



President's Column

Recent excitement about public comments by judges invites consideration of the question when and to what extent the judiciary should make its views known to the public.

Judges have for long been constrained by convention to restrict to their judgments public comment and criticisms of subjects they regarded as offensive in principle. A good illustration of that approach being taken is the decision of *Trenerry v. Bradley* I mentioned last month which contained trenchant criticism by two of three Northern Territory judges of the injustice wrought by mandatory sentencing legislation.

The convention is traced, in part, to the doctrine of the separation of powers. Law making should be left to the politicians; interpreting the law should be left to the judges, who should confine their operations to the courtroom. Further, in part, convention had it, it was better if judges remained aloof, thus ensuring their judgments could not be seen to be affected by personal opinions.

The convention was re-inforced in 1955 when Lord Chancellor Kilmuir wrote to the BBC (which was seeking the participation of serving judges in a programme about former judges):

So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the performance of his judicial duties, must necessarily bring him within the focus of criticism.

Times have changed considerably since 1955. 'Accountability' is a defining concept of today's public debate. The strict performance of judicial duties does not render a judge immune from criticism (the *Sydney Morning Herald* headline the day after *Wik* was delivered was 'A Judgment for Chaos'). The options for judges to speak have broadened concomitantly.

In England the Kilmuir 'rule' was countermanded in 1987 by Lord Chancellor Mackay, who thought it was important recognition of the independence of the judiciary that it should be left to each judge to decide whether to become involved in public discussion.

Since at least the early eighties, the question whether judges should engage in



Ruth McColl S.C., President.

public comment has been the subject of much debate within Australian judicial circles. That debate arose in two contexts. First, the fact that Attorneys-General were abdicating the field they had traditionally occupied of defending the judiciary. Secondly, the increasing criticism of the judiciary and judgments in the media to which there was no, or little, informed response.

In 1993 Chief Justice Mason spoke benignly of the increase in public criticism of Court judgments as 'no bad thing' and as reflecting a 'marked upsurge of public interest in the Courts'. He saw that increased interest as providing judges, where appropriate, with the opportunity to 'explain publicly their work and the issues they face so long as judges refrain from expressing views about cases likely to come before them or about the legal implications and consequences of their decisions'.

More recently Justice Michael Kirby has pointed out that silence from the judiciary in the face of public criticism attracts the 'implication that the criticism was justified'. Chief Justice Doyle has written of the need for the judiciary to counter inaccurate and ill informed discussion and criticism of its work by improving public understanding of

judicial methods and principles. While recognising the need for judicial commentators to ensure they are media-savvy, he would not accept that 'judges demean themselves or their office by giving interviews, participating in talkback programmes or in television panel discussions and so on'.

The pressure to assist public understanding of the judicial process has been recognised to a certain extent by the appointment of court media officers. However, even this step has not stemmed the flow of criticism, principally of sentencing decisions, which features regularly in the press. Politicians were frequently heard to say that mandatory sentencing laws were a response to the 'fact' that judges were not performing their role of sentencing people to sufficiently severe terms of imprisonment. No empirical evidence was produced to support such assertions, but they were accepted almost uncritically by the public.

In a world where the public's principal source of information about the courts is conveyed by the media, the time must have come when the judiciary considers what steps can be taken better to communicate the nature and method of judicial work to the public.

In the sentencing context, there is no doubt, as Chief Justice Malcolm pointed out recently, 'it is essential that those who commit crimes are not only punished, but seen to be punished'. It is also the case, as Chief Justice Spigelman has said, that empirical research in all common law jurisdictions demonstrates that when the full facts of individual cases are explained, the public tends substantially to support the actual sentences or to be less critical of their perceived leniency.

Much of the recent public debate concerning mandatory sentencing demonstrated the public recognised the importance of judicial discretion in sentencing. It is the application of the discretion in sentencing which seems to be poorly understood by the public. The consequence is too ready acceptance of criticisms of sentences as being disproportionate to the perceived crime, without the balancing factors being exposed for consideration.

Continued on page 2

Solicitors' Duty to pay Counsels fees

In the March 1999 edition of its *Journal*, The Law Society of NSW published an article about solicitors' duty to pay counsels fees. A copy of that article is available in the Bar Association Library and may also be found at the following website: www.lawsocnsw.asn.au

Importantly, the Law Society reiterated to its members that there are two Solicitors' Rules that may give rise to conduct issues for consideration, in the event that a solicitor fails to pay counsel's fees.

The first is Practice Rule 32, which provides:

A practitioner who deals with a third party on behalf of a client for the purpose of obtaining some service in respect of the client's business must inform the third party when the service is requested that the practitioner will accept personal liability for payment of the fees to be charged for the service or, if the practitioner is not to accept personal liability, the practitioner must inform the third party of the arrangement intended to be made for payment of the fees.

The second is Practice Rule 33, which provides:

A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates to a third party in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with the terms, and within the time promised (if any) or within a reasonable time.

The *Journal* article points out

...the terms of these rules are mandatory and are not framed as best practice or recommended procedure. Consequently, the committee [the Professional Conduct Committee] must take seriously any breach of these rules. It should be noted that these Rules may not apply

if the solicitor has specifically informed the barrister that he/she will not accept responsibility for payment of the barrister's fees. Thus if a solicitor for any reason omits or overlooks to inform that barrister that he/she does not accept responsibility for payment of the barrister's fees then the solicitor has given an implied undertaking, the breach of which can have very serious consequences for the solicitor.

