



President's Column

Continuing Professional Development

The Association held a Bar planning meeting in late May this year. Forty-three people were present, being members of the Bar Council and heads or representatives of Bar committees, sections and regional Bars. Agreement was reached on a number of principles, which were to be further developed by the Bar Planning Committee (which planned for and co-ordinated the papers for the meeting) and which were then to be the subject of a process of consultation.

Of these, the one which presently has highest priority was the in-principle resolution that the Association should introduce a mandatory continuing professional development programme, to commence on 1 July 2002, to apply to all barristers holding a NSW practising certificate.

Following the meeting, further work was done on the initiative by the Bar Planning Committee and the matter was brought back to the Bar Council's meeting of 12 July 2001.

At that meeting the Council resolved to approve in-principle the introduction of a Bar Professional Development Programme, effective from 1 July 2002. The intention is that the programme will cover legal education, general professional development and skills training.

Methods of teaching proposed include seminars, workshops and discussion groups, to be held at a variety of venues including the Bar Association, Sydney Downtown, Parramatta and regional centres. Seminars are to be made accessible to regional bars, in particular, by electronic and video means. In addition, one or two full days are to be set aside each year where a significant number of credit points can be obtained. It is proposed that each barrister will be required to undertake 10 hours of development each year.

Within the area of legal education, seminars will be offered in all areas but, in particular, public law, equity/commercial, common law, modified statutory schemes, criminal law, environmental, local government and valuation, family law and evidence. Within the area of skills training, areas to



Ruth McColl S.C., President.

be covered would include ethics, oral and written advocacy, negotiation, mediation, pleadings and legal research. Within the area of general professional development seminars will cover all areas but include business administration, risk management, efficient delivery of services and personal health.

In adopting its in-principle position, the planning meeting took into consideration a number of matters.

Most importantly, it considered that it was essential to maintain the professional reputation of the Bar, that it be seen to be serious about raising and maintaining its professional standards at a very high level.

An analysis of existing continuing legal education activities revealed that approximately 80 per cent of the Bar did not attend a single CLE event in any given year. These statistics and anecdotal evidence suggested that many barristers have no self-imposed programme for continuing professional development but leave that exercise to such learning 'on the job' as may be necessary to master a particular brief.

The planning meeting clearly thought this approach undesirable and favoured the view that CLE was important in raising the standards of the Bar. CLE was seen as a means for barristers to look beyond

their narrow areas of specialty and also a means for barristers who find their area of specialty work diminishing to expand their skills. The analogy drawn was with retraining in commercial organisations.

The planning meeting was also influenced by the fact that the English Bar decided in December 2000 to extend its mandatory continuing professional development programme to all members of the Bar. The requirement is to be phased in, so that by 2005 all English barristers will be required to complete 12 hours of continuing professional development each year.

Further, in 1999 the Queensland Bar Association introduced mandatory CLE for a barrister in the first three years of practice. The New South Wales Law Society has had a mandatory CLE programme since 1986 under which 10 hours per annum must be completed. The Law Society recently reviewed its programme and decided to retain it, subject to some variations.

The Planning Committee was aware that the New South Wales Legal Professional Advisory Council ('LPAC') had before it for its May meeting a discussion paper proposing mandatory CLE for the first three years of a barrister's practice in the principles and standards of advocacy and appropriate risk management training. As well, the discussion paper proposed to recommend to the Bar Association that it adopt a recommendation of Justice Hampel - that at the end of the initial three years period of practice, the Bar Council certify, after assessment, that the barrister is proficient in advocacy and a fit and proper person to hold a practicing certificate as an advocate. The discussion paper also proposed that the Association set out in the Barristers' Rules a code in relation to the standards of good advocacy. On 6 August 2001 the Secretary of the LPAC wrote to me enclosing a draft recommendation which confirmed that the LPAC had adopted all of the three recommendations in the discussion paper.

As I have said, the decision reached by the Bar Council both at the planning meeting in May and as adopted on 12 July 2001 was an in-principle decision, implementation of which is subject to consultation with the Bar.

(Continued on page 2)

I raised the matter for comment at the ACT and NSW Bar Associations' Gerringong CLE meeting on 14 July 2001. That meeting was attended by representatives of both the New South Wales and ACT Bars. The proposal was received well. There was favourable comment and no criticism.

I then called a meeting of heads of chambers and silks to discuss the proposal. That meeting was held on the evening of 31 July 2001. The proposal was outlined to the meeting on the basis that those present would take the in-principle decision back to their chambers and to their colleagues for discussion and response.

A number of views were expressed at that meeting. As might be expected, not all were favourable. That is understandable. However, I was heartened by what I believe was the overwhelming sentiment that supported the proposed changes. I was also heartened to receive an expression of support from some who were unable to attend, one of which was from TEF Hughes AO QC, which he has kindly given permission to be reproduced.

Only five years ago the LPAC recommended mandatory CLE for the whole Bar and the Association successfully opposed that initiative. However times have changed. Litigation against members of the Bar has increased substantially in the last four or five years with a consequent adverse upwards effect on professional indemnity insurance premiums. It was apparent from negotiations to secure the services of Willis to advise the Bar on professional indemnity insurance, that risk management programmes such as professional development were seen as relevant to premium levels.

Another of the issues considered and approved at the planning meeting was the implementation of a scheme under the *Professional Standards Act 1994* (NSW). Such schemes include as an essential pre-requisite demonstration that the relevant body, with its scheme, has in place risk management procedures. Continuing professional development is such a risk management procedure.

Finally, the increased emphasis on the efficient administration of justice reflected in the overriding purpose introduced to the Supreme Court Rules in January 2000 and the increasing emphasis on controlling the cost of justice, emphasises that barristers need to be highly competent and increasingly efficient in order to meet rapidly changing demands. Such competency and efficiency will be enhanced by regular professional development.

