



Common Law Division civil circuits: soon to be extinct

The Chief Justice of New South Wales, the Hon Justice James Spigelman AC, has advised the cancellation of nearly all Supreme Court's Common Law Division civil circuits in 2004.

In a letter to the President of the Bar Association, the Chief Justice said that gazetted circuits in the Central West, Northern Rivers and Newcastle have been cancelled, with the Riverina circuit being the only 2004 circuit to commence as

planned. 'All future regional hearings will be listed as special fixtures and, from 2005, the court will not schedule any Common Law Division circuits', said the Chief Justice.

The main reason for the decision is the continuing downward trend in scheduled sittings in recent years. In 1989 there were 58 weeks of scheduled civil circuits, but by 2002 the number had dropped to just 16 weeks. In 2003 seven weeks of civil circuits

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Fund management: a trap for young players

By D A Wheelahan QC

Before 1 October 2003 (and in the absence of evidence to the contrary) fees for fund management were calculated in accordance with the Rosniak¹ principle.

Example: Assume that a plaintiff was incapable of managing his own affairs. Assume that his life expectancy was 30 years and that the appropriate multiplier (at 5 per cent) was 822.

Assume a fund for investment of \$3,000,000.

The calculation would proceed as follows:

(a) Establishment fee:

On first \$100,000	\$4,000
On second \$100,000	\$3,000
On third \$100,000	\$2,000
On balance (\$2,700,000) @ 1 per cent	\$27,000

(b) Cost of management of the fund:

One is then invited to assume a return of 5 per cent on the investment and a fee of 5.25 per cent applied to that figure. That would produce an annual fee of \$7,875, or a weekly cost (allowing 52.18 weeks per annum) of \$150.92.

Capitalised over the balance of the plaintiff's life that would equate to \$124,056.

Avoiding the recalculation of the investment of the sum for fund management (see Bacha²) the total sum calculated in this way for fund management is \$160,056.

On 1 October 2003 the Protected Estates Regulation 2003 prescribed the fees that the OPC can charge.

For the management of a protected person's estate the OPC can, and inevitably will, charge as follows:

- 2.1 per cent of the value of the estate for first year of management; and
- 1.1 per cent of the value of the estate for every year after the first year.

The first year fee is made of the 1.1 per cent annual fee plus 1 per cent first year fee capped at \$2,200.³

Making the same assumptions as for the example above, the fees likely to be charged are as follows:

(a) 1.1 per cent of the value of the estate	\$33,000
1 per cent first year fee capped at \$2,200	\$2,200
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	\$35,200

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A message from the President

At last some good news!

Members of the Executive recently met with the Bars at Parramatta and Newcastle. These meetings were part of a series of annual visits to 'regional' Bars aimed at keeping the lines of communication open with members who practise beyond the CBD and who often feel isolated both geographically and sometimes in other ways. These visits have been an ongoing part of the strategies by the Bar Council to ensure that all members' concerns can be addressed at a direct personal level.

I was particularly pleased at Parramatta to have been introduced to a new member of Arthur Phillip Chambers who has recently relocated there from chambers in Sydney. His practice was exclusively in the workers' compensation field. It requires no comment from me to explain why that is no longer an attractive proposition.

This barrister has engineered a lifestyle and practice change which sees him now seeking briefs in family law as his new area of specialty. This conversion was, understandably, not effected without considerable effort, including a necessary re-education programme which, for obvious reasons, is still ongoing. He informs me, however, that work is available and increasing and the unfortunate consequences of recent well known legislative changes to his traditional area of practice are being overcome. He is to be commended in his own right and as an



Ian Harrison SC

President of the New South Wales Bar Association.

example to all of us when faced with the difficult decision to be made when one arrives at the crossroads in professional life to which I made reference in my recent article in the winter edition of *Bar News*.

Another good news story was presented to me in Newcastle. Reports which I received first hand indicate that the Bar in Newcastle is alive and well, something which I was very happy to learn given the traditional and extensive connection between the Bar in that city and common law litigation. There was, as well, an all-pervading feeling amongst members of the Newcastle Bar of informed optimism. I did not get the impression, which I have been

for some long time at pains to dispel, that members of the Newcastle Bar expected a miraculous return to the good old days. There was in contrast a widespread and apparently well-informed mood that, whereas some adjustments and necessary changes to the type and flow of work might be anticipated, the continuing health of the Newcastle Bar was moving from a probability to something approaching a certainty.

Unfortunately, not all members will be sharing this feeling. I have recently been informed by the Chief Justice, for example, that there will be no common law sittings of the Supreme Court of New South Wales in regional areas in 2005. The reasons for this are more complex than simply the result of the *Civil Liability Act 2002* but the trend is nonetheless worrying. I continue to be encouraged by members who report to me regularly that the flow of work, including importantly new work, is at least holding up.

Consistent with this are the extremely reassuring and personally gratifying levels of practising certificate renewals which, as at the middle of June this year, are the equivalent of last year. Particularly satisfying to me has been the level of membership renewals of the Bar Association which is running at near enough to 100 per cent. I thank all members who have rejoined the Bar Association. The practical and symbolic significance of this, particularly in hard times, cannot be overestimated.



Bar Council business for April–May 2004

Meeting at Henry Parkes Chambers

The President advised that on 19 April he had met with members of Henry Parkes Chambers for a discussion on how its members might be able to broaden their areas of practice given recent legislative changes to, in particular, workers compensation and common law. The President intended to visit other chambers for similar discussions.

Fees paid to counsel by the Commonwealth and New South Wales governments

The President noted that the Bar Association's submission to the Federal Attorney-General's Department on its rewrite of the Legal Services Directions gave particular emphasis to the low level of

fees paid to counsel. He and the Executive Director were to meet on 5 May with the First Assistant Secretary, Legal Services and Native Title Division, to discuss the submission and, in particular, the problem of the low level of fees and the delay in payment.

The Executive Director had separately raised with the Director General of the New South Wales Attorney General's Department the low level of fees paid by the Crown Solicitor.

The President and Executive Director would be giving particular attention to the issue of fees over the next few months.

The President, in his role as President of the Australian Bar Association, would also be taking up with the ABA the problem of the low level of counsel's fees paid by the federal and state governments.

Update on professional indemnity insurance for 2004/2005

The Executive Director advised that three policies were with the Attorney General for his approval; from Aon NZ, Suncorp and Heath Lambert (Marsh Pty Ltd). Discussions are continuing with Aon (CGU), Willis and AIG concerning proposed policies. It is possible that AIG will not submit a policy for approval for the forthcoming practice year.

The Executive Director advised that, as in past years, an enormous amount of work was being undertaken by Meagher SC, Michael Ball and the Bar Association's staff (in particular, Kim Kemp) in persuading brokers and insurers to submit policies that were acceptable to the Bar Association.

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Bar Council business for April–May 2004

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Accumulation of CPD points for 2004/205 practice year

The Executive Director advised that he had approved 12 April 2004 as being the date after which CPD points accrued above the necessary ten points could be carried over to be counted in the next practice year. This carry over provision was one way in which barristers were encouraged to attend (and to attend for the full period) the various 'mini conferences' that are held in April/May/June to enable barristers to obtain the required ten points. The Bar Association was running some half a dozen conferences in this period this year; the crown prosecutors' annual conference was being held in April.

To obviate the need to determine a 'carry over' date each year, the Executive Director proposed that this date be the second Monday in April of each year.

Bar Council resolved to endorse the Executive Director determinations of the carry over date for this and future years.

Professional standards application

The Executive Director advised that staff of the Professional Standards Council secretariat had inspected the Bar Association's databases. They had first signed a confidentiality agreement. The officers had been very impressed with the databases. The council is to meet on 7 May to further consider the Bar Association's application for a scheme and the related actuarial report it had commissioned. It was possible that the council would approve the scheme in principle on 7 May, although there were a number of statutory processes that then needed to be followed before a scheme could be formally approved.

World Conference of Barristers and Advocates in Cape Town, 12 – 14 April 2004

The Executive Director thanked the Bar Council for agreeing that he might represent the Bar Association at the above conference. This conference had been the most professional of any conference he had attended in the last 30 years. The conference was directed very specifically to the Bar. The speakers were of international class and the subjects discussed of general relevance to all Bars (eg: professional development of barristers, competition policy and the legal profession and attacks [written, verbal and physical] on the judiciary). The presence of a number of former victims of the apartheid regime who had served long prison sentences and who had been physically attacked had added a

special poignancy to the conference.