In light of this article, members are reminded of their obligation to ensure that they comply with the fee disclosure requirements of Part 11 of the *Legal Profession Act 1987 (NSW)*, including making it clear when you look to the instructing solicitor for payment of your fees.

Extracts of the article 'The duty to pay Counsel: practical lessons from complaints' by Peter Mazurek (former Deputy Manager of the Law Society's Professional Standard Department) published in the March 1999 edition of the *NSW Law Society Journal*, have been reprinted with the kind permission of the Law Society.

President's Column

Continued from page 1

A good starting point to the exercise of judges publicly explaining their work would be to ensure the rationale for sentencing decisions is clearly explained to the media and the public.

A next step would be to devise a short explanatory document - perhaps in the form of a headnote - which could be issued by the judge at the time of sentencing to ensure that the media, and again hopefully the public, understood how the sentence had been arrived at by the application of the appropriate principles. There might then be less scope for media to report merely the bottom line or excerpts from sentencing decisions in tones which indicated a fundamental mistake has been made whenever the accused was not sentenced to the maximum term available.

Debate within legal circles demonstrates much support for the fact that the time has passed when the judiciary can remain aloof. So far acceptance of that proposition does not really appear to have pervaded the public sphere.

Greater involvement of the judiciary in public debate will assist in the public better understanding the way justice is administered.

Supreme and District Courts

As reported in the last *Bar Brief*, Common Law and Criminal Law Users Committees have been established in the Supreme Court with Bar representation. I would encourage members of the Bar who feel they are encountering practical problems in their work in either Division of the Supreme Court to pass their concerns on to me or the Bar's representatives so that such matters may be raised with the Court.

The latest report from Brian Murray QC, who represents the Bar on the District Court Users Committee, is that Judge Garling lists 6 long cases (cases of 5 days or longer) each Monday. They are allocated specifically to a judge. All such cases are given a start on the Monday they are listed. So far this year, every case has started and all but one have been finalised. Judges have been asked not to become part-heard in any of these cases.

The Motion List is now being conducted by two judges and, again according to Judge Garling, is working well with all motions having been reached as at mid-February.

Again, I would encourage anyone who feels they are experiencing practical problems with any aspect of their work in the District Court to pass on those concerns to me or either Murray QC or Lidden, both of whom represent the Bar on this Committee.

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Bar Council business for February

Any member interested in a particular matter should contact either the relevant member of Council or the Executive Director for further information.

President's Report

Appointment of Justice Dyson Heydon to the Supreme Court of NSW and as a Judge of Appeal as of 14 February 2000.

The President advised that she had both written to the *Financial Review* (16 February 2000) and given several media interviews rebutting the criticism of the appointment of Heydon QC to the bench.

Meetings with heads of jurisdictions

The President advised that she and the Executive Director had had a series of meetings with the Chief Justice and heads of jurisdictions; the NSW Attorney General; President of the Law Society of NSW; Managing Director of the Legal Aid Commission and others concerning the working relationship with the Bar Association. She had also met with a delegation from the Japan Bar Federation.

Executive Director's Report

ALRC Report No 89, *Managing Justice – A review of the federal civil justice system*.

The Executive Director advised that this report had been published earlier in the day. The ALRC had commended the new NSW Barristers' Rules and had recommended them to the Law Council of Australia as national model professional rules.

Items for consideration

NSW Law Reform Commission – review of Part 10 of the *Legal Profession Act 1987* - draft terms of reference

The Bar Council agreed to the draft terms of reference.

Note: because of the confidentiality provisions in the *Legal Profession Act 1987* (s.171P), the Bar Council's deliberations on professional conduct matters cannot be noted in these summaries.

Matters discussed by the Bar Council reported elsewhere in *Bar Brief*, too, are omitted from these summaries.

Advocacy workshops in Bangladesh

For the last five years a team of Australian barristers has visited Bangladesh in December for the purpose of carrying out advocacy workshops. The Australian Bar Association has in the past provided financial assistance for this project. However, there is no certainty that such assistance will continue to be available. The team is looking for additional volunteers who would be prepared to give up ten days to two weeks of their time in December to travel to Bangladesh to assist in these workshops.

The airfare is usually about \$2,000 (sometimes less can be negotiated) and accommodation is about \$120.00 per night. Most meals are provided.

To carry out this work experience in teaching in advocacy workshops is required. It is preferable that volunteers have undergone the Australian Advocacy Institute Train the Trainer Course or an equivalent Bar Association Train the Trainer Course.

If anyone is interested, would they please advise Brian Donovan QC at DX 450 Sydney or fax (02) 9231 5366, including details of qualifications and experience in teaching advocacy workshops. Those interested should realise that the workshops involve intensive and hard work. However, those who have previously carried out this work have found it extremely fulfilling and of great benefit to the participants.

Albury Chambers

Empire Chambers of Canberra have established rooms at Albury for the use of Empire Chambers members when on circuit at Albury.

The facilities are located in an older style bank building quite near to the court house and incorporate ample desk space, large conference facilities, computer and printing facilities and internet access.

The Chambers are available to visiting counsel from time to time on a day use basis when not required by the members of Empire Chambers.

