It is no understatement to say that the New South Wales Bar has undergone difficult times recently. In his interview in this edition, clerk Paul Daley describes morale around the Bar as being at its lowest ebb at present. Many members, however, have praised the President, Ruth McColl S.C., for the manner in which she is leading the Bar through these difficult times. It should also be noted that members of the Bar are making a special contribution to dealing with the present difficulties and setting the Bar on a firmer footing. For example, the Professional Indemnity Committee, led by Tony Meagher S.C., (together with James Allsop S.C., prior to his appointment to the Bench) has worked very hard to restore a market, and indeed a competitive market, with insurers for the New South Wales Bar. Under the leadership of Bernie Coles QC, PCC#5 has been dealing with the notifications required by the recent regulation. Anna Katzmann S.C. and Brian Ferrari have worked tirelessly to persuade the Government and the media of the very serious problems with the proposed new workers compensation legislation.

There are other initiatives which should be noted. The BarCare scheme has now been established and members have been circulated with the names of the BarCare counsellors. The Indigenous Barristers Trust is close to being established. The trust deed has been settled and the Association is awaiting approval from the Australian Taxation Office to ensure donations will be tax deductible. The Trust will incorporate the capital of a fund set up to honour the memory of Shirley Smith ('Mum Shirl'), who was known to many members of the Bench and Bar as a tireless worker for the welfare of Aboriginal people, particularly those facing the criminal justice system. The silks of 2000 will make a substantial gift to the fund.

In addition, a full day meeting was held of some 45 representatives of the Bar on 26 May 2001, being members of the Bar Council and heads or representatives from the various committees, sections and regions, to discuss future issues facing the Bar. Particular matters discussed included continuing professional development, practice management, limitation of liability and the services provided by the Bar Association. Proposals will be put before members shortly.

Leaving aside negative and often unfair publicity received by the Bar recently, there remains a legitimate expectation by the Government and the community generally that the Bar will provide the highest quality professional services in respect to advocacy and dispute resolution, and that the Bar will constructively engage in a dialogue for an improvement in the delivery of legal services.

A number of questions arise which require the Bar's attention, including:

- how the balance is altering, or should alter, between oral and written advocacy;
- the extent to which it is proper to put time limits on cross-examination or oral address;
- how the Bar can better ensure that its services, particularly in relation to chamber work and advices, are provided on time to meet the needs of solicitors and clients;
- what is the role of the Bar when governments at all levels are increasingly taking matters away from the courts and placing them before tribunals;
- how the Bar can be flexible in terms of providing services in growth areas (e.g. insolvency, administrative law, or alternative dispute resolution) when traditional areas of work are declining; and
- what are the proper standards to be followed by barristers in areas such as practice management, business administration and risk management?

These are some of the questions which the Bar Association and the Bar Council are addressing. However, all members are encouraged to give their attention to these issues and other possible areas of reform. Any contributions to this journal on such matters would be warmly welcomed.

Some of the matters included in the previous edition of this journal have provoked comment or follow up. **Bill Walsh** wrote of the difficulties for country towns with the abolition of District Court sittings. This problem received further attention in the Legislative Assembly on 6 June when the Member for Lachlan, The Hon. Ian Armstrong MP OBE, drew attention to the recent press release by the Chief Judge of the District Court indicating there would be no sittings of that court in Cootamundra for the first six months of 2002. Mr Armstrong noted that this announcement caused major upset amongst the legal fraternity, local government and the broader community of Cootamundra. He said that District Court sittings are a boost to the local community as a whole, as an indication that the community is recognised as a viable and important one. Mr Colin Markham MP, the Parliamentary Secretary and Member for Wollongong, indicated that he tended

to agree with Mr Armstrong and that he would bring the matter to the Attorney General's attention.

The last issue also included an article by **Glenn Bartley** expressing the view that the sexual assault communications privilege was under siege. **Phillip Priest QC** has written a critical letter in response.

The last issue also included the address given by **Ellicott QC** at the dinner to celebrate his 50 years at the Bar. That address included some rather critical comment on certain aspects of the role of Malcolm Fraser as prime minister in relation to the Sankey proceeding. Mr Fraser has indicated to *Bar News* his concern at the inaccuracy of some of Ellicott QC's comments. Mr Fraser has been offered a right of reply.

The present issue includes a shortened version of the paper delivered by **Robertson Wright** and **Michelle Painter** at a recent meeting of the Trade Practices Section of the New South Wales Bar. It is hoped that members will continue to contribute to the ongoing legal development of the whole Bar by delivery of such papers and allowing them to be published in this journal.

For those members, like the editor, for whom the notion of a country circuit is a strange and rare beast, considerable enlightenment is provided by the article in this issue from **Stephen Stanton** concerning his years of practice in the Pacific Islands. Members should also be interested in **Rena Sofroniou's** interview with **Paul Daley** which gives insight into his extraordinary success as a clerk over 40 years at the Bar.

Justin Gleeson S.C.

LETTERS TO THE EDITOR

Dear Sir,

Several aspects of Glenn Bartley's article in Summer 2000/2001 *Bar News* ('Sexual assault communications privilege under siege') require comment. He wrote:

> A common criticism of the privilege, encountered by the author, is that it would prevent disclosure of a counselling note revealing that the complaint of sexual assault was 'recovered memory', which arose after hypnotherapy. However, these cases do not occur often and in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory.

The first thing to note is the tacitly expressed suggestion that cases of recovered memory occur only where hypnotherapy has been employed. This is not so. Research has demonstrated that false memories are relatively easy to create in the course of therapy or counselling, without the need for hypnotherapy or similar techniques.

Secondly, the assertion that 'these cases do not occur often' is highly questionable. No evidence is offered in support of this statement. In my experience, the recovery of repressed memories of sexual abuse (or the creation of false memories of abuse) is all too common.

Thirdly, the suggestion that 'in nearly all of them there is other evidence of hypnotherapy having led to a recovered memory' does not accord with the experience of those who regularly practise in the area of sexual assault. Indeed, other than a client's denials, often the only objective evidence one has available that memories are, or might be, false, are the notes of counsellors produced in obedience to a subpoena. I have had personal experience of several cases where the first clue that memories may have been the product of 'therapy' came from the therapists' notes. There is no doubt in my mind that, in a number of cases in which I have been involved, potential miscarriages of justice were avoided by access to therapists' notes and other records. (My experience has been in Victoria, although I doubt NSW is any different.)

As a counter to the Bar Association's submission, Glenn Bartley somewhat emotively asks:

> How many tens of thousands of innocent sexual assault victims deterred from reporting the crimes committed against them or from maintaining their complaints, or traumatically humiliated in court, are sufficient to justify the legislation?

Again, two things ought to be noticed.

First, the statement seems to assume that innocent victim will be deterred from complaining by the legislation permitting access to records. Experience seems to suggest, however, that if anything, it is the curial process itself which may act as a deterrent to some victims.

Secondly, the implied suggestion is that tens of thousands of putative victims may be deterred from bringing or maintaining complaints as a result of the legislation. The extravagance of this assertion is manifest.

If innocent men are to avoid wrongful conviction and punishment (and make no mistake, it is principally fathers and grandfathers who are accused after repressed memory is 'recovered'), then further restriction upon access to counsellors' records is undesirable.

Yours sincerely,
Phillip Priest QC
20 April 2001