

MEETING THE CHALLENGES OF THE MODERN BAR

A Clerk's View

Anthony Cheshire SC and Penny Thew, interviewing
Jeh Coutinho (clerk at Banco Chambers), Tobias O'Hehir (of O'Hehir Consulting and former
clerk at Greenway Chambers) and Kristine Massih (clerk at Alinea Chambers).

At the request of the Bar Association, two clerks and one former clerk were asked to describe what they perceived to be current and future challenges facing the modern Bar, some implications of those challenges and the steps that can be taken by those charged with the invaluable role of supporting the Bar to assist in managing those challenges. The views expressed herein are those solely of the interviewees and are not considered applicable to, nor as a standardised benchmark for, all chambers. Barristers' chambers have differing priorities, resources and requirements and the responses below were given in recognition of that.

1. *When did you commence your career as a clerk?*

Jeh: I started as a junior to Nick Tiffen at 7 Selborne. It was a good education in chambers life and I've been working for barristers for 12 years now.

Tobias: I commenced my career at the Bar in 2010.

Kristine: I became a clerk three years ago but my experience in chambers goes back over 10 years.

2. *How has the Bar changed since you started your career as a clerk? For instance, have you observed a greater number of women, people from a wider variety of racial, ethnic or cultural backgrounds and/or people from a wider variety of backgrounds generally coming to the Bar?*

Jeh: In 2006 I started on a floor with 25 bar-

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risters and two of them were women. Recent readership intakes have more evenly proportioned gender splits so at the junior Bar there is an increased level of diversity. My experience is that more women than men leave the Bar in the first 10 years. While ethnic and cultural diversity is on the rise, it is happening at a slower rate than gender diversity. It's an issue that gets less attention as well.

Tobias: The Bar is still not reflective of the wider community, however, there has been a small increase of members from different backgrounds.

Kristine: In the 3 years I have been a clerk the Bar has not changed much. There have been a number of changes over the time I have been in chambers across the last decade though. The percentage of women practising at the Bar has risen slightly, although I have noticed women at the Bar are gaining prominence. The 'gay bar' is something that now exists in a more open way than it did 10 years ago.

Technology has played a huge part in the changes that have occurred over the last 10 years. The Supreme Court had by then commenced publishing Court lists online but it was not extensively used by barristers. Before that I was cutting the lists from the *Sydney Morning Herald* and pinning them to the noticeboard in chambers. E-filing was emerging as an innovative new way

to file documents when I first started and is now the ordinary way to file. These advances have, for me, improved efficiency in chambers and as a clerk. Barristers are also now more able to work remotely and do not need to spend as much time in chambers. Finally, barristers' awareness of the need for self-care and the Bar's schemes in support of barristers' wellbeing are issues that have become more prominent at the Bar in the past few years.

3. *In your experience, has the nature of the work performed by barristers changed over time? Have the opportunities for new barristers changed over time?*

Jeh: Court filing statistics show that there is less litigation than previously.¹ Barristers are increasingly being briefed to provide strategic or commercial advice to complement their legal advice. I think this trend will continue as the regulatory climate evolves. Barristers should be ready for this and look to build upon their existing skill sets (e.g., by enrolling in a company director's course). However, complex legal problems will continue to arise and the solutions will continue to be found at the Bar.

The opportunities for new barristers are changing. Solicitors retain more work for themselves and online Court systems will continue to take away traditional avenues for building advocacy skills. It is harder for barristers to get into Court and that could be problematic for developing the next generation of advocates. Every junior wants to be in Court more and senior barristers should give careful consideration to finding advocacy opportunities for juniors within their cases.

Tobias: The opportunities open to new bar-



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Kristine Massih and Jeh Coutinho

risters can depend on their initial decisions; e.g., a new barrister's choice of chambers, as well as the barrister's tutor and clerk, can all have a significant impact on the development of that barrister, as can the barrister's pre-existing professional networks.