Anyone with appearance or conference work in Albury or Wodonga seeking suitable Chambers space should contact the clerks at Empire Chambers, Joanna Scott or Tamara Nasser on telephone 02 6257 6007, facsimile 02 6257 6290 or email clerk@empirechambers.com.au



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Exploring alternatives: An express ethical obligation

The Rule

The new Barristers' Rule 17A makes express an obligation on barristers to consider alternatives to a full contest. Mediation will be a frequent means of satisfying the Rule but there are other alternatives. A review of the various alternatives will appear soon, in *Bar Brief*.

The terms of the Rule are as follows:

17A. Duty to Client

A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

The provision to the client of a booklet on alternative dispute resolution or a 'standard letter' will not, of itself, discharge the obligation under this Rule. The Rule requires the provision of not just general information but tailor-made advice which is specific to the particular piece of litigation at hand. The advice must be as to which alternatives are most 'available' (in the context this must mean 'applicable') to enable that client to make the necessary decisions about the case.

The provision of that advice to the solicitor alone satisfies the first part of the new Rule. If given to an experienced solicitor, it may amount to no more than 'We should try mediation in this case', or 'This case would benefit from a round table settlement meeting.' To a client, it will be much more detailed.

There are situations where the advice may be that alternatives to a full court hearing are inappropriate. For example, an issue estoppel may be sought by a quick hearing in one court for use in other larger proceedings. A client may seek a full hearing on some matter of law or some principle. Sometimes, a client might seek a full hearing to publicly respond to some damaging allegation. That may be as valid in

industrial proceedings, as in allegations of breach of trust, or in a civil action for child sexual assault, as it is in some defamation cases. These situations are not usual. Generally, attempts at alternatives to a full hearing are a reasonable option which a client may wish to choose. The Bar knows that. Most barristers consider prospects of settlement in most non-criminal cases. Most cases settle.

The Rule applies whatever the nature of the brief held by the barrister. Some barristers who received a 'brief to appear' may in the past have considered that advising on alternatives to a hearing was beyond their brief or, perhaps, actually contrary to their instructions. The Rule overrides these considerations.

The new Rule aims to widen the prospect of settlement and to give direction to those barristers who do not give settlement sufficient attention. Above all, the new Rule aims to bring settlement further forward, to a time earlier than the door of the court on the first day of hearing. Thus, if the matter must go to a hearing, the barrister is less likely to be distracted from preparation for hearing by last-minute settlement negotiations that are engaged in for the first time just before the hearing.

The Exemption

The second part of the Rule, which exempts the barrister from providing considered advice, would have limited use in practice. It only operates if the barrister believes, on reasonable grounds, that the client already has sufficient understanding of the alternatives to permit that client to make a decision in his or her own best interests in relation to the litigation at hand.

Rule 17A is different from other 'reasonable grounds' rules such as Rules 36, 37 and 38. In those Rules, which relate to the grounds a barrister must have before making serious allegations, a 'reasonable ground' is defined (in Rule 39), to include the solicitor's opinion as to the credibility of the allegation. No such definition appears in Rule 17A.

Reasonable grounds in Rule 17A may still be information given to the barrister in the brief or over the phone. Such information would have to include not only that the client is aware of the alternatives but that the client has an awareness adequate to make an informed decision about the specific case at hand, otherwise the exemption may not operate. In short, it may be enough to give your views on alternatives to the solicitor but it may not be enough to accept, in lieu of giving advice, a statement from the solicitor that 'I've told the client about mediation.' Whether such a statement amounts to 'reasonable grounds' for the purpose of the exemption will depend on such matters as the barrister's knowledge of the solicitor's usual practice. A barrister may know that a particular solicitor always discusses alternatives with a client so that the client has the necessary understanding.

If the barrister is not familiar with the solicitor's practice, then the barrister must inquire further. Solicitors are not bound by Rule 17A. Such an inquiry could take longer or cause more problems than the provision of the appropriate advice. The prudent course is to formulate a view in any brief relating to a contest and convey the view.

If the barrister is aware, from prior experience with a particular solicitor that alternatives to a contested hearing are, as a matter of practice, fully considered and discussed between solicitor and client, that knowledge alone may cause the exemption in the second half of Rule 17A to operate. But it's a risk. There can always be one client that slips through a system and does not receive the benefit of the solicitor's usual practice. Again, prudence and good practice would suggest that a view about alternatives to a full contest be formulated and conveyed. The Rule opens with the obligation that the barrister 'must' act in a particular way and closes with a reference to '...the client's best interests...'.
Mediation Committee

Supreme Court Pro Bono Scheme

– Letter from the President –

Dear Colleagues

The Chief Justice of the Supreme Court of NSW, The Hon. JJ Spigelman, has approached the Bar Council to enlist its help in establishing a scheme for the provision of legal assistance on a pro bono basis to deserving litigants in appropriate cases commenced in the Supreme Court. The central aspects of the scheme will be embodied in a special rule of the Court, to be made shortly.

The Supreme Court Pro Bono Scheme will operate along similar lines to that of the Federal Court Pro Bono Scheme. A Judge will make an order for referral to the Registrar of the Court, who will then contact a barrister who has volunteered to participate.

The scheme is not intended to be a substitute for the provision of legal aid, nor will its operation have that effect. Equally, it is not intended to relieve any government of its obligation to provide adequate funding for existing legal aid services. It is, however, designed to assist deserving litigants to have their cases properly presented to the Court.

I would urge all members of the Bar with expertise in the areas of practice

covered by the scheme to offer their services. If the Scheme is to succeed, it requires the co-operation of sufficient numbers of members of the Bar to ensure that the burden of providing pro bono assistance under it does not fall unfairly on only a few of our members.

