

## The future of the New South Wales Bar: a time to reflect and act

By Arthur Moses SC



It is an honour and a privilege to be entrusted with the role of president of the New South Wales Bar Association, which I first joined in 1993 as a 24 year old. I am mindful that I follow in the footsteps of giants of the New South Wales Bar, including Tom Hughes QC, Bret Walker SC and Ian Barker QC who have each mentored me over the years. I look forward to working with my colleagues on Bar Council to promote the administration of justice and improve the practices of barristers.

I acknowledge the service and dedication of our former president, Noel Hutley SC who has served on Bar Council since 2013 when we were both elected. At my first Bar Council meeting as president on 11 May 2017, I moved that Hutley SC and Justin Gleeson SC be awarded life memberships of the Bar Association. The motion was passed by universal acclamation of the Bar Council. Gleeson SC has returned to the New South Wales Bar after his service as Commonwealth solicitor-general. He was awarded life membership because of his distinguished service to the law and extensive work for the Bar Association. Hutley SC and Gleeson SC are held in high esteem by the New South Wales Bar. Each richly deserve their awards of life membership. I assume the presidency at a time when

the New South Wales Bar is undergoing change. The policy dilemma for Bar Council is that the bar might not be changing fast enough. Over the past 14 years the total number of practising barristers in NSW has increased by only 221. During this same period, the total number of practising solicitors in NSW has increased by more than 13,400. While the New South Wales Bar has not grown much, numerically speaking, it has grown older. Nearly one-third of practising barristers are aged 60 or over. Most of those are men. It is an aim of my presidency to recruit younger practitioners and more women to the bar. This is vital to ensuring the New South Wales Bar remains the largest and strongest independent bar in Australia. It is also an aim of my presidency to ensure that the Bar Association provide barristers with assistance in their practice development and open up new sources of work through engagement with in-house solicitors employed by corporations.

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It is timely to reflect on why we exist as an independent bar and note some of the work that the Bar Council and our staff under the leadership of Professor Greg Tolhurst is undertaking to assist the bar. I spoke about some of these matters when I was invited to address the Tasmanian Bench and Bar Dinner in May of this year.

### **Role of the independent bar in Australia in the proper administration of justice**

The existence of a skilled, respected and independent bar remains as fundamental to the proper administration of justice as ever before. The fact that it is possible for a justice system, such as the United States

to work without an independent bar does not explain the importance of the bar as an institution, which enhances the administration of justice. On this issue, Chief Justice Mason stated:

the adversary system can function without the establishment of an independent bar. Just how well it can function is another question.<sup>1</sup>

Sir Owen Dixon, described by Sir Anthony Mason as 'Australia's greatest lawyer', said the following, when sworn in as chief justice of Australia:

[B]ecause it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence.<sup>2</sup>

There are, of course, many good reasons underpinning the observations of two of Australia's greatest jurists. One reason is that having an independent bar facilitates the application of the cab rank principle, which may otherwise be difficult, if not impossible, to apply in the context of a 'fused' profession.

Barristers cannot pick and choose their clients and for good reason. Unpopular or offensive people or persons associated with unpopular causes would be left without representation in courts of justice. Justice would not be done. Far less would it be seen to be done.

In *Giannarelli v Wraith*,<sup>3</sup> Justice Brennan pointed out that the cab rank rule was of ancient origin. A similar rule could be found, amongst other places, in the law of medieval France. Justice Brennan said:

It is difficult enough to ensure that justice according to law is generally

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available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on payment of extravagant fees. The profession would become the puppet of the powerful. If the cab rank rule be in decline - and I do not know that it is - it would be the duty of the leaders of the bar and of the professional associations to ensure its restoration in full vigour.<sup>4</sup>

Robert French AC, our former chief justice, gave a speech in Darwin on 18 May 2017 as part of Law Week on access to justice and made the point that without it the rule of law was diminished. It still remains our duty as leaders of the bar in 2017 to ensure the cab rank rule is adhered to.