It is well known that lower numbers of matters are proceeding to hearing, which means less time for barristers in Court on their feet, making it difficult to gain a profile. This lack of exposure can limit the opportunities for new barristers. It also means barristers need to work harder at marketing and business development strategies to ensure they are creating pathways and relationships to improve their practice.

Kristine: It depends on the barrister, their practice and the stage of their career progression. Speaking generally, I have observed that clients are moving increasingly to try to keep matters out of Courts where possible, and alternative dispute resolution is often an attractive option to clients due to its efficiency, flexibility and cost effec-

tiveness. This has meant less Court-based work for barristers, especially juniors. However, in my experience there will always be a need for litigation of high-level, complex matters.

4. Have you observed that the needs or briefing patterns of solicitors have changed over time?

Jeh: I have not perceived briefing patterns to have shifted dramatically, but some needs have changed. There is a preference to brief electronically where possible, and having a chambers Dropbox account certainly helps, as does having tech savvy barristers. Banco recently started conducting an annual in-house CPD on the latest technology trends for managing documents electronically to make sure we're across what's available and how to make use of it.

Solicitors still require barristers to be reliable and meet deadlines, respond to emails, manage expectations, and be clear

communicators in project managing a piece of legal work. We are in a competitive service industry and having a pleasant experience is as important as the quality of the legal work.

Tobias: The main changes are solicitors briefing later in the litigation process and not as many cold calls from solicitors to the clerk. Solicitors rely heavily on their professional networks for barrister recommendations as well as whether a barrister is known as having expertise and a profile in a particular area of law. The research for, and selection of, a barrister occurs many steps before a solicitor contacts either the chambers or the clerk. Solicitors also make decisions based on whether they can work successfully and harmoniously with counsel which can influence their briefing decisions. These factors combined mean barristers ought to communicate clearly their specialities, expertise and practice areas.

Kristine: I have observed that there has often been a push to curb or control litigation costs. Solicitors are becoming in-

creasingly cautious about briefing counsel. Direct briefing by in-house counsel has been increasing as a result of corporate clients looking for a time efficient and cost-effective alternative. Consequently, this indicates an increased awareness that barristers are available to provide advice and not solely called upon for litigation work.

The paperless practice has become an accepted option of the modern barrister, and it is commonplace to use file-sharing services to brief barristers. Some of these applications have real-time alerts to let the barrister know when a file has been uploaded or updated.

5. Do you see it as part of the role of a clerk to provide particular assistance to support the varying needs of barristers? For instance, do you give more support in developing the skills and practice of newer barristers or those returning from parental leave?

Jeh: Yes. Barristers will have different needs across the trajectory of their careers. For new barristers, I try to have them work with as many different barristers and solicitors as possible to help build up their network. Feedback is rare at the Bar, so I try and facilitate that to assist new barristers in improving. For new barristers, running their own business, managing commitments, being reliable and working out the value of their work are common issues. I try to ensure that junior barristers feel comfortable discussing issues with me so that we can work out these early challenges together.

For more senior barristers it's about giving strategic advice to position them for increased amounts of unled or specialised work to prepare them for a silk application in future years. Having a plan for a future silk application is critical and it needs to be put in place years before the application is made. For barristers returning from parental leave a clerk can play an important role in the return to work phase. The barrister can be working from home or part-time and may not be as visible, and this can make it hard to re-establish a practice. Having a clerk as an advocate in chambers to make sure you stay front of mind in briefing and other chambers decisions can make a difference.

Tobias: I see the primary function of a clerk as providing frameworks and support for barristers to operate their businesses successfully. Effective support means understanding that each level of practitioner has different requirements, especially any practice in a transitional phase. The legal industry is changing rapidly, and barristers can be expected to engage with social media,

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speak on their expertise, and network and build strategic relationships. The clerk can provide valuable insight in to how this can be achieved while balancing the functions of a busy practice.

