A special edition on expert evidence

I own one particularly well-thumbed past edition of *Bar News*: Andrew Bell's December 2006 special edition on expert evidence.

One of my first steps as editor was to commission Hugh Stowe of 5 Wentworth Chambers to curate an updated suite of articles on expert evidence. In this edition you will find his thoughts on the ethical boundaries involved in reviewing (not settling!) draft expert reports. A second article considers the difficult question of whether legal professional privilege can be maintained in respect of communications with an expert. Victoria Brigden has written on cross-examination of experts. David Robertson and Charles Gregory provide an up to date and deeply practical discussion on the admissibility of expert evidence. And there is a comprehensive guide to concurrent expert evidence – or 'hot tubbing' – by Adam Batt and Hugh Stowe. An enormous amount of work has gone into these splendid articles, and *Bar News* records its appreciation to each of the contributors, and to Hugh Stowe in particular.

We are also pleased to publish the inaugural Bathurst Lecture on commercial law, delivered by the Hon Murray Gleeson AC QC. Rocco Fazzari, previously of Fairfax, has painted a portrait of Gleeson to accompany the lecture, along with three marvelous illustrations to accompany our expert evidence pieces.

This edition also carries some great pieces describing the practice of the Bar. First among them is the piece by Alexander Edwards and Ting Lim on the regional bar – the 104 members of the Bar Association whose chambers are outside the Sydney CBD. Heydon Miller (Orange), Shanna Mahoney (Parramatta), Sophie Anderson (Lismore) and Belinda Epstein (Newcastle) each describe the benefits of practicing away from Sydney.

Emmanuel Kerkyasharian has written a searing article on the wholly inadequate Legal Aid rates, which have not increased since 2007. A barrister briefed by Legal Aid to prepare and appear in a four week murder trial for an accused was paid $9.37/hour after expenses, less than half the national minimum wage. Emmanuel's article is echoed in Catherine Gleeson's review of The Secret Barrister, a book by an anonymous British barrister. Baby barristers there at times literally pay to work, with their train fare for a

circuit brief greater than their legal aid brief fee. The book asks the question, why isn't the resourcing of the criminal justice system the subject of debate in the same manner as access to health care? Perhaps it is because most think a brush with the courts will not happen to them – when in fact exposure to crime is as happenstance as a sudden illness or accident.

Michael Kearney SC writes about another area of chronic underfunding - family law, and the extensive delays that occur in that jurisdiction as a result. Matters being commenced today involving children are unlikely to be determined inside three years. In regional centres matters listed for hearing are routinely not reached and stood over for months to the next set of hearing days, when they may again not get reached. At times legal aid funding is exhausted before the matter can be heard.

This edition also carries some wonderful positive stories, including a fantastic interview with Greg Tolhurst, who took over the role of executive director of the NSW Bar Association in October 2016. The article reveals a learned and thoughtful man, whose nascent career as a drummer in a rock band was happily cut short, and who, through a series of fortunate events, became a well-published legal academic before joining the Bar Association. Greg discusses the Bar Association's strategic plan as one with many initiatives, but to achieve them you need an end point. '…the role of the Bar Association is to safeguard the rule of law and support the administration of justice in NSW through a sustainable cohort of high quality independent practitioners at the Bar operating with integrity and thriving in a changing legal environment.'

Bar News remains the home of great articles on legal history. In this edition Michael Slattery tells us the fascinating story of Percy Valentine Storkey, the Sydney Law Student and District Court Judge who won a Victoria Cross in World War I. Geoffrey Watson SC writes about why US Supreme Court Justice Douglas' grave lies in Washington DC's Arlington Cemetery in both senses of the word.

Can I end by thanking the outgoing *Bar News* committee members on behalf of myself and my predecessor. *Bar News* is very much a collaborative effort, and leans heavily on its committee members, and those who have left the committee will be missed.

Ingmar Taylor
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Bar News thanks Hugh Stowe for curating the special edition articles on expert evidence.