If you are willing to offer your services to assist the scheme, please complete the form in this edition of *Bar Brief* and return it as soon as possible. The information will be used to prepare a list that will be provided to the Registrar of the Supreme Court responsible for the management of the Scheme.

Federal Court Pro Bono Scheme

May I also take this opportunity to ask members of the Bar to volunteer for this scheme if they have not already done so? Those members who have already volunteered would no doubt be glad if some additional names could be given to the Registrar. The feedback on the operation of the Scheme to date has been very good and to those members who have been involved I record my thanks.

Bar Association Legal Assistance Scheme

I would also like to ask members to again offer their support for our own Legal Assistance Scheme. Our scheme, which has formally existed since 1996, offers people who genuinely cannot afford to pay for barristers the opportunity to have their matters legally assessed and, if appropriate, to have barristers appear for them in Court.

Over the years there has been a significant increase in the number of requests for assistance. There is no indication that the increase in requests will abate. In order that the same generous people are not overburdened from doing legal assistance work, and to assist us in the day-to-day running of the scheme, I should be grateful if members would indicate their willingness to be involved, stipulating their preferred areas of law. A copy of the scheme's guidelines is available at Reception.

A form for the purposes of expressing interest in being involved in any or all three of the schemes is included in this edition of *Bar Brief*.

Ruth McColl S.C.
President

A letter from the Chief Justice

The President of the Bar Association, McColl S.C., recently received a letter from the Chief Justice, The Hon. JJ Spigelman, regarding the Supreme Court Pro Bono Scheme. In it he said:

'I wish to express my appreciation to the New South Wales Bar Association for its assistance in developing and establishing the Supreme Court Pro Bono Scheme. This represents a good example of the Court and Bar working together to improve access to justice.

The Scheme is not, of course, a substitute for a properly funded legal service. Judges will only refer litigants to participant members of the Bar where the Court forms the opinion that representation is appropriate in the interests of administration of justice.

I have no doubt that your members will respond positively to this initiative in the best traditions of the Bar.'

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email: clerk@mauricebyers.com

Letter to the Editor

In defence of direct access

I reply to the article page 9 *Stop Press* December 1999 'CCA Views on Direct Access'.

At some risk of summary conviction for heresy I rise to the defence of direct access as one of the legitimate models for the delivery of professional barrister services to clients.

This article essentially published remarks from the Court of Criminal Appeal criticising a barrister's conduct and characterises the identified difficulties as having been caused by the barrister accepting instructions direct from a client.

With respect it may be too simplistic to attribute these events to direct access. The District Court judgment, which the Court of Appeal set aside, records that a barrister conferred direct with an applicant at a remand centre after his arrest. The accused was allegedly in a car, affected by intoxicating liquor or a drug or both and a quantity of material was found in the accused's car. The barrister acted upon instructions to enter a plea of guilty.

The District Court judgment records the true errors by the barrister: conferring with an accused without [ever] a witness being present, failing to [ever] obtain written confirmation of the client instructions, failing [ever] to discuss the police brief and the transcript of evidence; and (the barrister) being ignorant of the maximum penalties for the subject offences.

Would these be any less in error if the actions were those of a solicitor? What if a solicitor and barrister had jointly provided identical services (or non service)? It can be confidently argued that any competent practitioner would successfully apply to have a conviction set aside if it could be established that such elementary elements of competent advice were lacking, no matter what the mode of advice service.

It is submitted that these are signals of lack of competence and not sins with which direct access practice should be universally condemned. Indeed to quote the CCA 'The applicant had not had any, or any competent, advice that laid out before him ...'

Even in a somewhat routine commercial matter, it is common practice to obtain written confirmation of instructions to make an offer, or to canvass certain issues. With or without an

instructing solicitor these are fundamental steps to take and seem to have been absent here.

The Court of Appeal refers to 'best professional practice' proscribing the kind of direct dealing between the barrister '... so significant a feature by the relevant course of events in the present case ...'.

If this is a reference to and condemnation of direct access per se it is respectfully submitted to be in error. The longstanding best professional practice of the Bar has always included direct access. It has always proscribed acting as an attorney, so that the intervention of an instructing solicitor or clerk, or self conduct of some aspects of contentious matters always relieved the barrister of the potential for embarrassment such as occurred here.

Direct access in many civil and especially commercial matters should be espoused by the Bar as a legitimate strategy for professional service delivery. There are sensible constraints to preserve the barrister's integrity as an advocate and there are clients for whom direct access is impossible as they do not have a personal capacity to manage aspects of the litigation.

If the Bar is to maintain or revive a claim for specialisation in dispute resolution, models of service delivery other than 'in court advocacy' will require recognition and a positive approach to the development and publication of service strategies or codes of conduct which command respect within and without the Bar.

Direct access is one small example of flexible delivery of legal services which are now required in a variety of situations. Court room advocacy will soon be seen as a small part of barrister practice.

Disclaimer: The writer practices primarily in commercial matters and has almost zero criminal court experience, and thus admits readily there may be special features of the criminal process which are not paralleled in other jurisdictions. If this is so it is a reason for better differentiation of prudent and skilful practice rules relevant to distinct practice areas rather than a blanket condemnation of direct access.

Warwick Davis
Canberra, ACT

In Brief

The President of the Bar Association would like to thank Murray QC, Wheelahan QC, and Morrison S.C. for briefing The Hon. Ms Justice Kathleen Satchwell of the South African High Court on motor accident compensation legislation.