Kristine: In my experience, I find that a clerk will strive to be sensitive to the needs of her or his barristers, but a clerk's role in chambers is directed by the needs of the set, and no two sets are alike. The structure of chambers, resources they have available and the mechanisms they have in place to support new or returning barristers, varies a lot between chambers, so it is the responsibility of the chambers and the clerk to provide such support and development. Much of the support that new and returning barristers receive is also provided by the broader legal community and the connections they maintain with their colleagues and clients.

6. Barristers are self-employed and therefore generally do not enjoy the statutory protections or benefits that employees receive. Does this pose particular challenges for barristers, and some more than others?

Jeh: Income is variable but overheads are constant. Without the protections or benefits that employees have, barristers can find themselves in precarious situations. Women are affected more than men because they are more likely to take career breaks and thereafter bear the greater burden of parental responsibilities. For barristers returning from parental leave I'm proud to be part of a floor like Banco that has implemented a parental leave policy which we think is among the most comprehensive.

I've worked at a number of chambers and my experience of each is that they have been supportive of barristers taking parental leave, but the structure of it has been

informal and it has required the barrister to ask for assistance. The Banco policy offers clear certainty and commitment about what is going to happen, allowing barristers to plan and meaning they don't have to ask a chambers board for help. It has a value i.e., of comparable weight to that of an employee who has the certainty of statutory benefits. In addition barristers whose practices are winding down before they are ready to leave the Bar can require support. Often it is only the clerk who knows how busy a barrister is.

Bullying and sexual harassment is another significant issue. The hierarchy and dynamics of chambers make it difficult for victims to come forward. There is an obvious need for more research in this area so that there is data to base a proper response upon.

Tobias: Chambers is a shared services company, a model which is growing at an astronomical rate in the wider commercial landscape, which enables small businesses to obtain the benefits that shared workspaces provide. The shared structure of chambers serves the unique requirements of barristers well; however, there are downsides. Barristers suffer more from social and commercial isolation than other professions.

While barristers operate as solo businesses, in truth they are part of a broader, collegiate profession. This broader inclusion is often overlooked. It is important that chambers encourage events to enhance the culture and collaboration among members. The clerk and the administrative staff are an active hub of chambers and should be included in organising and suggesting events throughout the year.

There are in addition some legislative obligations (such as under anti-discrimination, anti-bullying and work health and safety legislation) that may apply to some in chambers, and there are obligations on barristers under the Bar Rules not to bully, harass or discriminate. Chambers and the clerk should make reporting of incidents straightforward and easy to access. Adoption of the Bar Association's Model Best Practice Guidelines can assist with this.

Kristine: As sole traders, barristers do not receive benefits like sick pay, but the nature of barristers' work is that they can benefit from flexible working hours/working from home to suit their own circumstances. This may also mean that, because it is not a 9 to 5 job, some barristers find it difficult to 'clock off'. Barristers do not get paid overtime if they work longer than the standard working day but can charge an hourly rate.

The other obvious challenge barristers face is inconsistent and unpredictable payment for the work they do. This can put barristers under more pressure at various times.



Tobias O'Hehir

7. Have you observed that women barristers face different hurdles and challenges from those faced by men barristers?

Jeh: Yes. First, my observation is that some women charge less for their work than men at the same level, which is not appropriate. I have adopted mechanisms to attempt to combat this. For instance, I encourage female barristers to keep a spreadsheet of the hours they discount when doing their billing. It's a good way of putting the issue in perspective for them and knowing and asserting your value is an important point of principle to learn. Barristers are likely to attract more work by reason of appearing more successful if they are able to resist pressure to reduce their rates.

Second, as a generality government work makes up a larger percentage of the work of women than of men, which further exacerbates the gender pay gap since government work tends to pay less. In planning discussions we discuss whether better rates can be negotiated or whether it is appropriate to reduce the number of government briefs the barrister holds at a particular time to reduce the impact on income.

