

**Arthur Moses SC Senior Vice-President NSW Bar Association, 'Improving wellbeing at the New South Wales Bar'**

formed through the tireless work of Tristan's parents, Marie and George, who I admire greatly. Through its engagement with the profession and the annual lectures it promotes, there has been an increase in anecdotal evidence of a link between studying and practising law and depression, drug and alcohol abuse and mental illness. In 2006 beyondblue contributed to a Beaton Consulting report on levels of depression among the professions.<sup>1</sup> In 2008 Vrkleviski and Franklin studied the incidence of vicarious trauma on criminal defence lawyers and prosecutors who work regularly with traumatised clients. In 2009 the Brain and Mind Institute published *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers*.<sup>2</sup> That study was based on a survey of 924 solicitors and 756 barristers (including 97 senior counsel) and found that 42 per cent of barristers had experienced depression.

My concern was heightened when I reviewed the results of the Bar Association's *2014 Member Profile Report*, which was written by the social and market research firm Urbis. The 2014 survey was the first time that the Bar Association sought this information from its membership. The express purpose was to obtain data, which can be used to develop, support and justify initiatives of the Bar Association for its members. The association collected and collated the 1,174 responses received to the survey and provided Urbis with the raw data, which they then analysed in the course of the preparation of the report.

<p><b>DEPRESSION</b></p> <p>37% of respondents reported suffering from depression while at the bar. While most of these respondents were male (74%), a similar proportion of all females (35%) and male (37%) reported experiencing depression whilst at the bar.</p>
<p><b>DIVORCE</b></p> <p>21% of respondents reported experiencing divorce or separation while at the bar.</p>

We drilled down on the figures to see what the rates of depression were by years of admission. The higher rates of depression appear to be those that have practised for 20 years or more in that 1986-1995 and 1975-1985 range. The two highest age groups were 50-60 and over 60, although the other age groups were worryingly high.

We then compared the rate of depression at the bar to the medical profession. The study by beyondblue in October 2013 found that 20 per cent of the medical profession have been diagnosed with depression.<sup>3</sup> It should be noted that the NSW Bar Association's Urbis survey relied on 'self-diagnosis': we asked our members to indicate whether they *believed* they had suffered from depression at the bar, rather than having been diagnosed. This may explain

the disparity. We then looked at how barristers compared with the general public – as you will see from this beyondblue study – it estimates that 14 per cent of Australians experience depression during their lifetime.

Clearly, the rates of depression in our profession are high. The Bar Council has determined that we now need to examine why this is occurring and what we can do to reduce these rates. I think it is important that the bar, the legal profession, and law schools use the figures from the Urbis survey to shine a light on how we deal with our colleagues who suffer from depression and how we can improve what we do because in some respects, and in relation to some of our colleagues, we are obviously failing.

What are the main causes of depression within the profession and how we could do better to deal with practitioners who suffer from mental illnesses? We don't know this but can only speculate based on what we are told. These may include, but are not limited to:

- Secondary trauma associated with constant exposure to details of crimes, traumatic events, suffering and loss experienced by clients. These factors are especially present in criminal law and family law matters
- Isolated nature of work undertaken as a barrister
- Pressures associated with decisions having to be taken in relation to ethical matters, which may conflict with interests of clients
- Stress and anxiety related to work pressure and nature of work being undertaken for clients.
- Bullying by judicial officers
- Bullying and harassment by colleagues
- Financial pressures relating to either not being paid for work undertaken or not having sufficient work

One of the issues we have seen impacting on the mental health of our colleagues is conduct by other members of the profession or judges. What this demonstrates is that we all have to be mindful as to how our words and conduct may impact on the wellbeing of others. The NSW DPP had to confront this in 2013 when a survey found that one-third of staff had been bullied, which arose in light of two staff committing suicide.

### The present regulatory system

There is no requirement in the *Legal Profession Uniform Law (NSW) 2014* (Uniform Law) that legal practitioners report other legal practitioners suspected of substance abuse or mental health issues. This is to be contrasted with the medical profession.<sup>4</sup> The National Law requires health practitioners to notify the Australian Health Practitioner Regulation Agency (AHPRA) of notifiable

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conduct of another health practitioner. Notifiable conduct under the National Law for health practitioners includes:

- practising whilst intoxicated by alcohol or drugs. This is a constant theme because a lot of practitioners in both the medical and legal profession deal with stress through the taking of drugs or alcohol;
- sexual misconduct in the practise of the profession; and
- placing the public at risk because of an impairment

On 1 July 2015 the Uniform Law commenced operation. Barristers are now required to have regard to the matters set out in rule 13(1) of the *Legal Profession Uniform General Rules 2015* ('Uniform Rules') when renewing their practicing certificates.

