

Reports from Bar Council Committees

Fees Committee

1. Recoveries

In the financial year ended 30 June 1988 a total of \$285,989.69 has been recovered from solicitors on behalf of 258 members. This compares with \$263,501.90 in the previous financial year.

An increasing number of matters are being referred to arbitration in accordance with the Joint Statement between this Association and the Law Society. From 1 July 1987 to 30 June 1988 16 matters were so referred to arbitration. The Fees Committee would especially like to express its thanks to those Members who give their time to act as arbitrators.

A survey of awards made by arbitrators in the last few years indicates that the majority of awards made was in favour of counsel.

There are a number of aspects of recovery of fees for Members which still remain troublesome. A not infrequently occurring problem is that the solicitor responsible for payment of counsel's fees may sell his practice, die, be struck off or, for a number of other reasons fail to continue to hold a practising certificate. In these circumstances, the Fees Committee is at present powerless to help counsel whose fees still remain outstanding but the problem is being investigated. Indeed, it is hoped to arrange, in consultation with and co-operation of the Law Society, a thorough revision of the current agreed Joint Statement in the light of experience in the operation of the current Statement.

Members are reminded that complaints about unpaid fees should be made to the Bar Council not later than four (4) years after the date of the memoranda of fees, otherwise the fees may be regarded as stale.

Any Junior member to whom is passed a brief from another barrister should always take particular care to confirm direct with the instructing solicitor -

1. that he or she is in fact formally briefed in the matter, and
2. that suitable arrangements for payment of his or her own fees are agreed.

It frequently occurs that a barrister receiving a brief will notice reference in some form or other to another barrister's previous involvement in the same matter. In those circumstances members are reminded of their obligations under Rule 64.1 which provides -

'Where a barrister who is asked to accept a brief or who has accepted a brief discovers that any other barrister has been briefed in any capacity whatsoever in connection with the same matter or substantially the same matter, whether on appeal or in other proceedings, and whether briefed by the same solicitor or not on behalf of the same client or one or more of the same

clients, he shall not accept or continue to retain the brief until he is satisfied that the fees of that other barrister have been paid or that the other barrister is satisfied with any arrangements made with regard to his fees, or consents to his accepting or continuing to retain the brief.'

Members are also referred to Rules 62.2, 64.3 and 64.4.

2. Scales and Loadings

The last increase in the Supreme Court scale was on 1 September 1987. Since then there has been an increase of approximately 25% in the District Court scale of fees from 9 February 1988.

The District Court accepted a substantial increase in the rates of country loadings from 2 June 1988. A corresponding increase has been accepted in principle by the Supreme Court. The formal implementation of that increase will take a little longer and it has been indicated that the Taxing Officers in the Supreme Court will allow, pending the formal publication of a New Practice Note, loadings for counsel for Supreme Court towns at the recent increased District Court rate. A submission is currently being prepared for a further increase in the Supreme Court scale of fees together with a submission for a further increase in loadings. Corresponding submissions will be made to the District Court.

The Registrar in Bankruptcy has indicated that from 1 July 1988 fees for Counsel will be allowed on taxation at an increased rate which was published.

The Legal Aid Commission also published a revised scale of junior counsel's fees, representing a 20% increase, applicable to work done on and from 1 July 1988.

The State Attorney-General's Department also indicated that there had been a review of the fees paid to private counsel briefed by the solicitor for Public Prosecutions to prosecute on behalf of the Crown. The Attorney-General approved of a 20% increase in those fees in respect of briefs delivered on and after 1 July 1988.

The Legal Aid Commission published a fresh scale of fees to apply in Tenancy (Local Court) matters. They are intended to apply to grants of Legal Aid after 1 November 1988. The Bar Association initiated helpful negotiations with the Commission for two variations to that scale. First, there had previously been no fee allowed for a conference with a client as distinct from a witness. That has now been included. Second, the refresher fee was increased from the normal two-thirds to four-fifths after negotiations concerning the inappropriately low rate of refresher fee.

Members are assured that the Committee is mindful of the need for continuous monitoring of fees and loadings. The present Committee has tried so to arrange matters as to ensure at least a regular annual review.