Third, from time to time I am asked to

recommend an 'aggressive' barrister to appear in a difficult case that involves a robust cross examination or a hard submission. My observation in these situations is that the expected response is to recommend a male barrister. This is because there may be a perception that female barristers are not ordinarily associated with those characteristics. However, my experience is that female barristers are as capable as male barristers in those types of cases.

Fourth, women are more likely to take career breaks than men. That may slow down their career trajectory, inhibit their capacity to buy chambers, or place them further back in the pecking order for membership. Having robust parental leave policies will help.

Tobias: Women at the Bar often charge less than men at the same level, both in rate and by reducing actual time spent on a matter. Women should be conscious of market rates and not charge less. In my experience higher rates do not lead to less work – if anything the opposite. I have also observed that women are asked by solicitors for discounts for work done. When I have been told of this, I have stepped in and prevented it because it is unacceptable. My advice to barristers is to generally not agree to this. These fac-

tors provide additional hurdles for women, especially when a career at the Bar presents numerous other challenges for both women and men without adding additional barriers to success. Women at the Bar are empowered to charge and recover fees just as men do.

Kristine: The main difference that can be observed between men and women barristers is that women have conventionally taken time away from the Bar to have children. Women generally undertake the greater share of family responsibilities, which impacts upon their careers.

However, differences also depend on the chambers and a barrister's core practice areas. For example, a five year male barrister with a commercial practice may not be as busy in a public law chambers as a five year female barrister with a commercial practice in a commercial chambers. At Alinea Chambers, which is a commercial chambers, I have not noticed any particular difference between the amount of work of the men and women barristers of about the same seniority.

8. Firms and barristers are increasingly signing up to the Law Council of Australia's Equitable Briefing Policy. How can clerks contribute to its successful implementation?

Jeh: Clerks are called upon to make suggestions or recommendations of suitable counsel for matters. They have an opportunity to influence briefing decisions and should take into account gender outcomes in making their recommendations. A number of Silks have adopted the policy and we should encourage more to do so. Clerks can be aware of who in their chambers is a signatory (and who their preferred women juniors are) and advise prospective solicitors of that fact in advance to set expectations about who will complete the counsel team.

Tobias: From my experience clerks are getting fewer cold calls from solicitors, which means less opportunity to put any particular barrister (including women) forward. Solicitors develop relationships with individual counsel and unsurprisingly use similar barristers each time, unless they have asked their professional network for a recommendation for a new brief or matter. Therefore, the clerk's role is advocacy for individual barristers and of the equitable briefing policy, while promoting the benefits of briefing counsel.

Clerks can develop and implement strategies to facilitate networking and professional events for solicitors and barristers to raise the profile of individuals. Both individual clerks



and the NSW Barristers' Clerks' Association can advocate for chambers to adopt the policy as a whole, thereby sending a clear message to firms and corporates that barristers and chambers support the policy. I think more work needs to be done with advocacy of the policy on the client side.

Kristine: The number of men at the Bar is significantly greater than the number of women. The Equitable Briefing Policy aims for a briefing percentage of at least 30% of all briefs to go to women barristers by 2020, and that women barristers receive at least 30% of the value of all brief fees. While the policy aims to inspire change, from a practical perspective, most chambers, and the Bar as a whole, do not have enough women barristers to meet these targets.

In my observation and experience, the clerk will always prioritise the interest of the client to find suitable counsel with the skills, experience and relevant practice areas to brief, rather than aim to meet any target. The most important thing that a clerk can do in an effort to support equitable briefing is to always ensure that women barristers who are suitable for a brief are put forward for it.

9. In your experience, why do barristers leave the Bar (other than to retire or when appointed)?

Jeh: There are three primary reasons. The first is not having enough work for it to be financially viable. Second, although on the face of it working for yourself seems like it would be flexible, often it's not, especially when you're in Court. Some barristers learn that the ebbs and flows of the job are incompatible with the work/life balance they want to have.

