THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2019

barnews

WE ARE THE BAR

A special edition on diversity at the NSW Bar

ALSO

Interview with The Hon Margaret Beazley AO QC

An autopsy of the NSW coronial system

THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2019

barnews

ISSN 0817-0002

Contributions are welcome and should be addressed to the editor:

Ingmar Taylor SC
Greenway Chambers
L10 99 Elizabeth Street
Sydney 2000
DX 165 Sydney

Contributions may be subject to editing prior to publication, at the discretion of the editor.

Cover - left to right: Jane Needham SC (13th Floor St James Hall), James Mack (Level 22 Chambers), Catherine Lin (Trust Chambers), Hament Dhanji SC (Forbes Chambers), Michael McHugh SC (Wardell Chambers), Nipa Dewan (Second Floor Selborne Chambers), Kavita Balendra (4th Floor Wentworth Chambers), Talitha Fishburn (Wardell Chambers), Kevin Tang (8th Floor Wentworth Chambers), Sharna Clemmett (Greenway Chambers), Samuel Pararajasingham (Forbes Chambers).

We are the bar

A special edition on diversity

Diversity is very much in the public mind at present. It was highlighted in the tragic mass shooting event that transpired in Christchurch and the reaction after it, led so intelligently, emotionally and steadfastly by Prime Minister Jacinda Ardern. The event itself demonstrated that there is considerable diversity already within our societies in all manner, covering disparate cultures, nationalities, religions, sexes, ages and socio-economic groupings. Immediately after it, Prime Minister Ardern spoke about the victims in the most inclusive of ways: 'They are us' she declared. It is the sentiment in this statement that underlines the drive for diversity across our institutions, businesses and professions, the judiciary and bar included. All of them need to ensure that they are drawn from 'us'. If they are not, they risk undermining the confidence of the public in those institutions and professions, in the manner identified by our President in his column.

After I commenced as editor I approached each of the Bar Association's committees and asked them to consider working with the *Bar News* Committee to produce a special edition focussing on the issues that concern that committee. The Diversity and Equality Committee, chaired by Kate Eastman SC and assisted by Ting Lim of the Bar Association, took up that invitation. Members of that committee have been instrumental in putting together this special edition focussing on diversity at the bar. I am pleased they did. Enhancing diversity is one of the important issues that faces the bar.

Quintessentially, addressing this subject in print requires great diversity in topics, thought and contributors. This edition contains analysis of issues that affect diversity within the profession, and the backgrounds and experiences of various individuals. I want to acknowledge the very generous contributions that have been made by the many who have brought this issue to life, particularly those who have shared their intensely personal stories.

The bar has changed. It is substantially more diverse than it was 20 years ago. There are more women at the Bar, more barristers who practise part-time, more barristers from non-anglo backgrounds, in short more barristers who are not 'straight white men' (to adopt Hament Dhanji's phrase). It is important to record this change. I could think of no better way to do that than by a 'Vanity Fair' style cover, recording how the Bar is changing. This edition celebrates the diversity that exists while identifying the challenges that remain.

The bar has changed. It is substantially more diverse than it was 20 years ago.

Any discussion on diversity necessarily focuses on statistics and data (which Chris Winslow and I have summarised from the 2018 Survey of the Bar). One cannot address an issue one does not understand. But it is important that analysis of diversity does not just concentrate on numbers. When we consider diversity we are discussing people, and every person has their own story of how they have travelled to where they are and their own view of their experiences along the way. Focussing on diversity enables us to hear a wider collection of stories than we might otherwise hear. It helps us understand one another and in turn gives each of us a richer experience when we hear them. This issue of *Bar News* has uncovered some of those stories. We have a generous contribution from the recently appointed Advocate for Change and former President of the NSW Bar Council, Jane Needham SC, who in interview provides her reflections on her journey to a career at the Bar and her experience as a barrister, professing the importance of diversity for the Bar and outlining some of the challenges that she has experienced along the way. Hament Dhanji SC, in a second interview, discusses how the bar is changing. His bar course 20 years ago was dominated by 'straight white men'. Now an Advocate for Change he has come to the view it is important to go to schools and 'in a sense show my face, a bit darker than the … stereotype'. Issues of racial and cultural diversity at the Bar are covered in several other pieces. First by the personal story of Bilal Rauf, who tells us how he found his way into the law and then eventually the Bar, noting the lack of diversity he has experienced at several stages of his career, why it is so important for that to be addressed and how he has seen it being addressed in recent times. Kavita Balendra has written about her experiences in common law, including her view that her version of diversity has acted to her advantage in practice. Samuel Pararajasingham writes about the significance of racial and cultural diversity at the Bar and why those matters should be addressed. The issues raised for achieving gender diversity have been at the forefront for the Bar in achieving greater diversity over the past several years. Much of that work has been underpinned by the statistics that have been gathered within the past five years. Continuing their considerable work in gathering and presenting the statistics on court appearances by women across the various jurisdictions, Richard Scruby SC and Brenda Tronson have written further about the experience of women at the Bar, particularly emphasising the lower quality of the work performed by women, the resultant impact on their incomes and their attrition from careers at

the Bar. These observations are underpinned when one considers the economic cost from discrimination, about which Penny Thew and Brenda Tronson have written, concluding that there are considerable gains to be made from greater diversity, particularly in productivity and income. The experiences of those working flexibly at the Bar and the issues that they need to address have been well analysed and captured by Surya Palaniappan, Nicholas Kelly and Alexandra Rose. The changes that have occurred in this regard over the past 20 years have been considerable. One imagines that the pace of technological change will continue to support those who wish to practise in that way. In the UK discussions about increasing diversity at the Bar include a strong focus on improving socio-economic diversity. Here in Australia, where we pride ourselves on a mistaken view that we are classless, there has been little focus on examining what barriers may exist to prevent those from disadvantaged backgrounds from coming to the bar and from succeeding when they arrive. Joe Edwards has been brave enough to take up my request to write about this difficult subject, in a piece that is accompanied by interviews with two barristers who describe their path to the bar. Another topic that does not get the attention it deserves is disability. Brenda Tronson and Aditi Rao explode the myth that having a physical disability is in some way incompatible with being a barrister. If there is an overarching message from the various articles, it is that there is obvious sense in the Bar Association's Strategic Plan stating that for the bar to represent clients from a cross-section of society, it must reflect that society. Public confidence in the bar, and by extension the judiciary which is largely appointed from the bar, would be eroded by a perception that it was overwhelmingly drawn from only a portion of society.

"… there is obvious sense in the Bar Association's Strategic Plan stating that for the bar to represent clients from a cross-section of society, it must reflect that society."

Diversity needs to be encouraged so that over time the leaders of the bar become visibly representative of our society. This will in turn send a message to those from diverse backgrounds: if you are bright, articulate and hard working you will succeed at the Bar regardless of your gender, ethnic or cultural background.

Can I end by thanking the hard working members of the *Bar News* committee, who have written a number of great pieces for this edition, including Kevin Tang for the significant number of excellent articles recording appointments, retirements and obituaries and Victoria Brigden for her wonderful interview with the outgoing President of the Court of Appeal, the new Governor of NSW, Margaret Beazley AO QC. I would like to acknowledge the large amount of time and effort taken by Mark Machonchie to create his marvellous photo essay of four of the commencement of term religious ceremonies, and thank those involved in organising the ceremonies for making him welcome. Finally, I thank Anthony McGrath SC, the previous chair of the Equality and Diversity Committee, for his assistance, including with this editorial

Ingmar Taylor SC

Changing face of the profession:

Diversity, professional standards and professional development

By Tim Game SC

In this column I would like to address two issues: one concerning the professional conduct work of the Bar Council and the Association more broadly; and the other the work we will be doing on our CPD programme over the next 18 months. First, however, I would like to make a few comments about diversity at the Bar which you will read a good deal about in this edition of *Bar News*. Diversity matters. Starting with the courts, a judiciary which, in composition, properly reflects diversity in the community is essential. It is essential to the process of decision making and to the legitimacy of the entire curial process, which includes the context and atmosphere in which legal argument is put and heard in all of our courts.

In a recent speech the Lord Chief Justice of England, Lord Burnett of Maldon, said:

> Increased diversity seeks to maintain and improve public confidence in the judiciary and thus to maintain accountability of the judiciary. It is reasonable to assume that the public will readily accept that the judiciary should be populated by educated and skilled lawyers. But confidence is likely to be higher if it is clear that the skilled and educated lawyers come from all sections of society and are not skewed towards, or against, any particular group….[I]f the judiciary is not appointed from every corner of the legal profession, talented people will be missed and the overall quality of the judiciary will suffer.

Most of the judiciary is drawn from the ranks of the Bar – we cannot expect a diverse judiciary without a diverse Bar. In addition, without a diverse Bar the courts will not receive the help they can expect when making the legal and policy decisions they are called on to make. Moreover, the very quality of life within chambers is improved, in fact transformed, if there is diverse membership by gender and ethnicity, reflected at the various levels of seniority.

This is much more than just a matter of numbers. There needs to be diversity across

We all have a part to play in attracting and maintaining a diverse NSW Bar and I urge you to contribute to that endeavour.

all areas of practice at the Bar. To give but one example; briefing a woman to lead the defence in a major criminal appeal is much more likely now that there is a fair proportion of women in senior roles arguing these appeals on the other side of the record, and also presiding on and hearing the appeals. It is now common for women to lead in such appeals on both sides of the record. Yet, it must be acknowledged that the same has not yet been achieved in other appeals.

This is not to suggest that things are not happening in other areas of practice and, in particular, the adoption of equitable briefing practices is to be both celebrated and further encouraged. We can say that diversity within the Bar is increasing, that is, diversity in terms of gender, ethnicity and social diversity. But you only have to look at the statistics in relation to gender to see that there is still a long way to go before the Bar reflects the composition of the society we live in. The resolution of this issue requires a sophisticated response often involving initiatives from a number of our committees (and from individual chambers), so that the Bar is perceived as an attractive career choice for school students, university students and young lawyers as well as being seen as an attractive place to stay. We all have a part to play in attracting and maintaining a diverse NSW Bar and I urge you to contribute to that endeavour.

Professional Standards

Turning to professional conduct, the Bar Council has a significant role in investigating complaints and the there are lessons to be learned from matters we see. Most of you would be aware that the Association performs a significant regulatory function with a separately funded Professional Conduct Division with a senior solicitor and a staff of six including a certification officer.

Bar Council has delegated powers to deal with complaints referred to it by the Legal Services Commissioner (LSC). We have powers to amend and add complaints in matters referred to us. When a complaint is referred, the Bar Council, through its Professional Conduct Committees (PCCs), carries out the assessment and investigation of the matter pursuant to its delegated powers. There are four such PCCs. Each PCC has community members. Within these four PCCs upwards of 60 barristers voluntarily carry out the exacting work that is involved in the investigation and assessment of complaints.

The final decision, following investigation is that of the Bar Council. The Bar Council may resolve to deal with a matter under section 277 of Legal Profession Uniform Law (LPUL) (to close a complaint, or a specific ground of a complaint, on a number of bases), section 299 of the LPUL (to make a finding of unsatisfactory professional conduct and make one or more orders including a caution/reprimand, an apology, a fine or reducing fees), or refer a matter to the Tribunal under the discretion set out in section 300 of the LPUL.

The latter discretion is broad and, in effect, extends to the more serious conduct, namely, that which the Bar Council considers may amount to professional misconduct or unsatisfactory professional conduct which

it determines would be better dealt with by the Tribunal (e.g., where there are significant credibility issues which cannot be resolved by the Council). The Tribunal's powers are more extensive than those given to the Bar Council and include the making of a recommendation that the practitioner be removed from the Roll.

The statistics for 2016/2017, 2017/2018 show that issues of bad communication, failure to take or follow instructions and lack of proper preparation remain areas of continuing concern. So too are matters relating to costs and costs disclosures, particularly in direct access matters.

However, the statistics included in our Annual Report tell only part of the story. Quite apart from the complaint process, matters come to our attention through separate disclosures made at the time of renewing practising certificates, or statutory obligations to report commission of offences (s 51), and show cause events such as bankruptcy. A good number of these are dealt with outside the formal complaint process such as by way of placing medical or financial conditions on practising certificates. Personal stress and financial pressure feature significantly as underlying factors.

Often we are first alerted to a looming problem either through the barrister calling the Bar Association's ethical guidance phone line in person, or by a call being made by a client or solicitor. We have also received calls from concerned heads of chambers, clerks and other barristers. In many cases the caller will want to know about what support is available for the barrister and we often refer members to BarCare which, of course, is a confidential service.

We are seeing evidence of an increase in practitioners coming to the attention of the PCD who are practising in 'virtual chambers' or working from home doing direct access work and handling fees directly with minimal support network of mentors or peers. They may be struggling financially or with personal circumstances. It is important that members do not feel isolated, or allow others whom they can see struggling to become isolated. Collegiality is a cornerstone of our profession.

A specific area that warrants mention is the barrister who is tempted to accept briefs which are beyond their experience or even outside their preferred area of practice. This is clearly unwise and can lead to serious consequences for the client, not to mention stress and pressure for the practitioner. Very often, the decision to take such a matter is rashly made due to lack of work and cashflow issues. These are often direct access cases, and involve the handling of trust money. The combination of not having an instructor, the already stressful or complex case, the need for diligent record-keeping and compliance with clause 15 (*Legal Profession Uniform Law Application Regulation 2015 (NSW)*) has been shown to lead to errors being made.

We are aware of how stressful it is for a member when a complaint is made against them and they become the subject of an investigation by Bar Council. We do what we can to limit the possibility of such complaints through pre-emptive education. The PCD and Professional Development department liaise regularly to address any trends that PCD see through CPD seminars. I also refer all members to the costs precedents available on the Bar Association website. In addition, I encourage members to avail themselves at an early stage of the PCD ethical guidance phone line. It is confidential and the staff will be able to refer callers to Silks on PCCs for guidance on many issues. The staff can also put barristers in touch with BarCare.

I wish to say something in particular about Rule 123. Rule 123 of the *Barristers' Rules* encapsulates the anti-discrimination legislation and is expressed in mandatory terms.

It states:

> A barrister must not in the course of practice, engage in conduct which constitutes:
>
> (a) discrimination,
>
> (b) sexual harassment, or
>
> (c) workplace bullying.

Over the past two years the PCD has received several complaints under this rule. Our colleagues at the Law Society have seen the same trend. Some of these matters are formal complaints, made to the LSC and referred to the Bar Council for assessment and investigation and some are informal. Formal complaints are dealt with in the usual way as discussed above. The Bar Council has referred (under section 300 of the LPUL) more than one 'Rule 123-type' disciplinary matter to the Tribunal for determination in the past twelve months.

Obviously enough, the Bar Council is concerned that we should do all we can to eliminate any such conduct by barristers towards any person with whom they interact in the course of practice and we take seriously our protective regulatory functions in this regard.

However, victims of discrimination, sexual harassment or bullying do not always want to make a formal complaint. The subject-matter is often very personal and sensitive and the complainant may not want to have to face the other party in a mediation and may want to remain anonymous. Often they just want the conduct to stop. Thought needs to be given as to how such complaints are dealt with confidentially, impartially and promptly while also ensuring that there are no repercussions against anyone making a complaint or helping a person to make a complaint. To that end I note that the Bar Council is currently working through a number of recommendations from the Diversity and Equality Committee that address processes for dealing with such informal complaints.

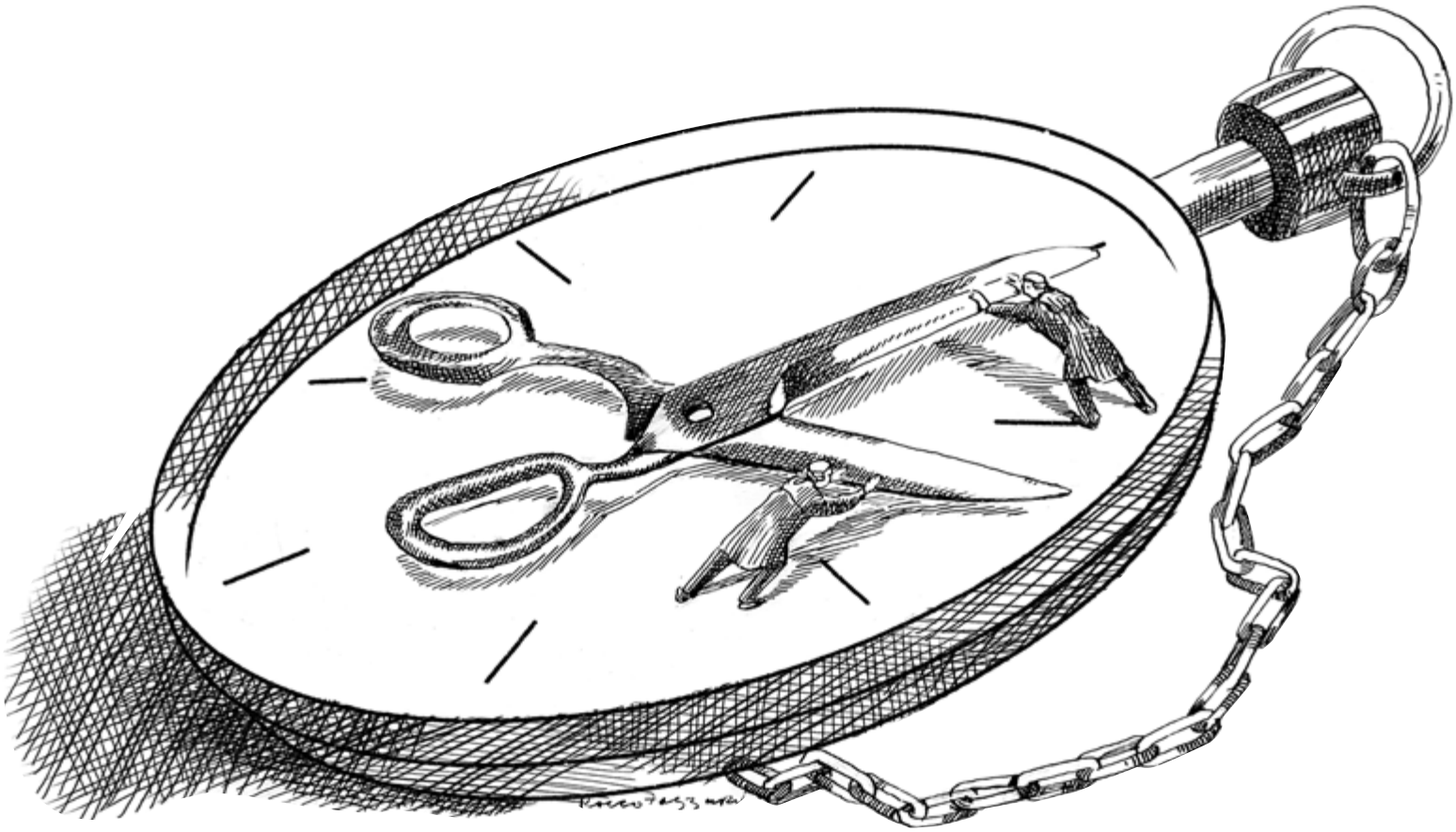
Continuing Professional Development

Finally, I would like to make a few comments about the Bar Association's CPD programme. As you will be aware the Association holds close to 100 CPD seminars each year in its common room, in addition to various lectures and city and regional conferences. It also provides numerous on-line resources for members.

There can be little doubt that high standards of education will play an important part in the future of the Bar in ensuring it stands at the forefront of legal knowledge and skill. It is therefore important that we continue to review the CPD programme in terms of content, delivery and infrastructure. We are seeking to ensure that the content of all CPDs is carefully planned by our committees so that each year it addresses, in a very systematic way, the needs of practising barristers. This does not mean that we will not maintain the ability to put on *ad hoc* CPDs at short notice of emerging issues, but we are seeking, carefully plan a large part of the CPD year. We also want to make sure that we draw on the broad expertise of the Bar in providing content. We have a depth of expertise to call on that no other teaching institution has and we need to use that asset to its best advantage and to be known for the very high quality of our CPD programme. Included in this CPD review is the introduction of advanced criminal advocacy training for barristers, which we intend to launch this year.

In addition to content we are investing in modernising the technology that sits behind the CPD programme. Much of that investment will be seen in our online offerings to ensure that they engage members so that learning is active and not passive. Other innovations in the annual calendar of CPD events are also being planned and we will move to allow your attendance at CPD events to be recorded so that the Bar Association can help you keep a record of your CPD points.

NEW SOUTH WALES
BAR ASSOCIATION



The Bar under stress

By Anthony Cheshire SC

There has been a lot of publicity in recent times about stress in the legal profession. This is not a recent phenomenon.

For instance, a study in 2009 of students, solicitors and barristers revealed 'high levels of psychological distress and risk of depression in the law students and practising lawyers' and 'a number of attitudes and behaviours which imply a general reluctance to seek help for mental health issues' (N.Kelk et al, 'Courting the blues: Attitudes towards depression in Australian law students and lawyers', Brain & Mind Research Institute, University of Sydney).

Judicial bullying has been reported as one of many contributing factors (as discussed by Arthur Moses SC in the President's Column in the 2017 Autumn edition of *Bar News*). That may itself be a product of stress in the judiciary, which is clearly a real issue given the results of the empirical study of judicial stress and wellbeing (as reported in *Current Issues* (2018) 92 ALJ 855, 859) and the suicides in the last eighteen months of two Victorian magistrates.

The position does not seem to be improving

and there are at least recent anecdotal accounts of ongoing unrealistic deadlines, stress, mental illness and self-harm at the bar.

The recent Financial Services Royal Commission got through an astonishing amount of material and breadth of issues in a short space of time in order to meet the very tight deadline imposed by the Government. There have been several media articles, however, describing the immense pressures under which lawyers were placed by the Royal Commission. Lawyers recorded working between 15 and 18 hours a day, seven days a week in phases where clients were required to respond to notices. There were notices requiring not only the production of documents but also responses to specific questions. Many notices were quickly followed by other notices, sometimes following on from a previous notice but often on a completely separate topic. Thus the intense phase of work was often extended over several weeks and sometimes right up to (or even beyond) when a client's relevant witness was due to give evidence.

Not only was the period of pressure often lengthy, but some of the notices imposed time limits that were so short that they simply could not be met. A failure to comply with a direction from the Royal Commission potentially exposed the client (and presumably the lawyers as accessories) to a criminal sanction of up to two years' imprisonment under section 3 of the *Royal Commission Act* 1902 (Cth).

Although a lack of time would presumably constitute a 'reasonable excuse' and therefore a defence to such a prosecution, a defendant bears an evidential onus in that regard. I, for one, would not wish to test the limits of the extent to which a need for sleep, a fear of a heart attack, a mother's 80th birthday or a desire to see one's children would constitute a reasonable excuse for a time limit not being met.

This is even before considering professional concerns of appearing lazy or not a team player or of letting the side down, all of which can be very damaging to a reputation and a career; let alone the prospect of being personally criticised in the public forum of a live-streamed Royal Commission under heavy media scrutiny.

The ABC reported the issue of lawyers' stress in the Royal Commission under the "headline": Banking commission's tight deadlines worsened legal profession's overwork culture. The question of whether the Royal Commission could (or indeed should) have sought an extension of time from the government in order to allow for some measure of breathing space (for the parties and the lawyers, if not indeed also the Royal Commission staff) was, however, never the subject of public debate; and the organisations the subject of the Royal Commission (and their lawyers) were understandably unwilling to raise the issue.

The Hon Dyson Heydon AC QC recently gave a speech in which, in the context of discussing delays in delivering judgments, he referred to 'a mentality of procrastination' and warned against 'a torpid shared culture of slackness, languor and drift' in the judiciary. There are often delays in meeting court deadlines, but would it be fair to describe those as resulting from a similar culture on the part of barristers and solicitors?

While we may wish to maintain a public face of being busy and important, we need to have support networks already in place to deal with problems when they arise.

In the *Australian Law Journal* (Current Issues (2018) 92 *ALJ* 855), Kunc J responded to that speech. His Honour described those comments as 'very unfair to all but a tiny minority of the country's judicial officers' and concluded that 'the moment has come to reconsider seriously, and with the benefit of modern human resources management insights, how judges do their work'. The same could be said for barristers and solicitors.

So what, if anything, is being done?

Work is already underway within many Australian courts to take steps to address judicial stress (as noted for example at (2018) 92 *ALJ* 855 at 859, 862).

WorkSafe Victoria began an investigation into one large law firm in response to a complaint about alleged health and safety breaches arising from staff being required to work unsafe hours in order to meet Royal Commission deadlines. While the Royal Commission was ongoing, law firms instituted additional support measures, including engaging additional staff, running matters with split teams, extending kitchen hours, giving gifts to staff and engaging nutrition consultants, fitness assessments, clinical psychologists, massagists and well-being coaches.

It is to be hoped that these responses are not regarded as extraordinary measures required in response to an extraordinary situation, but that they continue, at least in some form, beyond the Royal Commission. Calls from many within the profession for the culture of excessive work hours to cease offer some hope in that regard.

But what about the bar? Being self-employed, we should be in a position to control any excessive workload and engage any external support services that we need. The reality is, however, that we are not good at saying no to work or admitting to ourselves, let alone anyone else, that we need help or support.

While we may wish to maintain a public face of being busy and important, we need to have support networks already in place to deal with problems when they arise. Several years ago, a colleague set up a small group of barristers of a similar age to meet about once a month over wine and cheese and share personal and professional issues in a 'cone of silence'. The aim is not to provide solutions, but to enable people (if they wish) to identify, admit and share problems with friends and colleagues in an informal context. I have found being able to discuss problems with work, family or finances to be calming and to break the spiral of stress that can sometimes feel overwhelming.

In a more formal context, there are organisations such as BarCare, which provides counselling services to members of the bar and their immediate families and also has access to a wide network of medical and related professionals.

Such measures as exist, however, are largely ad hoc and rely upon the barrister identifying an issue and seeking assistance, which often does not occur. We need to be more prepared to admit to each other when we are experiencing difficulties.

Each branch of the profession then has its own internal support mechanisms, but there is little discussion across the three branches, even though stress in one can give rise to problems in another. Thus a stressed judge may bully a barrister, but a stressed barrister may add to a judge's workload and stress by not giving accurate or complete submissions on legal issues.

It seems to me that there needs to be much greater debate between judges, barristers and solicitors about the issue of stress and how we can, and are expected to, deal with it, in particular in the context of preparing for and

running cases. Short deadlines are still often imposed that will impact upon personal and family lives; and barristers will often be too proud or timid to mention a mother's 80th birthday or an excessive workload and ask for more time.

Events such as Bench and Bar lunches and morning teas in judges' chambers, where barristers are able to mix with judges, are likely to contribute positively to a bilateral dialogue in court about such issues, but a more formal extensive discussion between the three branches would be useful. The bar should be able to give guidance, such as in the Bar Course and CPDs, to junior members as to what is acceptable to raise with the bench.

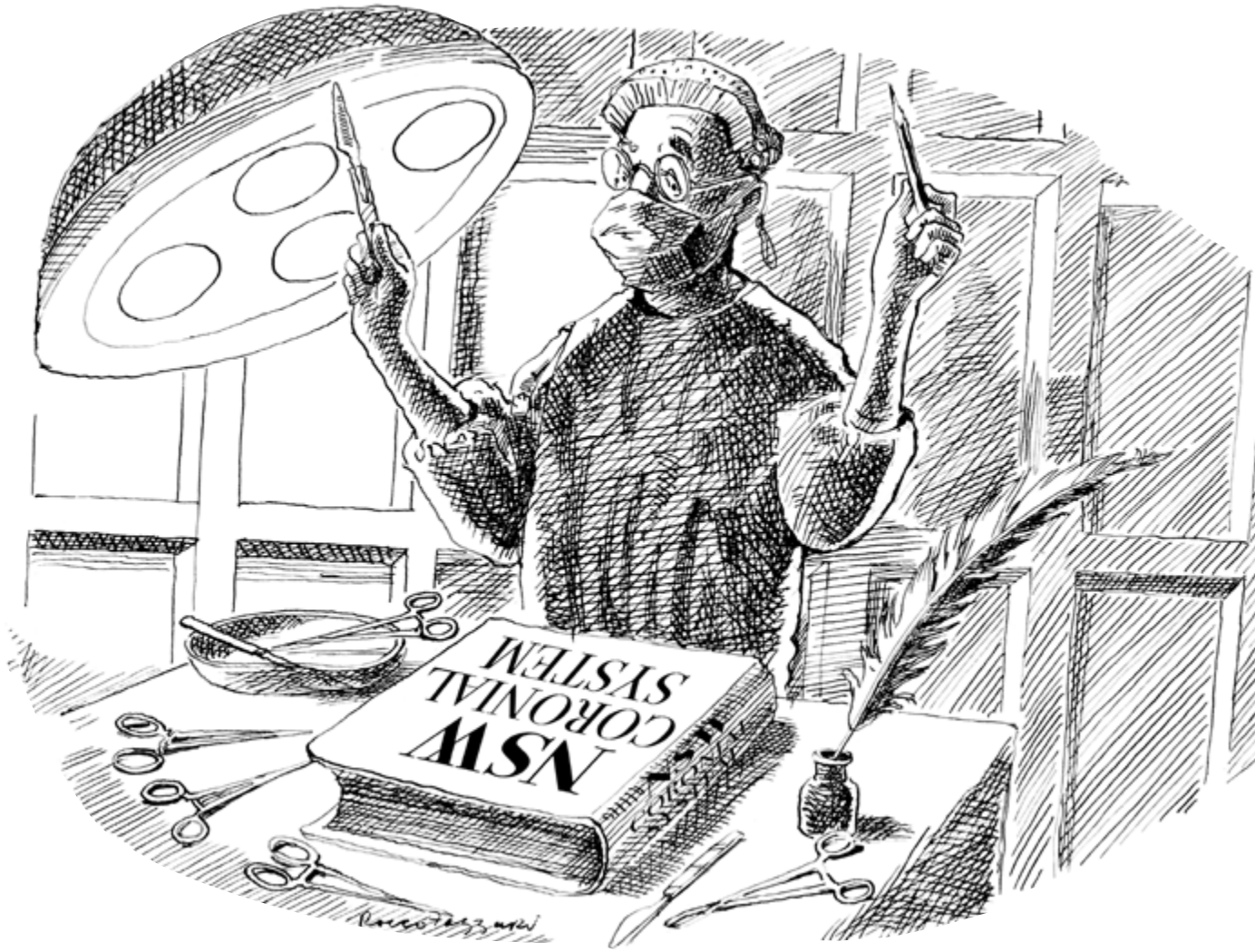
For instance, should one suggest to the judge that a four day case begin on a Tuesday so as not to ruin the weekend with young children; that a long case not sit on a Friday (which might also benefit the Judge in advancing the judgment); that a trial not be listed in school holidays; or that a timetable be extended to allow for a weekend away or a family celebration? There needs to be debate and guidance on these issues.

As I have previously commented, notwithstanding the notorious work hours and practices of lawyers, I do not believe that courts should operate on the assumption that lawyers must work during weekends and holidays.

The sympathetic words of Brereton J in *JKB Holdings Pty Ltd v Alejandro De La Vega* [2011] NSWSC 836, in the context of an application to rely upon evidence served late, are often ignored:

> As I have previously commented, notwithstanding the notorious work hours and practices of lawyers, I do not believe that courts should operate on the assumption that lawyers must work during weekends and holidays.

In reporting on the stress to lawyers arising from the Financial Services Royal Commission, the Financial Review recorded a comment from a lawyer that 'somebody is going to die'. It is easy to dismiss such comments as headline-grabbing or melodramatic, but to suggest that stress has been a factor in none of the deaths that have already occurred is naïve and unhelpful. A conversation across judges, barristers and solicitors about the issue of stress and what we can do to help each other is urgently needed.



A three-cavity autopsy of the NSW coronial system: what's going on inside?

The review of the Coroners Act – a new court? A new system?

Paper for the Medico-Legal Society Congress, Sydney, 6 March 2019

By Hugh Dillon*.

In 2010, a 'new' Coroners Act came into force. I use the ironical quotation marks because there was little really new about the Act. As is standard procedure, the Act included provision for a review after it had been operating for five years. The Justice Department began that review in 2014, expecting to make a few cosmetic changes. The then State Coroner, Michael Barnes, who had overseen the implementation of a new Coroners Act in Queensland in 2003, saw many deficiencies in the NSW Act and suggested a serious rewrite. He did not, however, expect that, by March 2019, the statutory review would remain incomplete and that whatever is to become of the coronial system would not be resolved until after the State election in that month.

Why has the delay been so extensive? The answer is probably that there is an internal competition of ideas between those who support the current structure, at the apex of which is the Chief Magistrate of

the Local Court, and those who are arguing for comprehensive reform. How that contest will be decided will be discovered after the election. The Local Court seeks to maintain the status quo in which the coronial system is located within and controlled by the magistracy. The reformers argue for a new organisation.

The foundations of the current structure of the coronial system were laid down in 1901 when the NSW magistracy was given control of it. In that year, steam engines – operating at 8% efficiency – were high tech. As the 20th century dawned, it made administrative sense to take the system out of the hands of amateur coroners and idiosyncratic juries and give it to educated, middle-class legal professionals familiar with police investigations and legal procedure. In the long term, however, it was a wrong turn. It folded the coronial system into the criminal justice system where it has remained to the present day. The investigation of suspicious death was its focus. While surreptitious homicide is self-evidently important, it is rare and, when suspected, is investigated thoroughly by police. Far more effective use can be made of this system.

In 1913, a medically trained English barrister and coroner, William Brend, lamented that the coronial system in his country was collecting vast amounts of medical and other data that was not being applied to improving public health. In a paper entitled 'The Futility of the Coroner's Inquest', published in *The Lancet*, he contended that 'the inquest verdict has no legal weight and does not settle legal questions; it has frequently little scientific value and does not provide accurate medical statistics.' He argued that, because the coronial system operated without a clear public policy strategy and because individual coroners, operating singly without guidance, made idiosyncratic decisions, the potential for deriving public health benefits from the coronial system was being wasted.[1] He argued that coronial data should be used for epidemiological research to guide the development of public health policy.

The criminal justice orientation of the Local Court limits the effectiveness of the coronial system. The cultural habits of mind and practice of magistrates are oriented towards managing and processing large volumes of relatively uncomplicated criminal matters as efficiently a and quickly as possible. Single cases are dealt with seriatim. Magistrates have no jurisdiction or capacity to treat them epidemiologically. Decisiveness and speed are the qualities most admired in magistrates by those who run the Local Court. High clearance rates are the KPI that keeps the Chief Magistrate's Office happiest. Some senior magistrates refer to the coronial jurisdiction of the court as a 'tick-a-box' jurisdiction – their view is that coronial cases can be disposed of almost effortlessly in most instances before they return to the real work of punishing drink-drivers, hotel heroes and other miscreants.

The shock, confusion, messiness and sadness of the broken human lives the coronial files document – and the potential for protecting lives from future tragedies – is not registered by such a 'tick-a-box' mindset. Not all magistrates bring such lack of empathy or narrowness of vision to their coronial responsibilities. In fact most are thoroughly decent human beings. But without a reorientation towards a philosophy of respect for human life and the desirability of finding ways of protecting it *through the coronial system*, coronership is wasted on the Local Court. The success or quality of coronial services are not and never should be measured merely by 'clearance rates' – too much is at stake for bereaved families, others involved in sudden and unexpected deaths, and society at large.

The untested assumption, based on historical practice and institutional inertia, that experience in criminal justice is the primary qualification for excellent coronership, remains at the heart of the Local Court's claim to control of the system. During his evidence at the Budget Estimates hearings before the NSW Parliament's Legal Affairs Committee, the attorney general, the Hon. Mark Speakman SC, was asked questions about the NSW coronial system and the argument reformers are making for a specialist court. On that question, the attorney stated:

> I know there is one school of thought that we should have a separate coronial jurisdiction. There is another school of thought that it is best dealt with in the Local Court and that you get more well-rounded decision-makers if they have spent a bit of time in general matters in the Local Court—mostly crime—and go into the coronial jurisdiction and come out again. So there are different schools of thought which are probably impossible to reconcile, but ultimately the statutory review will deal with both those schools of thought and make recommendations.[2]

The argument that 'you get more well-rounded decision-makers' if they have spent time sitting in criminal courts as magistrates is that of the local court hierarchy. It is noteworthy that the Attorney did not commit himself to the chief magistrate's position and that he recognised the impossibility of reconciling the two ideas in contest. One will have to give.

While the current team of full-time coroners based at Lidcombe is an excellent group – possibly the best team NSW has ever had – our system as a whole is not designed for purpose and is distorted by the criminal justice orientation of the Local Court. About 80% of the workload of the NSW Local Court consists in criminal proceedings of various kinds. Few magistrates ever have to grapple with complex medical evidence, public policy questions or the myriad issues that call for decisions from coroners.

On the other hand, under the Coroners Act, coroners are required to supervise medical investigations – every one of the 6500 deaths reported to coroners requires forensic medical review. How are coroners, without experience and training in medicine or science, to deal with such questions? The answer is that they either delegate the decisions to the forensic pathologists or court registrars, or they struggle to learn the ropes. My own experience was that it took about two years before I felt competent in discussing and making medical decisions and five years before I felt I was reasonably expert in this field. It is an impossible task for country magistrates, who do not have the opportunity to work shoulder-to-shoulder with forensic pathologists, cannot develop sufficient volume of experience to become competent, and who are not given the training and professional development in this field, to build either the professional rapport with the doctors or the medical knowledge to make well-informed decisions of this kind.

Judges and magistrates rarely develop expertise in the inquisitorial method that coroners apply. The separation of powers and principles of due process and fair trial separate the judiciary from the executive in the criminal and civil justice systems, and from the parties to litigation. Yet coroners are inquisitors – *they* are responsible for directing and overseeing investigations of sudden and unexpected deaths. This, again, requires a very different mindset from the conventional judicial approach in which the opposed parties frame the issues. Early in my coronial career, my counsel assisting asked me what I wanted her to do about some issue. My first thought was, 'What are you asking me for? I'm the judicial officer.' For me, the discussion that followed was a seminal moment for me in discovering the realities and responsibilities of coroners as leaders of investigations. The criminal (and civil) justice system require judicial distance from the parties and their dispute; coronership requires full engagement at an elemental level in identifying and framing the issues, establishing the scope and direction of the investigation, and a doggedness in following the evidence wherever it leads to relevant answers to questions about the causes or circumstances of a death. It is a misconception that 'well-rounded' criminal magistrates are equipped for ready translation to the inquisitorial method, at least at a sophisticated level.

In the criminal jurisdiction of the Local Court it is rare for a magistrate to deal with more than a few issues in a case, much less write a detailed judgment or decision. Yet in the coronial jurisdiction, many inquests, especially medical cases or those implicating state agencies, raise complex issues of fact and causation can be as complex as those dealt with in the Supreme Court. Acquiring and developing the competence to manage such inquests is not achieved overnight. Managing a high-volume court list is not adequate preparation for it.

The most fundamental problem with the Local Court's claim to control over the system, however, is that it lacks a coherent philosophical, theoretical or policy basis. What is, or what are, the purposes of the coronial system? Why is the Local Court the most appropriate anchorage for it? Nothing in the Act or the Local Court's literature about the coronial system provides a clear answer to these questions. From 1901 until now, the questions simply haven't been asked.

Brend's criticism of the English coronial system of the early 20th century can be echoed in this state. Brend thought that his system should be oriented towards, and designed to promote, public health and safety. That made sense in 1913, and it makes even more sense in NSW in 2019. More than 6500 thousand cases are reported to coroners annually in NSW. About half are due to natural causes. The remainder are due to suicides, accidents and other causes. Only a tiny fraction of the whole are homicides or suspicious deaths. The potential for saving lives lies in more thoroughly investigating many of the non-natural deaths, especially those in which systems failures are implicated, and in following up some natural deaths with family members who may be vulnerable to similar morbidities.

All of this suggests that a grounding in criminal law and procedure, while valuable experience, goes nowhere near qualifying magistrates as competent coroners.

It follows, then, that the NSW Government should first decide the purpose of the coronial system and design the organisation around that theory or policy, rather than the reverse. The principles for a theory of or policy for an excellent coronial system are, I believe, the following:

- Respect for and protection of the basal human right – the right to life;
- An orientation towards public health and safety rather than suspicious deaths;
- A priority to be given to healing and therapeutic approaches to the bereaved relatives and others affected by sudden and unexpected deaths;
- Accountability of the state – the social contract between the State and the members of the community to protect us from harm is implied in all coronial practice.

If these are the elementary principles, investigation of death by coroners would prioritise the prevention of future deaths and serious injury, and, where the state is implicated in a death, bringing it to account. Grieving relatives' most earnest desires include finding answers to their burning questions (how and why did this happen?) and, if possible, preventing others from suffering the same fates. In my view, there is no such thing as 'closure' – but it is possible to lift some of the burden of grief, bewilderment, confusion and despair. As a coroner, it was remarkable to me how so many people responded positively to demonstrations of respect they received from state officials, such as coroners, doctors, police officers, court counsellors and public servants who treated them compassionately.

Although some of the work of coroners relates to unsolved homicides and suspicious deaths, recent thinking about coroners emphasises their roles in enhancing public health and safety. In the 21st century, to conceptualise the coronial system as a unique state institution that combines public health and safety principles with therapeutic justice and human rights protection, rather than as a team of detectives or criminal court magistrates, is the way of the future.[3]

Instead of being a thin stratum of a pyramidal Local Court system in which the chief magistrate sits at the apex, specialist coroners should be the hub around which the moving parts of the coronial system operate – families and family support staff; medical and scientific investigators; police investigators; lawyers; ad hoc experts; epidemiological and policy researchers; and administrators – with state coroner having primary responsibility for co-ordinating and harmonising the efforts of all participants in the system. This organisation should be removed from the Local Court's administration and supervised by the state coroner and overseen by a strategically focussed multi-disciplinary board or council comprised of representatives of NSW Health, the Attorney-General, NSW Police and organisations such the Law Society, the NSW Bar and expert community representatives, especially those who can articulate the concerns of bereaved families.

The review of the coronial system in NSW remains on foot. There are many ways in which the system could be improved but the critical issue is how we conceive of the system as a whole and what we want it to do. How our next government approaches this task will set the system in concrete for the foreseeable future – will they reform or will the system still be steam-driven in a generation's time?

Coronial discretion: towards better decision-making?

William Brend noted that 'One of the first things [about the English coronial system of 1913] that arrest[s] attention… is the great diversity of principle among coroners in the selection of case upon which to hold inquests and of procedure in the conduct of inquest'.[4] The same could be said of NSW coroners in 2019 because of the hybrid organization of the system, its institutional ossification in the Local Court structure, and its lack of a coherent principles and philosophy or theory of practice.

Discretion is exercised by coroners in many ways – among them decisions concerning autopsies and medical investigations; decisions about the form, depth and direction of police investigations; decisions about scientific or other expert investigations or reviews; decisions about holding or not holding inquests; decisions about the scope of inquests; decisions about the management of inquests; and decisions about whether to make recommendations following inquests, how recommendations are framed and to whom they are delivered.

The decision with greatest impact on bereaved families and others involved in coronial case is that of holding or not holding an inquest. Coroners have virtually unfettered discretion in practice. While broad criteria are set out in the Local Court bench book to assist magistrates makes these decisions, there are few standard procedures. Coroners, therefore, like Brend's English coroners a century ago, operate very individualistically. This leads to great inconsistency in decision-making, resulting in unpredictability, confusion and complaints from agencies such as NSW Health. Developing guidelines for the exercise of the discretion would be a first step to improving the decision-making process. I suggest, though, that until the cottage industry system is replaced by a specialist coronial court in which these decisions are centralised and managed in a methodical way, the current inefficiency will continue to characterise the process of selecting inquests.

Although there are sometimes high profile public interest cases that demand full public inquests, the most effective way of using inquests would be to concentrate on two key areas: (a) preventable deaths, especially those contributed to by systems failure and (b) holding to account government agencies with a particular duty of care (police, corrective services, child welfare agencies, disabled care organisations, psychiatric hospital are obvious examples) for deaths occurring in their domains.

One important guiding principle should be that, insofar as is reasonably possible, a public health or epidemiological approach is taken to decision-making about inquests: cases should

be clustered so that lessons learned can be generalised. One-off cases (and recommendations) are far less likely to achieve death preventive impact than cases with a broad evidence base.

Centralising the decision-making process so that specialist coroners, working according to consistent standards, exercise the discretion would be a superior arrangement to the amateurish chaos that prevails at present. Guidelines could be developed in consultation with interested parties, such as NSW Police, NSW Health, Corrective Services, the Crown Solicitor's Office, the Human Rights Commission and non-government organisations such as the Public Interest Advocacy Centre, the Law Society, the NSW Bar, the Medico-Legal Society, and Suicide Prevention Australia.

Again, to achieve such efficiencies requires thinking about the first principles of the coronial system and how they can best be implemented in practice.

Inquests: can we do better?

According to the 2018 Report on Government Services, in 2017 NSW had a coronial clearance rate of 94.5%. It ranked 6th out of 8 Australian jurisdictions in that respect.[5] The number of inquests conducted in NSW also dropped alarmingly over the period 2016 and 2017:[6]

No. of inquests conducted in NSW:

Year	Inquest
2005	187
2006	212
2007	209
2008	243
2009	165
2010	196
2011	290
2012	148
2013	142
2014	140
2015	150
2016	120 (a 20% drop on 2015)
2017	84 (a 30% drop on 2016)

This is bad news for bereaved families and the community more generally. While it is largely a resourcing issue the Local Court's policy of rotating experienced specialist coroners out of the system back to the Local Court (or retirement if they choose not to return to the general bench of the Local Court) after a certain number of years is a contributory factor. 'Fresh blood' is inexperienced and therefore less efficient generally than old hands. Reported deaths also continue to increase as the population increases. Since 2010, the first year of operation of the 2009 Coroners Act, reported deaths have increased approximately 21% yet the number of full-time coroners has remained the same[7]

The effect is that a backlog of cases is building up to the detriment of bereaved families and others. It can be cleared by doing 'quick and dirty' inquests, by refusing to conduct inquests or discretionary inquests until the backlog is dealt with, or – as it should be – it can be managed properly by resourcing the jurisdiction with more coroners, support staff, research resources and by providing the support, training and professional development coroners need.

The backlog of cases imposes undue pressure on coroners to dispense with discretionary inquests. Yet inquests are the primary way by which coroners exercise their death preventative function. Only when inquests are conducted do coroners in NSW have power to make recommendations.[8] More subtly, holding inquests prompts action on the part of organisations such as NSW Health, Corrective Services and other agencies to take action to remedy systems failures. Many agencies are very keen to demonstrate publicly that there is no need for a coronial recommendation because they have addressed such issues.

And as I have suggested above, those inquests that are conducted could be more effective in mitigating risk of future deaths if epidemiological techniques were applied. Some NSW coroners understand this well: in recent years, such approaches have been taken, among others, to drug deaths of 'doctor-shopping' patients; deaths of rock fishers; deaths in high-speed police pursuits; and deaths due to quad-bike rollovers. Recently, an inquest has been announced into deaths at music festivals. Yet these tend to be the exception rather than the rule, especially in relation to deaths reported to country magistrates.

Most people directly involved in the coronial system know that one of the few small measures of comfort for bereaved families is the potential that an inquest may discover life-saving lessons. Holding sophisticated, efficient inquests concentrating on preventable deaths is one way our society can demonstrate respect for the dead, provide comfort to the bereaved and advance the welfare of our community.

Conclusion

This paper is being written shortly before a state election that will have momentous consequences for the coronial system in NSW. I am hopeful that, in a spirit of bipartisanship, both sides of politics will join in long-overdue root-and-branch reform of the system. Reform would, I suggest, be an inherent good for bereaved families and our society more generally. But there is a hard economic incentive to build a more effective system as well. The Australian government has estimated that the economic value of a human life in this country is approximately $4.5 million.

If the death preventive potential of the NSW coronial system could be lifted even marginally to save a few extra lives, it would be worth its own cost many times over. My hope is that the next NSW government will embrace the opportunity this state has to develop the best coronial system in the world. It would not be very costly in overall terms (say, $6-7million extra per annum out of a health and justice budget in its billions) and the human benefits would be immeasurable. It is within reach if the vision is there.

ENDNOTES

* Hugh Dillon is an Adjunct Professor at the UNSW Law School. He was a magistrate (1996-2017) and Deputy State Coroner (2008-2016). He is now a part-time Deputy President of the Mental Health Review Tribunal, a member of Maurice Byers Chambers and a PhD candidate at the UNSW Law School.

1 William A. Brend, 'The futility of the coroner's inquest', *The Lancet*, 17 May 1913, 1404-1408.

2 The Hon. Mark Speakman SC, Evidence, NSW Parliament, Legal Affairs Committee Budget Estimates hearing, 4 September 2018 transcript pp13-14. https://www.parliament.nsw.gov.au/lcdocs/transcripts/2117/Transcript%20-%204%20September%202018%20-%20CORRECTED%20-%20PC4%20-%20Attorney%20General.pdf accessed 27 February 2019.

3 See Jennifer Moore, *Coroners' Recommendations and the Promise of Saved Lives*, (Cheltenham: Edward Elgar, 2016). Moore, a lawyer and epidemiologist, argues for a public health orientation to coronial services. See also Ian Freckelton & David Ranson, *Death Investigation and the Coroner's Inquest*, (Melbourne: Oxford University Press, 2006).

4 Brend (1913), 1404.

5 Productivity Commission. 8 *Report on Government Services 2018*. Table 7.8 http://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice/courts/rogs-2018-partc-chapter7.pdf

6 At the time of writing, the figures for 2018 were not available. Anecdotal evidence suggests that the number of inquests conducted has risen from 2017 levels. The clearance rate may also have risen.

7 The 2011 Local Court Annual Review reports that in 2010 5448 deaths were reported to coroners. The 2017 Annual Review reports that this had risen to 6602 deaths in 2017.

8 *Coroners Act 2009*, s 82.

An ambitious water plan fails to deliver

The Report of the South Australian Murray-Darling Basin Royal Commission

By Josie Walker

On 29 January 2019, Commissioner Bret Walker SC handed down the Report of the South Australian Murray-Darling Basin Royal Commission (the Report). The Royal Commission was instigated by the government of South Australia, the tail-end state of the Murray-Darling Basin, long frustrated at the over-extraction of water by upstream states. The legacy of over-extraction can be seen particularly starkly in the Coorong, a Ramsar-listed wetland at the mouth of the Murray, which has been suffering from algal blooms and a drastic decline in its internationally-significant birdlife for many years. This is just one of the many riverine ecosystems which should have been protected by the Commonwealth and affected states under the Murray-Darling Basin Plan (MDBP).

The Report describes the scheme of intergovernmental cooperation between the Commonwealth and the Murray-Darling Basin States, beginning in 2007 as ambitious and unprecedented. Under the Commonwealth *Water Act 2007* (the Water Act), a key benchmark for the allocation of water is the Sustainable Diversion Limit (SDL). The SDL was supposed to be set, based on the best available scientific advice, at a level which would not compromise the health of riverine ecosystems. The Murray-Darling Basin Authority (MDBA) was then supposed to allocate the permissible take of water among each of the basin states. Individual states then determined the amount which could be taken from each regulated water source through state-based mechanisms. In New South Wales, these mechanisms are Water Sharing Plans under the *Water Management Act 2000* (NSW).

The MDBA published its *Guide to the Proposed Basin Plan* (the Guide) in 2010. The Guide posited an SDL which would achieve basin-wide environmental objectives with a high degree of certainty. Even in the original Guide, that figure was adjusted downwards to avoid perceived unacceptable impacts on the productivity of the basin. Nevertheless, Commissioner Walker SC describes the Guide as 'arguably the most comprehensive, scientifically-based open and transparent publication produced by the MDBA to date' (p 165). Notoriously, there was an intense political backlash against the Guide, which led to the SDL being adjusted downwards in 2012 with little scientific justification. The Report finds that ultimately the SDL was determined having regard to 'the limit of sectional or political tolerance for a recovery amount', rather than the science. The Report finds that this exercise demonstrated a 'cynical disregard for the clear statutory framework for decision-making… to the lasting discredit of all those who manipulated the process to this end' (p 24).

As Commissioner Walker SC says at p 25 of his Report, the errors which have been made to date in departing from the spirit and letter of the Water Act 2007 (Cth) *'can and should be rectified'.*

Even after the SDL was set at a level patently inadequate for the protection of ecosystems, it was not immune from further erosion. The MDBP provides a mechanism by which the SDL may be adjusted if the amount of water set aside for the environment can be demonstrated to be more than is necessary for the protection and recovery of basin ecology. The Report finds that, while this process of adjustment has the potential to benefit both the environment and consumptive users in principle, to date these processes have been distorted, because 'the overt aims of some of the currently proposed adjustments is to enable more water to be used consumptively by irrigators'. This has led to a lack of scientific rigour in the adjustment process which presents a further risk to the integrity and lawfulness of the SDL (pp 28-29).

The Report is particularly critical of reported threats by the New South Wales Minister for Agriculture, Niall Blair, to 'blow up' the MDBP if adjustments are not approved in response to the planned Menindee Lakes Scheme (p 29). The Menindee Lakes Scheme is a proposal by the NSW government to change the management of the Menindee Lakes to decrease the amount of water lost through evaporation. New South Wales is urging the MDBA to increase the level of permissible take to take account of the water efficiencies promised by this scheme. However, these management changes have been resisted by the MDBA to date because of their potential to negatively affect bird and fish habitat.

It is of concern that the negative portrayal of the MDBP in the Royal Commission Report could be used by some in the political arena as a justification for abandoning the process of cooperative basin management altogether. That would be a mistake. The MDBP is the only mechanism that we have for rationally allocating water between consumptive and environmental uses across the four basin states and one territory. Without it, there would be no legal brake on upstream states taking as much water as they could use, leaving both downstream users and the environment high and dry. While the MDBP has not so far lived up to its promise, the alternative of *not* having a MDBP would be much worse.

As Commissioner Walker SC says at p 25 of his Report, the errors which have been made to date in departing from the spirit and letter of the *Water Act 2007* (Cth) 'can and should be rectified'. The MDBA needs to be reformed to provide for greater transparency and a greater degree of independence from political interference. Not only environmental objectives, but a respect for the rule of law, should prompt rectification of past errors. At the end of the day, it may be easier to build political consensus behind a strengthened MDBP based on independent scientific advice which promises improved health for the riverine system, than one based on political expediency which merely maintains our inland rivers on life support.

Clickwrap contracts

Is an 'I agree' click the same as a signature?

By David Ash

Introduction

Lobbyists, legislators and judges have always grappled with the lopsided bargain. This article looks at the challenge thrown up by the online transaction. Does clicking 'I agree' mean 'I agree'? And if it does then what, exactly, is being agreed?

Is there a contract at all?

A standard form contract has a first page applying to the individual consumer (with the make, the model, the price, etc) and a second page applying indiscriminately to the offeror's intended customers.

The online transaction must be approached differently. There is a developing taxonomy of browsewrap, clickwrap, scrollwrap and sign-in wrap, and the separate question of whether a hyperlink can or cannot incorporate terms.

The different fact scenarios are beyond this article. Reference may be had to Simon Blount's *Electronic Contracts*, 2nd ed, 2015, LexisNexis. The important point is that the voyage from the offeror's home screen to its payment and receipt screens may well be relevant, either as surrounding circumstances or as part of the contract itself.

There are temporal and spatial issues. If things are changing on the face of the transaction, what may this say about the continuing applicability of a box ticked at the outset?

In practical terms, are you still drafting the request: 'If the contract is in writing and signed, please provide a copy.' when you should be asking something along the lines: 'If the contract is online, please provide a screenshot of each step from offer to acceptance?'

The law of the pen in Australia

If the contract is contained in a railway ticket or other unsigned document, it is necessary for the party invoking its terms to prove that

the other was aware or ought to have been aware, of its terms and conditions. However, these cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation or of statutory amelioration, the party signing it is bound, and it is immaterial whether they have read the document or not.

These propositions – the rule in Graucob – comprise the settled law of Australia: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; 219 CLR 165; 79 ALJR 129; 211 ALR 342, [57]*. The High Court added at [53]:

> The proposition [adopted in the courts below] appears to be that a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms. If the proposition is limited to some terms and not others, it is not easy to see what the discrimen may be.

In summary, where the contract is unsigned, reasonable or actual awareness is in issue, and where the contract is signed, the signature forecloses that issue.

The forensic difference is vital. Where the consumer has signed the contract, the consumer bears the burden of disavowing their own act. Where the consumer has not signed the contract, the offeror bears the burden that reasonable notice has been given: see e.g., *Sydney Corporation v West (1965) 114 CLR 481*, 486 per Barwick CJ and Taylor J.

The US position

I recommend two judgments. First, Sotomayor J's reasons in *Specht v Netscape 306 F3d 17(2002)* provide an enduring and authoritative framework authored by a preeminent US jurist. Secondly, Weinstein J's reasons in *Berkson v Gogo LLC 97 FSupp3d 359 (2015)* provide a recent and vibrant conspectus by a trial judge.

Judge Sotomayor observed (1) paper transaction principles apply equally to the emergent world of online product delivery; (2) a party cannot avoid the terms of a paper contract on the ground that they failed to read it; (3) however, when the paper does not appear to be a contract and terms are not called to the attention of the recipient, no contract is formed with respect to the undisclosed term; and (4) reasonably conspicuous notice and unambiguous manifestation of assent by consumers are essential if electronic bargaining is to have integrity and credibility.[1]

Thus a signature – that is, an 'unambiguous manifestation of assent' – does not preclude a parallel assessment of 'reasonably conspicuous notice'. In electronic bargaining, a click may and almost certainly will, amount to a concluded bargain, but that will be upon an assessment of the evidence of the transaction as a whole and not upon the presumptive effect of a click.

