

Reports from Bar Council Committees

Criminal Law Committee

Three significant things have occurred this year in the area of review of Criminal Law. The first is the establishment of the Committee for the Review of Commonwealth Criminal Law chaired by Sir Harry Gibbs. This Committee has published two discussion papers. The first dealt with the onus of proof and averments and the second with the role of the Common Law in Commonwealth criminal law. The Association's Criminal Law Committee made submissions in response to the two papers.

The second matter is the move to establish a Criminal Law Section of the Law Council. The Committee has taken an interest in this development although at this stage the Section has not been fully set up. In the meantime the Association's Committee has had referred to it a number of matters in the area of Criminal Law by the Law Council. Apart from the *Proceeds of Crime Act* of the Commonwealth the matters referred did not cause any great concern. The *Proceeds of Crime Act* did cause a great deal of concern. The Association is in the process of drawing a submission in opposition to much of it even though the Act has already been passed. It was passed with little discussion or publicity.

The third matter has been the creation of the New South Wales Criminal Lawyers Association. The Association is currently running a series of seminars chaired by The Honourable Mr Justice Lee. The Association aims to have lawyers from all areas of practice of the criminal law and the Bar Association's Committee hopes that the Bar will be influential in this new Association.

The Association's Committee has made representations on a number of matters to various authorities but the most controversial has been the Task Force on Violence Against Women and Children. In discussion papers issued by its Task Force it was suggested that certain evidence be taken by video monitor and that certain material obtained during the investigation may not be made available to the defence. The Association made written and oral submissions to the Task Force and joined with the Law Society in opposition to these proposals.

Criminal Injuries Compensation has also been under review this year. There have been suggestions that the process should be dealt with by specialised tribunals, not by Courts. The Committee has opposed the use of specialised tribunals in all areas of criminal law and has opposed their use both as a matter of principle and of practice in cost efficiency and justice. □

Family Law Committee

The Family Law Sub-Committee met approximately eight times during the year and made some important contributions as a result of those meetings in regard to Counsel's fees, the Sydney premises of the Family Court of Australia, listing problems, legal aid fees for Counsel appearing in family law, the issue of the Family Court being a division of the Federal Court, the Court procedures, including enforcement of access and maintenance orders and contempt in the Family Court.

Counsel's Fees in Family Law

The Judges Rules of the Family Court of Australia now give power to Judges through their committee to make rules in relation to Counsel's fees. The Family Law Sub-Committee, in conjunction with the Family Law Section Executive of the Law Council of Australia, has made contributions towards the Judges Rules Committee in relation to Counsel's fees.

The Family Law Section Executive made a written submission to the Judges and then made oral comments on that written submission to the Judges Rules Committee on 27th July 1987. Prior to that, there had been discussions between Handley Q.C., on behalf of the New South Wales Bar Association, with the representatives of the Victorian Bar Council and the Queensland Bar Council in respect to that scale of fees proposed by the Family Court Judges. The New South Wales Bar Council supported the Family Law Section Executive proposals as to the quantum of that scale. The Judges Rules Committee proposed to write to each of the Bar Councils inviting them to make reply in order that such replies should be all available when the report of the Judges Rules Committee to the whole of the Judges of the Family Court of Australia was to be made in November 1987.

Such request has not been received, but when received will be replied to in accordance with the proposals earlier outlined.

Sydney Court Premises

For some considerable time there have been complaints that the Sydney premises of the Family Court of Australia are inadequate. Not only have the Judges and staff been complaining to the extent that the staff have been going on strike but the profession, including the solicitors and the New South Wales Bar Council have made representations by letter and otherwise to the Federal Attorney General.

The Federal Attorney General met a delegation of members of the profession in May 1987 to deflect the proposal by the Attorney General to move the Family Court to premises in William Street, Sydney. Towards the end of 1986 the premises at 75 Elizabeth Street, Sydney were remodelled to allow greater security for the Judge and more Courts made available. This is not adequate and still leaves a shortage of space and adequate accommodation for the profession and the public in these premises.

Court Procedures and Delays

The Sydney Registry has been battling with delay in the hearings of matters in the Family Court for a considerable time. Approaches have been made to the Judges in regular quarterly meetings with the Sydney Judges to overcome the delay. A new listing procedure came into force in September 1987 whereby there is a rolling list of long defended matters. The Family Law Sub-Committee has made submissions to the Judges on this and other procedures, including case management, during the year to ensure that there is effective dealing with all matters including long defendeds, short defendeds and duty matters.

The Family Law Sub-Committee and the New South Wales Bar Council is not yet satisfied that the problem has so far been overcome but is continuing its negotiations with the Attorney General and the Judges to overcome delays.