Harrison S.C. has been appointed Chairman of the Neuroscience Institute of Schizophrenia and Allied Disorders. NISAD was the official charity of the Bar Association in 1998 / 1999.

Bar Council has agreed that members may include on their letterhead the statement 'Member of the New South Wales Bar Association', so long as their membership is current.

Supreme Court Common Law Users Committee

A committee comprising Wheelahan QC and Walmsley S.C. has been created to liaise with the Common Law Division of the Supreme Court and deal with concerns affecting both the Bar and the court.

Members who have issues they would like considered are invited to provide a short note on the matter to Wheelahan QC at DX 171 Sydney or Walmsley S.C. at DX 1070 Sydney.

NSW Supreme Court Pro Bono Scheme

Fill out the form below if you are willing to participate in the NSW Supreme Court Pro Bono Scheme.

Expression of Willingness to participate

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(Print name in full)

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Supreme Court Pro Bono Scheme

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| <input type="checkbox"/> Probate matters | <input type="checkbox"/> Commercial matters | <input type="checkbox"/> Common Law (Civil) |
| <input type="checkbox"/> Protective matters | <input type="checkbox"/> Admiralty matters | <input type="checkbox"/> Equity (General) |
| <input type="checkbox"/> Adoptions matters | <input type="checkbox"/> Defamation matters | <input type="checkbox"/> Crime |
| <input type="checkbox"/> Professional negligence matters | <input type="checkbox"/> Administrative Law matters | <input type="checkbox"/> Appellate work (indicating area of interest e.g. Workers' Compensation appeals) |
| <input type="checkbox"/> Possession matters | <input type="checkbox"/> Corporations Law matters | <input type="checkbox"/> _____ |
| | | <input type="checkbox"/> _____ |

Federal Court of Australia Pro Bono Scheme

Please tick (✓) any of the boxes below which represent areas in which you would be willing to provide pro bono assistance under the Scheme:

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| <input type="checkbox"/> Migration | <input type="checkbox"/> Trade Practices and Consumer Protection |
| <input type="checkbox"/> Administrative Law | <input type="checkbox"/> Native Title |
| <input type="checkbox"/> Veterans and Social Security Entitlements | <input type="checkbox"/> Bankruptcy |
| <input type="checkbox"/> Human rights and Equal Opportunity | |
| <input type="checkbox"/> Industrial Relations | |



New South Wales Bar Association's Legal Assistance Scheme

Please tick (✓) the boxes below which represent the practice areas in which you would like to volunteer:

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| <input type="checkbox"/> Administrative | <input type="checkbox"/> Human Rights & Equal Opportunity |
| <input type="checkbox"/> Admiralty | <input type="checkbox"/> International |
| <input type="checkbox"/> Advocacy – appellate | <input type="checkbox"/> Industrial Relations |
| <input type="checkbox"/> Alternative Dispute Resolution: | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> Arbitration | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Aviation | <input type="checkbox"/> Landlord and Tenancy |
| <input type="checkbox"/> Bankruptcy | <input type="checkbox"/> Local Government |
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| <input type="checkbox"/> Commercial | <input type="checkbox"/> Native Title |
| <input type="checkbox"/> Common Law | <input type="checkbox"/> Negligence – Medical |
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| <input type="checkbox"/> Customs | <input type="checkbox"/> Trusts |
| <input type="checkbox"/> Defamation | <input type="checkbox"/> Veterans & Social Security Entitlements |
| <input type="checkbox"/> Early Neutral Evaluation/Appraisal | <input type="checkbox"/> Wills and Estates |
| <input type="checkbox"/> Environment and Planning | <input type="checkbox"/> Workers' Compensation |
| <input type="checkbox"/> Equity | |
| <input type="checkbox"/> Family Law | |
| <input type="checkbox"/> Franchising | |

Once completed, please return this form covering all three schemes to:

**The Manager
Legal Assistance Scheme
The New South Wales Bar Association
174 Phillip Street Sydney, NSW 2000
or DX 1204 Sydney**

Inquiries should be directed to:

**Heather Sare
Phone: 9232.4055
Fax: 9221.1149
or Email: hsare@nswbar.asn.au**



GST Alert

ABN Registration

The Commissioner has set 31 May 2000 as the deadline for an application for an ABN.

Any barrister who still has not made the application should be aware that a failure to apply by 31 May is likely to result in fees for work done after 1 July 2000 being subject to a withholding at the top marginal rate which is currently 48.5%.

Barristers' Disbursements

There is some confusion as to how a barrister's disbursements should be treated after 1 July 2000.

One argument is that the reimbursement of disbursements is not consideration for any supply made by a barrister.

If a barrister accepts a retainer on the basis of a fee and reimbursement of out-of-pocket expenses for accommodation, travel and the like, the better view is that the reimbursement forms part of the consideration for the barrister's supply of services.

Further confusion arises as to the level of that consideration. Some say that the amount of the consideration is the gross amount, including GST, paid by the barrister. For example, disbursements of \$1,100 including \$100 GST are said to be chargeable to a solicitor as part of the consideration for the supply of legal services, and further GST is added to that amount.

That approach smacks of price exploitation, contrary to the Australian Competition & Consumer Commission's guidelines.