Two further matters of relevance to Australia.

First, the usual admonition – each case

depends on its facts – applies to online transactions with unusual force. Judge Sotomayor distinguished a number of cases where a contract had been found to exist, because a review of those cases showed 'much clearer notice' than in the case before her.[2] If the offer carries 'an immediately visible notice of the existence of… terms' and requires 'unambiguous manifestation of assent to those terms', that will be enough.[3] Anything less, and the offeror, at least in the US, will have its work cut out.

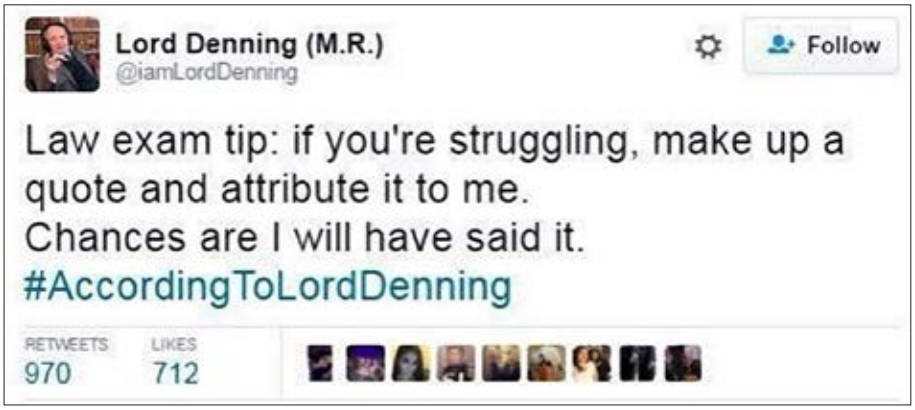
Secondly, the makeup of the reasonable user is as essential and as elusive in US jurisprudence as Australian jurisprudence.

On the one hand, both the US and Anglo-Australian courts have declined to recognise a juridical entity called 'the unsophisticated consumer'. In Australia, for example, a person seeking to avoid their signature cannot say 'I have a special legal status because I am not a businessperson.' As the rule in Graucob makes clear, the person must positively establish an equity or an extra-contractual representation or a statutory 'out'.

On the other hand, both the US and Anglo-Australian courts acknowledge that one type of consumer may differ from notice to another. A good example is Specht itself. Judge Sotomayor noted that in one case on which Netscape placed 'great importance', the offeror's terms of use 'were well known to [the consumer], which took the information daily with full awareness that it was using the information in a manner prohibited by the terms of [the corporation's] offer.' She simply noted 'The case is not closely analogous to ours.' [4]

Consumer law

It must be noted that Australian parliaments, as distinct from Australian courts, recognise a category of law called consumer law. However, contract law is not consumer law. Consumer law focuses on a supply of goods or services by a provider to a consumer, whether the supply is by contract or not. Whether a practitioner acting to shield a consumer from a contractual claim is able to invoke the sword of statutory consumer law is a complex question in both form and substance. It is sufficient for current purposes to note that the regimes are different.



Question 1 – Who was in the minority?

Will Australian courts apply the rule in Graucob by analogy?

Provided that there is a bargain at all – as to which, see above – will Australian courts say that a click of 'I agree' is analogous to a signature, so that argument about awareness is foreclosed?

In Toll, the court was at pains to focus on the physical use of the pen as a line of division. It justified the division by reference to two different policies. First, the significance given by the signer to the act of signing. Secondly, the need to protect both the person who asks for the document to be signed and for third parties who have a valid commercial interest in the signed document's binding nature, including but not limited to banks and insurers. As the court acknowledged, each policy feeds on the other.

As to the first, I think an offeror who argues 'it is common knowledge that a clicker gives the same significance to a click as a signer gives to the act of signing' is doomed to fail. A young person's development of their signature is, or at least was, part of growing up. It may not have had the emotional immediacy of one's first kiss or first drink or first driving lesson, but each of us when we had our signature in its final form felt different from when we hadn't.

The second is more difficult. A court is in the business of administering justice, not dispensing it. The danger of an individualised justice is apparent. However, I am not sure that an argument 'We used to rely on the pen, the pen has been replaced by a click, ergo we rely on the click' is demonstrably common knowledge. Put another way, replacement of the physical means does not evidence continuity of reliance.

An apt yet inappropriate analogy?

An analogy can be both apt and inappropriate. On the one hand, to warn against putting the cart before the horse is as true today as it was a thousand years ago. On the other hand, it is a century since the horse-and-cart gave way to the mechanised vehicle, we are soon to have not only mechanised but driverless vehicles, and in any event, how many of today's children will ever see a horse drawing a cart?

Where a signature is applied to a piece of paper and a copy of the signed paper is immediately returned to the signer, there is a viscerally physical process of exchange and no matter how unwise the transaction may turn out to be for the signer, we can understand even if we refuse to accept an argument that mutuality was such that the terms in the paper have now adhered to the signer.

The online process may be very different. The 'I agree' click is often not at the end of the process, or even the point of or the price of entry. If that is the circumstance, can the 'I agree' click have any analogue in orthodox bargain theory except, ironically if not paradoxically, an invitation to treat?

Conclusion

In a debate in the House of Lords in 1977, Lord Denning said:

> I wish particularly to draw attention to the printed conditions which appear on

> the backs of order forms, warehousemen's notes, laundry cleaning documents and the like; whatever it may be, we sign them without reading them and, if we do not read them or there is no place for signing, we are bound by them.
>
> They are said to be contracts, but we have never agreed to them. It is a fiction of the law to say they are contracts, and it has been a great mistake of the law hitherto to say that the courts cannot inquire as to whether or not they are reasonable.

In his speech, Denning muses on Graucob. He was allowed to; he had appeared for the successful offeror in Graucob almost a half century before! For the rest of us, whether current Australian, American or English authority is 'a great mistake' or whether any 'mistake' is now to be inflicted upon a new generation of consumers is a value-driven debate best left for another day.

The only purpose of this article is to suggest (a) that a practitioner advising a consumer in an online transaction must nail down what, precisely, the alleged bargain is said to be in all the temporal and spatial circumstances; and (b) that a practitioner advising a putative offeror seeking to enforce an online transaction is still going to have to have their work cut out.

To use a redundant expression from the last century, 'stay tuned'.

ENDNOTES

1 Specht, 20-22, 28.
2 Specht, 26.
3 cf Specht, 23.
4 Specht, fn 16.

Confidential Assistance

BarCare

BarCare is an independent, professional counselling service, which helps members of the Bar Association to manage emotional and stress-related problems, such as marital breakdown, drug or alcohol dependency and practice pressures.

BarCare is available to all members of the Bar Association, their immediate families and clerks.

The first consultation is free of charge.

BarCare has access to a wide network of professionals across NSW from different disciplines for referral purposes or to discuss aspects of treatment.

Members in rural and regional areas can contact BarCare for assistance in locating an appropriate specialist closer to home.

Clerks and colleagues in chambers can make a confidential referral.

Confidential assistance

The Bar Association's sole involvement is to fund and promote the service to ensure assistance is available to all members in need.

No information is provided to the Bar Association without the express permission of the barrister.

If you require assistance:

Jenny Houen
Director
0427 317 958
jhouen@barcare.org

barcare.org

Starting the dialogue: Academics of Islamic faith and *R v Bayda; R v Namoa (No 8)*

By Yaseen Shariff and Bilal Rauf

The decision in *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 generated interest well beyond the courtroom. In sentencing two offenders who were convicted of the offence of conspiring with each other to do acts in preparation for a terrorist act, reliance was placed on certain extremist material found on their respective phones: *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [59].

In the course of the judgment, Fagan J referred to the extremist material and found that the two offenders understood it to be a '…divine command for attacks on innocent Western civilians': *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [58]. Reference was also made to verses of the Quran which, it was said, 'unmistakably instruct the believers to undertake jihad in pursuit of universal Islamic dominance': *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [60]. His Honour characterised some of the materials as '… sermons and writings..' which were '…serious and scholarly religious teaching': *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [60]. In this context, it was noted that the 'whole concept of inclusive tolerance would be destroyed if respect and protection were accorded to beliefs that are themselves violently intolerant and that conflict with secular laws designed to secure diverse freedom of worship for all': *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [78].

The decision proceeds to state that if Australian Muslims make 'a clear public disavowal' of certain verses as not being authoritative instructions from Allah (God) then terrorists convictions might be weakened. The decision further states that '(t)he incitements to violence which terrorists quote from the Quran cannot just be ignored by the many believers who desire harmonious coexistence' and 'in the absence of express public disavowal of verses which convey Allah's command for violence', assurances that 'Islam is a religion of peace' and that the faith of Muslims requires them to obey the laws of a country 'are apparently contradicted': *R v Bayda; R v Namoa (No 8)* [2019] NSWSC 24 at [78] – [80].

Soon after the decision, the Australian National Imams Council issued a public statement noting its disappointment and reiterating its rejection of extremist interpretations of the Quran and the misuse of Islam by extremists. The Muslim Legal Network of NSW issued a statement expressing concern about the obiter comments directed at Australian Muslims. The Law Council of Australia, through its President, Arthur Moses SC, made the observation that 'we must ensure that the criminal actions of a few are not used to unfairly judge, discriminate against or condemn a whole community and religion. And that those who break our laws are the ones that pay the price and bear the punishment – not others wrongly implicated by association' (as reported in the *Sydney Morning Herald*, 'Judge not: lawyers back Muslim community', by Michaela Whitbourn, dated 8 February 2019). We spoke to two senior academics who are well versed in issues associated with the administration of justice in Australia, and are leading scholars in the Islamic faith and its practices.

Yaseen Shariff

Bilal Rauf

Professor Mohamad Abdalla is a Professor in the School of Education at the University of South Australia and Director of the Centre of Islamic Thought and Education at that University. His recent books include *Leadership in Islam: Processes and Solutions in Australian Organizations*, and *Islamic schooling in the West: Pathways to Renewal*. Professor Abdalla has had extensive involvement with the Australian Muslim community including acting as an Imam, Advisor to government and non-government organisations and Vice-President of the Australian National Imams Council. Dr Salim Farrar is an Associate Professor in Law at the University of Sydney. He specialises in Islamic Law, Muslim minorities and the law and Comparative Criminal Justice. He was called to the English Bar in 1992. He has also taught at the Universities of Coventry, Warwick, Manchester and International Islamic University Malaysia. Dr Farrar also acts as a Muslim Chaplain at the University of Sydney and assists Muslim students on campus. His academic research actively engages with the Australian Muslim communities. His most recent book is *Accommodating Muslims under Common Law: A Comparative Analysis*.

Discussions with Professor Mohamad Abdalla and Dr Salim Farrar

What are the different approaches to textual interpretation of the Quran?

Professor Mohamad Abdalla:

Interpretation (exegesis) of the Qur'an is the most important of sciences in Islam. Scholars distinguish between *tafsir* and *ta'wil* of the Qur'an. The former aims at explaining the 'outer' or exoteric meaning of the Qur'an. The latter aims at explaining the 'inner' or esoteric meaning of the Qur'an. There are multiple approaches to the textual interpretations of the Qur'an. Orthodox Muslim scholars suggest that an exegete of the Qur'an must have a number of specialisations including: expert knowledge of the principles of jurisprudence, Arabic grammar and morphology, rhetoric, literal and

contextual understanding of the Qur'an, the science of abrogation, the Sunnah and must be able to contextualise the interpretation of the Qur'an to reflect contemporary realities.

Dr Salim Farrar:

The Qur'an is not an 'open book', although it is 'clear' for those with comprehension and understanding. We rely on scholars' interpretations who are informed by the Prophetic example and aware of the context(s) and different applications of the Revelation. One cannot simply flip open a page, read and assume to comprehend a verse's full and proper meaning. That is not to say that there are not splinter groups or individuals, historically and presently, separate from the majority and who have either denied the validity of 'interpretation' or give verses of the Qur'an meanings which the majority do not accept.

Do you believe that there are parts of the Quran that are open to interpretations which may incite violence? To the extent that jihadist literature relies on violent interpretations of the Quran, what position do the orthodox and mainstream schools of thought have relating to these verses?

Professor Mohamad Abdalla:

It is true that there is text contained in the Qur'an that seems very violent. When such text is not read in its proper textual and historical context, it is manipulated and distorted – by Muslims and non-Muslims alike.

Muslim scholars argue that those who read the Qur'an should keep at a minimum the following principles in mind: An awareness of the inner coherence in the Qur'an; to study at the least the preceding and following verses for a sense of the immediate context; look at all of the verses that deal with the same subject in the book; the occasion of revelation, the historical context, of a particular verse; a cursory knowledge of Prophet Muhammad's life; finally the way the Prophet implemented a particular directive in a verse of the Qur'an in his own life.

According to mainstream and orthodox Muslim scholars, the use of the Qur'an to justify the killing of any person, including civilians, is prohibited, completely wrong and a misguided innovation. (There is an exception where people are engaged in a field of battle and even then it extends to those engaged in the combat, much like the position under international law where there are designated rules of combat.) The nature of this prohibition is so specific and well-defined that there can be no legal justification, nor can there be a legitimate *Sharia* excuse, for circumventing this scholarly consensus: Shaykh Muhammad Afifi Al-Akiti, 'Defending the Transgressed by Censuring the Reckless against the Killing of Civilians,' http://warda.info/fatwa.pdf.

Professor Mohamad Abdalla

Indeed, one of the highest objectives of Islamic law is the preservation of life or anything which leads to the preservation of life (for instance, training of medical staff, investment in cures and medicine, establishing and supporting hospitals and so on).

Dr Salim Farrar:

There are verses in the Qur'an which are open to interpretations of violence, just as there are verses in the Christian Bible, but they do not incite violence. Rather, it is violent people who incite violence; they use and misinterpret religious texts for their own purposes. In an authentic saying of Prophet Muhammad (peace be upon him), narrated via the famous Companion, Abdullah ibn Omar, he warned: 'What I fear greatly for my nation is a man who mis-explains the Qur'an and who takes it out of context'.

Dr Salim Farrar

There were individuals and groups in Islamic history who misinterpreted the Qur'an, with devastating and violent consequences (including against mainstream and orthodox Muslims). The first of these was the Kharijites (during the time of the Companions of the Holy Prophet) who regarded it lawful to kill all those who disagreed with them. The orthodox and mainstream schools of thought regarded the Kharijites, and those like them, as misguided and even beyond the fold of Islam. They certainly did not regard their beliefs or interpretations as canonical. Unfortunately, there are some around today who similarly misinterpret the Qur'an. Their interpretations are no more Islamic than those of the Kharijites.

Do you think there are parts of the Quran that should be repudiated?

Professor Mohamad Abdalla:

There is a consensus position among Muslims, in the past and present, that the Qur'an is the speech of God, sent down upon the last Prophet Muhammad, through the Angel Gabriel, in its precise meaning and precise wording. Therefore, no parts of the Qur'an can be repudiated. However, *interpretations* of the Qur'an that contravene the rules of exegesis (as outlined above), scholarly consensus, or the fundamentals of Islam can and have been repudiated. For example, in his scholarly article 'Defending the Transgressed by Censuring the Reckless against the Killing of Civilians,' Shaykh Al Akiti repudiates the interpretations of violent extremists' understanding of jihad. Further, an open letter to Abu Bakr al-Baghdadi (the leader of ISIL/ISIS), signed by hundreds of Muslim leaders and scholars, repudiates the group's actions and ideology based on the Qur'an and other jurisprudential texts.

Dr Salim Farrar:

There is no basis for any part of the Quran to be repudiated. A Muslim is a Muslim because they believe all of the Qur'an was revealed to Prophet Muhammad; every single letter and word. If a person says that Muslims should repudiate even one letter of the Qur'an, they are telling them to renounce their faith. If a Muslim were to accept that part of the Qur'an was wrong, then logically, the same might flow for other parts of the Qur'an or its entirety. All of the Qur'an is a revelation from God. The issue is one of interpretation only.

Do you believe that the Islamic faith is reconcilable with a liberal democratic society such as Australia?

Professor Mohamad Abdalla:

A substantial amount of scholarly literature supports the claim that the major tenets of liberal democracy are compatible with Islam and that Islamic values and norms actually encourage 'democracy'. I support this claim. Scholars argue that Islam and its laws have inherent values compatible with important elements of democracy, including: shura (consultation); ijma' (consensus) and ijtihad (independent legal reasoning). Furthermore, a focus on the fundamental moral values shows that the tradition of Islamic political thought contains both interpretative and practical possibilities that can be developed into a democratic model. The Sharia and its sources (Qur'an and Sunnah), did not specify a particular form of government, but advocated for principles of 'good governance'. The Sharia identified a set of social and political values that are central to any form of government. In fact, it can also be argued that 'In espousing the rule of law and limited government, classical Muslim scholars embraced core elements of modern democratic practice.'[1] Three values are significant: 'pursuing justice through social cooperation and mutual assistance (Qur'an 49:13 and 11:119); establishing a non-autocratic, consultative method of governance; and institutionalising mercy and compassion in social interactions (6:12; 21:107; 27:77; 29:51; 45:20).': Khaled Abou El Fadl (2003), 'Islam and the challenge of democracy,' *Boston Review*, http://bostonreview.net/archives/BR28.2/abou.html

In the area of Islamic jurisprudence, Muslims are obliged to comply with the laws of their country of residence as premised on the Qur'anic dicta demanding fulfilling 'obligations' and 'covenants'. The Quran states, for example, that 'You who believe, fulfil your obligations' and 'Honour your pledges: you will be questioned about your pledges.' Muslim jurists have also understood that the ultimate authority in any country belongs to the government, and so in a non-Muslim context it is counter-intuitive to assume that individual Muslims, or the religious leaders, can take the law into their own hands: : Mohamad Abdalla (2012), 'Sacred Law In a Secular Land - To What Extent Should Sharia Law be Followed in Australia?', Griffith Law Review, Volume 21, 2012 - Issue 3.

Dr Salim Farrar:

I do, but it depends what type of 'liberal' society one is referring to. I also think it is reconcilable, (almost), with any democratic society, hence why Muslim communities have endured across the world.

Breaches of directors' duties in managed investment schemes

Amy Campbell reports on *Comptroller General of Customs v Zappia* [2018] HCA 54

The High Court has held that employees who are subject to the direction of others can have 'possession, custody or control' of dutiable goods for the purposes of s 35A of the *Customs Act 1901* (Cth) (Act) and thereby be required to pay customs duty not received by reason of a failure to keep those goods safe.

Background

Zaps Transport (Aust) Pty Ltd (Zaps) operated a warehouse pursuant to a licence issued to it under the Act. During a break-in, tobacco products were stolen from the warehouse. Zaps, John Zappia (the sole director of Zaps) and Domenic Zappia (both the son of John and the 'general manager' and 'warehouse manager' of Zaps) were each served with notices of demand by a collector for customs duty that would have been payable on the stolen goods if they had been entered for home consumption. The notices asserted that they had failed to keep the stolen goods safely, as required by s 35A(1)(a) of the Act.

Each of the recipients of the notices was unsuccessful in the Administrative Appeals Tribunal in their review of the decision to demand payment from them. In affirming the Collector's decision, the Tribunal found that the tobacco products had not been kept safely and that Domenic had exercised control over the tobacco products, albeit that his control was subordinate to that of his father and Zaps.

Domenic appealed from the Tribunal's decision to the Federal Court, constituted by a Full Court. (John, who was a bankrupt, and Zaps, which was in liquidation, did not appeal). By majority (White and Moshinsky JJ; Davies J dissenting), the Full Court set aside the decision of the Tribunal and declared the demand served on Domenic to be 'invalid and of no effect'. White and Moshinsky JJ found that an employee of a licensed warehouse did not have the necessary 'possession, custody or control' of the dutiable goods for the purposes of s 35A(1) of the Act, not having exclusive possession

or physical control of the goods.

Davies J concluded that the application of the provision depended upon the measure of control exercised by the person over the dutiable goods. Her Honour concluded that the Tribunal erred in law as it failed to address specifically whether the operational control of Dominic was such that it could be said that he failed to keep the stolen goods safely on the occasion of the break-in (a course that White and Moshinsky JJ would also have taken if their conclusion had been wrong).

The High Court's decision

The High Court unanimously allowed an appeal from the Full Court's decision.

In a joint judgment, Kiefel CJ, Bell, Gageler and Gordon JJ, held that the expression 'possession, custody or control' had to be read in light of its statutory purpose, namely, ensuring customs duty was paid before delivery of dutiable goods into home consumption, and the affirmative obligations imposed by s 35A (at [28]-[29]). Their Honours observed that none of the terms had a fixed legal meaning, and that the power or authority of a person in relation to a thing in that context was a question of degree that was not closely confined and which was able to arise from a range of sources (at [30]).

Their Honours considered that there was no reason why power or authority over the goods needed to be exclusive or paramount (at [36]) and that several persons may each possess power or authority to the requisite degree within a chain of commerce or hierarchy (at [37]). The mere fact that one or some of the persons might act subject to the direction of another did not disqualify them (at [39]). Further, there was no inconsistency between that conclusion and the principle that criminal liability should be certain and ascertainable, with their Honours noting that, in any event, the provision was not quasi-penal in character (at [40]).

Their Honours concluded that the facts found by the Tribunal were sufficient to establish that Domenic had the requisite 'possession, custody or control' over the stolen goods and failed to keep those goods safely, given he had authority to direct what was to happen to the goods on a day-to-day basis during the period of the break-in (at [41]).

Nettle J agreed. His Honour observed that a range of contexts may inform the meaning of the expression 'possession, custody or control' and, in the present case, this was a provision that was concerned with the ability of persons in fact to control goods rather than the legal relationship of those persons and the goods. His Honour contrasted the present case with other provisions which had the object of attributing to a person in possession, custody or control of specified goods an intent to sell which, therefore, implied that the person needed the legal power to sell those goods (at [45]-[46]).

'The end of a criminal prosecution does not justify the adoption of any means for securing a conviction'

Unlawful conduct by the ACC results in permanent stay of criminal prosecutions

Belinda Baker reports on *Tony Strickland (a pseudonym) (and others) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 (8 November 2018)

In *Tony Strickland (a pseudonym) (and others) v Commonwealth Director of Public Prosecutions* [2018] HCA 53, the High Court found that the 'extraordinary step' of ordering a permanent stay of a criminal prosecution should be taken in circumstances where the Australian Crime Commission ('ACC') had contravened the appellant's statutory and common law privilege against self-incrimination.

Background

In 2008, the ACC received information that a company which employed the appellants was involved in serious criminal activity. The ACC referred that information to the Australian Federal Police

('AFP'). The ACC also offered the AFP the use of its coercive powers to examine witnesses.

After the appellants each declined to participate in a cautioned record of interview, the ACC used its powers to require the appellants to be compulsorily examined. Unknown to the appellants, several AFP officers watched each examination from a nearby room. Following each examination, the examiner made orders under the *Australian Crime Commission Act* 2002 (Cth) ('ACC Act') permitting the dissemination of the examination material and audio recordings of the examinations to the AFP and the Commonwealth Director of Public Prosecutions ('CDPP'). In an internal minute, the AFP subsequently recorded that the hearings did not add substantially to intelligence holdings, 'but did lock certain witnesses into a version of events which may prove valuable in court.'

The appellants were subsequently charged with offences against Commonwealth and Victorian law. These were serious offences. As counsel for Strickland accepted, the appellants were 'sharks', rather than 'minnows' in the alleged offending.

The primary judge ordered that each of the prosecutions be permanently stayed as a result of the conduct of the ACC. These stays were set aside by the Victorian Court of Appeal on appeal. The Court of Appeal agreed that the ACC had acted unlawfully, but concluded that the primary judge had erred in holding that the appellants had suffered an unfair disadvantage that could not be sufficiently ameliorated by trial directions.

The High Court's decision

The High Court unanimously held that the ACC had acted unlawfully and in 'blatant disregard' of provisions of the ACC Act (at [102]). The examinations were not conducted as part of an existing ACC special investigation as required by the ACC Act. Rather, the ACC had acted as a facility for the AFP to cross-examine the appellants under oath for the AFP's own purposes. Further, the ACC had contravened the ACC Act by permitting AFP officers to be present at each examination without inquiry as to who the various officers were and their roles in the prosecution of the appellant, failing to inform each appellant of the clandestine presence of those officers, and defying a statutory obligation which required non-publication of the answers given in examination where such disclosure might prejudice the fair trial of any person who may be charged with an offence.

A majority of the High Court (Kiefel CJ, Bell and Nettle JJ; Edelman and Keane JJ agreeing; Gageler and Gordon JJ dissenting) held that the appellants' prosecutions should be permanently stayed as a consequence of the ACC's unlawful conduct.

In so finding, the plurality acknowledged that a permanent stay of a criminal prosecution is an 'extraordinary step which will rarely be justified', observing that there is a 'powerful social imperative' for those charged with criminal offences to be brought to trial (at [106]). However, the plurality continued, it is also necessary to 'ensure that the end of a criminal prosecution does not justify the adoption of any and every means for securing a conviction' (at [106], emphasis in original). For this reason, where a defect in process is so profound as to 'offend the integrity and functions of the court as such', a permanent stay will be ordered 'to prevent the administration of justice falling into disrepute' (at [107]).

The plurality emphasised that, although not constitutionally entrenched, the common law right to silence is fundamental to the Australian criminal justice system (at [101]). A defendant who had been compelled to reveal his or her defence 'can no longer decide the course which he or she should adopt at any subsequent trial according only to the strength of the prosecution case as revealed by the material provided by the prosecution before trial or to the strength of the evidence led by the prosecution at trial' (at [78]). There was real forensic disadvantage occasioned by the conduct of the ACC, which could only be eradicated by commencing the investigation again, with different investigators and no recourse to the fact or result of the previous examinations (at [85]). As the trial judge had found, it was practically impossible to 'unscramble the egg' so as to remove this improperly obtained forensic advantage (at [61]).

Of itself, this was not a sufficient basis to order a stay. However, a stay was justified in the present case by the combination of forensic disadvantage sustained and the unlawful and the ACC's reckless disregard of its statutory responsibilities (at [86]). The plurality concluded that declining to order a permanent stay would encourage infractions of the common law right to silence, and would bring the administration of justice into disrepute (at [100] and [107]).

Similarly, Keane J found that the Court of Appeal had erred in focussing on whether there was a prospect of actual forensic disadvantage to the appellants and in concluding that the trial judge could give directions to ensure the fairness of the trial (at [195]). His Honour noted that the giving of such directions would distort the evidence given at trial. Such distortion of evidence for no other reason than to accommodate the lawlessness of the ACC would bring the administration of justice into disrepute (at [195]).

In a concurring judgment, Edelman J stated that it would be an 'extremely rare case' in which orders could not be made, or undertakings given, to address a concern that a trial would bring the administration of justice into disrepute (at [265]). In particular, his Honour observed that a 'tainted' prosecution team could usually be replaced after giving undertakings in respect of the dissemination of unlawfully coerced information. However, such a course was not appropriate in the present case because the unlawful examinations substantially contributed to the preparation for, and the trial of, the appellants (at [292]). In this respect, his Honour observed that the CDPP did not suggest that it was a realistic alternative to commence the investigations 'from scratch' without the benefit of the appellants' unlawful examinations (at [292]).

In dissent, Gageler J emphasised that the power to stay proceedings as an abuse of process is a power to protect the integrity of the court's processes: 'it is not a power to discipline or to punish those who might bring proceedings or those who might stand behind them' (at [154]).

Both Gageler and Gordon JJ would have upheld the Court of Appeal's finding that any disadvantage to the appellants could have been managed by changing the prosecution team and prohibiting the investigators from mentioning the coerced questioning. Their Honours were each of the view that the public interest in having serious charges determined by a court should prevail.

Standing

An issue also arose in the High Court as to the standing of the ACC to appear on the appeals. In holding that the ACC would not be granted leave to appear, the plurality observed that where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused: 'it is for the Crown and no one else to represent the community' (at [109]). An intervenor may be heard on a criminal appeal where the Crown embraces or supports the intervenor's contentions (at [109]). However, where the intervenor raises issues that are not 'at one' with the Crown, 'the intervenor should ordinarily not be heard' (at [109]); see also at [274], per Edelman J.

The High Court again considers the admission of tendency evidence

Nicholas Bentley reports on *McPhillamy v R* (2018) 92 ALJR 1045; 361 ALR 13; [2018] HCA 52

Hot on the heels of *R v Bauer* (2018) 92 ALJR 846; 359 ALR 359 ('Bauer'), the High Court has once again reiterated the subtle but important thresholds to be met before admitting tendency evidence. In *McPhillamy v R*, the High Court reversed a majority decision of the NSW Court of Criminal Appeal that had upheld the conviction of the appellant for six counts of sexual assault. In ordering a new trial, the High Court emphasised that while evidence of a sexual interest is relevant, its probative value generally turns on whether the evidence demonstrates a tendency to act on that interest.

The facts and rulings of the trial judge

The appellant was charged with six counts of sexual offences against an 11 year-old altar boy ('A'), alleged to have occurred on two separate occasions between November 1995 and March 1996 in the public toilets of the St Michael and St John's Cathedral in Bathurst, where the appellant was an acolyte. Before trial, the prosecution served written notice on the appellant of its intention to adduce tendency evidence from two men ('B' and 'C') pursuant to s 97(1)(a) of the *Evidence Act 1995* (NSW). In 1985, B and C were both 13 year-old borders at St Stanislaus' College, Bathurst, while the appellant was an assistant housemaster at the school. Their evidence was that in 1985, after feeling homesick and upset, they had separately visited the appellant's bedroom where he sexually assaulted them ('Tendency Evidence').

District Court Judge King SC admitted the Tendency Evidence, but failed to provide reasons after the voir dire. At trial, the prosecutor outlined to the jury the use to be made of the Tendency Evidence, namely that is showed 'that the [appellant] had a sexual attraction or interest in young teenage males' and that he 'acted on it in his dealings with [B and C] when he was alone with them…[which he did] with [A] too'. The trial judge gave a jury direction that 'If you find that [the appellant] had a sexual interest in male children in their early teenage years, who were under his supervision, and that he had such an interest in [A], it may indicate that the particular allegations are true.' The appellant was subsequently convicted on each count.

The NSW Court of Criminal Appeal decision

By majority, Harrison and RA Hulme JJ dismissed the appeal contesting the admission of the Tendency Evidence. Their Honours concluded that the Tendency Evidence strongly supported the prosecution case (at [128]) and that any difference between the circumstances of the alleged conduct in 1985 to the present offences did not detract from the 'overriding similarity' of the conduct on each occasion (at [127]). In dissent, Meagher JA held that while the 1985 conduct manifested a sexual interest in young teenage boys, it did not show the appellant's preparedness to act on that interest in the circumstances alleged by A (at [115]-[117]). Accordingly, his Honour concluded that the evidence did not meet the threshold test under s 97(1)(b) – that the Tendency Evidence had significant probative value.

The High Court decision

In a joint judgment, Kiefel CJ, Bell, Keane and Nettle JJ (Edelman J agreeing separately) allowed the appeal. It was held that the evidence of B and C was capable of establishing that the appellant had an interest in young teenage boys, which is a tendency to have a particular state of mind that would endure for more than a decade (at [26]). This, however, was not enough to meet the requirement of significant probative value. Instead, 'it is [generally] the tendency to *act* on the sexual interest that gives tendency evidence in sexual cases its probative value' (at [27]). As had been identified by Meagher JA, the Tendency Evidence did not go towards establishing that the appellant *acted* in the way A alleged, which meant that the probative value of the alleged tendency was weak (at [30]).

In addition, the Court restated at [31] the proposition outlined at [58] in *Bauer* – where the tendency evidence concerns sexual misconduct with a person or persons other than the complainant, there 'must ordinarily be some feature of or about the offending which links the two together' for the evidence to be significantly probative. Such a feature was not present in the Tendency Evidence, since taking advantage of young teenage boys who sought out the appellant as the assistant housemaster in the privacy of his bedroom had little in common with A's account that the appellant, as an acolyte, twice followed A into a public toilet and molested him before church.

The Tendency Evidence thus failed to satisfy the test of significant probative value, as it was not capable of affecting the assessment of the likelihood that the appellant committed the offences against A to a significant extent (at [32]). As s 97(1) had not been satisfied, the Court did not address the next admissibility test prescribed by s 101(2).

In separate additional reasons, Edelman J at [34] restated the two stages explained in *Hughes* for assessing the probative value of tendency evidence: (1) the extent to which the evidence is capable of proving the tendency and (2) the extent to which proof of the tendency increases the likelihood of the commission of the offence (*Hughes v R* (2017) 92 ALJR 52; 344 ALR 187 at [41]). His Honour distinguished *Hughes*, noting that the Tendency Evidence was given by only two witnesses alleging incidents that occurred a decade before the alleged offences (at [35]). His Honour also explained that, at trial, the tendency was expressed at a level of generality that overlooked the specific differences (identified in the joint judgment) between the contexts of the Tendency Evidence and the alleged offences against A (at [36]).

Overall, the High Court's repeated interest in clarifying when tendency evidence will be admissible has illustrated that the analysis in each case will depend upon the nature of the alleged offending and the nature of the tendency evidence in question. Like *Bauer*, this decision will also be applicable for non-uniform evidence law jurisdictions: see *Johnson v The Queen* (2018) 92 ALJR 1018; 357 ALR 1 at [17] and *R v K*, GA [2019] SASCFC 2 at [59].

Cap on electoral expenditure by third party campaigners struck down

Douglas McDonald-Norman reports on *Unions NSW v State of New South Wales* [2019] HCA 1

In *Unions NSW v State of New South Wales*, the High Court considered the validity of two provisions of the *Electoral Funding Act 2018* (NSW). Section 29(10) of that Act imposed caps on electoral expenditure by 'third-party campaigners'. These caps were significantly lower than the permitted expenditure of those political parties which had endorsed more than ten candidates for election to the NSW Legislative Assembly. Section 35 of the Act prohibited third-party campaigners from acting in concert with other persons to exceed the applicable cap for the third-party campaigner within specified periods. In five separate judgments, every member of the Court concluded that s 29(10) impermissibly burdened the implied freedom of communication on matters of politics and government protected by the Constitution. With the exception of Edelman J, who found that s 35 was invalid (at [160]), all members of the Court found it unnecessary to decide the question of the validity of s 35 in circumstances where there was no cap upon which that section could operate. This decision further illuminates the extent and implications of the implied freedom following the re-articulation of the test for what is 'reasonably appropriate and adapted' in *McCloy v New South Wales* (2015) 257 CLR 178.

'Third-party campaigners', for the purposes of State elections, are persons or other entities (subject to exemptions) who incur electoral expenditure for a state election within a specified period exceeding $2000 in total. They include unions and industry groups. Restrictions upon their ability to spend money in state elections are potentially highly significant for the conduct of politics in this state.

The *Electoral Funding Act* was enacted on 30 May 2018, replacing the *Election Funding, Expenditure and Disclosures Act 1981*. Both of the impugned provisions were introduced as part of the new Act. Prior to the new Act's enactment, third-party campaigners registered before the capped state expenditure period for an election were able to spend up to $1,050,000 in respect of a state general election. By contrast, political parties which had endorsed more than ten candidates for election to the Legislative Assembly were subject to a cap of $100,000 multiplied by the number of electoral districts in which they had endorsed candidates. (Logically, this cap would hence always equal or exceed $1,000,000.) Section 29(10) of the new Act reduced the applicable cap for third-party campaigners registered before the capped state expenditure period to $500,000 – less than half of its previous total.

The new limits on the activities of third-party campaigners were a purported response to the recommendations of an Expert Panel (comprised of Dr Kerry Schott, Andrew Tink AM and the Hon John Watkins) on political donations in New South Wales. The panel's report, delivered in December 2014, recommended reduction of the expenditure cap on third-party campaigners. The expert panel suggested an expenditure cap of $500,000, which exceeded the highest sum spent by any third-party campaigner in the 2011 state election. The expert panel asserted, in this regard, that 'political parties and candidates should have a privileged position in election campaigns [because they] are directly engaged in the electoral [contest] and are the only ones able to form government and be elected to Parliament' (at [24]). Third-party campaigners, while 'recognised participants' in the electoral process and entitled to a voice, 'should not be able to drown out the voice of the political parties' (at [24]).

The expert panel's report was referred to the Joint Standing Committee on Electoral Matters. While accepting the expert panel's premise that 'third-party campaigners should not be able to run campaigns to the same extent as candidates and parties' (at [26]), the committee recommended that, before reducing the cap to $500,000, the New South Wales Government should 'consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that expenditure limit' (at [26]). Significantly, no evidence was put before the High Court that any such consideration had taken place prior to the enactment of the expenditure cap into law. The expert panel had similarly recommended that its proposed $500,000 figure be checked against third-party expenditure at the 2015 election (so as to determine its continued suitability); no evidence was put before the High Court that this had occurred. Several third-party campaigners spent significantly in excess of $500,000 at the 2015 state election (at [213]).

The six plaintiffs were unions (and hence prospective third-party campaigners). They challenged ss 29(10) and 35 as inconsistent in two key respects with the test as to whether a law infringes the implied freedom of political communication:

- whether the law effectively burdens the implied freedom in its terms, operation or effect;
- whether the purpose of the law is legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and
- whether the law is reasonably appropriate and adapted to achieve that legitimate object in a manner compatible with the constitutionally prescribed system of representative and responsible government, having regard to whether the law is suitable, necessary and adequate in its balance.

First, as to whether the provisions served a legitimate purpose, the plaintiffs argued that both sections were discriminatory in that they aimed to privilege the voices of political parties over those of third-party campaigners. While they acknowledged that the Act as a whole did not share this purpose, and that the broader statute possessed a legitimate purpose, the plaintiffs asserted that the impugned sections (to the extent that they privileged the voices of certain participants in the political process over others) served an illegitimate purpose and were to that extent invalid.

Second, as to whether the provisions were reasonably appropriate and adapted or proportionate in the means chosen to serve this purpose, the plaintiffs contended that the State had not established that the new, restrictive cap on electoral expenditure by third-party campaigners was suitable, necessary or adequate in their balance.

Kiefel CJ, Bell and Keane JJ, who delivered a joint judgment, found it unnecessary to decide the question of whether the purpose of the impugned provisions was legitimate, because the question of whether the law was reasonably appropriate and adapted was 'the issue which is clearly determinative' (at [35]). Gordon J proceeded upon a similar assumption (at [154]). Gageler JJ (at [81]-[90]) and Nettle J (at [108]-[110]) both found the asserted purpose of the impugned sections to be legitimate – whether to ensure that political parties are able to communicate 'without being overwhelmed by the targeted campaigns of any number of third-party campaigners acting alone or in concert' (Gageler J at [90]), or more simply so as to 'preven[t] voices being drowned out by the powerful' (Nettle J at [109]).

Edelman J, by contrast, found the identified illegitimate purpose of the impugned sections – 'to burden the freedom of political communication of third-party campaigners' (at [160]) – sufficient to invalidate both provisions. The significant reduction in the cap for third-party campaigners (and associated prohibition on 'acting in concert' so as to circumvent this cap) was found by his Honour to reflect an 'additional' purpose to the Act, absent from the prior *Election Funding, Expenditure and Disclosures Act 1981*: 'to privilege political parties and candidates' (at [221]). This purpose, 'of quietening the voices of third-party campaigners relative to political parties and candidates', was found by Edelman J to be inconsistent with the implied freedom of political communication. (Given his Honour's findings in this regard, he did not proceed to determine whether the impugned provisions in question were 'reasonably appropriate and adapted' to achieve a legitimate object.)

Each other judge of the Court found that the State had not established that s 29(10) was 'reasonably appropriate and adapted' to serve any constitutionally legitimate purpose. Kiefel CJ, Bell and Keane JJ observed that no enquiry appeared to have been undertaken 'as to what in fact is necessary to enable third-party campaigners reasonably to communicate their messages'; the expert panel gave no basis for 'halving' the figure of permitted third-party electoral expenditure, and the figure adopted was not checked against what had been spent in 2015 (at [53]). As Nettle J put it (at [117]):

> [T]he expert panel considered it was necessary to gather evidence to establish the appropriate relativity before the change was enacted. Yet, for reasons which do not appear, that recommendation went unheeded. It is as if Parliament simply went ahead and enacted the *Electoral Funding Act* without pausing to consider whether a cut of as much as 50 per cent was required.

Gageler J similarly found that the State had not satisfied the Court that the burden upon the implied freedom imposed by a cap of $500,000 was justified (at [99]-[101] per Gageler J and at [151]-[153] per Gordon J).

The Court's approach to the establishment of facts in this regard warrants mention. Kiefel CJ, Bell and Keane JJ emphasised that while Parliament ordinarily need not provide evidence to prove a basis for legislation, 'its position in respect of legislation which burdens the implied freedom is otherwise'; Parliament must justify the burdens it chooses to impose in this regard (at [45]). Gageler J sought to qualify this position, noting that questions of constitutional fact 'cannot form issues between parties to be tried like ordinary questions of fact' (at [94]). These questions of constitutional fact do not involve notions of proof or onus (at [94]). This is subject, however, to the nature of the Court's task in this regard: '[i]f a court cannot be satisfied of a fact the existence of which is necessary in law to provide a constitutional basis for impugned legislation … the court has no option but to pronounce the legislation invalid' (at [95]).

By this decision, the High Court has continued to reaffirm that there are a range of permissible options by which a legitimate statutory purpose may be achieved within the discretion of Parliament – a 'domain of selections'. But these options must be capable of justification when subjected to judicial scrutiny as the method best suited to fulfil a legitimate legislative purpose with the least resulting harm to the implied freedom of communication on governmental and political matters.

The civil practice and procedure provisions strike again in the High Court

Jeremy L Harrison reports on *UBS AG v Tyne* [2018] HCA 45 (17 October 2018)

This appeal concerned whether the continuance of proceedings constituted an abuse of process in circumstances where prior proceedings which concerned substantially the same matters were discontinued, the merits of the matter had not been determined, and delay had not made a fair trial impossible.

The majority of the High Court of Australia (4:3) allowed the appeal, concluding that there was an abuse of process particularly because the 'tactical manoeuvring' by Mr Tyne to 'hold back' a claim represented the 'antithesis' of the overarching purpose of the civil practice and procedure provisions.

The judgments of the majority (Kiefel CJ, Bell and Keane JJ, Gageler J agreeing, with additional reasons) differed from those of the dissenting judges (Nettle and Edelman JJ; Gordon J) with respect to multiple interrelated issues including whether there was a contravention of the overarching purpose of the civil practice and procedure provisions, whether the explanation for the discontinuance was reasonable, whether the prior proceedings had been 'determined' (and the consequences which followed), whether there was a material delay, whether costs had increased significantly, whether UBS would be oppressed, and whether the administration of justice would be brought into disrepute.

Background

Mr Tyne was the 'controlling mind' of the former trustee of a family trust (the Trust) and an investment company (the Company). The Company opened an investment account with UBS in Singapore and UBS provided the Company with credit facilities. UBS allegedly advised the Company to acquire certain bonds which became worthless. UBS and the Company agreed that the Trust would loan assets to the Company in order for the Company to satisfy its liability to UBS.

UBS commenced proceedings in Singapore in 2010 against the Company alleging that the Company's account with UBS was in default.

Two weeks later, the Company, Mr Tyne and the former trustee commenced proceed-

ings in the Supreme Court of New South Wales alleging that UBS provided negligent advice and made misleading and deceptive representations. The Supreme Court proceedings were temporarily stayed in February 2012 pending the determination of the Singaporean proceedings.

Relevantly, Mr Tyne and the former trustee discontinued their claims in March 2012. This left the Company as the sole remaining plaintiff in the Supreme Court proceedings. The Singaporean proceedings were determined in favour of UBS in July 2012. The Supreme Court proceedings were permanently stayed in May 2013 on the basis that the Singaporean judgement created a res judicata.

Mr Tyne took over as the trustee of the Trust and commenced the proceedings the subject of this decision in the Federal Court of Australia in January 2014 claiming damages as a result of the advice and representations made by UBS. The Trust alleged that the Company was unable to return the assets to the Trust because the bonds lost their value.

UBS applied to permanently stay the proceedings. The primary judge concluded that the proceedings amounted to an abuse of process. Mr Tyne appealed and the majority (2:1) of the Full Court of the Federal Court of Australia concluded that there was no abuse of process.

Explanation for the discontinuance

Mr Tyne had explained that he discontinued the Trust's claim because (a) there would likely be no need for the trustee to commence the present proceedings if the Company was successful in the Supreme Court, (b) the trustee's claim would be more difficult, expensive and time-consuming to prove than the Company's claim and Mr Tyne was short of money, and (c) it was not predictable that the Supreme Court proceedings would be permanently stayed.

The majority of the High Court concluded that, having regard to the totality of the private and public interests involved, it was not reasonable for Mr Tyne to take it upon himself to hold the Trust's claim in abeyance with a view to pursuing that claim in separate proceedings if it turned out that the Company's claim was not successful.

The dissenting judges concluded that the Trust had 'good reason' for discontinuing and that the explanation was 'reasonable'.

The majority stated at the outset that the determination of whether the present proceedings constituted an abuse of the process must take into account the overarching purpose of the civil practice and procedure provisions (see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 213 [98]) such as s 37M(1) of the *Federal Court of Australia Act* 1976 (Cth).

The majority placed significant importance on the notion that Mr Tyne planned to 'hold back' the Trust's claim and prosecute that claim in subsequent proceedings should the Company's claim in the Supreme Court be unsuccessful, and that this plan contravened the heart of the overarching purpose. The Court found that this plan would lead to duplication of resources, increased cost and delay if what remained of the Supreme Court proceedings were to be stayed, holding at [55]:

> Hiving off the Trust's claim, with a view to bringing it in another court after the determination of the SCNSW proceedings, was the antithesis of the discharge of the duty imposed on the parties to civil litigation …

The majority emphasised that the whole of the dispute between the Tyne-related parties and UBS was before the Supreme Court and that the time to have the trial of the factual allegations underlying the Company's and

the Trust's claims was during the Supreme Court proceedings.

The majority stated that since the decisions in *Aon and Tomlinson v Ramsey Food Processing Pty Ltd* ((2015) 256 CLR 509) and the enactment of the civil practice and procedure provisions the courts will not indulge parties who engage in 'tactical manoeuvring' which impedes the just, quick and efficient resolution of litigation.

The dissenting judges concluded that there was no breach of the overarching purpose because Mr Tyne's explanation for discontinuing the Trust's claim was reasonable.

Discontinuance with no imposed conditions

The dissenting judges began their analysis by focussing on the effect of the discontinuance under r 12.3(1) of the Uniform Civil Procedure Rules 2005 (NSW) including the express provision that a discontinuance of proceedings did not prevent the plaintiff from claiming the same relief in fresh proceedings.

The majority stated that focussing on the 'right' of a litigant to discontinue and later commence fresh proceedings was out of keeping with the conduct of modern litigation and the overarching purpose. Their Honours stated that a discontinuance is not irrelevant to the determination of whether an abuse of process has taken place regardless of UCPR 12.3. Gageler J observed that, when the Trust discontinued its claim, Mr Tyne did not indicate to UBS that the Trust would likely commence later proceedings.

Were the claims determined on their merits?

The majority stated that *Batistatos v Roads and Traffic Authority* (NSW) makes it clear that the 'just resolution' of a controversy may be the permanent stay of the proceedings notwithstanding that the merits of the claim have not been decided ((2006) 226 CLR 256 at 280 [63]).

The dissenting judges indicated that the Supreme Court proceedings did not proceed to a 'final determination' and that 'there has been no previous determination of the Trustee's claims' noting that UBS obtained a temporary stay and then a permanent stay of the Supreme Court proceedings.

Can an abuse of process occur if claims have not been determined on their merits?

In any case, the majority stated that the fact that the Trust's claim had not been heard on its merits and the fact that a fair trial of the claim could occur 'cannot be determinative of whether the proceeding is unjustifiably oppressive to UBS or whether its continuance would bring the administration of justice into disrepute' (at [44]).

By contrast, the dissenting judges rejected the suggestion that the lack of a decision on the merits was not conclusive as to whether there was an abuse of process.

Delay and increased costs

The majority stated that 'inexcusable delay' is not required for there to be an abuse of process. Any substantial delay increases costs, decreases the quality of justice and leaves other litigants in the queue awaiting justice.

The dissenting judges emphasised that only eight months elapsed between UBS achieving a permanent stay of the Supreme Court proceedings and Mr Tyne commencing the present proceedings. Their Honours concluded that this was not an 'appalling' or 'inexcusable' delay.

Their Honours were not convinced that Mr Tyne had increased UBS's costs other than possibly with respect to the application by UBS for a permanent stay, which was not significant. Their Honours concluded that there was no material duplication of process and reiterated that UBS had never even pleaded a defence with respect to the Trust's claim.

Oppression

The majority considered that permitting the Trust's claim to proceed would subject UBS to unjustifiable oppression due to the significant delay, increased costs and being required to deal 'again' with the claims that should have been resolved in the Supreme Court.

The dissenting judges stated that UBS had not actually been vexed with the relevant matters in the Supreme Court and so it was 'not correct' to say that Mr Tyne had made UBS deal with the matter 'again'.

Whether the claims would bring the administration of justice into disrepute

The majority concluded that allowing the 'staged conduct' of one dispute prosecuted by related parties with duplication of resources, delay, expense and vexation would likely give rise to the perception that the administration of justice is inefficient.

The dissenting judges concluded that the present proceedings would not bring the administration of justice into disrepute, noting that the delay was not inordinate or inexcusable, there had been no previous determination of the Trust's claim, the prosecution of the claim would not be unjustifiably oppressive to UBS, and the claim was not brought for a collateral purpose. In all of the circumstances, there was no material unfairness to, or unjustified oppression of, UBS particularly given that the UCPR permitted the discontinuance and the reasonable explanation for the discontinuance.

Binding the Crown and Sexually Transmitted Debt

David Smith reports on *Commissioner of Taxation v Tomaras* [2018] HCA 62

The High Court considered whether the presumption that legislation does not bind the Crown applied to Part VIIIAA of the *Family Law Act* 1975 (Cth). The Court also commented on when it is appropriate to state a question of law, before determining the merits.

Part VIII of the *Family Law Act* is concerned with spousal maintenance and the division of property of parties to a marriage. Part VIIIAA permits a court to make an order that is directed to, or alters the rights, liabilities or property interests of a third party to the marriage. Specifically, a court may make an order directed to a creditor of one party to a marriage to substitute the other party to the marriage in relation to the debt owed to that creditor (s 90AE). That is, in adjusting the property rights of parties to a marriage, a court can make one party liable for the other party's debts.

In proceedings before the Federal Circuit Court, a question arose whether the Court had power to order that a husband be substituted as the debtor in respect of a taxation liability owed by his wife. The Commissioner contended that he was not bound by Part VIIIAA of the *Family Law Act* and so could not be the subject of an order substituting one debtor for another. The issue for the High Court in *Commissioner of Taxation v Tomaras* [2018] HCA 62 (Tomaras) was therefore whether Part VIIIAA of the *Family Law Act* binds the Crown.

The wife sought an order that the husband be liable for an unpaid judgment debt obtained by the Commissioner in 2009. The husband was an undischarged bankrupt. The Commissioner was granted leave to intervene. Rather than decide the case on its merits, the Federal Circuit Judge stated a question of law for the opinion of the Full Court of the Family Court under s 94A of the *Family Law Act*.

It was held in *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at [17] that it is a rule of statutory interpretation that legislation is presumed not to bind the Crown, but an intention to bind the Crown

may be discerned from the provisions of the statute, including its subject matter and its disclosed purpose and policy, construed in context. As Gageler J put it in *Tomaras* at [18]: '*… the presumption is displaced simply where an affirmative intention to alter the legal position of the Commonwealth, State or self-governing Territory appears from the text, structure, subject matter or context of the statute*.'

In four judgments, all five judges of the High Court held that Part VIIIAA binds the Crown. The main reasons given were:

a. It was common ground that the Crown was a '*creditor*' under Part VIII of the Act. Part VIIIAA is expressly ancillary to Part VIII: it allows the Court to make orders under Part VIII that are directed to third parties. It follows that '*creditor*' should have the same meaning in Part VIIIAA as it has in Part VIII (Kiefel CJ and Keane J at [5]; Gordon J at [77]; Edelman J at [119]).

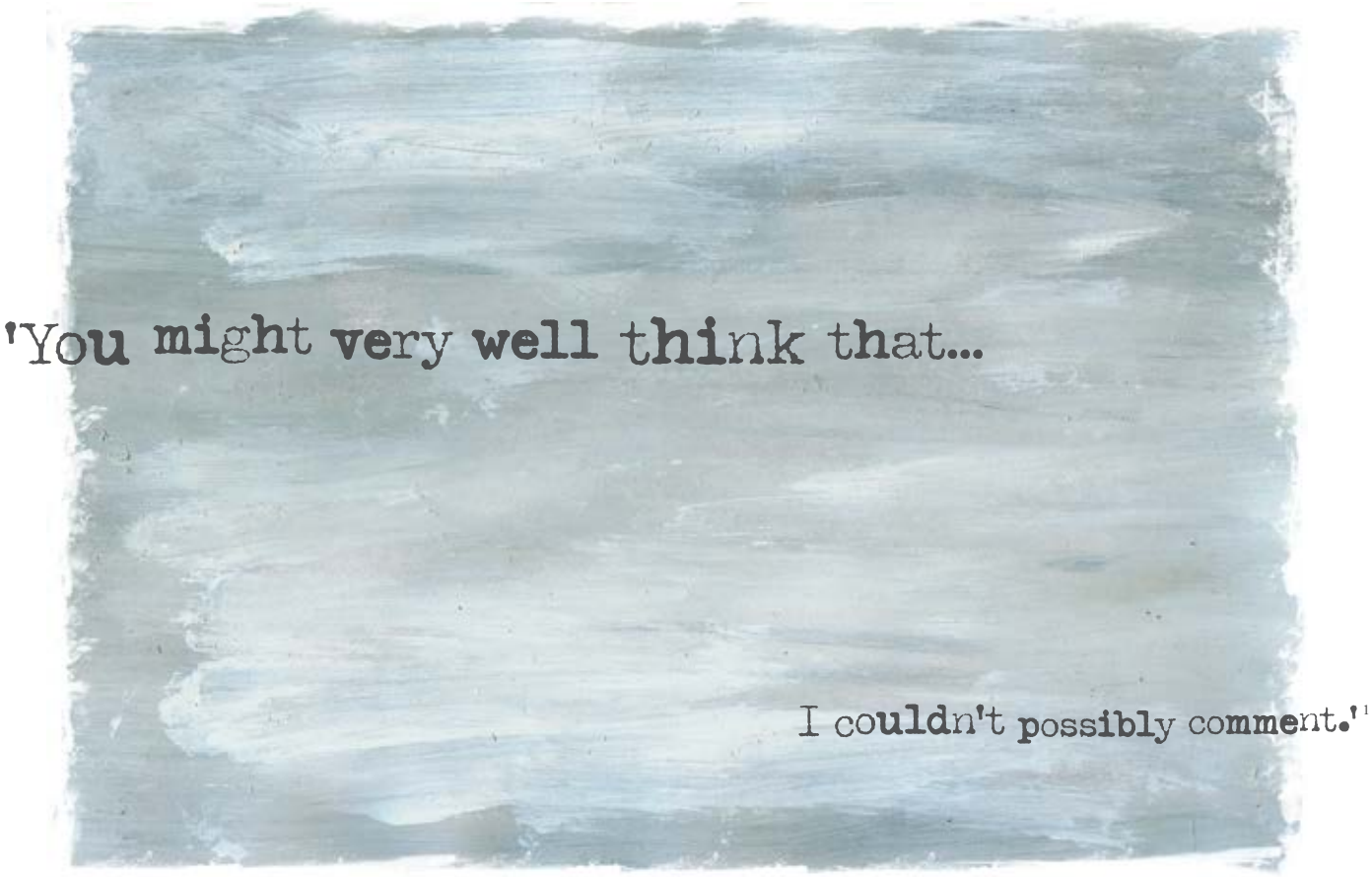
b. There is nothing in the application of Part VIIIAA to suggest that its practical effect on the Commissioner would be different from its effect on other creditors. All creditors are protected from any adverse effects of an order under Part VIIIAA. Under s 90AE, an order directed at a third party creditor cannot be made if it is foreseeable that the order would result in the debt not being paid in full or where the order would be unjust or inequitable (Kiefel CJ and Keane J at [7] to [8]; Gordon J at [78]; Edelman J at [126] to [128]).

c. A '*third party*' is defined in Part VIIIAA as '*a person who is not party to the marriage*' (s 90AB). Under s 2C *Acts Interpretation Act* 1901 (Cth), a reference to a '*person*' includes a reference to a '*body politic*' absent something to indicate a contrary intention (Gageler J at [21]; Edelman J at [121]).

d. Part VIIIAA is expressed to have effect despite anything to the contrary in any other law: s 90AC(1)(a) (Gageler J at [22]; Gordon J at [76]; Edelman J at [129]).

Such considerations will be important in future cases considering whether legislation binds the Crown.