Copies of the papers given at the conference will be posted on the World Bar web site www.worldbaronline.com.

Evidentiary certificates

Bar Council resolved that the Executive Director be authorised to issue evidentiary certificates on the Bar Council's behalf pursuant to sec 213A(1) and (4) of the *Legal Profession Act 1987*.

A child care initiative for the Bar

The Bar Council discussed the pilot of a scheme for in-home child care for barristers that had been conducted over the winter months last year and which had now been assessed by Jane Smyth & Associates. The Bar Council enthusiastically endorsed the scheme now being implemented on a permanent basis.

The Bar Council discussed ways in which the scheme might be publicised, as it will only work if the Bar can generate interest in it. The Executive Director was asked to work with Virginia Lydiard, Chair of the Equal Opportunity Committee, to arrange a 'launch' and publicity for the scheme.

The Bar Council expressed its thanks to Slattery QC, Virginia Lydiard and Rashda Rana for all their work in setting up the scheme.

The New South Wales Barristers' Rules and New South Wales DPP Prosecution Guidelines

The Bar Council discussed the possibility of there being a conflict between *The New South Wales Barristers' Rules* and the New South Wales DPP's Prosecution Guidelines.

The council asked that this matter be referred to Walker SC so that it might be considered during his review of the *Barristers' Rules*. The Executive Director advised that he had already informally sent this material to Walker SC and that he had also forwarded to Walker SC material relating to there being a possible conflict between provisions of *The New South Wales Barristers' Rules* and Division 5C of the *Legal Profession Act 1987*, in particular section 198J.

Results of survey on the payment of counsel's fees

The President advised that he has spoken with Ian Tonking about his memorandum of 15 April. Tonking was now preparing a draft letter that the President might send to the President of The Law Society of New South Wales concerning the problems that had been identified with solicitors paying

(paying late or not at all) counsel's fees.

The Bar Council discussed ways in which some of the identified problems might be addressed. The Executive Director was asked to arrange for a CPD seminar on this issue; the speakers at this seminar might include the President, Greg McNally and a member of the Professional Conduct Department with experience in fee recovery work.

The Executive Director noted that Walker SC had expressed an interest in participating in such a seminar.

The Bar Council expressed its appreciation to Tonking for all his work on this matter.

Barristers' Sickness and Accident Fund Pty Ltd

Bar Council resolved to agree to the proposed amendments of the Trust Deed of the Barristers' Sickness and Accident Fund.



Federal Court of Australia – Refugee Review Tribunal Legal Advice Scheme

Applications are invited from members of the Bar to augment the existing panel of barristers and solicitors who assess the prospects of success of appeals filed in the Federal Court and Federal Magistrates Court from unsuccessful RRT decisions.

Applicants should be interested in administrative law generally and refugee law in particular.

A modest fee is paid for the advice and travelling expenses to Villawood Detention Centre if incurred.

All applications should be addressed to:

The Executive Director
The New South Wales Bar Association
Lower Ground Floor
Selborne Chambers
174 Phillip Street
SYDNEY NSW 2000
DX 1204 SYDNEY

It's not just cricket

By Glenn Martin SC, President, Bar Association of Queensland

Following the recent World Bar Conference in Cape Town I travelled with a group of Bar representatives to Harare. The party comprised: Stephen Irwin QC (Chairman, Bar of England and Wales), Conor Maguire SC (Chairman, Bar of Ireland), Justice (his first name – as he constantly had to tell people) Poswa SC (Deputy Chairperson, Bar of South Africa), Roy Martin QC (Vice Dean, Faculty of Advocates) and me. The trip was organised in order to provide a report to the International Council of Advocates and Barristers and to gather evidence to support an appeal for aid for the lawyers in Zimbabwe who support the rule of law and need resources to continue their effort.

We undertook a series of interviews with a number of people including: the Acting Attorney General (Bharat Patel), Sternford Moyo (past president, Law Society of Zimbabwe), Justice Ben Paradza (High Court of Zimbabwe), members of the Harare Bar and lawyers who were willing to speak to us on the condition that they not be identified.

Harare has a population of over 1.6 million which, like many large cities in Africa, is increasing rapidly as people move in from out-lying regions seeking work. Its colonial heritage is evident in much of its architecture, but there is also the ugliness of modern high rises dotted about the city centre. The overall impression was of a city which was run down and with good reason – the economy is in tatters. Inflation has been running at 500 to 600 per cent over the last year and is predicted to peak at 700 per cent this year, before slowly declining. The Australian dollar is worth between 7,000 and 10,000 Zimbabwe dollars; depending upon where you exchange and, it seemed, the time of day. Along with road-side stalls selling small amounts of produce, there are some homes on the road from the airport into the city. Those were indicative of many homes which we saw: surrounded by two metre high solid fences which, in turn, were surmounted by razor wire or electrified fencing. In the suburb which contained some of the embassies and the homes of foreign business people, in addition to the physical barriers, twenty-four hour security protection and guard dogs were ubiquitous. We called upon the Acting Attorney General first, as we wished to hear what a government representative had to say about many of the concerns which we had about the independence of the judiciary and the profession. The office of the Attorney

General was some of five or six blocks from the hotel in which we were staying. It was made clear to us by the hotel staff that it would be wise if we were escorted to the office building by a hotel employee. We took that advice – just as we took the advice to be back in the hotel before night fall and then not to venture out again.

Mr Patel was a gracious host who was anxious to acknowledge that the farm invasions and the associated violence of 1999-2000 were most regrettable and that the way in which some members of the judiciary were treated was appalling. He was not so willing, though, to accept that the large numbers of judges retiring early from Zimbabwe courts was necessarily associated with what we saw as the continued attack on their independence and, in some cases, personal security. It was, perhaps, an indication of the approach to the whole issue of independence, that he seemed quite pleased to be introducing into parliament a Bill to preclude judges from being arrested in their own chambers. Others we spoke to had the view that Mr Patel was doing his best in a bad situation. That may be so. It may also be that the actions of the last four years have seen nearly all the independent judges leave and that the obstacles to the government's unlawful actions have been significantly lowered.

It appears that the era of violent farm invasions is over and that the disturbances associated with them have diminished. But looks can deceive. Two groups - lawyers and journalists - are the subject of continued attack by the government and agencies of the government. It is only five years since two journalists were arrested, detained, interrogated and tortured over an article they wrote about an alleged coup plot by a few officers. Despite complaint by the journalists and an order of the Supreme Court, the Commissioner of Police refused to make any investigations.

The resort to thuggery now seems to have been partly replaced by a mechanism to gag independent journalists by other means. The government recently enacted legislation requiring all journalists to be licensed. But who, effectively, grants these licences? The Minister for Information and Publicity. Have all applications been granted? Not, it seems, to those newspapers or journalists seen to be opponents of the Mugabe regime.

Stifling dissent or criticism by an

independent media is only one part of the story. That is not enough for the truly insecure. The assault on the rule of law continues – often by direct, physical means against the judiciary and the legal profession. In 2000, the Supreme Court made a series of declarations that farm invasions were unlawful and that the Commissioner of Police should act to prevent them. These orders were ignored by the police and the government. The then chief justice (Anthony Gubbay) was accused of bias in favour of white land owners by both the government and his eventual successor, Justice Chidyausiku. In November 2000, the Supreme Court was invaded by hundreds of war veterans and followers. They crowded the courtroom and some called for the judges to be killed. Soon afterwards, Gubbay was forced to resign and his critic, Chidyausiku, became chief justice.

The violence didn't end there. In 2002, a magistrate (sitting in a small town) refused an application by the government to remand in custody five members of the opposition party. He was dragged out of his courtroom by war veterans and bashed. He suffered broken ribs and a fractured collarbone. That, though, was not enough. The magistrate was paraded through the town and made to chant slogans of ZANU(PF), the government party.