Members are entitled to be concerned as to the content and cost of the proposed

new system. I have already set out the proposed content. It is intended that the implementation of the programme, should it proceed, be undertaken by a Director of Studies, being a person with both legal and education qualifications. The programme will be very carefully budgeted to ensure there is appropriate support for the Director of the new programme as well as funding for the travel associated with the programme, materials and payment for several flagship lectures.

The establishment of the programme and its first year implementation will be the responsibility of Bret Walker S.C., the Senior Vice President, in conjunction with a small committee to consist of three barristers to be nominated by myself, the Executive Director and, when retained, the new Director of Studies.

For those who are interested, the report by Sir John Collyear FR Eng, who chaired the Committee of the General Council of the Bar of England and Wales 'Blueprint for the Future' which reported on education for the English Bar can be read at www.lawzone.co.uk/barcouncil/resources/download/colly.pdf

I would welcome feedback from members about this proposal

Prudent and Good Practice

Prudent practice, highlighted by events earlier this year, dictates that barristers put in place procedures to ensure that sufficient money is set aside regularly to meet their obligations. In particular, no barrister should lose sight of the requirement to account to the Australian Taxation Office on a quarterly basis for GST for 10 per cent of receipts and in addition for PAYG income tax at the Commissioner's notified instalment rate (often in excess of 30 per cent).

This issue was also considered at the planning meeting which resolved to recommend to members of the Bar that they ensure that within a short period of time after payment of each memorandum of fees, sufficient moneys are placed in a separate bank account to meet GST and income tax liabilities at the Commissioner's instalment rate. It is, of course, essential that barristers do not then 'raid' this account for purposes other than payment of tax obligations.

The Association recommends that barristers consult their accountants to ensure there are appropriate procedures in place for meeting income tax and GST obligations.

Common Law Inquiry

Further to my report in July *Bar Brief*, the Association made oral submissions to the Sheahan Inquiry on 30 July 2001. Katzmann S.C., Hoeben S.C., King S.C. and Ferrari and I addressed. Justice

Sheahan and members of his advisory group and representatives of the Inquiry office. Justice Sheahan's report is to be handed to the Governor of New South Wales by 17 August 2001*.

Transcripts of oral submissions to the inquiry can be read at the Inquiry's website: www.sheahan.inquiry.nsw.govt.au

Lawyers' Survey

A recent article in *The Age* reports on a survey commissioned by Victoria's Legal Ombudsman, Kate Hammond. The survey revealed a high degree of satisfaction among Victorians surveyed with the service they had received from their lawyers. Seventy one per cent rated the service they received as good or very good compared to seven per cent who considered it poor or very poor.

The survey reported that delays, poor communication, unprofessionalism and costs were the main areas of complaints for those unhappy with lawyers' services. These areas also reflect many of the most significant areas of complaints concerning members of the New South Wales Bar.

* Footnote: Extended to 31 August 2001.

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Bar Council business for June 2001

President's report

Workers compensation

The President advised that the Special Minister of State, The Hon. John Della Bosca MLC, had not arranged for consultation on the workers compensation legislation, nor had he provided requested documentation.

Katzmann S.C. and the Executive Director had briefed a number of parliamentarians. The President and Katzmann S.C. had given a number of media interviews.

HIH collapse

The President advised that it was not practical for a Bar Association nominee to be appointed to the Consultative Committee being established by HIH's Provisional Liquidator. Confidentiality provisions would prevent any reporting back to the Bar Council; further, as the Bar Association was not a creditor, any nominee would be unable to speak on behalf of barristers who may be creditors.

Contempt proceedings against Mr Katelaris

The President advised that on 1 June Justice McClellan found Mr Katelaris in contempt of court for his assault on Horler QC. Sentence had yet to be handed down.

Senior Counsel Appointment Committee

The President advised that the following would comprise the Senior Counsel Appointment Committee for 2001:

McCull S.C. (President)

Walker S.C. (Senior Vice President)

Hastings QC

Forster S.C.

Walmsley S.C.

Bench and Bar Dinner, 18 May 2001

The President advised that a number of attendees had spoken highly of the function. Bar Council expressed its thanks to the speakers and, in particular,

to Ms Denise Fleming, the Association's Administrative Officer (Social Functions).

Victorian Bar Dinner

The President advised that she had represented the NSW Bar Association at the Victorian Bar Dinner held in Melbourne on 2 June 2001.

Practising certificate renewals

The Executive Director reminded Bar Councillors that practising certificate renewals were due by cob 22 June 2001. The Executive Director emphasised that practitioners should lodge renewal applications even if professional indemnity insurance had still to be effected.

Items for consideration

Academics' practising certificates

Bar Council resolved that all academics who wish to hold a practising certificate be required to hold professional indemnity insurance.

It was further resolved that practising certificates issued to an academic continue to bear the following annotation:

'This certificate is subject to the condition that the holder is not permitted to appear as a barrister without a leader in any court, tribunal or arbitration except with the permission of the Bar Council'.

Liquor Bar – new credit arrangements

The Executive Director outlined the administrative and other problems that arise because of the existing credit arrangements. There are significant administrative overheads in administering these arrangements. Members are able to purchase liquor with cash, cheque or 4 credit cards.

It was resolved that the Bar Association discontinue the liquor bar credit account system once alternative arrangements are put in place.

Results of strategic planning meeting held on 26 May 2001

Bar Council noted the papers relating to

the strategic planning meeting of 26 May 2001. The President advised that from her discussions with a number of those who had attended this meeting, there seemed to be a general view that it had been very successful. Gleeson S.C. outlined the action being taken by the Strategic Planning Committee to advance matters discussed at the planning meeting.

Bar Council resolved that the Executive determine how best to consult with the Bar on the various issues that arose from the Planning Day and the on-going work of the Planning Committee. The Executive would also discuss a proposed timetable for the implementation of the proposed Bar's continuing legal education programme.

Note: Because of the confidentiality provisions in the *Legal Profession Act 1987* (s171P), 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.

Letters

Dear President,

Unfortunately, I was unable to attend the meeting of heads of chambers and silks, held on 31 July.

