpaid fees, compared to 48 requests in the previous year. A total of \$43,439.59 was recovered on behalf of members for the financial year ended 30 June 2004. The Bar Association was unable to recover fees in nine of the 21 matters finalised.

The basis upon which the association can assist in members' fee recovery has been set out in an article entitled 'Changes in fee recovery assistance for members' which is available on the

association's web site. Familiarity with the costs disclosure provisions of Part 11 of the Act and the *Legal Profession Regulation 2002* are an essential part of a barrister's tools of trade.

The Bar Association has a panel of solicitors to which members can be referred should the association's efforts be unsuccessful in recovering fees from solicitors. The panel undertakes the fee recovery work for barristers at reduced rates. Enquiries can be made through Ms Karen Mobbs, Deputy Director, Professional Conduct.

Any enquiries about fee recovery or the operation of Part 11 of the Act should be made in the first instance to Ms Mobbs. Greg McNally as the Fees Convenor, is consulted about difficult matters. The association is, as always, indebted to McNally for his continued assistance in this area.

### Significant case:

#### NSW Bar Association v Amor-Smith

On 19 August 2003 the Administrative Decisions Tribunal delivered its judgment in *NSW Bar Association v Amor-Smith [2003] NSWADT 239*. The tribunal found the barrister guilty of professional misconduct for gross overcharging and ordered his name be removed from the Roll of Legal Practitioners. The tribunal made no adverse finding in respect of another count of failing to provide a statement regarding billing arrangements and an estimate of likely costs as required by the Act.

The barrister had rendered five tax invoices to the clients. Only the fourth and fifth memoranda of fees were the subject of complaint, the clients having paid the first three memoranda totalling \$91,470. In respect of the fourth and fifth memoranda, the costs assessor determined an amount of \$32,500 to be 'fair and reasonable', just over one-fifth of the amount actually charged of \$151,441.05. The barrister did not seek to challenge the costs assessor's determination.

The judgment contains a useful examination of the authorities on overcharging. The tribunal found that gross overcharging can amount to professional misconduct and that the question of whether the clients should be characterised as 'vulnerable' is an important factor. In this case, despite the clients making the barrister aware of their very real concern regarding costs and the stress they were suffering, the barrister went ahead with a number of time consuming tasks, levied an excessive charge per hour for photocopying and overcharged in that he undertook unnecessary work and spent unreasonably long periods of time in undertaking work. He failed to ensure that the amount of work he did was kept within reasonable limits or that the

clients were advised of the number of hours being spent on their claim, in order that they could take whatever steps remained feasible to control their liability for costs.

The facts that impelled the tribunal to conclude the barrister is not fit to remain in legal practice included that he was aware that he may in due course have to accept a lesser figure than the amount charged in the fourth and fifth memoranda of fees, the amount charged was substantial when the clients, even if successful, were unlikely to obtain a sufficient amount in the litigation to make such an outlay worthwhile, the barrister demanded full payment over a period of nearly three months in a distinctly aggressive manner and threatened to cease acting in circumstances where he knew that these demands substantially increased the pressure to which the clients were already subject. The tribunal found the overcharging amounted to 'exploitation of the weaknesses of lay clients in a distinctly vulnerable position.'

On the question of penalty, the barrister, who had not renewed his practising certificate since its expiry on 30 June 2003, proffered to the tribunal an undertaking that he would never again seek to obtain a practising certificate. He submitted that this together with an order that he be reprimanded would constitute sufficient protection of the professional and public interest in the integrity of the legal profession. The tribunal rejected this argument finding that even if acceptance of the undertaking sufficiently protects the public from the possibility of further misconduct on the part of the barrister, if the barrister is not a fit and proper person to remain a member of the profession, the undertaking proffered will not adequately protect the reputation of and maintain public confidence in the profession.

## Professional Conduct statistics

**Table 1**

**Results of disciplinary cases in the New South Wales Court of Appeal / Supreme Court determined in the years ended 30 June 2002, 2003 and 2004**

### New South Wales Court of Appeal / Supreme Court

Financial Year 2004		Orders
19.08.03	Young, Andrew H	Removal name from roll
09.09.03	Stevens, Clarence J	Removal name from roll
Financial Year 2003		Orders
03.07.02	Wardell, Timothy	Wardell's sec 38B appeal dismissed
11.12.02	Cameron, Robert W	By consent - Cameron's sec 38B appeal dismissed, cancellation of PC
19.12.02	Whitehead, Glenn N	By consent - Whitehead's appeal upheld, conditions attached to PC up to 30 June 2006
04.04.03	De Robillard, C Roger	By consent - de Robillard's sec 38B appeal dismissed, noting the issue of a conditional practising certificate
Financial Year 2002		Orders
23.07.01	Cummins, John D	Removal name from roll
20.08.01	Somosi, L Robert	Removal name from roll
21.11.01	Small, Trevor	Small's sec 38B appeal dismissed
28.06.02	Murphy, Barry	Bar Council's appeal against McClellan J's decision (to uphold sec 38B appeal) dismissed

