Criminal Law and Inquests Special Edition

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This edition has as its focus criminal law and inquests.

I am indebted to the Criminal Law Committee, chaired by Gaby Bashir SC and Stephen Odgers SC and the Inquests and Inquiries Committee chaired by Kristina Stern SC, for assisting to pull together a number of entertaining and thought-provoking articles.

Coronial inquests require a particular type of advocacy, arising from the inquisitorial nature of the hearing as well as the subject matter. *Advocacy in coronial inquests* (p36), which pithily provides useful tips and insights, is well worth consideration by anyone briefed for a party in a coronial. For example, Hugh Dillon, former Deputy State Coroner, recommends when acting for a person who has some responsibility for the death: "… *try to get your client to apologise*".

In *Changing the landscape: the inquest into the disappearance of Ben Dominick* (p40) Kirsten Edwards provides a fascinating description of how orthodox coronial processes were adapted to meet the challenges faced by the difficult circumstances of an inquiry held near and on the opal fields at the Coocoran near Lightening Ridge. Evidence was taken from witnesses while conducting 'walkthroughs' of locations. In-court evidence was taken sitting around a table, allowing witnesses to feel less intimidated and the Coroner to be more closely involved.

This issue carries a number of great interviews, including Justice Robert Beech-Jones discussing the work of the Court of Criminal Appeal, Michael King, Deputy Senior Public Defender on practising in Wagga Wagga, and interviews with four of the many barristers who donate their time to act as duty barristers at the Local Court.

Belinda Baker pulled off a coup in getting two departing DPPs into a room to ask them about their tenure and the work of their offices. Lloyd Babb SC (NSW DPP) and Sarah McNaughton SC (Cth DPP) found that they had many similar experiences.

Investigative journalist Louise Milligan's recent book *Witness* (review by Catherine Gleeson, p115) explores flaws in the justice system by examining how witnesses are treated, particularly witnesses who are

also complainants. The same book leads Anthony Cheshire (*The trauma of being a witness*, p6) to ask whether barristers should be permitted to cross-examine on peripheral credit issues, particularly in the case of non-party witnesses with no interest in the proceedings.

Catherine Gleeson provides a useful reminder of *The Prosecutor's duty of disclosure* (p65) in light of recent authority, including how it intersects with the maintenance of legal professional privilege.

We have two wonderful pieces of historical writing about criminal law. Lizzie McLaughlin (*Burigon and Son*, p46) writes about a First Nations man whose death resulted in the first superior court record of a European being tried, convicted and executed for the murder of a First Australian. We also reprint an entertaining lecture by Bathurst CJ whose *History of Criminal Law* (p54), starts in 600AD and takes us up to present day. His Honour ends with the hope that he will have retired before counsel have to explain the concept of theft of crypto-currency. If so, his Honour would no doubt have some trepidation about a case that involves the subject matter of Farid Assaf's article *Can AI entities be held criminally responsible?* (p49). Who is criminally responsible when a fully automated car kills a person?

As always, I would like to thank my committee for all their assistance with this edition. Particular credit should be given to Belinda Baker and Ann Bonnor who worked with the Criminal Law Committee to conceive and gather the criminal law articles, and who also prepared the cover quiz (instructions on the inside cover page).

Good luck to those who are entering the quiz. I cannot promise any additional marks for amusing entries, but I nevertheless invite them!

Enough is Enough

On 15 March 2021 women across the country took to the streets for March 4 Justice to say 'Enough is Enough'. Leading members of the NSW Bar were amongst them.

Chief Justice Kiefel's statement on 22 June 2020 detailing the findings of an investigation into the conduct of former Justice Heydon has been the impetus for the Australian legal profession to examine the incidence of sexual harassment within the profession (Kate Jenkins, Sex Discrimination Commissioner *Respect@Work*, p14).

For many members of the Bar the Chief Justice's statement awakened memories, both distant and recent, as to their own similar experiences (Jane Needham, *A tsunami of complaints*, p16). "*What became clear was that the problem of sexual harassment in the profession was endemic …*"

This conclusion has been confirmed by two further reports recently published: Sexual Harassment in Victorian Courts by Dr Helen Szoke and Harassment in the South Australian Legal Profession by Equal Opportunity Commissioner, Steph Halliday.

Both reports reinforce previous studies as to the prevalence of sexual harassment: in Victoria 36% of all legal professionals, and 61% of women have experienced sexual harassment at work; while the Halliday survey recorded 42% of all respondents, and 57% of women within the legal profession in South Australia having experienced sexual harassment.

There is no reason to think the position in NSW is any different. As Bathurst CJ said in his speech to mark the opening of law term (*Trust in the Judiciary,* p84), *"Legal workplaces feature many risk factors for sexual harassment including power imbalances, systems of patronage, interconnectedness, long hours and the reality that men continue to hold most senior positions."*

The Szoke report identifies as an issue "*everyday sexism and a culture that often sees women and junior staff as 'less than'. Sexually suggestive comments or jokes, intrusive questions about their private life, and unwelcome comments on their physical appearance were accepted as part of the job*". Similarly the Halliday survey found the three most prevalent forms of sexual harassment to be: sexually suggestive comments or jokes; intrusive questions about private life or physical appearance; and inappropriate staring ("*I still have lawyers on the other side of matters who look at my breasts and not my face*").