In my view it is the \$1,000, ie the disbursement net of GST, which constitutes part of the consideration for the barrister's supply, thus:

Fee on Brief	\$ 5,000
Travel and accommodation	1,000
	<hr/>
	\$ 6,000
GST	600
	<hr/>
	\$ 6,600
	<hr/>

When the barrister pays for the travel and accommodation, \$1,000 is debited to an expense account and \$100 is debited to a GST clearing account.

When the barrister receives the fee, \$6,000 is credited to fees and \$600 is

credited to the GST clearing account, thereby creating a net liability for GST of \$500 in respect of the fee on brief.

In this way the disbursements are dealt with neutrally so far as GST is concerned.

The solicitor's fee note to his / her client should follow a similar pattern:

Care and Consideration	\$ 10,000
Counsel's Fees	6,000
	<hr/>
	16,000
GST	1,600
	<hr/>
	\$ 17,600
	<hr/>

When the solicitor pays counsel's fees, a debit of \$600 should occur in the solicitor's GST clearing account.

When the solicitor is paid, \$1,600 should be credited to the solicitor's GST clearing account such that the net GST payable relates solely to the solicitor's fee for care and consideration.

If the client incurred the fee in a business context, a debit of \$1,600 will arise in the client's GST clearing account.

Exactly the same result follows if the client pays counsel's travel expenses directly and if the client retains barrister and solicitor separately.

When the client pays the travel and accommodation bills a debit of \$100 arises in the client's GST clearing account.

When the client pays the \$5,500 to the barrister and \$11,000 to the solicitor a further debit of \$1,500 arises in the client's GST clearing account.

The same result arises if the client pays the solicitor \$16,500 including counsel's fees.

This matter has been addressed in a publication being prepared for distribution to all members, *A Practical GST and PAYG Overview*. It will include a pro-forma of a tax invoice including disbursements.

Gzell QC

Chairman

GST Committee

6 April 2000

Papers to Note

Supreme Court Practice Note 112: Preparation and listing of criminal trials. This supersedes *Practice Note 103*. A copy may be obtained by visiting the NSW Supreme Court's web site at www.lawlink.nsw.gov.au/sc

District Court Rule (Affidavits) 2000. The purpose of this Rule is to relax certain requirements in the *District Court Rules 1973* concerning the filing of affidavits and to make further provision in respect of the return of affidavits.

District Court Rule (Exhibits) 2000. The purpose of this Rule is to amend Part 29 rule 5 of the *District Court Rules 1973* to provide for the return of exhibits.

District Court Rule (Motor Accidents) 2000. The purpose of this Rule is to make miscellaneous amendments to the *District Court Rules 1973* concerning proceedings under the *Motor Accidents Compensation Act 1999*.

Photocopies of these documents can be made in the Bar Library.

National Competition Policy Reviews by the NSW Department of Fair Trading.

Employment Agents Act 1996. Written submissions relating to this Issues Paper should be sent to Ms Barbara El-Gamel, Employment Agents Act Review via email:

bel-gamel@fairtrading.nsw.gov.au , Fax: (02) 938 8935 or via the Department's postal address listed below. Submissions must be received by 8 May 2000.

Pawnbrokers and Second Hand Dealers Act 1996. Written submissions relating to this Issues Paper should be sent to Ms Tracy Taylor, Pawnbrokers and Second-hand Dealers Review via email: ttaylor@fairtrading.nsw.gov.au , Fax: (02) 938 8935 or via the Department's postal address listed below. Submissions must be received by 8 May 2000.

Conveyancers Licensing Act 1995. Written submissions relating to this Issues Paper should be sent to Ms Barbara Fernandez, Conveyancers Licensing Act Review via email:

bfernandez@fairtrading.nsw.gov.au , Fax: (02) 9338 8935 or via the Department's postal address listed below. Submissions must be received by 12 May 2000.

These issues papers are available for loan from the Bar Library. Written submissions can be mailed to:

Policy Division
Department of Fair Trading
PO Q168, QVB Post Shop
SYDNEY NSW 1230

Media Briefing

Articles and letters to the editor written by the President of the New South Wales Bar Association

Mandatory Sentencing, Letter to the Editor, *Sydney Morning Herald*, 23 March 2000, p.16

Mandatory Sentencing, Letter to the Editor, *The Australian*, Friday 17 March 2000, p.14

'Punition should fit the crime,' *The Australian*, Tuesday 14 March 2000, p.13

Submissions and position papers made by the New South Wales Bar Association

Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999, 21 February 2000, prepared by David Re and Tim Game S.C.

Restraints of Trade Act 1976 (NSW) - National Competition Review Policy, 31 March 2000, prepared by Jeffrey Hilton S.C.

Council of Law Reporting Act 1969 (NSW) - National Competition Review Policy, 7 March 2000, prepared by Ian Jackman.

The President would like to thank those who prepared these submissions.

Media releases issued by the Law Council of Australia

Diversionary conferencing not a solution to mandatory sentencing problem, warns Law Council, 5 April 2000.

Council Welcomes Senate Passing of Private Members' Bill: Reiterates Call for PM to Allow Conscience Vote - 15 March 2000.

Federal Government Must Heed Findings of Senate Report on Mandatory Sentencing - Private Members' Bill Should be Passed Urgently - 14 March 2000.

NT Mandatory Sentencing Poll Misleading: Law Council - 9 March 2000.

Submissions and position papers made by the Law Council of Australia

The mandatory sentencing debate, 10 March 2000. A Position paper in relation to appropriateness of 'mandatory sentencing' laws in Western Australia and the Northern Territory, 10 March 2000.

