Welcome to the new President

On 9 November 2001 the new Executive of the New South Wales Bar Council was elected. It comprises Walker S.C. as President, Harrison S.C. as Senior Vice President, Slattery Q.C. as Junior Vice President, Bathurst Q.C. as Treasurer and Gormly S.C. as Secretary.

This issue contains an interview by Rena Sofroniou with Ruth McColl S.C., the immediate past-president. The New South Wales Bar is grateful for her tireless efforts on behalf of the Bar over the last two difficult years.

On 9 November 2001, one day after his election, Walker S.C. spoke to *Bar News* about his presidency of the Bar.

Gleeson: Could you tell us what are some of the objectives of your presidency?

Walker: I would like the Bar Council to maintain its professionalism in questions of discipline and ethics. I would like the Bar generally to improve its professionalism with respect to the level of forensic skills and legal learning. If my presidency can assist in those two areas, without neglecting the continuous representative and political roles of the Bar Association, I will think it has not been a failure.

'...[we have] to start with a plain and precise statement of why the sensible use of litigation to determine entitlements to compensation for personal injury is a better choice for the community...'

Gleeson: What damage has the Bar suffered from bankrupt barristers; how can it be remedied and how quickly?

Walker: There has been a lot of damage of a general kind. It is difficult to measure it but easy to appreciate its existence. The kind of social disapproval expressed both privately and publicly is, ironically, a back-handed compliment, given the expectations it implies people have of the Bar. Unfortunately, it makes the damage more powerful to contemplate. Whether the damage can be remedied is a real question to ask, not merely how it can be remedied. The reputation of professional groups like the Bar is much more readily spoiled than enhanced. In the eyes of some people, the damage is irremediable. We must try as best we can. The first step is to be very clear and confident in the values and standards which we say are relevant to the Bar. The second step is to listen to people, both within and outside the profession, who may disagree with the way in which we articulate our standards and values. I do not think the remedy will be quick. It will be measured in years, but the process has already started and I believe that the 2001 Bar Council has commenced in the right way.

Gleeson: Could you explain why the scheme announced for continuing professional development is necessary; and what you would say to those who have doubts about the scheme, including those barristers, whether long standing, or working in heavily specialised areas, or struggling in diminishing work areas, who see that the scheme has no benefit for them?

Walker: I do believe that we need to increase the substance of our conventional description of each other as 'our learned friends' and to do so in a way which uses and enhances the collegiality suggested by the same expression. As the doctrinal part of statutes and common law becomes more copious, and new areas of law multiply, the important intellectual structures involved in our system of law become more difficult to keep under close practical contact. At the same time, the expectations upon us as barristers, particularly but not only at the appellate level, as reasonably held by judges and clients, are that barristers will continue to present arguments founded on sound bases in principle. I personally believe that human nature, professional attention and the way in which the market for legal services works, are very strong influences towards specialisation which need no further encouragement. Continuing professional development is necessary so that specialisation does not fragment the Bar's intellectual capital. There is also no doubt that important parts of professional life apart from legal development must now be the focus of explicit mutual teaching and learning. Risk management is critical as insurance premiums increase. Risk management is also critical if we are to consider statutory limitations on liability. Practice management is vital if we are to avoid other forms of financial disarray for individuals. The cliché is that as one door closes at the Bar another one or two doors open. This is too comfortable a cliché. There is no doubt that the door is closing on certain forms of personal injury litigation. This calls for a more concerted effort to polish up and possibly change the skills and knowledge of competent practitioners than ever thought necessary before.

Gleeson: Do you see it as important that the Bar maintain its role in disciplinary matters?

Walker: I think it is vital that the Bar maintain the extent of its present role under Part 10 of the *Legal Professional Act 1987*. It is the essence of any profession, particularly the legal profession, that it take responsibility not merely to react to, but to positively investigate, alleged misconduct. It is quite wrong for a profession to claim a noble status but to leave to others outside the profession the task of bringing to book those who have failed to live up to their obligations.

Gleeson: What can be done to arrest the decline of the personal injuries bar?

Walker: I think this is the most difficult political task for the new Bar Council. I believe that concern about it at the Bar generally was reflected in recent voting for Bar Councillors. Whether this is true or not, or however strong the influence was, the sheer numbers of those affected at the Bar, and more importantly the injured persons, means that it is a matter which we have to address. There is no quick fix. I believe that the political climate is very adverse. It may be that a counter-movement against what are wrongly called reforms has to start with a plain and precise statement of why the sensible use of litigation to determine entitlements to compensation for personal injury is a better choice for the community than what both major parties have decided.

Gleeson: What are some of the other matters which will inform your presidency?

Walker: The issues which I expect to arise at a political level go beyond New South Wales and I expect to be returning to the questions raised by the so-called national profession. This is especially so given the recent call by the Commonwealth Attorney-General for more uniformity across Australia in discipline and regulatory matters. Those questions do not have simple answers.