Family Court and Federal Court

Representations have been made to make the Family Court a division of the Federal Court. There have been many obstacles to this suggestion, which has been supported by many branches of the family law profession throughout Australia.

It appears that the recommendation of the Constitutional Commission dealing with that part of its report related to the Judiciary, recommends that the Family Court be gradually integrated into the Federal Court.

Apparently, the Federal Judges do not want the Family Court to be part of the Federal Court and the probability of the Family Court remaining as a separate Court will continue despite the plea by the then Chief Justice of the High Court of Australia, Sir Harry Gibbs, in August 1985 that the Family Court should no longer remain a separate Court.

Reference of Power and Cross Vesting

Both these matters have been the subject of discussion and submissions to the Attorney General during the year. Cross vesting legislation has now been passed by the Commonwealth and by New South Wales, Victoria and South Australia (all of the latter three will come into force in 1988) but the reference of power legislation has still not passed through the Parliament.

New Legislation

The Family Law Sub-Committee has been aware that the Federal Government proposes to introduce new legislation to give jurisdiction to magistrates of the various States to hear some property matters (with a limit of civil jurisdiction appropriate in each State) and in relation to the hearing of divorces by magistrates in State Courts.

Although the Family Law Sub-Committee has joined with other bodies in opposing this legislation, they have so far been unsuccessful. The new legislation giving jurisdiction to magistrates, giving powers to Masters and using the reference of powers provisions to overcome the dichotomy between Federal and State Courts on custody matters will be introduced into the Parliament in November 1987. □

Fees (Scale) Committee

During the course of this year success has been achieved in obtaining approval of a new scale of Supreme Court fees which will, in accordance with recognised procedures, become reflected in the updating of the District Court fee scales.

In addition, an application has been made for the loadings for country work to be increased to accord with current costs and the result of this application is awaited.

A previous study involving the possibility of change to charges by counsel on the basis of a daily fee or part thereof for portions of a day, in lieu of the long established system of brief fee plus refreshers (the latter on a two-thirds basis) has been presented to the Fees Committee chaired by Mr. Justice Priestley and is understood to be under current consideration. □

Fees (Recovery) Committee

This Committee has carried out a large amount of the routine work involving a large number of matters involving fees outstanding to counsel, the great bulk of such work being carried out by Biscoe, whose efforts have been substantial and appreciated. In a limited number of cases a situation has developed where a few solicitors have determined not to pay fees even where the question of entitlement of counsel has been the subject of arbitration under the joint statement. The Law Society has apparently not yet determined to regard the non payment of fees under an arbitration award as amounting to professional misconduct. There is a present need for the establishment of such a proposition.

Further problems have emerged in relation to the "black" list where there have been mergers of listed firms or of partners formerly part of listed firms with the result that the solicitor carrying the obligation for unpaid fees has become divorced from the listed firm. The view has been taken that the incidents of listing should be carried to the firm with whom the solicitor has become associated. This needs clarification in the Bar Rules. Furthermore, a similar problem has emerged in relation to the obligations of counsel not to accept a brief where satisfactory arrangements have not been made for the payment of counsel previously briefed. In this instance the view has been held that the obligation resting upon counsel still exists, regardless of the solicitor having moved to a different firm and having taken the matter with him. Again, clarification of the Rules is called for. □

Legal Aid

Members may be assured that the Association is doing something about the legal aid scale of counsel's fees in criminal matters. This is overwhelmingly the most important task of this Committee. Present fees are, of course, quite unrealistically low. The Association adopted, therefore, a "mould-breaking" approach in its submission to the Legal Aid Commission, Donovan's contribution to the compilation of our submission merits specific recognition. Negotiations and discussions have taken place with senior staff of the Commission, and it is understood that the matter is now being considered at Commission level. We hope that a decision is not too far off. No doubt, there are budgetary restraints upon the Commission. However, the community knows that effective provision of legal aid in criminal matters requires the involvement of the Bar. What is necessary to ensure that continuing involvement is the payment by the Commission of decent fees for counsel.

In civil matters the new court scales mean that the remuneration for this type of legal aid work has, at last, been increased. Here there is no prospect of the Commission changing its policy of paying 80% of the fees prescribed by court scales. Those scales must, accordingly, be updated.

The merger of the ALOA with the Commission appears to have gone ahead fairly well. Complaints about payment difficulties have declined. The Committee is, of course, available to assist members with specific problems in their dealings with the Commission. □

Law Reform Committee & Accident Compensation Committee

The time and attention of the members of this Law Reform Committee and the Accident Compensation Committee were heavily engaged during the year in dealing with the State Government's proposals for changes to the legislation governing the Legal Profession, Workers Compensation and Road Accident Compensation.