Zimbabwe has been engaged for some years in a reallocation of land ownership. The matter of reallocation is a political issue and our group did not and does not make any comment upon it. A significant number of senior judges have been granted farms under the land resettlement scheme. The grant is at the will of the government and the farms may be taken back at any time without compensation. A fundamental prerequisite for the effective operation of the rule of law is that judges are independent of the government and the executive. But, these same judges have to adjudicate on the controversial legal and constitutional issues arising out of the land redistribution legislation, under which they, themselves, have received farms.

Sternford Moyo is a very impressive man. He is a partner in the firm of Scanlen and Holderness. It celebrated its centenary recently and is justly famous for, in the early 1950s, being the first firm, in what was then Southern Rhodesia, to employ a black articulated clerk. Moyo has been well known for his opposition to the heavy handed and corrupt behaviour of many in the government. Perhaps too well known. In 2002, he and the Law Society of Zimbabwe's Executive Secretary were

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It's not just cricket

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arrested and detained over allegations of possessing 'subversive' documents relating to the mass action allegedly planned by the Movement for Democratic Change (MDC) to force President Mugabe to re-run the elections. The police searched the home of Sternford Moyo and the LSZ offices for the documents, allegedly addressed to the MDC and the British High Commission. According to reports, no such documents were found.

In 2002, Justice Fergus Blackie, of the Zimbabwe High Court, held the then Minister for Justice in contempt of court and sentenced him to three months imprisonment. There was an outcry. The Commissioner of Police refused to have the minister arrested, and President Mugabe castigated the judge as racially biased, adding that any judgment that was not regarded (presumably by him) as being fair and impartial, would not be enforced. Justice Blackie retired from the court shortly after that, but in September of 2002 he was taken from his Harare home at about 4.00am in the morning, hidden from his relatives and lawyers, denied his medication and forced to spend three nights in a filthy prison cell. The pretext for the arrest was a spurious charge that he showed racial bias in upholding a white woman's appeal against a sentence for theft. The police did what they could to prevent any action being taken to have him released from jail but he was, eventually, given bail. The matter came on for trial in June last year and, in the presence of international observers, the prosecutors were forced to withdraw the charges, they having absolutely no substance at all.

But, it is not simply a question of a judge being black or white. It is a matter of whether or not a judge acts independently and, in doing so, displeases the government. Last year, the Mayor of Harare (a member of the opposition political party) was arrested for addressing a public meeting about the city's water shortage. He was left for two nights in a public cell, beaten by his jailers and prevented from contacting his lawyer. Justice Ben Paradza ordered (twice) that he be released. Paradza is a war veteran, but that did not help him when he applied the law impartially. A month after ordering the release of the mayor, Paradza was arrested in his chambers at the Harare High Court and held in custody for twenty-four hours upon charges of corruption and attempting to obstruct the course of justice. He was taken to a watch house on the outskirts of Harare in an apparent attempt to prevent

his lawyer getting in touch with him. He is the first serving judge ever to be arrested in Zimbabwe and his arrest was clearly in contravention of the Constitution. He has denied the charges and says that he was told 'You have been appointed to look after the government interests, but you have embarrassed the government and now we are going to embarrass you'.

The Harare Bar has about twenty members. They go about their profession, at least on the surface, in much the same way as we do. Indeed, it should be said that the ordinary business of the courts seems to proceed in a reasonable way. Complaints about the ability of some of the judges reminded each of us in the group of similar discussions over coffee in our respective jurisdictions. The difference was that the complaints extended beyond the usual barrister's lament. One of their number, Eric Matinenga, is junior counsel for Paradza J and in the treason trial being brought against MDC leader Morgan Tsvangirai. He has been subject to harassment at many levels, some of it ridiculously amateurish. He is the legal adviser to one of the Anglican Church dioceses in Zimbabwe. Recently, he was the subject of an allegation that he was conspiring to murder the Bishop. While this was not pursued, it is indicative of the extent to which those who wish to suppress opposition will go.

Any case which involves the government carries with it the probability of interference. Criminal cases can often be the vehicle for oppression and persecution of political opponents. Yet this small group perseveres. The buying power of the Zimbabwe dollar, the currency in which they are paid, is so absurdly low that they find it difficult to keep up their library's subscriptions to even the most basic sets of reports. For the same reason, they have no access to reports on CD and online subscriptions are both expensive and, due to poor Internet access, difficult to obtain.

But even the strongest can only take so much. One of Harare's leading counsel has moved, permanently, to South Africa. He has been at the forefront of many legal battles in an attempt to control an almost uncontrollable Executive. Last year, while he was out of Zimbabwe, his house was invaded at night and his wife was assaulted. After the attackers left (having stolen nothing) she called the police. They arrived some hours later and, after, showing little interest in her plight asked her to make

them some sandwiches as they were hungry. This was the final insult in a string of indignities.

Those judges who exhibit independence are subjected to personal attacks in the government controlled press. These often appear to be linked to a decision made by the judge which was seen as being hostile to the government. Recently, the government-controlled newspaper *The Sunday Mail*, in a column headed 'Under the Surface', carried the following item:

Just when the government thought the revolution at the courts was over, there seems to be something stinking there. Under the Surface smells some Justice Gubbay residue and this residue stinks so bad that it is cause for concern. What makes this Gubbay residue even more dangerous is that it has the colour that we can identify with and speaks our mother language, but the thinking stinks of colonial ideas. Of course some will say, let's have some democracy, but why leave a snake in the house? One day the snake will strike while we concentrate on pressing issues and it will be too late to hit its poisonous head.

In the final meeting of our group, we sat in the foyer of the hotel in which we had stayed. We had been warned before our visit that it was possible that we might be under surveillance. I don't know if we were. It was curious, though, that as the five of us sat and discussed what we had been told, the two casually dressed men at a table near ours said nothing to each other for the forty or so minutes that we were talking.

Zimbabwe is due to have its next general election in 2005. The last election (2000) generated 36 petitions alleging illegalities in the electoral process. Six of them have not yet had a hearing. Seven of the remaining petitions have, so far, been successful, but the government has appealed and there is no indication of when the appeals might be heard. The decision as to who hears the cases has been removed from the Court Registrar and taken over by the Judge President. In all likelihood, the delays in processing these cases are so great, that none of them will have concluded before the next election.

Unless there are vivid images of farm invasions or records are being broken in cricket matches, it is not likely that the media in Australia will say much about Zimbabwe. Perhaps it is because the apparent level of physical violence occasioned to judges and lawyers in Zimbabwe seems to have diminished lately. The violence being done to the rule of law continues.

Legal Profession Amendment Bill 2004 now before parliament

On 3 June 2004 the *Legal Profession Amendment Bill 2004* passed through the Legislative Assembly and is currently listed for second reading in the upper house on 22 June.

The principal purpose of the Bill, which has bipartisan support, is to amend the *Legal Profession Act 1987* with regard to the way disciplinary matters may be conducted by, among others, the Administrative Decisions Tribunal and the councils of the Bar Association and the Law Society.

The Bill includes the following provisions, as outlined in the Explanatory Memorandum:

Pre-admission events: powers relating to bankrupt or convicted applicants for and holders of practising certificates

- Schedule 1 [1] amends s3 to insert a definition of *pre-admission event*, which is an act of bankruptcy committed, or finding of guilt for an indictable or tax offence, occurring before a person's admission as a legal practitioner.
- Schedule 1 [2] amends s30 to make it clear that the regulations may prescribe details relating to pre-admission events as information that must accompany an application for a practising certificate. Transitional provisions validate regulations already made (Schedule 1 [22] amending Schedule 8).
- Schedule 1 [3] amends s37 to make it clear that the Bar Council or the Law Society Council may exercise powers to refuse to issue, or to cancel or suspend, a practising certificate on grounds relating to pre-admission events, though specific authority is given to a council to take no action in connection with a pre-admission event if satisfied that it is appropriate to do so given the passage of time and other circumstances the council considers relevant. Transitional provisions validate past actions taken by councils (Schedule 1 [22] amending Schedule 8).

Notices requiring assistance by legal practitioners

- Schedule 1 [4] and [5] amend s152 in relation to a notice requiring a legal practitioner to provide information, documents or other assistance to the Legal Services Commissioner (commissioner) or a council when investigating a complaint against a legal practitioner. Under the section as proposed to be amended, the notice will be able to be served by posting it to the legal practitioner's place of practice, business or residence last notified to a council (as well as by personal service).