### **Barristers are better advocates than solicitors by virtue of their specialisation**

A second reason why the administration of justice is better and more cost effective when served by an independent bar is the efficient conduct of litigation by virtue of the specialisation of barristers as advocates. The observations of Chief Justice Warren Burger of the Supreme Court of the United States as to the quality of advocacy in England and Wales in which there is an independent bar, as compared to the United States is instructive. In his lecture at the Fordham University Law School in New York, Chief Justice Burger said:

For twenty years, I have watched advocates conduct trials in more than a dozen countries, and nowhere have I seen more ardent, more effective advocacy than in the courts of England.<sup>5</sup>

### **The independent bar promotes a better judiciary**

Thirdly, the existence of an independent bar leads to the appointment of

experienced lawyers as judicial officers which contributes to the effective administration of justice. Again, in his lecture at the Fordham University Law School, Chief Justice Burger also observed:

Another difference is that judges of trial courts of general jurisdiction are selected entirely from the ranks of the ablest barristers. Thus there is little or no on-the-job learning for trial judges as is all too often the case in the United States courts, both State and Federal. Only with the highest qualifications can a trial advocate enter into the selection of English judges. As a result, an English trial is in the hands of three highly experienced litigation specialists who have a common professional background.<sup>6</sup>

This is not to suggest that judges should only be drawn from the ranks of the bar or that there are not great judges who have been appointed who only practised as solicitors. However, experience gained in the courtroom from the other side of the bar table makes it easier, compared to other lawyers, to make the transition into judicial office.

Finally, as politicians retreat from their defence of democratic traditions, including the role of an attorney-general in defending the judiciary from attack, the bar has an increasingly important role to play in defending the judiciary. I am not suggesting that judges and courts should not be the subject of vigorous and even trenchant attack for their decisions or their conduct where it is appropriate to do so. That is an important part of a liberal democracy such as ours.<sup>7</sup> However, when the judiciary is subject to personal attack or misinformation, as occurred recently with the attacks on the Victorian Court of Appeal<sup>8</sup>, the bar must step up.

The importance of the bar stepping up

to the role of defending the judiciary cannot be underestimated. As Justice Keane has observed, the bar is the natural ally of the judiciary.<sup>9</sup> I share the views of Justice Keane.

### **THE FUTURE**

In order to ensure that the bar remains the arm of the profession in Australia which provides specialised advocacy services, each of us needs to contribute to the teaching and mentoring of our colleagues. We also need to educate clients and solicitors that briefing counsel at an early stage of proceedings to provide advices on evidence and prospects, assists in the proper governance of proceedings in order to ensure that costs are not unnecessarily incurred by the parties or the justice system.

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Of course, the greatest threats to the future of the bar these days do not come from the legislators, but rather some law firms that continue to cannibalise the work which junior counsel should routinely be retained to do.

The bars in each state/territory need to highlight their efficiency and skill in order to educate in-house solicitors and clients so that questions can be raised as to why their services are not being used at an early stage of proceedings.

On this topic, Justice Rares of the Federal Court in *Armstrong Scalisi Holdings Pty*

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*Ltd v Piscopo (Trustee), in the matter of Collins*<sup>10</sup>, in a decision delivered in March this year has assisted us in this task. That decision received coverage in *The Australian*<sup>11</sup>, *The Sydney Morning Herald*<sup>12</sup> and the *Australian Law Journal*.<sup>13</sup> Justice Rares noted that it was vitally important that barristers, rather than solicitors, undertook the important tasks of finalising court documents and submissions because of their specialisation which allowed the work to be done in a cost effective and timely manner.

### Engagement with the Association of Corporate Counsel

The New South Wales Bar has been working with the Association of Corporate Counsel in order to encourage more direct briefing of the bar by in-house solicitors. In-house solicitors now make up approximately 25 per cent of the legal profession in NSW and are the fastest growing sector of the national legal profession. The Bar Association's Practice Development Committee, under the leadership of Liz Cheeseman SC has spent a considerable amount of time and effort on this relationship. We will continue to engage with the Association of Corporate Counsel, including attending a conference later this year at which members of the New South Wales Bar will address the attendees.