Two further matters may be noted briefly. First, Kiefel CJ, Keane and Gordon JJ observed that orders for substitution under Part VIIIAA will be rare because of the requirements that it not be foreseeable that the order would result in the debt not being paid in full and that it be just and equitable to make the order (Kiefel CJ and Keane J at [10]; Gordon J at [90]). Secondly, Kiefel CJ and Keane J said it was '*regrettable*' that the matter proceeded as a special case stated because the question would not have arisen had the case been determined on its merits (Kiefel CJ and Keane J at [13]; see also Gordon J at [93] to [96]). By contrast, Gageler J (at [6]) and Edelman J (at [132]) considered that the case stated procedure was appropriate.



Judicial comments on the jury's determination of facts at trial

Dean Jordan SC and Ann Bonnor report on *McKell v The Queen* [2019] HCA 5

The fundamental task of a trial judge is to ensure the fair trial of the accused. In *McKell v The Queen* [2019] HCA 5, the High Court visited an aspect of this task: the judicial discretion to comment on the facts of the case in a criminal trial. The Court made clear that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury.

The facts

The appellant was tried before a jury, and convicted, in the District Court of NSW for offences of importing a border-controlled precursor, conspiracy, and dealing with proceeds of crime.

The appellant worked for a company which transported freight from cargo terminal operators at the airport to freight-forwarding agencies. On 16 May 2013, a consignment of five cardboard boxes labelled 'pijamas' arrived in Sydney from Chile (the first consignment). He collected the boxes then drove to meet a co-accused.

On 20 May 2013, a second consignment arrived in Sydney containing crystalline pseudoephedrine. Soon after it arrived, the appellant texted his co-accused stating 'dont [sic] forget to tape trial'. The appellant collected the second consignment. He was then intercepted and arrested. Subsequently, a third consignment arrived, which contained crystal methylamphetamine. Police found $400,150 in cash in a tin box in the appellant's bedroom.

The trial and the summing up

The appellant gave evidence at trial. His case was that he was an 'innocent dupe'. He said the cash was the product of cash gambling. When addressing the jury, defence counsel submitted that separate online betting accounts showed evidence of the appellant's gambling success. However, the net position in those accounts was in fact overall loss.

In summing-up to the jury, the trial judge observed 'the possibility that there was something in [the first consignment] which was taken out', which suggested to the jury for the first time, and at odds with a pre-trial ruling, that the first consignment may well have contained drugs. The trial judge also observed that 'you may think' a sophisticated organisation was involved.

The trial judge remarked that it was 'so obvious' that in the 'tape trial' message, contrary to his evidence, the appellant was not talking about horses. The judge suggested it referred to repackaging the second consignment after a substitution. If the online accounts were an indication of success, the trial judge said, 'you certainly would not want to be an unsuccessful gambler, would you?'

Court of Criminal Appeal

The appellant appealed on the sole ground that the summing-up had occasioned a miscarriage of justice. The majority of the CCA held that it had not. Beech-Jones J, dissenting, found that the summing-up did not exhibit 'judicial balance' and a miscarriage of justice resulted.

The High Court

The Court (Bell, Keane, Gordon and Edelman JJ, Gageler J agreeing on this point) was unanimous in holding that the summing-up in the appellant's trial was so unfair in its lack of balance as to cause a miscarriage of justice (at [45], [58]).

A trial judge's 'broad discretion' to comment on the facts is an aspect of the power by which the judge discharges the fundamental task of ensuring a fair trial. It is not exercisable, at large, independently of that task (at [3]). It is to be exercised judicially as part of ensuring that facts are put 'accurately and fairly' to the jury (at [3]). Where a summing-up so favours the prosecution as to deny the accused a fair trial, the resulting miscarriage of justice cannot be justified or excused by invoking the judge's 'right' to comment on the facts (at [45]).

On the first consignment and 'sophisticated organisation', the trial judge's remarks were unnecessary and distinctly apt to persuade the jury of the appellant's guilt (at [36]). The trial judge was permitted to correct the defence submission on gambling success, but the trial judge's remarks went further, such as to gratuitously belittle counsel and distract from the point that the cash was not online gambling proceeds (at [38]). The summing-up must be read as a whole, and this was not one 'unfortunate' remark, as characterised by the majority of the CCA (at [39]).

The Court did not accept that the judge's comments were 'typical and permissible', as found by the CCA majority (at [40]):

> It would not be a cause for satisfaction if these remarks were 'typical' of the daily work of trial judges. The content and tone… would not have been out of place in a powerful address by counsel for the prosecution.

The forceful language of the trial judge was such as to cause a risk that the jury might be overawed such that there was 'really nothing for them to decide' or that they would be 'fatuous or disrespectful if they disagreed with the judge's views' (at [43], citing *B v The Queen* (1992) 175 CLR 599 at 605 606). But there is a further risk, of particular concern in this case, that the jury might be persuaded to convict 'by what was, functionally, a second address by the prosecution' (at [43]).

A strong Crown case did not justify the lack of balance (at [44]). There is a real and well-recognised difference between the statement of a case and advocacy of that case (at [44]). The trial judge's remarks were couched in the forceful language of persuasion (at [44]). A strong Crown case in no way diminishes the obligation of those conducting the trial to ensure that it is a fair one (at [44]).

Clarification of principle and implications

The majority (Gageler J finding it unnecessary to address) stated it should be clearly understood that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury so as to avoid the risk of unfairness to either party (at [5], [46]).

The jury is the constitutional tribunal for deciding issues of fact (at [49]). Expressions of opinion by a trial judge as to the determination of a disputed issue of fact are not consistent with the trial judge's function as it is now understood (at [49]). There is a tension between suggesting to the jury what they 'might think' about an aspect of the facts and then directing them that they should feel free to ignore the suggestion if they think differently (at [50]). There is a risk that the jury may be swayed by the trial judge's suggestions.

None of this detracts from the duty of a trial judge to direct the jury as to the issues which arise on the evidence for their determination (at [53]). There remains scope for proper comment. The correction of errors that might adversely affect the jury's ability to decide the case fairly on the merits, is plainly not objectionable (at [54]). It is not difficult to imagine cases where judicial comment – but not an expression of opinion on the determination of a matter of disputed fact – may be necessary to maintain the balance of fairness (at [53]).

ENDNOTE

1 Quote taken from the BBC Television trilogy 'House of Cards' © (1990) BBC

The greater public interest in maintaining the integrity of the criminal justice system

Ann Bonnor reports on
AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58

On 5 November 2018, the High Court unanimously revoked special leave to appeal in two proceedings, brought by the Chief Commissioner of Victoria Police (AB) and a police informer (EF[1]) against a decision of the Victorian Court of Appeal. The revocation enabled the Victorian Director of Public Prosecutions (CD) to disclose information contained in a report prepared by the Victorian Independent Broad-based Anti-corruption Commission (IBAC) to a number of convicted persons. The information concerned the way in which Victoria Police had deployed EF in obtaining those persons' convictions.

The reasons given by the Court for revoking special leave explain why the public interest against disclosure of EF's identity to the convicted persons needed to be subordinated to the prosecution's duty of disclosure and the integrity of the criminal justice system.

The Court's reasons were made public on 3 December 2018. On the same day, the Victorian Premier announced a Royal Commission to inquire into Victoria Police's recruitment and management of EF.

Background

While purporting to act as counsel for convicted persons (identified as Atonios Mokbel and six associates), EF provided information to Victoria Police that had the potential to undermine those persons' defences to criminal charges of which they were later convicted. EF also provided information to police

about other persons for whom she had acted as counsel and who later made statements against the convicted persons.

Information concerning the relationship between EF and Victoria police was contained in an IBAC report, which was provided to the Director of Public Prosecutions. The Director concluded that he was under a duty to disclose information from the report to the convicted persons. Victoria Police determined that if this occurred, the risk of death to EF would become 'almost certain'.

The Chief Commissioner and EF sought declarations in the Victorian Supreme Court that the information was subject to public interest immunity, such that the Director was not permitted by law to make the proposed disclosures.The proceedings were heard in camera (including in the High Court), without notice to the convicted persons but with their interests represented by amici curiae, and publication was suppressed until 3 December 2018.

On 19 June 2017, Ginnane J dismissed the public interest immunity claim, deciding that whilst there was a clear public interest in preserving the anonymity of EF, there was a competing and more powerful public interest in favour of disclosure. This lay in the assistance that the information might afford the convicted persons in having their convictions overturned and, more fundamentally, in order to maintain public confidence in the integrity of the criminal justice system. The Court of Appeal dismissed appeals brought by the Chief Commission and EF against this decision.

The High Court's decision

Special leave was granted to the Chief Commissioner and EF to appeal against the decision of the Court of Appeal.

It was clear from written submissions that the only arguable issue was whether it was no longer possible to adequately protect the safety of EF and her children in the event of disclosure. The Court sought and was provided with further evidence, the effect of which was that protection of EF and her children may be adequate provided that EF agreed to enter into a witness protection programme.

Given this evidence, and after further argument, the Court revoked special leave. In so doing, the Court explained that it was essential in the public interest for the information to be disclosed to the convicted persons notwithstanding the countervailing public interest in non-disclosure.

The Court acknowledged the clear public interest in maintaining the anonymity of a police informer. The situation in this case, however, was 'very different, if not unique, and it is greatly to be hoped that it will never be repeated'.

'It is greatly to be hoped that it will never be repeated'

First, EF's actions in purporting to act as counsel for the convicted persons, while covertly informing against those persons, were 'fundamental and appalling breaches' of EF's obligations as counsel to her clients and her duties to the court. Second, Victoria Police were guilty of 'reprehensible conduct' in knowingly encouraging EF to do as she did. Police were involved in 'sanctioning atrocious breaches' of their sworn duties.

As a result, the prosecution of each convicted person was corrupted in a manner which debased the fundamental premises of the criminal justice system. The public interest favouring disclosure was compelling: the maintenance of the integrity of the criminal justice system demanded that the information be disclosed and that the propriety of each convicted person's conviction be re-examined in light of the information.

In these circumstances, the public interest in preserving EF's anonymity had to be subordinated to the integrity of the criminal justice system. This was despite evidence that EF and her children would be at grave risk of harm unless EF agreed to enter into the witness protection programme, that she had declined to enter the programme, and that Victoria Police may have borne a large measure of responsibility for putting EF in the position in which she found herself.

The Court acknowledged the importance of honouring assurances of anonymity of the kind that were given to EF. However, 'where, as in this case, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield'.

On 4 December 2018, the President of the NSW Bar Association, Tim Game SC, circulated a message to members, drawing attention to the decision and reminding barristers of the longstanding position that barristers' paramount duty is to the administration of justice.

Attention was also drawn to the words 'by all proper and lawful means' in the professional rule which obliges barristers to promote a client's best interest, and to the fact that that the *Legal Profession Uniform Conduct (Barristers) Rules 2015* do not provide any means by which a barrister could ever be complicit in criminal conduct – to the contrary, this is precluded by ethical responsibilities and compliance with the law.

ENDNOTES

1 On 28 February 2019, Nettle J made orders protecting the identify of EF's children: AB (*a pseudonym*) v CD (*a pseudonym*); EF (*a pseudonym*) v CD (*a pseudonym*) [2019] HCA 6. Non-publication orders over EF's name expired on 1 March 2019.

Managed investment schemes

David Smith reports on *ASIC v Lewski* [2018] HCA 63

The High Court has held unanimously that directors of the responsible entity of a managed investment scheme breached their duties under the *Corporations Act* 2001 (Cth) (Act) in circumstances where the directors resolved to amend the constitution of the scheme, resulting in substantial new fees being payable to the responsible entity without any corresponding benefit to members. The case is of interest because the conduct impugned was not the passing of the amendment resolution, which was time-barred, but a subsequent resolution authorising the lodgement of the amended constitution.

Background

In June 2006, Australian Property Custodian Holdings Ltd (APCHL), the responsible entity of a managed investment scheme, was taking steps towards a listing of the scheme on the ASX within the next 12 to 18 months. A resolution was passed on 19 July 2006 to amend the constitution of the scheme to confer very substantial new fees in favour of APCHL in the event of a listing, without any corresponding benefit to the members of the scheme (Amendment Resolution). The Amendment Resolution was not impugned in the proceeding because it was time-barred.

On 22 August 2006, a further resolution was passed to give effect to the Amendment Resolution by resolving to lodge the amended constitution with ASIC (Lodgement Resolution). The Lodgement Resolution was not time-barred. The central issue was whether the responsible entity and the directors had contravened the Act by resolving to lodge the amended constitution with ASIC and by later acts effecting the payment of the increased fees.

It was held at first instance that APCHL's directors had contravened various provisions of the Act. The Full Federal Court held that any breach of duty involved in the Amendment Resolution did not taint the Lodgement Resolution or subsequent acts by which the directors, acting honestly, merely gave effect to the amended constitution.

High Court decision

The High Court (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) unanimously allowed ASIC's appeal. The first argument addressed by the High Court arose from a notice of contention filed by the directors concerning s 601GC of the Act. That section provides that an amendment to the constitution of a responsible entity can be approved by the responsible entity without a special resolution of members where the responsible entity reasonably believes the amendment '…will not adversely affect members' rights'. The directors argued that the members had no 'right' under s 601GC to the due administration of the scheme. The Court rejected this argument on the basis of definitions in the Act which equated 'interests' with 'rights' and, where 'interest' has a '…broad, general meaning' (at [50]), that includes the due administration of the scheme. The Court said further that a narrow construction of 'rights' would be contrary to the purpose of s 601GC which is to protect the members of schemes (at [52]).

The first ground of appeal concerned the Full Court's view that the Amendment Resolution had 'interim validity', the effect being that the Amendment Resolution was deemed valid until it was set aside, even though it was invalid. Under this view, the Lodgement Resolution merely gave effect to the constitution as amended pursuant to the Amendment Resolution. The High Court held that there was '…no textual basis for interpreting s 601GC as not invalidating a noncompliant amendment, still less as conferring some qualified interim validity upon it' (at [59]). The Court further observed that 'interim validity' would cut across provisions in the Act that exonerate directors' breaches of duty and presume validity only for procedural irregularities (e.g. ss 1318 and 1322), and that such a concept '…has never been suggested to apply to unauthorised amendments to the constitutions of corporations' (at [62]).

The second appeal ground concerned the Full Court's conclusion that any breach of duty was 'spent' after the Amendment Resolution and that subsequent acts and resolutions were not tainted by any breaches involved in the passing of the Amendment Resolution. The High Court held that resolutions and other acts giving effect to the Amendment Resolution were not '… mere administrative task[s]' and that the Amendment Resolution '…even if valid, would have remained inchoate' and required further acts to give it legal and practical effect (at [66] to [67]). The High Court then considered the directors' duties of care, skill, diligence, loyalty and improper use of position, and duties to act in accordance with the constitution and the Act. It held that all these duties had been breached (at [68] to [78]).

The final matter considered by the High Court involved s 208(1) of the Act, which requires member approval where a responsible entity wishes to confer benefits on a related party. Section 208(3) provides that member approval is not required where the responsible entity is paying itself fees as provided for in its constitution. ASIC alleged that the directors were knowingly involved (under s 79(c) of the Act) in contraventions of s 208(1) relating to the payment of fees to a company associated with Mr Lewski. The issue was whether ASIC had to prove that the directors knew that the payment was not authorised by the constitution. The Court held that ASIC did need to prove the directors knew that the constitution did not authorise the payment and it was common ground that ASIC could not do so (at [87]).

Cake making and religious freedom

By Todd Marskell

Introduction

Over a four month period in 2018 the Supreme Courts of both the United States and the United Kingdom delivered judgments dealing with issues said to arise from an incompatibility between anti-discrimination legislation and genuinely held religious beliefs.

The Supreme Court of the United Kingdom delivered its judgment in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 on 10 October 2018, the case having been heard on 1 and 2 May 2018.

The Supreme Court of the United States issued its opinion in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 138 S. Ct. 1719 (2018) on 4 June 2018, the case having been argued on 5 December 2017.

Both cases arose from similar circumstances, namely the refusal by cake makers in Northern Ireland and Colorado to supply cakes to their respective customers. In the UK, the reason for refusing to make the cake was the request that it contain a statement in support of gay marriage and, in the US, the reason was that the cake had been made known to be for consumption at a gay marriage ceremony.

The facts of both cases are uncomplicated.

The decision in the US involved a bakery called the Masterpiece Cakeshop located in Colorado. In 2012, a same sex couple (Craig and Mullins) and the mother of Craig entered the shop seeking to purchase a cake with Craig and Mullins informing the owner (Mr Phillips) it was for 'their wedding'. The owner informed the couple he would make other forms of baked goods for them but not a cake for a same sex wedding.

The mother of Craig spoke with Mr Phillips by telephone the next day asking why he would not provide a wedding cake and Mr Phillips explained his opposition was on religious grounds and also because, at that time, Colorado did not recognise same sex marriage.

The decision in the UK involved Ashers Baking Company Limited (Ashers) which was owned and operated by the McArthur

family in Belfast, Northern Ireland.

On 8 or 9 May 2014, Mr Lee, who as a gay man, sought to purchase a cake from Ashers which was iced with images of Bert and Ernie from *Sesame Street*, the logo of an organisation called 'QueerSpace' and the words 'Support Gay Marriage'. Mr Lee was to attend an event organised by QueerSpace to mark the end of anti-homophobia week in Northern Ireland and the political momentum gathering towards same sex marriage and wished to take a cake along.

Mrs McArthur said nothing at the time but later spoke with Mr Lee by telephone and informed him that his order could not be met, apologised and provided a full refund while also returning the image to be iced on the cake.

The legislation

The *Colorado Anti-Discrimination Act* (CADA) provided:

> It is discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from or deny to an individual or group, because of disability, race creed, color sex, sexual orientation, marital status, national origin or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

The term 'public accommodation' was defined to include a place of business engaged in sales to the public.

It will be observed that no reference is made in the CADA to religion. This is because the First Amendment to the US Constitution (the Bill of Rights is contained in the first ten amendments), also referred to as the 'free exercise clause' provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The CADA was subject to the First Amendment by reason of section 1 of the Fourteenth Amendment (also called the 'equal protection' clause) which relevantly provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The decision of the US Supreme Court turned on the conflict between the First Amendment and the CADA.

In Northern Ireland, the *Fair Employment and Treatment (Northern Ireland) Order 1998* was made under the *Northern Ireland Act 1974* and prohibited discrimination in the provision of goods, facilities or services on the ground of religious belief or political opinion. The *Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006* was made under the *Equality Act 2006* and prohibited the discrimination in the provision of goods, facilities or services on grounds of sexual orientation.

Articles 9(1) and (2) European Conven-

tion on Human Rights were also considered by the Supreme Court of the United Kingdom, with article 9(1) providing:

> Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in the community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9(2) allowed limitations to the freedom to manifest one's religions or beliefs but not on the freedom to hold them.

The course of the litigation

In the US, the procedural history involved the following:

(a) a complaint was made to Colorado Civil Rights Division which proceeded to investigate the matter;

(b) having investigated and found probable cause, the Colorado Civil Rights Division referred the matter to the Colorado Civil Rights Commission;

(c) the Colorado Civil Rights Commission then initiated a formal hearing before an Administrative Law Judge who issued a decision; and

(d) this decision was then appealed to a seven member body constituting the full Colorado Civil Rights Commission with a public hearing and deliberative session held followed by a vote.

It was before the Administrative Law Judge that Mr Phillips first raised the constitutional point argued before the Supreme Court. The Administrative Law Judge ruled that Mr Phillips contravened the CADA and rejected the argument that the CADA was inconsistent with the principle of religious freedom provided by the First Amendment.

This ruling was affirmed by the full Colorado Civil Rights Commission. An appeal to the Colorado Court of Appeal affirmed the decision of the Colorado Civil Rights Commission. The Colorado Supreme Court declined to hear the case.

The procedural history is significant in that it included an event which was dispositive of the appeal before the US Supreme Court.

During the formal hearing before the Colorado Civil Rights Commission, one commissioner stated that freedom of religion and religion 'has been used throughout history, whether it be slavery, whether it be the holocaust, whatever it be – I mean, we-we can list hundreds of situations where freedom or religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to-to use their religion to hurt others.'

The US cake shop now has this disclaimer on their website:-

'Masterpiece Cakeshop will happily create custom cakes for anyone. But like many cake artists, Jack cannot create all custom cakes. He cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs.'

Returning to the UK, Mr Lee made a complaint to the Equality Commission for Northern Ireland (ECNI). With the support of the ECNI, Mr Lee brought a claim against Ashers in the District Court. The District Court held that Ashers had engaged in direct discrimination and Mr Lee was awarded damages of £500.

Ashers appealed to the Court of Appeal, which dismissed that appeal in October 2016.

The Attorney General sought to have the Court of Appeal refer the matter to the Supreme Court on two issues but the Court of Appeal concluded the Attorney General had no power to do so as the proceedings had ended. As part of its judgment, the Supreme Court resolved this jurisdictional issue, permitting the appeal before the Supreme Court to be determined on the merits, with Lord Mance writing a judgment on this issue with whom all members of the Court agreed.

In both cases, the *bona fides* of the religious beliefs of the relevant individuals was not the subject of challenge.

The outcome

It is convenient to deal first with the decision of the UK Supreme Court, even though it came later in time.

The judgment on the substantive issue was written by Lady Hale (with whom the other members of the Supreme Court agreed). As described by Lady Hale at [1], the substantive question in the case was 'whether it is unlawful discrimination, either on grounds of sexual orientation, or on grounds of religious belief or political opinion, for a bakery to refuse to supply a cake iced with the message 'support gay marriage' because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God'.

As to the first ground (concerning sexual orientation), the Supreme Court characterised Ashers' objection to baking the cake as one directed 'to the message, not the messenger' (at [22]), in that '[a]nyone who wanted that message would have been treated in the same way' (at [23]). Therefore, the Supreme Court held that since 'the objection was to the message and not to any particular person or persons ... there was no discrimination on grounds of sexual orientation in this case' (at [34]-[35]).

An argument of associative discrimination was rejected on the basis there was no finding that Ashers refused to supply a cake to Mr Lee because he associated with gay people.

The Supreme Court held further that a denial of service because of someone's race, gender, disability, sexual orientation or any other 'protected characteristic' did not occur in this case and 'it does the project of equal treatment no favours to seek to extend it beyond its proper scope' (at [35]).

The ground based on political beliefs also was rejected (at [45]) on the basis the prohibition under the relevant legislation must be in respect of the religious belief or political opinion of someone other than the person said to be engaged in discriminatory conduct. In other words, the protected characteristic was the religious beliefs of the McArthurs, not the consequences of such beliefs as regards Mr Lee who did not hold similar beliefs.

The Supreme Court also noted (at [47]) that the answer to the claim based on political beliefs may, like the claim based on sexual discrimination, also be that there was no less favourable treatment on this ground because anyone else would have been treated the

same way and 'the less favourable treatment was afforded to the message' and not to the individual.

As to the European Convention on Human Rights, there were two issues. The first issue was the effect that Convention had on the legislation prohibiting discrimination based on religious or political beliefs. The Supreme Court held (at [56]) that the relevant legislation should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree unless justification is shown for doing so. The Supreme Court earlier noted (at [50]) that 'obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights'.

A second issue was whether the company (Ashers) could be liable where the McArthurs were not. The Supreme Court rejected that proposition stating (at [57]) that to hold the company liable when the McArthurs were not 'would effectively negate their convention rights' and that in so holding that the company was not liable, the Court was not holding that the company has rights under article 9 but, rather 'it is upholding the rights of the McArthurs under that article'.

By reason of the Supreme Court's decision, an additional issue as to the validity of the applicable legislation and whether both pieces of legislation should be read down due to their incompatibility with articles 9 and 10 of the European Convention on Human Rights did not need to be decided.

The Supreme Court referred to *Masterpiece* in a postscript. The Supreme Court noted the factual differences between the two cases. It stated (at [62]) that the 'important message' from Masterpiece 'is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics'. The Supreme Court reiterated that 'in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics'. Thus, there was no discrimination on grounds of sexual orientation.

This suggests that the UK Supreme Court may have taken a different view if the refusal to bake the cake was by reason of the characteristics of a particular customer. If that is so, the issue unresolved by the Supreme Court as to whether the applicable legislation should be read down due to incompatibility with the

European Convention on Human Rights may have arisen for determination.

The opinion of the US Supreme Court in *Masterpiece* was delivered by Justice Kennedy with whom Justices Kagan, Gorsuch, Alito and Thomas joined, with concurring opinions filed by Justices Kagan, Gorsuch and Thomas, those concurring opinions joined by other members of the Court. The dissenting opinion was issued by Justice Ginsburg with whom Justice Sotomayor joined.

The Supreme Court determined the case on narrow grounds. The Court held that the Colorado Civil Rights Commission did not employ religious neutrality, thus violating Mr Phillips' right, guaranteed by the First Amendment, to the free exercise of religion. The dispositive error was the Commission acting in a 'manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices' in violation of the First Amendment (at 1731) such that 'the Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral towards religion' (at 1732). The relevant conduct of the Colorado Civil Rights Commission was the statement to which reference has been made above. A point to which Justice Kennedy noted (at 1731) was that the First Amendment bars even 'subtle departures from neutrality'.

Justice Kennedy also referred to instances where the Commission had treated conscience-based objections to the provisions of cakes as legitimate, that having occurred where the cake-maker considered the proposed text to be hateful or derogatory. Justice Kennedy said that in acting in such a manner, the Commission acted in contravention of the principle that a difference in treatment 'cannot be based on the government's own assessment of offensiveness' (at 1731).

The Supreme Court therefore held that when the Colorado Civil Rights Commission considered the complaint in that case, 'it did not do so with the religious neutrality that the Constitution requires' (at 1724).

In so holding that there was a contravention of the First Amendment by the Commission, the Supreme Court was not required to consider the broader question of how to resolve a case which raises the intersection between anti-discrimination laws, the free exercise of religion and freedom of speech.

A sense of the competing views can be seen in the concurring opinion of Justice Thomas and the dissenting opinion of Justice Ginsburg. Justice Thomas, who considered that the issue of freedom of speech also arose in the case, said that because the Court's decision 'vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day'. However, 'in future cases, the freedom of speech could be essential to preventing *Obergefell v Hodges* 135 S.Ct. 2584 (2015) from being used to 'stamp out every vestige of dissent' and 'vilify Americans who are unwilling to assent to the new orthodoxy".

Justice Ginsburg, while not discounting the hostility of the Colorado Civil Rights Commission towards Mr Phillips' religious beliefs, considered that that matter should not overcome Mr Phillips' refusal to sell the wedding cake, with her Honour also noting that the proceeding 'involved several layers of independent decision-making, of which the Commission was but one' (at 1751).

Justice Ginsburg also drew a point of factual distinction between the situation in *Masterpiece* and other instances of conscience-based refusal to sell cakes such as those refusals which occurred where the proposed message was known and bakeries would not sell a cake with that message to any customer (at 1750). In that regard, her Honour's comments appeared broadly consistent with the approach taken by the UK Supreme Court in *Lee*.

Application to Australia?

The High Court has not yet had to consider an analogous case following the passing of the *Marriage Amendment (Definition and Religious Freedoms) Act* 2017 (Cth). If a case does arise, it is doubtful that the decision in Masterpiece will be of particular relevance, as it was determined based on the US Supreme Court's conclusion that the Colorado Civil Rights Commission had not afforded Mr Phillips religious neutrality as required by the First Amendment. However, depending on the specific facts, the decision in Lee may be relevant. This is because the UK Supreme Court's decision did not turn on the applicability of the European Convention on Human Rights but, rather, the manner in which Ashers' objection to baking the cake was to be characterised.

Prasad directions 'contrary to law'

Belinda Baker reports on *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 (8 November 2018)

A Prasad direction is a direction to a jury determining a criminal trial that it may bring in a verdict of not guilty at any time, after the close of the *Crown: R v Prasad (1979)* 23 SASR 161. In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9, the High Court unanimously held that such directions are contrary to the common law of Australia.

This decision mirrors the High Court's unanimous decision in *McKell v The Queen [2019]* HCA 5, in emphasising the fundamental role of the jury as the constitutional tribunal for the determination of issues of fact in a criminal trial.

Background

The accused person was charged with murder. He entered a plea of not guilty to that charge, and a jury of 13 persons was empaneled (as permitted under Victorian law). Following the close of the prosecution case, the trial judge gave a Prasad direction, over the objection of the Crown.

The direction was lengthy. A printed copy of the transcript of the direction (which was provided to the jury) was in excess of 20 pages, and included instruction on the elements of murder and manslaughter with particular reference to proof of the intent for murder, as well as instructions on self-defence in the context of family violence.

Before the jury withdrew to consider its response to the direction, a ballot was conducted to reduce the jury to 12 jurors (in case the jury determined to return verdict(s) of acquittal). After retiring to consider the direction, those 12 jurors advised that they wished to hear more. The juror who had been balloted off re-joined the jury, and the trial continued with all 13 jurors present.

Following the close of the defence case, but before addresses were given, the trial judge reminded the jury of the Prasad direction. By a second ballot, the jury was again reduced to 12 persons before it considered its response to the renewed Prasad direction. On their return to the court, the jury delivered verdicts of not guilty of the charges of murder and manslaughter.

The Victorian Director of Public Prosecutions referred a point of law to the Victorian Court of Appeal pursuant to s. 308(4) of

the *Criminal Procedure Act* 2009 (Vic). In particular, the Director sought the court's opinion as to whether '[t]he direction commonly referred to as the "Prasad direction" is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person.' (Such a reference does not affect the acquittal of the accused person.)

A majority of the Court of Appeal (Weinberg and Beach JJA; Maxwell P dissenting) answered this question in the negative, noting that the giving of a Prasad direction had been accepted practice in Australian courts for almost 40 years. In dissent, Maxwell P considered that the practice of giving the direction should be 'comprehensively disapproved', as it had been in England.

The High Court's decision

In the High Court, the Director contended that a trial judge is precluded from giving a Prasad direction either by the common law of Australia or by the statutory scheme for the conduct of trials in Victoria. The High Court unanimously upheld the Director's first contention, holding that Prasad directions are contrary to law, and should not be administered to a jury determining a criminal trial between the Crown and an accused person.

The Court observed retaining the trial judge's power to give a Prasad direction could be said to be justified on the basis of 'the saving of time and costs, and restoring the accused to his or her liberty at the earliest opportunity' (at [50]). However, their Honours noted that those considerations lose much of their force once it is recognised that a Prasad direction is unsuitable to trials that involve legal or factual complexity or to trials involving multiple accused (at [51]).

The Court listed the dangers that accompanied the giving of a Prasad direction, including the risk that a jury will consider that the judge considers acquittal to be the appropriate verdict. The Court noted the duty of the trial judge to preside impartially, and to ensure that the trial is fair to each party, including the prosecution (at [53]). The Court held that the exercise of the discretion to give a Prasad direction based on the judge's estimate of the evidence to support a conviction is inconsistent with the division of functions between judge and jury, and with the essential features of an adversarial trial (at [56]).

Finally, the Court noted that inviting a jury to stop a trial without having heard all of the evidence, without having heard counsel's addresses and without the assistance of a complete summing up 'is to invite the jury to decide the matter from a basis of ignorance which may be profound' (at [57]).

Accordingly, the Court concluded that:

> 'If evidence at taken at its highest is capable of sustaining a conviction, it is for the jury as the constitutional tribunal of fact to decide whether the evidence establishes guilt beyond reasonable doubt' (at [57]).

Data on diversity: The 2018 survey

By Ingmar Taylor SC and Chris Winslow

The New South Wales Bar is perceived as an island in a sea of demographic change. Society views barristers as 'old white men wearing wigs'.[1] Michael Kirby said he was 'shocked and surprised' by the under-representation of Asian Australians in the legal profession, comprising just 1.6 per cent of barristers nation-wide.[2] At the time the NSW Bar Council was in no position to demur – it did not have the data to do so.

To be sure, the New South Wales Bar Association has long kept and published basic data regarding local practising barristers. The purpose was partly regulatory, but also as a means to determine the 'retention' and career progression of barristers, from pupillage to appointment as senior counsel and beyond. Such data also served as a useful indicator of the resilience of an independent referral bar, buffeted by the collapse of HIH, challenged by competition from solicitors, and under threat from government policies designed to curtail common law rights to compensation in motor accident cases. That information included gender, but until recently the bar did not study the cultural composition of the bar. That changed recently when it became an object of the association's strategic planning.

In the context of the bar, diversity is a function of two factors: commencement and retention over a given time – put simply, who is admitted, who stays and for how long? Nowhere has this equation been more apparent than in the obvious gender imbalance at the bar. This was the first facet of diversity to be scrutinised. In 2004 *Bar News* published a special edition on women barristers, which examined the statistics and the perception that women completing the Bar Practice Course were leaving the bar not long after and were not 'retained'.[3]

In the ensuing years, Bar Association committees, along with several academics, have examined the issue, including studies on equitable briefing and court appearances by women. The most recent of these was an excellent article by Richard Scruby SC and Brenda Tronson in the Summer 2018 edition of *Bar News*.[4] At the same time, the focus on the composition of the bar was widened to include the severe under-representation of Indigenous Australians. Bar Council commissioned ad hoc surveys – such as the one by Urbis Consulting in 2014 – but the surveys were not aimed at understanding cultural diversity and the findings were not widely published. During this time the Bar Association was falling behind other peak legal organisations in the collection, analysis and publication of member data, most notably the Victorian Bar, the Bar of England and Wales, the Bar Standards Board and the Judicial Appointments Commission in the UK. Over this period there has been a growing understanding of the need to build, what marketers would call, a '360-degree view': an end-to-end picture of barristers' career pathways to the bar, their practices – and their diversity.

In the context of the bar, diversity is a function of two factors: commencement and retention over a given time – put simply, who is admitted, who stays and for how long?

In 2018 the Bar Council, under the leadership of Arthur Moses SC, recognised that to deal with the challenges of a changing society, economy and market for legal services, as well as to provide better targeted services and benefits to its members, the Bar Association needed to collect data systematically and regularly on the intellectual capital and diversity of the New South Wales Bar and trends in the changing nature of local barristers' practices. As part of the 2018-19 practising certificate renewal documentation, the Bar Association included 'Appendix A', an optional survey containing 12 questions, which covered issues relating to their practice, cultural and linguistic diversity and parental responsibilities. LGBTIQ orientation was not one of facets of diversity targeted in 2018-19, but will be in the 2019-20 practising year. Appendix A was sent to all holders of a 2016-17 PC. Respondents were asked about their experience within a 12-month period commencing on 1 April 2017 and concluding on 31 March 2018 (inclusive). The exceptionally high response rate (64.97 per cent), lends confidence to the results.[5] It is only by examining this data, and how it changes over time, that the Bar Association can understand the extent of the issue and the effectiveness of steps being taken to address it.

THE REPORT CARD

There is nascent cultural diversity at the New South Wales Bar. It is comparable in most respects to its interstate and overseas counterparts, although a quick walk down most suburban streets in Sydney will tell that it remains a long way from being representative of the state's population as a whole.

The Bar Association followed the Australian Bureau of Statistics' practice of identifying two ancestries as a guide to ethnic diversity. Members were asked: 'What is your ancestry?'[6] Members could respond by nominating *up to two cultures* – picking from the list provided (which included 'Australian') plus the option of a free answer. A total of 1526 barristers (63 per cent of those surveyed) gave at least one response. More than half of the barrister-respondents (790; 51.77 per cent) identified with *a single ancestry* (see Graph 1). Of those, 413 (52.3 per cent) identified themselves as 'Australian'. In other words, 27.2 per cent of the bar.[7]

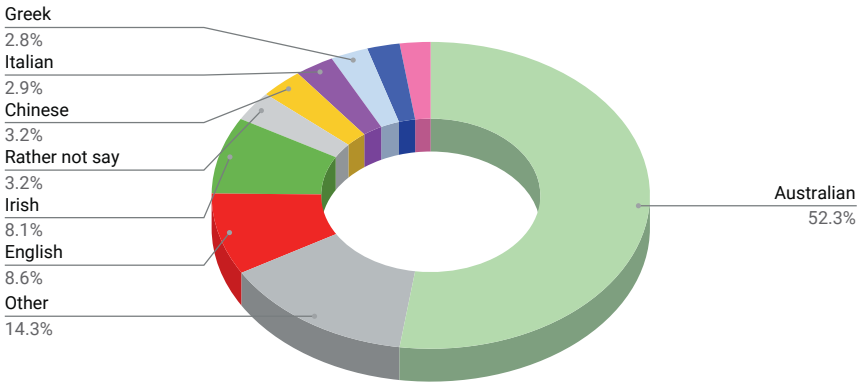
Whether the diversity of the bar continues to grow will depend, to some extent, on whether these barristers remain in practice, or at least do not leave the bar at a rate exceeding those who do not have identify as having a diverse background.

As Graph 2 indicates, 'Other' was the second most frequent response – 113 respondents who identified 44 distinct cultures.

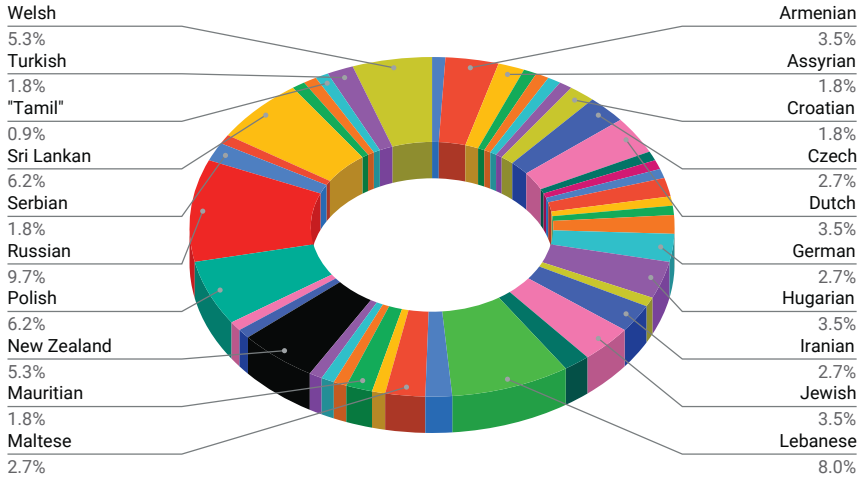
What of 'mixed ancestries' or 'hyphenated' identities? According to the data collected, 337 barristers (22 per cent of respondents) nominated Australian and *one other ancestry*. As expected, 80.2 per cent identified English, Irish or Scottish. However, 55 barristers (16.3 per cent) responded 'Other' and nominated 31 unique cultures – eight of which were Eastern European, part of the former Soviet Union or the former Yugoslavia.

It is worth noting the significantly increased cultural diversity among 305 *young* barristers, which for the purposes of this analysis is anyone born in 1978 or later.

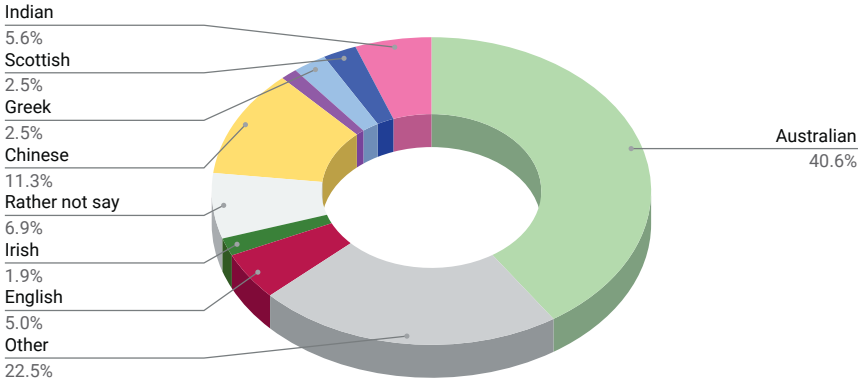
Graph 1: Ancestry, single response



Graph 2: Composition of single 'other' ancestry



Graph 3: Single ancestry, born 1978 and after



Although it is, admittedly, a small cohort, approximately 17 per cent of those born after 1978, who identify as having a single ancestry, nominated either Chinese or Indian as their cultural heritage. Together with those who nominated 'other' as a single ancestry, nearly 40 per cent of barristers aged under 40 have a diverse cultural background. The number who nominated Chinese ancestry (11.3 per cent) is nearly twice the proportion of the NSW population as a whole. Whether the diversity of the bar continues to grow will depend, to some extent, on whether these barristers remain in practice, or at least do not leave the bar at a rate exceeding those who do not identify as having a diverse background.

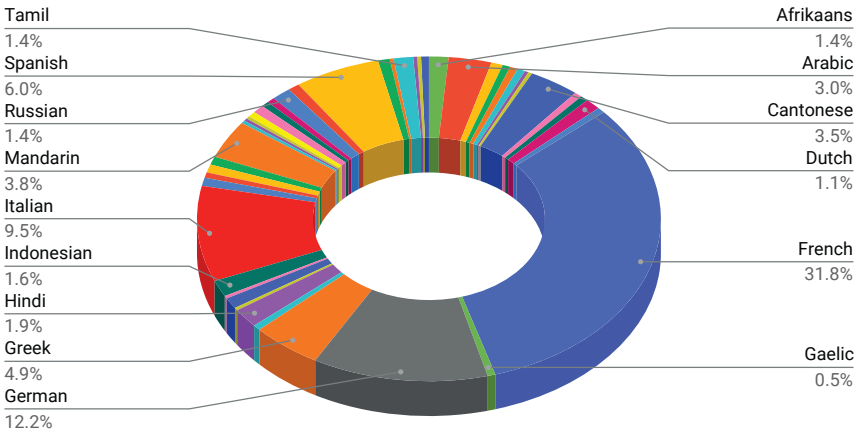
Regrettably, less than one per cent of respondents identified as being of Aboriginal or Torres Strait Islander descent. This compares unfavourably with the Victorian Bar, where 1.2 per cent claim Aboriginal and Torres Strait Islander ancestry and with the NSW population as a whole (2.9 per cent).

The Bar Association also asked barristers to nominate their country of birth. There were 1547 responses – a response rate of 65 per cent. 14.3 of respondents were born overseas in 49 countries (or 48, depending on the interpretation of East Timor's status at the relevant point in time).[8] This is significantly short of the national or state figure: 34.5 per cent of the population in NSW were born overseas.

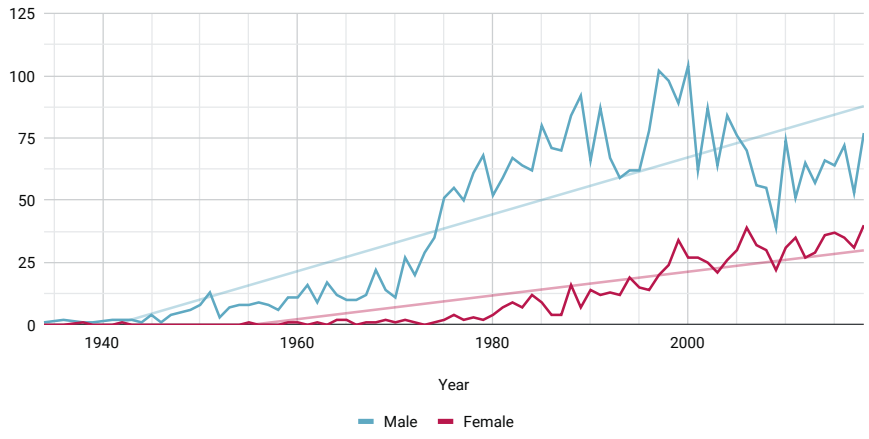
Again, there is emergent diversity among young barristers. Of the 304 respondents aged 39 or less, 22.7 per cent were born overseas in 25 countries. The diversity of this cohort is more proximate with the NSW community as a whole. For example: there are five barristers born in India (1.65 per cent of that cohort). 1.9 per cent of the NSW population was born in India. Seven barristers aged 39 or less were born in China (2.31 per cent of that cohort) versus 3.0 per cent for the whole population of NSW.

Regrettably, less than one per cent of respondents identified as being of Aboriginal or

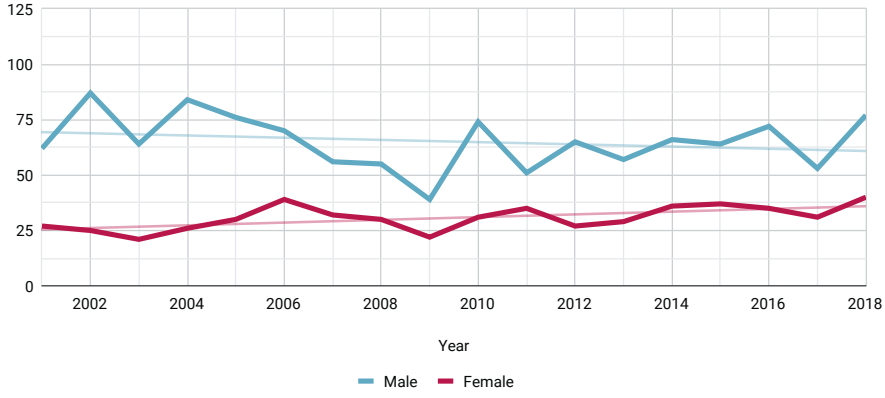
Graph 4: Language proficiency - intermediate and high



Graph 5: Practice commencement by calendar year



Graph 6: Trend commencement, 2000



Torres Strait Islander descent. This compares unfavourably with the Victorian Bar, where 1.2 per cent claim Aboriginal and Torres Strait Islander ancestry and with the NSW population as a whole (2.9 per cent).

LANGUAGES OTHER THAN ENGLISH

The Bar Association has long collected data on languages spoken by practising certificate holders, but this did not extend to self-reporting on language proficiency. During PC renewals, Question A10 asked respondents to assess their proficiency in other languages according to a scale of 'Basic', 'Intermediate' and 'High'. Respondents could identify proficiency in more than one language.[9]

...only 58 barristers (less than 3 per cent) reported an intermediate or high proficiency in an East Asian or South Asian language.

In order to make the findings more relevant, those who reported only a rudimentary knowledge of another language (e.g., for travel) were eliminated from the data set. The result ,represented by Graph 4, is that 368 barristers report having either an intermediate or advanced proficiency in a foreign language (15.2 per cent of the NSW Bar). Women barristers in New South Wales are more likely than their male counterparts to report an ability to speak a language other than English. However, only 58 barristers (less than 3 per cent) reported an intermediate or high proficiency in an East Asian or South Asian language.

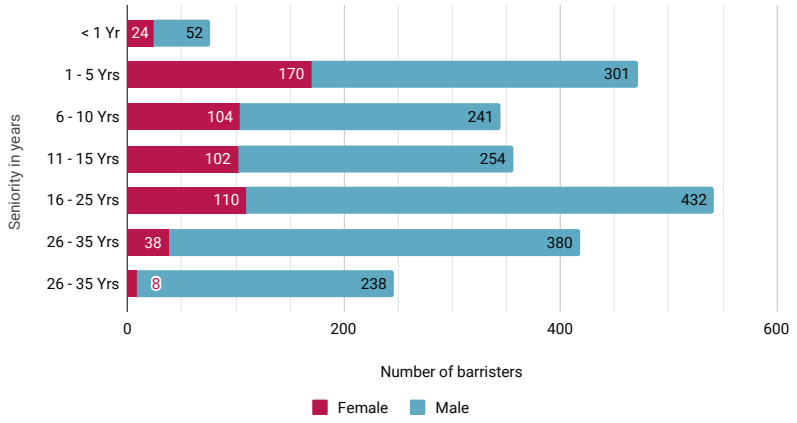
SOCIOECONOMIC DIVERSITY

As reported elsewhere in this edition, the survey provided limited evidence suggesting that socio-economic factors affect who comes to the bar. Secondary education, often used as a proxy for social mobility and socio-economic status, indicates an over-representation of graduates from non-government high schools.

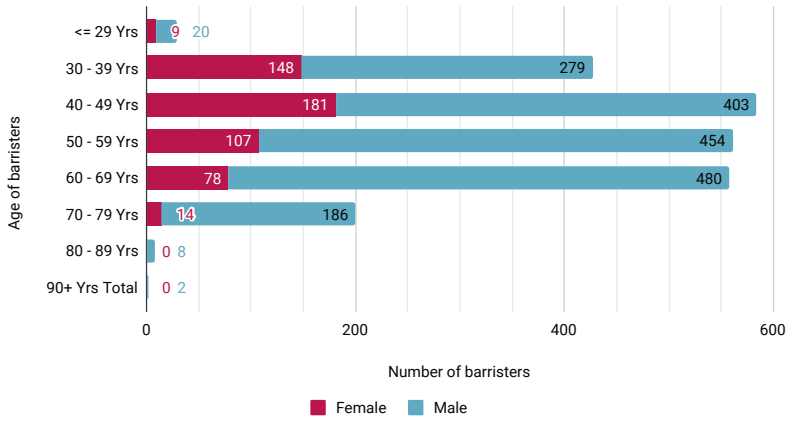
WOMEN AT THE BAR

The ratio of men to women at the bar has been the focus of attention since the first women were admitted, but more so since the number of women graduating in law exceeded the number of males and women became a majority of the solicitor branch of

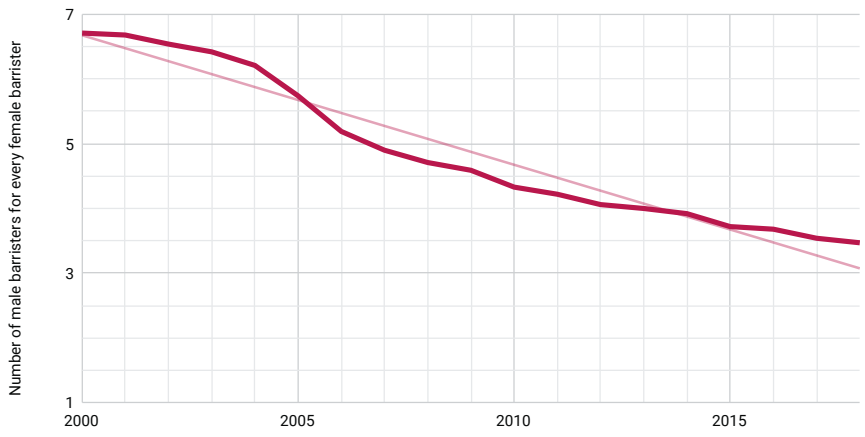
Graph 7: Practising barristers, by seniority and gender



Graph 8: Practising barristers, by age and gender



Graph 9: Ratio of male to female barristers



the profession. Currently, women comprise only 23.17 per cent of practising barristers in NSW, and only 11.26 per cent of silks. Data collected by the Bar Association indicates a consistent, upward trend in the number of women commencing and practising at the bar (Graph 5). Men increased in number at a higher rate until 2000, but since then the commencement numbers have been more stable, while varying from year to year.

A serious concern for diversity at the bar is that, while the ratio of men to women is reducing, it is doing so at a declining rate.

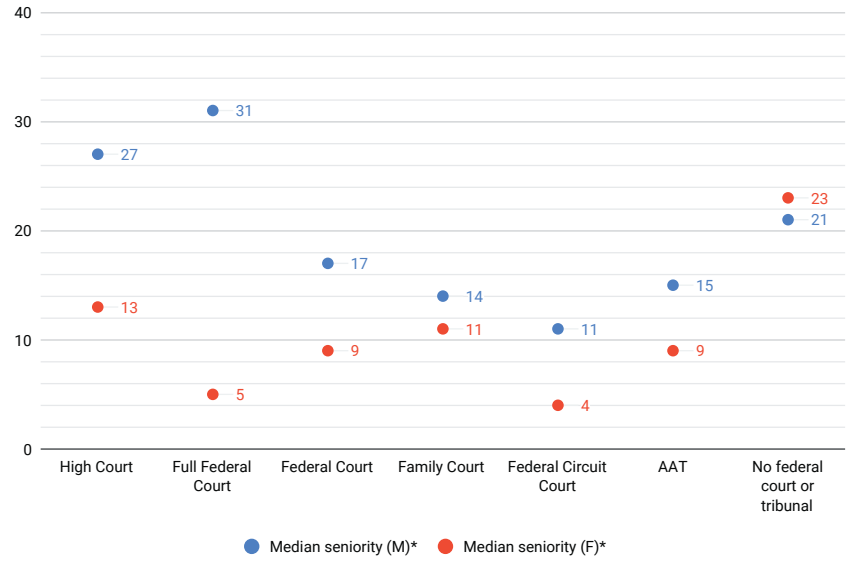
A serious concern for diversity at the bar is that, while the ratio of men to women is reducing, it is doing so at a declining rate. The 2004 *Bar News* article, 'A statistical analysis of gender at the NSW Bar', concluded that 'the overall percentage of barristers who are women will not be anywhere near 50 per cent in the foreseeable future'. That prediction has proven accurate.

Data on women commencing at the bar is one thing, but what about court work?

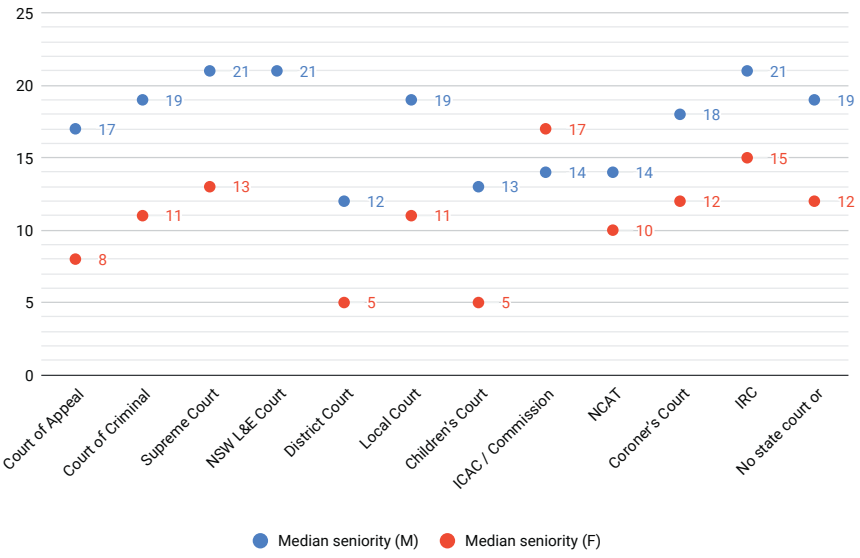
Graph 7 and Graph 8 show the number of practising barristers broken down by gender, seniority and age, while Graph 9 represents the ratio of male to female barristers. The gradient of the line has lessened since around 2012. Had the ratio sustained its rate of change between 2004 and 2006, there would be parity between the number of men and women barristers by 2018. That hasn't happened. The gradient of the line since 2016 is a cause for concern and suggests that the ratio of men to women will approach 3:1, but will take many years to intersect and go below that point.

Data on women commencing at the bar is one thing, but what about court work? There have been several reports on in-court appearances by women barristers. Data collected by the Bar Association indicates that women are more likely to accept direct

Graph 10: Appearances in federal courts, seniority and gender



Graph 11: Appearances in state courts, seniority and gender



briefing by in-house counsel than men (54.44 per cent / 49.22 per cent), but not significantly more likely to accept a direct access brief. Women are appearing in mediations and arbitrations (both representing and as an approved mediator) in approximate proportion to their numbers at the bar. In a number of federal and state courts and tribunals, the median seniority of women barristers is nine years, considerably less than their male colleagues' 17 years.[10]

To retain its position as the home of the best lawyers in Australia it must be permeable to the 'best and brightest' legal minds, whatever their origin.

Matching data collected on court appearances and gender produces the hierarchy represented in Graph 12. It shows significant disparities between the ratio of men to women barristers and their court appearances during the practising year in the various jurisdictions. As at 30 June 2018 the ratio of male to female barristers in NSW was 3.46. The ratio of male to female silks is 8.19. The ratio of male to female respondents to the survey was 3.17. As can be seen, the ratio of men to women appearing in ICAC, commissions of inquiry, the Local Court and the Court of Criminal Appeal, is much closer than in other jurisdictions, including the NSW Court of Appeal and High Court. To some extent this might be said to reflect the lower median seniority of women at the Bar, although that explanation is harder to adopt in respect of the District Court.

CONCLUSION

The Bar Association's Strategic Plan posits that in order for the bar to represent clients from a cross-section of society, it must reflect that society. Many at the New South Wales Bar consider it to be purely meritocratic, although that is not something necessarily known to those who view it from outside (nor necessarily accepted by all within it).

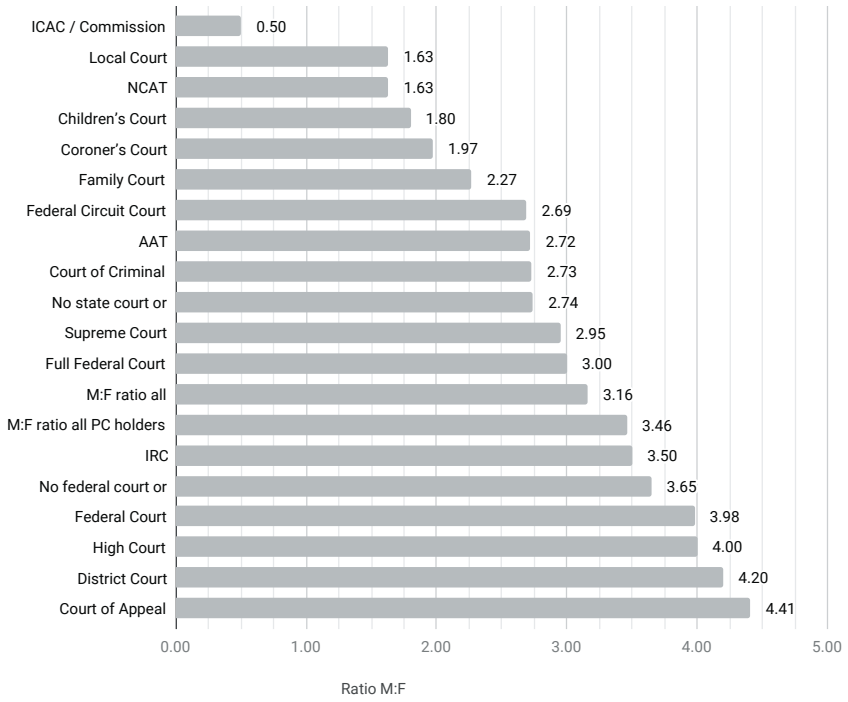
To retain its position as the home of the best lawyers in Australia it must be permeable to the 'best and brightest' legal minds, whatever their origin. Furthermore, once admitted to practise, barristers who are not old

white men in the making need to remain in practice. The need to increase the number of women at the bar remains acute, particularly in respect of the number of women silks.