Reprimands administered to legal practitioners by commissioner or council

- Schedule 1 [6] amends s155 to remove the requirement that a reprimand can be administered to a legal practitioner only with the practitioner's consent, where the reprimand is to be administered by the commissioner or a council instead of instituting proceedings in the Administrative Decisions Tribunal (tribunal).
- Schedule 1 [8] amends s160 to remove a similar requirement when the commissioner is reviewing a decision of a council.

- Schedule 1 [7] and [9] amend ss155 and 160 to confer a right of appeal to the tribunal against a decision to reprimand a legal practitioner if the practitioner does not consent to the reprimand.
- Schedule [16] inserts a new s171N to provide for the hearing and determination by the tribunal of such an appeal.

Time for instituting proceedings in the tribunal

- Schedule 1 [10] inserts a new s167AA to provide that proceedings on a complaint against a legal practitioner may be instituted in the tribunal at any time within six months after the commissioner or a council decides that proceedings be instituted. The tribunal is empowered to extend that time after consideration of matters mentioned in the proposed section. The proposed section will prevail over section 44 of the *Administrative Decisions Tribunal Act 1997* and any rules or regulations under that Act.

Power to disregard procedural lapses

- Schedule 1 [11] inserts a new s171 to allow the tribunal to order that a failure to observe a procedural requirement in relation to a complaint against a legal practitioner is to be disregarded, if satisfied that the parties have not been prejudiced by the failure.

Reprimands administered to legal practitioners by tribunal

- Schedule 1 [12] amends s171C to make it clear that the tribunal, when reprimanding a legal practitioner, does so by order. Schedule 1 [13] amends section 171C to require the tribunal to publish any order by which it publicly reprimands a legal practitioner and a statement of reasons.
- Schedule 1 [15] amends section 171LA to exclude private reprimands from the register of disciplinary action kept by the commissioner.

Appeals from tribunal to Supreme Court

- Schedule 1 [14] substitutes section 171F. Under the current section, certain appeals from decisions of the tribunal lie to an appeals panel of the tribunal and others lie to the Supreme Court, depending how the tribunal was constituted at first instance. Under the proposed section, all appeals under Part 10 from the tribunal at first instance will lie to the Supreme Court only and Chapter 7 of the *Administrative Decisions Tribunal Act 1977* will be overridden. Section 75A of the *Supreme Court Act 1970* will apply to the appeals, and the appeals will be by way of rehearing rather by way of a new hearing.

Undertakings

- Schedule 1 [17] inserts a new s171U. Breach of an undertaking given by a legal practitioner to the commissioner or a council in the course of investigating or dealing with a complaint or in the course of a mediation will be capable of being unsatisfactory professional conduct or professional misconduct.

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Legal Profession Amendment Bill 2004 now before parliament

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Commencement of proceedings without reasonable prospect of success

- Schedule 1 [18]–[20] amend s198L, which provides that a solicitor or barrister cannot file originating process or a defence on a claim for damages unless the solicitor or barrister certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence has reasonable prospects of success. Under the amendment, a wider definition of *court documentation* is used to describe the material that cannot be filed.

Speaking in support of the Bill, the Attorney General, the Hon Bob Debus MP, spoke highly of the role played by the professional associations:

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

A copy of the Bill may be obtained from the parliamentary web site at www.parliament.nsw.gov.au. A copy is held in the Bar Library.



Practising certificate renewals: Update no.4, 16 June 2004

By Philip Selth, Executive Director

This is the fourth 'Renewal Update' issued to the Bar over the last few weeks. This Update supersedes those issued on 7 and 28 May and 7 June.

All practising certificate renewal documentation and fees should have been received by the Association by 6pm last Friday 11 June 2004.

If you have not yet sent in your renewal documentation, it is overdue.

Hundreds of renewal applications were received on Thursday and Friday last week. Staff worked all weekend to process as many applications as possible. We are still receiving renewal applications, albeit late. These late renewals will not be processed until we have been able to process those received before the due date. At this stage I cannot guarantee that applications received after the due date will be processed before 30 June 2004.

Late renewals will not be processed until the statutory late fee is paid in full or a *written undertaking* is given that the late fee will be paid. The statutory late fee is \$30 or 10 per cent of the practising certificate fee, whichever is the highest.

Any barrister who has incurred the statutory late fee may make a written application to the Treasurer for a waiver of the fee. The application will need to demonstrate why the barrister was unable to comply with the statutory deadline met by most of the Bar, particularly having regard to the numerous reminders of the due date which were conveyed to members of the Bar and clerks.

Practising certificates are being issued as quickly as possible. Please do not contact the Bar Association to inquire when a PC will be issued. This diverts staff from the processing task and causes further delay. It is not feasible to keep wading through reams of unprocessed paper work to locate an individual's renewal application.

I should appreciate your understanding (and tolerance) during the next two weeks whilst we concentrate our efforts on issuing all practising certificates, at least those lodged by the due date, before 1 July 2004.



Facilities restored at Penrith Court Complex

Two interview rooms in the main building at Penrith Court Complex, temporarily closed while refurbishments and security upgrading were in progress, are now back in operation.

In response to concerns raised by the Bar Association, the Director General of the NSW Attorney General's Department, Laurie Glanfield, has advised that two of the four interview rooms in the main building are back in operation. Work would shortly begin on returning a third interview room to operation. An additional room would also be built once security upgrades were complete.

For further information, contact Philip Selth, the Executive Director of the Bar Association on ph: (02) 9229 1735 or via e-mail: executivedirector@nswbar.asn.au



CDLA launches membership drive

The Criminal Defence Lawyers' Association is a non-profit organisation with a special interest in the area of the defence of criminal charges and its related issues. The association was incorporated in 2001 by interested lawyers, however it fell into hiatus after hosting some very successful CLE seminars and attracting over 250 members. The Annual Dinner on June 18 2004, at which the Hon Mary Gaudron is guest speaker, will serve as the springboard to relaunch a much-invigorated association.

The CDLA's objectives include ensuring justice and procedural fairness, fostering the integrity, independence and expertise of criminal defence lawyers, and promoting the proper and fair administration of criminal justice. The association plans to fulfil these objectives in a number of ways, including hosting forums and meetings, hosting CLE lectures and seminars and forming opinions in relation to its objectives and then lobbying those responsible for determining policies and practices in the criminal justice system.

The CDLA plans to have its Annual General Meeting later this year to formalise its functions and elect its representatives. Those interested in the CDLA and what it proposes to do, can contact us at:

Criminal Defence Lawyers' Association
C/- Ada Evans Chambers
Level 1, 370 Pitt Street
Sydney NSW 2000
Ph: 9283 6230
Fax: 9283 6231
cdlansw@yahoo.com.au

CRIMINAL DEFENCE LAWYERS' ASSOCIATION OBJECTIVES AND PURPOSES

OBJECTIVES

- To ensure justice and procedural fairness to people accused of a crime or subjected to arrest or detention
- To foster the integrity, independence and expertise of lawyers involved in the defence of criminal charges
- To promote the proper and fair administration of criminal justice.

PRIMARY PURPOSES

- (a) To promote study and research in the field of criminal defence law and procedure;
- (b) To sponsor periodic meetings of criminal defence practitioners; to provide a forum for the exchange of information regarding the administration of criminal justice for the purpose of improving the practice of criminal law;
- (c) To disseminate, by lectures, seminars, conferences and publications, information and knowledge relating to the objectives of the Association and, in particular, in the practice of advocacy in the defence of criminal charges;
- (d) To represent the interests of the Association in the deliberations of those individuals and agencies responsible for the determination of policy practice and procedure in matters relevant to the objectives and purposes of the Association and, in particular, to promote the implementation of laws and practices which are, either potentially or in fact contrary to the objectives of the Association;
- (e) To preserve, protect and defend the adversary system of justice.

Further progress towards a national legal profession

The creation of a national legal practice moved a step closer last month when the Standing Committee of Attorneys General endorsed the National Legal Profession Model Bill and authorised its public distribution.

Since 2002 the New South Wales Bar Association, in its role as a constituent body of the Law Council of Australia, has played an active part in the consultations between the profession, attorneys general and their departmental officers on the drafting of the Model Bill for a national legal profession.