By arrangement with the Attorney-General the Hon. Terry Sheahan M.P. and his officers the Bar Association was supplied with drafts of the proposed Legal Profession Bill and given the opportunity to comment on the form of those drafts. The Council took full advantage of this opportunity and a total of 59 amendments were suggested to the Attorney-General and all but two of them were adopted.

The Council's suggested amendment to the definition of professional misconduct in the Bill was not accepted, nor was its suggestion that the Q.C.-Solicitor provision in the Legal Practitioners Act be phased out.

Discussions are continuing with the Attorney-General on the new statutory definition of misconduct. The Attorney-General has written to the Council agreeing to 1st July 1988 as the commencement date for the new system of practising certificates. The new disciplinary system will commence on 1st January 1988.

An article summarising the aspects of the Legal Profession Act of particular relevance to barristers appeared in the Bar News of Winter 1987.

Prior to June members of the Accident Compensation Law Reform Committees were active in examining various "Green Papers" prepared for the State Government which proposed changes to the Workers Compensation Act 1926 as amended and to the Motor Vehicles Third Party Insurance Act 1942 as amended. The Council and its Committees co-operated with the Law Society and its Committees in this work. Submissions in answer were prepared and distributed to members of Cabinet, its Policy and Planning Committee and to members of Parliament. Ultimately representatives of the Council and the Law Society were given the opportunity to make verbal representations and to speak to their written submissions before a Sub-committee of Cabinet presided over by the Premier.

The Council did not adopt a negative approach but made numerous positive suggestions for reforms to the system which were believed to effect significant cost savings. However throughout it argued strongly for the continuance of substantial common law rights involving in most cases lump sum assessment of damages by the Courts.

In relation to proposed changes to the Workers Compensation Act the Council argued strongly for the retention of common law rights in respect of industrial accidents.

In the end, as members will be aware, the Government rejected the submissions made by the Bar Council and Law Society, and legislation has been passed abolishing common law in relation to industrial accidents, and practically abolishing such rights in respect of motor vehicle accidents in this State.

Articles summarising the effect of the new Workcover and Transcover legislation appeared in the Bar News of Winter 1987.

Since the commencement of the new legislation on 1st July 1987 the Council has undertaken a limited advertising programme in major daily newspapers directed to the

victims of serious motor vehicle accidents and their friends and relatives advising of the continued need of such victims for legal advice and assistance. At the same time the Accident Compensation Sub-committee prepared a brochure for use by solicitors summarising those aspects of the Transcover system which busy solicitors would need to know in order to handle enquiries from the public.

This brochure was distributed to all floors, and further copies are available on request from the Registrar.

This brochure was made available to the Law Society which distributed copies to all firms of solicitors in the State. The President of the Law Society also wrote to all firms commending the brochure to them and encouraging those who had accident compensation practices to continue acting for seriously injured victims of road accidents.

The Law Reform Committee also worked in conjunction with the Law Council in an unsuccessful attempt to persuade the Federal Government and later the Opposition and the Democrats to retain the first instance jurisdiction of the State Supreme Courts in Federal taxation appeals.

The Council and its Sub-committees are still active in the Accident Compensation field with a view to maintaining the involvement of solicitors in the provision of advice and assistance for the victims of serious road accidents and in arousing public awareness of the significance of the loss of common law rights.

The Council and its Sub-committees have also been active, so far without result, in attempts to restore common law rights in industrial accidents through Federal or State industrial awards. □

Professional Conduct Committee No.1

The Committee met on a fortnightly basis throughout the year and was greatly assisted by the participation of Sir Frederick Deer. The seven person committee was able to make recommendations upon a number of complaints referred to it which have been acted upon by the Bar Council. There were also a number of urgent rulings given to junior counsel. Although a substantial number of complaints were dismissed following recommendations to the Bar Council there were however a number of instances where counsel had failed to comply with the standards and obligations set out in the Bar Rules. The impropriety of direct communications with the client and acting in the role of a solicitor were some of the serious breaches dealt with by the Committee. Disregard of the client's interests and late passing of briefs was another area of serious breaches of the Bar Rules.