The same is true of those from non-Anglo backgrounds. Diversity needs to be encouraged so that over time the leaders of the bar become visibly representative of our society. This will in turn send a message to those from diverse backgrounds: if you are bright, articulate and hard working you will succeed at the bar regardless of your gender, ethnic or cultural background.

Positive steps need to be taken. The first of which is to understand who we are. The 2018 survey was that first step.

Graph 12: Ratio M:F all courts



ENDNOTE

1 Katie Walsh, 'Barristers insist they are not 'just old white men wearing wigs", *Australian Financial Review*, 5 April 2018. The solicitors branch of the profession was not immune to criticism either.

2 In 2015 the Hon Michael Kirby AC CMG, acceptance speech as patron of the Australian Asian Lawyers Association, reported in Rowan Callick, 'Michael Kirby shocked by dearth of Asian Australian lawyers', *The Australian*, 4 December 2015.

3 Ingmar Taylor and Chris Winslow, 'A statistical analysis of gender at the NSW Bar', [2004] (Winter) *Bar News* 20.

4 Richard Scruby SC and Brenda Tronson, 'Some recent statistics on women at the New South Wales Bar', [2018] (Summer) *Bar News* 50-54.

5

	Male	Female	Total	M:F ratio	Response rate
Responents	1193	376	1569	3.17	64.97%
PC holders 30 June 2018	1862	536	2415	3.46	-

6 Australian Bureau of Statistics, *Data Quality Statement, Ancestry (ANCP, ANC1P, ANC2P)*, http://www.abs.gov.au/websitedbs/censushome.nsf/home/statementspersonancp?opendocument&navpos=430 (Accessed 14 March 2019). *The Australian* Standard Classification of Cultural and Ethnic Groups (ASCCEG), 2011, Table 1.3 was used as a guide for recording responses.

7 The top five ancestries nominated by respondents to the 2016 Australian Census were: English (23.3 per cent); Australian (22.9 per cent); Irish (7.5 per cent); Scottish (5.9 per cent) and Chinese (5.2 per cent).

8 **According to the Victorian Bar survey**, 15 per cent of Victorian barristers were born overseas, while 37 per cent had at least one parent born overseas. Survey respondents listed 33 countries of birth, the most common being UK, New Zealand and Canada.

9 The Victorian Bar took a different approach. According to their survey, nine per cent of their local practising barristers speak a language other than English *at home*. Respondents listed 18 languages. The most common of these were Greek, Italian, French, German and Hebrew. *The State of the Victorian Bar: Performance, challenges, and opportunities* (Nous, March 2018) https://www.vicbar.com.au/sites/default/files/The%20State%20of%20the%20Victorian%20Bar%20report.pdf

10 The median seniority for all Appendix A respondents was 18 years for males and 10 years for females.

Breaking the culture of silence – sexual harassment at the Bar

By Kate Eastman SC

Sexual harassment of women lawyers has been a recurrent and persistent feature of many women's experiences in legal practice. Anecdotal evidence indicates that many barristers in New South Wales have experienced sexual harassment, with women barristers who have experienced sexual harassment reporting being subjected to a wide range of behaviours. However, there has been very little research into the working conditions of barristers and their experience of sexual harassment. There is also limited data. In 2015, a Practising Certificate Renewal Survey asked about barristers' experience of sexual harassment.

The results of the Practising Certificate Renewal Survey were (as at June 2015):

- 42% of all women barristers who responded said they had experienced sexual harassment compared with only 3% of male barristers; and
- 64% of women barristers reported experiencing bullying at the Bar.

The majority (85%) of women who experienced sexual harassment indicated that the source of harassment was a fellow barrister, while men who experienced sexual harassment were more likely to report the source of harassment as a client (59%) or solicitor (41%).

Despite the high level of reports of sexual harassment, over half (56%) of females and close to half of males (49%), took no action

Despite the high level of reports of sexual harassment, over half (56%) of females and close to half of males (49%), took no action, with only a minority raising the issue with a colleague or a clerk. Not a single respondent (male or female) made a formal complaint of sexual harassment.

The Diversity and Equality Committee sought to explore the reasons why sexual harassment occurs at the Bar and the reluctance to report such incidents when preparing a submission for the Australian Human Rights Commission's national inquiry into sexual harassment in Australian workplaces.[1]

We asked whether there are any particular features of the Bar that might explain why sexual harassment occurs. We have also considered whether the Bar is different to other workplaces and whether those differences may account for why sexual harassment occurs.

Anecdotal evidence and experience show sexual harassment by barristers and towards barristers bears the same features and causes as other professions that are historically hierarchical male dominated professions.

To a significant degree, the Bar remains male dominated and retains a hierarchical structure.[2] The culture of the Bar is adversarial. While barristers, as members of

chambers, operate as a collective of practitioners, as sole practitioners they remain in competition with every other barrister. The adversarial nature of the work barristers do in court also permeates the interactions of barristers outside of court.

Depending to a significant degree on the area of practice and the nature of the brief, stereotypical views continue about lawyers, particularly women barristers; and women still experience discrimination when decisions are made about engaging barristers. In the early days, women barristers were expected to practise in 'so-called' women's areas – family law and matters concerning children.[3] While the areas where women now practise have expanded, the legacy of the "women's work" remains and the structure of the legal profession continues to present barriers for women. The nature of practice and the demands on lawyers can be challenging for women who are still usually the primary carers of children.

Too often women offended by unacceptable conduct find themselves facing passive aggression and are asked if they can't take a compliment, or recognise a joke, or are told to 'lighten up'. How much more powerful would it be if others took the initiative to challenge and deprecate such conduct; if others made it plain that conduct that demeans women is not acceptable within the profession: it is not a joke, or a compliment?

One particular concern for barristers is the patchy coverage of Commonwealth and New South Wales laws proscribing sexual harassment, relevant to their workplaces and professional relationships. One significant feature of the Bar, compared with other workplaces is the limited coverage of the *Sex Discrimination Act* 1984 (Cth) (SDA) and *Anti-Discrimination Act* 1977 (NSW) to barristers. These laws presently provide little or no protection for barristers sexually harassed by another barrister in chambers or in court.

Furthermore, we found the reasons for a victim's reluctance to make a complaint or take action are complex. All victims of sexual harassment have agency, in the sense that an individual has the ability to make effective choices and to transform those choices into desired outcomes. There is no obligation to report sexual harassment, make a complaint or take action. However, those barristers who experienced sexual harassment indicated that their reluctance to make a complaint was due to embarrassment, trauma, the absence of relevant or effective policies or processes to make a complaint, fear of retribution, damage to professional reputation, the cost, the risk of adverse financial outcomes if the barrister loses work, publicity, threats of defamation as well as the absence of an effective remedy. In *Precedent* (Issue 144 February 2018), Catherine Branson QC, retired Federal Court Judge and former President of the Australian Human Rights Commission said:

> *Too often women offended by unacceptable conduct find themselves facing passive aggression and are asked if they can't take a compliment, or recognise a joke, or are told to 'lighten up'. How much more powerful would it be if others took the initiative to challenge and deprecate such conduct; if others made it plain that conduct that demeans women is not acceptable within the profession: it is not a joke, or a compliment?*

Reluctance of this kind extends not only to those harassed but also to bystanders and witnesses to sexual harassment. The 'usual suspects' may be able to engage in inappropriate conduct because no one has stopped them. This may breed a culture of silence, in turn creating a culture of complacency when it comes to tolerating sexual harassment. In those ways, those engaging in sexual harassment may be protected by a culture of inaction.[4]

The New South Wales Bar Association made a number of recommendations to the National Inquiry to address these issues, including:

- the SDA be amended to reflect the provisions of s 94 of the *Equal Opportunity Act* 2010 (Vic) and s 87(1) of the *Equal Opportunity Act* 1984 (SA) whereby the protections are not limited by the status of the persons involved but directed to the circumstances where the conduct takes place – i.e., at work.

- the SDA be amended to make it unlawful to cause, instruct, induce, aid or permit another person to engage in sexual harassment; and
- the introduction of a new provision in the SDA to provide for positive measures to be taken to eliminate sexual harassment.

Ongoing work is required to shift adverse stereotypical views and break the culture of silence. This work will involve legislative change as well as the effective enforcement of relevant professional conduct standards and policies. As the Sex Discrimination Commissioner says, sexual harassment in workplaces is everyone's business.

ENDNOTES

1 New South Wales Bar Association Submission to the National Inquiry into Sexual Harassment (18 February 2019) https://inbrief.nswbar.asn.au/posts/382308183e574d49c74b3c9609103aba/attachment/NSWBA_submission_AHRC_inquiry_sexual_harassment.pdf

2 http://theconversation.com/australian-women-must-hold-their-nerve-until-justice-is-served-21464

3 Chambers J 'The First Woman to Clear the Bar in New South Wales' [2010-2011] (Summer) *Bar News* p.99.

4 See e.g., Cunningham G: https://theconversation.com/why-bystanders-rarely-speak-up-when-they-witness-sexual-harassment-85797

Advocates for Change

Jane Needham SC

In conversation with Stephen Free SC

On 14 August 2018, Stephen Free[1] (SF) sat down with Jane Needham SC (JN) to discuss the Advocates for Change role and the importance of the role and women and diversity at the NSW Bar.

Set out below is their conversation.

SF: *I have the interesting challenge and privilege tonight of interviewing Jane Needham in her capacity as an advocate for change. Jane joined the Bar in 1990 and took silk fourteen years later. She has served on the Bar Council and on various committees since 1993. Jane was the President of the Bar Association in 2014 and 2015. She has a keen interest in the welfare and future of the Bar. If I could start Jane by asking what did you understand to be involved in the role of 'advocate for change' and why did you accept it?*

JN: I did ask the rhetorical question when I was asked to be an advocate for change, well if we're looking at diversity, which is one of the aspects of that, why should a privately educated WASPy daughter of a judge and a solicitor be appointed as an advocate for diversity? I think it comes down to using positions of privilege to assist those who aren't as lucky. Certainly my interests at the Bar are around gender diversity and also flexible practice, and the way that I encapsulated that when I was President was 'making the Bar a better place to work for everyone.' That is what I'm hoping to achieve.

SF: *What are the forums in which you see yourself advocating for change?*

JN: Now that I'm not in a formal capacity with the Bar, I find that it's very much one-on-one. I do quite a lot of – mentoring is the wrong word – people come to me with problems. I probably have breakfast once or twice or a month with people who have specific issues that they would like to see changed at the Bar Association. They can range from concerns with individual chambers, ideas for taking flexible practice forward, ideas for running complaints without actually running a complaint, those kind of things. With the appointment as advocate for change I find that people whom I don't know are ringing me up and saying can you help with this particular issue, whether it's a personal issue or a structural issue. More broadly I'm often asked to speak and I have spoken at the ABA in London and Dublin on issues of diversity and the future of the Bar. I found that really interesting, meeting people from England and Wales and from the Irish Bar, who have all the same issues that we do.

SF: *I want to get onto issues of diversity and some of the experiences locally and internationally. But I'd also like to get a sense of your views about the public perception of the Bar and its position in the broader community, on issues of diversity but also on other issues. Firstly from your own time as President what conclusions did you draw about the way the Bar is perceived?*

JN: Well it's interesting because I came into the Presidency at a time of quite focussed public interest in the Bar. There was the corporatisation debate and the beginnings of the QC issue which had been bubbling away and came to a head under Phillip Boulten's Presidency, and those got a lot of media interest. So when I was elected to the position I found that there was a real drive for change, people were very interested in change and how the Bar was structured and how it could change. But I found that there was a real dichotomy in the way people viewed it. There is a significant portion of the world that sees the Bar as completely anachronistic, and to that extent the fact that only slightly over twenty-one percent of the Bar is female feeds into that. It's very hard to shift that opinion. Wigs and gowns and 'my learned friend'-ing don't help. But then we have the perception, which is gaining ground, that we are being innovative and we are trying our hardest and we are trying to adopt structures which will assist people. That effort, as against the background of the very ancient tradition of the Bar, is seen as quite unusual.

SF: *Are there ways that the Bar, either through the Association or just as a community, can engage with the community to shift some of those perceptions?*

JN: I think they are doing that. The way in which (the immediate past president) Arthur Moses dealt with public issues and was very vocal in calling out what he sees as injustices and difficult circumstances is very helpful. Because people do listen. When the President of the Bar says something people listen. Whether they like it or not is another question. There is a perception now that the Bar does speak for a viewpoint which is not necessarily what people would normally have thought it was, which is the old fashioned traditionalist male bastion. And that is very helpful. The Bar does hold a position in the public eye as being an important organisation, rightly or wrongly. But there certainly is that perception. Changes in structure and changes in approach at this level can be very helpful when other people, for example the Law Society and smaller Bars, see what we are doing.

SF: *What about presenting the Bar as a workplace either to prospective barristers or to the community – are there things that can be done to educate people about changes at the Bar and better present the Bar?*

JN: Definitely. One of the most common breakfast requests I have is from young women or recent graduates who want to come to the Bar but don't feel confident that they can have the kind of life that they would like, which involves flexible work, being able to have children, having a partner which will be effective for their family situation. A lot of work has been done over the last five years with the equitable briefing policy, the childcare places, and the ways in which we've engaged with the Courts about recognition of caring responsibilities. All of those things bear more focus and more emphasis. Each of those is a really useful thing to present to people to say, 'yes, it can change.' However, on the other hand a number of the people who feed me breakfast have the most terrible workplace stories. It really is a different world for women and I'm very sad to hear, even after my unconscionably long time at the Bar, women are still having the same kind of experiences that were common when I came to the Bar.

SF: *Is your general message over breakfast an encouraging one?*

JN: Absolutely. I think the Bar is a fantastic way to practise. And, again, I say that with a huge amount of privilege because I came straight to the Bar when doing that was an easier thing to do. When I say young, I was twenty-seven, but even so. By the time I had my first child, I was thirty-nine, I'd had twelve years of practice at the Bar and I could pretty much say to my clerk and to my solicitors, 'look, I'll be away for a while, I'll come back, I'll be part-time.' And I had my first child just when it was becoming okay to practise by email, to correspond by email, and that was hugely significant. If I'd done it two years before it would have been much harder to do. I had probably one of the first virtual, portable practices when I practised part-time after the birth of my first child. Then I had the twins after I had taken silk and that was just crazy.

SF: *I'm interested in the perspective you got as the President of the Bar. What was your diagnosis when you took the pulse of the Bar?*

JN: I was really taken aback, coming from a commercial equity background, how many barristers really struggle, how many barristers don't earn the kind of money that people think all barristers do. There are a lot of people out there who are putting in enormous hours for average weekly earnings, carrying chambers expenses, carrying clients' expectations. I was particularly struck by how hard the Legal Aid Criminal Bar and portions of the Personal Injury Bar were doing, and it was a real eye opener. When we did the 2014 Practising Certificate Survey about the way in which people worked, we had stats on hours of work, kind of work, what people were earning, and the gender pay gap was what really kicked me in the teeth. I thought that was extraordinary. And it really is. I was told that we actually had achieved something really special in having a greater gender pay gap than the mining industry. So that was something that I found really concerning, and the equitable briefing policy was very much a response to that.

SF: *Were they the first statistics of that kind? Were there any analogous statistics that you could use to compare with the past?*

JN: No, nothing so solid. And that was done before I came into the Presidency. I think that was an initiative of the Practice Development Committee. It didn't start as a health of the Bar poll, but other committees said 'can you ask this?', 'can you ask that?'. It became a really interesting broad assessment of what the Bar was like. It also showed, as was shown on a national level by the National Attrition and Re-Engagement Study, that sexual harassment and bullying is rife. Judicial bullying is a real problem, and women, as usual, get the hard end of all of that. Although of course with the bullying it is not quite gender blind, and a significant portion of men also complained of being bullied at work.

SF: *Did you think before you had seen those figures that things were on the improve or that the difference wasn't that stark?*

JN: I did not think that there would be a gender pay gap in the high thirties or forties. I thought it would be there, because of a number of reasons. One of which is that women tend to cluster in the more junior realms of the Bar, that there aren't that many women silks. I think we're around ten percent. One person gets appointed, one person leaves, it's a shift of the percentages because there are so few. But it was a real surprise to me that the gender pay gap started around the second year of practice at all levels and was maintained. And some of the criticism of the focus on the gender pay gap was that women, 'choose' to have babies, look after children, have a more relaxed or flexible life. But another stark aspect of that was that I think fifty percent of women at the Bar don't have children. Annabel Crabb wrote a really good book with a terrible title called 'The Wife Drought', about the politician's child penalty. Women in politics have fewer children than men in politics. And women at the Bar have fewer children then men at the Bar. So when you look at that in the context of income, it isn't necessarily what people put as a choice, which is of course also partly structural, that women in Australia tend to do the childcaring, the house minding, the dentist appointments and the like.

SF: *What about measures to address it – what have you seen so far in terms of successes, failures?*

JN: It's a little early to tell because the Law Council brought in the Equitable Briefing Policy which has reporting guidelines for women at the Bar. I know the first tranche of figures was reasonably good but I expected them to be reasonably good because the people who adopt the gender Equitable Briefing Policy are going to be briefing women. That policy was very firmly set with a view to trying to address that balance. The Government briefing has been very successful in getting women up in front of courts. Still, even though the number of briefs is similar or represents the percentage of women at the Bar, the days in court do not. So the men are still getting the big briefs and the women are getting the shorter briefs. There needs to be a lot of work done. One of the interesting things we did in relation to that was, instead of having barristers sit down and go 'well what can we do?', the committee, which was headed by Kate Eastman and Arthur Moses, brought in solicitors, clerks, and people from government, such as the Attorney-General's Chief of Staff. We had representatives of large law firms. We had someone from Legal Aid. And we tried really hard to get a policy that everyone would sign up to and that was the basis of the policy that went up to the ABA and then LCA. But it's early days.

SF: *What is your sense of the support for it among commercial solicitors, for instance?*

JN: Well I'm having lunch with one of the women on the committee, and I'll talk to her about that in a couple of weeks. Most of the things I do are over meals I'm afraid. The large firms certainly have adopted it, and whether they're paying lip service or whether they are actually pulling their weight, it's too early to tell. There is that recognition that there is an issue. But when you come down to the briefs from the large law firms I would be surprised if there has been an immediate bump in numbers.

SF: *Do you get the sense that there is an appetite for change or for formal policies?*

JN: I do. And I think the policies reflect the requirements of the clients. The clients require that there be some sort of equitable approach to their work. They ask their solicitors to do the same and the solicitors should then turn to the Bar to do that. So maybe there is a bit of a trickle down effect and we'll see it more later. I don't think policies can do it all. I think we need continued focus on the problem. I would like to see another broad survey along the lines of the 2014 survey. That would be a really interesting point in time comparison. The first survey suffered, understandably, from being put together by well intentioned people who weren't expert survey designers. There were some questions that were a little either ambiguous or not particularly relevant. If we asked again we'd need to be very careful both to reflect the first survey but also ask better questions.

SF: *Another finding of that survey was that, leaving aside gender issues and diversity issues, there was a fairly stark indication that a lot of barristers struggle with the demands of the job, in varying degrees, in some cases quite profoundly. Was that a surprise to you?*

JN: No, it wasn't. I'd been on the Bar Council under Anna Katzmann who put in place a lot of the current strategies that we have. BarCare in particular I've been quite interested in. I'd also been, again in my sort of unofficial shoulder of the Bar role, aware of people who had suffered very badly. One of the really difficult moments of my Presidency was the Lindt Siege. And you may recall, I think that happened on the Monday, and on the Wednesday afternoon after Phillip Street reopened we had a gathering here where we opened up the common room, had some catering, and we had about two hundred people through the door, which is a significant portion of the Bar. The social worker who triaged the BarCare approaches, and I tried to get around to every person, and every one of those people we spoke to was significantly hurt and suffering from the event. Looking at the BarCare figures showing how many people they picked up as clients after that it was quite a lot. It was a quite significant portion of their work after that. They're still actually getting approaches from people who cite the siege as one of the reasons they go to BarCare. So it wasn't a surprise, it was a sad realisation that people are now able to say 'yes I'm having problems', and that really is one of the first steps we need for people to put their hand up to be helped. And, of course, all of you probably know that you can yourself contact BarCare about a colleague if you're worried about that colleague. A number of a referrals come through chambers colleagues or partners or friends.

SF: *From your own sense of practice, thinking back to when you started and comparing it to now, do you think that level of stress and anxiety was always there in similar levels and it's just a question of appreciation and awareness of it, or do you think the job has got harder?*

JN: I think it has always been there. It was much more acceptable to self-medicate in those days. There are a number of people who, in the chambers where I started, who routinely were drinking by four thirty, who were on their third wives, who had money problems and were hiding it by silly spending. That's much rarer now I think. People understand that that is not a very healthy way to deal with stress. One of the things the Association does really well is it puts out all its health and wellness programmes so that people are aware. You can't read a brief for a week without being exhorted to do yoga. Yoga is not for everyone. But it's great that it's there for people who want it. There was a walking group for a while. And there's the knitting group and all sorts of things. But if you need support you can get it. Of course you can do it in your own life as well. But it is nice now, as opposed to back when I started where there was really nothing. I started right at the tail end of the Naval Officers being the Registrar of the Bar Association. I don't know about you but it's very difficult to think of going to a Naval Officer and saying 'look, I'm having a real problem with stress and I keep bursting into tears whenever I walk into the court'. There was a bar in the Bar Association Common Room and there were regulars there every night. It's a very different world now. Having said that, there are still significant levels of stress that need to be acknowledged and looked after.

Jane Needham SC photographed wearing her father, the Hon Denys Needham's wig and holding her mother, Anne Cunningham's law degree.

SF: *You mentioned judicial bullying before. Is there a dialogue, in your experience, between the Bench and the Bar about the welfare of barristers?*

JN: There is dialogue. It's fair to say that judicial bullying is a bit of a delicate subject with the Bench. But there is dialogue, yes. I remember a CPD discussion where a judge was having a general talk on relations with the judge and how to run a case properly. One person kept saying

'I keep getting bullied' and the judge said 'if it keeps happening then you just need to change what you're doing'. And at this point I put my hand up and I said 'you do know that the statistics say that women get bullied a lot more then men and what do you do if you're a woman?' And that's the problem. He looked horrified at the thought that it was a legitimate complaint. But it is true. What can you do? Again a complaint that's often brought to me is I can't appear before this particular judge because he's so much meaner to me than he is to my male colleagues. And it's really unfortunate because that's something you can't change. It's difficult to say to a client 'well I can do it but not if it's in front of Justice Free', for example.

SF: *Can I bring you back to managing your own work life balance and the challenges of having children. Can you just talk us through your own experience?*

JN: Well, as I say, I was very lucky in the timing when I had my first child. I remember being on one of those then newfangled mobile phones down at Rushcutters Bay Park feeling terribly modern and chatting to the solicitor with a child in a pram. I was able to work part-time for a couple of years and the way my chambers treated me and my part-time work formed the basis for my enthusiasm about the best practice guidelines because they picked up, in a parallel process, pretty much everything my chambers had done for me right at the outset. We negotiated that I would be not there but they wouldn't say 'she's on a couch somewhere with a baby'. They would treat it professionally. They would provide me with support remotely. And they were terrific. I ended up with a working chambers at home. It was before cloud computing and the like so there was a quite a lot of running into town to pick things up or drop things off. But that was great and that was in 2002. When my twin boys were born in 2006, things had really moved on. It was much easier to transfer documents at that point. And I think we even had wireless which was amazing. But I was silk by then, and I found that easier than being junior counsel. Now it's totally impractical to say to women 'it'll be much easier if you wait until you get silk to have babies' because there is that slight restriction. A fertility doctor to whom I was chatting once said to me 'you need to tell all your colleagues that they need to have children between twenty-five and twenty-nine because that's best for mother and best for baby'. I said 'well, then I won't have any female colleagues'. But it really is a question of what do you do that's most important at the time. It's amazing how much you can get away with texting under the table these days. When I first had kids I'd keep my phone in my pocket and if it rang at 3.15 I'd think 'oh, it's the school someone's not picked them up'. And there was that terrible 'what do I do?'. But it always worked out. They always got home eventually. I find that it's better to be open with people than not, and say 'I can't do that, I've got parent teacher night'. I did have one judge tell me that I just needed to try a little harder. And I said 'you can't move parent teacher night, sorry it's absolutely inflexible'. .

Jane Needham SC photographed wearing her father the Hon Denys Needham's wig and holding her mother, Anne Cunningham's law degree.

SF: *That leads to a question which I came pre-armed with from an anonymous junior. Is having a flexible working practice something a junior should share with their solicitors, or senior counsel that they are working with, or is it something that they should be quietly maintaining as much as possible?*

JN: I don't think there's an inflexible rule. Some senior counsel will be more understanding than others. Fiona McLeod, whom most of you will either know or know of, once had job sharing juniors. She had two women who each had young families and they job shared the junior role. Fiona said it took quite a bit of work on her part and their part, but it enabled them to get a big brief, have roles where they could stand up in Court and actually get their faces before judges. And she took the initiative to do that. I think that's great. Whereas, going back to when I first came to the Bar, I'd been at the Bar for six months and a silk on my floor offered a second junior role in the High Court. And I said 'I can't do it'. He said 'what's more important than that?' I said, 'my brother's getting married in Queensland.' He was speechless with shock that I would even consider going to my brother's wedding. It depends on the person with whom you're dealing. You should always let your clerk know, and if your clerk doesn't support you, you should take that up with the chambers management, particularly if your chambers has signed up to best practice guidelines which reflect flexible practice and chambers giving support to people who don't practise twenty-four-seven. If the chambers haven't signed up to that, what you can do is perhaps approach the President or a member of Bar Council and have a chat. I've spent eighteen months having unofficial chats with people. I can tell you sometimes it works, sometimes it doesn't. I do think you need to engage with your clerk and if you have an assistant they definitely need to know what's on your schedule and what is inflexible and what is not.

SF: *I take your point about having to choose your audience, but do you get a sense that there is a greater acceptance of being open about that now than there was previously?*

JN: Yes. One of the tiny steps that I'm trying to take, to make things easier for people who come after me, is be really frank with everybody and just say 'I won't be in tomorrow, I'm taking a kid to a specialist appointment, and they're harder to get than appointments with me so you can find another one'. The more people who do it, and the more men that do it the better. Things catch on when they become normalised. While it's seen as a bit of ghetto female thing to look after your kids and be there, once the guys start doing it and once they're open about it, that will change. I know a lot of them do it, but if they don't talk about it then it's not going to be normalised. It will stay as a 'female problem' and it will be used as one of the reasons to justify why women don't earn as much because they're not 'serious' about their work.

SF: *Was that part of the intention behind establishing the Bar Association childcare places? That is, that it's partly about the symbolism of it as well as the practicality of it?*

JN: Absolutely. We find it's being used by male barristers a lot. People assumed it would be a service for women but a lot of fathers use it. But the symbolism of this, as one way we can make your working life easier, is really important. Some of you may remember in the very exciting election that happened a few years ago, there was a letter which was published in the *Sydney Morning Herald* picking on childcare as one of the issues that the Bar was indulging in rather than substantive issues. And that letter came out on the same day that I got a letter from a junior counsel who wrote to me and said 'the Bar childcare is the only one that came through for us, that's the reason I'm back at work, thank you'. And I thought well that is substantial, that is really important. We're not just a trade union in the sense of let's get barristers more work and more money. We are a professional organisation that should be there for everybody including the people who would like to have their children close to them in the city.

SF: *At the chambers level you've mentioned clerks and adoption of the guidelines. Are there other measures that you consider can be done at the chambers level that will really help people with the demands of balancing young families?*

JN: Yes. For a while we had so many people on our floor with young children, we actually looked at whether it would be feasible to have some sort of group child minding. No was the answer. It's a very regulated profession. When you start looking at clerks and at chambers staff, and also when working out who runs chambers, it's really important to look at the kind of things that they're interested in. There are some chambers where women are still not welcome, and they haven't adopted best practice guidelines. One of the things I asked to be done was for the readers website, which we set up with all of the readers' accommodation, to indicate in one of the columns whether the chambers had adopted best practice guidelines and a link to the guidelines. So juniors coming to the Bar who are concerned about the workplace practices and the attitudes of chambers can check to see whether they have been adopted. A couple of the people I've been speaking to over the years have complained that while best practice guidelines have been adopted, they haven't been actually implemented. Again we come back to that issue of policies are great, work on the ground is better.

SF: *What about other issues of diversity at the Bar? We've spoken about the issues facing women coming to the Bar and staying at the Bar. What about ethnic diversity – there's still a strong sense that the Bar doesn't reflect the mix of society or even law schools?*

JN: That's right. I really don't know what to do about that, but I think the recent applications for Practising Certificates had a question on that. Until we know how our members categorise themselves we can't do anything about that makeup. Measuring it comes first. This is something that came out of a discussion with the recently departed Race Discrimination Commissioner who suggested we really need to measure both issues of cultural and ethnic diversity as well as sexual orientation. We haven't got that far yet but one day we should.

SF: *Do you get a sense, either from your work when you were the President or from any other involvement, that there are perceived barriers in particular parts of the community to coming to the Bar?*

JN: I think there are. There must be if we don't reflect society as a whole. There must be perceptions that we're not welcoming enough or we're not accommodating enough or we're not open enough. It's a really difficult conversation to have because people almost always get it wrong. What we need to do, and what we were starting to do at the end of my Presidency, was to take those steps to try to see how we can get it right. We have law student days, and as much as you can tell from looking out at faces on those law student days certainly there's a real interest in coming to the Bar among the Bar's non-traditional cultural groups. The question is whether that actually translates into people stepping up. Hament Dhanji is another advocate for change and I'd be really interested to hear his take on that.

SF: *What about financial barriers to entry? Do you see that there's either a perception of financial barriers or a reality?*

JN: When I first started at the Bar it was before the legal district had really expanded, and there were very few options apart from spending the money to get chambers in the Selborne/Wentworth building or a couple of other chambers which were around. It was very difficult in those days to even get readers' rooms and the like. Once you were over your free or subsidised six or twelve months you were expected to buy in and if you couldn't buy in or you didn't buy in there were very few other options. Things have changed on those fronts. I'm not really au fait with what it's like to be a reader, and I would love to know how that goes. I understand from talking to people who want to become barristers that they're told you need to have a year's worth of living expenses ready to go because that's what it takes. It wasn't like that when I came to the Bar in 1990. But that's a concern. I don't know many other jobs where you have to support yourself for a year before you can actually earn any money.

It's really starting a new business. But the Bar in England has that very interesting system of paid pupillages, and that's something we may want to look at. It's a big change for us though.

SF: *That one seems a massive change. Are there other more realistic aspects of practice you've seen in other jurisdictions, either Australia or overseas, that you think could help with flexibility here?*

JN: People may want to look at more flexible ways of practice, rather than bricks and mortar chambers. There is room to embed flexibility in the general sense, and not only having chambers and ducking out early to pick up the kids, but flexible practice in the real sense of travelling with your brief on your tablet and you can work from home and you can work from shared offices. You don't really need chambers but we are still stuck in that system. So I'd really like to see some more work put into enabling barristers to practise more flexibly in that way. I haven't seen much in the way of that. One of the benefits of the Victorian system is that they are able, because the Bar owns most of the chambers, to provide what is really a corporate parental leave system where you have a rebate of your fees. We have an option for support through the best practice guidelines but we can't provide that in a more corporate way. The Victorian model is a good way to do it. Then again that would involve a really massive change in the way in which we do business. But our attachment to bricks and mortar chambers might have to shift a bit. Still, it's a great way to work. I love my chambers. I love the collegiality of it. There's a number of people I can just go and moan at when I need to. And that's great because we can be quite isolated and the iPad and

the room at home is not a very collegiate way to practise. We need something that bridges the gap there.

SF: *I wanted to ask about collegiality. You mentioned the bar which I gather used to be in the common room and people often talk about the dining arrangements that used to apply down here. Were you a regular at those?*

JN: No I wasn't. One of my colleagues and I used to come down here when I was a relatively young women at the Bar. We kept being told we've got to have lunch at the Bar Association. It was just gruesome. I know a lot of people used it. But you'd come down here and it smelled of cabbage. The food did get better, but in the early days, there was a rule, an absolutely inflexible rule that you had to sit at the first available table. You couldn't form your own table or sit on your own you had to go and join a table that was there. And it was always men. There were almost never any women there. Janet Coombs used to take us each out to lunch in the Bar Association as a new woman barrister and now we have the Janet Coombs lunch which has sometimes twenty-five new women barristers. But then it was a one on one thing. The regular lunches were just terrible because you'd come down, and occasionally you'd be lucky enough to sit with someone friendly, but it would always be the crankiest old judge or the bloke who'd sort of waddled over from the bar and sat down and breathed Scotch over you and it was just terrible. But I still have people say to me, we should have never closed down the bar and the common room. We had to, because it was losing so much money. What the Bar does now for collegiality is much better. I was talking about the knitting club, and that's fantastic. The book club fills a need. The yoga fills a need. These CPD's, the one's that aren't necessarily the kind of things you need to get your points for, but people do come to them. I think it's terrific that we can offer that kind of collegiality without forcing you to eat boarding school food.

SF: *Do you think, as far as collegiality goes, that the Bar is doing a reasonably good job at maintaining the tradition?*

JN: I think they're doing the right things. I know that for some the tradition will always be the tradition. But I don't see the people who complain about the closure of the dining room attending the lunches that the Bar Association does organise. That's interesting to me.

SF: *I'll got to a couple of final questions that are again pre-armed questions from an anonymous junior. If you could go back and tell Reader Jane three tips about longevity at the Bar what would they be?*

JN: Well I suppose I've got longevity at the Bar already. Reader Jane, that's a really hard question because I love what I do.

SF: *Where there times when you didn't?*

JN: Yes.

SF: *Where there times you had to endure?*

JN: Yes there were. This is what I would say. When you start swearing when the phone rings, take a bit of time off. I took a job lecturing for a year, two days a week, and I rented a house in Berry. I would spend four or five days in the country and then I'd come up and teach, and then I'd do chambers work at home or in Berry. And it was terrific. It was a wonderful year of my life, and it made me realise I was not going to be great as an academic and I should come back to the Bar full-time. But you've really got to listen to yourself, for when you need a break.

ENDNOTES

1 Stephen Free SC was appointed Silk in October 2018. At the time of the *In Conversation with Jane Needham SC* he was not yet a Silk.

Advocates for Change

Hament Dhanji SC

In conversation with Samuel Pararajasingham

On 28 November 2018, Sam Pararajasingham (SP) sat down with Hament Dhanji SC (HD) to discuss the Advocates for Change role and the importance of the role and cultural diversity at the NSW Bar.

Set out below is their conversation.

SP: *Hi everyone. Thanks for coming along. This is part of a sort of series of interviews that have taken place with the Advocates for Change. The most recent was with Richard Weinstein, Senior Counsel earlier this year and today's our chance to have a conversation with Hament Dhanji SC. Now, he probably doesn't really need much of an introduction, but just briefly for those who don't know, Hament is a member of Forbes Chambers. He's*

practised exclusively in crime and crime related areas since he was admitted as a lawyer in 1990. Hament was called to the bar in 1997 and appointed silk in 2010. He has a substantial appellate practice and appears in major criminal trials and is a much liked and respected member of the bar. The purpose of this chat really is twofold. One is to kind of get to know a little bit more about Hament and his backstory and the other is to explore some issues around cultural diversity at the bar. I expect this will be a fairly fluid kind of process so if anyone has any questions along the way or wants to jump in, go for it. We'll have some questions at the end as well. Alright well Hament maybe just to start off, if you can just tell us a little bit about your background but start with your cultural background, because you have a kind of a Benjamin Kingsley kind of look about you.

HD: I do. I think Benjamin Kingsley is in fact the same racial mix as me which is one English parent, one Indian parent and that's my ethnic mix. Although while that's my ethnic mix I actually grew up in a sort of very Indian environment. I've got an English mother and an Indian father, they didn't stay together and I actually grew up with my father until I was about eight so he was a sole parent and in fact I find it slightly embarrassing in a sense giving a talk like this because it's not like I'm in a position to come here and say well I've overcome all of this adversity and managed to get to where I've got. I've overcome absolutely no adversity, almost no adversity at all, in fact. So I feel like I'm coming along here and saying here's this sort of rough road for people who – and I'm not saying it's necessarily the same for everybody, but it is interesting. Coming up here I was thinking about my father and I think he overcame a significant amount of adversity because he came here as a fairly young man. He was seventeen. He had reasonable English but he was in Brisbane in the nineteen fifties, he was vegetarian, it was hopeless. He had very few cultural reference points in terms of his background and what happened, is sort of interesting. So he met my mother here and they had children including me. And as I said they didn't stay together and then I was brought up by my father until I was eight and so if I think of adversity then I think of my father bringing up children. He had no family, very few cultural connections and there was really no Indian community to speak of around that time and that, I think, would have been incredibly difficult. And it's one of those things that I've only recently started talking to my father about. But he remarried and the woman he married, who I call my mother and regard as my mother, because she's actually filled the role of a mother, was Indian and then around that time an Indian community did develop in Sydney and so we became, culturally, a very Indian family. We mixed in the Indian community. Paresh [Khandhar SC] is here, I knew Paresh as a child because we shared membership of the Gujarati community. But in terms of that sort of background what's, I think, interesting in terms of an issue that perhaps affects how we achieve greater levels of diversity at the bar and part of the reason I say I didn't overcome a lot of adversity is that while things weren't straight forward, one thing that was very clear in my upbringing was that there was an emphasis on education. And I think having that background and having that sort of emphasis did mean that there was at least the idea of going to university, doing something at university.[1] I must say [with an] Indian background the sort of expectation or the ideal is that you become a doctor or an engineer, and so it's a radical act of rebellion to become a lawyer. But you get the idea that it's a lot easier [to end up at university in the context of such expectations]. I think, the other thing to put all this in perspective, one of the things that is troubling in terms of where we're at, is that [my decision to go to university] also coincided with a time when there was free education or free tertiary education. And that's a very troubling aspect and when I was reflecting on the issues that arise in relation to just having this sort of conversation and where there are difficulties for me, there are things that we might address, it seemed to me that while the bar is not as diverse as the broader population there's a lot to be positive about. I think twenty one years ago when I did the readers course my group was very dominated by straight white men. I think that when you look at the people coming through now it's a lot broader and that's positive, but still lagging. But one thing Sam and I have talked about leading into this is what seems to be apparent to me is that while that broader diversity is improving, Indigenous representation I think remains sadly low and that's a concern. There's a lot being done in relation to that. Chris Ronalds SC has done an enormous amount of work. I think I've strayed beyond the question.

SP: *So just coming back, how much, if at all, was your identity growing up bound up in your ethnic makeup?*

HD: Look that's a difficult and deeply personal question. Well partly, because as I say I did have this kind of unusual growing up and there was an absence of an Indian community and then one came along and as a kid your natural inclination as a kid, I think is to be like everybody else and struggle a little bit with the idea that you're different and then we actually became more different as time went on because of the cultural change that happened and my father I think had been, as I said he'd been here since the nineteen fifties and he really didn't have a lot to grab hold of in terms of maintaining his cultural identity but then that changed and he I think became far more Indian as time went on.

SP: *Was that something you were immersed in?*

HD: Ultimately yeah, and ultimately, it was strange, it wasn't immediate but I think ultimately I came to appreciate the richness of what we had and it's something where my own children, who are now further watered down, they love going to their grandparents and love getting an understanding of their cultural background but I think for them it's far different to the lived experience. I mean frankly they're spoilt, middle class, eastern suburbs kids.

[laughter]

HD: Gorgeous, but you know.

SP: *Growing up did you experience any difficulties, tensions?*

HD: Look, I feel like the appropriate answer to fall on is yes. But I think the answer is yes, but I don't know that I would say that I was ever held back or particularly troubled. And perhaps it's as much as anything a personality thing and this is part of it. I mean, look, I don't doubt for a moment that racism still exists and is quite pervasive. And I don't doubt for a moment that it affects people in their careers in the law and at the bar. In terms of the bar, and as I say, to an extent it may be a personality thing, but my own way of looking at it is that if you've made the decision to go to the bar you've got a degree of self-assuredness that allows you to make that decision. You've decided to back yourself and if you've backed yourself then aspects of the slights or intended slights that have no rational basis and don't impact upon your capacity to do your job – and I [while I] find that really troubling in the sense that people are still minded to go there, or troubling in the sense that there's that level of ignorance – but in terms of how it actually impacts upon me, I'm for the most part bemused, I have to say. But again, that's a very personal reaction. I feel like it's perhaps the wrong answer in a forum like this, but that's the reality of the way I've experienced things.

SP: *Let's talk about your path into the law. You said the expectation is to go to university, be a doctor, engineer; how was it that you came to study law, get into the law?*

HD: Again, none of these things reflect particularly well on me.

[laughter]

HD: I was a little bit perhaps bored at school, I certainly didn't do well. This is where I think those sort of parental expectations come in. Despite the fact that I hadn't done particularly well, I knew that I needed to do enough to get into university. And that was also partly perhaps an immaturity thing, in that I knew I wasn't ready to go into the world. But having that sort of backing, that sort of background where you knew that you didn't have to pay fees and you were going be supported allowed me to maintain that level of immaturity I suppose, which meant that I did barely enough to get myself into university, which really wasn't very much. I started in an arts degree and then I worked out you really didn't have to work very hard to transfer into a law degree. It was certainly a lot easier than actually having to get the marks at HSC level, so I transferred into law and I did that, and obviously grew up along the way while doing that, and I think within a few years I did start to have some idea that this is something that I might be interested in and I had thoughts then of wanting to go on from there and work somewhere like the Legal Aid Commission or a Community Legal Centre or that type of thing and in fact I went from there to the Legal Aid Commission.

SP: *And what about those institutions attracted you?*

HD: Whatever it is in my background, I mean I certainly had I think a strong desire, if I was going to work in the law, to work in an area where you actually felt like you were providing some meaningful assistance to the broader community and in particular the less privileged people in the community. I should say in [the context of] the current trial I'm in, that seems a very long time ago. And just, I mean it's quite interesting and it does reflect on diversity and diversity in the community more generally. I'm in the middle of a trial involving a breach of the Corporations Act, acting for a director of a fairly large publicly listed company. There've been seventeen witnesses called by the Crown. Each and every one of them has been old, white, man, because they're all the people at high levels within this large publicly listed company with the exception of one who was the ASIC investigator. And there are company reports tendered in evidence and you open up the first few pages and white man after white man, but that's where I find myself now certainly. When I started in the early years of the bar I obviously continued to do a lot of Legal Aid work and a lot of work for the Aboriginal Legal Services.

SP: *So coming back to your first foray into the law, the Legal Aid Commission you said?*

HD: Mhm.

SP: *Where were you working and what were you doing specifically?*

HD: I worked in crime, I started in the Prisoners Legal Service and then I did almost all of my time working in the Inner City Local Courts sections.

SP: *And how long were you a solicitor?*

HD: Seven years altogether.

SP: *And the decision to come into the bar, who or what were your inspirations for that?*

HD: Again, and this is I suppose one of the things that's relevant in terms of this discussion, I didn't start with any particular aspirations of going to the bar. And I think, in terms of my background, it is certainly the case it wasn't on the radar at all because I didn't grow up in an environment where I knew any barristers. I didn't grow up in an environment where we knew any solicitors or lawyers. Perhaps one or two by the time I was older, but I did have a sense of the bar being a somewhat foreign place. Having said that obviously I worked as a solicitor for a number of years. Because I worked in Local Courts I didn't have a lot of connection with the bar because doing Local Courts you don't tend to instruct counsel. Every now and again there are unusual matters. You tend to do your own advocacy, but I think I got to the point where I'd been doing that as I say for about seven years. It occurred to me that I'd got a little bit bored, I felt like I'd learnt everything I was going to learn. And Philip Strickland told me it was a terrible idea to go to the bar, that it was uncertain and that if I had a job I was moderately happy with I should stay. But I think I was just looking for something new and made the move.

SP: *Do you recall thinking at any point in time that not seeing faces like yourself at the bar, did that ever weigh into the consideration in going to the bar?*

HD: Look again I'm going to give the wrong answer but the answer's no. And whether I just simply didn't expect anything different, one thing I will say is that I did feel that I was stepping into a world where I didn't necessarily feel comfortable and wasn't sure I would ever feel like I belonged. That's certainly true. That said, to be fair, I don't necessarily assume that that's terribly different for a lot of people. You know obviously there are perhaps some people who have a sense of the bar well before they come and connections within the bar world before they come and they feel that they slot straight in but I wouldn't presume for a moment that simply because I have a slightly or somewhat different background that it was necessarily more foreign or more difficult for me. I mean certainly my feeling was that it was a somewhat sort of foreign environment and I certainly had questions about whether I belonged there.

SP: *And in those early years at the bar did you have any mentors?*

HD: I did. I didn't necessarily feel like I had a lot of connections. I did know Phil very well, had done for a number of years so there was at least that. But I in fact had no idea, it was a measure of I suppose my lack of connection, I certainly had no idea who I might read with and spoke to Phil and he suggested Ian McClintock. And so not quite knowing what a burden it was, not thinking through why someone who was a complete stranger to me might want to take on the responsibility, I spoke to Ian and he agreed. And we're still good friends. I couldn't speak highly enough of the time, encouragement, acceptance that he gave me. I think the experience probably does have to be put in the context of going somewhere like Forbes. I've never been anywhere else, but I suspect it was probably a different experience to one that I might have had on various floors in Phillip Street. Forbes is a really accepting environment. It certainly has been the entire time that I've been there. It's a terrific group of people and a great place to practise being a barrister.

SP: *Change of tack a little bit. You were presumably approached to be an Advocate for Change.*

HD: I was.

SP: *You agreed.*

HD: I did.

SP: *There was a reason for that.*

HD: There was.

[laughter]

SP: *What's that reason?*

HD: I was contacted and asked if I would be an agent for change and my immediate response was to say well I'm happy to but I'm not sure that I'm quite as exotic as you might think I am. And it's funny I mean thinking about it, thinking it through to an extent, it is somewhat of a reflection of the problem I suppose. That, and I know that there are people certainly coming through who have had far more difficult paths in terms of coming to

Australia at much older ages and not being able to speak English and then having to learn English, study law, and the like, so there are certainly people coming through. But they were obviously looking for someone who'd been at the bar for a number of years and the fact that in a way, if I'm sort of the most exotic person at the senior level of the bar, that that does tell you something about the lack of diversity. But as I say, on the plus side, what does seem to be the case is that the makeup of each readers course, or certainly I compare the makeup of the readers' course that I was in with what the readers' include now, it's a very, very different mix. Still lagging I've no doubt at all, but certainly there seems to have been significant progress.

SP: *And how do you see yourself fulfilling any responsibilities of being an advocate for change?*

HD: Well obviously the idea is that while we're seeing greater numbers or greater diversity of people coming in there is still that lag. And so it is really important I think that – I mean events like this I think are good but, obviously, to an extent there's an element of preaching to the converted, and pretty much everybody here's either at the bar or been at the bar – and so you don't need a lot of encouragement in terms of coming to the bar. But these sorts of things are useful to at least get people thinking about these issues. It's been useful for me to actually think about, to actually take some time to actually think about these issues. But the more important aspect of it, I think, and part of the programme – the idea is to actually go out to some schools and in a sense show my face, a bit darker than the average white kind of barrister that might be the stereotype. But apart from that as I said Chris Ronalds has done a lot of work and the bar has done a lot of work in terms of the Indigenous students programmes and that really is I think hugely important because we have this situation where the progress there has been slow at the very same time we've got the statistics in relation to incarceration rates going backwards. And so, it's a very disturbing kind of aspect and anything that can be done there is obviously positive and in terms of that, whether it's because I'm an agent for change or whether it's just what you do, certainly there's been programmes for Indigenous students to come and spend some time at the bar and I've formed a relationship with one of the younger students that I remain in touch with. He's a really nice young man and if through having some sort of contact with me he feels like the bar is a more viable option, well that's one small thing. And if that's happening, that's a very small contribution. If that's happening more broadly and we're all getting involved, having that awareness and maintaining that sort of attitude to try and encourage progress, yeah.

SP: *Taking a step back, why do you think cultural diversity is even worth pursuing at the bar?*

HD: Well there's probably two ways to look at it. First that if we want to be successful as a profession we're only going to do that by serving the community and in order to serve the community you're just not going to, as a profession, you're not going to do it well if you simply don't reflect that community. So there is a real need if we are to maintain that ability to do what we're here to do, to ensure that we've actually got a membership that reflects as best we can the broader population. [The second aspect is] being a barrister is a great privilege and if we are to be a fair and egalitarian society it's a privilege that one would hope would be available to everybody and to the extent that the bar doesn't reflect diversity, well that's demonstrating to you that you don't have the fairness and the egalitarianism that we would want to have. So viewed from both directions you can see, to my mind it really is a worthwhile aspiration.

SP: *And from your vantage point, peering down –*

HD: I wouldn't say peering down. Looking around.

[laughter]

SP: *How is the bar going in that regard?*

HD: Well as I say you could look at the readers' groups, they seem to be significantly more diverse. And there's going to be a lag I suppose it's to be expected. You've got significant migrant populations, you know they take root, the first generation the options simply may not be available to them in terms of their English skills and the time at which they've come here but then their children growing up here and learning English from an early age, if not from birth, are going to have one would hope a better opportunity but that obviously takes time. We've been a multicultural society for a long time now and one would hope that the lags aren't quite so significant, but I suppose if you look at it in terms of the various waves of immigration, so I suppose to take an example, the Vietnamese community one would hope that you'd start to see within the Vietnamese community people coming through, choosing law and going to the bar. You'd hope that it was happening to a greater extent by now. But even if it's not happening to the extent at which you'd hope, you'd certainly hope that that builds.

SP: *I want to identify a few, I suppose broader race or cultural issues in society and ask you or pose to you whether you think these issues are reflected at the bar, and if so ask you to comment on them. Let's start with a fairly obvious thing of overt racism for example. Now I think I brought to your attention, and others may have seen this, there was an article in the Financial Review a couple of months ago about a fellow by the name of Nimal Wikramanayake QC in Victoria, he's now retired. He was the first or one of the first 'coloured' barristers in Australia and in this article he gives a bit of an account of his experience. He recounts one example where "one young barrister came to see me while I was in conversation with another person and said what's the nig nog telling you?" Nimal complained to the chairman of the bar council and was told that the younger barrister should be counselled. And Wikramanayake said "look, you're not taking me seriously because I'm a black bastard, you don't care, nobody gives a damn about us, this is a bloody racist state." Now that's fairly florid stuff, have you experienced anything in that orbit?*

HD: Not as direct. I mean I've had references to spin bowling. I mean possibly the worst, I think, example was I took over a brief from Murugan Thangaraj to appear at [in the] Local Court and I stood up and announced my appearance. There had been some correspondence prior to me taking over and on the correspondence indicated [Murugan] was appearing and I stood up and I announced my appearance, "My name's Dhanji". And it got stood down and it came later and she referred to me and she said something, but she certainly didn't say Dhanji, it was something much closer to Thangaraj. And I said your Honour my name's Dhanji, and I was ignored, and [it] kind of went on for a little bit. And then it was like 'Mr [mispronounciation of Thangaraj]' and I said to her your Honour my name's Dhanji and she was still trying to say Thangaraj and she looked at the papers and then she said: "Well I can't pronounce it". I just stopped in my tracks. But again I was not, I was not impressed, I was not particularly thrilled by it, but did I form the view that I'd been affected in terms of my ability to put my client's case? I'm not sure that I did. I think that, and again I think I said this at the start and it might be a personality thing, but I was bemused more than anything else. And I wouldn't suggest that my client was affected. So I suppose you can look at that and I think it shows a lack of respect perhaps. But did it trouble me? Not particularly.

SP: *Let's pick up on the mispronunciation of surnames, that's a bit of a bugbear of mine, frankly. Dhanji is not that hard.*

[laughter]

SP: *It reminds me of, and I know you're a big soccer fan, 2 you may recall earlier this year during the world cup that SBS televised there was an incident with the host Lucy Zelic. She went to great lengths to pronounce the surnames of various players correctly and at times adopted the appropriate accent. She inexplicably copped a whole whirlwind of grief, social media mainly, and then her co-host Craig Foster the following night kind of came to her defence and among other things he said this, on the issue of pronunciation of a surname, and you've kind of hinted at it, can be trivialised at times. He made this point he said, "of course the way you use the language is the most important way to show respect to someone, through the name. If you can't get someone's name right, it means you have no regard, you haven't done the work, you haven't tried". Do you agree with that?*

HD: Yeah I do. And as I said it's an issue of respect. And that in a sense reflects these broader ideas that we share in this community, we're made up of a range of different people with different backgrounds and if we're serious about actually sharing the community that we're part of with all members then, you know, fundamental things like a basic level of respect in terms of making an effort to pronounce somebody's name properly. Your name is what you go by, it's an identity [which] in many ways takes you into the world. And to convey to people that you, in a sense, don't recognise that means by which they are supposed to be recognised in this world or in this community does have a fundamental lack of respect about it. The whole thing with the mispronunciation of the names, that was terrible in that Lucy Zelic had been brought in to commentate as a result of Les Murray having died and so it was a new presenter and we got a woman who's actually very knowledgeable about the game and then to have this kind of thing occur it was pretty ugly.

SP: *I want to ask you about this idea of nepotism. Do you accept that a feature of the first generation migrant experience is the absence of any sort of institutional connection?*

HD: Look that's obviously a factor and that's obviously going to mean that it's not as easy for people in that situation as it may be for others. If you come from a background that's had several generations in the law, or even one generation in the law, that's obviously going to assist you. I think you do also need to, as the sort of person without that background, need to also understand that just because you're from what might be described as an ethnic minority, I don't think it's constructive to be going into law or the bar thinking that things are set against you because other people [have such connections] because again, in this area, I think you do have to be careful about making assumptions about other people. And while certainly it may be for some, I mean if you look around and see a straight white male the temptation to say, well it's necessarily easier for that person – you don't quite know what that person's experience is, whether they've overcome poverty, or what their kind of particular background is. So yes it's true to say that coming from my background I guess I was not going to have any particular advantages in terms of connections. And yes anything like the bar is unlikely to be a level playing field. I don't think it's constructive and again I'm speaking for myself as I approach it, I don't think I've ever regarded it as healthy or constructive to approach these things with the mindset that I've got an obstacle to overcome.

SP: *Just to slightly challenge you on that, in an area or industry where one sources work through connections, where invariably briefs come to someone's desk for reasons other than necessarily merit, do you see the particular role that nepotism might play and the experience for those who are deprived of that. The absence of that nepotism can play in firstly the decision to come to the bar and secondly, enjoyment or success at the bar.*

HD: Obviously if you start with the proposition that the bar's not a meritocracy then necessarily it's going to flow that you're only going to succeed if you've got particular advantages, but the premise that it's not a meritocracy and I'm not suggesting for a moment that it's purely a meritocracy, I'm not suggesting for a

moment that there's not a lot to be done and it's across – obviously the focus of this talk is on ethnic diversity but you do have to look across the broader range. When I finished law school we had I think it was the first year in which they'd been more women than men in Sydney University Law School graduating: the women just outnumbered the men. And so that's my cohort and if you look at my cohort coming to the bar when I did or you look at my cohort now, women have fallen away considerably from the levels at graduation.[3] And so – I've sort of lost the thread of the question really but in terms of meritocracy, yes I don't suggest that the bar is based purely on merit, I don't suggest for a moment that there aren't advantages enjoyed by some. But I'm sort of positive in my outlook in terms of the way things are moving. I'm positive in my outlook in terms of confidence that there is developing a broader understanding of these issues, the fact that we're here I think is an acknowledgment. I think twenty years ago these sorts of events wouldn't have been on the radar. So I don't want to seem like I'm ignorant of the issues or the problems but how would you put it, I mean on the way up here I think I was saying to you that the way I'd perhaps put it, is if you want to be a really average barrister - it would be a good thing if you're a straight white male. But if you're willing to put the work in and have some ability I think that the way the bar works does provide some encouragement. But I should say whether the experience in crime is different, is another sort of interesting question. Certainly in crime I've noticed in the last probably five years plus the diversity among the solicitors that brief us has really expanded and there's some terrific young firms with kind of diverse, well more generally diverse both in terms of ethnic background and gender, so that has an impact potentially in terms of who they might be briefing because obviously unconscious bias, obviously that's going to be playing out in some way. So to get back to your question I suppose, and it may be a case of look it's easy for me to say because through luck, good management or otherwise things have actually worked out reasonably well so, you know sort of fine for me to say well it's clearly a meritocracy [laugh] because there's a sort of self-congratulatory aspect to it. And I suppose the other thing I should say about the way crime works is that you also have a kind of diverse client group so you're not necessarily dealing with a client base that has a particular expectation, or maybe you are, I don't know. And other people's experience might be different but it may be that it's easier for a solicitor to provide a client, given the criminal mix, someone who's perhaps not the sort that looks like a barrister that you'd normally see on television. Because certainly the fact is if you're looking at representation of people, if you watch television and maybe it's changing slightly but I think where you're seeing these roles portrayed you're not seeing perhaps the same mix that would be ideal. There's actually an article in the *The Guide* this week – there's a programme on tonight on SBS called On The Ropes and there's an actor Nicole Chamoun and she was commenting on the fact that it's a great role – she plays a young Muslim woman who wants to be a boxing trainer, but she makes the comment that well you know I'm very pleased to be doing this role but I'd really like to be cast as a doctor or a lawyer where the fact that I actually am not obviously Anglo Saxon is not part of the character. Just saying again and again, all her roles, she's always cast in roles where she's cast because she can be a Muslim woman. And you know I think that's a really good point. You really want to see people being cast, or at least you want to see through film and television better representation in the professions of that sort of diversity. But can I just pause there and just say if you do go home and watch On The Ropes tonight at 8:30, it's not bad and there's a character in it called Iggy who's played by my son.