In the matter of fee and loadings scales, the committee would like to note in particular the continuing assistance of Webb Q.C. who, although not a current Council member, has much helped the current Committee as a co-opted member with years of past experience of dealing with Courts and officials on these ever sensitive matters. □

Law Reform

The Law Reform Committee of the Bar Council has, this year, taken on a different role. Whereas the Committee in past years has comprised a number of members of Council who have, themselves, taken on the task of preparing submissions on behalf of the Association to be made to Government with respect to matters of law reform, the new Council determined in November, 1987 that its Law Reform Committee would comprise but two members of Council whose function was to consider bills of the New South Wales and, in some cases, Federal Parliament and then determine whether there were matters raised in the bills which required further consideration. If they did, then the Committee would co-opt members of the Bar who were not members of Council but whose expertise was such that they were aptly qualified to prepare a submission on a particular bill for consideration and adoption by Council as the submission to Government of the Association.

The Bar's interest and concern, in this context, was to ensure that the proposals contained in bills of the Parliament adequately protected and safeguarded those members of the public who would otherwise be affected thereby and to ensure that the judiciary and the administration of justice generally were safeguarded and enhanced. Except in certain particular matters, the Bar has no part to play in the political decisions brought forth in particular legislation provided otherwise that the rights of affected citizens are properly and adequately protected.

It was in the light of this policy that the Committee has considered the various bills of the Parliament. In respect of a number of them it co-opted members of the Bar to provide Council with a draft submission. In this respect, submissions have been made by the Association on the following bills:

Anti-Discrimination (Amendment) Bill 1987
Companies and Securities Legislation (Federal)
Australian Securities Commission Bill 1987 (Federal)
Defamation (Criminal Defamation) Amendment Bill 1988

The Council has also made submissions to the Australian Law Reform Commission on Class Actions. An ad hoc sub-committee has also been formed to prepare submissions with respect to the draft New South Wales Evidence Bill.

Both the Council and the Committee have referred a number of bills in the criminal law field to the Criminal Law Committee. That Committee will refer to its work in this regard in its own report.

The Committee would like to take this opportunity of expressing its sincerest thanks and appreciation to those non-Council members of the Bar who have given so generously of their time, expertise and experience in preparing submissions which have been adopted by the Council on behalf of the Association. The submissions so prepared have been of a universally high standard and we are confident that they have and will influence Government with respect to the legislation to which they relate. □

Legal Education and Reading

Currently there are 136 barristers with a condition of pupillage attached to their practising certificate. This represents 8.9% of barristers holding practising certificates in New South Wales.

The Reading Committee is presently re-drafting the Reading Rules to reflect the changes which have occurred as a result of the introduction of the Legal Profession Act. A form of certification by Masters will also be introduced early in 1989.

With the opening of some new Chambers and floors in 1989 most pupils seem to have been able to secure accommodation in advance of, or soon after, commencing practice. However, with an increase in the number of people coming to the Bar, the Bar must continue to be vigilant in its search for suitable accommodation.

The reading programme continues to emphasise the need for practical training for barristers. For the past year or so each pupil has participated as Counsel in a moot. Such performances are recorded on video and in future each Master will review the performance of his or her pupil.

An increasing number of lecture and workshop segments are also being devoted to 'on their feet' training for readers with the benefit of comment by Judges and Masters. The Masters and Registrars of the Federal, Supreme and District Courts are especially thanked for their interest in developing these segments.

The Reading Committee acknowledges with thanks the continuing assistance of all those who give freely of their time to lecture in the programme. □

Library

There has been a pleasing increase in the use by members of the Library's collection and services in the past year. The number of loans processed in the Library last year was 15,707; 10,351 of those items were borrowed by members from Selborne/Wentworth Chambers and 5,356 by members from all other chambers. The number of members of the Association located in Selborne/Wentworth Chambers was 681 and in other chambers 622. To help correct this imbalance and to encourage greater use of the Library's facilities by members of the Association in chambers outside Selborne/Wentworth, it was decided to provide special services to save those members the inconvenience of

personally attending the Library. Thus -

(a) A facsimile machine has been installed in the Library. Its number is 231.1904. Members in chambers outside the Central Business District may have materials faxed to them between 8.30 a.m. and 4.30 p.m. Monday to Friday. Members within the Central Business District and outside Selborne/Wentworth Chambers may have use of this facility between 8.30 a.m. and 10 a.m. only when their staff is unavailable to attend the Library and materials are required for Court. Members within Selborne/Wentworth Chambers should have no problems in their staff attending the Library. However, requests cannot be made by floor juniors.