A survey, recently commissioned by the NSW Barristers Clerks Association, complements that work nicely and suggests areas for further cooperation and research. It's particularly valuable to gain insights into the expectations corporate counsel have when searching for specialist expertise in our increasingly competitive legal services market. The Bar Association is now focussing on new and better ways to promote the intellectual capital of local barristers online, such as through 'Find a Barrister' ([find-a-barrister.nswbar.asn.au](http://find-a-barrister.nswbar.asn.au)). Similar search facilities are being developed for accredited arbitrators,

mediators and evaluators. The message that I have been delivering to in-house counsel is to brief counsel early and often, particularly junior counsel. The New South Wales Bar has an array of talented, experienced and hard-working junior counsel who are more cost-effective than law firms. This observation was made succinctly by Justice White in *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd*.<sup>14</sup>

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In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise. It is a judgment I quote often when addressing audiences on the virtues of briefing junior counsel early.

### Escrow Payment Service Project

The Bar Association has also been working together with the National Australia Bank on an Escrow Payment Service Project. Fee security and speed of payment remains a real problem for the bar, especially junior barristers.

Client funds held by a mutually trusted stakeholder as security for timely payment of professional fees and disbursements would solve this problem without the need for trust accounts to operate. If the project is successful, this would also allow barristers to accept direct briefs without having to deal with the obligations in clause 15 of the *Legal Profession Uniform Law Application Regulation 2015*.

### Strategic Plan

The Bar Council approved a new Strategic Plan for the New South Wales Bar Association on 27 July 2017 with a view to ensuring that it better serves the current membership of the bar. The Bar Association has a number of roles which include but are not limited to promoting the administration of justice, investigating and determining matters relating to the conduct of barristers and providing services to barristers. Each of these roles are equally important. However, the Bar Council is examining how the Association can provide services to members which better assists them in their practices.

The staff at the Bar Association are preparing a number of proposals for new and improved services and benefits under the leadership of Chris Winslow who is now the co-ordinator of services and benefits. There will soon be an increase in the capacity of our Fee Recovery Service. It has received relatively little attention in recent years, but the Bar Association helps to recover on average \$100,000 per year in unpaid solicitors' fees. Fee recovery clinics on the last Friday of each month in one of the Bar Association's conference rooms will commence shortly to assist members of the bar to recover unpaid bills.

### Innovation and technology

The Innovation and Technology Committee under the leadership of Michael Green SC was established in June 2017. Part of the mission of the

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committee is to formulate strategies and improvements for practice through the use of technology which enhance the competitiveness of the independent bar whilst meeting the needs of clients.

### Legal Aid rates

We will continue to seek an increase in Legal Aid rates paid to barristers. An increasing number of our colleagues are working an excessive number of unpaid hours to subsidise an under-resourced justice system. This has a detrimental effect on the health of barristers and a disadvantageous effect on their working lives.

### More opportunities for junior counsel to be briefed by the NSW DPP and to perform work for the Public Defenders Chambers

There has been an increase in criminal prosecutions and cases pending before the District Court of NSW. The Bar Association encourages members of the private junior bar to consider accepting briefs to appear in matters for the NSW DPP as well as assist the Public Defenders Chambers. The Bar Association will work with the NSW DPP and the Public Defenders Chambers to identify possible opportunities and the terms upon which barristers can be retained to undertake work which is unable to be undertaken by these agencies. Such work provides an important opportunity for barristers to contribute to work in the public interest as well as obtain invaluable advocacy experience.



### Quality of Working Life Survey

The bar at times can be stressful. The results of the Quality of Working Life Survey, which was undertaken earlier this year, are currently being examined. A working group has been established by the Bar Council to oversee further interrogation of the data to be included in the final report. Once that is done, engagement with stakeholders will commence in order to provide a response to the results of the survey. Of course, the Bar Association, through the director of BarCare, Jenny Houen, and the Benevolent Association, continue to support barristers who encounter personal misfortune or require some form of assistance. The treasurer, Andrew Bell SC, is currently working on initiatives to highlight the accessibility of funds to assist members who require assistance.