[laughter]

SP: *You don't have much time left but I just want to go into some deeper water if I can. And explore with you this idea of double standards. Waleed Aly and others have made this observation about the migrant experience or the ethnic experience in Australia that the acceptance or success of culturally diverse people in Australian society is on strict terms and at the leisure of the majority and Waleed, I think, uses this example of if you conceive of Australia as this enormous pie, and the majority carves out a slice for the minority. As long as minorities are content with that slice they can participate in this wonderful democracy. But, so the argument goes, the moment you want more than your slice, more than your lot, the moment you manifest features that are not in keeping with fixed or widely understood views of you as a minority, then you are in for a world of pain and the most obvious example that you and I have discussed which is perhaps ironically in the context of Indigenous Australians is the way Adam Goodes was treated.*

HD: Yeah.

SP: *Is there anything you wanted to say about that topic, that example?*

HD: I mean something like the Adam Goodes experience, it breaks your heart that at this stage of our supposed development as a society, that that should go on and one of my reactions to this idea of – and I don't want to be critical at all, the idea of the agent for change, I mean it is possible to have a reaction to that and say well look is there kind of an aspect to that where I'm supposed to be a role model and that's fine, but is there an aspect to that which says that and I should hold myself up to higher standards of behaviour than somebody of a similar level at the bar because I am supposed to be a role model and that the expectations should be higher? And there's obviously a clear problem with that. Because I should be able to behave as badly as anybody else.

[laughter]

HD: And that's not to say that I should but it certainly ought not to be the case where to be a role model you have to somehow maintain some higher standard than what is expected of other people at a similar level within the profession. Now I'm not suggesting that that's the expectation but I think there is that potential in terms of that type of role and one needs to be careful about that.

SP: *Sorry, so you acknowledge the situation for example of a white male barrister going in to court, making some oral argument in a fairly florid way, he's considered bold; the same argument run by say a south east Asian barrister and he's presumptively arrogant, he's being difficult and he gets the ire of the judge, yet the former doesn't get that kind of heat?*

HD: These things are very difficult to assess. They're unquantifiable aspects. I think another really good example, it's probably a few years ago now but when the Sri Lankan cricket team started dishing it back, and there was this real thing of like the Australians had for years been acting in this particular manner and somehow when the dark skinned opponents weren't just pleased to be here and be included and have the privilege of getting on the field against the Australian cricket team, they were upstarts and they didn't know their place. And that was I think a real sense that came out from that and I think that was fairly overt, I thought at the time. One hopes that things aren't quite as extreme, [but] I think there certainly can be an element of well you should be pleased to be here and that's enough.

SP: *We've basically run out of time so my last question is what can the Bar Association do to further foster cultural diversity?*

HD: Well I think they've, as I said, they're obviously thinking about it which is the first step and there's obviously the Diversity Committee and that's obviously working on issues and doing things like appointing Advocates for Change. And so the idea of I suppose reaching out to particular communities and then within the bar I suppose increasing awareness of these issues so that people are conscious of

them and able to just think about how we can all contribute to making the bar a welcoming environment for a more diverse population and encouraging a more diverse population to come to the bar and I think to an extent, whether that's developing, each of us as individuals, developing mentoring relationships or being a contact point for people who might be assisted, those sorts of small things; at a more formal level, programmes for actually getting young students and the Indigenous students programmes and then the process of actually going out to schools that are populated by kids who don't have the visible presence of barristers, judges, in their lives, actually being exposed to people and being encouraged.

SP: *Just picking up on something you said then, how important is it in time to have a culturally diverse bench?*

HD: Again, this is this thing of just the time for things to filter through and if you look at the bench it's pretty obvious that it's got a long way to go. But that's again, that's obviously going to be fed by the bar and one hopes that as we continue to improve diversity at the bar that flows on, and then you come back to that fundamental point that I was making earlier which is the bar obviously is there to serve the community and our ability to do that is reflected by our diversity and the point is obviously all the more significant in the case of the judiciary. And indeed a way to look at it would be the importance of diversity at the bar, a large aspect of it is to ultimately be looking to greater diversity on the bench and that again, travelling back to the idea of the kind of society that we want, it's obviously vitally important.

SP: *We've got a few minutes for questions if anyone's got anything to ask you Hament really.*

HD: Or Sam.

Phillip Boulten SC: So an Arabic solicitor, young man, who instructed me a lot, left with problems. Standing up to appear in court he would be asked where his solicitor is. One afternoon, I knew I would be late the next day. I have a place in town, I said 'can you go to court, look after the client, I'll be there at ten thirty.' And ten past ten the jury couldn't agree. I said 'can you grab my bag and bring it into town.' He went into the robing room looking in the lockers for my bag and a barrister came in and said 'what are you doing?' he said 'I'm looking for Phil Boulton's bag.' He said 'who are you?' He said 'you're asking me that question because I'm Lebanese and that's the only reason you're asking that question'. Sheriff's officer came. 'What are you doing here looking in people's lockers?' He said 'I'm not answering your question, I've got no time for you.' He was detained at the entrance of the court. Last month I wrote an opinion about the way the young, female, Vietnamese heritage barrister was literally savaged by the trial judge in the Supreme Court in another jurisdiction. It is still out there and it is partly subconscious racism.

HD: I think it's absolutely still out there, but I should say I mean I think I've had a pretty good run. Question?

Aditi Rao: I'm glad you [added that] Phil because my question to you Hament, was that listening to you today I wonder if you have experienced, there must be an expression for the phenomenon and it ties in to Waleed Aly's comment; which is that you might have been a visible example of someone who's different but not threatening because there's so few of you and liked in some ways, so it's possible that you've had an easier time of it, sort of almost a charmed passage through by comparison to what I think the wave of people maybe behind you have experienced. My father came to Australia in the sixties, not as early as your father came, but it's something that he's commented on that white Australians, once you [inaudible] almost like a pet, you're the pet Indian and they're quite affectionate toward you and they'll look after you. But once there's a seething mass of people of different colour it's quite a different experience.

HD: I think that's a really, really good point. I think it's almost certainly right. And I think it does make my experience perhaps not representative. I think Phil's story in that context is a really good one because you've got this Arabic male solicitor rifling through lockers provokes immediately for the people around a stereotype and given that the time I was growing up and the time I was coming through there wasn't the same stereotype to mark me against. I think that's a really valid point and I think is absolutely right.

SP: *Anyone else? Alright, thanks everyone for coming and thank you Hament for making the time.*

[applause]

[end]

ENDNOTES

1 This can be contrasted with, what Stan Grant describes as 'the tyranny of low expectations': Grant, *Talking to my Country*, Harper Collins 2016, p 44.
I interpose here to note that my interest in football in this country is inextricably linked with my views about diversity. I grew up playing what was then (imaginatively) called "wogball". I am now thrilled to see Australia regularly playing at the World Cup, and in the Asian Cup, whereby we engage with the world through sport in a way that is not possible with the other football codes played in this country. It is a sport suited to a range of body types and hence suited to a multicultural society. We recently saw Awer Mabil and Thomas Deng, two footballers who came here with their families as refugees from South Sudan, make their debuts together for the national team. Of late I have seen, prominently displayed in the windows of sports stores, Australian Women's jerseys labelled with 'Samantha Kerr' (an Indigenous footballer) and her number, which underscores football's inclusiveness.

3 The point I was thinking of here but failed to make is that women (as a group), should have the same relative advantage as men, yet they remain underrepresented.

Advocates for Change
Andrew Pickles SC

On 25 March 2019, President Tim Game SC appointed Andrew Pickles SC as a NSW Bar Advocate for Change for a period of three years.

The purpose of the Advocates for Change programme is to provide role models who are excellent practitioners and who, through the example of what they do and say in their professional lives as barristers, represent the full width of diversity and inclusion that the NSW Bar Association wishes to promote at the Bar.

Through Andrew's work at the Bar and the NSW community, he has demonstrated a commitment to LGBTI diversity and inclusion and it is hoped that his appointment as NSW Bar Advocate for Change will contribute to the advancement of LGBTI inclusion and diversity at the NSW Bar.

As an Advocate for Change, Andrew has agreed to participate in the formulation of strategies to promote equality, diversity and inclusion at the NSW Bar.

There may be three Advocates for Change serving at any one time. He joins Advocates for Change, Jane Needham SC and Hament Dhanji SC who were appointed in June 2017.

More information about the NSW Bar Advocates for Change programme can be found on the NSW Bar Association website www.nswbar.asn.au.

Race and the Bar

By Samuel Pararajasingham

Recent years have witnessed a number of active steps being taken by the New South Wales Bar Association to address the issue of gender diversity at the Bar. Implicit in these steps has been an acknowledgment of the perception, at least, that the Bar is possessed of a homogeneity in its culture that does not reflect the diversity of the communities we serve and society more broadly.

Equally deserving of attention and analysis is the significance of racial or cultural diversity at the Bar. *While* few would disagree with that sentiment, on one view it raises more questions than it answers. Is cultural diversity to be understood as restricted to non-European diversity? What can be said about the unique experience of intersectionality between gender and race at the Bar? How has the majority at the Bar approached the issue of cultural diversity over time? Has bemusement hardened into grudging acceptance? And what are those factors which compel the majority to acknowledge racial or cultural diversity? Pragmatism in the face of a numerically strong minority? A favourable political climate? The force of the personality of the individual and the extent to which he or she asserts his or her cultural difference?

These are the types of questions which must precede and inform any discussion about racial and cultural diversity at the Bar. This article attempts to briefly raise some of the broader race and cultural diversity concerns in society and how they might spark further discussion related to life at the Bar.

A rarity in modern times is overt racism. And the same must be said about overt racism at the Bar. The experience of Nimal Wikramanayake QC, referred to as a 'nig-nog' in public by a junior member of the Victorian Bar in the 1970s serves as a reminder of the kind of explicit racism that some minorities have previously experienced. A perhaps subtler form of racism is the routine and, on occasion, careless mispronunciation of surnames by judicial officers. In 2019 there can be no excuse for this. Here the comments of former footballer and cultural icon Craig Foster are apposite, 'If you can't get someone's name right it means you have no regard, you haven't done the work, you haven't tried.' Here Foster was referring to the backlash his co-presenter, Lucy Zelic, received for her correct pronunciation of surnames during the 2018 soccer World Cup. The point

is well made and of equal application in the present context.

Moving beyond surface racism, leading racial theorist Professor Derrick Bell, the first tenured African-American professor at law at Harvard Law School, once described the deprivation of nepotism as one of the defining features of the cultural minority experience. In fact, Professor Bell attributed racial nepotism ahead of racial animus as the singular greatest challenge of the diversity movement. Unpacking this idea, the absence of institutional connections, be they political, social or professional, continue to be a hallmark of the first-generation migrant experience at the Bar. That is not to say that every other minority or indeed every member of the ethnic majority necessarily enjoys the benefits of deep institutional connections; plainly that is not the case. However, it must be acknowledged that an inevitable feature of being a member of a cultural minority is the absence of those deep roots.

Accepting that proposition, as a consequence it might be argued that cultural minorities do not tend to enjoy the benefits of racial nepotism, missing out on opportunities and prospects, not because of any racial enmity but perhaps merely because of a preference that subconsciously compels the cultural majority to prefer that which they know and have always and only known. This phenomenon might have some application to the life at the Bar, particularly when it comes to the issue of briefing ethnically diverse counsel.

Delving deeper still, an interesting question arises as to the space inhabited by cultural minorities in society and at the Bar. Social commentators such as Waleed Aly and others have observed the at times uneasy position minorities occupy and the complications in their reception by the majority. The position can be perhaps described this way: there is a sense in Australia that cultural minorities are permitted to participate in this great democracy on strict terms and, generally speaking, in conformity with a widely understood yet ultimately reductive view of their position within society. As long as the particular minority group embraces that assignation they too can participate in this democracy and enjoy its benefits.

Closely considered, this is really an observation about the sorts of restrictions and fetters that operate on any cultural minority and has at least two consequences. First, any deviation by a member of the minority from the fixed view is often characterised severely, hypocritically so. Think of the public reaction to Adam Goodes' Indigenous war dance where in a brief moment, exhibiting a powerful and threatening image of himself, Goodes went from a wholesome and palatable representative of his culture to a figure, considered by some to be odious and subject to unjustifiably extreme vitriol.

Second, and relatedly, this prevailing view stifles the expression and reception of individuality within the minority group. Membership to the cultural majority means being possessed of a blank canvas on which individual traits and idiosyncrasies are highlighted and proudly on display. The majority is typically afforded the full gamut of personalities and behaviours. The same cannot necessarily be said about membership of a cultural minority where the reductive view can mean that subtle differences in character are overlooked, mischaracterised or met with indifference. These considerations may have some application to life at the Bar for those belonging to minority cultural groups; the fetters or restrictions described above may operate as limiting factors in interactions with the Bench, for example.

Beyond a few instances of overt discrimination, the significance of racial and cultural diversity at the Bar has been largely unconsidered to date. It is an area not without its complications and there may be a place for the Bar to promote and foster cultural diversity in the years to come, which is part of the work being done by the Diversity and Equality Committee. A good starting point is an informed and frank discussion about the issues between all stakeholders that moves beyond surface racism and examines the complex ways in which race and culture intersect with life in society, and at the Bar.

Disability and the Bar

By Brenda Tronson and Aditi Rao

The daily practice of law has at times an uneasy relationship with disability. Barristers, we may unconsciously think, should seem invulnerable: in control, and impervious to obstacles. Clients, solicitors and judges (we perhaps assume) want counsel to be a 'safe pair of hands' in litigation and to handle with ease anything thrown at us. We might worry that if we are seen to have a disability, we might be seen to be less able in general.

What, then, for those of us with a disability? If we have an invisible one, we may perhaps be tempted to hide it. And if a disability is obvious for all to see, appearing on Phillip Street might make us feel discomfort or embarrassment for so obviously defying the medicalised idea of the 'normal' or 'able' body.

Underpinning such instinctive responses is, we suspect, the entirely legitimate desire to be seen as able counsel; not to be defined in the eyes of others by disability but to transcend it.

There is really no good reason why a barrister with, say, a mobility impairment should be any less of a barrister for that. The widespread availability of hearing loops today ought to mean that many kinds of hearing impairments should be accommodated readily in court. And literally thousands of us overcome our visual impairments by the use of eyeglasses.

Currently, there are other impairments currently seen as diminishing the capacity to be a barrister which ought not be seen as disabling at all. But ideally, a talented lawyer who may happen to have a disability should be able to participate fully in all aspects of the legal profession.

In the interests of maintaining the excellence of the Bar, such talented lawyers ought not be turned away by irrational barriers. It is thus a matter of enlightened self interest that the Bar should strive to reduce such barriers wherever possible.

Medical and social models

In considering which apparent barriers can be overcome in this way, it is useful to understand the two broadly accepted 'models' of understanding disability: the medical model and the social model.

Under the ***medical model***, which is the one many unconsciously adopt, a person's disability is caused by their impairments. A disability is primarily a health condition which needs to be treated, fixed or managed. The person with the disability is seen as broken, they are a 'disabled person': something is wrong with *them*. This manner of thinking tends to dehumanise people with disabilities. They become 'less than' others; the burden of disability – responsibility and ownership of it – tends to fall upon the individual.

Under the ***social model***, disability is caused by an interaction between the environment and impairment. In effect, a person is disabled by an environment which is not appropriate to their circumstances, rather than any impairment as such. The barriers leading to that disability or disablement might be physical (such as steps), but they might also arise from the attitudes of others or society generally, or be communication barriers. This model allows the burden to be understood to include aspects of the world that are external to the person. There is also a moral dimension: we *should* be making environmental adjustments to enable full participation and inclusion.[1]

Under this model, it is more readily apparent that all persons are equal and have equal rights to participate in society. Addressing disability in this context involves a consideration of how the environment might be modified to ensure that all can participate, rather than on trying to 'fix' any person.

The social model is reflected in the United Nations Convention on the Rights of Persons with Disabilities (see, for example, para (e) of the Preamble), which 'mark[ed] the official paradigm shift in attitudes towards people with disability and approaches to disability concerns.'[2]

The social model is also reflected in developments in Australian law. Section 5(2) of the *Disability Discrimination Act 1992* (Cth) (DDA) requires reasonable adjustments to be made 'for' a person with a disability. In *Watts v Australian Postal Corporation* [2014] FCA 370; (2014) 222 FCR 220 at 228 [23], Mortimer J's description of what is required by s 5(2) was as follows:

> 'To what does the adjustment relate? By s 5(2), it is made 'for' the person with a disability. It is not made 'to' the position the person occupies. It is not made 'to' the equipment a person uses. In the context of discrimination at work in Div 1 of Pt 2 of the DDA, it is an alteration or modification 'for' the person, which operates on the person's ability to do the work she or he is employed or appointed to do. The adjustment is to be enabling or facultative.'

The concept of an 'enabling or facultative' adjustment is consistent with the social model of disability. That is to say, it posits that the environment in which the person with a disability operates can be adjusted so as to reduce the barrier to participation. And the policy of the law is that this should be done unless it would cause 'unjustifiable hardship'.

Increase in accessibility

The installation of hearing loops in courtrooms in relatively recent times is an example of reducing barriers to access. Robinson SC has worked with the NSW Department of Justice and Attorney-Generals Department on such projects.

This demonstrates an important feature of the moral or social model of disability: the removal of barriers should not be individual crusades but a shared responsibility.

Another beneficial consequence is that, by making adjustments required for a particular disability widespread, both the disability and the need for adjustment will cease to be a deviation from a norm and instead be *included within* the norm. Like the rollout of hearing loops, the accessibility of courtrooms for the mobility impaired provides a good example of how this norm has shifted in recent memory.

As the Judicial Commission of New South Wales has observed in the Bench Book *Equality before the Law*:[3]

> 'If such adjustments are not made, people with disabilities and/or any carers are likely to:
- not be able to participate fully, adequately, or at all in court proceedings
- feel uncomfortable, fearful or overwhelmed,
- feel resentful or offended by what occurs in court,
- not understand what is happening and/or be able to get their point of view across and be adequately understood,
- feel that an injustice has occurred,
- in some cases be treated with less respect, unfairly and/or unjustly when compared with other people.'

The shift is important not just in equipment and facilities, but also in attitudes. So, for example, the accessibility ramp not only needs to exist, it needs to be kept clear. Technology should not only be installed: it needs to be switched on, updated and be maintained in working order. And so on. Ensuring this occurs can become a hidden burden, and another part of the attitudinal shift is to seek to avoid this burden falling only on those for whom the equipment and facilities is an absolute necessity.

Every-day adjustments

It is also useful to remind ourselves that every-day tools are, or can be, adjustments.

Consider the speed with which many barristers have adopted tablet technology. Most did so because tablets are useful and convenient. They can also provide adjustments or accommodations for disability. For example, the person who cannot carry five folders no longer needs to do so; the person who needs large font for legibility can zoom in; the person who cannot write or type can use portable voice-recognition technology.

Prescription glasses provide another example of an every-day tool which is an adjustment or accommodation. Without glasses, many people would not be able to perform (would be disabled in relation to) essential tasks of lawyers. The ubiquity, and acceptability, of glasses means we do not commonly think of them as redressing disability. If all adjustments or accommodations were so matter-of-fact, a large number of other conditions which are presently seen as, or as causing, disabilities would not be seen as disabling at all.

Room for improvement

One of the most useful things the social model of disability does is to remind us to ask the question: is the way we are used to doing something the only way, or the best way?

For example, the installation of a ramp or an elevator in addition to, or to replace, steps ensures that wheelchair users can access the premises in question. It also makes life easier for many other people, including people with document trolleys or wheeled bags and people carrying heavy bags or folders.

Another example pertinent to the legal profession is the long working hours that apply across the board. This is relevant to disability in two ways:

- if a person has a disability which impacts on the number of hours they can work, they may (seem to) be a less attractive candidate for a job, or they might decide not to apply at all; and
- the long working hours undoubtedly have something to do with the high levels of mental illness (which can also be, or cause, a disability) found in the legal profession,[4] whether that relationship is causal or simply aggravating, or perhaps a natural human response to the extended high stress that is all too common in our line of work.

A recent pilot study at a financial services company in New Zealand has demonstrated significant success in moving to a four-day week.[5] Productivity did not diminish. Stress-levels did.

On this basis, in the right circumstances, making an adjustment such as this could permit a person who could only work reduced hours to have as successful and productive a career as a person who is able to work the traditionally-expected hours per week. In other words, changing the social attitudes and expectations could remove or diminish the barrier which previously existed.

Further, extending the adjustment to everyone might result in greater productivity (and potentially career success) across the board, and better mental health outcomes as well.

Overall, by approaching questions of adjustments with an open mind, it is possible to benefit not only those persons with a disability for whom the adjustment might remove a direct barrier, but all. That benefit can extend beyond the individuals concerned and provide broader societal goods. For barristers, that might be measured not only in productivity but in a greater general capacity for good advocacy and good advice.

ENDNOTES

1 The addition of the moral dimension has been attributed to a 'human rights model' of disability also: https://nhri.ohchr.org/EN/News/Documents/Human_Rights_and_Disability_Manual.pdf

2 People With Disability Australia website, 'Social Model of Disability' <https://pwd.org.au/resources/social-model-of-disability/> (accessed 20 February 2019).

3 https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality_before_the_Law_Bench_Book.pdf

4 See, for example, Medlow S, Kelk N and Hickie I, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771, 790.

5 'White Paper – the Four Day Week: Guidelines for an outcome-based trial – raising productivity and engagement' (2019, Coulthard Barnes, Perpetual Guardian, The University of Auckland, Auckland University of Technology and MinterEllisonRuddWatts); also reported in *The Guardian Australia edition*, 'Four-day week: trial finds lower stress and increased productivity' < https://www.theguardian.com/money/2019/feb/19/four-day-week-trial-study-finds-lower-stress-but-no-cut-in-output> (accessed 20 February 2019).

Further statistics on women at the New South Wales Bar

By Richard Scruby SC and Brenda Tronson

In 'Some recent statistics on women at the New South Wales Bar' (Court Appearance Paper),[1] we addressed gender diversity at the NSW Bar through the lens of data we had collected on court appearances. In this follow-up paper, we consider the implications of this data, in light of other statistics that have been collected, on the attraction of qualified women to, and retention of qualified women at, the Bar.

NARS Report – statistics and the importance of quality of work

In February 2014, the Law Council of Australia published the National Attrition and Re-engagement Study (NARS) Report.[2] Findings of the NARS Report included:

- 7% of women and 15% of men practising law are barristers[3]
- of lawyers who are not presently barristers, 5% of women and 12% of men, reported they were actively considering a move to the Bar[4]
- of those not actively considering such a move, 33% of women and 44% of men, reported they might consider a move to the Bar[5]

The NARS Report also considered reasons for past career moves and future career intentions. For both men and women, 'better quality of work elsewhere' was one of the most important and most frequent reasons for a past career move.[6] For men generally, and for women barristers, 'more interesting or varied work' was an important and frequent reason for a past career move.[7] For both men and women generally, 'more interesting or varied work' was an important and frequent reason for a contemplated future career move.[8] And for both men and women who reported they might consider working at the Bar in the future, the 'more interesting and exciting work' which might be available at the Bar was the second-most common reasons provided for that possible move.[9]

In relation to people who had left the profession entirely, '[t]he enjoyment derived from the interesting, stimulating and challenging nature of legal work' was a common reason given for considering re-engagement with the profession.[10]

From this, two points can be made:

- men are still being attracted to the Bar at greater rates than women; and
- the quality of work (howsoever expressed) is important to both men and women when considering career moves.

Career Intentions Survey – importance of intellectual stimulation

In June 2015, the Women Lawyers Association of NSW published the Final Report of the Career Intentions Survey 2013-2015 (Career Intentions Survey).[11] Just as for men and women already in the legal profession, male law students were more likely than female law students to express an interest in the Bar.[12]

Further, students who wanted to be barristers 'were significantly more likely to have chosen law because they wanted intellectual stimulation … than respondents who proposed to work in other legal sectors.'[13] The potential for intellectual stimulation was also important to a majority of students in their proposed practice area, and even more so for those wanting to be barristers.[14]

Court appearance data and quality of work

Our data cannot tell us directly about the quality of work men and women at the Bar are receiving. However, we can draw some broad inferences relevant to this point.

Of particular relevance is the data on the briefing of silks and the briefing of unled juniors.

The briefing of women silks in the New South Wales Supreme Court and the Sydney Registry of the Federal Court of Australia during the period May 2017 to April 2018 was disproportionately low when overall figures and private sector briefs are considered. Bearing in mind that, in the relevant period, approximately 10% of silks at the NSW Bar were women:

- In the New South Wales Supreme Court: overall, 9% of briefs to silk went to women, compared to 6% of briefs to silk by the private sector and 22% of briefs to silk by the public sector
- In the Sydney Registry of the Federal Court of Australia: overall, 7% of briefs to silk went to women, compared to 7% of briefs to silk by the private sector and 15% of briefs to silk by the public sector

Turning to unled juniors, and bearing in mind that, in the relevant period, approximately 24% of the junior Bar were women:

- In the New South Wales Supreme Court: overall, 18% of briefs to unled juniors went to women, compared to 14% of briefs to unled juniors by the private sector and 32% of briefs to unled juniors by the public sector
- In the Sydney Registry of the Federal Court of Australia: overall, 18% of briefs to unled juniors went to women, compared to 15% of briefs to unled juniors by the private sector and 27% of briefs to unled juniors by the public sector

Chart 1: Unled appearances by junior counsel

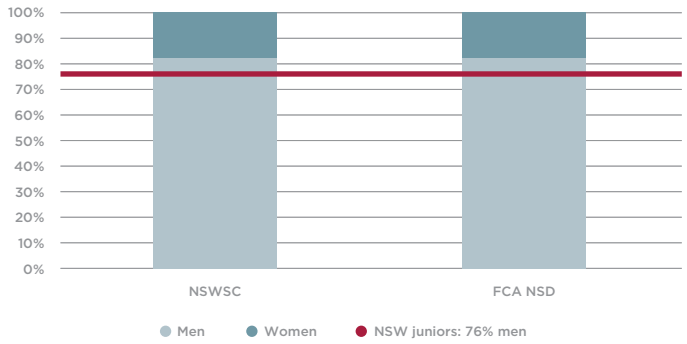


Chart 1: Unled appearances by junior counsel in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

Chart 2: Unled appearances by junior counsel: private sector

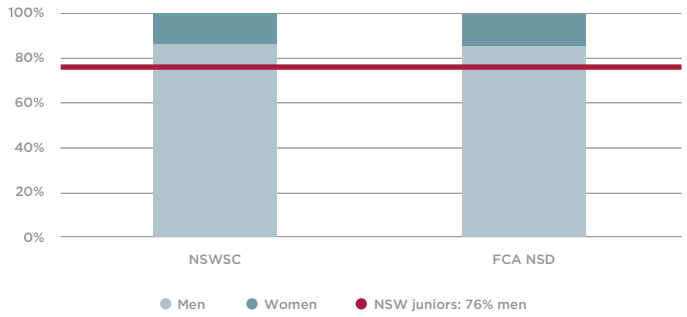


Chart 2: Unled appearances by junior counsel briefed by the private sector in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

Chart 3: Unled appearances by junior counsel: public sector

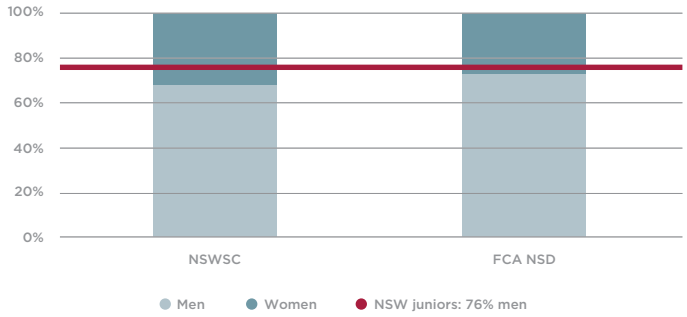


Chart 3: Unled appearances by junior counsel briefed by the public sector in the NSW Supreme Court and Sydney Registry of the Federal Court of Australia, May 2017 to April 2018

The figures on unled juniors are represented in Charts 1, 2 and 3, with a comparison line showing the percentage of male juniors at the Bar.

From these data and charts, we see a familiar picture:

- an under-representation of women overall; and
- an even greater under-representation of women receiving briefs from the private sector; and
- an over-representation of women receiving briefs from the public sector.

Broadly speaking, unled junior work is likely to be higher quality junior work from the point of view of the person doing the work. It is more likely to provide a junior barrister with an opportunity to use and strengthen her or his skills as a barrister and give her or him the chance to work more independently. That unled work is considered to be higher quality is reflected in the fact that junior barristers who do not perform unled work have a much more limited chance of taking silk, and entities which brief barristers are particularly careful to place only those they trust in unled roles.

As a consequence, the fact that women are significantly under-represented as unled juniors, particularly when private sector briefs are considered, leads to an inference that women are receiving a lower share of the higher quality work.

A further inference is available: that women are receiving a disproportionately low amount of the intellectual stimulation for which so many barristers, men and women, come to the Bar, and that they are receiving a disproportionately low amount of varied and interesting work which, as seen above, drives career moves.

Our data also suggested significant disproportion between women practising commercial law and equity (24% of such barristers are women) and women appearing in the commercial and construction lists of the NSWSC (12%) or Equity Division generally (16%).[15] If this reflects the general position, then it is not difficult to infer that it would contribute significantly to dissatisfaction with professional practice.

Income

While money is not necessarily the biggest or most absolute driver behind the career decisions made by lawyers, it is not unimportant.

Better salary or remuneration was reported as one of the most frequent (although not

Photo taken at the High Court in the case *DL v R*, 11 May 2018: a rare all women case.
Tanya Smith, Kara Shead SC, Gabby Bashir SC, Georgia Huxley and their instructing solicitors.

most important) factors for future career moves for both men and women,[16] and for women in relation to past career moves.[17] For women at the Bar, stability and reliability of income was the biggest element of dissatisfaction.[18]

There is some evidence which supports a conclusion that there is a gender pay gap at the NSW Bar.

The Law Council of Australia's 'Equitable Briefing Policy – Annual Report edition 1, 2016-2017'[19] (EB Report) provides some data on the differences in brief fees paid to men and women barristers: despite 20% of all briefs going to women, only 15% of fees were paid to women.[20]

While the EB Report concerns the whole of Australia, in the authors' view, it can be assumed that there is a broad similarity with NSW-specific data given the sizes of the NSW Bar and legal market, and the fact that Australia-wide data often reflect NSW-specific data fairly closely.

The EB Report includes only data reported by briefing entities which:

- had adopted the gender equitable briefing policy for the whole of the 2016-2017 year; and
- had complied with their reporting obligations.

In other words, this is a self-selected group of entities who have at least the intention or goal of briefing equitably. For this reason, the picture painted by the EB Report is likely to be rosier than if data were available for all briefing entities.

For these reasons, the EB Report supports an inference that there is a gender pay gap for barristers.

In 'What do women barristers earn',[21] Ingmar Taylor SC reported on the gender pay gap apparent from the responses to the voluntary survey conducted by the Bar Association in 2014 of its members.[22] In that year, the average fees reported by men were $437,450 and the average fees reported by women were $269,958. Taylor SC concluded there were two factors contributing to these differences: the fact that most women at the NSW Bar have less than 10 years seniority, and that, on average, women charge lower fees at the same level of seniority.

The existence of a gender pay gap is entirely consistent with our data.

While our data again cannot tell us directly about any differences in remuneration of men and women barristers, we can say the following.

As we have previously observed, it is important to note that the most and best paid legal work emanates from the private sector.[23]

The disproportionately low briefing rates of men and women by the private sector in particular, with the disproportion growing as one moves from general figures for junior counsel to unled appearances for junior counsel to the briefing of silks, must have the effect that there is a similar disproportion in the remuneration of men and women from the private sector. That would be so even if it were to be assumed that men and women charged the same rates.

In other words, the disproportionate briefing practices reflected in these data must be causative of a gender pay gap.

This is reinforced when one recalls the disproportionately high briefing rates of men and women by the public sector. While this is positive in some ways, given the lower rates that the public sector tends to pay, if women are doing public sector work instead of private sector work, or because they are not offered private sector work, their levels of remuneration will suffer in comparison to men. Again, these data suggest present briefing practices must be causative of a gender pay gap.

Attrition rates at the Bar

When we turn to the available data on retention, we see that, as at November 2018, the

attrition rate for women barristers is in fact higher than for men:[24]

- 10 year snapshot: for those who commenced practice between 2009 and 2018 (876 in total, comprised of 569 men and 307 women): as at November 2018, 6% of men had left, and 11% of women had left
- 20 year snapshot: for those who commenced practice between 1999 and 2018 (1706 in total, comprised of 1158 men and 548 women): as at November 2018, 16% of men had left, and 23% of women had left

Very limited information is collected from those who leave the Bar as to their reasons for doing so but, in light of the data outlined above, it is perhaps significant that more women than men give 'leaving to practise as a solicitor' as a reason: 59% of women and 44% of men in the 10 year snapshot, and 38% of women and 30% of men in the 20 year snapshot.

Conclusions: Equitable Briefing

The representation of men and women at the Bar as an important aspect of diversity. Diversity, as we suggested in the Court Appearance Paper, is important to the future of Bar. In that Paper, we summarised statistics concerning men and women entering the profession generally: the simple position is that women are, by a large margin, under represented at the Bar.[25] The NARS Report, the Career Intentions Survey, the gender pay gap and inferences that can be drawn as to the differential quality of work received by men and women suggest a risk that women will leave the Bar at greater rates than men.

It is self-evident that improving equitable briefing practices will go a long way, and perhaps all of the way, to redressing the disproportionately low number of women at the Bar by both attracting more women to the Bar and preventing attrition. The more difficult question is how to improve equitable briefing practices. The implementation of the Law Council's Equitable Briefing Policy is an obvious first step in the right direction.

ENDNOTES

1 [2018] (Summer) *Bar News* 50.
2 https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement
3 NARS Report, 15.
4 NARS Report, 45.
5 NARS Report, 50.
6 NARS Report, 43-44.
7 NARS Report, 43-44.
8 NARS Report, 46.
9 NARS Report, 51.
10 NARS Report, 60.
11 https://womenlawyersnsw.org.au/workplace-practices/career-intentions-survey/
12 Career Intentions Survey, Executive Summary at iii, 20.
13 Career Intentions Survey, 14.
14 Career Intentions Survey, 21.
15 Court Appearance Paper, 53-54.
16 NARS Report, 46.
17 NARS Report, 43.
18 NARS Report, 21.
19 https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy
20 EB Report, 10.
21 [2016] (Spring) *Bar News* 48.
22 *Ibid* at 49.
23 Court Appearance Paper, 54.
24 'Retention of males and females at the Bar who commenced the Bar Practice Course at the private bar in NSW between 1994 and 2018 as at November 2018' (available from the NSW Bar Library).
25 Court Appearance Paper, 51.

Photo of Bar Council meeting on 28 March 2019 shortly before it commenced, with past Presidents photos in background.
From back to front (right): Gabrielle Bashir SC, Sera Mirzabegian, Talitha Hennessy Vanja Bulut, Mary Walker, Catherine Gleeson, Julia Roy, Ruth Higgins SC.
From back to front (left): Liz Welsh, Paresh Khandhar SC, Tim Game SC. Photo: M McHugh.

What is the economic cost of discrimination?

By Penny Thew and Brenda Tronson[1]

The cost to economies and workplaces of discriminatory[2] practices and frameworks is well researched, traversed and documented.[3]

Estimates of the cost of discrimination in workplaces and economies in Australia, the United States and the United Kingdom for instance have varied from A$45bn per annum in Australia between 2001 and 2011 in respect of racial discrimination alone;[4] £127.6bn per annum in the United Kingdom in 2018 in respect of total output lost resulting from discriminatory pay practices on the basis of sex, ethnicity and sexual orientation (meaning 'pay gaps' between women and men, different ethnicities and sexual orientations, resulting in lost output of £123bn, £2.6bn and £2bn respectively);[5] to up to USD$12 trillion for the global economy, or 16% of global income, in respect of gender-based discrimination in social institutions (namely formal and informal laws, social norms and practices restricting rights and opportunities).[6]

The cost of workplace bullying in various forms is estimated to be A$36 billion annually in Australia (as at 2010) and £13.75 billion per annum in the UK.[7]

In November 2018, the International Monetary Fund (IMF) found that the productivity and growth gains from adding women to the labour force for instance (by reducing barriers to participation) 'are larger than previously thought …[and that] for the bottom half of the countries in our sample in terms of gender inequality, closing the gender gap could increase GDP by an average of 35%.'[8] The IMF found that higher productivity generally and higher incomes for men would result from a greater inclusion of women in the labour force, the latter because of the overall productivity increase.

In 2012, Crosby Burns said 'there's a price to be paid for workplace discrimination [in the United States] – US$64 billion' (ibid, p1). This was an annual amount said to constitute the 'estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination.' The research found that businesses that discriminate 'put themselves at a competitive disadvantage compared to businesses that evaluate individuals based solely on their qualifications and capacity to contribute,' even setting aside the exposure to 'potentially costly lawsuits' (p3).

In its 2018 report, the Centre for Economics and Business Research Limited (Cebr) in the United Kingdom applied the methodology adopted by the World Bank and found that wage discrimination (or 'pay gaps') led directly to a loss of labour income for the group discriminated against plus a reduction of labour as an input for production for the economy as a whole, resulting in an estimated total of £249bn of total output lost from the gender pay gap alone (ibid, pp28, 30). The conclusion was that a 'double-dividend' existed to increasing workplace diversity and decreasing discriminatory practices, namely because more diverse organisations are more likely to be financially successful, while a decrease in discriminatory practices increased incomes of many groups which in turn benefits the whole economy.

In 2014 it was estimated that the global economy would be 'billions if not trillions of dollars richer if opportunities were offered more equitably', with discrimination described as a 'very expensive habit' (Voyles, ibid, p1-2).

Are these analyses relevant to the New South Wales Bar?

The reports described above arise largely from studies of the costs of discrimination, harassment and bullying in workplaces in Australia, the United Kingdom, the United States, Europe and Asia. The workplaces analysed typically consist primarily of common law employment relationships, or at least relationships whereby a principal bears some responsibility for, and control over, a (casual, independent contractor or employed) worker. By contrast, barristers practising in New South Wales are of course largely self employed and are required to operate as 'sole practitioners'.[9]

In that context, do the economic analyses above have any applicability to the New South Wales Bar and the working environment of chambers and, if so, how? Is there a cost to the New South Wales Bar, or even to individual chambers or barristers (aside from the costs of potential litigation) of discrimination, harassment and/or bullying? Is that cost borne personally by the perpetrators, the victims or does it impact on the profession as a whole and does this have implications for the ongoing success and relevance of the profession?

In December 2017, Fiona McLeod SC, then President of the Law Council of Australia (the LCA), observed that:

'The strength of the legal profession depends upon nurturing a professional environment that fosters and rewards individual ability, application and integrity, shielded from the impact of discriminatory, extraneous and arbitrary practices. The overarching objective is to provide a productive, inclusive and sustainable legal profession that is well placed to serve the needs of the community.'[10]

At the same time, the LCA launched a series of tools to assist in addressing discrimination, harassment and bullying in the profession, including a summary of relevant laws and their potential impact on the legal profession, and links to resources available across the Australian bars including the NSW Bar Association's Model Best Practice Guidelines and VicBar's online complaint and reporting portal as well as its bullying, discrimination and harassment policies.[11]

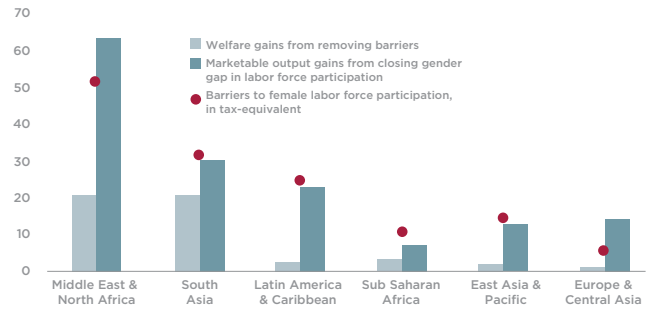
The impact on the profession in Australia of discriminatory practices was considered in 2014 in the report flowing from the LCA's National Attrition and Re-engagement Study (the NARS report), in the context of which the LCA expressed 'particular concern' at the 'wide gap between the number of women who enter the profession and those that remain in it', and the 'evaporating workforce' (NARS report Q&A). The NARS report found that 1 in 2 women respondents, of the 4000 women and men legal practitioners surveyed, reported being discriminated against on the basis

of sex, one in four women reported being sexually harassed, while one in two women and more than one in three men also reported being bullied at work (at [7.2.2]). A key issue for the profession was said to be the impact on its reputation of such findings (p87, table 21).

Systemic disparities within the profession, such as the 'gender pay gap', have been the subject of numerous reports in the mainstream media. While the 'gender pay gap' at the New South Wales Bar is said to be approximately 38.3% (in that, of those responding to a NSW Bar 2014 survey, women at the Bar reported a gross income of about 61.7% of that of men before expenses),[12] that gap has been widely reported in the media as being substantially higher.[13] The gender pay gap of 38.3% at the New South Wales Bar can be sharply contrasted with the far lower (yet still significant) national gender pay gap of 21.3% for full time total remuneration.[14]

Setting aside the accuracy of the figures reported in the mainstream media of the gender pay gap at the Bar,[15] arguably reports of pay disparities of even the more accurate 38.3% have the potential to influence the decisions of those considering entering or staying in the profession, and may impact more broadly on the public perception of the profession.

Chart 1: Economic Gains – Reducing barriers to women in the workplace significantly boosts welfare and growth.



Source: IMF staff calculations.

Note: See 'Economic Gains from Gender Inclusion: New Mechanisms, New Evidence,' IMF Staff Discussion Note No 18/06 for explanations of the calculations.

In addition, the rates at which women appear unled in Court is far lower than for men.[16] It is likely that these disparities are at least partly causative of the gender pay gap and may contribute to decisions (particularly by women) to come to and remain at the Bar, and to the public perception of the profession more generally.

Commensurate with this observation, a consideration of NSW Bar Association statistics[17] demonstrates that women leave the Bar at significantly higher rates than men, with attrition rates of 11% for women and 6% for men over a ten year period to November 2018 and 23% for women and 16% for men over a twenty year period.

An analogy can be drawn in this respect to the analyses described above of the cost of 'losing and replacing workers' where at least some of the attrition may be attributed to systemic and/or direct discrimination, including harassment, as well as bullying. If consideration is had to the expenditure in attracting entrants to the Bar (in the form of seminars and events directed at universities), as well as the cost of facilitating entry to the Bar (in the form of the Bar exams, Bar Practice Course and CPDs), plus the less measurable but substantial voluntary contribution of time and endeavour by the senior Bar to fostering the junior Bar, the ongoing financial and other losses to the profession of 'losing and replacing workers' are quantifiable and significant.

What are some of the other common law bars doing?

By way of specific example, the New York Bar has implemented a number of strategies addressing in particular harassment in the profession, including links to seminars entitled 'How to navigate sexual harassment in the workplace',[18] 'Moving the Culture Forward: Metoo and sexual harassment in the workplace'[19] and a link directly to the 'metoo' webpage. The New York Bar has also produced a webinar in relation to the relevant sexual harassment bar rules.[20]

The United Kingdom Bar has implemented various initiatives dealing with bullying and harassment in the profession, including a website dedicated to well-being at the Bar,[21] which deals with bullying and harassment in particular, and the publication of a report entitled *Barristers' Working Lives 2017*, which deals with bullying and harassment.[22]

Conclusion

If one applies the economic analyses of, say, the IMF as described above, it could be said that adding greater numbers of women, and people of diverse ethnicities, cultures, racial backgrounds and sexual orientations to the Bar (reflecting the broader community) has the potential to increase productivity and growth, thereby resulting in higher incomes globally at the Bar (cf Largarde and Ostrey, ibid). At the least, it appears that reducing the attrition rate of both women and men at the Bar can minimise the cost of losing and replacing the workforce (Crosby Burns, ibid). Steps assisting to reduce wage discrimination, or 'pay gaps', at the Bar could produce the 'double dividend' of the overall increased financial success of a more diverse profession combined with incomes in discrete groups increasing as a result of a decrease in discriminatory practices (Cebr, ibid). Overall, a distinct competitive advantage combined with increased financial success is reported to result from a more diverse workforce and decreased discriminatory practices (Crosby Burns, ibid).

ENDNOTES

1 The authors would like to thank the New South Wales Bar Association Library for its invaluable assistance in the conduct of research for this article.

2 This article considers in addition the economic cost of harassment, considered a form of discrimination, as well as bullying.

3 E.g., Crosby Burns, *The Costly Business of Discrimination*, Center for American Progress, March 2012; Green et al, *Diversity and inclusion at work: facing up to the business case*, CIPD, June 2018; Hersch and Bullock, *The Law and Economics of Employment Discrimination Law*, Vanderbilt University Law School, Legal Studies Research Paper Series Working Paper Number 18-41, 2018; Voyles, *The High Cost of Discrimination*, CKGSB Knowledge, 2014; Cebr, *The Value of Diversity*, INvolve, 2018; Ferrant and Kolev, *The economic cost of gender-based discrimination in social institutions*, OECD Development Centre, June 2016; Becker, *The Economics of Discrimination*, University of Chicago Press, 1957.

4 Elias, *Measuring the economic consequences of racial discrimination in Australia*, Deakin University, 2015.

5 Cebr, ibid, p. 30; https://www.personneltoday.com/hr/cost-of-discrimination-uk-economy/

6 Ferrant and Kolev, ibid, pp 1, 2.

7 Potter et al, *Bullying and harassment in Australian workplaces: results from the Australian workplace barometer project 2014/2015*, 2016, p5.

8 Largarde and Ostrey, *Economic Gains from Gender Inclusion: Even Greater Than You Thought*, IMFblog, Insights and Analysis on Economics and Finance, 2018.

9 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, Rule 12.

10 https://www.lawcouncil.asn.au/media/media-releases/building-a-more-diverse-and-inclusive-legal-profession

11 https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/bullying-and-harassment-in-the-workplace

12 *NSW Bar Association 2014 Member Profile Report* (Urbis Pty Ltd, March 2015), Section 6.1 Gross annual fees, p.13.

13 Irvine, 'Rough justice: the job with 140% gender pay gap', *SMH*, 10 June 2016; Inga Ting, 'The gender income gap in more than 1000 occupations', *SMH*, 20 April 2017; Butt et al, 'The jobs that don't earn what you would expect', *SMH*, 17 May 2017; Woodhill, 'Barristers top the gender pay gap list', *Australasian Lawyer*, 14 June 2016.

14 https://www.wgea.gov.au/topics/gender-pay-gap).

15 Ingmar Taylor SC, 'What do women barristers earn? '[2016] (Spring) *Bar News*, 2016, p 48.

16 Scruby SC and Tronson, 'Some recent statistics on women at the New South Wales Bar' [2018] (Summer) *Bar News*, 2018, p50; 'Further statistics on women at the New South Wales Bar' [2019] (Autumn) *Bar News* 50; Kate Eastman SC 'Visible Targets' (June 2016): https://www.kateeastman.com/wp-content/uploads/2017/02/Visible-Targets-2016-Kate-Eastman-SC.pdf

17 'Retention of males and females at the Bar who commenced the Bar Practice Course at the private bar in NSW between 1994 and 2018 as at November 2018' (NSW Bar Library).

18 http://www.nysba.org/store/events/registration.aspx?event=0FK64

19 http://www.nysba.org/store/events/registration.aspx?event=0FR81

20 https://clearlawinstitute.com/shop/webinars/free-webinar-new-york-state-and-nycs-new-sexual-harassment-laws-082818/

21 https://www.wellbeingatthebar.org.uk/problems/bullying/

22 https://www.barcouncil.org.uk/media/664669/barristers_working_lives_2017_harassment_and_bullying.pdf

Parental leave - balancing the scales

By Renée Bianchi

I was asked to write about the positive experience I had taking parental leave and since returning. Such stories need to be made public. I have become a vocal proponent of the 'you cannot be what you cannot see'. Those thinking about studying law, need to know that the bar is a good choice if that's what they want.

I cannot say it has been easy, and I do not know what the next week will be like nor the one after that, but this is my experience. This is not just a women's issue. It's a whole bar and profession issue.

I like to plan. At Law School I decided I would practise as a solicitor for around five years then go to the bar. In addition to wanting to be an advocate, the bar appealed to me for its flexibility and autonomy, things I did not think I would get working in a firm.

As a solicitor and then a reader I was often told by those more senior that I should wait until my practice was developed before start-

ing a family – their advice ranged from waiting at least five years, to 10 years. I decided to give myself five years as I thought that would give me sufficient time to build a practice and reputation. I would be known, which would hopefully make it easier to return from parental leave.

I had been warned that solicitors may not brief me if they found out I was pregnant, and/or they may not brief me once I returned from leave. When I found out I was pregnant I became concerned about work drying up. I thought solicitors would forget about me or that because I was on leave, they would have to brief someone else and they would continue to brief that barrister rather than me after my return.

Suffice to say, that is not what occurred. I was very clear that I would only be taking around four months of leave and I have been incredibly fortunate that my solicitors were waiting for my return. They have all been incredibly supportive. The nature and type of work is the same if not better than it was before I went on leave.

In discussing those that have been supportive, I cannot go past my Floor, 13th Floor St James Hall Chambers. My Floor continued to keep me updated with what was going on. I had bought a room some years prior to my leave so was also involved in the running of my Floor. These commitments did not stop and allowed me to still feel part of the profession.

My clerk, Eugenie Crosby, ensured I received all emails and my baby and I were welcomed to Floor functions, including when she was about eight weeks old and hiccupped through a seminar delivered by a past member of the Floor, the now NSW Solicitor-General Michael Sexton SC – he took it in his stride as did everyone else. Having a very good working relationship with my clerk both during pregnancy and while on leave made my return even smoother.

My clerk and fellow Floor members have been particularly helpful in recommending me to solicitors (and reminding solicitors that I am back) to ensure that my diary and practice slowly filled up. As a fellow Floor member said, it is important to the Floor that my practice is at the level I want it to be and that I was supported in my return to work.

I was nervous about asking my Floor about arrangements for when I was on leave. I did not know how I was going to meet the costs of maintaining my room while on leave. My Floor had adopted the Best Practice Guidelines but not the option of a period of six months free of rent and chambers fees during the period of leave. I asked my Floor what arrangements would, or could, be made. My Floor kindly offered to waive my rent and chambers fees for a period of four months, with an option to extend if I so requested.

I did not seek to waive any other fees or

'you cannot be what you cannot see'

Renée and her daughter

CPD requirements due to the time I took off. I was not aware that I could seek a waiver of my practising certificate fees as I was the primary caregiver of my child for greater than two months.

My attitude following the birth of my child is very different to my attitude beforehand. I told very few barristers that I was pregnant. I told even fewer instructing solicitors that I was pregnant, leaving it to the last possible moment. I was concerned that if I told them with six months or so of my pregnancy to go, they would take matters off me, or not brief me at all.

After my daughter was born I took the view that I would not keep the fact I had a child a secret. When necessary she has turned up to CPDs, meetings and other functions (even making a guest appearance at a mediation when the 6.00pm childcare pickup called).

I decided early on that I would only take a short period of leave. I was very clear with my solicitors about the period of time and when they could expect me back in chambers. I also started getting in touch with solicitors in the month prior to my return so that work would be waiting for me. Others I connected with and arranged coffee and/or lunch to reconnect with them and make it clear that I was now back.

Taking the amount of leave that I did meant that I returned to chambers mid-year and had the rest of the year to build my practice back up to where it was before taking leave. I have returned to Chambers in 2019 to a full diary for the first few months and the other months are filling. This brings with it a feeling of the unknown as to how I juggle my increasing work commitments with spending time with my family. I have become more vocal about what I can and cannot do, and clear with instructing solicitors about when I am available.

Upon my return, I chose not to take hearings of longer than a day for the first six months and while I returned on a fulltime basis, my hours for the first six months would be considered part-time.

I still try to leave chambers no later than 5.30pm so that I can be home for the nightly routine. If required I then continue working after my child's bedtime. I try not to make this a regular occurrence, and in doing so, have become more efficient in managing my time, particularly when in Chambers.

I have been fortunate to be able to return fulltime as my husband works in an industry where flexible work practices are the norm. However, on the days he works, he is unable to leave, so if our daughter is unable to attend childcare, I have to stay at home. This has only happened on two occasions so far, thankfully.

We do not have a fallback option for childcare and we need to arrange one.

Upon my return to work, we decided to place our daughter in childcare one day per

week. This has just increased to two days per week. The childcare chosen was one close to Chambers, available to members of the NSW Bar Association.

While I was on leave, I remained active on social media and in professional associations so that I could keep abreast of the general news but also of legal developments. I also tweeted about being a barrister and being a mum, adding my little story to the dialogue around parental responsibilities and the legal profession.

In doing so, I came across an initiative of the VicBar where they have a parental leave get together. The Women Barristers Forum happily took onboard my suggestion that we adopt this initiative and the first informal roundtable on parental leave was held with a great turnout (and baby attended with me).

The right time to have a child is the right time for the individual. For me, I wanted to establish myself as a legal practitioner (by the time I had my child I had been admitted for a decade) and that seems to have worked for me.

Various comments have been made about whether my advocacy style will change now that I am a mother (it hasn't) and how hard it must be to be a working mum (no harder than for anyone else that has responsibilities outside work). I have not changed as a practitioner and I have not forgotten how to do my job.

My commitment to my work has only increased since having a child, as it is important to me personally but also important that others see this as an option. The bar has the flexibility and autonomy to be welcoming to all. Let's make sure it is.

Renée Bianchi
13th Floor St James Hall Chambers

Sharna Clemmett

I came back to the bar from maternity leave seven months after having my first child (although before then, when my first son was four months old, I had returned to run a week long hearing in a matter I had not been able to persuade myself to relinquish.)

My plan was to work part-time upon my return, but it did not quite work out that way. Although my hours can be flexible, court timetables and commitments do not lend themselves to working a set, limited number of days per week.

Things without which life upon my return to the bar would have been extremely difficult are (a) reliable childcare five days a week (whether we need to use it or not), and (b) both my husband and I being able to pick up an approximately equal share of the practical parenting load (pick up and drop off at daycare; doing the dinner, bed and bath routine). It also helped that my chambers (Greenway) has adopted the model parental leave policy – importantly, it also adopted the optional clause 11, which provides relief from rent and floor fees for a period of six months for those taking parental leave.

Without that policy being in place, the stress of taking parental leave would be much greater. There already are so many aspects of taking extended leave from the bar and becoming a parent that create stress and anxiety that the difference the adoption of that model policy makes is tangible and significant.

My husband also runs his own business. It cannot be denied that both his business and mine have suffered to some extent, but we try to balance that in about equal shares. Before I went on parental leave the first time I had the usual apprehension that my practice would stall and I would struggle to rebuild it, but I found that upon my return to the bar most of my instructing solicitors resumed briefing me with the same regularity with which they had briefed me before that leave.

I try to be upfront with my instructing solicitors about the competing demands placed upon my time arising from being a parent at the bar, because if we do not talk about these things openly, the profession will never properly adapt to the competing demands of family and practice as a barrister.

Encouragingly, I have found that that approach often opens up a line of dialogue that helps, rather than hinders, the development of those professional relationships – both among colleagues at the bar and between counsel and instructing solicitor.

Sharna Clemmett
Greenway Chambers

Working flexibly at the Bar - fact or fiction?

By Surya Palaniappan, Nicholas Kelly and Alexandra Rose

In 2002, Ingmar Taylor SC wrote an article for *Bar News*, asking 'If I came to the Bar, could I work part-time?' In 2015, he followed this up with a further article entitled 'Parental responsibilities and the Bar'. As Jane Needham SC, then-President of the Bar Association, noted in her President's column: 'One of the major changes [since 2002] is the terminology; almost everyone now refers to 'flexible' rather than 'part-time' practice'.

'Flexible' work or practice, it seems, does not necessarily mean the same thing from one person to the next. This article explores a few ways barristers can, and indeed do, work flexibly, including working part-time or from home, sharing rooms and taking sabbaticals.