**Table 2**

**Results of disciplinary action taken by the Bar Council in the Administrative Decisions Tribunal determined in the years ended 30 June 2002, 2003 and 2004**

### Administrative Decisions Tribunal

Financial Year 2004		Previous Findings	Penalty
23.07.03	Bryson, John Henry Appeal Panel	pm	Bryson's appeal dismissed
03.09.03	Abdul-Karim, Michael S (Complaint by Mr Hamod & Bar Council)	pm & upc	Removal of name from roll
24.10.03 (No.1)	Howen, Alexander S	pm	Public reprimand
24.10.03 (No.2)	Howen, Alexander S	pm	Public reprimand
24.10.03 - not published	A barrister	upc	Public reprimand
05.11.03	Amor-Smith, John S	pm	Removal of name from roll
17.02.04	Abdul-Karim, Michael S (Complaint by Mr Hamod & Bar Council) Appeal Panel	pm & upc	Abdul-Karim's appeal dismissed. Abdul-Karim has appealed to NSW Court of Appeal
17.2.04	Abdul-Karim, Michael S (Complaint by BC) Appeal Panel	pm	Abdul-Karim appeal withdrawn
31.05.04	Donnelly, Bruce L	pm	Finding of professional misconduct. Penalty part heard.

## Professional Conduct statistics – continued

**Table 2 - continued**

Financial Year 2003		Previous Findings	Penalty
30.07.02	Greenaway, Richard A	upc	Public reprimand
13.09.02	Abdul-Karim, Michael S (Complaint by Mr Layouts)	upc	Public reprimand, compensation \$1,137
18.09.02	Jobson, James A	upc	Public reprimand on one Information, other Information dismissed
26.09.02	Mitry, Richard	pm	Public reprimand, Bar Practice course, CLE
09.01.03	Donnelly, Bruce L	pm & upc	Public reprimand, education course, no PC prior to 01.03.03
29.01.03	Bryson, John Henry	pm	Public reprimand, fine \$10,000
10.04.03	Van Thieu Nguyen	pm	Public reprimand, fine \$15,000 Order for removal of name from roll by ADT on 13.08.01
30.04.03	Tedeschi QC, Mark	No adverse finding	Information dismissed
16.05.03	Thomas, Timothy L	upc	Public reprimand, compensation \$4,000
19.05.03	Smith, Mark D	upc	Public reprimand, compensation \$1,000
17.06.03	Abdul-Karim, Michael S (Complaint by Bar Council)	pm & upc	Education course, Bar exams
Financial Year 2002			
13.08.01	Van Thieu Nguyen	pm	Removal of name from roll
17.10.01 - not published	A barrister	upc	Private reprimand
16.11.01	Di Suvero, Henry M	upc	Di Suvero's appeal against award of costs dismissed
12.12.01	Harrison, Thomas E	pm	Removal of name from roll

**Table 3**

**Notifications of offences and acts of bankruptcy made by barristers between 1 July 2003 and 30 June 2004 (compared to previous year)**

	2003-2004	2002-2003
Tax offences	8*	8 <sub>-</sub>
Acts of bankruptcy	5 <sub>#</sub>	14 <sub>∞</sub>
Indictable offences	0	2
Prescribed concentration of alcohol	8	4
Traffic offences	3	0
Fare evasion	3	0
Other	3	4
<b>Total</b>	<b>30</b>	<b>32</b>

<sub>-</sub> Of the eight notifications of tax offences, four barristers notified the council of two tax offences. These have been treated as one notification of tax offences in each case.

\* Of the eight notifications of tax offences, one barrister notified the council of three tax offences and one barrister notified the council of four tax offences. These have been treated as one notification of tax offences in each case.

∞ Of the 14 notifications of acts of bankruptcy, one notified the council of two acts of bankruptcy and four tax offences. This has been treated as one notification of an act of bankruptcy. Two barristers made two separate notifications on different dates each regarding a creditor's petition and a debtor's petition, one of whom also made a separate notification of a tax offence. These have been treated as separate notifications.

<sub>#</sub> Of the five notifications of acts of bankruptcy, one notified the council of an act of bankruptcy and one tax offence. This has been treated as one notification of an act of bankruptcy.