Structured Settlements - urging support of proposal by the Structured Settlement Group (SSG) regarding amendment to

the Income Tax Assessment Act to confirm the tax-free status of structured settlements, 6 March 2000. A submission by the Law Council to the Treasurer.

Appellate Practice & Procedure in Civil Matters: Statement of Issues - commenting on Statement of Issues, 1 March 2000. A submission by the Law Council to the Federal Court of Australia.

A full list of the Law Council's submissions may be obtained from its web site at www.lawcouncil.asn.au

Speeches

Ceremonial sitting of the NSW Court of Criminal Appeal at Wagga Wagga, 13 March 2000. A collection of speeches by The Chief Justice, The Hon. JJ Spigelman, NSW Director of Public Prosecutions, Nicholas Cowdery QC, The President of the Law Society of New South Wales, John North and the President of the South West Slopes Law Society, Anthony Paul. Photocopies can be made at the Bar Library.

Swearing-in of the Honourable Justice Dyson Heydon, QC, 14 February 2000. Speeches by The Chief Justice, The Hon. JJ Spigelman, the President of the Bar Association, McColl S.C., and The President of the Law Society of NSW, John North.

Update on the Professional Negligence List and Expert Evidence: Changes for the Future, by The Hon. Justice Abadee RFD, 3 March 2000.

Copies of these speeches may be obtained from the Supreme Court's web site at www.lawlink.nsw.gov.au/sc, or it may be photocopied in the Bar Library.

NSW Attorney General outlines scheme for incorporation of legal practices, March 10 2000. An excerpt from a speech by the Attorney General, published by *The Justinian*. Photocopies can be made at the Bar Library.

Crime reduction and prevention: Some suggestions for the new millenium. This speech was delivered by The Hon. David K Malcolm AC, Chief Justice of Western Australia, before the Salvation Army Men's Club on 3 March 2000. Photocopies can be made at the Bar Library. The Chief Justice's speech was delivered as the mandatory sentencing debate was escalating. He challenges the community as a whole to re-evaluate and reassess solutions to crime and warned that mandatory sentencing is 'only a short term quick fix solution to impress constituents from one election to the next: a response to a community looking for a solution with blinkers on.'

Coming Up

New South Wales Bar Association Regional Conference, Bowral, 10-11 June 2000: Members should, by now have received a brochure on the forthcoming conference. For more information, please refer to the advertisement on the back page.

'Australia Week,' London, 2-9 July 2000: is a program of activities in London designed to commemorate the centenary of the passage of the Australian Constitution through the British Parliament. In addition to a week of cultural activities, there will be a service in Westminster Abbey on Friday 7 July 2000, to be attended by HM The Queen and the Prime Minister, The Hon. John Howard. An application form for tickets to the service may be obtained at Reception, or by visiting the Australian High Commission's web site at www.australia.org.uk.

Public Interest Advocacy Centre Annual Fundraising Dinner, 21 June 2000, Pavillion on the Park. The guest speaker will be The Hon. Justice Arthur Chaskalson, President of the South African Constitutional Court. Invitations will be mailed at the end of April, but in the interim it is possible to reserve a seat or a table of 8. The price is \$160 per head or \$120 for a concession. For further details, or to make a reservation, call Marie Manaena at PIAC on (02) 9299 7833.

Trends 2000: The Australian Capital Territory Bar Association's Millennium Seminar, 5-7 May 2000, Grand Mercure Hotel Bowral Heritage Park. This seminar will examine trends in several areas of law, including sentencing, equity, drugs and environmental law. Speakers include Justice Ian Callinan of the High Court, Justice Brian Sully of the NSW Supreme Court and Justice John Faulks of the Family Court. For any inquiries, contact George Brzostowski on (02) 6247 5040.

American Express

In addition to Mastercard, Visa and Bankcard, The Bar Association now accepts American Express.

Law Council of Australia Notification N90770

On 1 March 2000 the Law Council of Australia notified the Australian Competition and Consumer Commission (the Commission) of particulars of proposed conduct of a kind referred to in subsection 47(6) or (7) of the Trade Practices Act 1974 (the Act).

The Law Council proposes to require that persons who wish to join or remain members of its Sections must also be members of its Constituents.

Copies of the notification and supporting documents are available from the ACCC's public register. Alternatively, the notification and supporting documents may be down loaded from the Commission's Web Site at www.accc.gov.au under Adjudication.

Notification provides immunity from legal proceedings under the Act. Immunity for third line forcing conduct begins 14 days after the date details are lodged with the Commission. However, in this case the conduct is not proposed to come into operation until 1 July 2000.

Essentially, notification is a process whereby the Commission assesses the likely benefits and detriments arising from the notified conduct.

To deny immunity in respect of notified third line forcing (by issuing a draft notice) the Commission must be satisfied that the likely benefit to the public will not outweigh the likely detriment to the public. If the Commission issues a draft during the prescribed period, the immunity will not begin. If the Commission does not issue a draft notice during the prescribed period, immunity will begin at the end of this period. The Commission may issue a draft notice after the expiry of the prescribed period. Immunity will continue until a final notice is issued.

To assist the Commission in its consideration, it is seeking submissions from interested parties likely to be affected by the arrangements.