Many barristers are attracted to the Bar because of the flexibility that working for yourself enables, and many barristers already practise flexibility – even if they do not call it that – by taking school holidays off, taking long holidays in January and mid-year, and taking breaks between trials. But on a more granular level, a unifying theme of what 'flexible' work encapsulates seems to be less hours in chambers and more hours at home.

In Ingmar Taylor SC's articles he concluded that it was possible to work flexibly at the Bar, with a few limitations on the volume and type of work one might accept. The 2015 article, published at a time when the authors of this article were starting out at the Bar, was simultaneously terrifying and inspiring. It could be done, the question was how.

A supportive partner, disposable income for daycare and/or nannies (booked but not necessarily used) and a discipline to say no to certain briefs (urgent, long-running, interstate etc) seemed to be a minimum. However, this sometimes seems like an insurmountable goal for those who can't meet all those criteria, particularly more junior barristers.

It is often those with parental or other carer responsibilities that seek to work flexibly, so they can work remotely, be available for pick-ups and the dinner, bath and bedtime routine and generally be more present and involved in their children's lives. But at what cost?

There are flow-on effects of not being present in chambers. Working from home can also make it impossible to separate work life from home life.

There are also some structural impediments to working flexibility at the Bar, including the traditional chambers model and the high cost of childcare. Ingmar Taylor SC described this in 2015 as follows:

> …the Bar is set up on the assumption of full time practice. Room rent, floor fees, practising certificate and professional indemnity insurance are all costs that do not reduce for those working part-time. Add to that the cost of funding child care out of after-tax dollars and it is very difficult for those without a high-income partner or a high hourly rate to be able to afford to work part-time at the Bar.



Those with criminal or government practices may feel these financial pressures even more keenly. Junior barristers may also find it more difficult to work flexibly as they juggle the expectations of both the client and their leader.

However, there may be some relatively simple adaptations a leader can make, to accommodate a junior who is trying to work 'flexibly', including:

1. Giving sufficient notice as to the timing of conferences so alternative childcare arrangements can be made.

2. Avoiding conferences on the days someone is working from home.

3. Liaising with your junior about suitable conference times prior to responding to the solicitor: It is much harder for a junior to tell a solicitor that they usually leave early on Thursdays if their leader has just written back saying they are available for a 5pm conference.

4. Using face to face conferences sparingly: Conference calls can be just as effective and will cut out unnecessary travel time for barristers working from home.

5. Remembering that weekends are not, by default, workdays (unless you are in court on Monday).

6. Refraining from asking a barrister why they are unavailable at a certain time, unless they volunteer this information themselves.

A critical part of a junior barrister's wellbeing and ability to work flexibly is the support of their leader. In an industry where one's reputation is their livelihood, it is understandable that a barrister's part-time or flexible hours are not published on websites or business cards for everyone to see. But within our profession, where we aim to look out for one another, there should ideally be an open and frank two-way line of communication between a leader and their junior at the start of a case.

There is a top-tier management consulting firm that asks its team members to set out three personal 'Key Performance Indicators' (KPIs) at the start of each project, focussed on achieving work-life balance. Barristers could set similar boundaries at the beginning of a matter such as 'no conferences on Wednesday afternoons' or 'emails sent after 5pm will be responded to between the hours of 8-10pm'.

Thus, while the bulk of the responsibility lies with the barrister aiming to work flexibly, there are some simple steps that colleagues can take to ease the burden – which will hopefully encourage greater sustainability and diversity of people practising at the Bar.

Get a room

Mention 'room sharing' and for many it will conjure memories of annoying siblings, youth hostel dorms or boarding school. However, in recent years, sharing a room at work has become quite common. Many law firms have moved to open plan offices, including, very recently, the NSW Crown Solicitor's Office. However, as things presently stand, the possibility of shared barristers' workspaces seems quite remote – hot chambers anyone? Nevertheless, until quite recently, it was quite common for barristers to share rooms.

The Hon Peter Jacobson QC, lately of the Federal Court, came to the Bar in 1979. Peter recalls that chambers were very limited at that time, and the only commercial chambers were in Selborne and Wentworth chambers. Even within the building at 176-180 Phillip St, the number of good floors was limited and finding a room was a challenge for any new barrister. Peter had been briefing John Bryson (later John Bryson QC) before coming to the Bar, and Bryson told Peter not to wait for a room, offering Peter the opportunity to sit in his room in 10th Floor Selborne Chambers for the duration of an upcoming long trial, and for Peter to 'float' out of Bryson's room.

Bryson had a small table in the corner that Peter used when they were both in chambers. Bryson's trial was running for ten weeks at Liverpool Street and every morning and afternoon he and Peter would have a chat before Bryson went to court, at which point Peter could occupy the large round table Bryson used as his

desk. 'It was terrific'. Peter says.

> 'He was a very experienced junior at that stage. Having the opportunity to sit in the room with someone like that gave me the opportunity to meet other people and learn a lot. When John finished his trial, I was still floating, out of Keith Mason's room on 10 Wentworth. Keith was a very busy practitioner, so I'd often have to use other rooms if I needed space for a conference.'

Peter notes that one of the main disadvantages of floating was that as you get more senior you need your own space and clients start to have expectations that when they arrive with solicitors, you'll have a room.

Peter says that only some floors allowed barristers to float out of others' chambers, but recalls it being pretty common, with some people sitting in their pupil masters' rooms for 12 months. However, he notes it was probably easier at that time than now, because barristers were in court a lot:

Carolina Soto with her children

> 'When you were very junior, you'd do a lot of short appearance work and then chambers work during the day. Floating was also easier then because we had smaller briefs. It would be much harder today with the size of the briefs.'

As to more recent examples, Peter says that in the late 90s or 2000, by which time he was practising from 7 Selborne, there was a large room in the floor's annexe in Lockhart Chambers that was used as a shared workspace.

Kristina Stern SC practised for many years in London. Kristina says that about 50% of rooms in her old chambers were shared, and that she shared with two others for eight years. Kristina says that the room sharing was common partly because the general practice of chambers was that if the chambers wanted someone to become a new member, the person was taken on regardless of the available space:

> 'This allowed a degree of flexibility to bring people you want into chambers, which meant it was less likely that a floor would lose the people that it wanted on the floor.'

Kristina also identifies the pupillage practices of the UK Bar as a reason for why room sharing is more common there: 'You automatically sat on the other side of the desk from your pupil master, so you got into a working practice where you were used to sharing a room.' More senior barristers also shared rooms, including silks, with people sharing up until they took silk and then continuing to share.

Kristina's experience of room sharing was extremely positive:

> 'It was really fantastic. We loved it. You could run things by people. There was no sense of isolation, you would always see people and it encouraged greater camaraderie because you didn't have to make an effort to find people, and other people might come in to see one of your colleagues. The people I shared with became my best, best friends. You were able to bond in a way that isn't as easy when you're not sharing. You also learn a lot through indirect experience by seeing how someone else runs their practice. It also worked really well in terms of maternity leave.'

There were challenges though: 'You have to be able to concentrate while people are working around you. Sometimes all three of us would be on our phones at the same time.' Issues could arise if one of the occupants was working on something particularly confidential or where room-mates were acting against each other. Kristina says this was manageable, but recognises that room sharing was much easier to achieve generally because barristers do not hold conferences in chambers in London, they use conference rooms: 'In 10 years of practice I never saw people having a conference in chambers. It would be difficult to make sharing work unless you have separate conference facilities.'

Sophie Callan and Nick Kelly have been sharing a room in 12 Wentworth Selborne Chambers since 2016. Nick says that overwhelmingly, his experience of room sharing has a been a positive one:

'Sophie and I were friends before we started sharing, so that probably made the whole process a little easier. But, to be honest, we settled in pretty quickly. One of the big positives for me is having a colleague who works in similar areas of the law to me sitting right next to me for sense checks and advice. It's also great just having a friend to chat to about your day to day troubles. I've also found that I get the opportunity to engage with some of Sophie's readers when she's out of chambers, which I find really rewarding.;

However, Nick recognises that there are challenges to making it work:

> 'I tend to try and use the conference rooms we have on our floor for conferences, but every now and again we'll find each other having a conference that we didn't tell the other one about, or that happens at short notice. It happens very rarely, but when it does it's usually pretty easy to decamp to a café nearby to work for a while, or to go and sit in someone else's room for an hour or so.'

Sophie acknowledges that sharing a room in chambers is clearly not for everyone, but for her, it has been a great success:

> 'I came to share my room on 12 Wentworth Selborne after two years of absence from the floor. When I returned, the floor agreed to let me share with Nick, who was already a very good friend and colleague. In my experience, it seems to me that successful room sharing can really only work where there's mutual consideration and easy communication. It's not unusual for Nick and I to sit together in the room for hours without talking while we focus on our work. But, we often debrief after a difficult day in court, which I think helps us both to clear our head for the next day's work. And when one of us is wrestling with a particularly tricky forensic, legal or ethical issue, we've found it really beneficial to

Ed sailing in Tuscany

Ed (and friends) walking the 'sentiero del viendante' in Lake Como

Tom graduating from his LLM at Columbia Law School

Judge Bourke and Juliet Bourke in Tuscany

> easily and quickly have a quick discussion to help resolve it.'

Rebekah Rodger and Ragni Mathur share a room at Maurice Byers Chambers. Rebekah's experience of the positives of room sharing is consistent with what Nick and Sophie describe:

> 'I prefer sharing a large room with Ragni than having my own small room. It is an enjoyable collegiate atmosphere in which we are both able to respect each other's need for silence and have someone nearby to bounce ideas off.'

Rebekah also highlights the benefits of a large room, which she and Ragni may not otherwise be able to afford, for use in conferences. Rebekah says that defraying the costs of chambers also allows for greater flexibility in terms of choosing to work from home at times and assists in achieving a better work/life balance generally.

However, Rebekah says that it's crucial to share with someone that you get on well with, and who has a similar practice. She and Ragni are both in court a lot and/or working from home, which allows for use of the room by each of them for conferences. They also have access to a break out conference room in chambers, which means they can have conferences at the same time when the need arises. She recommends finding someone who is happy to chat when appropriate but also happy to be quiet.

Rebekah advises that sharing will be much easier in a room that is fitted out to allow both occupants to work in the space at the same time, and so that one doesn't have to pack up when the other is using the room. She also suggests investing in some noise cancelling headphones for when you are both in chambers and there's a need to have extended telephone calls.

It is striking that the positives and negatives of room sharing described above are consistent across time and location, and that the negatives are largely related to logistics. In circumstances where our profession has such high rates of depression and anxiety, the positives described above that come from the close support and friendship that room sharing provides, a move towards more room sharing may be one small way of addressing this blight on our working lives. Room sharing may also provide financial benefits to people at the beginning of their career, at the end of their career or for whom the costs of chambers are too big to bear on their own, for any number of reasons.

However, despite these benefits, room sharing appears to be relatively rare and, when it happens, it does so on an *ad hoc* and informal basis. Anecdotally, it appears that some floors expressly prohibit room sharing. As an exception, Banco Chambers has taken a step towards formalising room sharing by including it in its Parental Leave Policy. The policy provides that a barrister who takes parental leave may share his or her room with another member, or a licencee approved by the floor, for 12 months upon returning to work. Each barrister is liable for 2/3rds of clerk fees in that instance.

This is a positive step towards formalising a flexible way of working at the Bar with clear benefits. Perhaps as the needs of the members of the profession evolve, we will see a return to our past, where sharing was common and, at times, encouraged.

Sabbaticals

The term 'sabbatical' comes from the Greek *sabbatikos*, meaning a 'ceasing'. It also comes from the Sabbath, the one day per week set aside for rest and the one year every seven that fields were left fallow, to allow the land time to regenerate. Such periods of rest could have similar effects on humans, even barristers.

Academics often take sabbaticals – to conduct research, or to write articles or books. It is often also used as a euphemism for parents taking time off work to practise the art of parenting – although that is rarely described as a period of rest.

You may also be surprised to learn that many of your colleagues have taken extended leave from the Bar to travel, study, compete in sporting events, conduct research or write books. Others simply want to experience life in another place and to read, rest and reconnect.

There are no rules when it comes to sabbaticals. They can be for any length of time. They can be in pursuit of any goal. The only expectation there seems to be is that you return to your job at the end of it. And the benefits are obvious. It provides opportunities for further professional growth and development, time to reflect on the direction of one's career and a well-deserved mental and physical rest.

Barristers seem to be quite fond of this ancient tradition. In 1970, Justice Michael Kirby took 12 months out of practice to drive a kombi, with his partner, now husband Johan, through Asia and Europe. He had only been at the Bar for five years at that time and was bored with his workers compensation practice. He told his biographer in 2012 that 'going overseas allowed me to clear the decks. When I came back I effectively let it be known that I was not going to do that work', allowing him to develop an industrial practice.[1] Justice Kirby was so taken with the concept, that he took another sabbatical in 1973, driving a different kombi through Europe, to Ceylon (as it then was) and back again. He admitted that

> 'if I had not been appointed a judge, that's what I would have done with my life – I would have gone on being a barrister for a time and then gone off and done these overseas trips. Which were a kind of epiphany or self-exploration'.[2]

Modern-day barristers are getting into the act too. In 2012, Edward Cox SC, from Greenway Chambers, spent a few months travelling through the Americas before renting an apartment on the shores of Lake Como in Italy for 12 months. Ed had been at the Bar for 11 years by then and was feeling a bit stale at work. He also wanted to fulfil a lifelong dream of racing dinghies in world champi-onships around Europe. He didn't take on any new work while he was away, but he did keep some of his ongoing matters, and flew back to Australia when needed to appear in short matters. He even appeared in a hearing via video link from a hostel in Chile once, fighting off other backpackers for bandwidth! Overall, Ed worked about two days per week on his ongoing cases and spent the rest of his time sailing, travelling, reading and walking his neighbours' dogs. Ed also read more books in 2012 than he had in the 15 years prior.

However, it was not a tough decision for Ed to come back to the Bar when he did, as he missed running cases. His initial concerns about rebuilding a practice were also quickly overcome as his solicitors were happy to brief him again. Others hadn't even realised he had gone! Ed was also open to accepting briefs outside of his usual commercial work, including coronial inquiries. Overall, it only took him about six months to build his practice back up

to where it was before he left. He has been back at the Bar for five years now and was made a silk last year.

Ed used his time away as a period of reflection and never regrets his sabbatical, noting that 'barristers are unlikely to regret not spending enough time in chambers on their death bed'.

Similarly, in 2012, Andrew Gotting (from PG Hely Chambers) and Michelle Rabsch (from 12 Wentworth Selborne), took 12 months out of their practices to live in Valencia in Spain with their three children. They had promised each other they would take a sabbatical when they turned 40. Andrew had been at the Bar for 12 years and Michelle was the Counsel assisting the NSW Solicitor General and Crown Advocate. The family spent the first few months settling into their new home, learning Spanish and travelling through Europe. There was also a period of home schooling before the older kids (aged 7 and 9) joined the local school. They took advantage of the slower pace of life, the Spanish culture and made great friends.

Prior to the sabbatical, Andrew had been involved in large matters which would often take 6-12 months to complete. Therefore, taking 12 months away from the Bar did not prejudice his practice in any way. He licensed his room out and his clerk simply informed solicitors that he was unavailable for the next few months. When he returned to Australia in 2013, he went straight into a hearing and the work resumed as it had before. Michelle returned to her job and then joined the private Bar in 2016.

Each recalls that there were naysayers, suggesting that they were making a career limiting move. But the sky did not fall in and they are even thinking about taking another sabbatical in a few years' time. Andrew advises those that are thinking about taking some time off to 'just do it. It will work – it always works'.

Michelle organised school books for the kids before they left, packed one big suitcase for everyone and left the accommodation, language lessons and other matters until they arrived in Spain. She describes the experience as a great adventure and one that she would recommend for any family. And if you are wondering how you could afford to stop working and take your family overseas for a year, you could consider renting out your house in Australia, like Michelle and Andrew did, as your rental income is likely to be more than enough to live on in somewhere like Spain or parts of Italy.

More recently, his Honour Judge Ian Bourke SC, his wife, Juliet, and daughter Eliza, took a six-month sabbatical to live in the ancient walled city of Lucca in Italy. They rented an apartment in a 500-year-old building, learned Italian, took walks around *Le Mura* (the walls), travelled throughout Italy and Europe, went to concerts, ate pizza and met new friends for evening drinks. Judge Bourke also bought a new guitar to learn some new songs.

A little concerned about taking a pause, Juliet persuaded Judge Bourke that they needed a sabbatical as they had both been working hard for 30 years. However, Judge Bourke found it nerve-wracking to leave his practice for six months and wondered whether it would recover, but he thought it was time to take a risk, after 21 years at the private Bar.

He kept lightly connected by responding to a few email inquiries about his diary while he was away and spending a few days at the beginning of the sabbatical finishing off some work and a few days at the end, preparing for a trial he was starting as soon as he came back. But this was not a major intrusion into their time away.

Contrary to his fears, Judge Bourke said that the sabbatical did not disadvantage his ongoing practice, indeed it gave him new energy and something interesting to talk about with his solicitors and juniors. He also relished the quality time he got to spend with Juliet and making new lifelong friends. His concerns about having sufficient funds were also unrealised (he still had to maintain his chambers while away), with the cost of living surprisingly cheap in Italy.

Judge Bourke wonders whether six months was long enough and advises others thinking about taking a sabbatical to consider taking 12 months off. He also recommends speaking to people who have lived in the country you are going to about the visa requirements – as the information you get in Australia may not be accurate.

Juliet and Judge Bourke plan to take another pause in five years, having had such a great experience. Thinking about the regenerative benefits of their sabbatical, Judge Bourke worries that the sustained pace of life at the Bar is unhealthy and is thankful to those fellow barristers who encouraged him to take a break.

Ultimately, Judge Bourke notes that,

> 'if I was asked what I did in 2017, or 2015, I would probably have to look at my diary, and I would no doubt see a series of cases in which I appeared that are now a vague memory. But if I am asked what I did in 2018, I will always remember that for the first half of the year I was living and travelling in Italy'.

But sabbaticals aren't all about drinking aperitivi on the Adriatic or sangria in San Sebastian. Sometimes they involve serious study. Take for example, Tom Dixon from State Chambers. In 2014/15, Tom completed his LLM at Columbia Law School in New York, focussing on constitutional law. He had always wanted to live in the Big Apple and was looking for a change of scenery after 10 years at the Bar.

Tom decided to up the ante a little and flew to New York the morning after finishing a big trial with nothing but hand luggage and nowhere to live. But as luck would have it, he soon found an apartment on the upper west side, next to Central Park. Not only did he complete his LLM while he was there, he also completed an economics degree he had started in Australia! He loved studying, but found he was learning just as much after class as in class with prominent jurors like Supreme Court Justice Ruth Bader Ginsberg and Amal Clooney popping into Columbia to give lunchtime lectures. Tom bought a Vespa to discover the wonders of Manhattan and rode to classes most days. He spent days off socialising with classmates including watching the NY Yankees as often as possible.

The impetus for the sabbatical was not only to follow his passion in constitutional law but to focus on living, instead of working. Tom had been working seven days a week for years and knew that the only way he could switch off was if he was outside of his usual environment.

Tom came back to Australia the fittest he has ever been and with a different mindset. He also started accepting more diverse briefs and it only took him a few months to rebuild his practice.

Tom highly recommends taking a sabbatical but notes that he couldn't have taken one any earlier in his career as he couldn't have afforded to stop working for 14 months and live the lifestyle he did – noting that although he was a student, he didn't live like one in New York! Although, he was able to license his room in chambers while he was away, which was a great help.

Taking a career break may not be something that interests you now, or it may not be feasible either financially or logistically at the moment. But a sabbatical may be worth considering if you are burnt out, lacking inspiration, or seeking to pivot into a different area of law. Ed, Andrew, Michelle, Tom and Judge Bourke each describe their experiences as refreshing and reinvigorating, and each returned to thriving practices.

Sometimes all you need is a break.

For those of you that are considering taking time out, remember to contact the Bar Association to discuss your practising certificate renewal and the various ways you can fulfill your CPD obligations while you are away.

ENDNOTES

1 Michael Kirby: *Law, Love & Life*, Daryl Dellora, Penguin Group 2012, p 152.

2 Michael Kirby: *Law, Love & Life*, Daryl Dellora, Penguin Group 2012, p 144.

Avoiding the law; only to become immersed in it

By Bilal Rauf

Introduction

'It's better you avoid law. Maybe think about pharmacy, ophthalmology or some science course.' These were the words of my otherwise sagacious father in mid-1994, as we canvassed appropriate university course selections. Yet, 25 years later, the law has come to define the very essence of my being and personality. I share in this article my journey of practising law and observations relating to the importance of diversity in the legal profession, particularly the NSW Bar.

Bilal Rauf

The study of law

The advice proffered by my father was in a context where, hitherto, we had had little interaction with lawyers and had a minimal understanding of the practice of law. His was a view based on the experience of a migrant who had arrived in Australia in 1971 and focussed on working to create a base in a new country. It was his first trip out of Pakistan and the choice of Australia was fortuitous rather than planned. At the time of our discussion, he had retired from his long standing employment at the University of Sydney in the Information Technology Department. His advice was well-intentioned in that, English was not our first language; we did not know any lawyers; and any career requiring a certain mastery in English discourse and public speaking was unappealing. There was also a perception that law as a career was inordinately difficult and inaccessible as a vocation for someone of a migrant background.

Nonetheless, I persisted with undertaking a law degree. I commenced my combined Bachelor of Arts and Bachelor of Laws at the University of Sydney in 1996. Towards the end of my law degree, I had the privilege of studying under, and then performing research work for, Professor Ron McCallum in the area of industrial law. That experience was pivotal to my resolving to pursue a career in industrial and safety law. However, at that stage, it had not occurred to me that a career as a barrister might be worth considering.

A career in law

Following my graduation and admission as a solicitor in 2000, I was employed by, and worked at, various law firms. That was when the challenges began. I was a graduate lawyer when the tragic events of 11 September 2001 occurred. From that point, there was an unprecedented scrutiny of the religious aspect of my identity. As a Muslim, I was openly questioned about my loyalties to Australia and whether or not I sympathised with the terrorists. There were other challenges created by a lack of diversity and understanding of different cultures. The advice proffered by my father suddenly assumed greater meaning.

As a consequence of the observed lack of cultural diversity within the legal profession, it was difficult not to feel apart or, at times, alien. However, as my career progressed, I noticed a shift in the attitude of law firms. The bigger firms were merging and assuming a more global identity. The last firm at which I spent eleven years was taking significant and commendable strides in achieving diversity and providing exposure of the law to students from migrant backgrounds. The results showed in the background of the lawyers coming through the ranks.

As I transitioned to the NSW Bar, I had expected that there would be a similar focus to embrace and encourage diversity. My initial impressions were not positive and I was disappointed by a perceived lack of realisation about the issue. There was little, if any, discussion and there were no statistics to draw upon to understand the composition of the Bar.

The importance of diversity

There is now considerable research on the importance of diversity in the workplace and its correlation with performance and positive outcomes. For instance, the 'Diversity Matters' report by McKinsey & Company examined the relationship between the level of diversity and company financial performance based on financial data and leadership demographics compiled from hundreds of organisations and thousands of executives in the United Kingdom, Canada, Latin America, and the United States. Based on the research, the report stated:

> The relationship between diversity and performance highlighted in the research is a correlation, not a causal link. This is an important distinction, but the findings nonetheless permit reasonable hypotheses on what is driving improved performance by companies with diverse executive teams and boards. It stands to reason—and has been demonstrated in other studies, as we indicate—that more diverse companies are better able to win top talent, and improve their customer orientation, employee satisfaction, and decision making, leading to a virtuous cycle of increasing returns.

Diversity matters because we increasingly live in a global world that has become deeply interconnected. The interconnection is partly the result of improved technology. It should come as no surprise that more diverse companies and institutions are achieving

Bilal with his father Abdur Rauf and his wife Shahida Israil.

better performance. Most organisations, including McKinsey, have work to do in taking full advantage of the opportunity that a more diverse leadership team represents, and, in particular, more work to do on the talent pipeline: attracting, developing, mentoring, sponsoring, and retaining the next generations of global leaders at all levels of the organisation. Given the increasing returns that diversity is expected to bring, it is better to invest now, as winners will pull further ahead and laggards will fall further behind.[1]

The importance of diversity for the NSW Bar

The achievement of diversity is critical for the Bar in at least two respects.

First, it goes directly to the issue of the respect and regard which the broader society accord to the profession. Barristers are at the forefront of the legal processes which determine matters of innocence or guilt and the assessment of legal rights and claims. Increasingly, barristers are also involved in facilitating mediation and alternative dispute resolution. Respect and regard for the law among the wider community are enhanced when those who are active participants in the administration of justice are derived from, and reflect, the diverse society in which we exist. Otherwise, there is the risk that the NSW Bar and legal profession generally is perceived as the '*other*', an elitist vocation to be respected from a distance and perhaps even grudgingly, but never quite embraced or appreciated as it ought to be.

Second, and given the results of research such as that conducted by McKinsey & Company, the NSW Bar's commitment to excellence is enhanced if it is able to attract practitioners who are reflective of the community they serve. The NSW Bar is then better able to position for the future and draw on the unique attributes which contribute to the overall advancement of the profession. The focus on the future is also in line with the Strategic Plan of the NSW Bar.[2]

In more recent times, there have been important advances by the Bar Association (with some terrific work from staff of the NSW Bar Association, such as Ting Lim, Senior Policy Lawyer). At the urging of Anthony McGrath SC (Chair), Ingmar Taylor SC and others on the Equality and Diversity Committee (of which I was a member at the time) and under the stewardship of Arthur Moses SC (when he was the President of the Bar Association), an optional survey was introduced for the first time in 2017 for barristers to provide information as a part of the practice renewal certificates form about, among other matters, their cultural and ethnic background and the different languages which they spoke. The collection of this data is viewed by the Bar Association to be imperative in order to map trends and understand the direction of the future of the NSW Bar not only in terms of the changing nature of a barrister's work but also in understanding the cultural background, place of birth and languages spoken by members of the Bar.

As a further step, the Bar Association participated in the Careers Fair at the Macquarie University in 2016. Anthony McGrath SC, Theresa Baw, Ting Lim and I had the opportunity to speak to many law students. Many of these students did not quite appreciate the work of barristers and understood little of the NSW Bar. This initiative highlighted the importance of providing opportunities for interaction between members of the NSW Bar and students who do not have the benefit of bridges, networks and opportunities which others may do.

There are also many mentoring initiatives in place for lawyers and law students. It is important that barristers participate in these. So much is demonstrated by the long-standing practice of tutorship at the NSW Bar.

Emerging statistics

Work remains to be done in terms of continuing the dialogue about diversity and developing and implementing strategies, policies and initiatives to attract people from diverse backgrounds.

The statistics collected by the NSW Bar Association during 2018 indicate that there is a degree of cultural diversity at the NSW Bar. 300 (out of 1193) respondents nominated "other" as their ancestry. Those respondents identified 44 distinct ancestries. One third of respondents identified a single ancestry originating from Eastern Europe, the Balkans or a republic of the former Soviet Union. Among the younger and more junior members, there is an emergent diversity of East and South Asian barristers. Approximately 17 per cent of those who identify as having one ancestry nominated either Chinese or Indian as their cultural heritage. Together with those who nominated 'other' as a single ancestry, nearly two-fifths (40 per cent) of barristers aged under 40 have a diverse cultural background. However, these statistics are still not representative of the state's population as a whole. They also suggest that there exist socioeconomic barriers to a practice at the Bar.

Back to my father

Some 25 years later, and with the benefit of having an insight into the practice of law and exposure to other members of the profession, including at the Open Law Term Event at Auburn Mosque in 2014, my father shares with pride that his son is a member of the legal profession. He also encourages that I do more to mentor others and build bridges between the profession and the community. One of his enduring memories of an interaction with a judicial officer was with Justice Geoff Lindsay of the Supreme Court of NSW. After a firm handshake and a discussion, he turned to me and said 'The Judge is very easy to talk to and has some interesting ideas.' He subsequently turned to my then 11 year old son, standing beside him, and said 'You should study hard so that you can also become a lawyer'.

Needless to say but my advice to others would be different to the advice given to me in 1994. The opportunity to undertake work as a barrister has indeed been a privilege and fulfilling and enriching experience.

ENDNOTES

1 'Diversity Matters' Report, McKinsey and Company, re-released in 2015, see Executive Summary.

2 See NSW Bar Strategic Plan at https://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf

Untethered: ruminations of a common law barrister

By Kavita Balendra

I am sitting in Dubbo in my solicitor's conference room across the table from my client and her mother.

My client was injured in a motor vehicle accident. Badly. She's a 19 year old Aboriginal woman with three young children. The accident occurred when she was 16 and she's never been the same. Her mum greets me and after a moment tells me that she's sorry but she can't stand to look at me. She says that I look 'the spit' of the Aboriginal driver that caused the accident.

I'm a Sri Lankan Tamil.

It's a jarring note to commence a conference, but this is not the first time something like this has happened. So I do what I usually do and just talk….

I came to Australia when I was nine. I'd lived in three different countries before coming here and visited several others, but Australia was the first country I'd been to that had a winter. We lived in the western suburbs of Sydney and I grew up surrounded by first and second generation immigrants of various backgrounds. My first degree is in science and I spent my honours year doing research in the psychiatric units of two hospitals. Consequently I'd never thought of myself as a 'diverse' person because everyone was diverse.

It was only after coming to the Bar that I realised that not everyone who grew up in Sydney had lived in an area where it was usual to take your shoes off before entering someone's home. I have been mistaken for an instructing solicitor, a paralegal or on at least one memorable occasion, the plaintiff. I have been patronised, been informed that I don't understand my case, and have had opponents (and a mediator) kindly try to explain the applicable law to me. I realised very early on that tick-a-box diversity made me stand out at the Bar.

Yet to me, the Bar is actually quite a diverse place. There are few workplaces that accommodate such a range of misfits. There is room for all sorts, silver tongued rogues rub shoulders with brilliant introverts and manic eccentrics. It is an egalitarian sort of club where the key to acceptance is not just passing the Bar exams but the possession of an amusing anecdote about a mishap in court, preferably involving a witness in the box and garnished with a judicial dressing down. In many ways the Bar is a reflection of broader Australian society, it just doesn't look like it.

I consider myself fortunate to practise in common law. There is around the common law Bar an unfortunate air of fatalism. It is an aging jurisdiction, considerably 'top heavy' with ongoing legislative changes decimating available work, ensuring that fewer and fewer juniors are attracted to its practice. But one cannot escape the fact that the duty to care for one's neighbours and the regulation of each person's behaviour towards another is of fundamental importance in a civil society. Few who have travelled to our nearest neighbours and have seen the disregard for safe worksites, the lack of duty of care to passers-by, or the lack of regard for consumers of goods and services, will have any doubts over the need for robust tort and consumer law. After all when there is a breakdown of those duties of care, it is tort law that is used to hold institutions to account.

There are a number of surprising secrets to practising at the common law Bar. One is that I have found that my version of diversity is a peculiar strength. I've bonded with a client over shared cultural expectations, while explaining to them why those cultural expectations do not translate into monetary compensation. I've extracted evidence from weeping men who are more comfortable talking to me than they would be to any male barrister. And I've held the hand of a client after senior counsel delivered the bad news that she had no basis for a claim for the death of her child. She thanked me for being there.

Another oddity of the common law bar is that it is one of the few civil jurisdictions which regularly requires practitioners to travel to the country. My Sydney based solicitors are always slightly apologetic when briefing me on matters that involves travel. The truth is that I find that there are few pleasures at the bar greater than being on circuit. My life is easier – I am paid to spend a few days away from my caring responsibilities and I even take extra work with me that I actually manage to complete.

While travelling through country NSW I expect to stick out, and sometimes I do, though sometimes we forget how truly diverse the country is and how little the Bar reflects the rest of Australia. Generally I find country solicitors are genuinely welcoming and surprisingly grateful for your willingness to travel, and it is amazing how easily an opponent with a reputation for belligerence can become a friend over dinner and wine. And besides, where else would you get the opportunity to sit (with your opponent) and share a meal with a judicial officer presiding over your case and try to convince them that gaming is for everyone, they just need to try it?*

So now I am in Dubbo wrapped in my 'diversity', with a face that is too much like the driver that caused my client's accident, and I recognise that I may not be the barrister they expected to see. But when we settle her case and she calls me 'sister' and I receive a hug from them both, I hope that they are glad that I'm the barrister they got.

* Editor note - this practice of breaking bread with a judicial officer would have got the barrister into hot water in the long-distant past!

Journey through my lens

By Nipa Dewan

When I first sat down to write this piece, so many thoughts crossed my mind. Diversity, a huge topic, where do I even start? Then I thought, perhaps I should write about myself, my experience and my journey. A journey that has taken me through many countries, and enriched my experience and outlook on life as I met and became friends with people from all walks of life.

After I finished my high school in Canberra, I decided to move halfway across the world to pursue my legal studies. It took many of my friends by surprise, but I wanted to experience something different. Studying law in the medieval headquarters of the common law system in London was meant to be different, and it certainly was. As I walked through the meadows of Lincoln's Inn, I was not only mesmerised by its majestic gothic architecture and hundreds of years of history, what also struck me was the diversity of its members – there were not only a significant number of female barristers, but there were also plenty of barristers of different colours, ethnicities and other backgrounds.

Not long after my call to the English Bar in 2008, I returned home. I found that, notwithstanding the multiculturalism in our society, the legal profession was not as diverse as I thought it would be. The number of female lawyers was comparatively low, particularly at senior level, and it was way behind on cultural and ethnic measures. I, who did not even stand out in Lincoln's Inn, admittedly felt different at times. Perhaps it was because I was young, female, and from an ethnic background.

Like others, I wanted to make sure that I joined the NSW Bar at the right time. I soon realised though there was no such thing as the right time; you just have to take the plunge and take it as it comes. I knew that joining the NSW Bar would bring new experiences, some of which would be different than those of my peers. That became apparent not long before the end of my Bar course, when I was approached to discuss what my court attire would be, more specifically, how I would wear my headscarf and its colour when I robe. I did not even think of this until it was raised, and it dawned on me at that moment that I might be the first woman in the NSW Bar to wear a headscarf. I was very impressed with the way the Bar and the Judiciary handled this, and from then on, a precedent was set.

I knew that joining the NSW Bar would bring new experiences, some of which would be different than those of my peers. That became apparent not long before the end of my Bar course, when I was approached to discuss what my court attire would be, more specifically, how I would wear my headscarf and its colour when I robe.

Looking back, the past five years at the NSW Bar has been filled with a strong sense of camaraderie, which one would rarely experience elsewhere. While my path may have been different to some of my colleagues, we all have encountered various trials and tribulations to get to where we are today. I now realise more than ever, no matter how different you are or may appear to be, if you remain true to yourself, people will eventually come around and appreciate you for who you truly are.

While the legal profession has historically been slow in embracing the differences and 'the otherness' among us, that certainly is changing. The diversity of newly admitted lawyers as they gather with their proud families and friends on any admission ceremony in the Supreme Court is a testament of this change. It is only a matter of time before this change is fully reflected at the Bar.

The modern Bar wants the best people, no matter what their gender, ethnicity, cultural or other backgrounds might be. The more reflective the Bar, and for that matter, the Judiciary are of the wider society they serve, the more confidence there will be in our legal system.

Socio-economic 'diversity' at the NSW Bar

By Joe Edwards[1]

When the *Bar News* Committee made a decision to have a special edition of *Bar News* focussing on the diversity of the modern Bar, potential articles were swiftly identified addressing race, gender, disability, sexuality, parental or caring responsibilities, and the like. However, the editor then asked a difficult question: does a focus on these issues, important though they are, distract attention from the elephant in the room; which is to say, can a person who comes from a low or lower socio-economic background make it at the Bar? The question floated, issues of nomenclature and measurement arose around the Committee table. What is meant by the term 'socio-economic background'? Does it mean anything different from the older term 'class' or the more newfangled one 'social mobility'? And even if the term has a meaningful content, how do you measure it? More particularly, how would you measure the socio-economic background of a barrister?

Now, I should immediately confess that this article does not purport to address all of these questions in any fulsome way. Instead, it seeks to achieve two modest goals. First, to summarise the information we have – admittedly not a great deal – about the socio-economic background of members of the Bar. And second, to tell the stories of two barristers who hail from what might be described as 'non-traditional' socio-economic backgrounds: Vanja Bulut and Oshie Fagir. Vanja and Oshie kindly agreed to answer five questions relating to their experiences at the Bar and socio-economic barriers to practice. The questions were inspired by an initiative of the UK Bar Council, which last year selected – and interviewed – 11 'social mobility advocates' from among the ranks of UK barristers. These interviews, which are online, provide food for thought for those interested in drawing comparisons between Australia and the UK.[2]

What do we know?

I hardly need to tell readers of this publication that there is a general perception in the community that most barristers come from relatively privileged socio-economic backgrounds. But is this perception warranted?

To answer this question in a systematic way, we would need to have rather a lot of

information about barristers and their lives prior to joining the Bar. Assessing a person's socio-economic status at any particular point in life is difficult. As the Australian Bureau of Statistics (ABS) points out, '[s]ocio-economic status is generally unobserved' and '[t]here is no single correct measure of socio-economic status': 'proxy measures' must be used.[3]

Common concepts in searching for such proxy measures include education, employment, income and consumption. The trouble, of course, is that we do not have especially good or comprehensive information about these matters insofar as barristers are concerned. No-one asks a person applying to sit the bar exam about his or her post-tax income in the five years prior to sitting the exam. Still less do we have good or comprehensive information about barristers' parents or broader families. No-one collects data on the highest level of educational attainment of an incoming barrister's parents (this being something which is known to be strongly correlated with a person's overall socio-economic background[4]).

However, while we may not be able to answer the question in a systematic way, we do have information about one common proxy measure used to assess socio-economic background: we know where barristers and a particular class of former barristers (judges) went to secondary school. The information concerning barristers' secondary schooling comes from the Bar Association's 2018-2019 practising certificate renewal survey (PC renewal survey) which, for the first time, asked barristers to describe 'the affiliation of the secondary school(s) you attended'. The information concerning judges' secondary schooling comes from a very different source: swearing in speeches, where it is of course customary to offer a potted summary of the new judge's journey from birth to bench.

Before turning to the data, it is necessary to point out the obvious: using only one proxy measure (where did you go to school?) to assess the socio-economic background of barristers and judges is problematic. A meaningful assessment of socio-economic status generally involves the use of a number of proxy measures, not just one.[5] Moreover, there are real questions to be asked about whether knowing where a person went to secondary school necessarily tells you anything (or anything much) about the person's socio-economic background. For one thing, as anyone who has followed recent political debates about education funding in Australia would know, the labels 'public school' and 'private school' mask great variability between schools. An independent school, especially a prestigious independent school, may be very different to a Catholic school, especially a systemic Catholic school, notwithstanding that both are typically lumped together in the category 'private school' (including by the ABS). Second, to know that a person went to a private school, even a prestigious independent school, does not tell you whether the person went there on a scholarship or because his or her parents took out a second mortgage or took on a third or fourth job. Third, those who attend public selective schools have on average a higher socio-economic background than those who attend other public schools, in some cases not significantly different to those at surrounding private schools. Parents who might otherwise send their children to private schools will often prefer a public selective school (and in many cases pay for tutoring to assist them to gain entry). Put simply, then, there are both systemic and personal issues with using secondary schooling as a proxy measure to assess a person's socio-economic background. That said, the information we have is the information we have: so what does it tell us?

Turning first to the PC renewal survey information, a total of 1527 barristers answered the question concerning secondary schooling, a response rate of 63.2%. Of these respondents, 641 (or approximately 42%) went to a public school and 886 (or approximately 58%) went to a private school.[6] When the results are broken down according to the age bracket of respondents,

a fair degree of constancy in these percentage shares is evident, except among the younger and older age brackets. For example:

- Barristers less than 29 years (19 respondents): approximately 53% public to 47% private[7]
- Barristers 30 to 39 years (283 respondents): approximately 40% public to 60% private[8]
- Barristers 40 to 49 years (379 respondents): approximately 41% public to 59% private[9]
- Barristers 50 to 59 years (385 respondents): approximately 42% public to 58% private[10]
- Barristers 60 to 69 years (335 respondents): approximately 42% public to 58% private[11]
- Barristers 70 to 79 years (116 respondents): approximately 50% public to 50% private[12]

These results suggest that a disproportionate number of barristers at the NSW Bar attended a private school, given that, in the population at large, the enrolment share of private schools has never been more than 40% (ranging from approximately 20% in 1970 to approximately 40% in 2017).[13] A similar overrepresentation in the number of private school attendees is evident at the UK Bar. The latest data collected by the UK Bar Standards Board shows that 15.5% of UK barristers went to an independent school, compared with 7% of the population at large.[14] The Victorian Bar has not (to my knowledge) collected similar data from Victorian barristers.

The information about judges' secondary schooling presents a fairly similar picture. Using only publicly available information (mainly, as already noted, judges' swearing in speeches), the results are as follows:

Court	Public	Private	Unknown
HCA	**2** (29%)	**5** (71%)	**0** (0%)
NSWSC (incl NSWCA)	**21** (36%)	**31** (54%)	**6** (10%)
FCA	**14** (29%)	**17** (35.5%)	**17** (35%)

Again, even allowing for the relatively poor data concerning Federal Court judges, these results suggest that a disproportionate number of superior court judges attended a private school relative to the population at large.

What to make of all of this? I have already noted some of the difficulties associated with using secondary schooling as a proxy measure to assess the socio-economic background of barristers and judges. To those difficulties could be added several others. For instance, even if you accept that going to a public school rather than a private school offers meaningful information about a person's socio-economic background – and, more particularly, suggests that the person may be from a low or lower socio-economic background – that background may have been well and truly overcome by the time the person considers applying for readerships in Phillip Street. A relatively humble secondary school education may have been followed by a first class honours degree from Sydney University, an associateship with a Federal Court judge and a stint in the dispute resolution group of a top tier law firm: a person in this situation probably has few socio-economic barriers to overcome by the time he or she makes the leap to the Bar.

However, these difficulties aside, the results summarised above do show that barristers are different from the population at large in one important proxy measure of socio-economic background. This may provide some evidentiary support for the proposition that there are indeed socio-economic barriers to joining and succeeding at the Bar. (It bears mentioning that, if this is the case, the Bar is hardly alone, as a recent study of the fields of television broadcasting, accounting, architecture and acting (yes, acting) has shown.[15]) Firmer conclusions may be able to be drawn if, in future surveys of members, the Bar Association takes the same step as the UK Bar Standards Board, which surveys barristers about not only their secondary schooling, but also the level of educational attainment of their parents. But in the absence of better data, there is always anecdote, so I turn now to my two interview subjects.

Interview with Vanja Bulut, 12 Wentworth Selborne Chambers

1. *Tell us about your background and why you decided to become a barrister*

I was born in (what is now) Bosnia and Herzegovina and my family immigrated to Australia as refugees when I was nine years old. A civil war broke out in Bosnia when I was five years old, and my family was trapped in Sarajevo – a city under siege – for three years. We fled Bosnia to Serbia and then sought asylum in Canada and Australia. We were fortunate to be granted humanitarian visas by the Australian government in 1996 and the government flew my family to Darwin, and provided settlement support to us.

When we arrived, we did not speak English and literally had two suitcases which carried all our belongings. I went to local public schools in Darwin, including an Intensive English Unit within a local primary school for the first 12 months, where I learnt English. My father got a job in his field of work (as a welding inspector) within months of us arriving in Australia, but my mother could not get a job as an accountant, which was her profession, and instead retrained as a chef and worked in local restaurants during my teenage years.

After finishing high school, I moved to Sydney to study at university, graduating with an arts degree from UNSW and a law degree from the University of Sydney.

For as long as I can remember, I have been interested in advocating for others. Experiencing first-hand the horrors of war, the failed attempts of international intervention and the benefit of humanitarian programmes made me passionate about the justice system and addressing what I perceived to be injustices. In Darwin, I often saw others unable to speak for themselves, at times due to language barriers. I found myself acting as an interpreter for my parents and other

members of the community in Darwin, assisting older community members deal with various government departments and newly arrived children deal with issues at school. Being able to speak on behalf of others, who were more vulnerable than me, felt powerful. I also took part in high school debating, model United Nations and public speaking competitions.

After making the decision to study law, I knew early that I wanted to come to the Bar. I enjoyed reading decisions and I viewed litigation as being at the forefront of the law-making process. I wanted to be part of that – simply 'instructing' was never going to be enough for me.

2. *Did you face any obstacles along your journey to becoming a barrister and how did you overcome them? Have any of them persisted since becoming a barrister?*

Growing up in Darwin, and being the only person in my family to complete a university degree, let alone study law, I did not know any solicitors or barristers in Sydney. I was fortunate to obtain a summer clerkship and graduate position with Clayton Utz, and then went on to work at Seyfarth Shaw. I worked with and learned from some fantastic lawyers at these firms and this gave me both practical knowledge of the law and confidence in my skills and abilities.

However, at university, and while I was working as a solicitor, there was an information vacuum about coming to the Bar. I can remember attending a Bar Association open day for university students – this was the only platform I could find to obtain information publicly. To overcome this, I started to speak with the barristers I briefed and with whom I had formed a professional working relationship. I sought their advice and general information about coming to the Bar. One of those barristers was Yaseen Shariff, who went on to become my tutor and my mentor. Perhaps in part because his background was somewhat similar to mine, Yaseen went out of his way to explain the process and give me encouragement. He was also able to provide me with practical advice about my proposed timing of coming to the Bar, when to apply to for readership on floors, the relevant contact persons, etc.

Since coming to the Bar, the challenges and obstacles I face have changed. The Bar has a lot more work to do to reflect the true diversity of the community. And by diversity, I mean diversity of all kinds. On a regular basis, I find myself at the bar table as the only female, the only (relatively) young person, the only person from a non-English speaking background, or indeed all of those. It is tempting to seek to blend in, but there are some terrific examples of female leaders at the Bar, along with senior members of all backgrounds, whom I look up to.

One of the great things about the Bar is that, over time, you find likeminded people and you develop your own 'family' of barristers with a similar background, and others who have completely different backgrounds but who have been welcoming and giving with their time and support.

3. *Did you receive any support, assistance or encouragement along your journey to becoming a barrister? What impact did that have?*

Apart from the unconditional support of my family, I found the support and encouragement of the barristers I briefed to be invaluable.

I was also very grateful for the encouragement of my solicitor colleagues. Vice President Joe Catanzariti of the Fair Work Commission, who I reported to at Clayton Utz, offered me the opportunity (which I gladly accepted) to work for him as his first associate following his appointment to the Commission. He thought that the experience would be valuable given my aspirations – and he was right!

I was always honest with my solicitor colleagues about my aspirations of coming to the Bar. Far from the warnings some gave me that this disclosure would result in lack of promotion, I found that honesty worked to my benefit.

4. *What are the challenges facing an aspiring barrister from a non-traditional or less socially mobile background? How can they be addressed? Is there a role for the Bar Association?*

I am glad to say that some things have changed in the years since I first looked into coming to the Bar. There is more information available to the public, including more practical advice. I note that in 2017, the Bar Association issued a 'Guide to becoming a barrister in New South Wales'. I think that's a great initiative.

The Bar is a sum of its parts. The Bar can improve by ensuring it is contemporary, accessible and approachable. The Bar Association and members of the Bar should continue proactive initiatives which reach out to law students, and even high school students, to provide information about the opportunity of coming to the Bar and what a career as a barrister can bring.

This is even more important when considering students who are not from private or selective schools, or who are not from Sydney.

5. *What advice would you give to someone from a non-traditional or less socially mobile background who is seeking to come to the Bar?*

My message is simple – do not be afraid to ask questions. In my experience, staff at the Bar Association, clerks and individual barristers are approachable and eager to assist and guide you through the process.

I also add that you should look for mentors early in your career, and then become a mentor to those that come after you.

Interview with Oshie Fagir, Greenway Chambers

1. *Tell us about your background and why you decided to become a barrister.*

I was born in Saudi Arabia to a Sudanese father and Scottish-Australian mother. Skating over some detail, I was raised and schooled in Sudan, moving back here when I was 16. My mother's family migrated from the Glasgow slums to Wollongong in the 1950s and that is where I landed 50 years later.

My mother, a nurse, was effectively a single parent. I occasionally look at the Nurses Award pay rates for that period and wonder how she managed, but I did not feel deprived at the time. Quite the opposite – having lived in Sudan for the ten years prior, the ready availability of hot chips and the absence of malarial mosquitoes produced an intense sense of wellbeing.

I spent years 11 and 12 at Wollongong High and then studied law and computer science at the University of Wollongong. I practised as a solicitor for about six years, first in a small criminal law practice, then a trade union and finally a commercial law firm.

About halfway through I realised barristers got to do all the parts of the job that are worth doing.

2. *Did you face any obstacles along your journey to becoming a barrister and how did you overcome them? Have any of them persisted since becoming a barrister?*

There must be doubts about the value in this context of anecdotal evidence from a small number of practising barristers. That group is (a) statistically insignificant (b) naturally inclined to understate any struggles and (c) by definition, has not faced any insurmountable obstacles. It may also be that that the real obstacles are not readily detected by individuals—after all it is not really possible to identify opportunities not offered. A sociologist, or an aspiring barrister who didn't make it, might be better placed to explain why the profession does not reflect the diversity of the community.

In any case, I myself have not encountered any overt hostility or discrimination on ethnic or class grounds. No one ever told me, or implied to me, that I would not make it because I couldn't tell the difference between a stern pair and an openside flanker.

The main obstacle I confronted is the usual one: a lack of connections in the law and a general ignorance about the Bar. I did not know any lawyers when I graduated. Naturally that changed over my years in practice. By the time I came to the Bar I knew a handful of barristers (mainly people I had appeared against) and had some understanding of the industrial bar.

That, it turned out, was enough. The process of coming to the bar was quite painless, mainly thanks to Ingmar Taylor SC (as I explain below).

3. *Did you receive any support, assistance or encouragement along your journey to becoming a barrister? What impact did that have?*

In 2012 I appeared in an Industrial Court case against Ingmar Taylor SC (in a case we ultimately won – but we need not dwell on that). After the hearing Ingmar got in touch and asked if I had considered coming to the Bar. One thing lead to another and I ended up as a reader on Ingmar's floor the next year.

Ingmar introduced me to solicitors and clients, got me into a series of cases as his junior and generally got my practice up and running. I had the support and assistance of a number of other colleagues including Franco Corsaro SC (who is largely responsible for my commercial practice), Max Kimber SC, Arthur Moses SC, Tom Dixon, Yaseen Shariff and Dilan Mahendra.

That assistance was invaluable. It meant I was busy straight away and gave me a chance to prove myself to solicitors and build a network. It is possible I would have succeeded without it, but it would have been a longer and more difficult path.

4. *What are the challenges facing an aspiring barrister from a non-traditional or less socially mobile background? How can they be addressed? Is there a role for the Bar Association?*

Coming to the Bar is easier than succeeding at the Bar. The former requires ability but the latter both ability and opportunity. It does not matter how hard-working or brilliant a barrister is if they do not have the opportunity to prove themselves doing good work for good solicitors.

The problem of lack of connections leading to lack of opportunity can be ameliorated through the reader system. A tutor who is busy, has good work and is invested in their reader's success can make all the difference.

The Bar Association should politely indicate to potential tutors that they should only take on the role if they intend to have frequent contact with their reader, get them into cases and introduce them to people (solicitors and barristers).

5. *What advice would you give to someone from a non-traditional or less socially mobile background who is seeking to come to the Bar?*

I have three practical suggestions.

First, if you do not have connections at the Bar you need to make some. The Bar likes to think of itself as meritocratic and that is true, but only to a degree. It does not matter how brilliant or hard-working you are if you never get a chance to demonstrate your brilliance. It is not as though solicitors are monitoring the Bar Association website looking for novice barristers to brief (perhaps some are, but you do not want their work).

One of the strange and wonderful features of the Bar is that many barristers are happy to help strangers become competitors. You just need to get in front of them. Find (on Google and Austlii) and contact people working in areas that interest you. Cold call or email. If the first person is not helpful the second or third will be. Don't worry about seeming pushy. Lack of assertiveness is a reasonably common disability among those from less privileged backgrounds, and one that you should discard. (Incidentally being assertive is a skill commonly possessed by those who attend the best private schools.)

Second, you *must* choose your tutors and your floor carefully. Your tutors (have two) should be busy and should take their role as tutor seriously. Try to find out from past readers if the potential tutor introduced their readers to people and helped them find good work (there is a list of tutors and readers published each year which remains available online). Likewise you must be selective with your floor. There is no point just getting a start anywhere that will have you. You need a floor that can give work you want to do. That means it should be busy and it should be collegial.

Third, the hard truth is that there is not a great deal of 'class' mobility *within* the Bar. Stories of barristers who begin their careers running fencing disputes in the magistrates' courts and work their way up to Solicitor-General belong to a different era. It is more likely than not that you will wind up doing the same kind of work you did in your first two or three years. So think carefully at the outset about the kind of work you want to do and how you will get it.

ENDNOTES

1 The author thanks Anthony Cheshire SC, Penny Thew, Lee-May Saw, Kevin Tang, Kim Pham and Chris Winslow for their ideas and assistance in the course of preparing this article. The author especially thanks his two willing interview subjects, Vanja Bulut and Oshie Fagir.

2 See https://www.barcouncil.org.uk/careers/i-am-the-bar-social-mobility/social-mobility-advocates/.

3 ABS, *Information Paper: Measures of Socioeconomic Status* (Commonwealth of Australia, 2011) (ABS Information Paper) at pp 1 and 23.

4 See, e.g., E Bukodi and J H Goldthorpe, 'Decomposing 'social origins': the effects of parents' class, status, and education on the educational attainment of their children' (2013) 29(5) *European Sociological Review* 1024-1039.

5 ABS Information Paper, op cit, p. 24.

6 I am simplifying a bit here because a number of respondents (63) said that they were educated in more than one school system.

7 Breaking these results down further: approximately 16% public comprehensive; 37% public selective; 42% independent; 0% Catholic systemic; 5% Catholic independent.

8 Approximately 24% public comprehensive; 16% public selective; 41% independent; 7% Catholic systemic; 11% Catholic independent.

9 Approximately 34% public comprehensive; 7% public selective; 31% independent; 9% Catholic systemic; 19% Catholic independent.

10 Approximately 36% public comprehensive; 6% public selective; 26% independent; 11% Catholic systemic; 21% Catholic independent.

11 Approximately 35% public comprehensive; 7% public selective; 30% independent; 7% Catholic systemic; 21% Catholic independent.

12 Approximately 35% public comprehensive; 15% public selective; 28% independent; 5% Catholic systemic; 17% Catholic independent.

13 See, e.g., ABS, *Schools, Australia*, 2017 (Commonwealth of Australia, 2017). See also https://theconversation.com/fewer-students-are-going-to-public-secondary-schools-in-australia-79425.

14 UK Bar Standards Board, *Diversity at the Bar 2018* (2019) at pp 18-19. The UK Bar Standards Board's data derives from a survey of UK barristers conducted at the time that barristers renewed their practising certificates. Only 47% of barristers answered the question concerning secondary schooling. However, as the UK Bar Standards Board points out in its report, 'even if every barrister who did not respond had gone to a state school, the proportion of barristers who went to an independent school would be higher than the wider population'.

15 S Friedman and D Laurison, *The Class Ceiling: Why it Pays to be Privileged* (Policy Press, 2019).

Katrina Dawson Award recipients

By Lyndelle Barnett

The Katrina Dawson Award is awarded annually to one woman who has passed the NSW Bar exams and is committed to starting practice. The Award, in honour of Katrina, is intended to encourage women to start their practise as a barrister.

Josie Dempster

In May 2018 the Award was went to Josie Dempster.

Josie practises from Key Chambers in Canberra, mainly in common law and crime. Like most new barristers Josie is relishing the opportunity to learn new things and think on her feet, and welcomes challenges in new areas of the law. Josie is looking forward to expanding her practice into NSW.

Josie grew up in Moruya, a small town in NSW. Josie was the first person in her immediate family to go to university, and has always been passionate about supporting and breaking down the barriers for other young people, particularly women, and helping them to achieve their career goals.

Being a barrister wasn't always Josie's dream. Her early career goal was to be an actor on *Neighbours* however she eventually settled on law as a viable and stable career option. Being a barrister 'one day' was on Josie's radar from early on.

Josie graduated from the Australian National University with a Bachelor of Laws (Hons) in December 2014. Prior to coming to the Bar Josie worked as a solicitor at DLA Piper and at Sparke Helmore where Josie worked in the commercial insurance team. From 2016 to 2018 Josie specialised in institutional abuse.

Josie was the winner of the ACT Golden Gavel in May 2016 and will soon start tutoring the Litigation and Dispute Management course at ANU.

In deciding to make the leap to the Bar, Josie was very aware that fear (of the unknown, of failing, and of humiliation generally) can be debilitating and holds people, often women, back from achieving their goals. Josie didn't want to look back in 10 years' time and wish that she had sat the exam when she was brave enough to consider doing it.

In her application for the Award, speaking of the life and career of Katrina Dawson, Josie said:

'In many respects, I had a very different upbringing to Katrina Dawson. From what I have read about her though, we [share an] intense desire to strive for excellence, to exceed other people's expectations, to give more than we take, to be fierce and fearless, but also to be gentle. If I can achieve one-twentieth of what Katrina achieved in her short but fulfilling career, I will be immensely proud of myself.'