Such conduct, which falls well short of outright criminal activity (sexual assault), is only rarely called out. Yet it is conduct that is corrosive of equality. It conveys that the recipient is 'less than'; that they are something other than a colleague, a floor member, an opponent, an equal.

The solution requires a change in the behaviour and attitude that was not just tolerated but normal in the working memory of older members of the bar (while in a different context, think of the office environment portrayed in *Mad Men)*.

Recently NCAT found that a 76yr old barrister had engaged in unsatisfactory professional conduct amounting to sexual harassment, despite the absence of intention to distress or embarrass (*Council of the NSW Bar Association v Raphael* [2021] NSWCATOD 44). Noticing that the voice of the junior female solicitor who was his opponent that day had become shaky before beginning to cry, he put his arm on her shoulder for 10-20 seconds, kissed her on the top of her head and said '*Don't worry you poor thing*'. Earlier he had referred to her wedding ring and then said something which he considered an old and somewhat tired joke: '*Won't your husband get jealous because we are spending so much time together. He will think something is going on*'. The barrister characterised his conduct as the kind of thing he has done throughout his lifetime, a fact corroborated by his own character witnesses. The tribunal found: "*He was apparently totally ignorant of the likely effect that an unsolicited act of physical intimacy combined with a comment about her husband being jealous, would have on Ms X. His lack of understanding of the potential impact of his behaviour is of considerable concern*."

Speaking of older members of the bar, Bullfry ("*Bullfry cleans up his act*, p118) is "*almost seventy, time was nearly up, and the hoar-frost was settling slowly upon him. (And yet, demographically, he was still in the largest cohort of barristers by far).*" As Kate Eastman SC, chair of the Diversity and Equality Committee, has noted with an eye to the future, 30% of the bar are men over 60yrs.

But the problem is not confined to a subset of the oldest cohort of the bar. Frankly of greater concern is the 'horseplay' or worse engaged in by a new generation of male barristers, born of a 'boy's club' mentality (*Enough of the 'horseplay'*, Madeleine Bridgett and Christine Melis, p11). Recently a "*ritualised greeting* [by a male barrister to another male barrister] *which, in part, parodied oral sex*" at a clerks' function which he then echoed towards a female assistant clerk was rightly held to be vulgar, inappropriate and unsatisfactory professional conduct (*Council of the NSW Bar Association v EFA* [2021] NSWCATOD 21).

Dr Szoke's report identified that "*barristers' role in the courts and VCAT, and the culture of the Bar … inevitably transfers to the bench as the vast majority of judges are appointed from the Bar, [which means] that changing the culture of the Bar will be very important to fully addressing sexual harassment within the Courts and VCAT*." While the review's ambit did not include making specific recommendations directed to the Victorian Bar Association, Dr Szoke nevertheless suggested it review its sexual harassment policies and employ a specially trained dedicated assessment and conduct officer whose role would include supporting those who have experienced sexual harassment.

For those who have become perhaps understandably somewhat downcast by these and other recent news-stories of sexual harassment and worse, I commend the *Furies* (p120), and the inspirational and comforting quote they supply in their *Special Note to Our Lady Readers*.

Writing for Bar News

Every year there are many more applicants to join the Bar News committee than can be accommodated. But you do not need to be a member of the Committee to write for *Bar News*. As the journal of the bar, by the bar, all members are welcome to submit an article.

For those who are interested, some pointers. First, Bar News is not a legal journal. This is not a home for your authoritative 10,000 word analysis of equitable estoppel.

We value four types of writing

First, opinion pieces. These can be about the bar, an aspect of practice or procedure or a substantive area of law. While some brief explanation of the state of law may be required, the focus of the piece will be identifying an issue and what might be done to address it.

Second, interviews or articles that tell us about someone at the bar or bench. These tend to focus on lesser known aspects of practice (eg practising out of Sydney, or in lesser known jurisdictions), or activities outside practice (such as a contribution to our new series – *With my own two hands* (p98).

Third, history pieces which tell us about an aspect of law or practice at the bar. I remain keen for example to carry a piece, based perhaps on interviews, which explores what practice was like in the 1960's and 1970's (absence of women professionals, briefs that could be carried to court under one arm, carefully annotated libraries that doubled as superannuation).

Fourth, humour. For example, each edition carries Advocatus, an anonymous reflection of life at the bar from a different author. Questions for the Furies are always welcome too.

If you are thinking of writing an article send me an email with your idea and I can provide the deadline. We prefer pieces that are 1-3 pages in length (800-2700 words) and that come with good photographs or an idea for an illustration.

I look forward to hearing from you!