I write to express my support for the establishment of a regime of continuing legal education for all members of the Bar, regardless of seniority.

The time is past for the Bar as a professional body to rely only on 'on the job training'.

We must be seen to be determined to upgrade our efficiency.

If I can be of any help with the programme, please let me know.

T E F Hughes QC



BarCare is designed to guide barristers through emotional and stress related problems including family or marital problems, drug or alcohol dependency and practice pressures. The Bar Association will cover costs associated with the initial consultation with the BarCare counsellor.

For further information contact the Education Manager on (02) 9229 1722 or barcare@nswbar.asn.au

Federal Court Refugee Legal Advice Scheme

Expressions of interest

The Hon. Phillip Ruddock MP, Minister for Immigration and Multicultural Affairs, has approved an extension of the Federal Court Refugee Legal Advice Scheme for a further 12 months to 31 July 2002. Members who have not already done so are invited to submit an expression of interest. The scheme has been operating since 1 July 2000 along the following lines;

The purpose of the scheme is to expedite the Federal Court process by having applicants challenging an adverse decision of the Refugee Review Tribunal receive advice on the legal merit of applications at an early stage and having the grounds and particulars of applications that do proceed more clearly set out.

The Bar Association and Law Society appoint panels of members with relevant experience to participate in the scheme.

Where a panel member believes the application should be pursued, the panel member assists in redrafting the application, including properly particularising the application.

The Department wishes to receive a redrafted application, not advice from the panel member. The Court wishes to know that applicants have received legal advice about their application, and understand the role of the Court in determining appeals against decisions of the Refugee Review Tribunal. The Court will be able to take into account the fact that an applicant has received advice when setting down a date for the hearing of the application should the applicant proceed with their application after receiving advice from a panel member.

The Bar Association and Law Society advise the Federal Court of the names and contact details of the panel members. The Court, which has about 350 applications in its list in NSW, with about 25 being lodged in Sydney each month (with up to fifty percent of persons being in detention), asks each applicant if they wish to receive legal advice from a panel member. If the applicant wishes to receive advice, the Court contacts the next panel member on the list and gives them the name of their assigned applicant, and also arranges for the Australian Government Solicitor's Office to forward the Green Book to the practitioner. (It may take about six weeks for the Green Book to be made available).

The Court provides the applicant with a written statement setting out the terms of the scheme; each panel member is also provided with a copy of that statement.

Once the Green Book is provided to the practitioner, he or she meets with the applicant within two weeks, and returns to the Court within a further week the Green Book and a note advising

that advice has been provided to the applicant (and any redrafted application if that is considered appropriate). A copy of the note is returned to the Department. The practitioner also forwards to the Bar Association a notice of the advice having been given so that the Association can arrange payment.

The Department pays a flat fee of \$600 per matter (plus a further \$150 if the panel member needs to travel to meet the applicant should he or she be in custody at, say, Villawood). If an interpreter is required, the panel member makes the necessary arrangements and bills the Department direct. The panel member is paid the flat fee even if the applicant fails to attend for the conference, on the basis the practitioner will have done the preparatory work and set aside an hour for the conference. Panel fees (but not interpreter fees) are paid through the Bar Association.

If an applicant, having been given advice by a panel member, wishes to brief that member to act for them, that is a matter *totally separate from the advice scheme*.

Members wishing to be considered for appointment to the Bar Association's panel should write to the Executive Director briefly setting out their relevant qualifications and experience. Applications can be posted to DX 1204; faxed to 9221 1149 or e-mailed to executivedirector@nswbar.asn.au

Members who are already on the Association's panel need not reapply. However, should a member no longer wish to continue on the panel, they should let the Executive Director know.

Bar Association Liquor Bar

The liquor bar no longer runs a credit system.

A cash system and credit card/EFTPOS machine (Amex, VISA, Mastercard and Bankcard accepted) are available for your convenience.

WATER – INFORMATION - NSW



The cover of the book.

WATER (NSW) A to Z

is a new and large book publishing October 2001 as a limited edition. It covers all aspects of the inland, estuarine and marine waters of the State (plus a little bit about the ACT), including sources, uses (eg. agriculture, domestic, fishing, navigation, environmental), sharing, legal, management, political

and more. There is so much NSW water law that a special section of LAW NOTES, cross-referenced with the main text, is provided for lawyers. The price is a very high value-for-money at \$66 (incl. GST and postage).

The author/editor is Ian Salmon, a retired NSW solicitor experienced in water matters.

Please visit the special web site www.waterbooks.com.au for a full description of what the book offers and how to reserve a copy. Or request the publisher, Waterbooks [PO Box 212, Main Beach Qld 4217; fax 07 5532 6053; tel 07 5532 6036] for a free, summarised, fact-sheet.

GST on barristers' fees where the client is a non-resident

In December last year the Law Council of Australia obtained written confirmation from the Australian Taxation Office ('ATO') that GST is generally not payable on fees charged by a barrister for services supplied to an Australian solicitor acting as agent for a non-resident who is not in Australia when the services are performed and either the services are not directly connected with real property in Australia, or the non-resident client obtained the services in carrying on an enterprise and is neither registered nor required to be registered.

GST is payable on a 'taxable supply' as defined in *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act'). This is a supply made for consideration in the course or furtherance of an enterprise, which is connected with Australia and is made by an entity which is registered or required to be registered, except where the supply is GST-free or input taxed (s9-5).

Where a barrister provides services to an Australian solicitor acting as agent for a client who is a non-resident, and the barrister performs the services in Australia, the supply will have the relevant connection with Australia (s9-25). Assuming the barrister is registered or required to be registered, the supply will be a taxable supply unless it is GST-free.

Item 2 in the table in s38-190(1) of the GST Act provides that the following supply (except to the extent that it is a supply of goods or real property) is GST-free:

a supply that is made to a non-resident who is not in Australia when the thing supplied is done, and:

- (a) the supply is neither a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia; or
- (b) the non-resident acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered.