### Self-reporting

Rule 13(1)(m) provides that the barrister must consider:

- (m) whether the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner'

This Rule would require self-reporting at the time of renewal of practising certificates. The difficulty is that some practitioners with a mental health issue would not necessarily be self-aware. Further, there is a reluctance to disclose such matters in the event that it may impact upon an ability to practise.

### Power of the Bar Council to have barristers medically examined

Section 95 of the Uniform Law provides:

95. Consideration and investigation of applicants or holders

In considering whether or not to grant, renew, vary, suspend or cancel a certificate, the designated local regulatory authority may, by notice to the applicant or holder, require the applicant or holder:

- (a) to give it specified documents or information; or
  - (b) to be medically examined by a medical practitioner nominated by the designated local regulatory authority; or
  - (c) to provide a report from a Commissioner of Police as to whether the applicant or holder have been convicted or found guilty of an offence in Australia; or
  - (d) to cooperate with any inquiries by the designated local regulatory authority that it considers appropriate.
- (2) a failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for making an adverse decision in relation to the action being considered by the designated local regulatory authority.

**The Bar Council has used this power in a number of instances to require barristers to be medically examined in relation to issues concerning their mental health.**

### The Power of the Bar Council to impose conditions on practising certificates

Section 53 of the Uniform Law states:

53. Discretionary conditions

(1) The designated local regulatory authority may impose discretionary conditions on an Australian practising certificate granted in this jurisdiction in accordance with the Uniform Rules, but those conditions must be of a kind permitted by this Law or specified or described in the Uniform Rules for the purposes of this section.

(2) Discretionary conditions may be imposed on an Australian practising certificate at its grant or renewal or during its currency and must be reasonable and relevant.

### Type of conditions that can be imposed on practising certificates

Section 16 of the Uniform Law states:

16 Discretionary conditions on Australian practising certificate

For the purposes of section 53 of the Uniform Law, the discretionary conditions that the designated local regulatory authority may impose on an Australian practising certificate are any one or more of the following:

...

(b) a condition that the holder undertake and complete one or more of the following:

- (i) continuing legal education;
- (ii) specific legal education or training; and/or
- (iii) a specified period of supervised legal practice.

...

(e) a condition requiring the holder to undergo counselling or medical treatment or to act in accordance with medical advice given to the holder,

...

a condition agreed by the holder

The Bar Council has imposed conditions on practising certificates using these powers.

### Workplace bullying

The profession's conduct rules expressly prohibit certain type of behaviour within the workplace that could impact upon the wellbeing of a barrister.

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### Council of the NSW Bar Association v BRJ [2015] NSWCATOD 73: A Case Study

On 12 December 2013 pursuant to s 551 of the *Legal Profession Act 2004* (the Act) the Bar Council commenced an Application for Original Decision against BRJ, former barrister in the then New South Wales Administrative Decisions Tribunal (the Tribunal). The application to the Tribunal arose out of the investigation of two complaints the Legal Services Commissioner made against BRJ on 24 August 2011 and 6 December 2011 respectively. Those complaints, and the proceedings in the Tribunal, related to BRJ's conduct during the period from July 2010 to December 2011 which involved:

- BRJ presenting late for rostered duty at courts as a member of the Specialist Domestic Violence Practitioner Panel on several occasions; and
- BRJ entering into a lease with a client in circumstance where there was a conflict of interest, in breach of her fiduciary duty; and
- BRJ continuing to act for that client notwithstanding the ongoing conflict of interest.

BRJ admitted this conduct and admitted that it amounted to unsatisfactory professional conduct. However, she submitted that the Tribunal should make no formal finding of unsatisfactory professional conduct. The Bar Council contended that findings should be made and that the Tribunal should reprimand BRJ pursuant to s 562 of the Act.

The Tribunal delivered its decision on 16 July 2015: *Council of The New South Wales Bar Association v BRJ* [2015] NSWCATOD 73. The Tribunal made findings of unsatisfactory professional

conduct, but declined to reprimand BRJ because:

The Tribunal concludes from the medical evidence that the respondent's judgment and cognition were affected by the anorexia nervosa with the result that she did not have sufficient comprehension of her conduct nor the ability to properly reason in relation to her conduct. In those circumstances the Tribunal is of the view that it would not be appropriate that she be reprimanded for her conduct.