Last, being a barrister is emotionally demanding. The burden of responsibility is significant, particularly in Court, and it

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can cause untold levels of stress and anxiety. Some find that the unique demands of the Bar are unsuited to them.

Tobias: Barristers leave the profession for all manner of reasons and a contributing factor could be the unexpected nature of a solo practice and the lack of support and structure that comes with running a small business. Women tend to leave around the seven-year mark, which is said to coincide with having children, but women without children leave the Bar too. Some barristers, after practising for a few years, do not achieve their commercial objectives and think being a salaried employee would be better. Others leave because the Bar is at times an inhospitable environment.

Kristine: Without elaborating too much, the few reasons I have observed over my 10 years in chambers are burnout from overwork; inertia (or lack of motivation i.e., needed to succeed when you are self-employed); opportunities arising elsewhere; personal issues exacerbated by a barrister's experience at the bar.

10. What do you see as being the future of the Bar?

Jeh: The Bar has always been a source of specialised advocacy and legal advice and I think it will continue to be that way in the future. We will need to respond to changing demands on the profession, including by embracing technology and innovation in the legal sector to maintain a high level of service, and to be a source of commercial and related strategic advice.

Tobias: The future of the Bar is a continuation of barristers being perceived as expert advocates and 'trusted strategic advisors', assisting businesses, organisations, and individuals to navigate dispute resolution. To stay relevant in the changing legal sector, barristers (and therefore the face of the Bar generally), need to be more diverse and representative of the broader community. The Bar should adapt, change and be flexible where required. The profession may need to make

efforts to understand the changing demands and requirements of legal services, whether this is with alternative business structures or adopting technology and innovative practice solutions. By engaging with change, barristers will remain relevant.

Kristine: The traditional model of chambers is evolving. Bricks and mortar establishments can never be replaced, but technology is allowing barristers to work outside of chambers more readily. This might be seen as facilitating work-life balance but can also be seen as making work inescapable. Some chambers have set up a hot desk or 'virtual chambers' for a fee, so that associate members or interstate barristers have a Sydney number, the use of staff to receive calls and a temporary place to put down their robes if they have the need for it.

The future of the bar, as with most other professional services, will be facilitated increasingly with the use of technology to aid the efficiency of how and how long matters progress. Some Courts have been integrating some processes, e.g., as paperless, and virtual hearings are being used where possible, and matters are trackable online. These are steps that can potentially make legal access more affordable and available in the future to people who have limited access.

Achieving true gender and cultural diversity is an ever present issue and I believe that we will see the gender and gender pay gaps close. I think it is certain that the Bar will eventually, over a longer time span, become a more inclusive and multicultural profession.

11. What in your experience are some of the greatest challenges that the Bar is currently facing and will face going into the future?

Jeh: Diversity is a current challenge. The Bar strives to attract the best lawyers and in order to do so it needs to attract them from all backgrounds. I think this will change organically over time but we should still be making every effort to demonstrate to prospective barristers that coming to the Bar is a viable and attractive option for them. Robust parental leave policies are an important part of that effort.

Getting enough work for all barristers will continue to be a challenge going forward. Barristers will need to think strategically about how they offer their services in order to remain competitive. If the number of opportunities to engage in advocacy decreases we will need to consider how that craft can be honed and developed in future barristers to maintain that specialised skill at the Bar.

Tobias: The greatest challenge will be staying relevant and maintaining visibility within



a rapidly changing legal landscape, coupled with the ability to adapt to new technology and different practices; especially when consumers demand change. One mechanism for making use of existing technology is for barristers to better develop a defined digital presence that clearly sets out practice areas with specific reference to the work that they have done and continue to do.