This is subject to s38-190(3) which provides that a supply covered by item 2 set out above is not GST-free if:

- (a) it is a supply under an agreement entered into, whether directly or indirectly, with a non-resident; and
- (b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.

ATO advice

The Law Council of Australia sought the views of the ATO on the following question:

When an Australian barrister provides services to an Australian solicitor who is acting as agent for a non-resident client who is not in Australia when the barrister supplies the service and the service is not directly connected with real property in Australia, or the non-resident client obtains the services in carrying on an enterprise and is neither registered nor required to be registered, are the barrister's services GST-free in terms of subsection 38-190 table item 2 of the GST Act?

The ATO's answer to that question was as follows:

Yes. The normal rules of agency apply. Accordingly, when an agent uses his or her authority to act for a principal, then any act done on behalf of that principal is an act of the principal.

Therefore, when a solicitor acts as agent for a non-resident client in obtaining the services of a barrister, the services are in effect provided to the non-resident client. The supply by a barrister who is registered for GST will therefore be GST-free in terms of table item 2, subsection 38-190(1) of the GST Act. Subsection 38-190(3) which specifically refers to a supply covered by item 2, will not be applicable in these circumstances as the solicitor is merely acting as a conduit for the information provided as a result of the services of the barrister. On this basis, the supply of information under an agreement is not provided to another entity in Australia. It should be noted that this advice applies only where the solicitor is acting as agent for the client.

However if the solicitor is acting in his or her own right in obtaining the services of a barrister, the supply will not be GST-free even though the name of the solicitor's client may be provided to the barrister.

The facts provided to the ATO on which the ATO relied in answering this (and another) question were as follows:

When a solicitor retains a barrister to provide services to a client of the solicitor, the solicitor will normally act as agent of the client.

As between the barrister and the solicitor, however, the obligation to pay the barrister's fee is that of the solicitor even though the solicitor acts as agent of the client. The Legal Profession Act 1987 provides for the making of a costs agreement between a barrister and a solicitor. A barrister will normally address a fee note (now a tax invoice) to the solicitor and not to the solicitor's client.

In some cases a solicitor will retain a barrister to provide services to the solicitor when the solicitor is not then acting for a client. In such a case the solicitor is acting as principal and not as agent.

When a solicitor receives moneys from a client for the payment of a barrister's fees, those moneys are deposited to the solicitor's trust account and are held in trust for the client until the barrister's tax invoice is received. In the period during which the moneys are held in trust they play no part in the calculation of a solicitor's assessable income for the purposes of the Income Tax Assessment Act 1997 ('1997 Tax Act').

When a barrister's tax invoice is received, moneys are paid from the trust account to the barrister. Again, the payment plays no part in the calculation of the solicitor's assessable income.

If a solicitor receives a barrister's tax invoice in advance of obtaining funds from the client, moneys subsequently received for payment of the barrister's fee are paid into the solicitor's trust account and then to the barrister. Again, the receipt and payment play no part in the calculation of the solicitor's assessable income.

It is a rare occurrence for a solicitor to pay from the general account a barrister's fee in advance of receiving funds for the client. But, again, payment and receipt play no part in the calculation of the solicitor's assessable income. In this case, it is appropriate to regard the advance payment by the solicitor as being made as agent for the client and to regard

(Continued on page 6)

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GST on barristers' fees where the client is a non-resident

(Continued from page 5)

the receipt as a discharge of the agent's disbursement and to treat payment and receipt as forming no part of the remuneration for professional services of the solicitor.

These views are expressed by the ATO in an 'interpretative advice' addressed to the Law Council of Australia which is not binding on the ATO. Nevertheless the ATO can be expected to follow it unless and until it subsequently issues a public ruling that conflicts with the advice or there is a relevant change in the legislation.

There is some ambiguity in the reference in item 2 of the table in s38-190(1) to a 'non-resident who is not in Australia'. Where the non-resident is an individual and is physically present in Australia when the barrister's services are performed, item 2 would not apply. Also, it would not apply where the non-resident is a company which has a branch or representative office here. If there is any doubt whether the non-resident is in Australia, the barrister concerned should give consideration to obtaining a ruling from the ATO or specialist advice.

A barrister who proposes to rely on item 2 of the table in s38-190(1) should ensure that the costs agreement which he or she enters into with the instructing solicitor states that the instructing solicitor is acting as agent for the non-resident client. Also, the barrister should obtain confirmation from the instructing solicitor that the non-resident client is not in Australia and, where necessary, is not registered or required to be registered for GST purposes. The fee note issued by the barrister to the solicitor should state that the supply is GST-free.

Ian Gzell QC
Chairman

Mark Richmond
Member
Taxation Committee

Struck off

On 13 August 2001 the Administrative Decisions Tribunal, Legal Services Division ordered that the name of **Dr Nguyen Van Thieu** be removed from the Roll of Legal Practitioners. Dr Nguyen's practising certificate was cancelled by resolution of the Bar Council on 15 June 2000.

On 23 July 2001 the NSW Court of Appeal made an order that the name of **John Cummins QC** be removed from the Roll of Legal Practitioners.

On Monday 20 August 2001 the NSW Court of Appeal, as a consequence of disciplinary proceedings taken by the NSW Bar Association, ordered that the name of **Lawrence Robert Somosi** be removed from the Roll of Legal Practitioners.

Self-represented litigants

On 23 July 2001 the Bar Association hosted the launch of *Guidelines for barristers on dealing with self-represented litigants*.

The Chief Justice of the Family Court of Australia, The Hon. Justice Alastair Nicholson AO RFD, told guests of the extent of self-representation in the Family Court and outlined some of the practical difficulties faced by judges. Both the Chief Justice and the President, McColl S.C., congratulated the author, Brian Knox, for producing a work of outstanding assistance to the Bar.



The Hon. Justice Alastair Nicholson AO RFD, Chief Justice of the Family Court of Australia.