## Professional Conduct statistics – continued

**Table 4**

**Number of complaints received by complaint type between 1 July 2003 and 30 June 2004 (compared to previous year)**

Complaint type	2003-2004	2002-2003
Acting contrary to/failure to carry out instructions	3	4
Acting without instructions	0	1
Breach of sec152 Legal Profession Act 1987	0	3
Breach of undertaking	0	1
Breach costs disclosure provisions Part 11 <i>Legal Profession Act 1987</i>	0	1
Breach of Barristers' Rule 35 (Clyne case)	3	0
Breach of Barristers' Rules 36 or 37	0	2
Breach of Barristers' Rule (Other)	3	2
Breach of confidentiality	0	1
Conflict of interest	1	3
Conspiracy to pervert course of justice	1	2
Delay/failure to provide chamber work	2	3
Failure to adduce evidence available	1	0
Failure to advise properly or at all	4	1
Failure to appear	5	1
Failure to conduct a fair hearing	0	2
Failure to explain terms of settlement (properly or at all)	1	1
Other incompetence in legal practice	0	3
Misleading conduct/dishonesty	7	5
Other unethical conduct	12	3
Over zealous cross-examination (harranging a witness)	3	1
Over charging and/or over servicing	3	4
Personal conduct	3	4
Practising without a practising certificate	0	5
Pressure to change plea/plead guilty	2	1
Rudeness/discourtesy	1	1
<b>Total</b>	<b>55</b>	<b>55</b>

**Table 5**

**Complaints received between 1 July 2003 and 30 June 2004 by complainant type (compared to previous year)**

	2003-2004	2002-2003
Bar Council	5	15
Barrister	0	0
Client/former client	24	17
Government department/statutory law body	0	2
Instructing solicitor	2	2
Judicial/quasi judicial officer	0	1
Legal Services Commissioner	2	4
Opposing client	16	8
Opposing solicitor	0	3
Witness	3	0
Relative/friend	0	1
Other	3	2
<b>Total</b>	<b>55</b>	<b>55</b>

## Professional Conduct statistics – continued

**Table 6**

**Length of time complaints commenced between 1 July 2003 and 30 June 2004 have been and remain under investigation (compared to previous year)**

	2003-2004	2002-2003
Less than six months	22	22
Between six and less than nine months	11	4
Between nine and less than twelve months	10	8
<b>Total</b>	<b>43</b>	<b>34</b>

**Table 7**

**Results of investigation of complaints under Part 10 of the Legal Profession Act 1987 commenced and completed between 1 July 2002 and 30 June 2003 (compared to previous year)**

	2003-2004	2002-2003	
<b>Result of investigation</b>			
Complaint under investigation	43	34	_The withdrawal of one complaint followed successful mediation of the complaint.
Withdrawn	3_	3	* In the period 2003-2004, one decision by the Bar Council made in 2003/2004 to dismiss a complaint pursuant to sec155(4) was the subject of an application for review by the Legal Services Commissioner. That decision was upheld by the commissioner under sec160(1)(a). An application for review by the Legal Services Commissioner was also made in respect of a decision made by the Bar Council in 2002/2003 to dismiss a complaint pursuant to sec155(4). As at 30 June 2004, that decision remains under review.
Dismiss - sec139(1)(a)	0	1	
Dismiss - sec155(4)	9*	7	
Dismiss - sec155(3)(b)	0	4	
Refer to tribunal (prof misconduct) - sec155(2)	0	2	
Reprimand - sec155(3)(a)	0	4	
<b>Total</b>	<b>55</b>	<b>55</b>	

**Table 8**

**Results of investigation of complaints under Part 10 of the Legal Profession Act 1987 carried forward or commenced and completed between 1 July 2003 and 30 June 2004 (compared to previous year)**

	2003-2004	2002-2003	
<b>Result of investigation</b>			
Withdrawn	3_	5	_The withdrawal of one complaint followed successful mediation of the complaint.
Withdrawn but council initiated complaint under sec134(2)	0	1	* In the period 2003-2004, 11 decisions made by the Bar Council in 2003/2004 to dismiss a complaint pursuant to sec155(4) were the subject of an application for review by the Legal Services Commissioner. Two of those decisions were upheld by the commissioner under sec160(1)(a). The other nine decisions remain under review. An application for review by the Legal Services Commissioner was also made in respect of a decision made by the Bar Council in 2002/2003 to dismiss a complaint pursuant to sec155(4). As at 30 June 2004, that decision remains under review.
Dismiss - sec139(1)(a)	1	1	
Dismiss - sec155(3)(b)	1	4	
Dismiss - sec155(4)	40*	33	
Dismissed with conditions attached to practising certificate - sec155(4)	0	1	
Dismiss - sec155A	1	0	
Refer to tribunal (professional misconduct) - sec155(2)	5	4	
Refer to tribunal (unsatisfactory professional conduct) - sec155(2)	1	0	
Refer to tribunal (unsats prof conduct/prof misconduct) - sec155(2)	2	2	
Reprimand - sec155(3)(a)	3	6	# At the Bar Council's request, the Legal Services Commissioner agreed to take over the investigation of one complaint.
Reprimand - sec155(3)(a), plus pay compensation	2	0	
Reprimand plus conditions on practising certificate - sec155(3)(a)	0	3	
No action required as barrister's name removed from roll	0	1	
Investigation transferred to LSC	1#	0	
<b>Total</b>	<b>60</b>	<b>61</b>	