If the respondent's judgment and cognition had not been affected, a reprimand would be an appropriate order to make.

The Supreme Court of NSW dismissed an appeal against the decision of the Tribunal in *BRJ v Council of the NSW Bar Association* [2016] NSWSC 146

This decision is important on two levels:

- There was a recognition by the Tribunal that a person who has engaged in unsatisfactory professional conduct which has been caused in part by an illness which did not allow the person to comprehend their conduct, that they should not be punished for their conduct by a reprimand finding; and
- The medical report which the tribunal relied upon was a medical report which came about because the Bar Council directed the barrister to attend a medical examination with a psychiatrist. Had that not occurred, the reason for her conduct would not have come to light because there had been a sustained non acceptance by the barrister that she was ill.

It is hoped that this reasoning may encourage other barristers to come forward early in relation to their illnesses.

Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* states the following:

A barrister must not in the course of practice, engage in conduct with constitutes:

discrimination;

sexual harassment; or

workplace bullying.

Rule 125 defines workplace bullying as meaning:

unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person working in a workplace.

## Current programs

### Best Practice Guidelines

The NSW Bar Association on 19 June 2014 approved Best Practice Guidelines (BPG) to deal with issues concerning bullying, harassment, discrimination and victimisation. These issues impact upon the health of members and staff. BPG are voluntary, however, the Bar Association encourages its members and their chambers to adopt them. The guidelines are aimed at ensuring that the workplace of barristers do not contribute to unnecessary stress and mental health issues. The BPG are to be found on the website of the NSW Bar Association.

In 2015, the NSW Bar Association became a signatory to the Tristan Jepson Memorial Foundation's Psychological Wellbeing: Best Practice Guidelines for the Legal Profession. A working party is reviewing BPG of the NSW Bar Association.

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### **Promotion of health and wellbeing initiatives**

This is done through activities promoted by the Health and Wellbeing Committee.

### **BarCare**

This service provides confidential assistance to barristers and their families who are experiencing difficulties. The information which is provided to BarCare, either by concerned colleagues, family members or the barrister who is suffering difficulties is meant to be confidential and not disseminated to the Professional Conduct Department of the NSW Bar Association. Assistance to practitioners is facilitated either through access to psychologists, psychiatrists or financial assistance through the Benevolent Fund.

### **Statutory powers**

From time to time, the NSW Bar Council has exercised its powers pursuant to s 95 of the Uniform Law to have barristers medically examined and impose conditions on practising certificates. This ordinarily arises in the context of a complaint that has been lodged.

### **The Wellbeing Survey**

In late 2016 the New South Wales Bar Council resolved to review the quality of the working life of our profession. This was triggered by the results of the Urbis survey. We are assisted with the design and delivery of the program by a team from the United Kingdom, who conducted similar work on behalf of the General Council of the UK Bar. Their project has been incredibly beneficial to the profession in terms of engagement with their members, representation with government and other third parties, which utilised the data gathered.

The survey uses an established survey, which was undertaken by the UK Bar in partnership with the Quality of Life Working Unit of the University of Portsmouth. It has been adopted to the NSW Bar and the subject of road-testing amongst a cross-section of the bar with the chair of the UK Bar's Wellbeing at the Bar Project, Rachel Spearing, who spent a week in the NSW Bar Association's offices in February 2017 to assist staff to implement it. Rachel's interest in this area occurred following the suicide of a Queen's Counsel who was leading her in a large case. He committed suicide during that case. Rachel had to continue the case after a short adjournment.

Rachel initiated and led the successful research into measuring the wellbeing of barristers at the UK Bar, summarised in the following link, [www.barcouncil.org.uk/wellbeing](http://www.barcouncil.org.uk/wellbeing). The UK Bar produced an in depth empirical study yielding valuable data following this research.

The Bar Council launched a Wellbeing Portal on 15 October 2016 at their annual bar conference at [www.wellbeingatthebar.org](http://www.wellbeingatthebar.org).

org.uk with a significant amount of information for the bar regarding its wellbeing. The Bar of England and Wales has also conducted training at the Advocacy Training Council during the summer vacation in vicarious and secondary trauma. This training is now being reviewed by the UK Bar and may be implemented as a mandatory exercise to safeguard the resilience of lawyers dealing with vulnerable victims and witnesses.

