

# Welcome to the Winter 2022 edition of *Bar News*

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It is a great honour to be elected to the office of president of the NSW Bar. I was lucky to serve on the executive of Bar Council under collaborative presidents and will strive to emulate their outstanding work. I would like to commence by again expressing my thanks to my predecessor Michael McHugh SC for his dedication to the bar. McHugh SC served on the Bar Council for 19 years in total, in addition to his work on several committees and working parties. He will be remembered in particular for overseeing responses to the Omicron pandemic wave and continuing with important reforms in combatting sexual harassment and bullying in the profession. The International Committee and the Succession and Elder Law Committee introduced under McHugh SC have enhanced the Association's breadth of expert policy advisers and CPD presentations. His outstanding service to the profession was recognised by awarding him life membership of the Association. McHugh SC remains a current vice-president of the Australian Bar Association. The profession wishes him well in all his future endeavours.

As I write this column the nation has passed the grim milestone of 11,000 fatalities from the pandemic: more than 8,900 of which have occurred since the start of this year. The third Omicron wave, 'the winter wave', consisting of the BA.4 and BA.5 variants, is circulating in the community, with 95,571 cases in NSW in the last seven days. By now we have all had our personal and professional lives disrupted by this virus, directly or indirectly. The profession has proved flexible and resilient and we will face this wave with the same determination and with understanding that there remain high risks for those vulnerable to COVID-19, and ongoing health issues for many members. This makes the sensitivities of the courts to the health impacts of COVID-19 and the willingness of the profession to raise such



issues where they exist of great importance as we continue to rise to the challenges thrown at us by the pandemic.

I remain committed to seeing the profession through the pandemic. BarCare and the Barristers' Benevolent Association are there for those who need confidential assistance or, in the case of the Barristers' Safe Place, an attentive listener. Staff at the Bar Association continue to collate and publish the latest available information on COVID protocols for state and federal courts and tribunals. They are working according to the Association's Return to Office and Reopening Plan and have resumed COVID-safe operations. The staff of the Association, and their hard work for the benefit of the members, under the guidance most recently of our CEO Andreas Heger, has been remarkable throughout the pandemic and on behalf of the profession I express gratitude.

Our Bar Exams and Bar Practice Course were both successfully completed despite COVID strikes and disruptions, Bar Council has resumed face to face meetings and CPDs are being conducted in person where possible. The 15 bobber for Justice Peden and Justice Raper in the Common Room on Friday 22 July 2022 was a happy occasion with a full house. It was the first 15 bobber since the celebration on 14 June

2019 of the now Chief Justice Andrew Bell's appointment as President of the Court of Appeal and of Justice Angus Stewart being appointed to the Federal Court.

High on our list of priorities is the revival of our many and varied collegial events. Since his appointment in March this year, Chief Justice Bell has spoken on many occasions about the importance of return to professional life in chambers and in court and of the pitfalls of 'remote' practice. Ceremonial court sittings are the epitome of collegiality. The speeches provide the profession with a glimpse into the careers and diverse life paths of those who are the leaders of our profession. The occasions are an opportunity to meet with members of the judiciary and barristers of all seniority and areas of practice. They are of particular importance for our under fives and readers, many of whom have only recently experienced their first swearing-in ceremony. I encourage the profession to turn out in force as a mark of respect for our new judicial officers and to connect with our young members. We also have a wonderful social event for the Bench and Bar and I encourage you all to attend our Spring dinner on 2 September 2022. This will be a celebration of our new Chief Justice and is not to be missed!

## Policy work

The work of the Bar Association in policy continues to be prolific. The Association has recently been consulted on defamation law reform, family as culture relating to children in care and been involved in a major rethink to the manner of operations of the coronial jurisdiction in NSW. The bar has also been actively engaged in responding to proposed reforms to the *Motor Accidents Injuries Act 2017* and is astute to the impacts on the common law bar of ongoing reforms in the area of personal injuries in the name of 'efficiency'. I recently attended the 120th anniversary of the first sitting of the

Industrial Relations Commission, the first conciliation and arbitration commission in Australia. Another senior silk and I met with the Australian Law Reform Commission in consultation on the proposed reforms to the Corporations Act, rules and guidelines and the ASIC Act.