Copies of the *Guidelines* were mailed to all members. A copy may also be obtained in PDF from the Bar Association's web site.

Since the printing of the *Guidelines*, the Family Court has handed down its judgment in *Re F: Litigants in Person Guidelines*. The Association's *Guidelines*, therefore, need to be read in conjunction with *Re F*. The web version of the *Guidelines* will be revised to

take into account the judgment of *Re F* and other relevant judgments as they are published.

Media briefing

Media releases and letters to the Editor issued by the NSW Bar Association

'Letter to the Editor', *Sun Herald*, 12 August 2001, unpublished

Bar Association welcomes Law Reform Commission report, 10 August 2001

Visit the Bar Association's web site at www.nswbar.asn.au to obtain the full text of all media releases and letter to the Editor.

Appointments

NSW District Court

Stephen Walmsley S.C. has been appointed a Judge of the District Court of New South Wales, effective 27 August 2001.

Acting Chief Justice of NSW

The Honourable Justice Keith Mason has been appointed Acting Chief Justice of the Supreme Court of New South Wales, effective 1 September 2001 to 22 September 2001.

Acting judges of the NSW Supreme Court

The following persons have been appointed to act as judges of the Supreme Court of New South Wales for the periods shown:

The Hon. Gerald Fitzgerald AC QC 3 September 2001 to 30 November 2001 (Acting Judge of Appeal)

The Hon. James Rolfe QC 24 September 2001 to 30 November 2001 (Acting Judge of Appeal)

The Hon. James Burchett QC 3 September 2001 to 2 September 2002
Thomas Davidson QC 9 August 2001 to 8 August 2002

His Honour Judge Kenneth Taylor AM 27 August 2001 to 19 October 2001

His Honour Judge William Knight 27 August 2001 to 26 October 2001

His Honour Judge Harvey Cooper 22 October 2001 to 14 December 2001

His Honour Judge Ronald Solomon 29 October 2001 to 14 December 2001

Acting judges of the NSW District Court

Thomas Davidson QC and Joseph Moore have been appointed acting judges of the NSW District Court, effective 9 August 2001 to 30 June 2002.

Regional Bar Conference

By Bill Walsh

The recent NSW/ACT Regional Bar Conference at Gerringong was a great success. The venue facilities were good and the speakers were good as well. The inclusion of such papers as *A balancing act: surviving and thriving in private practice* and *Practical financial planning* was a good idea (as was the invitation to partners to attend these two papers), and the social evening was great fun. All in all, it was a success. It was also a great opportunity for the ACT and NSW Bars to strengthen their collegiate ties and share some time together.

Now that we are on the road to mandatory legal education/development, I would like to suggest that it is timely that consideration be given to holding an annual Bar conference in Australia. I

have in mind that the various State and Territory Bars could take it in turns to be the host for such a conference. I know that the Australian Bar Association has a bi-annual conference overseas; however not everyone is able to travel overseas, especially every two years.

Over the years, Australian barristers have had little or nothing to do with our brothers and sisters from other States and Territories. As we move towards some form of 'nationalisation' of the legal profession in Australia, I consider it timely that we move in the direction of an annual conference for barristers in Australia. Such annual conferences would strengthen our collegiality as well as give us an opportunity to share ideas and experiences. No doubt the members

of the various Bars would welcome the opportunity to travel to other States and Territories. Such conferences would not need to be plush, expensive shows. The recent ACT/NSW regional conference was good value for money.

With the advent of mandatory legal education/development, the Bar will be looking for more opportunities to conduct legal education/development programs, which are worthwhile and of appeal to our members. No doubt other State and Territory Bars will have similar aspirations.

I have forwarded my suggestion to Ruth McColl S.C. in her capacity as the President of the Australian Bar Association. Does anyone share my thoughts?

Bar Association did not seek power to search and seize

The Senior Vice President, Bret Walker S.C., has repudiated reports that the Bar Association sought powers to enter, search and seize documents from barristers' chambers.

In its latest report, *Complaints against lawyers*, the New South Wales Law Reform Commission examined the procedures contained in Part 10 of the *Legal Profession Act 1987*.

In its consideration of the power of the Legal Services Commissioner to compel practitioners to cooperate with investigations, the report cited 'numerous submissions ... that this power should be strengthened.' The Bar Association submission, made on 22 December last year, was one example. (Footnote 105)

The Commission recommended that Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the Legal Services Commissioner powers of

entry, search and seizure without notice when considering complaints (Recommendation 11).

It was reported by Chris Merritt in the *Australian Financial Review* on 10 August that the Bar Association wanted all three regulators of the legal profession to have 'the power to raid lawyers' offices'.

The true position of the Bar Association was contained in paragraph 112 of its submission, which stated: 'The Bar Association should have power to appoint an investigator similar to the power of the Law Society under s55(1)(b) of the *Legal Profession Act 1987*.'

The Association's Senior Vice President, Bret Walker S.C., clarified the issue through comments reported in the AFR's 'Hearsay' column. He explained that the Association only wanted the power to enter chambers in strictly limited circumstances: such as when a barrister

is incapacitated or simply vacates his or her practice. On the rare occasions when this occurs, it is necessary to recover documents relating to briefs to protect the interests of clients.

'You can attribute to us a lack of support for a comprehensive search warrant-style power in aid of all and any investigations. We have never come out in support of that', said Walker S.C.

Despite the confusion over Recommendation 11, the Bar Association has generally welcomed the report. The President of the Bar Association, Ruth McColl S.C., issued a media release in support of most recommendations, believing that they will make the complaints process more efficient and less subject to technicalities.

The Commission did not examine the more fundamental aspects of co-regulation, instead recommending a further review of the Act by the Attorney General's Department. That review also has the support of the Bar Association.