(b) A printed catalogue of the Library's major serial and textbook holdings has been completed. A copy has been sent to all floor clerks. Additional copies of the catalogue may be purchased for \$5 each. Cumulative supplements are published every three months and supplied at no charge to subscribers. It is planned to reprint the entire catalogue every two years.

(c) Telephone enquiries may be made to ascertain the availability of materials in the Library.

(d) Materials not held in the Library may be obtained by inter-library loan.

The Library has recently acquired new sets of law reports including the Canadian Criminal Cases, Building Law Reports, Ontario Reports and Queensland Reprint Statute Service. These acquisitions were made possible by a grant from the Law Foundation.

The Library Committee has resolved that as the Library now contains an extensive collection of reports and journals and due to the vast increase in the cost to members of practice materials, future acquisitions to the Library's collection will consist primarily of practice materials rather than serials. However, the Library will continue to subscribe to new Australian sets of journals and reports. Multiple copies of popular texts will also be purchased to meet user demands.

The staff is continuing the policy of expanding the legislation holdings of the Library. The legislation collection now comprises annual volumes and reprints of all States' and Territories' acts and ordinances. Due to staff restrictions only the Commonwealth and New South Wales acts have been consolidated with amendments.

To further assist members, the staff compiled an index of New South Wales rules and regulations. This index fills the gap left by the published index after 1976. The Library's index will be completed by the end of 1988.

Members would be aware that admittance to the Law Courts Library is now strictly policed. Barristers' support staff can only gain admittance by attending the course of instruction in the use of the Library conducted by the Bar Association's Librarian. To date 146 persons have attended the course.

In conclusion, it is appropriate for the Committee to publicly recognise the continuing unstinting efforts of the library staff, Mrs. Farmer, Miss Willard and Miss Ackland, during the past year. Without their unflinching courtesy and assistance the library could not possibly have provided the high standard of service to members which has been achieved. The gratitude of all concerned is accordingly acknowledged. □

Legal Aid

The past year was bitterly disappointing. Our main goal was to secure decent fees in criminal matters. The Legal Aid Commission evidently considered substantial increases, e.g. about 80% for District Court refreshers, to be justified. Yet budgetary constraints resulted in the scale being increased across the board by a paltry 20% with effect from 1 July 1988. This matter was discussed at a special meeting of the Bar on 31 May 1988, and it is anticipated that there will be another special meeting on this topic soon.

The Committee continues also to assist members with specific problems in their dealings with the Commission. However, it is worth emphasising that any fees outside the set scales must be agreed upon prior to the work being undertaken. □

Professional Conduct Committee #1

PPC #1 has dealt with 30 complaints during the course of its fortnightly meetings in 1988. Fourteen were dismissed or resolved on the basis of a ruling, one barrister was counselled, one was referred to a Disciplinary Tribunal and fourteen are still current. One matter in which proceedings were commenced in the Court of Appeal for disbarment was discontinued as a result of insufficiency of evidence. In NSW Bar Association v. Maddocks the Court of Appeal delivered judgment removing a barrister from the Roll* and in a further matter proceedings for disbarment are still pending.

The nature of the complaints included the propriety of counsel's conduct in the cross-examination of witnesses during an inquiry, matters of competence in the pursuit of a client's interests during an arbitration, the improper solicitation of fees relating to a local court case, the propriety of certain advice where criminal proceedings may be brought, the failure to have in attendance and obtain instructions through a solicitor and the impropriety of self advertisement.