We have long-standing policy positions of support for the Uluru statement of the heart, including a constitutionally enshrined voice to parliament, and to urge funding for a Walama Court – not only the widely applauded recently introduced Walama list. The Association continues to advocate for reforms to address the over-representation of First Nations persons in custody, not the least of which is an increase to the minimum age of criminal responsibility. Children can currently be charged with criminal offences, face court and be detained in custody at age 10 in this state, despite all peak medical and legal bodies recognising that children are still developing mentally, physically and emotionally under age 14 with limited capacity to assess risk and control impulses, and the law in NSW presuming that children under the age of 14 do not know right from wrong ('doli incapax'). The bar has also been actively involved in consultation in relation to the development of an offence of coercive control which is a matter of some complexity, warranting both the current public consultation process and training of police prior to introduction.

Another area stewarded through several presidencies now is a suite of actions in the area of respectful relations to counter sexual harassment, bullying, unlawful discrimination and vilification. This important work continues with Spot and Elker available as online reporting systems and the launch of the updated Best Practice Guidelines on 2 June 2022. There are upcoming CPDs as to the operation of the updated BPGs with implementation by chambers expected in the near future. The recently proposed harmonisation of state

and federal legislation in light of the Federal *Respect@Work* reform and recommendations is sensible. The articles in this edition on Barristers' Rule 123, CPD and new accessorial liability provisions will contribute to barristers' understanding of their personal and professional obligations. There is broader ongoing cultural change at the bar, which is certainly undergoing transformation not only in our modes of work but the way we interact and work together.

### Regulatory functions

The regulatory functions of the Bar for admission to practice, responsibility for the Bar Exam and Bar Practice Course which ensure that new barristers have quality advocacy training and are familiar with the requirements and continuing traditions of the bar, are supplemented by the handling of professional conduct matters through our conduct committees and the Bar Council. Our Victorian counterparts no longer receive and handle complaints regarding barristers, the instrument of delegation to the Victorian Bar being revoked following the implementation of Recommendation 88 of the *Royal Commission into the Management of Police Informants (Vic)* handed down in November 2020. The NSW Bar entered immediate consultations with the OLSC on publication of the recommendations and retains its disciplinary function.

The Hon T Bathurst AC QC's article on Professional Conduct for Barristers, Kavita Balendra's overview of the case of *Charisteas* and what it means for social relationships between the bench and the bar, and articles on the work of PCCs, the management of conflicts of interest, ethical decision-making and ethical communications are all timely.

We currently have eighty-five matters under assessment or investigation, related to competence, compliance, costs and ethics. Along with our new director of professional conduct, we will be reviewing the times from the making of a complaint to resolution

and I will be meeting with the heads of our Professional Conduct Committees to see how we can further streamline our practices without compromising procedural fairness or the high quality of our investigations and reports.

Recommendation 86 of that Victorian Royal Commission remains a matter of concern for the NSW Bar, with the Victorian government proposing amendments to the Legal Profession Uniform Law by 'introducing a mandatory requirement for lawyers to report suspected misconduct of other lawyers'. The NSW Bar has opposed such mandatory reporting requirements in the context of existing obligations under both the Uniform Law and ss 316 and 316A of the *Crimes Act (NSW)*. We also continue to scrutinise the terms of any such provision, the most recent draft proposing an obligation to report where a barrister holds a 'reasonable belief that a reportable person may have engaged or may be engaging in the reportable conduct', reportable conduct also being the subject of ongoing submission and drafting. The bar is very concerned to preserve legal professional privilege while never seeing the egregious conduct the concern of the Royal Commission into the Management of Police Informants continued. We will continue to press our views on the Attorney General and do all we can to ensure that any reform process takes account of the high professional standards of the NSW Bar, along with the desirability of guarding against the mischiefs of a plethora of defensive reporting that could result from low thresholds with wide drawn obligations.

The ethical observation of legal professional privilege and confidentiality obligations, avoidance of conflicts of interest and abidance by the barristers' rules are at the heart of our practices. I commend this edition of *Bar News* to the profession, and I wish you all the best as we get down to work, headlong into the busy and ever-challenging year.

**BN**