**Volunteer for the
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Speakers Bureau**

Those wishing to register for the Speakers Bureau should contact the Public Affairs Officer on
ph: (02) 9229 1732 ; fax: (02) 9221 1149
e-mail: cwinslow@nswbar.asn.au
or via DX 1204 SYDNEY

DPP responds to *Bar News* article

Dear Ms McColl

I have read in the Winter 2001 edition of *Bar News* the 'Opinion' piece at pages 20-21 by the Hon. J A Nader RFD QC. In my view the article presents an inaccurate and unfair picture of the exercise by my Office of its prosecutorial discretion.

Mr Nader has never raised concerns of this kind with me; nor was his article provided to me for comment before publication. No Judge has raised such issues with me. (My address is not a state secret.) I have since discovered that Acting Judge Nader made some remarks in a similar vein from the Bench in April 2001, but the transcript has only just reached me. It appears that he has not taken the trouble to consider the statistics in my Office's official records or those of the Bureau of Crime Statistics and Research or even to request information from me or my senior officers.

When Mr Nader writes of my Office he writes of me, because pursuant to the Director of Public Prosecutions Act 1986 the decision to prosecute or to discontinue a prosecution resides with me and I delegate that power to nominated officers in particular circumstances. I am an avid defender of the just rule of law and my officers and I are guided in our decision making by the law, the evidence and my Prosecution Policy and Guidelines (a document that is publicly and freely available). We disregard entirely any clamour in the media and the manoeuvring of politicians, especially 'vocal but uninformed criticism'. We are routinely required to withstand and sometimes to put aside even trenchant criticism.

The facts should be summarised briefly (in case anyone does take this article seriously).

For some ten years or more we have been presented with increasing numbers of allegations of child sexual assault. This is not confined to New South Wales – it is a national and international phenomenon.

There is reason to believe that the increase is not due to increased offending (which has always been present), but is due to increased reporting. We know that there is substance in these reports – they are not the result of some mass hysteria in a section of the population. We also know that some of the reports are false.

Such offences, by their very nature, are often committed, reported and prosecuted in the circumstances described by Mr Nader under the heading 'The general circumstances'. Is he suggesting that in all (or even most) such cases I should take the place of the jury and administratively, peremptorily determine the proceedings – despite there having been committals for trial (which, in footnote 2, the author does not criticise: for reasons that, at least to me, are far from 'obvious')?

Many cases in this category are in fact discontinued by me and my delegates in the exercise of judgment in accordance with the Prosecution Policy and Guidelines. The

majority of the cases that proceed are resolved by pleas of guilty and never get to juries. Presumably (according to Mr Nader) the finding of bills of indictment in those cases has been an abuse of process as well.

The identification of meaningful statistics about criminal proceedings is a difficult and complex exercise. Each case is unique and there are many variables to be taken into account, making comparisons difficult. It is simplistic and may be misleading to say that 'Most of these trials result in acquittals by juries'. In fact, the conviction rate in child sexual assault (CSA) cases that proceed to verdict in NSW is slightly above the general conviction rate for all trials. By way of example, for the year 1999-2000 the conviction rate in all trials that proceeded to verdict was 43.7 per cent (consistently with other years). The rate of conviction in CSA trials that year was 6 per cent higher than in non-CSA trials.

Some appeals from convictions are successful – usually because the judges have been found to have erred in the admission of evidence or in their directions to juries. (The author is included in such statistics, on at least one occasion for not having sufficiently warned the jury of the dangers of convicting. And I am not aware of any case in which Acting Judge Nader has taken it upon himself to stay any such proceedings. In the case in April 2001 in which he made public remarks, the charges were not withdrawn from the jury at the end of the Crown case, nor was a 'Prasad' direction given. The trial proceeded its full length and the jury's verdict was taken.) Judges are required to give warnings to juries about acting upon various categories of evidence in all these

cases, but juries still convict.

There are well established procedures in my Office for dealing with victims, in accordance with the Charter of Victims Rights and other instruments and guidelines in place (and too numerous to describe here). Despite our best endeavours, some victims do become emotionally distressed, whether or not there is an acquittal and regardless of their preparation for the trial. That experience is not confined to child sexual assault cases. My officers also suffer in these circumstances. Throughout the proceedings, my officers provide explanation and support in an appropriate fashion and we have specialist Witness Assistance Service officers on hand. (Why does Mr Nader ignorantly assume that such measures are not taken?)

My Prosecution Policy 5 lays down the tests to be applied when deciding whether or not a prosecution will be commenced or continued. My officers and I follow that Policy. The fundamental question is whether or not there is a reasonable prospect of conviction by a reasonable jury properly instructed as to the law. That question is addressed in every case we prosecute, based on the available admissible evidence and the law. Naturally, in every case the answer requires the making of a judgment on the basis of what is known at the time and that judgment requires, amongst other things, that the admissible evidence available be considered in the light of the probable course of the trial and the warnings that will be given by the judge.

Mr Nader's final attack on my independence cannot pass unchallenged. I am constantly subject to 'vocal but uninformed criticism' from many quarters (now, apparently, also from Mr Nader); but in my nearly seven years in office that has never influenced my decisions one whit. He says that he 'raise[s] for consideration whether there is any connection between' what he suggests may be a policy decision to prosecute almost every case (a 'flood') of child sexual assault, regardless of the prospects of conviction, and the publicity given to unsubstantiated allegations of official protection of paedophiles. I resent and reject that suggestion. There has never been such a policy decision. Prosecution decisions have not been and are not in any way influenced by publicity of any kind.

My senior lawyers, Crown Prosecutors, the Deputy Directors and I (all but the senior lawyers being members of the NSW Bar Association) do not conduct ourselves in the way suggested by Mr Nader and we are offended by what he has written.

Yours faithfully

N R Cowdery QC

Director of Public Prosecutions

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Speeches

'The importance of the International Criminal Court', delivered by The Hon. Daryl Williams AM QC MP on 9 August 2001. A copy of this speech may be obtained from the Commonwealth Attorney-General's web site at www.law.gov.au/ministers/attorney-general. A copy is held in the Bar Library.