The object of the draft legislation is to create a uniform, nationally consistent set of provisions governing the qualifications, training and conduct of legal practitioners, as well as a national market for legal services. Under the proposed legislation, lawyers would be able to practice 'seamlessly' across Australia.

Committees and working parties have been established to consider ways of implementing the provisions of the Model Bill and to consider amendments.

A copy of the Model Bill, together with further information about the progress in its development, may be obtained from the Law Council's web site at <http://www.lawcouncil.asn.au/natpractice/currentstatus.html>

Members of the Bar Association may also obtain further information from the Executive Director, Philip Selth, on (02) 9229 1735 or via e-mail: executivedirector@nswbar.asn.au



Changes to court security

The Sheriff has advised that from 1 July 2004 full scanning will be introduced in the following eleven court complexes which currently have perimeter security:

- Campbelltown
- Burwood
- Liverpool
- Lismore
- Downing Centre
- Sutherland
- Wollongong
- Central Local Court
- Parramatta
- Newcastle Supreme Court
- Bidura Children's Court

Over the coming year it is intended that perimeter security will be introduced at several other court houses.

The scanning procedures being implemented are similar to those used at airports.

Under the new security arrangements Bar Association photo ID cards will no longer allow members of the Bar to bypass the full scanning process. The Sheriff has advised that while he appreciates the new procedures may pose some inconvenience to counsel, it is necessary in order to prevent jeopardizing court security.



BARCARE

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 BarCare information line (02) 9230 0433 or visit the Association's website www.nswbar.asn.au

Practice Enhancement Scheme

The Bar Council has approved some changes to the way in which the Practice Enhancement Scheme (previously known as the Barristers' Mentoring Scheme) will operate.

The scheme is operated primarily by a committee of four persons. Bathurst QC is the convenor of the committee following the untimely death of Gee QC. The other three committee members are one silk and two senior juniors whose practices include commercial and equity work, family law work, insolvency work and work in disciplinary tribunals.

The committee is charged with the following preliminary functions:

- seeking the co-operation of clerks of chambers whose members' practices are predominantly outside the personal injuries area. Clerks will be requested to retain lists of barristers who wish to be involved in the mentoring programme and to recommend them for work in appropriate cases;
- establish points of contact in areas in which members of the committee do not practice. These include building and construction law, environmental law, family law and of course criminal law;
- working with the Bar Association's staff so that they may provide any assistance necessary to the scheme; and
- convening CPD seminars to discuss ways in which barristers might enhance the scope of their practice.

A barrister who wishes to participate will be offered the following assistance:

- advice as to the best persons to contact with a view to expanding his or her practice into different areas of interest;
- advice when required on procedural matters involving those areas;
- placement on the lists of barristers to be maintained by the clerks and an introduction to clerks of chambers or floors which practice in the barrister's particular area of interest; and
- subject to the barrister's competence and experience, priority for briefs in the Bar Association's Legal Assistance Referral Scheme in the area in which the barrister has a particular interest.

The scheme is available to barristers who are members of the Bar Association.

General enquiries about the scheme should be directed to the Bar Association's Executive Director, Philip Selth on ph: (02) 9229 1735 or e-mail executivedirector@nswbar.asn.au.

Barristers and clerks wishing to be in any way part of the scheme should contact Bathurst QC on ph: (02) 9221 0399 or e-mail tfbathurst@sixthfloor.com.au.



Common Law Division civil circuits: soon to be extinct *Continued from page 1*

were scheduled: two of which were subsequently cancelled. 'A review of the court's common law civil caseload reveals that it is unlikely that there will be sufficient cases at a suitable stage of readiness to justify the setting of any civil circuits in 2005', said the Chief Justice.

Regional litigants and practitioners, the Bar Association has been advised, will be better served by special fixture hearings at relevant regional venues. Better case management has enabled such hearing dates to be set down with greater certainty. In 2004, the Supreme Court has fixed four cases in Lismore, two in Wagga Wagga and two in Newcastle. 'The court remains committed to hearing matters at regional venues and flexibility will be maintained in the court's roster arrangement so that timely special fixture dates can be given at regional venues', said the Chief Justice.

LAWASIA downunder 2005

21-24 March 2005 | Gold Coast Queensland Australia



The Leading Legal Conference for Asia and the Pacific in 2005

Set to take place from March 21-24, at the glorious Queensland Gold Coast, *LAWASIA downunder 2005* will undoubtedly be the leading legal conference for Asia and the Pacific in 2005.



LAWASIA downunder 2005 will combine the international interest created by LAWASIA's traditional biennial conference, with the national profile of the Law Council of Australia's 34th Australian Legal Convention – the Meeting of Meetings.

The conference is proudly arranged and hosted by the Queensland Law Society, and its 44th Queensland Law Symposium will be held under the *LAWASIA downunder 2005* banner, bringing a unique networking opportunity to Queensland practitioners, as well as the chance to show off their home state to national and international legal colleagues.

Importantly, the conference will run concurrently with the 12th Conference of Chief Justices of Asia and the Pacific, with the Chief Justices combining their activities with those of *LAWASIA downunder 2005* at various times throughout the week.

What to expect from the program

The work program will cover (9) separate streams:

- Criminal Law
- Dispute Resolution/Litigation
- Human Rights and Constitutional Law
- Trade and Business Law
- Intellectual Property Law
- Legal Practice
- Family Law
- Property and Succession Law
- Legal Education

A panel of high profile practitioners, academics and others has been appointed as session rapporteurs, and to them goes the honour of arranging some (60) sessions within those streams. The work program will cater to the practical, the esoteric, the commercial, the inspirational and the need to collect CLE points, and each session will include expert speakers at regional, national and state level.

Bringing the profession together from around the region

Traditionally, delegates at a LAWASIA Biennial Conference come from as many as 30 different countries from the region and beyond, and tend to be drawn from amongst the leading law firms and chambers. LAWASIA's national member organisations send representatives, so the opportunity for delegates to mix with the leaders of the Asia-Pacific profession is an invaluable one.

LAWASIA downunder 2005, as an educational event, will provide

a climate that promotes open and informed discussion aimed at fostering regional uniformity and understanding in the increasingly cross-jurisdictional legal world. As a professional event, it will bring together those who have an active interest in the development of the profession and the welfare of those who practice in it. As a networking event, it creates opportunity to develop state, national and international relationships.

The social program will combine formal and informal occasions that will deliver a uniquely Australian social experience to overseas guests, and that will bring Australian colleagues together to celebrate the sense of belonging to an international legal community.

An exciting new venue

The conference venue, the Gold Coast Convention and Exhibition Centre, is a brand new facility in the heart of this popular destination, one that



needs no introduction to Australian delegates. Those coming from overseas will enjoy the chance to explore some of the area's attractions, which range from endless white sandy beaches, breathtaking hinterlands and golf at over 30 world class courses to international shopping, casinos, theme parks and zoos.

One of the major benefits of this destination is the comprehensive variety of accommodation that the conference can offer. Conrad's Jupiter Hotel, attached to the Convention Centre, will be the 5 star jewel in the accommodation crown, but other possibilities, including apartments for the family and friends-minded and 3 and 4 star hotels for the budget-conscious will be readily available, and within easy reach of the conference venue.

In that context, potential delegates might note that the conference dates are set to lead into the Easter vacation, and there is no doubt that the Queensland coast would be a highly desirable spot to spend a few post-conference days.

In all, there will be something for everyone at *LAWASIA downunder 2005*. The conference organising committee members are drawn from the three organisations that are coordinating to put the event together, so the needs of legal professionals at all levels and in all areas of legal interest are addressed.

Those who have attended a LAWASIA biennial conference before will attest to the camaraderie that the event produces; others are encouraged to experience it. Those who have enjoyed the stimulation of the Australian Legal Convention will enjoy the added regional and state level emphasis, and regular Queensland Law Symposium attendees will find CLE delivered at a more significant level than ever before.

Queensland Law Society looks forward to welcoming over 1000 judges, lawyers, academics and business partners to this premier event, and encourages delegates to register early to ensure participation at the conference and in its surrounding activities.

Need more information?

Full detail can be found on the conference website at:
<http://www.lawasiadownunder.com>

Fees paid by the Crown Solicitor

By Laurie Glanfield AM, Director General of the NSW Attorney General's Department

Mr P Selth, Executive Director, recently raised with me concerns held by members of the Bar about the level of fees being paid to junior counsel by the Crown Solicitor's Office.