Kristine: The nature of the barrister being self-employed/a sole trader necessitates that the structure of the Bar is not centralised, so shifts in behaviour, gender equality and advances in technology have been slower than in many other professions. As a result, the Bar can be resistant to change. How the Bar responds to innovation now can set the stage of the future Bar. The need for innovation and change is necessary to solve many of the challenges the Bar is currently facing. 'Business as usual' may not be an option. Universities will continue to produce law graduates, and competition at the Bar will continue. Social media is not just a trend and barristers face the challenge of optimising platforms such as LinkedIn to get an edge over their colleagues.

12. If chambers were provided with short, free or inexpensive education and training for clerks tailored to the specific needs of the Bar and barristers, for instance by the NSW Bar Association in tandem with the NSW Barristers' Clerks' Association, would that assist clerks in supporting barristers to prepare for the future?

Jeh: My own experience and that of my mentors and contemporaries is that we weren't trained but learned as much as we could

from those around us. Having a structured framework of education would help establish a pathway to clerking and help raise the skills and professional standards of clerks as a profession. This would undoubtedly enhance the work i.e., done in chambers.

The role of a clerk is highly variable so I don't know what form such a training course could take, but something that provides an introduction to book-keeping, corporate governance, legal foundations, and marketing would be a good building block.

Tobias: I would highly recommend the NSW Bar provide training and education similar to the practice management course provided by the College of Law. A short syllabus relevant to chambers would be beneficial and could include components relating to HR; IT systems; business, accounting, book-keeping and financial reporting; business development and marketing; organisational change, system design and delivery; and, leadership and management.

Kristine: Although such education and training could be provided, in my view the best training I have received is through hands-on experience. Any more formalised training would preferably be tailored to the common needs of chambers, as different sets have different needs.

I think that the NSW Bar Association may like to consider inviting clerks to future focussed CPD training that they provide for barristers, such as the recent seminar on 'Blockchain and Cryptocurrency for Barristers'. It would assist clerks to have a better understanding of the challenges that lie ahead for barristers in staying relevant in the ever-changing modern world.

The NSW Barrister's Clerks annual conference will be held on Friday 18 October 2019, with an opening dinner on 17 October 2019 at which Chief Justice Bathurst is the guest speaker.

Clerks are encouraged to bring at least three barristers from their floor to the opening dinner which will be held at the Manly Greenhouse in Manly.

Barristers interested in attending should speak to their clerk.

ENDNOTES

- 1 Filings in the Equity Division (all lists) of the Supreme Court of NSW have trended down from 6,254 in 2005 to 5,526 in 2009 and then to 4,147 in 2017 (Supreme Court of New South Wales 2009 Annual Review p58 for 2005 to 2009; and 2017 Annual Review p51). Filings in the Common Law Division – Civil (all lists) of the Supreme Court of New South Wales have trended down from 6,674 in 2005 to 6,313 in 2009 and then to 3,163 in 2017 (Supreme Court of New South Wales Annual Review, p57 for 2005 to 2009; and 2017 Annual Review, p48). Registrations of civil matters in the District Court have also trended down from 6,129 in 2005 to 5,297 in 2009 and then to 4,875 in 2017 (District Court of New South Wales Annual Review 2005, p14,

Annual Review 2009, p14 and 2017 Annual Review, p23). In the Local Court civil actions have generally trended down from 144,881 civil actions commenced in 2005 down to 68,103 in 2009 and then back up somewhat to 76,468 in 2017 (Local Court of NSW Annual Review 2005, p12; Annual Review 2009, p22; and Annual Review 2017, p14). By contrast, the Federal Court actions commenced in the original and appellate jurisdiction have trended up from 3,642 in 2009 to 5,921 in 2017 (Federal Court of Australia Annual Review 2009, p15; and Annual Review 2017/18, appendix 5). Similarly to the Federal Court, actions commenced in the Federal Circuit Court have trended up from 85,984 in 2008-9 to 95,716 in 2017-8 (both family and general federal law) (Federal Magistrates Court of Australia Annual Report 2008-9, p16; Federal Circuit Court of Australia Annual Report 2017-18, Part 3).