Left to right: Josie Dempster, Arthur Moses SC, Ashley Cameron, Claire Palmer

Ashley Cameron

Ashley Cameron is the recipient of the Award for May 2019.

Ashley will start the Bar Practice Course in May 2019 and will practise from Greenway Chambers, reading with Lucas Shipway and Melanie Cairns. Ashley intends to follow the advice given to her by the Honourable Brian Sully AM QC and maintain a general practice specialising in advocacy.

Prior to commencing her law degree in 2009, Ashley had no legal background and very little understanding of the legal profession. Ashley feels very privileged to be the first person in her family to attend university.

Ashley graduated from Western Sydney University in 2014 with a Bachelor of Laws (Hons)/Bachelor of Economics (Urban Regional Development). After working as a Tipstaff to McDougall J in the Supreme Court, Ashley commenced employment at TressCox Lawyers, now HWL Ebsworth Lawyers. Ashley is currently working as a Senior Associate with a general commercial litigation practice.

A NSW Bar Open Day proved a turning point for Ashley. When she first enrolled in her law degree, Ashley was not even sure she wanted to practise as a lawyer. Upon attending a Bar Open Day while at university Ashley describes meeting some incredible female barristers, who explained to her the role of a barrister and life at the Bar and inspired her ambition for a career at the Bar.

In her 'down time' Ashley enjoys netball, cooking, cycling and yoga, but spends most of her available time with her family.

Ashley is looking forward to the challenge the early years at the Bar can present, and working under and learning from impressive senior barristers.

Upon receiving news of the Award, Ashley paid tribute to Katrina Dawson:

'It's an honour to receive an award named after such an impressive and respected member of the NSW Bar, who had aspirations like my own. The Katrina Dawson Award is a fantastic initiative. The advancement of women at the Bar is critical to the future of the profession, and is a topic about which I am very enthusiastic.'

From Ada to Sybil: Why every woman counts

By Claire Palmer*

On Monday 4 March 2019, the Diversity Committee will present the Inaugural Sybil Morrison Lecture to mark International Women's Day 2019. Sybil Morrison (née Gibbs) was the first woman to practise at the NSW Bar. Babette Smith wrote the following of Sybil in *Bar News* in 1995:

> She was a trailblazer, a barrister of purpose and courage and intelligence, yet her name means little or nothing now. It is on no honour board. There are no legends or anecdotes among barristers about her advocacy, her personality or her eccentricity. Although of some notoriety in her own time, her impact is forgotten today.[1]

It is hoped that a lecture in Sybil's name will alleviate such institutional forgetting, both in relation to Sybil as well as other pioneering barristers whose stories are rarely told.

Sybil was born on 18 August 1895. Her father, Charles Gibbs, was a Victorian-born pastoralist, and her mother Alexandra (née Munro) was from Parramatta.[2] Sybil had the benefit of being educated at two schools with strongly progressive views on women's education. She first attended Shirley School on Edgecliff Road, Sydney. Shirley had been established in 1900 by Margaret Emily Hodge and Harriet Christina Newcomb, who were both involved in early suffrage movements. Hodge and Newcomb aimed to 'give the pupils an education which shall develop individual power.'[3] From 1910 to 1912, Sybil attended Presbyterian Ladies College, Croydon, which had an excellent reputation for encouraging young women to undertake university study.[4]

Sybil lived as a resident at Women's College while completing her legal studies at the University of Sydney. She graduated with her LLB in 1924. Perhaps hinting at an adventurous side, Sybil interrupted her studies in 1923 to travel to Britain. On 1 October 1923, she married Charles Carlisle Morrison in London, whose occupation on the marriage certificate is noted as 'ranch owner'.[5] Sybil appears to have agreed to marry Charles on the condition that she be allowed to finish her law degree and practise at the NSW bar.[6]

Sybil's admission to the bar was only possible in 1924 due to the enactment of the *Women's Legal Status Act 1918* (NSW) six years earlier. That Act provided that a person shall not 'by reason of sex' be prevented from being admitted to practice as a barrister or solicitor. This legislative reform was the result of a hard-fought campaign by women's advocates over the best part of two decades. Among them was Ada Evans, who had graduated in 1902 as Australia's first female LLB graduate and was finally admitted to the NSW Bar in 1921. However, due to the length of time since her graduation, ongoing family commitments and health concerns, Ada never practised.[7]

A press report covering Sybil's admission in 1924 described Chief Justice William Cullen as being 'in quite a twitter' at the prospect of a woman barrister. One journalist suggested that the Chief Justice was so discombobulated that he stumbled over his words:

> There before him in the body of the court stood a demure little figure with the usual black gown and little white bib. But despite the disguise, it could not look anything but girlish. Sir William Cullen was obviously very conscious of the fact – the well-worn phrases preceding the admission absolutely would not trip readily off his tongue…[8]

Sybil's first brief came from David Hall, who as Attorney-General had shepherded the Women's Legal Status Bill through Parliament.[9] On 20 December 1924, the *Sydney Morning Herald* reported that Sybil had appeared in her first case on behalf of a widow plaintiff in a claim under the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW). The newspaper noted that 'the matter was allowed to stand over for the filing of further affidavits.'[10]

Sybil was also briefed at times by her 'sisters-in-law' Christian Jollie Smith and Marie Byles, who were both admitted as solicitors in 1924.[11] In these cases, the appearance of a woman counsel briefed by a woman solicitor regularly generated press attention. One newspaper clipping commented that 'the spectacle of a lady barrister, instructed by a lady solicitor appearing in the Divorce Court is rather

unusual."[12] On another occasion, the *Daily Guardian* observed that 'Two Portias will make a magistrate blink at the Water Police Court this morning'.[13]

In many respects, Sybil was treated by the press as somewhat of a celebrity during the years she practised at the bar. In 1925, the *Daily Telegraph* wrote:

> Quite the coolest looking figure in the city yesterday was Mrs Sybil Morrison, our clever barrister. Walking to her chambers in Phillip Street, she looked charming in a fluffy frock of the finest blonde lace and chiffon. Her wide brimmed hat was of blue balibuntal which matched her sparkling eyes. The whole ensemble contradicted the theory that a clever varsity graduate should be a blue-stocking.[14]

Although admiring of her achievements, the press coverage of the time illustrates that Sybil faced constant and relentless pressure to prove her femininity.[15] According to the *Brisbane Daily Mail*, Sybil was 'stitching busily during the interview which was evidence that her studies and professions had not supplanted her womanly attributes."[16] The *Evening News* similarly wrote that Sybil 'was engaged in the feminine occupation of embroidering a supper cloth…Anyone more unlike the conventional idea of a stern advocate in court of justice, it would be hard to imagine."[17]

The attention that Sybil received from the press also belied the very significant practical challenges that she faced in establishing her practice in NSW. It is telling that Sybil's first intention upon admission was to practise in equity, yet she found more work representing other women and appearing in the Divorce and Children's Court. Almost certainly Sybil did not have sufficient work, and this was perhaps one of the reasons that she sought admission to Middle Temple, London in 1930. She did not establish long-term practice there.[18]

Finally, although there is insufficient information upon which to base any firm conclusion, one wonders whether Sybil ultimately found practising as a barrister to be incompatible with marriage. She divorced Charles in 1928 and remarried, to architect Carlyle Greenwell in 1937. After her second marriage, Sybil was no longer listed as a practising barrister.[19]

Fortunately, Sybil had her own money, and did not need to depend on the practice to sustain her. She was fashionable, interested in art, and had many friends across literary and artistic circles.[20] Even after she stopped practising, Sybil remained prominent in various women's groups, including the organisation that would become the Business and Professional Women's Club of Sydney.[21]

Ultimately, the significance of Sybil's contribution lies in the fact that once the *Women's Legal Status Act 1918* had been enacted, progress relied on individual women willing to take on both the glory and the challenges of being forerunners in the law, as well as in the broader community. Sybil took on this role with both courage and flair, although perhaps not without significant personal sacrifice. Joan O'Brien has quipped that Sybil's experience in the law is best summarised in *The Sun*'s report of her invitation to the Governor's levee in 1925:

> All members of the higher legal profession are 'gentlemen' by Act of Parliament. And all ladies too. Mrs S. Morrison B.A. LLB, barrister at law, is today a 'gentleman' for the purpose of the Governor-General's levee. She received a communication addressed: Mrs Sybil Morrison BA LLB Esq.[22]

ENDNOTES

* Claire Palmer LLB (Hons I) B.Comm (Hons I) (Syd), M.Phil, D.Phil. (Oxon), Barrister, Sixth Floor Selborne Wentworth Chambers.

1 Babette Smith (1995), 'A Lady of Law', *NSW Bar News*, pp.39-40 at p.39. Available at https://www.nswbar.asn.au/the-bar-association/pioneering-women/content/pdfs/2_Sybil_morrison/Sybil%20Morrison%20Bar%20News%20article.pdf (accessed on 28 February 2019).

2 Joan M. O'Brien (1986), 'Morrison, Sybil Enid (1895–1961)' *Australian Dictionary of Biography*. Available at: http://adb.anu.edu.au/biography/morrison-Sybil-enid-7664 (accessed on 28 February 2019).

3 Margaret Bettison (2005), 'Hodge, Margaret Emily (1858–1938)' *Australian Dictionary of Biography*, Available at: http://adb.anu.edu.au/biography/hodge-margaret-emily-12985 (accessed on 28 February 2019).

4 Joan M. O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', Thesis submitted to the University of Sydney (Department of History) at p.21., Available at: https://womenlawyersnsw.org.au/wp-content/uploads/History-of-Women-in-Legal-Profession.pdf (accessed on 27 February 2019).

5 O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', p.29.

6 Smith (1995), 'A Lady of Law', p.40.

7 Joan M. O'Brien (1981), 'Evans, Ada Emily (1872–1947),' *Australian Dictionary of Biography*. Available at: http://adb.anu.edu.au/biography/evans-ada-emily-6118 (accessed 28 February 2019).

8 Quoted in Smith (1995), 'A Lady of Law', p.39.

9 O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', p.29.

10 'Lady Barrister', *Sydney Morning Herald*, 20 December 1924, p.12.

11 O'Brien (1986), 'Morrison, Sybil Enid (1895–1961)'.

12 'Woman in the Case', *Capricornian* (Rockhampton), 20 November 1926, p.8.

13 *Daily Guardian*, 25 February 1926 quoted in O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', p.30.

14 Quoted in Smith (1995), 'A Lady of Law', p.39.

15 Smith (1995), 'A Lady of Law', p.39.

16 Quoted in Smith (1995), 'A Lady of Law', p.39.

17 Quoted in Smith (1995), 'A Lady of Law', p.40.

18 O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', pp.29-30.

19 Smith (1995), 'A Lady of Law', p.40; O'Brien (1986), 'Morrison, Sybil Enid (1895–1961)'.

20 O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', p.30.

21 O'Brien (1986), 'Morrison, Sybil Enid (1895–1961)'.

22 O'Brien (1986), 'A History of Women in the Legal Profession in New South Wales', pp.30-31.

The Hon Margaret Beazley AO QC

The following is an edited transcript of an interview conducted by Victoria Brigden with the former President of the NSW Court of Appeal and governor-designate, the Hon. Margaret Beazley AO QC

What first attracted you to the law, and then to the Bar?

I didn't decide to do law until right at the end of year 12. Not many women did law in those days, so it wasn't an obvious career path. But I was certain that I would go to university, again not an automatic assumption for females at that time and certainly not an automatic assumption given my socio-economic background. And the principal choices in those days for women who wanted to do tertiary education were teaching or nursing – and I didn't want to do either.

The way I have made decisions throughout my career seems to have been fairly consistent. Essentially, when I decide to do something, I do it. But my thinking process is always to think of various options, work out the down sides and what choices I would have if my decision didn't turn out to be right. I am not sure where or why I developed that habit of decision making but it seems to have worked!

My first decision came in Year 11 when I had a timetable clash between what were then called first levels in English/History and Maths/Science, so I had to choose between those two streams. I decided to maintain first levels in English and History and had to drop a level in Maths and Science to fit my timetable. These days there are very good reasons to see Science and Maths as an important adjunct to law. However, in having to make that choice that early I realised that I was drawn to the humanities. My only other thinking at that time was to do medicine. The view I took was that if I did decide on medicine I could always do a bridging course over summer to get me the right maths and science qualifications to get into medicine. It never really occurred to me that I couldn't do what I chose to do – including that I would have the marks for the courses I was considering!

I was also doing first level French and Economics, but my thinking was: 'What do you do with economics as a career?' I didn't want to be a banker. And as I have said I didn't want to teach. In putting all those factors together, I was eliminating things that didn't have a pull for me.

That said, I always liked debating, but I didn't have a fancy education. In junior high school we didn't have debating, so I didn't

start debating until the last two years of high school but once I started – there was just no doubt that I loved working out the best argument to put forward and which was the best way to attack the argument on the other side.

Once I decided to do law, my only thought was to go to the Bar. Which I did almost immediately. I was 23. I didn't really contemplate being a solicitor.

Is that because there weren't as many solicitors then or the firms weren't as big, so it wasn't as common a desired career path then for law students as it is now?

No, I just think I saw myself as going to the Bar. Having decided to do law, it just seemed to me to be the obvious thing for me to go to the Bar. And as it turned out, it was the right decision. On the way through law school the only other career I seriously thought about was a diplomatic career. I did apply for and was offered a position in what was is now ASIC. However, by then I had decided to go to the Bar so I turned down that job.

Once you started studying law, did you enjoy it?

It was just always the right decision. I did straight law which was a four year course. I would have done Economics/ Law, had that been available, but the only combined course available was Arts/ Law. It was a six year course, and when I was starting to think about it, I talked to my teacher, Sister Jude, (Associate Professor Patricia Malone) and she said, 'Margaret, I know you, you'll get halfway through this six year course and you'll be thinking, if I'd done that straight law course, I'd be done'. She was smart, and she really knew her students, so I opted for straight law. But of course when I started first year law, I was in a cohort of people who were in their third year of university, and I was very green.

I loved the commercial law subjects, I loved tax and loved equity. It's interesting to reflect on what attracts you to a particular aspect of the discipline you study – but they were subjects that I really liked. Having said that, there was no subject I didn't really like.

Did you take to the Bar quite quickly? What did you particularly love about your time as a barrister?

Yes, I did. It is great winning cases! I loved the jousting aspect of it: not only working out how to construct your own case but how to undermine your opponent's case! You're not always going to win cases, but sometimes you can lose cases well, and that can be as important. When you know the chances are that you are not on a winner, there can still be a significant difference between a particular order being made against your client as opposed to some different order. So the way you lose is important. Or success, if acting for a defendant, could mean a lower verdict than was being sought by the other side. I always considered it to be imperative to advise the client of what the possible outcomes of the case were likely to be so as to assist the client to decide whether the downsides of running the case were worth it.

Most barristers would agree that it's great when you win, but not so great when you lose. Did that perspective you've just described of losing cases well allow you to help process your losses, in the sense of thinking that things could have been worse?

I just think that if you do not lose as badly as you could have, you've actually had a victory. If you've advised your client 'you will not win this case', or advise on the worst likely outcome, I think you've done the right thing.

Different barristers enjoy different aspects of life at the Bar – some love the collegiality and being around other barristers, others love the thrill of argument. Is there a particular aspect

of life at the Bar which stood out for you?

I did love the thrill of the argument. When I came to the Bar, I could probably count about six women who were actively practising, and they were in different chambers, so there weren't the women around with whom to build up deep friendships and the women who were at the Bar at that time were at least 20 years older than me. There was certainly collegiality on the floor, mostly around Friday night drinks. However, the collegiality was very male-dominated. Once I had a family that made it much more difficult to engage in that aspect of the life of the Bar. Certainly I had very good friends at the Bar who were men, in fact most of my friends at the bar were male, because that's who was there.

You go on to floors now and feel a different collegiality. Lots of floors to which I applied refused to consider me for chambers because I was female and that attitude dominated the 'feel' of those chambers.

Purely because you were a woman?

Only because I was a woman.

I would make the application and they would tell me to my face that they would not have women on the floor and that if I wanted to be at the Bar, I should go round to Frederick Jordan Chambers where there were a couple of women who did family law, and that is what I should do. I was told that in explicit terms on more floors than I would like to name.

The thing that most annoyed me (and this is really the story of the red pant suit recounted at my retirement ceremony – and I did not imagine that that story would take off in the way that it has), but the point of the story is that there were so many male barristers who thought that they had the right to tell me what my role was, what type of law I should and only could do, where I should have my chambers, so long as it wasn't their floor. So the red pant suit story was my personal, if somewhat colourful protest against the discrimination that women encountered in those days – against people who told me what I should do, how I should act, what I should wear, rather than seeking to find out what I was capable of doing.

When you look back at your time as a judge, on the Federal Court and then on the Court of Appeal, is there anything about being a judge which surprised you compared with your expectations before you became a judge?

Becoming a judge wasn't an easy decision for me to make, because I was quite young, and I'd only been a silk for three years, but I did have three children and I was getting busier. My decision was essentially a choice for a more structured life to make things easier with the children. I had the six week Christmas break and four weeks' variable leave which really helped with organising life around school terms. It didn't mean that I didn't work late into the night, after reading to the kids. I have read every Roald Dahl book ever published.

Hopefully there were fewer phone calls and disruptions outside work. Although being a judge involves a heavy workload, were there fewer unexpected intrusions and contact with people than at the Bar?

Yes, but if you're in court a lot, that time's taken up anyway. I took the view, although it was still quite rare, that if judicial office didn't suit me I could just leave in six months, and hopefully go back to the Bar. But once I started, I felt that judicial office was right for me. I really loved it. So again, it was part of the decision-making process that I described earlier. Run with your decisions but if they don't work out do something about it. I got a lot of satisfaction out of being in court and in writing judgments. It's a significant intellectual exercise.

Did you find your time as a judge more collegiate than at the Bar, because certainly by the end, there were many more women, or was it just different from the Bar?

It was different. There were no other women in the Federal Court when I started and it was ten years before there was another woman on the Court of Appeal. That's a long time, and then for a long time there were only two of us. The Court has become a lot more collegiate over the years for many reasons. One reason was that Chief Justice Gleeson decided for the first time to hold the court conference away from the court precincts. That was a small innovation but it meant judges were mixing with each other in a professional and social milieu which was more relaxed and the Divisions and the Court of Appeal were mixing. Gradually the appointment of more women and more judges who had young families also created a different, more collegiate atmosphere. Over the years, that collegiate atmosphere has built under the three chief justices and under the Presidents and the court as I know it now is a really collegiate place.

What significant changes in the Bar have you noticed over time that have changed the way barristers have practised?

One of the biggest changes is the use of technology, particularly barristers appearing in court with submissions and documents on their iPads. I don't know that it's changed either the presentation or has resulted in significantly better advocacy. But it is a difference.

What has assisted in much better advocacy from my perspective, is that barristers have learned how to write a good set of 20 page submissions, at the appellate level, and then how to speak to those submissions. I think, overall, that this has led to an improvement in oral advocacy. It may also be that there is now more advocacy training when you start at the Bar, which we didn't have. There are also advocacy courses available right through one's time at the Bar. So there does seem to be a cumulative effect, overall, of significantly better advocacy.

Do you think that's because having to prepare written submissions weeks or months in advance focusses the mind and forces one to reduce one's argument concisely down on paper and then develop that orally?

That's my perception, and it's quite a strong perception. One of the reasons we had to introduce the page limit on written submissions in the Court of Appeal was that we

were getting submissions running to 80 or 90 pages. You can't advance a succinct argument in 80 or 90 pages. It was quite obvious that a lot of these were 'stream of consciousness' submissions, probably dictated reasonably late at night, and it was a nightmare to have to read them. They were not concise, and you wouldn't necessarily know what point was being made at what point of the submissions. There would be long slabs of quotations from cases, where it would have been much better just to cite the case and extract a few lines or passages to demonstrate the legal principle. When it's just a rabble of 80 or 90 pages, the submission totally loses its effectiveness.

The limit on the length of written submission makes the advocate really think about what points need to be made and how those points actually link to their grounds of appeal. And, of course, the grounds of appeal have to link back to the judgment. Finally, there has to be a link back to the pleadings. So written submissions directed to the issues constructed in the way I have described provides a more cohesive approach to advocacy. Those who get it, get it really well. I think also that younger barristers have done a lot more mooting than was hitherto the case and there is a lot more assignment writing at university with word limits. My feeling is that there's an entire lift in the quality of presentation that is needed for good advocacy: a lift in the quality of writing, in confidence in speaking, and in the ability to see the point to be made and in the ability to make the point.

Returning to what you said earlier about the use of technology and iPads, I think some people's fear of relying on them too much is that they fail. Have you had much experience of people using technology such as iPads in court before you and it's clear that it's failing when they're on their feet?

No, and I think the reason we haven't seen that is that there are not sufficient numbers of barristers who use them in court yet. It's going to be interesting so see how it will develop. Almost invariably when you see someone presenting a case from paper, they will have their written notes, either handwritten or typed. You'll see them drawing lines through them when they've covered their point, and when they're reviewing whether they've covered everything, they go back and they check it. You'll see them sitting there working out whether or not they need to reply to something. That's not as easy with an iPad. You can write on it, but I don't find that easy, and I don't find the scrolling function easy. When I use iPads, where possible I use the turning-page function and I find that much easier, but maybe that's my reading memory – how I've learned to think and operate.

We increasingly took iPads onto the Bench, and could look up cases ourselves, although I always found it easier to ask the tipstaff to do that for me rather than bringing the case up for myself. I was more intent on concentrating on the argument and you could miss something if you were trying to bring up a case.

Is there anything you wish that junior barristers would do differently, or that they understood better about their role in the court and their participation in the administration of justice?

Your role in the administration of justice is very important, and I consider that should always be at the forefront of one's mind. But at the end of the day, you're in there for a client, and that's what your job is, to do the best job that you can for your client. You can't resile from that for some perceived greater good, but the rules that govern barristers are all directed to assisting the administration of justice: by requiring honest submissions, in alerting the court to authorities to the contrary, and not being sneaky about the way you put your submissions. That is all very important. It doesn't mean there aren't hard tactical decisions that you are entitled to make, and you're not going to be a great barrister if you don't know the tactical aspects of your case as much as the legal aspects. That's all part of it. I don't resile from that, but I think underneath all of that, there's got to be honesty and integrity in the way that you perform that role. I do think barristers need to really, really understand that.

I did mean what I said in my retirement ceremony about aggressive conduct. We judges hear a lot of stories about aggressive conduct. I'm told it occurs more frequently in the District Court, and more frequently, apparently by solicitors rather than barristers, who are said to write to, email or telephone the District Court judges and I'm told the rudeness can on occasions be quite extraordinary.

Before we got the profession understanding our practice notes well, and the requirement to file not only written submissions but lists of authorities, there used to be a lot of passive aggression directed at the tipstaves by barristers over the phone. If ever I picked up that was happening I would just take the phone from the tipstaff and say to the barrister: 'do you have a problem?'

Interestingly, when we developed the system that allowed the list of authorities to be filed electronically, a lot of that aggression just stopped. Not only that, we were getting the list of authorities before time in a significant number of cases. It was interesting that it took such a small tweak to have things being done properly.

It's clear from your speech in your retirement ceremony yesterday that you consider that there's still more work to be done in terms of increasing the participation of women at the Bar. Do you have any ideas about ways of managing that, or what the top priorities should be going forward? Do you consider that change will happen organically as more and more women come to the bar, and take silk?

I think a lot of it is organic, but I'm surprised that we're still talking about it. We should not be still talking about this. Change has been extraordinarily slow, and I think that's quite a problem. I have been told that there has been a problem with the reluctance of female students in their early years of law school to engage in mooting, so some women law students set up a female mooting competition at Sydney University. There is also a national female mooting competition and

both of those initiatives seem to have been very successful in promoting and supporting the female students to have the confidence to moot.

I have had heard some say: 'Isn't the aim to have women being part of the bigger game?' But what I'm hearing from the students and the young lawyers who have become involved is that they find, for some reason, that these female mooting competitions have given women the opportunity to start to moot, and to get their confidence up so that they can go into the mixed mooting competitions. So far as I know there are no male mooting competitions, but there seemed to be a sense that there were a sufficient number of female students who didn't feel confident enough at the outset to engage in the mixed competitions, for something to be done about it. And when the women do moot, they do as brilliantly as the men.

I think that things like female mooting competitions are therefore worth supporting – just to get that cohort of students who aren't comfortable on their feet, mooting, learning how to argue, to prepare them for life in the profession, whether that be at the Bar or not. However, as I have said I do find it interesting that we are still talking, in 2019, of a need for initiatives such as this.

Whenever I have been involved in the female mentoring programmes, my philosophy about it is, as I tell the young mentees: 'The whole purpose of this is for you to feel that there is a person that you can relate to, speak to if you have any problems, so that you can then better integrate into the profession. It's not about keeping you separate. It's about giving you the wherewithal to integrate'. Some people need it, some people don't. It is apparently very competitive to get into these mentoring programmes. You have to make an application, and not everyone is accepted. This could all be part of the general competitiveness of the profession. I've not given a lot of thought to that, but it's not about keeping people apart.

Have you observed that female advocates appearing before you in court were less confident than male advocates, or is it too hard to say when one considers differences in seniority?

I don't think women are less confident, I wouldn't say that. You get such a range of styles of advocacy anyway. The worst style of advocate is the over-confident one, or the over-stylistic advocate. You can sometimes think they've been to advocacy school, and they've learnt to make the hand gestures. I suppose it's better that poor speakers are turned into good speakers, with a structure as to how to advance an argument, but there has to be a naturalness to advocacy. When I judge moots and when I talk to students about mooting, I tell them it is much better to have a conversational style. There are always tricks and traps. The trap is over-familiarity. The trick is the confident, persuasive, conversational style that engages the judge. You learn a lot of that on your feet but good advocacy training should enable the young advocate to develop a style which is natural to the individual advocate.

What are you most looking forward to in your upcoming role as Governor?

That's a hard question. I know what I'm not looking forward to! I don't want the role to be superficial. As I'm hearing what the other governors are doing, they seem to have been very adept at making the role of governor a significant, engaged role that operates at all levels of the community. I'll be very interested to learn and absorb more. There was one comment in one of the newspapers about the role which said that it's mainly ceremonial. I would doubt whether any of the governors would agree with that. It has ceremonial significance and there are important ceremonial functions, but it is what lies behind the ceremony which is significant. There is an underlying community aspect which needs to be understood and demonstrated.

It seems that the role involves a lot of hard work and a lot of meeting people.

Again, that will be part of the challenge, to make sure that meeting people isn't superficial. That's different from saying that I will go into the role to make best friends with the people I'm meeting, but I consider it important to look at what the particular organisation is doing, whether it be scientific, medical, educational, cultural or part of the many not-for-profit initiatives in our community and to get an understanding of that. What I do with that is going to be part of my learning curve.

What do you think you'll miss about being a judge?

All the judges! The wonderful collegiate court that we now have, having spoken about how hard it was with a lack of collegiality at the beginning. One of my daughters said to me, 'Gosh, I thought we were going to have to prise you out of there!' so I suppose it was just so much a part of what I did. Now I have to create something new for myself and that's exciting and challenging.

Every day as a barrister and a judge there is an intellectual engagement with the case and I don't know that that will be a feature of all aspects of the life as a governor, so that in itself will be a challenge. I've had the privilege of spending some time with the present governor, David Hurley, who has been very generous with his time and in his support. There is no way that he would think his role is superficial and he has built a strong base that I am sure will be of huge assistance to me as I take on the role. And as Marie Bashir has said to me, there is no greater honour than being able to serve your community. So I believe that there is much that can be done which will have significance. And as I have indicated, I see community as operating at all levels of society.

It's very exciting, and we wish you all the best in the role.

Thank you.

The New South Wales Bar Indigenous Law Students Clerkship 2019

L to R: Marlikka Perdrisat, Courtney Straney, the Hon T. Bathurst (Chief Justice of the Supreme Court of New South Wales), The Hon John Pascoe AC CVO (Chief Justice of the Federal Court of Australia), Bridget Cama, Michael McHugh SC

L to R: Bridget Cama, Courtney Straney and Marlikka Perdrisat

The New South Wales Bar Indigenous Law Students Clerkship 2019 occurred over a period of three weeks in February with the participation of the Federal Court of Australia, the Supreme Court of New South Wales and the District Court of New South Wales.

The three female Indigenous Clerks, Ms Courtney Straney, Ms Bridget Cama and Ms Marlikka Perdrisat were given the opportunity to rotate between the NSW Bar and the three participating Courts within the three-week period.

While at the Bar, the clerks were placed with barristers who allowed them to attend client conferences and Court.

The clerks also had the opportunity to be placed in Judge's Chambers and the Registry of the courts to observe the work of Judges, associates and court staff.

The New South Wales Bar Association would like to extend its thanks to the Federal Court of Australia, the Supreme Court of New South Wales and the District Court of New South Wales as well as Forbes Chambers for allowing the clerks to observe the work of courts and advocates.

Bench and Bar lunch

On Tuesday, 5 March 2019, No.10 Bistro was the venue for the year's first Bench and Bar Lunch. It was a full house, as 75 members of the New South Wales Bar, together with several judges from the Family Court, Federal Court, Supreme Court and the District Court enjoyed excellent food and punctual service on a beautiful Sydney afternoon.

Those with a seat on the balcony were especially lucky. If you haven't already done so, enjoying a Bench and Bar Lunch is an ideal introduction to the collegiality of the NSW Bar. Bench and Bar Lunches are an initiative of the Bar Association's Wellbeing Committee and proudly sponsored by BarCover.

Commencement of Law Term ceremonies 2019

A photographic essay by Mark Maconachie

Introduction

The 2019 Law Term commenced on 29 January 2019. To mark the occasion religious ceremonies were held at St Mary's Cathedral, St James' Church, the Great Synagogue, the Auburn Gallipoli Mosque, the Pan Orthodox Cathedral of the Annunciation, and St Patrick's Cathedral, which celebrated the inaugural Red Mass at Parramatta. With the exception of the Pan Orthodox and Parramatta celebrations, each of those events was photographed for *Bar News*. Unfortunately schedules for the Pan Orthodox and Red Mass Parramatta ceremonies became known too late for arrangements to be made to record those events.

Red Mass – St Mary's Cathedral, Sydney

The Red Mass was held early on the morning of 29 January, presided over by the Most Reverend Anthony Randazzo, Auxiliary Bishop of Sydney. Mass was sung by Capella Sublima, the lay clerks of the choir of St John's College, under the direction of Richard Perrignon. The organ was played by Mr Thomas Wilson.

The Red Mass takes its name from the red vestments worn by the celebrant, which symbolise the flames that descended upon the apostles at Pentecost, causing them to speak the languages of all the nations under heaven. The name also references the scarlet robes of the royal judges attending the Mass in the early 14th century in England. The tradition continues today, with a Red Mass being celebrated annually at Westminster Cathedral. A Red Mass has been celebrated at St Mary's Cathedral in Sydney each year since 1931, and is organised by the St Thomas More Society – a guild of lawyers with the purpose of extending within the legal profession the highest ideals of culture and morality.

New South Wales judges and magistrates, Federal judges, the Attorney General of New South Wales, other members of Parliament, and members of the Bar robed in the crypt below the cathedral. They followed the Chief Justice of New South Wales in procession up the spiral staircase and into the body of the cathedral. The legal procession met up with the procession of clergy, led by Bishop Randazzo, and was led down the aisle following the clergy.

St Mary's Cathedral Red Mass

A homily given by Bishop Randazzo emphasised the grave responsibilities upon those who make and administer the law. The homily also reflected upon Christian notions of repentance and forgiveness. Bishop Randazzo spoke of how the good must strive to maintain their good conduct and not rely on past good conduct to justify wrong. He also stressed that the wicked may be forgiven upon repenting.

Prayers were offered for members of Parliament to work diligently and honestly, for judicial officers to dispense justice with integrity, and for lawyers to act always with

upright conscience.

Following communion the clergy led the legal procession out of the cathedral and morning tea was served.

Thanks to Father Don Richardson, Dean of St Mary's Cathedral, for permission to photograph the Red Mass, and to Mr Michael McCauley of the Bar, President of the St Thomas More Society, for arranging access to photograph the Red Mass.

St James Church, Queens Square

Shortly after the conclusion of the St Mary's ceremony, the bells of St James' church rang out inviting attendance to the Anglican ceremony at the oldest church in Sydney.

The Chief Justice's Procession, again in ceremonial robes, led the Archbishop's Procession into the Church.

The St James' ceremony was presided over by the Most Reverend Dr Glenn Davies, Anglican Archbishop of Sydney. Hymns were led by the Bar Choir, conducted by the Honourable Peter Hidden AM, a former judge of the Supreme Court of New South Wales. The organist was Mr Alistair Nelson.

There were readings by the President of the Law Society of New South Wales, Ms Elizabeth Espinosa, and the then Senior Vice-President of the Bar Association, Mr Andrew Bell SC (as his Honour, the President of the Court of Appeal, then was).

Archbishop Davies gave a sermon considering chapter 33 of the Book of Ezekiel, and the reception of the idea of personal responsibility for one's own actions over the Israelites' earlier notion of corporate or collective responsibility. He explained that the earlier idea of collective responsibility had led to the Israelites being cast out of the Promised Land for the sins of their ancestors. The Archbishop reflected on the importance of personal responsibility in both the Christian tradition and the common law legal tradition, and echoed some of the sentiments considered by Bishop Randazzo in respect of the good not hiding behind past deeds to justify later wrongs.

Prayers were offered by the Reverend Dr Paul Logan OAM, the Honourable Justice Margaret Beazley AO (as her Excellency the Governor-Designate for New South Wales then was), the Honourable Justice Derek Price AM, Chief Judge of the District Court of New South Wales, his Honour Judge Graeme Henson AM, Chief Magistrate of New South Wales, Mr Gregory Burton SC and others.

St. James' Church, at the opening of the law term service

At the conclusion of the service the Archbishop's Procession led the Chief Justice's Procession from the Church, and members of the profession gathered with members of Parliament and members of the clergy in the foregrounds of the church on a beautiful Sydney morning.

Thanks to Reverend Andrew Sempell for granting permission to photograph the Anglican service, and to Mr Tony Papado-

polous, Facilities Manager at St James', who provided access to photograph the service, including a tour of the St James' bell tower (while not in use).

The Great Synagogue, Sydney

On the evening of 6 February Rabbi Dr Benjamin Elton, Chief Minister of the Great Synagogue, Reverend Joshua Weinberger, Cantor of the Great Synagogue, and the choir of the Great Synagogue conducted by Mr Justin Green, officiated over the Jewish service to mark the commencement of the 2019 Law Term. In attendance were the Chief Justice of New South Wales, the Chief Justice of the Federal Court of Australia, the Attorney General for New South Wales, members of Parliament from all sides of politics, as well as leaders and members of the legal profession, and the local congregation. The foundation stone of the Great Synagogue having been laid in 1878, this ceremony was held in the Synagogue's 140th year. Ceremonies to mark the commencement of the Law Term have been held here since the end of the Second World War.

Members of the judiciary and of the Bar gathered prior to the ceremony to enjoy refreshments and to robe in the Sukkah – an upstairs room with a sliding roof which opens to celebrate the tabernacle, or harvest, festival. Bathurst CJ then led them downstairs in procession.

The Honourable Justice Stephen Rothman AM, President of the Great Synagogue, welcomed the congregation. Readings and prayers were given by distinguished guests, before the Torah Scrolls were removed from the Ark and carried around the Synagogue. At the conclusion of their journey around the room, the Ark was opened by the Honourable Justice David Hammerschlag, for the Torah Scrolls to be returned.

Rabbi Elton gave a moving address, in which he remarked about the Jewish Community being in a privileged 'inside' position in Australian society. This is especially so, he said, in contrast to that of other minorities, such as the Indigenous peoples of Australia. He remarked that this privileged position gives the Jewish community a great insight into the plight of such other minorities who have not always been included, and who suffer as a result. That position also gives the Jewish community an opportunity to help other disadvantaged minorities to transcend that disadvantage, the Rabbi said.

The Great Synagogue, commencement of 2019 law term service

Rabbi Elton spoke of Jews elsewhere often having been excluded from mainstream legal and dispute resolution regimes until the nineteenth century, and observed that as a result Jewish communities often had their own legal and dispute resolution regimes. He observed, however, that in Jewish culture it was always the case that 'the law of the land is the law'.

The Rabbi also observed that Australia is one of only two countries in the world to have had Jewish vice regal representation, head of the judiciary, head of the executive and head of the military.

Following the ceremony refreshments were served and the officials, the judiciary, members of the Bar and the local congregation socialised in the auditorium beneath the Synagogue.

Thanks to his Honour Justice Rothman for

granting permission to photograph the Jewish service, and to Ms Ilana Moddel, of the Synagogue's administration team, for providing an advance tour of the Synagogue and access to photographing the service.

The Auburn Gallipoli Mosque

On the evening of 7 February the Chief Justice of New South Wales and the then President of the Court of Appeal joined with other judges of the State and Federal Superior Courts, the District and Local Courts of New South Wales, members of the profession and of Parliament, and the local Mosque community for an Islamic ceremony to celebrate the opening of the 2019 Law Term.

The event was organised and hosted by the Muslim Legal Network (MLN) in conjunction with the Auburn Mosque Committee. The MLN is a peak professional association representing Australian Muslim legal practitioners and their communities since 2009. Its three core focus areas are advocacy for the Muslim community, legal education, and networking. An Islamic ceremony to mark the opening of the law term has been organised by the MLN each year over the past decade.

The Auburn Gallipoli Mosque is a stunning example of Ottoman style architecture, based upon the famous Marmara University Faculty of Theology Mosque in Istanbul. Its carpet, featuring congregational prayer formation pattern, as well as much of its decorative masonry and brightly coloured windows, were crafted by specially commissioned artisans in Turkey.

Beneath a glorious sunset the congregation enjoyed refreshments in a palm tree lined southern courtyard, before removing shoes and forwarding into the Mosque for the ceremony. The Islamic ceremony departed from the pageantry of ceremonial robes featured in the Christian and Jewish ceremonies, in favour of modest and formal attire. The congregation gathered in an intimate semi-circular formation, and in a break from tradition were provided with seating in order to accommodate guests unaccustomed to the Islamic tradition of sitting and praying on the floor.

Islamic ceremony to celebrate the opening of the 2019 law term

The congregation addressed by Mr Kamran Khalid, Co Vice-President of the MLN, who welcomed distinguished guests and discussed the MLN's work in the law and in the community. A visiting Imam then spoke of the relationship between Islam and the law. He told of the reception of the Sharia by the Prophet Mohammad directly from Allah. He explained that Sharia had shifting meanings, and is often interpreted as 'the way', 'the path' or 'the path to water'. It was explained that because Mohammad was illiterate and alone when he received instruction from Allah, Muslims have always understood that his teachings could only have been delivered to him directly by Allah and are beyond question.

As it happens the approximate direction of Mecca lies to the west of the Auburn Gallipoli Mosque. As such, and given the time of day, late afternoon sun streamed into the Mosque as the ceremony progressed. Ever shifting beams of light created patterns on the intricate design of the carpet, illuminated the otherwise unlit chandeliers, and cast stunning patterns on the wall from the coloured windows of the high domes above.

Following the formalities the congregation socialised over a light meal and refreshments in a covered northern courtyard as sunset gave way to evening.

Thanks to Mr Bilal Rauf of the Bar for making arrangements to photograph the Islamic ceremony, and to Mr Kamran Khalid and Mr Aziz Abbas of the MLN for providing access to photograph the Mosque.

Newly appointed Senior Counsel and Queens Counsel

On Monday 4 February 2019 the newly appointed Senior Counsel and Queens Counsel from every state and territory took their bows before the full bench of the High Court in Canberra.

The Hon Chief Justice Susan Kiefel AC addressed and welcomed the new silks. Following the bows the silks, their families and esteemed guests attended an afternoon tea hosted by the Chief Justice.

The Australian Bar Association hosted a black tie dinner in the Great Hall of the High Court to welcome to the ranks the new Senior Counsel and Queens Counsel.

The Hon Justice James Edelman toasted the new silks with a learned and insightful speech on the history of the institution of senior counsel.

In reply, Paresh Khandhar SC gave an entertaining and jocular rebuttal as the photographs of the evening attest.

The Hon Chief Justice Susan Kiefel AC

Vanessa Whittaker SC and Michael Izzo SC

The Hon Justice James Edelman

The Hon Justice Stephen Gageler AC and Paresh Khandhar SC

Paresh Khandhar SC

The Hon Christian Porter AG MP and Michael McHugh SC

Marketing the bar to in-house Counsel

By Elizabeth Cheeseman SC

The Practice Development Committee's primary focus is the promotion and marketing of the Bar's services to in-house counsel, both corporate and government, in two principal areas, direct briefing and early briefing.

The Committee has been active in developing new ways to promote the services of the Bar to the growing ranks of the in-house community as a way of supplementing the Bar's traditional, and still core, market of instructing solicitors.

rise November 2018: Triage of Multi-faceted Disputes

At the ABA Conference, Liz Cheeseman SC (Committee Chair) moderated a panel on 'Effective Triage of Major Multi-faceted Disputes: Positioning Clients to Survive the Feeding Frenzy'.

The panellists, all leaders in their fields, were Caroline Cox (Group General Counsel, BHP), Neil Young QC (New Chambers) and Reay McGuiness (Webb Henderson).

The panel examined the role of the Bar in providing critical strategic advice at each stage of multi-dimensional (and often multi-jurisdictional) disputes.

ACC National Conference November 2018

In November 2018 David Thomas SC (a member of the Committee) and Zoë Hillman (Alinea Chambers) presented a NSW

Bar Association-sponsored session on direct briefing at the Association of Corporate Counsel (ACC) National Conference on the Gold Coast.

David and Zoë were joined on the panel by Marion Hemphill, General Counsel Australian Red Cross Blood Service. Coming as it did towards the end of the public hearings of the Banking Royal Commission, the session was timely in addressing the role the Bar can play in assisting in-house counsel in the context of intense and immediate media scrutiny, via traditional and new media platforms including Twitter and blogs.

Issues examined included devising strategies to control legal and reputational risk in the face of trial by social media, steps to promote procedural fairness in the face of intense public engagement and the legal responses that can be adopted in these circumstances.

The panel presentation generated lively discussion with many of the delegates sharing their own positive experiences of direct briefing.

The Association sponsored the ACC Corporate Responsibility Award at the Conference dinner which was presented to Shannon Landers of the Cotton On Group by Committee member Victoria O'Halloran.

The popular New South Wales Bar Association Barista Station was staffed by volunteer clerks (Michele Kearns, Martin Place Chambers, Angela Noakes, Ground Floor Wentworth and Paul Walker, 13th Floor Wentworth Selborne) and ran throughout the conference to provide practical advice to in-house counsel regarding briefing the Bar.

The clerks were able to engage on a one to one basis with delegates providing practical advice on briefing the Bar. Clerk representatives have attended the ACC National Conference under the umbrella of the Association's sponsorship for the past few years.

The role played by the clerks in demystifying and making the Bar more accessible to the in-house community has been an essential part of developing the relationship between the Association and the ACC.

Toolkit for briefing barristers

Victoria O'Halloran, who before coming to the Bar had extensive experience as in-house counsel developed the Briefing Toolkit to assist in-house counsel and junior solicitors in the compilation of a brief.

The Briefing Toolkit was promoted at the ACC National Conference and is available on the Association's website https://www.nswbar.asn.au/briefing-barristers/in-house-counsel.

The Toolkit has been promoted to members via In Brief and all members are encouraged to recommend the precedents to clients, solicitors and in-house counsel.

Chambers are encouraged to link to the Toolkit from their own websites if so desired.

Direct Briefing in-house roadshow

The Committee also presented the first of a series of direct briefing roadshows for in-house teams which focus on practical guidance for in-house lawyers on briefing the Bar.

The first presentation was to the Wool-

rise 2018: Triage of Multifaceted Disputes. Liz Cheeseman SC, Neil Young QC, Caroline Cox, Reay McGuiness

ACC National conference – Barista station: Michele Kearns and delegates

ACC National conference: Zoë Hillman, Marion Hemphill, David Thomas SC

worths in-house team at Bella Vista in September 2018 by Victoria O'Halloran, Michele Kearns, Paul Walker and Robert Yezerski (Banco).

The Committee is planning to take the roadshow to a variety of in-house teams, corporate and government, in 2019.

Skills for future practice

In July 2018, Ian Hemming SC (a Committee member) presented a CPD on Paperless Trials drawing on his experience of running fully electronic trials in the Land and Environment Court.

The session was extremely practical. It provided a forum for members to exchange information about the evolving landscape of technology in the courtroom. The Committee plans to repeat a CPD on this topic in 2019.

Geoff Farland was the driving force behind the March 2019 CPD session looking at business skills to 'future proof' practice in the changing legal services landscape. The session 'I didn't see that coming… Future proofing your practice - thinking differently about business at the Bar' was presented by Dr Rosemary Howell, Chairman Strategic Action Pty Ltd and Professorial Visiting Fellow of the University of New South Wales and Sue-Ella Prodonovich, Prodonovich Advisory and was followed by networking drinks (kindly sponsored by Jade Professional).

The Committee wishes to thank all those who have given their time to promote the services of the NSW Bar in 2018.

Any suggestions from members for future initiatives/events are most welcome and should be submitted to Alastair McConnachie, Deputy Executive Director, New South Wales Bar Association.

NEW SOUTH WALES
BAR ASSOCIATION

Member ADVANTAGE

Wake up somewhere new

with Member Advantage

Create your own adventure through your benefits program

More travel, less stress with worldwide travel insurance

SAVE on:

- Emergency cover
- Single trips or on your annual multi-trip premium

Get an online quote today

Liberate your adventurous spirit

SAVE on:

- Intrepid Travel, Peregrine and Urban Adventures tours
- Over 1,000 land tours in over 300 destinations worldwide

Select a tour

Give the gift of travel

SAVE on:

- Pre-purchased e-Gift cards from Flight Centre, Virgin Australia and Webjet
- Use for your own vacation or give as presents

Purchase an e-Gift card today

You've earned the right to be comfortable

SAVE on:

- 700,000 hotels worldwide across 71,000 destinations

Explore the range and book now

Freedom with great car hire offers

- Get from A to B without a timetable with Avis, Budget, Europcar or Hertz

Hire a car and save

Relax before you head off

SAVE on:

- Special rates on Qantas Club and Virgin Australia airline lounge memberships

Join or renew today

As with these and all our other offers, terms and conditions do apply

For more information, email info@memberadvantage.com.au or call 1300 853 352

www.nswbar.asn.au/for-members

Dr Andrew Scott Bell SC

Ceremonial Sitting
President of the NSW Court of Appeal

In a ceremonial sitting on 28 February 2019, Dr Andrew Bell SC by affirmation before the Chief Justice TF Bathurst AC became the President of the New South Wales Court of Appeal. The appointment was made directly from the ranks of the inner bar. It was standing room only in the Banco Court to witness this occasion.

The attendances included the country's most eminent judges who had sat in Queen's Square over the past 30 years. The former Chief Justices the Hon Murray Gleeson AC QC and the Hon Jim Spigelman AC QC were in attendance. The four predecessors who held office as the President of the NSW Court of Appeal the Hon Dennis Mahoney AO QC, the Hon Keith Mason AC QC, Chief Justice Allsop and the Hon Justice Margaret Beazley AO QC (the NSW governor-elect), were in attendance. The Hon Sir Anthony Mason AC KBE and the Hon Sir Gerard Brennan AC KBE were also in court for this event.

The Attorney General Mark Speakman SC MP spoke on behalf of the NSW Bar and Ms Elizabeth Espinosa, the President of the NSW Law Society, spoke on behalf of the solicitors. Both speakers mentioned the eminent scholastic achievements which developed into the career of a jurist and barrister for Dr Bell SC. Mention was also made of his eminent practice in international and commercial law at the Sydney Bar and his genial personal qualities.

The Judge recalled that he had spent a day's work experience with the late Justice John Kearney in the NSW Supreme Court when still a school boy, which experience gave him the impetus and inclination to aspire to be a barrister. The years that followed saw that ambition come to fruition.

Dr Bell's cursus honorum was one of exceptional rarity and distinction. He was an alumnus of the University of Sydney, having been the double medalist in law and economic history in 1987 and in 1989 also receiving the Convocation Medal. He was Rhodes Scholar for NSW in 1990. He then read for the BCL (Oxon) with first class honours and was named the Vinerian Scholar in 1993. His Honour then was awarded the DPhil in his chosen area in 1994.

The period of time which his Honour spent at Oxford was noted as a matter of significance. It was an extraordinary opportunity to become an expert in private international law and be supervised by Professor Adrian Briggs QC who became his friend and colleague. His Honour's scholarship is known throughout the world.

Dr Bell was associate briefly to the late Hon Justice Beaumont of the Federal Court of Australia in 1990, before commencing work as the associate to Sir Anthony Mason. Dr Bell SC was called to the Bar on 9 February 1995 and read with Phil Greenwood SC and PLG Brereton (as his Honour then was). He practised from the 11th Floor for the entirety of his career at the Bar. During this time, his Honour had established himself as a preeminent authority in international law and specifically so in anti-suit injunctions. He would coauthor *Nygh* with his tutor, the Honour Justice Brereton, and authored many other scholarly papers on the subject.

His Honour recalled fondly memorable cases with Alan Sullivan QC and Stephen Gageler (as his honour then was). All had been associates of Sir Anthony Mason. He noted the changes in the landscape of the Bar and the way gender diversity will continue to improve its ranks particularly in respect of women.

His Honour observed 'I don't think it is fully or sufficiently appreciated or acknowledged just how many barristers devote so many hours of their time entirely voluntarily to the diverse affairs and committees of the Bar Association and how important that work ultimately is for the rule of law in this State and the maintenance of respect for the rule of law' and adding [it is that] 'dedication and sense of social obligation [that] lies at the heart of the Bar as a profession.'

His Honour recalled happily his years in practice on 11 Wentworth eventually serving as Chairman of the floor in 2010 and 2017-2018. It was a time when he created a fine practice in tandem with full involvement in the *Bar News* Committee, which he joined in 1997 and edited from 2005 – 2011 inclusive, his subsequent election to Bar Council, where he finished as Senior Vice-President in 2018, and countless other diverse committees, conferences and working groups.

His Honour acknowledged his colleagues and friends from his years on the 11th Floor,

especially the loyal and devoted staff and the legendary Paul Daley, his old clerk and friend.

Fondly, his Honour noted his immense pride in his late father who was born in 1921 and worked for the AMP and had seen active service in the Royal Navy in the Pacific Fleet for six years. His father was awarded the 7th Masters degree in Economics at the University of Melbourne. He earned a Doctorate at the London School of Economics in less than two years. He was a man who made the very best of what he was afforded in his circumstances. He became a foremost economic and public commentator. His mother was present in court that morning, and his Honour noted her academic achievements in being awarded a PhD and as an art curator and her strong influence upon him, especially her unfailing support of him over the years.

Justice Bell noted:

> 'My parents gave and taught me so much – to seize opportunities, to value education, to think broadly, openly and compassionately, and that with privilege and opportunity comes social responsibility to repay that good fortune.'

His Honour's spouse Joanna Bird, also the recipient of the University Medal in Law at the University of Sydney and first class honours for her BCL at Oxford, was a High Court Judge's associate at the same time as his Honour. Ms Bird, now a brilliant and influential financial regulator, was in court that morning with their children Tom and Lucy, 'the Bell Birds', together with his brother David and his wife Michelle.

The Judge also recalled his memorable association with *Sculpture by the Sea* as its chairman 2009-2016 (and director between 2006 -2016). It was an exuberant introduction to the world of arts politics, sculptors/artists, sculptures and the ebb and flow of an arts organisation.

Finally, Justice Bell remarked upon his good fortune to be joining the NSW Court of Appeal – an outstanding court known throughout the common law world for its jurisprudence. It is a distinguished court of outstanding and dedicated judges exhibiting their hard work, dedication and skill. Moreover, it was on the Supreme Court's reputation more generally that rests the respect for the rule of law in NSW. That must never be taken for granted. It is something which the President earnestly undertook to advance and uphold as the Court nears its bi-centenary in four years and beyond. In the same vein, he greatly looked forward to discharging his judicial duties.

Kevin Tang

Justice Patricia Anne Henry

On Wednesday, 30 January 2019 Justice Patricia Anne Henry was sworn in as Judge of the Supreme Court by Bathurst CJ in the Banco Court. The Hon Mark Speakman SC MP the Attorney General of NSW spoke on behalf of the NSW Bar. Ms Elizabeth Espinosa the President of the Law Society spoke on behalf of the Law Society of NSW on this occasion.

Justice Henry's appointment may be considered rare as it was an appointment directly from the ranks of solictors to the NSW Supreme Court Bench. For more than 30 years, her Honour was a solicitor in the field of commercial dispute resolution at the largest of the firms King Wood and Mallesons (previously known as Mallesons Stephen Jaques and Stephen Jaques & Stephen etc...). Her Honour was admitted as a solicitor in July 1988 in the heady years of large-scale commercial litigation. Justice Henry loved working at the firm and was inducted by way of Perth as a seasonal clerk initially. She would rise to be a member of the Board.

There were many female solicitors in those years and fortunately her Honour grew up in

the firm among them and in their company. That experience was unique and invaluable. From the outset, her Honour showed great promise and passion for the law. It was an exciting time as most of those women rose to the rank of partner. The established partners who were part of the landscape in those years were David Fairlie, Julie Ward (now Chief Judge in Equity), Robyn Chalmers, Gerald Raftesath among many others. They were master solicitors of note. These partners taught her Honour much about the art of litigation. Her Honour was grateful for learning the importance of clarity and conciseness in the work of a lawyer among other matters in their company.

The public gallery was full of members of the profession, personal friends and family who had accompanied her Honour on the professional journey from the 1980s. Briefly, her Honour worked in London at Baker McKenzie venturing on a tour of the world with her spouse. However, even though London was a great experience, her Honour returned to the fold at Mallesons in Sydney. She became a partner nine years after commencing there in 1997. Justice Henry was a specialist in competition law and telecommunications law. Her clients included Telstra among other significant players in the Australian and international market.

Since that time, her Honour has held a swag of significant leadership roles in the firm. Practice Team Leader of the National Competition Law Team, Senior Partner Dispute Resolution as well as Staff Partner, Recruitment Partner. Her Honour's track record has attracted much affection and admiration from her colleagues at the firm. Justice Henry's life as a solicitor has been marked with the singular ability to deal with difficult problems head-on. Equality and diversity have featured highly on her Honour's list of major issues in recent years to inculcate in the firm's various strategies for professional progression and career growth of its members. This has taken a measure of courage, clear thinking and good sense. These characteristics bode well for life on the Court for her Honour.

Justice Henry thanked her family for their support and care throughout the years – especially her mother Beverly and late stepfather Guy and she remembered her father Barry who did not live to see the day. Her Honour was an only child raised on Sydney's north shore and was educated at Wenona at North Sydney, where a family tradition has taken hold, as her mother and now her daughter attended the school. In her Honour's early education, more than a touch of *To Kill a Mockingbird* and Atticus Finch propelled and inspired her to undertake a law degree at the University of New South Wales. Before commencing university, it is known that her Honour took some time to travel, she took a fabled gap year, to see the world and to broaden her horizons – it was noted more than once that those experiences included a sojourn for her Honour in a kibbutz.

It is also known that her Honour is a games buff – a champion of card games. She is an enthusiast and winner at Scrabble, if not a creative wordsmith. Trivia features highly on the scale of favoured hobbies. Film, reading and theatre are noted as her favoured forms of entertainment. It was also made known that her Honour is a follower of the Roosters. Otherwise, Justice Henry's preferred destination for travel is New York City. Closer to home, her Honour is devoted to her family and enjoys holidaying at Hardy's Bay as well as spending time with the family labrador Obi.

Justice Henry made a significant reference in her speech in Court that day, to the fact that her appointment was announced in the centenary year of the passing of the Women's Legal Status Act (NSW) in 1918. That statute allowed women to practise as solicitors, barristers and to be appointed judges and magistrates in NSW. However, it was not until 1924 when the first female solicitor was admitted, and not until 1980 that the first women would be appointed to the Supreme Court. Her Honour remembered all of those women who had gone before her and reiterated her commitment to the qualities of a judge of the Supreme Court. It is with confidence that her Honour steps forth to live out and work in the judicial role to the expectations and standards set by her fellow judges and the community at large.

Kevin Tang

Swearing-in

Mark Joseph Ierace

On Wednesday, 31 January 2019, there was a ceremonial sitting in the Banco Court for the swearing in of the Honourable Justice Mark Joseph Ierace as a judge of the Supreme Court of NSW. Mr Tim Game SC, President of the NSW Bar, spoke on behalf of the barristers and Ms Elizabeth Espinoza, President of the Law Society, spoke on behalf of the State's solicitors.

Mr Game SC commenced by remembering significant aspects of Justice Ierace's career. The Judge had been a Senior Public Defender for over a decade in a career which had spanned over forty years. Other various roles which his Honour has held include that of a teacher of the law, an author in disability and criminal law, a prosecutor of war crimes, a senior Public Defender and In-House Counsel at the Commonwealth Director of Prosecutions among other things. At various times he has been seconded to the NSW Law Reform Commission, and been an advocate at the Private Bar. His Honour took Silk in 1999. In each of the roles mentioned, his Honour has invested a significant degree of energy, engagement and enthusiasm, coupled with generosity of spirit, kindness and at times, a measure of stubbornness – which Mr Game SC noted as 'a wonderful thing.' At no time has his Honour been complacent.