I am advised that there is a perception by some that there has been no major increase in the level of fees paid to junior members of the Bar. However, an analysis of information held by the Crown Solicitor's Office confirms that this is not the case and that there has been a significant increase in the fees paid. By way of illustration, in the 1998 calendar year the median fee paid to junior counsel was \$1,000.00 per day. To date in 2004, the median fee is \$1,400.00 per day. During this period the median hourly rate went from \$125.00 per hour to \$175.00 per hour.

Members would be aware that the Crown Solicitor is responsible for securing legal services to government at a reasonable rate. I acknowledge that the fees paid by the

Crown Solicitor are not parallel to that which some members may receive in the private sector, however, the work briefed by the Crown Solicitor's Office is rewarding and interesting.

When briefing out a matter the Crown Solicitor is required to obtain the best possible rate given that the fees paid are from the public purse. To assist in the setting of an appropriate fee consideration is given to the following factors, namely:-

- whether the brief relates to a short matter;
- the experience of junior counsel; and
- whether junior counsel has expertise in an area of law which commands high fees.

Counsel briefed by the Crown Solicitor are able, by agreement, to charge extra for work done in excess of eight hours in a day.

As a rule, junior counsel will have practised

at the Bar continuously for at least five years to be regarded as an experienced junior counsel and for at least 10 years to be regarded as a very experienced junior counsel.

The system used by the Crown Solicitor's Office in setting counsels' fees was recently simplified to give greater flexibility by abolishing the concept of a standard fee and the distinction between first instance and appellate work.

Where counsel briefed by the Crown Solicitor believe that there is justification for a higher fee structure to be paid, I would encourage counsel to discuss any concerns directly with the Crown Solicitor's representative briefing the matter.

Finally, the Crown is aware that prompt payment of counsels' fees is important and its reputation for early payment reflects its continuing commitment to ensuring there is no delay in the payment of fees.



Reminder to update e-mail addresses

The Bar Association is increasingly using e-mail to communicate with members of the Bar and the Bar Association. Because much of the information that is e-mailed needs to be disseminated at short notice, there is often no other feasible way to distribute this information efficiently.

The e-mail sent by the Bar Association includes *Bar Brief*; the *Daily Brief*; updates on continuing professional development seminars, practising certificate renewal and professional indemnity insurance information; and information on judicial appointments, retirements and social functions.

Members who have changed their e-mail address, or who have recently opened an e-mail account, and who wish to receive e-mail from the Bar Association, are asked to advise the Certification Officer of their new address on ph: (02) 9232 4055, fax (02) 9221 1149 or e-mail: certification@nswbar.asn.au.



E-mail circulars

Due to the settings on the 'spam filters' at a number of chambers, some members have not been receiving the Bar Association's e-mail circulars.

Any chambers which has not been receiving these circulars should consult their network administrator. The filter may be adjusted to allow the chambers to receive Bar Association circulars.

Once the filter has been adjusted, those members who wish to catch up on past circulars can do so by clicking on the 'List ALL circulars' link at: <http://www.nswbar.asn.au/database/list-circulars.php>



CPD videos

The following are the latest CPD seminars to be added to the Bar Library's video collection. Members may borrow videos by contacting the library on ph: (02) 9233 4025 or e-mail: library@nswbar.asn.au

'Can I say that?', Steven Rares SC, 27 April 2004, **VID/193**

'Traps and tips of building and construction law', Frank Corsaro SC, 28 April 2004, **VID/194**

'Fact finding for arbitrators', the Hon Dennis Mahoney AO QC, 5 May 2004, **VID/195**

'Practice and procedure in the Federal Court', David Murr SC, 12 May 2004, **VID/197**

'Parental alienation', Professor Carolyn Quadrio, 1 June 2004, **VID/198**

'Migration law: practice and procedure', Margaret Allars, 2 June 2004, **VID/199**

Secrets of the jury room

One of the films on offer at the Sydney Film Festival is *Secrets of the jury room* : a court room documentary that goes behind the closed doors of Sydney's historic Darlinghurst Court. It is a unique jury room experiment, involving two juries and one criminal trial, which seeks to show, for the first time, how juries really work.

To make the film, a fictional, yet realistic criminal trial was conducted over one weekend in Sydney's historic Darlinghurst Court. Presiding over the case is retired Supreme Court judge, the Hon George Hampel QC. The barristers are Tom Molomby SC and Elizabeth Fullerton SC. The accused is a young, gay Lebanese man who, it is alleged, killed his lover: a terminally-ill sufferer of Motor Neurone Disease. As the story unfolds the viewer becomes privy to a thought-provoking insight into how juries actually work.

Tickets can be purchased from the Sydney Film Festival box office on ph: (02) 9280 0611, Ticketek on ph: (02) 9266 4800 or from The State Theatre and Dendy Opera Quays. Booking and transaction fees may apply.

Visit www.sydneyfilmfestival.org for full programme details.



Parental leave and waiver of practising certificate fee

It is the Bar Council's policy that members leaving the Bar for parental reasons are not required to hold a practising certificate for the period during which they will be absent from the Bar.

An application for a fee waiver due to parental reasons should be addressed in writing to the Executive Director or e-mail: executivedirector@nswbar.asn.au



Claims against HIH insured barristers

The Bar Association, regrets that it has been unsuccessful in its attempts to gain state or federal assistance for barristers whose professional indemnity insurance was affected by the collapse of HIH.

The Bar Association was unsuccessful at having the Commonwealth Government's assistance scheme amended to cover barristers with a liability of less than \$1 million. More recently, the association was advised that the New South Wales Treasurer has turned down its request for financial assistance.



Silk selection

The Bar Council has approved the following as members of the 2005 Senior Counsel selection committee:

Harrison SC
Slattery QC
Philip Hallen SC
Peter Zahra SC
Sharon Norton SC

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The CPD mini-conferences

By Chris D'Aeth, Director of Professional Development

The Bar Association's season of CPD mini-conferences for the 2003-2004 practice year has been an outstanding success. One-fifth of all practising barristers have attended at least one of the Continuing Professional Development Programme's mini-conferences, which are now regarded as an enjoyable, cost effective way to accumulate all ten CPD points across the four strands.

Attendances varied according to location: from more than 180 barristers at the University of Technology, Sydney on 29 May, down to the modest numbers of Orange and Wollongong. Mini-conferences were also held at The Australian National University, Canberra, University of Western Sydney, Parramatta, University of Wollongong, Southern Cross University, Lismore, University of Newcastle, and at Orange.

This year's mini-conferences built upon the successful format established in 2002/03, with the two additional conferences offering greater accessibility for barristers on the South Coast and the state's Central West. The content on the Saturdays varied between conferences and regions. The results of a member survey, held in November 2003, were used to help match topics to the needs of the local barristers.

There can be no doubt that attendance for



Ian Harrison SC

President of the New South Wales Bar Association.

the whole of a Saturday requires a great deal of motivation and effort. Seminars commenced at 8:00am and didn't conclude until nearly 7:00pm. However, those who managed the effort were amply rewarded: not only with their 10 CPD points, but also with an informative and entertaining day.

A collateral benefit of the mini-conferences was that six out of the seven were organised in partnership with the local universities. This provided law students

and academics an opportunity to meet members of the Bar in a relaxed and informal setting on the Friday evening. In addition, the Bar Association's Professional Development Department presented a short seminar to students on 'A career at the Bar', with local practitioners on hand to discuss the day-to-day reality of life in the profession.

The Bar Association would like to thank all the speakers and presenters for their preparation, time and commitment to the CPD Programme. Without their valued input the mini-conference programme would not have been the success that they were.



Senior Children's Magistrate, Roger Dive.



Fund management: a trap for young players

Continued from page 1

- (b) 1.1 per cent of the value of the estate for every year after the first year ie \$33,000 per annum or \$632.43 per week for 29 years (multiplier 809.6) deferred for one year (multiplier 0.952)

\$487,436
\$522,636

This is a simplistic approach⁴ to a complex actuarial calculation, but it does provide a broad guide to the sum which would be charged (in this case, 17.42 per cent of the fund).