### CONCLUDING REMARKS

The bench and the bar have a unique relationship. It is important that we do not forget that the bench and bar are related in important ways. Justice Spence of the Superior Court of Justice (Ontario) at the Twelfth Colloquium on the Legal Profession in 2009 expressed the relationship better than I can articulate it when he said:

As a judge, I start to think about this question of the independence of the bar in relation to the independence of the judiciary. These two institutional frameworks are related in important ways. The underlying principle was succinctly expressed in an exchange between then Chief Justice Rehnquist of the United States and Chief Justice Lamer of Canada during a dialogue in which they took part at Duke University in the Spring of 1991. In response to a

question as to what institutions are fundamental to the preservation of a free society, Chief Justice Rehnquist replied: 'an independent judiciary' and Chief Justice Lamer added 'an independent bar', because as he put it, 'you can't have one without the other' What is at stake is, of course, the right of citizens to enjoy the benefits and protections afforded by the law. The independence of the legal system is the institutional underpinning of those rights.<sup>15</sup>

It is why the courts expect much of us and why we should ensure we maintain a strong and large independent bar to serve the community. I look forward to working with each of you to achieve this aim.

### Thank you

This is the final *Bar News* edition under the editorial guidance of Jeremy Stoljar SC. I wish to thank Jeremy for his sterling service to the New South Wales Bar during five years as editor. As a former member of Jeremy's committee, I know first hand of the hard work he has undertaken in order to ensure the high quality of the publication. He has continued, and built upon, the fine work of his predecessors, such as Andrew Bell SC, Justin Gleeson SC and Ruth McColl SC (as she then was). Along the way, he has discovered some new and talented writers at the bar. 'Advocata', in particular, offers readers a witty insight into the work-life balance by a female junior barrister. Jeremy is, of course, an author himself, having published in 2011 *The Australian Book of Great Trials*. I wish Jeremy every success in any future literary endeavours. The bar is grateful for Jeremy's stewardship of the *Bar News*. Like every other member of the bar, I look forward to the editorship of Ingmar Taylor SC, someone who has contributed a number of excellent articles to our journal over many years.



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### Endnotes

- 1 Mason, Anthony, 'The independence of the bench; the independence of the bar and the bar's role in the judicial system' (1993) *Australian Bar Review* 10(1), 1-10.
- 2 Address upon taking the oath of office in Sydney on 21 April 1952, reprinted in *Jesting Pilate*, 1965, p 245.
- 3 (1988) 165 CLR 543 at 580.
- 4 (1988) 165 CLR 543 at 580.
- 5 Warren E Burger, 'The Special Skills of Advocacy', *Fordham Law Review*, Volume 83, Issue 1, 227 at 229. This article was delivered as the Fourth Annual John F. Sonnett Memorial Lecture on Nov. 26, 1973, at Fordham Law School in New York.
- 6 Warren E Burger, 'The Special Skills of Advocacy', *Fordham Law Review*, Volume 83, Issue 1, 227 at 228-229. This article was delivered as the Fourth Annual John F. Sonnett Memorial Lecture on Nov. 26, 1973, at Fordham Law School in New York.
- 7 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335; [1936] 1 All ER 704.
- 8 Calla Wahlquist, 'Coalition ministers will not face contempt charges after court accepts apology', *The Guardian*, Friday 23 June 2017, <https://www.theguardian.com/australia-news/2017/jun/23/coalition-ministers-no-contempt-charges-court-accepts-apology>
- 9 The Hon Justice P A Keane, 'The idea of the professional judge: the challenges of communication', Speech to the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014.
- 10 [2017] FCA 423.
- 11 Chris Merritt, 'Federal court urges law firms to send more work to bar', *The Australian*, 12 May 2017, <http://www.theaustralian.com.au/business/legal-affairs/federal-court-warns-law-firms-of-fines-over-extra-costs/news-story/b0e0cf91d7fe564fc5b0f61009ace6c1>
- 12 Michaela Whitbourn, 'Judge takes aim at 'incomprehensible' \$239,485 bill', *Sydney Morning Herald*, 2 May 2017, <http://www.smh.com.au/national/judge-takes-aim-at-incomprehensible-239485-bill-20170502-gvx3wn.html>
- 13 (2017) 91 ALJ 427.
- 14 [2009] NSWSC 867 at [26].
- 15 James M Spence, 'Why The Independence of the Bar Matters', delivered at Queen's University, 10 March 2009, pp 1-2.

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