Justice Ierace even had the time to complete a Master's thesis about 'Joint Criminal Enterprise and Common Purpose in International Criminal Law.' Not a moment of his time has gone to waste it would seem.

In the 1980s his Honour authored *Intellectual Disability: A Manual for Criminal Lawyer* and co-authored *Drug Laws in NSW*, a well-known textbook. He then started lecturing in international criminal law at the University of New South Wales.

However, his Honour's contribution goes far beyond that of an author. In terms of government and policy change, indeed policy and legislative reform, his Honour has made a significant contribution by faithfully representing the views of the Private Bar on such issues, while also preserving community standards and requirements which change over time.

Since before the time his Honour had qual-

ified as a lawyer and knowing something of the role of a Public Defender, he aspired to be one. His Honour Justice Ierace would come to spend some twelve years at the helm of the Public Defender's office, and was especially honoured by the presence that morning of the Hon Peter Hidden AM QC and his Hon Judge Peter Zara SC who had both occupied the position previously. His Honour observed that there is a symbiotic relationship between Public Defenders and the NSW Bar, and also with Legal Aid and the ALS. Each helps the other improve their performance and public service. His Honour's tenure will be remembered for his fervent commitment to establishing the services of the Public Defender as being of the highest calibre of advocacy available

It was remarked upon that with a career of such significant length at the Bar as his Honour's, that he was an exquisite example of moderation and control. This has gone so far as to have the opportunity to go from a major criminal practice in Sydney to running international cases in The Hague – a remarkable trajectory, on any view.

Justice Ierace appeared as counsel in the international courts in The Hague in the prosecution for war crimes and crimes against humanity such as the trial of General Galic. In so far as Australian cases are to be mentioned, his Honour was instrumental in 'Scognamiglio' in 1991 and *Champion* in 1992. By 1995 his Honour had become In-House Counsel for the Commonwealth DPP in which position he succeeded the Hon Terry Buddin SC and Justice Elizabeth Fullerton in prosecuting major trials in that capacity.

His Honour made an insightful observation about the criminal law and how the roles of solicitor and barrister, defending or prosecuting, are always emotionally and physically draining. At times, it even tests one's faith in humanity. The Judge noted that the burden on the police force and other first responders is even greater and a thought must be spared for surviving victims of crime and for those who do not survive. His Honour also ventured to suggest that one way to weather this onslaught, without becoming hardened by the experience, is through the warmth and joy of family, friendships and humour.

On this occasion Justice Ierace reflected on the significance of his family's sacrifices, both that of his own parents and grandparents. He was grateful for their hard work and for the chances that they took and he made special mention of his wife Janet and son Dave (a recent graduate from the ANU). He thanked his large family for their support that had ultimately brought him to this ceremony.

Finally, his Honour vowed to acquit the responsibilities of his appointment to the best of his abilities – Of that, we have no doubt.

Kevin Tang

Retirement

The Hon Justice Ruth Stephanie McColl AO

On Tuesday, 4 December 2018 a ceremonial sitting of the NSW Supreme Court took place to mark the retirement of the Honourable Justice Ruth McColl. Mr Tim Game SC President of the NSW Bar Association spoke on behalf of the NSW Bar and Ms Elizabeth Espinosa spoke on behalf of the solicitors of the State. The Banco Court was full to capacity with well-wishers on this occasion.

In opening remarks, the Chief Justice TF Bathurst noted that Justice McColl had been a role model for many talented women. All speakers remarked upon Justice McColl's extraordinary life in the law. At the time of coming to the Bar, she was just one of twenty women in a profession of 750 barristers. Her Honour took silk in 1994 and then became the first female President of the NSW Bar Association from 1999-2001. The judge was also President of the Australian Bar Association between 2000 and 2001. She was the co-founder of the Australian Women's Lawyers.

For some fifteen years, she has been a member of the NSW Court of Appeal, only the second woman to have been appointed to that distinguished court in the common law world. Justice McColl remarked upon the fact that 2018 marked the centenary of the *Women's Status Act* which gave women the right to practise as lawyers in this state. Previous to that, women could pursue academic law but not admission to the profession.

Justice McColl remembered the other great female pioneers in the law such as Ada Evans – the first NSW female barrister, the Hon Mary Gaudron QC – the nation's first female High Court judge, and the first female judge of the NSW Supreme Court Justice Jane Matthews. Justice McColl noted that '[T]he fact is, there is still work to be done by strong men and women to the goal of true equality.' Ms Espionza noted that this was an occasion to celebrate Justice McColl as a trailblazer for women in the legal profession.

The poignancy of the day was raised when Justice McColl noted that it had been forty-six years since she confidently strode into the State Crown Solicitors Office with her then fellow junior graduate Justice Peter Johnson who, fittingly, sat on the Bench with her Honour for this ceremony.

Her Honour mentioned the paucity of Indigenous barristers at the NSW Bar – something which must change in time. This was reference to the important work which her Honour has developed as an interest area, encouraging Indigenous students and graduates into the legal profession. This had its genesis in the Indigenous legal strategy that her Honour formulated with Michael Slattery QC (as his Honour then was) through the Equal Opportunity Committee when at the Bar.

Justice McColl's appointment directly to the NSW Court of Appeal has resulted in more than a decade of significant judgements, which are finely researched, and which have contributed to the jurisprudence of Australian law. It was fitting that in 2003 her Honour was awarded the Centenary Medal which recognised contributions of individuals to Australian society in the first one hundred years of Federation. Shortly before her Honour's appointment to the Court she had made a significant contribution to the Bar as its first Madam President and was well-known as a Silk in commercial matters and in defamation.

It was significant that her Honour mentioned that although this was her retirement and it was some four years before the statutory age (which has now become sixty-seven years) she was adamant that it be viewed as a beginning to the next chapter of her life. Her Honour observed that 'it [gave] her a bit of faith about her durability for the next chapter of my life.'

Harking back to 2003 when her Honour was sworn onto the NSW Court of Appeal, her Honour noted her struggle between appreciating that the Bar required strong women leaders and that the profession was well-served by women in judicial office. In the sixteen years that followed, the evidence was overwhelmingly that her Honour's decision to move to the engine room of the administration of justice was indeed the correct decision. Her Honour's contribution to the Court has been significant as well as memorable.

All indications are that Justice McColl will indeed forge ahead with other causes close to her heart in the years to come, her Honour having become a member of the Legal Services Council Admissions Committee in June of 2018.

It is with much anticipation that we await her next contributions to the legal world.

Kevin Tang

Retirement

The Hon Justice Margaret Joan Beazley AO QC

President of NSW Court of Appeal

On Wednesday 27 February 2019 a memorable ceremonial sitting took place in the Banco Court marking the retirement of the President of the NSW Court of Appeal, Justice Margaret Beazley.

It was standing room only with a remarkable representation from the legal profession and judiciary past and present who, along with her Honour's family and friends, assembled that morning to celebrate the culmination of a long and successful career in the law. It was a rare attendance which included past Chief Justices, the Hon Sir Gerard Brennan AC KBE QC, the Hon Sir Anthony Mason AC KBE QC, the Hon Murray Gleeson AC QC and the Hon James Spigelman AC QC. Former Presidents of the Court of Appeal were present including the Hon Dennis Mahoney AO QC, the Hon Michael Kirby AC CMG, the Hon Keith Mason AC QC and the Hon James Allsop AO, now Chief Justice of the Federal Court. The Court gallery was brimming with guests in an atmosphere of reverence.

The Chief Justice Tom Bathurst AC, opened with a speech reflecting on her Honour's career followed by the Hon Mark Speakman SC MP, Attorney General who spoke on behalf of the Bar and then by Ms Elizabeth Espinosa, President of the Law Society who spoke on behalf of solicitors. All speakers traced her Honour's eminent professional progress and echoed the various milestones along the way. Each speaker emphasised the unique personal traits with which her Honour is identified.

The Chief Justice's speech acknowledged a career of 'Firsts', being the first female judge to sit solely on the Federal Court in 1993 and also the first female member of the Court of Appeal in 1996. Her Honour's appointment in 2013 as President of the Court of Appeal was historic as the first female President.

The Chief Justice referred to her Honour as a trailblazer in the true sense of the word, serving as a role model for all women and the profession generally as she advanced through uncharted waters in her years from the Bar to the Bench.

The Chief Justice reflected upon her Honour's 2,000 plus judgments which cover a vast array of legal subjects and are akin to a legal encyclopedia. He remarked that her Honour has demonstrated an extraordinary legal intellect in her decision-making and statements of legal principle and doctrine and how this bank of legal knowledge and learning is her legacy in the law and will serve the profession well in years to come.

The Chief Justice thanked her Honour for her strong leadership of the Court in maintaining it as the intellectual powerhouse of the jurisdiction.

Her Honour's reply gave a humble recollection of some of her experiences in judicial life as she acknowledged the privilege of working with three Chief Justices and three Presidents. She made reference to the contribution of each of those judges being testament to the fact that the Court is an anchor for the administration of justice in this state. Her Honour recognised that the crucial work of the individual judges was what had made her time as President fulfilling and that she retains a deep respect, admiration and fondness for each and every judge who has sat with her on the Bench.

Her Honour observed that some ten thousand days had passed since she was first appointed, noting that much had changed in the profession since then and there were many positive developments. On commencing her career, she was the 37th woman to be admitted and became the 32nd woman to actively practise law. When she took silk in 1989, she was only the fourth woman to do so.

Her Honour remarked on how we live in different times now and attitudes towards women have changed with the intellectual vibrancy that diversity has brought to the profession and this cannot be underestimated. Despite a multitude of challenges, at each stage of her professional life she said it had been rewarding and fulfilling and that law had since become part of her DNA. Her Honour developed her great belief in institutional leadership and a tremendous respect for the law in her time as a judge and particularly as President. She remarked that NSW is privileged to have such fine judicial officers and a profession of such good repute: the Supreme Court, Court of Appeal and Court of Criminal Appeal jointly produce some 3,000 determinations per year. That burden and the responsibility is significant.

Her Honour amiably commended her four associates throughout her time at the Supreme Court – Trish, Lizzie, Barbara and Kate, noting that their support had been invaluable over these years. She also recalled her band of tipstaves whom she said were a joy to have in chambers. Her Honour remarked that the assistance of her personal staff has enabled her to be an effective judge and leader of the Court.

Her Honour expressed profound gratitude for the assistance provided by the Court's highly credentialled library staff who had been unfailingly helpful and she commented that their role was not to be underestimated in the administration of justice and the maintenance of the high level of jurisprudence associated with the Court.

She also complimented the crucial roles of the Court of Appeal Registrar, other Registrars of the Court, the Registry staff and other Court staff, thanking each of them for their significant contribution in managing the Court's work. Her Honour was mindful that neither the Court nor the administration of justice functions in a silo.

Notably, the wider profession was acknowledged for their roles in the administration of justice. Her Honour observed that the profession plays a pivotal role in assisting the Court to arrive at the correct decision and they are as much a part of the administration of justice as is the Court and this could not be underestimated.

In concluding, it was particularly touching for the audience to note her Honour's emotion in speaking about her parents Lorna and Gordon Beazley, to whom she admiringly expressed she owed everything and who were as she fondly recalled, selfless and sacrificed so much for their children's advancement in life. It was clear that her Honour's genuine, caring and personable nature has evolved from the stable upbringing they had provided. She remembered their astuteness and graciously remarked on the opportunities in education afforded to her which were not given to her parents' generation.

Present in Court were her three children, Erin, Lauren and Anthony in whom she expressed immense pride. Also present were her two sisters Christine and Trish along with her brother Brian; her brother Kevin was unable to attend. Her Honour thanked her husband Dennis and remarked that the encouragement and assistance of her family and friends were ultimately the key to her success. Her Honour made special mention of two life mentors, her school teachers Sr Patricia Malone (Jude) who was present and the late Sr Stanislaus (Stan), both of whom she held in high esteem for their wise counsel in her formative years and also throughout her career. They had distinctly made a lasting impression.

Following a commendable career which has spanned 25 years on the Bench in both the Federal and State jurisdictions, her Honour will begin her new role in May as the 39th Governor of NSW.

Her Honour's legendary courtesy, empathy and gracious nature foreshadows her next role as Governor and assuredly she will continue to serve in public office with distinction.

Kevin Tang

Robert Ian Bellamy

31 March 1964 - 23 December 2018

On Monday 14 January 2019 members of the profession, colleagues and family and many friends gathered at the NSW Art Gallery to commemorate the life of Robert Ian Bellamy. Robert was remembered as laconic, with a dry sense of humour, and a man whose word was 'golden'.

Robert was also a man of unexpected complexities – an enigma.

Robert was born to Gloria and Peter Bellamy and lived his formative years in the Sutherland Shire (Cronulla). He was one of four children along with Neal, David and Angelique (Green). His brothers were significantly older than him and he benefitted from their almost parental influence. His family were in the liquor industry and continue in that vein.

In his late teens, Robert commenced an apprenticeship in the radio industry, repairing complex transistor radios and maintaining radio stations. This was a surprisingly old-world occupation, but Robert revelled in the technical aspects of it. He had a fascination with CB radios that never ceased. During the years of his apprenticeship he gained an interest in politics and joined the Labor party, from which, it appears, his fascination with the law gradually evolved.

Significantly, Robert became an employee of a Labor Minister, Arthur Geizelt (in the Hawke years) and started working in Old Parliament House in Canberra. During this time he was learning, in earnest, about Labor politics in Australia; he even appeared in a film called 'Democracy.' He then spent time working for unions, namely the Timber Workers Union and Actor's Equity. From there he moved to the Commonwealth Ombudsman's Office fielding a mountain of complaints about anything and everything. It exercised his curious mind. He learnt much law from his time there and his ambition to become a barrister began.

Robert sat for the Solicitors Admission Board exams in the 1990s (the old SAB). He thought he might make the jump from a freshly minted SAB graduate to the rough and tumble of the Sydney Bar. He had essentially been an industrial advocate in the lead up, appearing before the industrial courts and tribunals. In those years this would have been excellent training in court advocacy. With his industrial dispute background he did not work as an employed solicitor for any firm but rather, boldly, he sought admission to the Sydney Bar directly. He was admitted on 20 February 1995.

In those heady days, commercial work, and for that matter any other work, was in abundance. His entrée to the Bar was on 11 St James' Hall Chambers where he was a reader. There he found a niche and befriended MLD Einfeld QC, DJ Hammerschlag (as his Honour then was), Peter McClellan (as his Honour then was) and Victor Kerr SC. The Hon John Spender AO QC, Gail Furness SC, Jane Jagot SC (as her Honour then was) and Geoffrey Johnson SC among others.

Robert was a competent barrister and knew how to work hard, and in the early years, did a significant matter with Geoffrey Hilton SC of 9 Selborne and with his fellow floor members.

Robert became a de facto reader of some senior barristers on his floor (in particular David Hammerschlag SC, as his Honour then was), from which he was well-schooled in courtcraft and forensic strategy in court. This early training gave him a wisdom beyond his years.

One of his friends, now a Supreme Court Judge, remembers Robert as an enthusiast of all things that flew: he remembered buying model aeroplanes in his company. Robert trained for a pilot's licence. One of his goals was to take a regional brief and one day fly there to appear in the regional Court. His other pastime was sailing. From his younger years he was a keen sailor, and he enjoyed participating in several Bench and Bar sailing days.

Robert was very much his own person. He had his own interests and his own world and it was a self-contained world. It was remarked upon by most of his friends that he had time to be good and kind to other people. He was an honest operator, with at least one Supreme Court Judge noting that his word was always taken without reservation before the court – Robert's word was golden.

The one thing that delighted Robert most in life, as a barrister was, to win - but not at all costs.

He is survived by his parents and his three siblings.

Kevin Tang

Margaret Gwyneth Newby

18 September 1936 - 19 December 2018

In a career that spanned nearly five decades Margaret Newby was the quintessential Judges' Associate. Margaret dedicated all of her energies to the loyal service of five judges in the Equity Division and in the Court of Appeal. She spent much of her lifetime in Queen's Square revelling in the work which was of utmost importance to the inner workings of the Bar and the Bench. She was a remarkable lady.

Margaret Gwyneth Newby was born in Wellington NSW on 18 September 1936. She died at St Vincent's Hospital on 19 December 2018, aged 82 years, after a short illness. All those who knew her will miss her deeply. She was the longest serving judge's associate in the Supreme Court, a facilitator of the court for the judiciary and of the Bar.

Margaret came from another time, a period of extraordinary opportunity in the law; she came to the Court via experience in two major law firms, McClellands and then Rankin & Nathan, both specialist firms in common law work.

At McClellands, Margaret was a secretary, paralegal, registration clerk and executive assistant and she learnt to do everything. She came to the attention of the firm's eponymous principal 'Diamond Jim' McClelland as he was known. Diamond Jim was a solicitor, senator and Whitlam Minister, Royal Commissioner and Judge. Both Margaret and Diamond Jim were to come full circle in the latter years with their working roles at the Court – it was a felicitous association.

During those busy years, Margaret prepared briefs and arranged for filing of court documents among other things. From around that time, Margaret was known to many barristers in Selborne and Wentworth Chambers. It was then a younger crowd of barristers who would rise up: among them were Jim Poulos, Larry King, Bob Toner, Barry Toomey, Harold Glass, Neville Wran, Bob Stitt, Horace Miller and Dusty Ireland. Privately, she operated a typing service, by referral only. She worked for a number of distinguished counsel on their advices, submissions and other necessary documents, late into the night, so that they were ready

first thing the following morning.

On account of her knowledge and experience, as Barrett AJA observed in his eulogy, Margaret came from a time when she could easily have ended up at the Bar or on the Bench depending on the circumstances. The firms at which she spent so many years were the best training ground. Apart from intelligence and knowledge, she was a most companionable charge in her roles.

When Harold Glass QC was offered judicial appointment in 1974, his old friend Diamond Jim suggested that he should take Margaret to the court as his associate. At that time she had been working for Rankin & Nathan in the capacity of setting up a Sydney office of the old Newcastle firm. Later Diamond Jim himself would go on the Bench to be the inaugural Chief Judge of the Land and Environment Court. Margaret stayed with Mr Justice Glass on the Court of Appeal for the entirety of his judicial career until he retired in 1987.

In the 1960s, Margaret established her wonderful city life with her good friend Joy and they lived in her beloved Elizabeth Bay, she loved the urban life.

Margaret had a strong Salvation Army religious background, reading the bible each day, and maintained those core values and the faith throughout her life. At times, she could be heard humming an old hymn. She never wandered from the tenets which her aged parents Faith and Wilfred instilled in her. She did however, evolve the temperance principle to allow her lengthy membership of the champagne club, as it was known. Margaret was fond of a glass or two of champagne with her friends.

Margaret knew life as a judge's associate, first in the old supreme court in St James' Road, then in the new Law Courts Building in Queen's Square from 1975 onwards. At the time of the first renovations in the early 2000s, Margaret recalled the thick, pile of the original mint green carpet in the inner sanctum, so plush and luxurious when the first inhabitants moved into the Law Courts Building. The carpet was threadbare by that time.

Margaret recalled her early years in the Supreme Court. Glass JA joined Moffitt P, Hope, Reynolds, Hutley, Sir Nigel Bowen, Samuels, Mahoney JJA among others, on the Court of Appeal. After Glass JA's retirement, Margaret became the associate to McHugh JA (as his Honour then was) with whom she remained until his appointment to the High Court. She then became Associate to Kearney J for some 14 years and following his retirement to Rolfe J. Under Andrew Rogers's guidance, the commercial division pursued case management with vigour. This placed pressure not only on the four judges assigned to it, but also on their staff – pressure in which Margaret delighted. It cast her in an administrative role from which she took the greatest pleasure.

Finally, after 11 years with Mr Justice Rolfe, Margaret then went to the chambers of the Hon Justice Reginald Barrett for some 14 years. She worked far beyond retiring age but she was devoted to the role. In those years, colleagues and other staff remember her arriving early on the 7th floor of the Judges Chambers reading the paper to start the day.

Ever the perfectionist, Margaret ran chambers correctly. Litigants in person (some infamous) would telephone chambers regularly to speak to staff and the Judge. Margaret's firm and unyielding response made for quick disengagement, fending off any unwanted discussion. Each judge for whom Margaret worked was safely shielded from the public.

Margaret took delight in befriending the new graduates who became tipstaves annually in chambers. Margaret loved their company and she made sure each started well and followed each on their journey into the law. She revelled in the contact with fledgling lawyers. In the face of overwork, inexperience or just a mess up, Margaret always spoke up firmly yet courteously being sure the same mistake would never be made again. She had a generous way of learning something with you and even from you.

Outside of the law, Margaret loved jazz, no new interpretations, just old-fashioned New Orleans jazz with a decent beat. She travelled the world, visiting Italy no less than three times. She loved the atmosphere and the food and wine, she made friends easily. She recalled conversing with Mr Justice Glass in Italian in chambers. She took her own charm and good nature all over the world.

Margaret enjoyed all manner of social gatherings especially drinks, a day out with friends and dinners. Her colleagues were constantly around her, namely Kate, Edwina, Victoria, Trish, Barbara, Anne, Suzanne, Sandy, Karen, Jane, Linda, Wendy, Maree, and Mari. These girls were her other family and she loved keeping up with each of them. In retirement, Margaret felt the wrench of leaving the court where she had spent some forty years working for her judges, and it was exacerbated by her fondness for her colleagues. Margaret loved the court and its people.

Margaret's funeral took place on a hot summer's day in January 2019. In attendance were 12 Supreme Court Judges, almost a whole division. In that number were the Chief Justice TF Bathurst, the President of the Court of Appeal Justice Margaret Beazley (the governor-elect) and the Chief Judge in Equity Justice Julie Ward. Present Judges included their Honours RW White, AJ Meagher, MJ Leeming JJA and their Honours MJ Slattery, D Hammerschlag JJ. Also, former judges including the Hon Michael McHugh AC QC, the Hon Moreton Rolfe QC and the Hon Murray Tobias QC were among the mourners. The Hon Reginald Barrett for whom she worked latterly on the Court of Appeal, delivered the eulogy. There were several judicial apologies. Mr Larry King SC and Mr James Kearney of the Bar attended. Her many friends came along, the court staff and the clerks: Registrar Leonie Walton and Di Strathdee, Nick Tiffin, Trish Hoff, Sarojini Ramsay and Michele Kearns. All had known her from the beginning. They had lost a good friend. Rochelle, her niece and her family were present, together with her close friend Rosie Hale and lifelong friend Joy Wylie, who with her son, recounted stories with humour and affection, demonstrating their lengthy association with Margaret.

Margaret had a wonderful life, it was well-lived in the fold of the Law. She seemed to be ageless in that context. Even in retirement, Margaret was always in company and seen in and around Phillip Street regularly. The Law Courts were Margaret's sphere and she was part of its very fabric. She was part of it for so long that it was a pleasure to continue in its wake – that light never dimmed.

> 'No matter how much time passes,
> no matter what takes place in the
> interim, there are some things
> we can never assign to oblivion,
> memories we can never rub away.'
>
> Haruki Murakami, Kafka on the Shore (2002)

Kevin Tang

The Hon Brian Thomas Sully AM QC

Some years ago, the Hon Brian Sully AM QC (Sully QC) introduced an eminent jurist in an after-dinner speech:

'[…] in se ipso totus, […] teres atque rotundus.'

A man in and of himself complete, polished and well-rounded.

The line is from Horace's *Satires* and aptly describes Sully QC himself. Indeed, it captures elegantly the essence of the great man: the Judge, the Barrister; the Mentor and the Teacher.

Sully QC was born on 3 February 1936 and died on 6 March 2019 after a short illness. He lived his entire life on the lower north shore of Sydney.

Sully QC was educated at the Sisters of Saint Joseph of the Sacred Heart at North Sydney, followed by Marist Brothers High School in Mosman. In the post war years, he was the first altar boy, given that signal distinction by the papal nuncio himself. He grew up with the Tridentine rite in the era of Vatican I. Sully QC was a devout Catholic and throughout his life carried his good Lord with him.

The Marist Brothers gave Sully QC a classical education and inculcated in him a discipline of mind and body. He was the classic gentleman. His composure was legendary. Sully QC won a bursary to read law at the University of Sydney from which he graduated in 1959, shortly after he became a solicitor. Although unaware at the time, Sully QC would embark on a long and distinguished career as a solicitor, barrister, silk, adjunct professor and eventually a Supreme Court Judge.

In 1962, Sully QC was called to the New South Wales Bar. As a barrister he enjoyed a broad and busy professional practice in the golden years of the Bar – a blend of equity, common law and crime. He was an expert in the art of conducting jury trials. Along with JDE (John) Traill QC, PW Young QC and JK McLaughlin and others, they established Mena House Chambers in Macquarie Street. Sully QC eventually moved to 12th floor of Selborne Chambers where many of his contemporaries and friends became luminaries of the Bar, among them their Honours JMN (Moreton) Rolfe QC, MD (Mervyn) Finlay QC, PE (Percy) Powell QC, KR Handley QC, GD (Denys) Needham QC, Simon Sheller QC to name just a few who all became his judicial brethren in time. In 1979, after 17 years at the Bar, Sully QC was appointed one of Her Majesty's Counsel.

Sully QC devoted a lifetime to the art of being a barrister and regarded it an absolute privilege to be a practitioner. He was steeped in the traditions of the Bar. Sully QC once remarked that he loved 'the Bar with a passion' and described it as a 'special place in the upholding of the rule of law'. He described the vocation of a Barrister as a 'gift of Divine Providence, and it might with all justice have been given as well to somebody else as to you or to me'.

In 1989, Sully QC was appointed a Justice of the Supreme Court of New South Wales. For almost two decades, Sully QC presided over substantial common law cases and sat frequently in the Court of Criminal Appeal. In his capacity as a judge, Sully QC was known for strenuously applying the rule of law, showing human compassion, administering justice without fear or favour, and showing prodigious respect to all individuals who had any business before the Court. In fact, his almost courtly courtesy was often startling in this day and age. He had no truck with popular culture and modernity.

Once describing himself as the 'unashamed Common Lawyer', Sully QC's many years of professional practise as a Barrister provided him with an excellent foundation to become a Supreme Court Judge.

After 50 years in the law, one could be forgiven for seeking greener pastures beyond the law. However, for Sully QC, that was not to be. He spent the 'twilight years' where it all began – back at university. His enthusiasm to impart his knowledge and experience was unequalled.

University of Western Sydney (UWS) (as it then was) became the significant beneficiary of Sully QC's expertise, time, generosity and dedication for about 11 years. Between 2007 and 2018, Sully QC lectured in both Advocacy and Criminal Procedure and Evidence ex gratia. Sully QC also gave to UWS a significant gift of his library and several sets of his judicial robes, which was a most magnanimous gesture on his part. The books and robes were the very essence of Sully QC's learned and civilised life in the law.

In his time at Western Sydney University (WSU) (as it is now), Sully QC left an indelible impact on the lives of many WSU law staff, law alumni and law students and the institution of the School of the Law itself. Sully QC gave of his time freely and often, providing an incredible insight into the practical workings of the law, mentoring numerous students and providing genuine and loving friendship. He knew the true meaning of friendship.

Outside of the law, Sully QC had an abiding passion for opera. For some 40 years, one of his great joys was to make a pilgrimage to the great European opera capitals regularly: Munich, Vienna and Berlin. Sully QC loved the music, voices and the locales e.g., Salzburg and Wiener Staatsoper and the Musikverein entranced him.

In 2015, Sully QC was awarded a Member of the Order of Australia for his significant service to the judiciary and to the law, particularly through legal education in New South Wales.

On 14 February 2019, the NSW Bar Association awarded Sully QC with life membership. On 20 February 2019, the President of the Bar Association, Mr Tim Game SC conferred the life membership on Sully QC, recognising his distinguished service to the Bar. In attendance at the ceremony were the President of the NSW Court of Appeal Justice Margaret Beazley with their Honours Bellew, Robson and Perram JJ. Messrs Hastings QC, Higgs SC, Fordham SC and Justin O'Connor of the Bar attended. The Hon John Dunford QC the former Judge and the executive director of the Bar Mr Greg Tolhurst were also there to mark the occasion.

It was recently whispered by a nurse at Lady Davidson Private Hospital, just outside Room 374, that he had never seen one person have so many visitors in his 30 years of healthcare work. Of course, that nurse was speaking about Sully QC in the last days. Quite frankly, dear boy, that says it all.

Jason Donnelly
Kevin Tang

Mr Grahame James Berecry

18 August 1947 - 30 January 2019
Registrar in Equity

Mr Grahame Berecry, former Registrar in Equity and Acting Master of the NSW Supreme Court has died aged 72 years after a short illness.

Mr Berecry commenced his career in the Attorney General's Department by 1969 in the registry of the NSW Supreme Court, after leaving secondary school. He undertook studies while working in those years and became a qualified legal practitioner in 1981. By 1979, he was Senior Clerk at Common Law. From 1979 to 1983 he was a Deputy Registrar of the Supreme Court and the Court of Appeal Registrar from 1983 – 1986. He was the Taxing Officer and Registrar in Equity in 1989. Shortly afterwards he held a commission as an Acting Master of the Equity Division of the Court. He is remembered fondly by the profession, especially by the junior practitioners, who commenced their careers (most mornings) in the Equity Registrar's List and the Company List in Court 7A in Queen's Square.

Mr Berecry was instrumental in creating and implementing the mediation programme, which became part of the culture of the Equity Division. It is part of his ongoing legacy to the administration of justice.

Mr Berecry worked in the Court and in the Law for some 50 years. He was fondly regarded by many barristers he counted as personal friends including their Honours Ian Harrison and Philip Hallen JJ and John Wilson SC, Michael Willmott SC, Peter McEwen SC, John Ireland QC and Martin Einfeld QC, among many others.

Mr Berecry is remembered for being unfailingly polite to all, however senior or junior. He was a calming influence and he acted swiftly and effectively to break deadlocks between practitioners.

In 2005, Mr Berecry was admitted to the Bar. He became a member of Edmund Barton Chambers and commenced in earnest a lengthy stint as a mediator of choice.

Many practitioners have written to the Bar Association to express their condolences and have recalled him fondly from their years in the List.

Kevin Tang

Murray Rutledge Wilcox AO QC

1937 - 8 November 2018

The Honourable Murray Wilcox, AO QC, was a judge on the Federal Court of Australia for 18 years. He was a trailblazer both on the court and at the Bar. He was a committed conservationist, instrumental in stopping the damming of the Franklin River in the 1980s among other things. One former president of the NSW Bar farewelled him as 'one of the poets of Australian law'.

Murray Rutledge Wilcox was born in 1937 in Longueville in Sydney to Valerie and Donald Wilcox, a Presbyterian Minister, who moved between parishes and around NSW while Murray grew up. Murray completed his education at The Scots College, where he was a fine scholar and champion debater.

It was at Scots that Murray decided that he wanted to become a barrister. At the time in the 1950s, a parent at the School was charged with murdering his wife by planting Minties laced with strychnine. He was enthralled by the horrible details of the case and compulsively read the daily reports of the court case in the *Sydney Morning Herald*, together with his school mates.

Murray commenced law after his Leaving Certificate at the University of Sydney in 1954, and took articles at Messrs Sly and Russell.

During his first year in law, Murray met his spouse Christina Gaven – one of the great events of his life. They married in 1959. They would spend the next half century together.

A new solicitor, Murray moved to Cooma, which, at the foot of the Snowy Mountains and mid Snowy Mountains Scheme, was a great place to start practising – cases of all types would come in. It was a timely move for a solicitor taking first steps. Wilcox, bright eyed and fresh faced from the city had just turned 22 years old and would face the realities of a small country practice. Murray had no help and managed the practice himself.

At Cooma, their eldest son Gavin, was born. They returned to Sydney in 1963 for Murray to go the Bar and in the years following, Murray and Chris had two daughters, Felicity and Anne.

In 1976 he became a member of the Law Reform Commission, of which he was chairman from 1984-85. In 1977, he became a Queen's Counsel and received Judicial Appointment in 1984 to the Federal Court of Australia. During his 22 years on the bench he was known for humanity, empathy and an ability to get to the heart of the issue. He was a humble man, with a seemingly endless capacity to listen to other points of view. He had an unerring quality of being able to take a judicial view seemingly not to favour any side. Murray's early years on the court were occupied with many questions of standing and defining the procedures to bring certain cases before the court.

Some of his most significant cases included being on the bench that granted an injunction preventing the de-registration of the Maritime Union of Australia in 1998. He also heard the Noongar native title case, which he delivered just two weeks before retiring in 2006. The decision was overturned on appeal, but reflected his willingness to make significant decisions. The decision has been susceptible to misreading ever since.

Murray Wilcox saw the law as a means of protecting the vulnerable and marginalised in society, and was particularly passionate about Indigenous land rights, anti-discrimination legislation and fighting for the protection of the environment – in the times before any such matters rose to any national prominence and concern.

He was appointed Chief Justice of the Industrial Relations Court of Australia, a role he held from 1994 until his retirement in 2006. When the Attorney-General offered him the position, Murray declined it. He was strongly opposed to the creation of the court. It was precisely for this reason that, he was informed, he had been chosen for the role. More than anyone, he would have known the pitfalls and risks of that court and how to preserve it.

In 2010, he became an officer of the Order of Australia for his services to the law and his environmental work, which was a great theme in his professional and judicial life.

As a barrister he appeared for conservation groups in several important cases, including the Myall Lakes inquiry against sand-mining and was the foundation president of the Environmental Law Association of NSW.

As far back as 1979, Wilcox was elected president of the Australian Conservation Foundation and fought valiantly to prevent the Franklin River dam fiasco which reached global prominence. As a barrister this was a moment in the sun for Murray. The 1970s was a chapter of history full of torrid disagreements and outcries of despair for the Earth and its future. He lobbied ministers on both sides of politics and united conservation groups in the effort to make the Franklin a defining issue of the 1983 federal election. The rest is history, as they say.

Murray was, before his time, an environmentalist. He saw and loved the beauty in nature and wanted to preserve it so it could be enjoyed in the future. He glimpsed the eternal in the cases to do with the preservation and continued good use of nature.

Murray loved bushwalking and with Chris walked the South Coast track in Tasmania three times, they scaled Table Mountain in Cape Town, walked the foothills of the Annapurna mountains in Nepal, climbed Mount Kinabalu in Borneo, and then Mount Kilimanjaro in Tanzania, a trek that almost killed him after he took ill in that strange climate in the hills surrounding. Speaking of mountains he also scaled Mount Gower at Lord Howe Island – a lawyer's haven latterly but to him a holiday destination with his children.

Murray enjoyed good food, music, theatre, political debate, literature and watching cricket and tennis. Murray and Chris drew in an enormous circle of interesting, lively, diverse and artistic friends. They constantly had guests in their home in Leura.

Although Murray was a distinguished Queen's Counsel and a long serving Federal Court Judge he was treated with little deference by his family. His children, as teenagers, invented the verb 'to swabb' referring to Murray's grand ability to speak with authority but on a subject about which he knew nothing at all. Murray could use the English language masterfully.

Tragically, his son Gavin died prematurely aged only 46 in about 2008. This bereavement remained with Murray in his last decade.

In the end, Murray died suddenly from a heart attack on November 8 2018 aged 81 years. Murray literally died on the Murray (River). He was doing what he loved – cruising down the river with Chris for their 59th wedding anniversary. It was a fine day, he took his leave and the end came quickly. Typically, the holiday was a time to enjoy nature, talk to interesting people. It was beautiful.

Christina, his spouse survives him, as do his daughters Felicity and Anne, a daughter-in-law Wendy, his son-in-law David, together with seven grandchildren and one great-grandson.

Kevin Tang

Mr Steven Woods

Steven Woods practised from the Thirteenth Floor of Selborne Chambers for 22 years as a barrister. The Bar has lost an active, industrious junior counsel who was also a great family man.

Steven had a prodigious legal practice which he built up over years. He was a master of detail and he left no stone unturned. Steven was tall in stature and was a man in court with a presence and powerful purpose.

Steven practised mainly in the area of medical negligence and common law. He was highly experienced and appeared in a great many other areas such as commercial cases. There were in fact many solicitors who have recently said that few barristers knew the territory of doctors, hospitals and all of the paramedical specialties as well as Steven. He managed hundreds of claims against the Red Cross Blood Bank which arose due to contamination of blood samples. At final hearing in the Supreme Court that case required 13 experts to be in court. That large piece of litigation took Steven to USA and Europe.

Steven had a great fascination for medical practice and its procedures. He was forever seeking out old medical texts and liked speaking to practitioners and experts on how things were done. In the field of medical negligence and accidents, a lengthy case which was covered in the media was the catastrophic injury at the time of Calandre Simpson's birth. Judges usually thank counsel for their assistance at the conclusion of a case, however in that case the trial judge thanked Steven for his ability, diligence and persistence. That was exceptional. He had the respect of the judiciary and the profession generally.

Steven often appeared in the protective jurisdiction in the NSW Supreme Court for children, minors and those with disabilities. Those clients were the most needy in the community and most vulnerable people in society sought out his expertise. Steven would appear in the best traditions of the Bar to assure the continued wellbeing of his client.

Steven acted on the Voyager litigation – the Australian destroyer which sunk in 1964 after a collision with HMAS Melbourne in Jervis Bay. That was a great case. Other fascinating cases which he ran concerned class actions in product liability and also the ICI litigation which involved a spray which was used on livestock causing some worrying consequences to the animals. This involved a significant head of cattle all along the eastern seaboard.

A highlight of his life as counsel was that Steven was appointed Solicitor General of the Solomon Islands. It was a period when Steven went to New York to the United Nations arguing matters of territorial importance – for that small nation. It was made all the more significant when it was known that rapacious fishing by foreign vessels regularly circling in its waters was taking place. Steven was a generous and accommodating man and he insisted on not flying business class to New York for that dispute so that others involved in the case from its inception would be able to travel and accompany him on that long haul flight to New York.

Steven's chambers were a study of ecclecticism. His briefs and boxes of documents were stacked up, strewn everywhere in the available space. Briefs formed a labyrinth of small corridors and pathways in and around his desk. In every nook Polynesian artefacts and objects from antiquity covered the shelf spaces. It was like an annexe of the Nicholson Museum at the University of Sydney. He was a collector of old books, crockery and porcelain, not to mention the early camera collection. There was the look of a cabinet of curiosities in Steven's room. The usual CLRs also found a home as well as medical treatises.

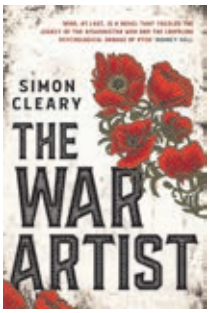
Steven had a towering intellect and also a quiet and magical sense of generosity. This quality is singular at the Bar. Steven helped establish several new barristers in their careers. He was welcoming and kind. This quality also extended to the occasions when he was led by Silk – Steven was a junior who made a Silk look good and made the job easier – for which his leaders are eternally grateful.

In the end, Steven's illness crept up on him, it was noticeable that use of his left hand was fading. His fellow floor members remarked that the time seemed to pass very quickly once Steven had received his diagnosis. At the prognosis of 'the cancer will affect my memory and my ability to walk' Steven's comment was 'I have never been good at remembering and I have always had difficulty walking'. We must not forget that Steven carried his crosses through life, and the burdens of illness to which those of lesser substance and fortitude would have succumbed. He had a certain inner strength and resolve that most counsel adopt and draw from their hours of preparation and discipline required for concentration and work. His was exceptional. Steven was learned and agile in mind as counsel, yet self-effacing and humble. He was an exquisite example of a barrister working away quietly.

Steven is survived by his spouse Carolyn and his sons Caleb and Liam.

Kevin Tang

BOOK



The War Artist by Simon Cleary

Anthony Cheshire SC

There are many difficult and often divisive questions that arise out of having Armed Forces. For instance, is it a form of service to their country or is it just a job? Does it make a difference if the service is in a foreign conflict that gives rise to no immediate threat to this country? Should we pay members better than other public servants?

Perhaps the most difficult issue is how to deal with those returning from conflicts. On one view, servicemen and women have risked their lives, and often suffered, for their country and are deserving of greater gratitude. Thus, in the United States people stand up and applaud their very presence in public.

An approach based upon gratitude, however, invites a value judgment on their service and thus on the conflict in which they have served. It is well-recognised that those who served in controversial conflicts such as Vietnam and Korea were not unambiguously welcomed home and celebrated. Similar issues arose even with those returning from the First and Second World Wars.

Whether approached from a principled perspective to service or as a matter of pragmatism, the fact is that there are many servicemen and women who suffer terrible physical and psychological injuries, which impact not only upon them but also their families.

Cleary's interest in the impact of war was inspired by his grandfather having returned 'both enhanced and traumatised' from the First World War, a man he describes as 'a confident, successful man by day, [but] his sleep was haunted by nightmares'.

There are many charities operating in the space of providing support and assistance to ex-servicemen and their families in times of injury, illness and crisis, but much of the focus of commemoration and fundraising continues to be by reference to long-past conflicts.

James Brown, the current head of the Returned and Services League NSW, has written powerfully in his excellent book, *Anzac's Long Shadow: The Cost of Our National Obsession* (Redback, 2014), how Australia expends too much time, money and emotion on the Anzac legend at the expense of the needs of current servicemen and women returning from conflicts such as Iraq and Afghanistan.

Simon Cleary's new book *The War Artist* (University of Queensland Press, 2019) is an important contribution to the debate that we ought to be having about returning service personnelt. He highlights, albeit in a fictional account, the devastating psychological effect that conflict can have upon servicemen and their families.

James Phelan is a Brigadier returning from Afghanistan with the body of a young soldier. He blames himself for the soldier's death as it may have been his very presence on the patrol that led to the ambush that killed him.

Phelan's guilt and reliving of the ambush, which he cannot shake, lead to a rapid mental disintegration. This commences with a decision to get a tattoo, which in turn leads to an encounter with a tattoo artist, Kira, who becomes a recurring, and indeed central, character in the book.

The third person in this emotional triangle is Phelan's wife. It is striking how much she has been living a life wholly separate from her husband during his absence and there is a tension upon his return such that the marriage could collapse at any moment. Instead of the marriage, it is Phelan who unravels. His disintegration and then partial recovery in his search for redemption is captivating and moving.

At times, the peripheral figures in the novel can feel somewhat one-dimensional. For instance, there is Kira's drug-dealing and abusive partner, the army colleagues of the dead soldier who blame Phelan for his death and embark on a campaign to destroy him and the senior officers whose only concern seems to be avoiding negative publicity. No doubt such people exist, but, together with the odd clunky metaphor in the early pages, their presence does distract on occasion from the tension of the central narrative.

It is the emotional triangle of Phelan, his wife and Kira that drives this novel on and in which Cleary excels. The initial pages of a novel are often taken up with watching from the outside new characters being introduced, but it was not long before I was completely engrossed in the story, but more importantly in the characters themselves.

Cleary is a talented writer and a successful one, his previous two novels having been recognised in literary awards in Queensland. He is also a practising barrister in Brisbane and so comes within that frustrating and impressive group of barristers who have extraordinary talents outside of the law.

SAVE THE DATE

Australian and New Zealand
Bar Associations Joint Conference

23-24 August 2019

Rydges Lakeland
Resort Hotel Queenstown

Skyline Queenstown

Australian
Bar Association

NEW ZEALAND
BAR ASSOCIATION

NZCONF.AUSTBAR.ASN.AU

ADVOCATUS #1

Police Officers fibbing?

Where am I? I pondered as I sat at the Bar table. I was in suit and tie so I knew I wasn't anywhere the Evidence Act applied. I strained my ears and could discern a judicial creature of some sort suggesting that a police officer was not to be believed. *Not to be believed? What is this place?* I cried in silence as a solicitor elbowed me in the ribs. *What does she want?* I thought. *An objection of some sort?* I awoke regardless and rather than lodge another baseless objection I remembered that I was in a commission of some sort. It was a hearing. There were police officers on my side, police officers on the other. All of the officers were giving evidence one by one and what was emerging was that they disagreed with each other. They were giving different narratives when compared to each other's evidence which led to a conclusion that one or more of them were lying. Not only that, but the judicial creature hearing this evidence had twigged.

Police officers fibbing? You wouldn't believe it. On many occasions I'd appeared before another tribunal, a court I think it was, where the judicial officers presiding could simply not fathom that a police officer could be less than candid let alone blatantly dishonest. I'd become inured to it. I'd told clients on many an occasion, 'Well it's your word versus the cops' and I can tell you now you're no hope of convincing the magistrate that you're telling the truth. And no, I don't care if you've got a dozen witnesses, hours of high-quality CCTV and character evidence from a former Prime Minister..'

Yet here we were. Back in this commission or tribunal or whatever it was and the creature presiding was considering a conclusion that a police officer – my client no less – was dishonest and not to be believed. I had a flashback to when another judicial officer had quoted Harry Gibbs from a Commonwealth Law Report. Gibbs had apparently said something to the effect that police often lie and their evidence should – sometimes – be treated with caution.

'Keep that one in your back pocket,' His Honour had said as he shut the CLR with a yellow Post-it note as his bookmark. How I've wished I'd taken his advice. Sure, lugging a CLR around in one's back pocket must be uncomfortable, especially one stolen from a District Court judge, but how many times have I needed Harry and his cynicism? And do you think I can remember the case or at least have a go at tracking it down? Of course not. Meanwhile, my client in blue's credibility was on life support and I needed something to revive it. Then I had an idea: A view.

Yep, we'd pack up what we were doing, hail a couple of cabs and have a wander through the Downing Centre. I'd guide the commissioner or member or whatever she was into a Local Court so she could see firsthand magistrates accepting without reservation everything police officers say. Sure, there was a chance we'd draw a rogue who might question the reliability of a young constable, but it was worth the risk. Then I received another jab in the ribs and realised I'd been daydreaming again.

'I object,' I whined.

'On what basis?.

'Relevance, Your Comm-er-Mem-mmm..'

'But this evidence goes directly to whether your client conducted an illegal search or not..'

'Does it? I withdraw the objection then.'

Needless to say we lost and I found myself a week later back in the Local Court. The client was charged with assaulting a police officer at a concert under the stars. Rival groups had argued over spilt wine on a picnic blanket which led to a melee.

'You're lucky,' I told the client during a conference. 'We've come up with a cutting edge strategy for you..'

I wouldn't dare so much as to suggest that the officer involved was lying, but rather *mistaken*. To suggest to a magistrate that a police officer has lied can often provoke a look of such discomfort that one wonders whether His or Her Honour is suffering from some form of indigestion or stomach upset. The remedy, I've found, is to suggest that the officer concerned is *mistaken*.

'Your Honour, I don't suggest that the officer has fabricated his version of events. Rather, he's mistaken as to who pushed him and then punched him. One can understand why such a mistake could be made given the noise and the number of people involved. There were thousands at this concert and more than a dozen people were involved in the fracas. It was a very dynamic situation. The officer is simply mistaken as to who pushed him and who punched him.'

Mistaken, mistaken, Her Honour pondered as she allowed my lozenge of logic to wallow in her mouth. Yes, I imagine she thought. *A mistake is far more palatable than a lie. He was mistaken. Houston, we have a reasonable doubt!*

But be careful of your use of the M word. It can hold plenty of sway in one jurisdiction and none in another. Likewise, the L word can be a sword in one forum and a straightjacket in another.

We can weasel our way around with words like 'reliable' and 'credible', but at the end of the day aren't we in pursuit of the truth? Shouldn't we be direct in our language during this endeavour? Of course not.

Ours is a business riddled with fictions and prejudices and the sooner we learn what they are and where they exist, the more effective we become. Unless of course, I'm very much mistaken.

ADVOCATUS #2

The Criminal Code: Using Language [1]

If one aspires to silken success in Phillip St, it is essential to have a familiarity with more than just the English language. *Prima facie*, there is Latin. There is also French, not only useful for summers in Provence, and winters in Chamonix, but also in statutory construction, when one may need to resort to the travaux préparatoires. While those of us who practise in the criminal jurisdictions of Sydney's western suburbs are unlikely to require one's French either in court or on vacation, we do need to master at least one other language.

Members of the civil bar may be surprised to know that 'pig Latin' is still very much utilised as a communication method between persons wishing to keep their activities secret from the police. Pig Latin is, of course, a 'secret' language formed from English, by transferring the initial consonant or consonant cluster of each word to the end of the word and adding a vocalic syllable: i.e., *Igpay atinlay*.[2]

Thus, from a covertly recorded telephone call tendered in a trial on charges of robbery and attempting to influence a witness, we receive the following transcript of a conversation:

> Male 1: Oi, listen closely my bra. My ownfay is aptay right cuz?
>
> Male 2: Yeah
>
> Male 1: There's Ds at my house ….The night of them two ingfays right … I was with ouyay and your adays … sweet?
>
> Male 2: Yeah

For non-criminal barristers, the conversation reveals that Male 1 is asking Male 2, his trusted friend, to attend closely to what he is about to tell him. First, he suspects that the police have obtained a warrant to lawfully intercept his telephone, and are therefore recording his conversation. Second, there are police officers, possibly designated detectives, currently at his home investigating a crime. Next, he is requesting his friend to provide him with a false alibi. He is directing Male 2's attention to a particular night when Male 1 carried out two alleged robberies, and asking him to advise any detective who may inquire, that Male 1 was in the innocent company of Male 2 and Male 2's father on that date.

Regrettably for Male 1, while he was correct about the telephone intercept warrant, he was incorrect in his assumption that the investigating police were unable to decipher his use of the only Latin that police can typically speak.

In our experience, would-be criminals are undeterred in their use of what they believe to be impenetrable codes. They show an impressive facility with them, even in spontaneous and somewhat stressful situations. For example, in the middle of a violent brawl in a public place:

> Q. When you saw [A] put his hood up, what happened then?
>
> A. We were sort of like moving towards them still and then and when [A] put his hood up and put his hands behind his back, [F] yelled out, *'He's got a nug.'*

Recently on Twitter, the following transcript extract was published with the caption '*Mr Walker, you appear to have swallowed my dictionary [The Macquarie, 7th Ed]*'. [3]

> Mr Walker: It did seem to be a rather elaborate saraband. I am not quite sure it needs to be broken up as much as it was. Can I try to attempt now some portmanteau submissions in that spirit?[4]

Reading this prompted a recollection that the other language with which criminal barristers require a facility is Exceedingly Plain English. On occasion a witness or client is able to remind one that a few inelegant words can conjure a powerful picture.

A suspect of very large Pacific Islander build had been apprehended with another man's mobile phone. He maintained there had been no violence. Questioning by police resulted in the following exchange:

> Q: Well, how did you rob him? Did you push him, did you use a knife or anything?
>
> A: Nothing. I just went up and asked him to hand over his phone and he did.
>
> Q: Well, what did he look like?
>
> A: Like a skinny bogan.

Rarely would one expect to encounter a better Exceedingly Plain English description than the one provided by Breanna, our potential witness in a home invasion case, who commenced her account thus:

> 'I know everyone that lives in the street. The main boys I have met in the street are Paul, Luke and Ronald. Ronald is only about 20. I know this because he has only done one lagging. Ronald is about 170 centimetres tall. He always dresses in Canterbury and Henleys. Ronald looks like Matt Damon the actor but has scabs on his face.'

Unfortunately for those who may have been prepared to overlook the scabs, Breanna had a little more to say about Ronald:

> 'He is also very dumb. I know this because he couldn't even do a scratchie. If you can't do that I think you are pretty dumb.'

At times, one's clients are even able to proffer some Exceedingly Plain English advice as to the skills involved in criminal practice at the bar. In some recorded gaol calls we discovered the following wisdom concerning trial preparation techniques:

> Girlfriend: I thought you said your lawyer was getting you out soon.
>
> Accused: I don't know what's going on out there… I haven't even got, you know the paperwork, I haven't even got nothing here.
>
> Girlfriend: OK so if I was your lawyer right, I would have demanded and subpoenaed the brief so that I have it in front of me on my table when I'm at work. Ok? Not jacking off to porn, I'm actually working, and I would sit at the table and I would read through the paperwork and have a look at what the opposition has. Then I would evaluate. How do I discredit the other side?

And to that, I plead *nolo contendre*.

ENDNOTES

1 All quotes used in this column have been sourced from briefs in the author's practice. The names and any other identifying information have been changed.

2 Collins English Dictionary online.

3 Twitter account William Gummow@shitjudgessay.

4 *Paige & Ors on behalf of the Barngala People v State of South Australia* [2018] HCATrans 216.

I am writing to ask a delicate question of you, viz., should I write a strongly worded letter to *Bar News*? I am a regional barrister, from Chambers in Newcastle that, on the face of the report on Regional Practice (Spring edition 2018 at page 107) doesn't exist. More pain came from an extract of 'impermissible cross examination' (ibid at page 15) for which yours truly was Counsel at trial. Do I stay under the radar, or thrust myself into the spotlight of notorious obscurity?

What joy! At last! The Furies have been asked by a disgruntled reader about *Bar News*' failure to acknowledge the existence of certain regional chambers! Joyful, because you must be real! We had come to suspect that the questions we feverishly answered were not occasioned by actual professional angst, but were the result of a desperate editor's desire to fill an awkward back page. This had led to us feeling an existential angst of our own, but with no obvious person to advise us, as to whether, if unacknowledged, we exist, which brings us to your (obviously real) query.

Let us first address the article in which you say you featured[1]. There are two classes of advocates: the infallible and the fallible[2]. You may feel relegated to the latter. This is a good thing. Pity the infallible advocates who possess the unfortunate flaw of not being able to learn from their mistakes. We certainly do. Apart from never seeking our advice as you have done – presuming we and you both exist – infallible advocates, being perfect, cannot conceive of the need to second guess, continually, their strategy or to adapt that said strategy to the unfolding trial or to self-excoriate, post-trial, when said strategy has not worked with a view to employing a better one next time.

However, that does not mean that we, the fallible, must lend a loud speaker to our missteps and inadequacies. On the contrary, our clients, like aircraft passengers listening to the calming tones of a pilot before take-off, desire assurance that their case is in a safe pair of hands; they do not want to read, in the in-flight magazine, about their pilot's history of impermissible manoeuvres.

So, by all means, write a letter to *Bar News* about the importance of the due recognition of regional chambers, but not in such strong terms as to cause further complaint about your manner and style. And you may wish to do so in the proud tradition of complaint writers everywhere: anonymously.

1 'Impermissible Cross Examination', *Bar News*, 2018 Spring Ed. p 15.

2 Depending on your political persuasions and view of history, these two classes may or may not correlate to the namesakes for two sets chambers omitted from the *Bar News* report and which, according to Find-a-barrister, also operate in Newcastle: Sir Owen Dixon Chambers and Lionel Murphy Chambers.

It is your mother's 80th birthday on Sunday and a family lunch is planned on the harbour. Your solicitor says that all hands on deck are required on Sunday to finish affidavits due on Monday morning. What do you do?

You say your mother's 80th birthday on the harbour is 'a family lunch' that has been 'planned'. This suggests a significant degree of organisation by you, your siblings and respective partners and, given the age of your mother, the likely coordination between event-filled family diaries to ensure the date does not clash unduly with the sporting finals, interstate dance competitions or music recitals of various grandchildren. Likely also, the venue has been booked well in advance given the surprising lack of good value eating establishments on the harbour foreshore large enough to accommodate the extended family of an 80 year old matriarch. No doubt, too, there has been significant angst over the choice of gift, the fair allocation of its expense and the burden of purchasing it. If the get together is a surprise party, then triple the logistics and degree of difficulty.

By contrast, the 'all hands on deck' call from your solicitor sounds like a last minute scramble by a 'hands-off' partner with zero organisational skills and an over-reliance on dependant-free millennial graduates hoping to overcome a billable hour deficit before their yearly pay review.

Unless you can bend the space-time continuum in your favour[3], you have the following choices.

First, you can eschew the family event to the everlasting resentment of your mother and those organising it (whether that be yourself or others) and, instead, come to the aid of your instructing solicitor. As a result, you may be rewarded with more briefs and, therefore, more opportunities to disappoint your near and dear in the pursuit of your career. Of course, when it is your 80th birthday and you face an empty table and the apologies of your offspring, you will have the bitter satisfaction of knowing you have passed onto them those same self-centred values, masquerading as self-sacrifice, by which no family can thrive.

Secondly, you can tell your solicitors that you cannot possibly work as you have a family event that requires your attendance on Sunday and that you will not be available until Monday morning, possibly late, because you may be on clean-up duty for the post lunch party back at yours. As a result, you will be deprived of future briefs, providing you with more opportunities to perform unpaid domestic work. Of course, when it is your 80th birthday, and you face a full table of children and grandchildren, you will have the bitter satisfaction of knowing that you have selflessly given them the most productive years of your life before you return to the caravan park in which you live because your superannuation, which was never going to be enough, has run out.

The third option is that you tell your solicitor that you expect the final draft affidavits to be ready by 4:00 PM on Sunday, at which time you will attend their offices to settle them on the understanding that the witnesses will be available to review and sign the affidavits first thing Monday morning[4]. Your solicitor will be grateful and you will have attended your mother's birthday lunch.

Your choice.

3 We understand that some infallible advocates also claim to be able to do this.

4 This option assumes many things: seniority typical of a forty-something year old barrister; domestic care arrangements Sunday evening (to be reciprocated); proximity of lunch venue to solicitor's offices and restrained consumption of alcohol at lunch being just a few.

If you have a question you want the Bar's agony aunts to answer send it to: ingmar.taylor@greenway.com.au