### **Project outline**

The project initiated by the NSW Bar Council involves three phases.

#### **Research (March 2017)**

Practising barristers were sent a survey to identify the 'individual' and 'environmental' workplace risk factors that impact on performance and directly support or impinge on their professional practice. The survey used a link to a confidential online platform. Participants cannot be identified by their link. The data is stored in secure facilities and can only be accessed through password-protected login.

#### **Strategy (July-Aug 2017)**

The NSW Bar Council will receive a report, which will analyse the data generated by the survey. The Bar Council will review the report analysing the data of the survey and presenting the thematic issues affecting the current profession and provide a strategic review and response to safeguard the profession.

#### **Delivering Resources (February 2018)**

The NSW Bar Council and the stakeholders will seek to provide a positive approach to:

- Highlight the resources available to support the profession;
- Seek to normalise the recognition of and investment in 'psychological wellbeing' as being central to sustaining performance as a barrister;
- Engage with education and training to improve the capacity and capability of barristers in managing their ethical responsibilities and performance.
- Advise government on the impact of policy, such as how inadequate legal aid funding can adversely affect the wellbeing of members
- Consult with the judiciary in relation to courtrooms as workplaces.
- Provide strong leadership with expectation and encouragement of practitioners to take notice & attend CPD.

### **Matters for debate within the profession**

In light of the high rate of depression and instances of self-harm

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and threats of self-harm, the following proposals have been advanced from time to time in order to deal with mental health issues confronting the profession. The proposals are raised in this article to encourage debate within the profession. These are not proposals of either myself or the Bar Council. Once the data is received from the Wellbeing survey, the data may assist the profession to debate these matters as well as other proposals that may be advanced for the consideration of the profession.

### **An Impaired Registrants Program (IRP)?**

The medical profession has an impaired registrants program established under the Health Practitioner Regulation National Law (NSW). This facilitates notifications concerning mental health issues relating to medical practitioners being dealt with confidentially outside of the professional conduct stream. Would this promote disclosure of mental health issues by barristers or is it best to leave the present regulatory system in place and focus on wellness management within the profession?

### **Judicial conduct**

Should the Bar Association work with the Judicial Commission of NSW and heads of federal jurisdictions to raise awareness amongst judicial officers as to how their conduct may impact upon others? Is there a need for a protocol between the Bar Association and the Courts as to how these issues may be dealt with so that there is transparency and in order to avoid members of the Bar being concerned that they may be victimised if they raise an issue concerning the conduct of a judicial officer?

### **Legal Aid fees**

Are the low rates of legal aid fees forcing practitioners to take on heavy caseloads in stressful family and criminal law cases in order to conduct a viable practice? Is this in turn having an impact on the health of practitioners?

### **Increased awareness of the BPG**

Should it be mandatory for each chambers to adopt Best Practice Guidelines? Do we need to review the rules which already exist prohibiting bullying and harassment?

### **Increased awareness of BarCare and the Benevolent Fund**

Barristers should be made more aware of services and funds that they can access should they be feeling under stress.

### **Conclusion**

The legal profession is an incredibly exciting and rewarding career both intellectually and financially. However, it is important, that we do not forget that there are aspects of it that are incredibly stressful and rather than attempt to sweep problems under the carpet, we should look to see how we can improve the profession

to limit instances of mental health issues. On behalf of the NSW Bar Council, I would like to thank members for completing the Wellbeing survey. The NSW Bar Council will be engaging with our colleagues once we receive the results of the survey. This will assist the Bar Council and other stakeholders to develop a strategy to safeguard the health of barristers.

### **Endnotes**

- 1 Beaton Consulting, Annual Professions Study (2007) featured the results of a survey by beyondblue assessing levels of depression and non-prescription drug use among 7,500 Australian professionals surveyed.
- 2 Followed in 2010 by research published by Medlow, Kelk and Hickie: 'Depression and the Law: Experiences of Australian Barristers and Solicitors', [2011] *Sydney Law Review* 771 at 772-73.
- 3 [https://www.beyondblue.org.au/docs/default-source/research-project-files/bl1132-report--nmhdms-full-report\\_web](https://www.beyondblue.org.au/docs/default-source/research-project-files/bl1132-report--nmhdms-full-report_web)
- 4 See s 141 of the Health Practitioner Regulation National Law (NSW)