In the course of investigation of some complaints there was revealed in some instances a lack of comprehensive awareness and understanding of the Bar Rules. The breadth of Rule 21 which provides that:

"A barrister shall not engage in unprofessional conduct or do anything contrary to the standards of practise becoming a barrister"

was considered in a number of complaints. The Bar's attention should also be drawn to Rule 10(1)(b) dealing with the return of a brief, Rule 15 relating to incompatible vocations, Rule 29B prohibiting direct soliciting of fees from a client, Rule 33 which defines the limited circumstances in which an instructing solicitor may be dispensed with, Rule 49(1) relating to pleadings alleging fraud or other serious misconduct and Rule 67 relating to requests from the Bar Council or a committee of the Council.

The Committee also considered a number of non-disciplinary type matters in which rulings were requested as to the propriety of certain conduct. There were a small number of requests for urgent oral rulings. Members are encouraged in areas of uncertainty or complexity as to their obligations or duty as counsel to avail themselves of the opportunity of seeking the guidance and assistance of one of the Professional Conduct Committees.

Once again PCC #1 was greatly assisted by Sir Frederick Deer whose contribution has been significant particularly in the areas involving deliberation upon matters touching the public perception of the Bar and maintenance of the high standards of the Bar. The Committee also takes this opportunity to record its appreciation for the efficient assistance of Yvonne Grant and the Registrar. □

* (See separate report this issue - Ed.)

Professional Conduct Committee #2

Since PCC #2 was reconstituted following the 1987 Bar Council elections, it has received 24 complaints against barristers. Of these, 10 have been dismissed, 5 have been referred to Disciplinary Tribunals (including 1 referral to a statutory Disciplinary Tribunal under the Legal Profession Act, 1987) and 9 are still under investigation. The complaints have included 5 arising out of workers' compensation proceedings (of which 3 have been dismissed and 2 have been referred to Disciplinary Tribunals), 4 arising out of family law proceedings (of which 1 has been dismissed and 3 are current), 2 arising out of criminal proceedings (both of which were dismissed), 3 arising out of personal injury proceedings (of which 2 have been dismissed and 1 is current) and 2 arising out of bankruptcy proceedings (both of which are current). The balance have included complaints arising out of medical negligence proceedings (dismissed), a building case (current), a Local Court arbitration (current), and an alleged contempt of court (referred to a statutory Disciplinary Tribunal).

A feature of the complaints arising out of workers compensation and family law proceedings has been an apparent lack of understanding on the part of complainants as to what has transpired. Sometimes these misunderstandings appear to be due to a failure on the part of the legal advisers to ensure that the client is kept fully informed and that some of the less familiar practices (such as morning tea with the Judge) are fully explained. The Committee cannot stress too strongly that in all probability

many complaints would not be made if there was a greater degree of communication between counsel and client so that the latter is made fully aware of and clearly understands the nature of the proceedings, especially where settlement occurs. In this respect, it is vital that any such communication take place in the presence of counsel's instructing solicitor so that there is corroboration of counsel's explanations to the client in the event of any future misunderstanding on the client's part. □

Professional Conduct Committee # 3

PCC #3 had carriage of 23 cases during this year. They comprised matters in the areas of Fees (1), Coronial Inquests (2), Workers' Compensation (3), Family Law (2), Ethics (5), Industrial Commission (1), Criminal Law (5), Personal Injuries (2), Building (1) and Uncategorised (1). Of those 23 matters, 13 were dismissed or resolved, 2 referred to a disciplinary tribunal and 8 remain current.

Following are examples of some of the matters which have come before PCC #3 in the course of the year.

1. A barrister was briefed to appear for a client in a committal. The committal commenced in the beginning of May 1988 and was adjourned, part-heard, to September 1988. A significant piece of evidence comprised entries in the client's diary. The barrister had access to that diary shortly before and during the May hearing. A policeman gave evidence, in May, about one of the entries in the diary. During the adjournment between May and September the barrister had access to the diary for a short time to assist him to prepare his cross-examination. His solicitor and client also had access. When the case resumed in September the same policeman went into the witness box again and gave evidence that the entry he had formerly referred to had been altered since the May hearing. There was the obvious implication against the barrister, and others, that he or they had made the alteration. The barrister sought, and was granted, an adjournment in order to obtain advice from the Bar Association and was also granted leave to withdraw from the case. The barrister asked whether he could, in any circumstances, continue to act for the client in the committal proceeding. He was advised that there appeared to be no alternative but for him to return the brief in circumstances where it was obvious he would have to give evidence in the committal of the fact that he had not been a party to altering the entry in the diary. It was also recommended that he might attempt to seek out a member of the bar of equivalent seniority and ask that member to take his place and to read the transcript without charging a fee for the reading (but charging a fee for the appearance).