On another point, the seriousness and enthusiasm of chambers outside the City of Sydney are palpable when you visit them, let alone when you appear against the individual barristers from those chambers. I think if we could reproduce the collegiality

of those chambers in the Bar as a whole of which they are such an important part, the Bar and the community served by us would be better off.

Finally, I had pupils reading with me from 1985 – 1993. They and their colleagues and my juniors since then have persuaded me of two things. First, that I was lucky to come to the Bar before they did because they are so good. Second, there is more reason to believe that the golden age of the Bar is ahead of us, not behind us, although of course one thing I've learnt from being involved with the Bar Association is that there never was a true golden age.

Readers will note that this issue contains a series of articles with a focus on regional and security issues.

Michael Kirby writes on how our legal system should respond to the events of September 11. Nicholas Cowdrey writes on the role of an international criminal court (as opposed to war) in dealing with terrorists. James Renwick writes on the legal rules, in existence and being introduced, governing the intelligence services in Australia. Justin Young writes on the new East Timor Constitution being drafted. Sarah Pritchard writes on the issues raised by the recent Tampa decisions.

Australia's recent treatment of asylum seekers is a matter which has raised great concern among members of the community. It is far from obvious to many that the policy of the previous government (which largely had bipartisan support) provides a solution that is humane, sustainable or consistent with Australia's international obligations and long term interests. This is an issue which has not, to date, greatly activated the NSW Bar Association, although individual members may have made contributions to public debate on the topic. It cries out for more attention. Contributions from members on this or any other topics are as always greatly welcomed.

We are also fortunate to be able to reproduce the Sir Maurice Byers lecture given, this year by McHugh J.

Finally, there is the welcome return of Bullfry Q.C.. Our thanks as always to Poulos Q.C. for his drawings of Bullfry Q.C.

Justin Gleeson S.C.

Reality training

Dear Sir,

Special thanks to Bryan Pape, Rena Sofroniou and Paul Daley for their contributions to the Winter *Bar News* 2001.

There used to be a form of reality training for budding lawyers. It was called 'Articles of Clerkship'. Even 'bad' articles could, and it was not really a paradox, provide very pertinent reality training.

There has been for many years a great shortage of junior assistants. This seems to have made ordinary practice so tight that the availability of pro bono services have been curtailed at the level where people need them most - the solicitor's office.

Articles of Clerkship may not suit these times but a form of internship for law students might. The first 500 hours might be unpaid but the next, say, 1500 might be paid at reasonable junior rates. The maximum number of hours per week might be limited to 15 during any semester. UTS seems well set up to introduce such a system. Detailed safeguards would be necessary. However, it seems likely that such a system would strongly reinforce problem based learning techniques used in the Law Schools.

The fact that only a few hundred might benefit does not seem to be reason to refuse them the benefits of such a system. The reasons originally given for abolishing Articles did not seem to many of us very appealing. Is it time for another look at a modern system of workplace legal training?

David Nelson

South African Judiciary

Dear Sir,

The Hon. Justice Ipp's otherwise erudite, well structured, and commendable address entitled 'Enduring values and change' reproduced in the *Bar News* Winter 2001 edition, requires qualification and response to his observations about the behaviour, in trials of a political nature, of the South African Supreme Court judiciary in the worst periods of the apartheid regime.

His Honour's statement that appearances before judges by barristers for the defence in political trials involving terrorism and sabotage and related offences was 'really unpleasant,' and that the judges who presided over these trials, having been hand picked, 'would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants'(p.40), does not accord with my experience when I appeared during the 1970s and again in the late 1980s for the accused in political trials, and for litigants in civil proceedings against cabinet ministers or organs of state.

His Honour's observation that 'practise at the Bar breeds independence of mind and attitude' and that 'subconsciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice' (p.39), although trite, deserves emphasis. All the judicial appointments to the Supreme Court Bench during the apartheid era were nominated by the minister of justice with the approval of the Cabinet and were chosen, with one exception in the case of an appointment of a particular chief justice with an academic legal background, from practising members of the various Bars. Judges were, in the main, from Afrikaans, and to lesser extent, English and Jewish backgrounds.

Supreme Court judges Boshoff, Irvine Steyn, de Wet, Henning, Auret van Heerden and Thirion, provided the best evidence and argument for appointing judges from senior and experienced barristers practising as individuals at an independent Bar. All these judges were from conservative Afrikaans backgrounds. They were members of the Bar at the time of their appointments. They were Nationalist Party (government) supporters. Notwithstanding this, and because they had come from the Bar to the Bench, they tried the cases of the kind in question in which I appeared before them without fear, favour or bias in accordance with their oaths of office and without any 'allegiance to an institution or political party'. The same was true of justices John Milne, Raymond Leon and Andrew Wilson who, from time to time, tried cases of a political nature. They were English speaking and doubtless voted for the Progressive (anti-Government) Party.

The 18 month long '*SASO*' trial early in the 1970s is a good illustration of the point I am making. Instigated by the minister of justice to eradicate and silence the South African Students Organisation (SASO) and