A legal profession, not a legal business

'The one great principle of the English law,' Charles Dickens once quipped, 'is to make business for itself'.[1] Some 165 years later, our profession still faces accusations that the price to pay to access justice is too high.

While we practise in a period of rapid change, including the increasing internationalisation and commercialisation of the law, the Bar Association's Strategic Plan recognises that these changes occur against the constant of community and court concern about the cost of litigation.

The cost of accessing legal representation and justice services remains a live concern to Australia's legal profession in the 21st century. Cost is often the decisive factor for clients considering whether to engage counsel or pursue litigation. The costs associated with litigation are prohibitive and may deter meritorious claimants from seeking recourse via the courts. Importantly, the affordability of justice impacts on the quality of the rule of law. There is no doubt that costs also impact upon the reputation and integrity of the legal profession. Fee-related disputes make up a significant source of complaints against solicitors and barristers.

As barristers, we have a paramount duty to fearlessly serve the administration of justice and an obligation to resolve matters as justly, cheaply and quickly as possible. Where tensions present in our practice between these three principles, we are called to reconcile these as best we can in accordance with the law and with our ethical obligations.

The chief justice of New South Wales has observed that 'commercialisation is not inherently bad or evil; it is a different set of means and ends, which both complement and conflict with the means and ends of professional legal practice'.[2]

Advocates of third-party litigation funding and contingency fees have long argued that these initiatives actually serve, rather than undermine, the rule of law by facilitating access to the courts for complainants who otherwise could not afford to seek recourse. The Australian Law Reform Commission is currently inquiring into class action proceedings and third-party litigation funders.

The Bar Association welcomes the opportunity for a national discussion on these issues, particularly on two key questions: whether a licensing regime should be introduced to regulate third-party litigation funders; and whether solicitors should be permitted to enter into contingency fee arrangements.

While these are not new arguments, it has become increasingly clear with the rise of class actions that a definitive answer is needed to provide clarity and maintain confidence in our courts and our lawyers. Cost should not prevent justice from being done. However, barristers deserve to be reasonably and properly compensated for the work we perform. Crucially, we believe that the practice of law must remain a profession, not a business.[3]

A national inquiry

In 2017 the attorney-general of Australia tasked the ALRC to consider whether class action proceedings and third-party litigation funders should be subject to Commonwealth regulation and whether there is adequate regulation of related matters including:[4]

- relationships and conflicts of interest between lawyers, litigation funders and plaintiffs;
- prudential requirements;
- distribution of litigation proceeds and the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
- requirements and fitness to be a litigation funder; and
- costs charged by solicitors in funded litigation, including class actions.

The Bar Association has formed an hoc working party comprising E A Cheeseman SC, G A Donnellan and J C Conde to assist us to consider and respond to the ALRC's proposals. In May the ALRC released a discussion paper outlining proposals for reform. In July, the association provided input to the Law Council of Australia on these proposals.

The time is long overdue to explore these issues thoroughly. In doing so, we must be prepared to look to other jurisdictions and learn from their experiences and mistakes.

Disputes and litigation are not limited to NSW, nor should discussions of policy be. I recently had the privilege of meeting with the president of the New York City Bar Association, Roger Maldonado. I walked away from that meeting with the conviction that we are strongest as a legal profession when we stand together with our international colleagues.

Although the NYC Bar is almost ten times the size of the New South Wales Bar, we face many of the same challenges, including disproportionate incarceration rates of minorities and retaining women lawyers. There is much to be gained from sharing our experiences across jurisdictions and borders. This is particularly true of policy responses to the challenges and opportunities posed by third-party litigation funding and contingency fees, as these issues have had a very different history and treatment in the USA as compared with NSW.

Litigation funders

One of the ALRC's most significant proposals for reform is that the *Corporations Act 2001* (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.[5]

The introduction of the federal class action regime in 1992 was a watershed moment in Australia's legal history. It was not without controversy, in fact it was described by some as a 'monstrosity'.[6] Fears the regime would open the floodgates to litigation do not appear to have eventuated.[7] However, there has been a steady rise in the number of class actions, accompanied by an increase in the number and the involvement of commercial third-party litigation funders.[8]