2. A barrister was offered a brief in a common law industrial accident claim upon the basis that he would not be paid if the claim was lost. The barrister was available on the days upon which the case was listed for hearing but did not want to take the brief upon the basis on which it was offered. He was advised that he was not obliged to take the brief on that basis.

3. A barrister was contacted directly by a client by telephone one Friday evening. The client rang him from a hospital to which he had been compulsorily committed. The barrister advised the client to contact a solicitor. The client evidently had limited access to a telephone so the barrister assisted the client by contacting a solicitor on behalf of the client. It was a Friday evening at the end of term and the barrister was at a function. The client needed to be in contact urgently with a solicitor in order to gain curial assistance for his release. Rule 30 of the Bar Rules provides that a "barrister shall not save in urgent and exceptional circumstances retain a solicitor on behalf of any person." It was resolved that the case fell within the "urgent and exceptional circumstances" provision of that rule.

4. Proceedings in the Compensation Court sometimes give rise to particular complaints. Many of those complaints come down to communication between the barrister and the client. Some complaints concern the circumstances of discussions with the client regarding settlement with particular reference to the time and pressure involved. Other complaints concern the client being informed for the first time on the hearing day of significant difficulties in the case when no mention was made of such difficulties at preliminary conferences. Other complaints sometimes concern comments made by a barrister regarding the state of preparation of the brief. Particular complaints were usually dismissed after full reports from the barrister but they emphasise the need for clear and patient communication between the barrister and the client. □

Practising Certificate Committee

On 1 January, 1988 the Legal Profession Act 1987 came into effect. The President in discussions with the Attorney-General sought and was granted a deferment of the effective date for Practising Certificates for barristers from 1 January 1988 to 1 July 1988. This was done in order to synchronise the commencement of the new system with the commencement of the Bar Association's financial year, the 1988/89 budget and to enable the Association to establish a computer system for its Membership and Practising Certificates records. A timetable for the issue of Practising Certificates by 1 July 1988 was prepared and implemented.

One of the early tasks of the Committee was to settle the form of the Practising Certificate and application and in the course of so doing to assist in refining the specifications for the computer programme.

It was also necessary for the Committee to establish the categories of practising barristers who would be entitled to a practising certificate and the restrictions if any to which they

would be subject.

The Committee has had carefully to consider the provisions of the Legal Profession Act 1987 governing Practising Certificates in making recommendations to the Bar Council with respect to formulation of Council policy on the concept of "practising as a barrister" concerning the issue and refusal of certificates.

As of 20 September 1988 Certificates had been issued, in the following categories:-

(a) Restrictions:	
1. Parliamentary Counsel (QC's) + Statutory Appointments	2 + 6
2. Pupils	132
3. Academics	29
4. Junior Parliamentary Counsel	11
(b) Crown Prosecutors	59
(c) Public Defenders	18
(d) Practising Barristers/QC's (without restrictions)	1,274

Total Certificates Issued **1,531**

The following table lists the categories of those who were refused Practising Certificates under the respective provisions of the Act

Government Employed Persons	27
Legal Advisors for Companies	10
Interstate/Overseas Practitioners	5
Not Presently Practising	6
Parliamentary Counsel refused [s.32(1) but offered S32(4)]	4
Persons refused unrestricted S.32(1) Certificates and offered Academic Certs.	3

Total **55**

In October 1987 the number of practising barristers who were members of the Association was **1,092**

In October 1988 the number of practising barristers who are members of the Association is **1,279**

The number of non-practising barristers is **277**. □

Full reports from the Common Law Liaison & Listing, Finance, Criminal Law and Commercial Liaison and Rules Committees were published in the Spring issue of Bar News - Ed.