Result

If one assesses the cost of fund management under the 'old' scheme, when the 'new' scheme is operational it can be seen that there could be a very significant shortfall which would be readily recoverable against solicitor and/or counsel if the error was made.

Another consequence of this new range of fees is that private fund management becomes significantly more attractive. Before the *Protected Estates Regulation 2003* was introduced the principal complaint about private fund management was that the fees for private fund management were significantly greater than those of

the Protective Commissioner. That is no longer the case. Plaintiffs' advisers must be aware of the difference between fees that were once charged and are now charged by the Office of the Protective Commissioner.⁵

¹ *Rosniak v GIO* (1997) 41 NSWLR 608

² *Bacha v Pettersen*, Hunter J., 20 September 1994

³ See OPC's web site

⁴ Defendants argue that the fee calculated in this way should be halved because the fund is steadily diminishing from the sum invested to zero over the period of the investment. This, likewise, is overly simplistic.

⁵ Be warned: There is much debate that the information published on the OPC's website does not accurately reflect the effect of the Regulations. In each case, the cost of fund management must be professionally assessed in accordance with the Regulations rather than the OPC's published information. Whatever be the precise case, it can be seen and is the fact that the new Regulations will ensure that if the funds are placed with the OPC the cost of management thereof will be many hundreds of thousands of dollars more than previously understood or as appears in ready reckoners published by forensic accountants and the like.

Reimbursement for regional practitioners

A regional member recently raised with the Bar Association apparent anomalies in the practice adopted by the Legal Aid Commission and Attorney General's Department in reimbursing regional barristers for travel and accommodation expenses when appearing in metropolitan regions, as opposed to that adopted in respect of metropolitan barristers appearing in regional areas.

The Executive Director took up these concerns with the Chief Executive Officer of the Legal Aid Commission and the Director General of the Attorney General's Department. Their responses are set out below for the information of the Bar.

Laurie Glanfield, the Director General of the Attorney General's Department wrote:

Under section 5(8) of the *Arbitration (Civil Actions) Act 1983*, remuneration of an arbitrator is determined by the Minister. The Attorney General's Determination of 26 June 2000, made under section 5(8), applies to the reimbursement of arbitrators' expenses.

The Determination provides for reimbursement, to specified limits, of the travel and accommodation expenses of arbitrators allocated to a hearing outside the Sydney metropolitan area. The Determination states that the reimbursement rates do not apply to hearings in Newcastle, Wollongong, Gosford, Penrith, Campbelltown or Liverpool.

The Determination makes no specific allowance for reimbursement of the expenses of regional-based barristers performing arbitral duties.

The practice of the Local and District Courts is to allocate arbitration hearings to barristers who live in the metropolitan or regional area in which the hearings take place. Regional-based barristers are allocated arbitral matters in Sydney only at their request. Metropolitan-based barristers are allocated arbitral matters in regional NSW only if no regional-based barristers are available to conduct the hearings.

Because of an excess of available metropolitan barristers neither court needs to request the arbitral services of regional-based barristers. Both courts are of the view that as metropolitan arbitration hearings are allocated to regional-based barristers at their request, and on a discretionary basis, there is no obligation to reimburse the barristers' expenses.

The courts' reasons for their practice of not reimbursing the expenses incurred by regional-based barristers appear reasonable, and I do not at present see a need to review the practice.

Yours faithfully



Laurie Glanfield
Director General

Bill Grant, Chief Executive Officer of Legal Aid New South Wales wrote:

I note that the substance of your enquiries on behalf of Barristers based in regional areas of NSW, relates to the Commission's policies regarding approval for travel and accommodation expenses for counsel and that the application of these policies 'discriminates' against regional practitioners.

The Commission's policies regarding approval for travel and accommodation expenses for all legal practitioners, provides that:

Travel and accommodation will be paid if they are traveling to a country court, but not if the matter is to be heard in Sydney or the metropolitan area, which includes Campbelltown, Hornsby and Penrith. If a request is made to cover counsel's travel and accommodation costs to go to courts on the periphery of the Sydney metro area, that is Gosford, Newcastle, and Wollongong, this is only allowed it in *exceptional circumstances* if a local barrister has not been briefed. An exceptional circumstance can include the length of trial and to some extent complexity (murder trials in the Supreme Court), also if the matter is transferred to another court, rather than pay additional preparation for new counsel, approval for travel and accommodation for counsel already briefed would be given.

The conditions inserted into the grant of aid pertaining to travel and accommodation states, "The Commission will *not* meet travel and/or accommodation expenses, nor any additional costs that would not have been incurred if the matter was assigned to a solicitor practising at or near the venue of the proceeding".

Accordingly, the Commission's policies provide that travel and accommodation will not be paid unless prior approval has been obtained.

Prior approval is usually obtained at the time the assigned solicitor informs the Commission of who they have briefed for the trial. It is at this time that confirmation should be sought from the Commission that counsel's travel and accommodation costs will be paid for the trial.

It should be noted that the Commission's policies in relation to travel and accommodation are applied to all legal practitioners. Therefore the Commission also only allows solicitor's travel *and* accommodation in exceptional circumstances. Exceptional circumstances include, 'where the practitioner has longstanding involvement with the matter and preparation fees have been paid; the judge moves courts (and the matter also moves). In these circumstances the Commission would consider payment of travel expenses.'

When accommodation is approved, the fee rate paid by the Commission is the rate according to the Premier's Circular 2003 - 30 effective 1 July 2003. The fees are set out [below].

All requests for all legal practitioners for travel and accommodation expenses are considered in accordance with the policies and guidelines indicated above.

I am sure that you appreciate that the Commission's funding is a finite resource and that it is necessary to have such policies in place to ensure the most appropriate expenditure of the limited legal aid funds. I am however, more than happy to consider any specific examples where practitioners could identify that they have been treated "differently" or "unfavourably" for reasons other than the application of the Commission's policies.

Yours faithfully



Bill Grant
Chief Executive Officer

Continued on page 15

Reimbursement for regional practitioners

Continued from page 14

Fees paid by Legal Aid New South Wales

Item No.	Clause No.	Description	Amount	
1	28(1) 28(2) 28(3)	Meal Expenses on One Day Journeys		
		Capital cities and high cost country centres (see list in item 2)		
		Breakfast	\$17.70	
		Dinner	\$34.05	
		Lunch	\$19.75	
		Tier 2 and other country centres (see list in item 2)		
28(1) 28(2) 28(3)	28(1) 28(2) 28(3)	Breakfast	\$15.75	
		Dinner	\$31.15	
		Lunch	\$18.05	
		Travelling Allowances When Staying in Non-Govt Accommodation		
		Capital Cities		
		Adelaide		
Brisbane				
Canberra				
Darwin				
Hobart				
Melbourne				
Perth				
Sydney				
2	29(2)(A)	High cost country centres	Per day	
		Alice Springs (NT)	\$170.35	
Broome (WA)			\$201.35	
Christmas Island			\$185.35	
Cocos (Keeling) Islands			\$185.35	
Dam pier (WA)			\$176.35	
Devonport (Tas)			\$173.35	
Exmouth (WA)			\$177.35	
Gold Coast (Old)			\$87.35	
Horn Island			\$193.35	
Jabiru (NT)			\$255.35	
Kalgoorlie (WA)			\$171.35	
Karratha (WA)			\$231.35	
Kununurra (WA)			\$183.35	
Launceston (Tas)			\$169.35	
Newcastle (NSW)			\$172.35	
Newman			\$198.85	
Nhulunbuy (SA)			\$206.35	
Norfolk Island			\$184.35	
Northam (WA)			\$170.35	
Paraburdoo (WA)			\$202.35	
Pt Headland (WA)			\$194.35	
Thursday Island			\$215.35	
Tom Price (WA)			\$175.35	
Weipa (Qld)			\$200.35	
Wilpena (SA)			\$180.35	
Wollongong (NSW)			\$170.35	
Yulara (NT)			\$446.85	
Tier 2 country centres			Per day	
Bathurst (NSW)			\$157.80	
Bendigo (Vic)			\$157.80	
Burnie (Tas)			\$157.80	
Cairns (Qld)			\$157.80	
Gosford (NSW)			\$157.80	
Geraldton (WA)			\$157.80	
Halls Creek (WA)			\$157.80	
Maitland (NSW)			\$157.80	
Maria (SA)			\$157.80	
Orange (NSW)			\$157.80	
Wagga Wagga (NSW)			\$157.80	
Wyndham (WA)			\$157.80	
	29(2)(A) 29(2)(B)	Other country centres	Per Day	
		Incidental expenses when claiming actual expenses - all locations	\$145.80	
			\$13.85	

Corrective Services: monitoring of phone calls

The NSW Department of Corrective Services has notified the Bar Association of revised procedures for the monitoring of telephone calls from correctional centres to legal practitioners.