The Committee would like to express its appreciation for the efficient assistance from the Registrar and staff, in particular Miss Kerry Taylor. □

New Barristers Committee

The New Barristers Committee was unfortunately not quite as active as it might otherwise have been. Although there were some functions held by the Committee it is hoped that there will be more lively social functions held in 1988. The New Barristers Committee was created following the preparation of a detailed research paper by Mr J.R.T. Wood, Q.C., as he then was, and to some extent the think-tank function ran out of think. With the ever increasing size of the Bar there are a number of matters including communication, continuing education and accommodation to be addressed by the Committee in 1988. □

Professional Conduct Committee No. 2

The activities of this Committee have been carried on at a high level. The burden of work has been considerable and the discharge of it has been a credit to all members of the Committee, including in particular the Hon. C.L.D. Meares Q.C., whose efforts have been outstanding.

Features of the problems presented have been, first, the considerable number of complaints lacking in real character as allegations of professional misconduct, which have been readily disposed of but nonetheless time consuming and, secondly, the dilatoriness of some members of the Bar in responding to notice of complaints so as to enable prompt attention to be given to them. □

Professional Conduct Committee No.3

So far this year PCC3 has disposed of 27 ethical matters. Five were references from barristers seeking advice. Four related to alleged incompetence on the part of the barrister. Three related to barristers making allegations in court which were said to be untrue. Three related to barristers having alleged conflicts of interest in proceedings. Four related to alleged incompetence on the part of the barrister. Two related to alleged failures on the part of the barristers to achieve a promised result. Two related to barristers being involved in alleged conspiracies against the complainant.

Of the 23 complaints received, 21 were dismissed, one was referred to a disciplinary tribunal and one has resulted in action being taken to have the barrister struck from the roll. In that latter case, the alleged default on the part of the barrister related to his conduct as a solicitor before he came to the Bar.

The committee currently has ten matters before it. □

Legal Education and Reading Programmes

The Reading Programme

The continuing development of the Association's reading programme over the last few years has laid firm foundations for the Bar to come to terms with the *Legal Profession Act*. This is anticipated to commence early next year.

The Association proposes to issue a certificate to Readers who satisfactorily complete the required programme. The first certificates should be issued in February or March 1988. Their issue will depend on, and reflect, the attendance of Readers at lectures and tutorials, their participation in case presentations, reading with Crown Prosecutors and Public Defenders and attendance generally on their respective Masters.

With the introduction of a system of practising certificates in mid-1988, newly admitted Barristers will be issued with practising certificates conditioned on their satisfactorily completing their reading. The Association's proposed certification procedures will facilitate the fair and efficient administration of the new legislation's practising certificate requirements.

The emphasis of the reading programme continues to be on practical exercises. Short case presentations (involving the preparation and presentation "in Court" of cases designed to confront commonly occurring practical problems) are now an integral part of the programme. They complement a full range of lectures and tutorials. They have recently been supplemented by Readers having an opportunity to observe — as invitees of Kirby P — the operation of the Court of Appeal on a busy motions day.

The Association acknowledges with thanks the assistance it continues to receive from Judges, judicial officers and the practising Bar. Without that assistance and the efforts of our Education Officer, the reading programme could not be maintained.

The Association also acknowledges the continuing assistance of the Law Foundation of New South Wales which has allocated funds for an independent review of the reading programme. It is hoped that this review will help to ensure that the effectiveness of the programme is maintained and improved.

The C.L.E. Programme

This year's continuing legal education programme has been a great success. In many ways it has been a golden year.

Sheppard and Young JJ, with commentaries from Handley Q.C. and Tobias Q.C., spoke at seminars on the new *Courts (Cross Vesting and Jurisdiction) Legislation*, providing both a Federal and State perspective in relation to this legislation.

The Association was also able to have a number of distinguished overseas visitors to take part in the programme. Lord Ackner entertained and instructed us with his insights into appellate advocacy in the House of Lords. Professor Furmston spoke with erudition on "Silecne as Consent," a significant contribution to current debates on the role and purpose of contract law. As this report goes to press R.S. Alexander Q.C. (of the English Bar) and Hughes Q.C., are scheduled to speak at a seminar on defamation law.

The issue of a series of papers on the law of defamation has been well received, as have the reading notes which have been offered for sale to members of the Association.

The Association thanks all who have participated in, and supported, its C.L.E. programme and who have made the reading course possible.

The Legal Education and Reading Committee welcomes suggestions as to appropriate C.L.E. topics and speakers. It also reminds members that the *Australian Bar Review* and the Association's *Bar News* provide outlets for the publication of articles written by, and for, the practising Bar. □

A Question of Balance

A telephone conversation between a senior counsel and a very senior counsel was interrupted by the latter exclaiming:

"Hold on a minute. There's some other bastard on the other telephone."

Pause and then to some person unknown:—

"Look, tell the Premier I will see him this afternoon."

The telephone conversation then resumed. □