'The poet's rich resource: issues in statutory interpretation', by The Hon. Justice J J Spigelman AC. This speech, delivered at the Government Lawyers' Convention on 7 August 2001, examines issues in statutory interpretation, such as the 'purposive approach', 'text versus purpose' and the use of extrinsic materials. The speech may be obtained from the Supreme Court web site at www.lawlink.nsw.gov.au/sc. A copy is held in the Bar Library.

'Beyond Mabo: The practical realities of negotiating native title', by The Hon. Daryl Williams AM QC MP. This speech was delivered on 2 August as the opening address of the 2001 Native Title Forum. A copy of this speech may be obtained from the Commonwealth Attorney-General's web site at www.law.gov.au/ministers/attorney-general. A copy is held in the Bar Library.

'Family law: past, present and future', delivered by The Hon. Daryl Williams AM QC MP, at the Family Courts of Australia 25th Anniversary Conference on 26 July 2001. A copy of this speech may be obtained from the Commonwealth Attorney-General's web site at www.law.gov.au/ministers/attorney-general. A copy is held in the Bar Library.

'The shape of representative democracy', The ninth Lucinda Lecture, by The Chief Justice of Australia, The Hon. Justice A M Gleeson AC. This speech, delivered on 24 July 2001, compares the Australian system of government with that of Canada, the United States, NZ and the UK. He argues that critics of the Australian Constitution should have regard to the political context in which it emerged and the formative influences upon those who drafted it. A copy of the speech may be obtained from the High Court web site at www.hcourt.gov.au/speeches. A copy of the speech is held in the Bar Library.

In brief

Parker QC made a Life Member

At a meeting held on 17 August 2001, Bar Council unanimously elected R W R Parker QC a Life Member of the Bar Association, for exceptional service over the past 35 years.

Sheahan Inquiry submissions

The Bar Association's submissions to The Commission of Inquiry into Workers Compensation Common Law Matters ('the Sheahan Inquiry') are available from the Association's web site at www.nswbar.asn.au. Transcripts and other information may be obtained from the Inquiry's web site at <http://www.sheahan.inquiry.nsw.gov.au/>

Senior Counsel Selection Committee

Campbell Bridge S.C. has joined the Senior Counsel Selection Committee, replacing Stephen Walmsley S.C., who has been appointed to the NSW District Court.

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The Bar Association History Scholarship

On Thursday 9 August 2001, the Bar History Committee hosted a function to celebrate the signing of a scholarship agreement between the Bar Association and Macquarie University.

The purpose of the scholarship is to foster interest in the history of barristers in New South Wales and to support postgraduate research by law or history students enrolled at Macquarie University. The Bar Association will pay a stipend of \$20,000 per annum for two years to MA or LLM students, or three years for those doing a PhD.

Professor Ros Atherton, speaking on behalf of Macquarie University, thanked the Bar Association President, Ruth McColl S.C. and the Chairman of the History Committee, Geoff Lindsay S.C. for the generous support they have given to the study of legal history.



Ruth McColl S.C. and Professor Peter Bergquist, Deputy Vice-Chancellor (Research) of Macquarie University.

In response, the President thanked the Committee for implementing the scholarship and for advancing other Bar history projects.

Coming up

Stephen Lewis Walsmley S.C. will be sworn in as a Judge of the District Court of NSW in Court 21A, John Maddison Tower on Monday 27 August 2001 at 9.30am.

Robes and wigs to be worn.

Katzmann S.C. will speak on behalf of the Bar.

All inquiries should be directed to Denise Fleming, tel: 9229-1720, e-mail: dfleming@nswbar.asn.au.

Advocacy Committee workshops

Cross examinations

Tuesday 25 September 5:30 - 7:00pm, Level seven, Queen's Square (All courts)

Thursday 27 September 5:30 - 7:00pm Level seven, Queen's Square (All courts)

Appellate practice

Tuesday 23 October 2001 5:30 - 7:00pm Level seven, Queen's Square (All courts)

Thursday 25 October 2001 5:30 - 7:00pm Level seven, Queen's Square (All courts)

Sir Maurice Byers Memorial Address

The Hon. Justice Michael McHugh AC will deliver the 2001 Sir Maurice Byers' Memorial Address on Wednesday, 17 October 2001 at 5.30 pm in the Bar Association Common Room. The title of the address will be announced closer to that date.

Retirement of Philip Jenkyn

On Thursday, 13 September 2001, between 5.00pm and 7.00pm, there will be an informal gathering in the Bar Association Common Room to mark the retirement of Phil Jenkyn (8 Wentworth Chambers). Phil is retiring on medical advice. All inquiries to Robyn on ph: (02) 9232 7967.

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At the lectern

Date	Audience	CLE Topic	Speakers
Monday, 10 September	Monday night series series	Cross examination on experts: Three perspectives	Chair: Brian Donovan QC Speaker: Ian Barker QC Robert Stitt QC Expert: Godfrey Oettle
Friday 28 September	Breakfast seminar	The NSW Drug Court	Speaker: Her Honour Judge Gay Murrell S.C. Chair: Tim Game S.C.

Conferences

The International Society for the Reform of Criminal Law: Politics, Crime and Criminal Justice, Canberra, 26-30 August 2001. The theme of the conference is to examine the inter-relationship of politics and criminal justice systems at local, national and international levels. Topics to be discussed include corruption, judicial independence, law reform commissions and restoration of criminal justice systems following the collapse of civil authority. For more information about the ISRCL and the conference, visit their web site at www.isrcl.org or contact the Secretariat in Vancouver, Canada on ph: ++ 1 604 643 1252 or e-mail: secretariat@isrcl.org. A conference registration brochure is held at Bar Association's Reception.

International Association of Lawyers / Union Internationale des Avocats, 45th Congress, Turin, 29 August - 2 September 2001. Topics to be discussed include 'The legal profession: the challenge of the third Millennium', 'Globalisation of the economy' and 'Children and criminal law'. For more information contact the UIA on ph: ++33 1 22 88 55 66, fax: ++33 1 44 88 55 77, e-mail: uiacentre@wanadoo.fr or visit the their web site at www.uianet.org. A conference programme and registration brochure is held at the Bar Association's Reception.

