

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



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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 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 cash-flow 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.



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