The following is an excerpt from a letter by Paul Nash, Executive Director of the department's Corporate Counsel and Legal Services division, to the President of the Bar Association, Ian Harrison SC.

Until recently the Department did not monitor or record legal telephone calls unless warrants or other court orders existed. However, revised procedures have been implemented in relation to the monitoring of legal telephone calls following several identified instances of threats to the good order and security of correctional centres. Under the revised procedures legal calls may be monitored if officers have reasonable cause to suspect that they may constitute a threat to the good order or security of a correctional centre and where it is established that a call does not constitute such a threat the monitoring will cease.

The Department is in the process of installing a new controlled telephone system (CIS) to allow inmates to make telephone calls to certain pre-approved numbers. The roll out of the new system commenced in March 2004 is due to be completed by 30 June 2004. The CTS provides a warning at the beginning of a call, which can be heard by both parties, that the call will be recorded and may be monitored. The parties are at liberty to hang up before the call proceeds. The way the CTS is currently configured it is unable to provide the warning at the beginning of a call that the call may be monitored without also recording the call.

The Department does not want to record legal telephone calls and has no intention to access any information recorded since the new system commenced or to provide it to any other agency or person. Arrangements have been made for the CTS to be reconfigured to enable legal calls to be monitored without being recorded and to delete from the database all legal calls that have been recorded since monitoring of legal calls commenced.

For further information, contact Philip Selth, the Executive Director of the Bar Association on ph: (02) 9229 1735 or via e-mail: executivedirector@nswbar.asn.au

Papers to note

Model equal opportunity briefing policy for female barristers and advocates

The Law Council adopted a national Model Equal Opportunity Briefing Policy for female barristers and advocates on 20 March 2004. A copy of the policy may be obtained from the Law Council's web site at www.lawcouncil.asn.au under 'Policies and guidelines'.

LCA Brief

The Law Council of Australia produces fact sheets containing background information on particular issues, together with an overview of the Law Council's response. Since February 2004 there have been four LCA Briefs published. They are:

- Law Council's FSR Guide - February 2004
- Financial Services Reform Q&A - February 2004
- AUSFTA and the Legal Profession - May 2004
- National Practice - May 2004

Each LCA Brief may be downloaded from the Law Council's web site at www.lawcouncil.asn.au under 'Publications'.

Federal Court Amendment Rules 2004 (No.2)

The Amendment Rules commenced on 24 May 2004. The Amendment Rules are available from the ScalePlus web site at <http://scaleplus.law.gov.au/home.htm>. A copy is held in the Bar Library.

District Court Amendment (Property Relationships) Rule 2004

The object of this Rule is to amend the District Court Rules 1973 to update references to the De Facto Relationships Act 1984. A copy is held in the Bar Library.

Children's Court Practice Direction No.22

'Case management in the Care Jurisdiction'. The Practice Note is available from the Children's Court web site at www.lawlink.nsw.gov.au/childrenscourt. A copy is held in the Bar Library.

POSITION VACANT

BARRISTERS' CLERK

An experienced person is required for the position of Clerk to a new floor of Barristers Chambers to be established in September 2004 in the Reserve Bank Building, Martin Place, Sydney.

The duties of the Clerk include the management of Chambers, supervision of office staff, maintenance of financial records of the Floor and liaison with the Courts and solicitors.

Applications in writing should be addressed to:

Tersplit Pty Ltd,
C/o 9/174 Phillip Street
Sydney
or
DX 376 Sydney

CLOSING DATE: 25 JUNE 2004.



Law Council media releases, May-June 2004

New laws may lead to lighter sentences for terrorists - 17 June 2004

Law Council backs government plans for anti-corruption watchdog - 16 June 2004

Doubts remain over fair trial for Hicks - 11 June 2004

Law Council welcomes averment recommendations - 3 June 2004

PM Jumps the gun on military trials for Australian detainees - 28 May 2004

Lawyers reject 'unnecessary' security clearance laws - 27 May 2004

Work-life balance vital to young lawyers - 19 May 2004

Australia's reputation at risk over treatment of child asylum seekers - 18 May 2004

Newcastle visit of the NSW Bar executive

By Stewart Austin

Members of the New South Wales Bar Association Executive (Ian Harrison SC, Anna Katzmann SC, and Philip Selth) made their annual visit to members of the Newcastle Bar on Friday 4 June 2004.

The visit was timed to coincide with the mini-conference held at the University of Newcastle Faculty of Law, which commenced on Friday and continued on Saturday.

The Executive met and mingled with practitioners and students at the university, before moving on to the Newcastle Club for drinks and dinner with members of the local Bar. Harrison SC, Katzmann SC, and Selth were engaging company throughout the night and, to their eternal credit, maintained that they were enjoying themselves despite being beyond the city limits of Sydney. The Newcastle Bar thanks them for their time.

The mini-conference was also a success, for which we extend our thanks to Chris D'Aeth and Travis Drummond, who were instrumental in the organisation and conduct of the conference.



Appointments

Supreme Court of New South Wales

The Hon Justice Mason, AC, has been appointed as Acting Chief Justice of the Supreme Court of New South Wales, effective 12 June 2004 - 10 July 2004.

The following persons have been reappointed as acting judges and judges of appeal of the Supreme Court of New South Wales for the periods shown:

The Hon Acting Justice Brownie - 3 May 2004 to 2 May 2005;

The Hon Acting Justice Mathews - 16 April 2004 to 15 April 2005; and

The Hon Acting Justice Miles, AO - 28 April 2004 to 27 April 2005.

Mr Grahame James Berecny has been reappointed as an acting master of the Supreme Court of New South Wales, effective 28 May 2004 - 27 May 2005.

District Court of New South Wales

His Honour Judge McGuire has been appointed as Acting Chief Judge of the District Court of New South Wales, effective 5 May 2004 and expiring on 27 June 2004.

Crown prosecutors

Brian Knox SC, Nicolas Harrison and Wayne Roser have been appointed as deputy senior crown prosecutors, effective 26 May 2004.



Bar Council regional representatives

Name	Address	Phone/Fax	E-mail
Stuart Hill	Hargraves Chambers Cnr of Church & Crown Streets Wollongong NSW 2500	ph: (02) 4228 8977 fax: (02) 4226 3947	harlaw@hotkey.net.au
Rob O'Neill	Lachlan Macquarie Chambers 16 George Street Parramatta NSW 2150	ph: (02) 9635 1000 fax: (02) 9891 1989	ro'neill@lacmac.com.au
Bill Walsh	William Owen Chambers 121A Byng Street Orange NSW 2800	ph: (02) 6361 7959 fax: (02) 6361 7921	woc@bigpond.net.au
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	sca 371@ozemail.com.au

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Level 10, AWA Building
47 York Street, Sydney 2000
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Fax: (02) 9299 7861

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Editorial Contributions to:

Public Affairs Officer,
New South Wales Bar Association,
LG Floor, Selborne Chambers,
174 Phillip Street, Sydney 2000
DX 1204 Sydney

E-mail: mediainquiries@nswbar.asn.au

Fax: (02) 9221 1149

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Association e-mail Directory

Administration

administration@nswbar.asn.au

Accounts Department

accounts@nswbar.asn.au

BarCare

barcare@nswbar.asn.au

Practising Certificates

certification@nswbar.asn.au

Professional Development Department

professionaldevelopment@nswbar.asn.au

Executive Director

executivedirector@nswbar.asn.au

Legal Assistance Scheme

legalassist@nswbar.asn.au

Library

library@nswbar.asn.au

Media Inquiries

mediainquiries@nswbar.asn.au

Membership Inquiries

certification@nswbar.asn.au

Professional Conduct Department

pcd@nswbar.asn.au

Sickness & Accidents Inquiries

sickacc@nswbar.asn.au