6th Annual Conference and General Meeting of the International Association of Prosecutors, Sheraton on the Park, Sydney, 2-7 September 2001. The principal theme of the conference is 'The role of the prosecutor in the new millenium' and the programme will include discussion on: 'The UN Convention against Transnational Organised Crime', 'The establishment of the International Criminal Court' and 'The plight of prosecutors in developing nations'. A copy of the programme and registration brochure may be obtained from the IAP 2001 Conference Managers on ph: (02) 9262 3135, email: iap2001@tourhosts.com.au or by visiting their web site at www.tourhosts.com.au/iap2001. A copy of the preliminary programme is held at Bar Association's Reception.

DNA evidence prosecuting under the microscope, Stamford Grand Adelaide, Glenelg Beach, South Australia, 9-11 September 2001. This conference, hosted by the South Australian Attorney General and the S.A. Office of the Director of Public

Prosecutions, will feature numerous lectures and workshops on DNA evidence and its future role in the courts. For more information, contact the Conference Secretariat on (08) 8379 8222, e-mail plevin@camtech.net.au or visit their web site at www.camtech.net.au/~plevin/dna/Home.htm. A conference information and registration brochure is held at the Bar Association's Reception.

Australian Wills & Probate Conference 2001, Vancouver, 16-19 September 2001. This conference is organised by the Leo Cussen Institute. For more information, contact Patricia Palman on ph: (03) 9602 3111, e-mail: ppalman@leocussen.vic.edu.au or visit their web site at www.leocussen.vic.edu.au

A celebration of federation: The Australian Constitution in retrospect and prospect. The National Conference of the Australian Association of Constitutional Law, Perth, 21-23 September 2001. Speakers include Sir Anthony Mason AC KBE, The Hon. Daryl Williams AM QC MP, Professor Geoffrey Bolton AO, David Jackson QC and Professor George Williams. Topics include 'Assumptions and expectations of 1901', 'Globalisation of rights and the constitution', 'Changing attitudes to federalism' and 'The role of government and its evolution'. A conference programme and registration brochure is held at the Bar Association's Reception.

The 2001 World Congress on Family Law and the Rights of Children and Youth, Bath, 19-22 September 2001. Topics for discussion include 'The revision of the Hague Convention on the Abduction of Children', 'International access arrangements' and 'Protection of children from violence'. For more information contact Capital Conferences Pty Ltd on ph: (02) 9252 1635, fax: (02) 9241 5282, e-mail lawrights@capcon.com.au or visit their web site at www.lawrights.asn.au. A registration brochure and programme is held at the Bar Association's Reception.

17th Biennial LAWASIA Conference / Triennial New Zealand Law Conference 2001, Christchurch, 4-8 October 2001. A conference information and registration brochure is held at the Bar Association Reception. Programme information may be obtained from the NZ Law Society's web site at www.nz-lawsoc.org.nz or via e-mail: Info@conference.co.nz, in January 2001.

Environment and Planning Law Association 2001 conference, Cowra, 19-20 October 2001. The programme for this conference will include topics of interest to both country and urban legal practitioners, including the anticipated release of the Land & Environment Court Review. For further information, visit the EPLA web site at www.epla.org.au or contact Michele Kearns on ph: (02) 9221 3527 or e-mail: kearns@stjames.net.au

2001 Australian Plaintiff Lawyers Association Conference, Hyatt Regency Coolum, QLD, 25-28 October 2001. The programme includes seminars on exemplary damages, passive smoking, public liability, abolition of immunity of road authorities for non-feasance and medical negligence. A conference information and registration brochure is held at the Bar Association's Reception. More information may be obtained from the APLA web site at www.apla.com.au.

2001 Conference of the International Bar Association, Cancun, Mexico, 28 October - 2 November 2001. The programme includes more than 100 working sessions on topics ranging from cost effective arbitration, cross border insolvency, trans-national organised crime and current issues in refugee law.

The Law Council of Australia has organised, in conjunction with Qantas, special airfares to Cancun. Inquiries regarding this special offer should be directed to the Qantas Travel Shop in Jolimont, Canberra on ph: (02) 6250 8296 or e-mail: Shr_jolimont@qantas.com.au.

A conference information and registration brochure is held at the Bar Association's Reception. For further information, visit the IBA web site at www.ibanet.org or contact Lisa Campbell on ph: ++44 20 7629 1206; fax: ++44 20 7409 0456 or via e-mail: confs@int-bar.org.

'Law via the Internet 2001': 3rd AustLII conference on computerisation of the law via the Internet. For more information about the conference, visit the AustLII web site at www.austlii.edu.au/austlii/conference.

Inter-Pacific Bar Association 12th Annual Meeting and Conference, Hong Kong, 3-7 May 2002. A conference information and registration brochure is held at the Bar Association's Reception. For more information about the conference, or about membership of the IPBA, visit their web site at www.ipba.org

New members of the Bar Association

The persons listed below have been accepted as members of the NSW Bar Association at a meeting of Bar Council on 4 July 2001.

Local practising practitioner

Trevor Tockar Edmund Barton Chambers

Legal practitioner other than local practising practitioner

Emily Culverhouse Temple Gardens, London

Geoffrey Diehm MLC Centre, Brisbane

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

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Studio 9, 5 Parsons Street
Balmain NSW 2041

Tel: (02) 9555 7866

Fax: (02) 9555 7861

E-mail: weavers@weavers.com.au

Web site: www.weavers.com.au

Advertising bookings and enquiries to John Weaver.

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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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Geoff Radburn	Lismore Chambers 32 Molesworth Street Lismore NSW 2480	ph: (02) 6621 2854 fax: (02) 6621 3898	radburn@nor.com.au
Stewart Austin	Chambers 30 Church Street Newcastle NSW 2300	ph: (02) 4926 2844 fax: (02) 4926 2841	