If you wish to make a submission please arrange for it to reach the Commission by 31 May 2000 and address it to:

Mr John O'Neill
General Manager
Adjudication
Australian Competition and Consumer Commission
PO Box 1199
Dickson Act 2602

Submissions to the Commission should be in writing and will be made publicly available on the public register. If you wish to include information in a submission that is of a confidential nature, it should be clearly marked as such and a claim for confidentiality for the material should be submitted. You will be informed of the outcome of that claim and, if it is refused, the relevant material will be returned to you if you wish. Material for which confidentiality is granted will not be publicly available, but may be taken into account by the Commission in its assessment.

Appointments

Acting Judges of Appeal, Supreme Court of NSW

The Hon. David Malcolm AC, Chief Justice of Western Australia, The Hon. Mr Justice McPherson, CBE, Judge of Appeal of the Supreme Court of Queensland, and The Hon. Mr Justice Ormiston, a Judge of Appeal of the Supreme Court of Victoria, were appointed as Judges of Appeal of the Supreme Court of NSW effective 15 May 2000 to 14 June 2000.

Acting Judges of the District Court of NSW

Warwick Andrew, CBE and Robert Woods, CBE have been appointed as Acting Judges of the District Court of NSW effective 30 March 2000 to 29 March 2001.

Deputy President of the Industrial Relations Commission of NSW

Roger Boland has been appointed as a Deputy President of the Industrial Relations Commission of NSW and as a Member of the Commission in Court Session effective 22 March 2000.

John Grayson has been appointed as a Deputy President of the Industrial Relations Commission of NSW effective 29 March 2000.

Magistrates

Associate Professor George Zdenkowski and Paul Mulrone have been appointed as Magistrates and Wardens, effective 24 March 2000.

Senior Deputy State Coroner

Janet Stevenson, Magistrate, has been appointed as a Deputy State Coroner and as Senior Deputy State Coroner effective 16 March 2000 to 15 March 2005.

Acting Crown Prosecutor

Helen Wilson has been reappointed as an Acting Crown Prosecutor effective 19 April 2000 to 18 April 2001.

Council of Law Reporting

The following have been appointed as members of the Council of Law Reporting, effective 16 April 2000 to 15 April 2003:

Francis Douglas QC
Joseph Campbell QC
Noel Hutley S.C.
Dr Christopher Birch S.C.
Christine Adamson
Suzanne Boyle
Shauna Jarrett

Bar Association new members

Alister Abadee
Peter Campton
Neale Dawson
Michael Henry
Richard Killalea
Robert Manser
Jeanna Walsh

Bar Association new Class B members

Damian Bugg QC
Debra Ann Mullins S.C.

Staff Appointments

The Bar Association has appointed Shanthini Govindasamy as the replacement Administrative Officer responsible for social functions, Human Resources and the Equal Opportunity Committee. Shanthini has a Bachelor of Arts from the University of Sydney and an MA in Applied Linguistics from Exeter University, England. She taught English in Egypt, Poland and Northern Europe. On her return to Australia, Shanthini completed a paralegal course and worked for Bauer in Selborne Chambers.

You are Invited to attend



The New South Wales Bar Association

Regional Conference

Queen's Birthday Weekend • 10 – 11 June 2000

Registrations close on Friday 2 June 2000

Southern Highlands

\$170.00 members • *\$250.00 non members

Evidence: Developments in Law & Defining the Issues

*For Barristers and *Accredited Solicitors*

P R O G R A M

Saturday 10 June

- 1.30 pm** Golf (optional) Bowral Golf Course
7.30 pm **Registration** and pre-dinner drinks
Bailleau Room, Milton Park Conference Centre
8.00 pm **Conference Dinner** – with *Trivial Pursuit* competition

Sunday 11 June

- 9.30 am** **Supplementary registration:** papers issued
9.45 am **Welcome & Opening**
Ruth McColl S.C. President, NSW Bar Association
10.00 – 11.15 am **"Developments in the Law of Evidence"**
Chair: *Rob O'Neill – Parramatta Bar*
Speaker: *The Hon Justice Virginia Bell, Supreme Court*
Commentator: *Stephen Odgers*

Developments will be considered from both Civil and Criminal perspectives

- 11.15 – 12.00 pm** **Morning Tea**
12.00 – 1.00 pm **"Case Analysis and Evidentiary Issues: Theory"**
Chair: *Stuart Hill – Wollongong Bar*
Speaker: *The Hon Justice Kevin Lindgren, Federal Court*

Why and how? A guide to defining the essential issues of the case

- 1.00 – 2.30 pm** **Lunch**
2.30 – 3.30 pm **"Case Analysis and Evidentiary Issues: Practice Workshop"**
Leaders: *Brian Donovan QC, Jim Glissan QC, Geoff Lindsay S.C. Carolyn Davenport, Crown Prosecutor*

Practice Workshop identifying the issues in a criminal or civil matter

- 3.30 – 4.00 pm** **Regroup for discussion of issues raised**
4.00 – 4.10 pm **Closure:** *Stevens QC*
4.15 – 5.00 **Afternoon Tea**
Guests leave to enjoy the rest of the weekend

Bar Brief is produced monthly for the New South Wales Bar Association by:

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*Contributions and advertising bookings and material for **Bar Brief** must be received by the end of the month prior to publication.*

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Correction

The March edition of *Bar Brief* included an article about the election of new office bearers on the Victorian Bar Council. It listed the Junior Vice-Chairman as 'Jack Rush.' It should read 'Jack Rush QC.' The error is regretted.