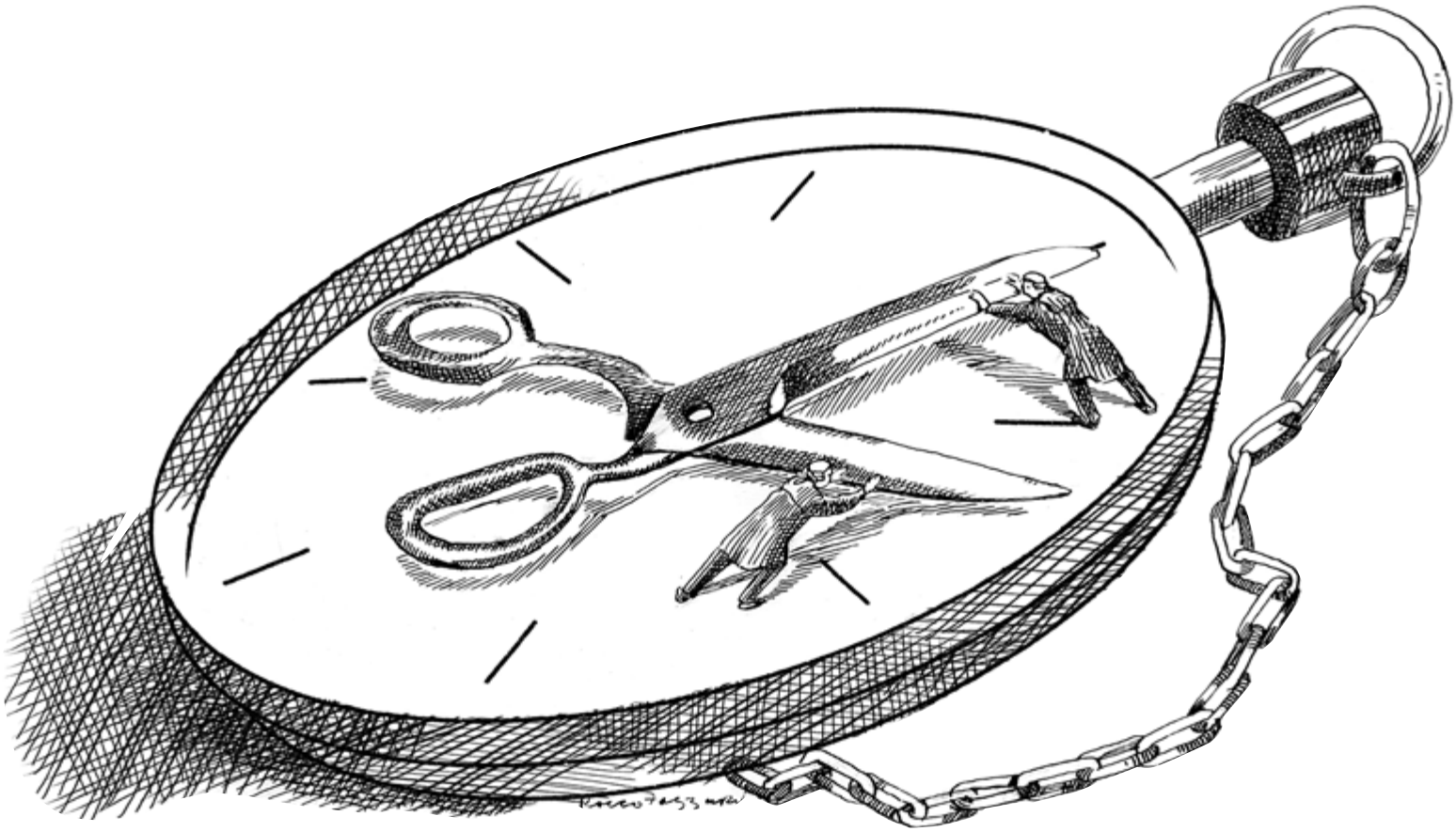

The Bar under stress

By Anthony Cheshire SC

There has been a lot of publicity in recent times about stress in the legal profession. This is not a recent phenomenon.

For instance, a study in 2009 of students, solicitors and barristers revealed 'high levels of psychological distress and risk of depression in the law students and practising lawyers' and 'a number of attitudes and behaviours which imply a general reluctance to seek help for mental health issues' (N.Kelk et al, 'Courting the blues: Attitudes towards depression in Australian law students and lawyers', Brain & Mind Research Institute, University of Sydney).

Judicial bullying has been reported as one of many contributing factors (as discussed by Arthur Moses SC in the President's Column in the 2017 Autumn edition of *Bar News*). That may itself be a product of stress in the judiciary, which is clearly a real issue given the results of the empirical study of judicial stress and wellbeing (as reported in *Current Issues* (2018) 92 ALJ 855, 859) and the suicides in the last eighteen months of two Victorian magistrates.

The position does not seem to be improving

and there are at least recent anecdotal accounts of ongoing unrealistic deadlines, stress, mental illness and self-harm at the bar.

The recent Financial Services Royal Commission got through an astonishing amount of material and breadth of issues in a short space of time in order to meet the very tight deadline imposed by the Government. There have been several media articles, however, describing the immense pressures under which lawyers were placed by the Royal Commission. Lawyers recorded working between 15 and 18 hours a day, seven days a week in phases where clients were required to respond to notices. There were notices requiring not only the production of documents but also responses to specific questions. Many notices were quickly followed by other notices, sometimes following on from a previous notice but often on a completely separate topic. Thus the intense phase of work was often extended over several weeks and sometimes right up to (or even beyond) when a client's relevant witness was due to give evidence.

Not only was the period of pressure often lengthy, but some of the notices imposed time limits that were so short that they simply could not be met. A failure to comply with a direction from the Royal Commission potentially exposed the client (and presumably the lawyers as accessories) to a criminal sanction of up to two years' imprisonment under section 3 of the *Royal Commission Act* 1902 (Cth).

Although a lack of time would presumably constitute a 'reasonable excuse' and therefore a defence to such a prosecution, a defendant bears an evidential onus in that regard. I, for one, would not wish to test the limits of the extent to which a need for sleep, a fear of a heart attack, a mother's 80th birthday or a desire to see one's children would constitute a reasonable excuse for a time limit not being met.

This is even before considering professional concerns of appearing lazy or not a team player or of letting the side down, all of which can be very damaging to a reputation and a career; let alone the prospect of being personally criticised in the public forum of a live-streamed Royal Commission under heavy media scrutiny.

The ABC reported the issue of lawyers' stress in the Royal Commission under the "headline": Banking commission's tight deadlines worsened legal profession's overwork culture. The question of whether the Royal Commission could (or indeed should) have sought an extension of time from the government in order to allow for some measure of breathing space (for the parties and the lawyers, if not indeed also the Royal Commission staff) was, however, never the subject of public debate; and the organisations the subject of the Royal Commission (and their lawyers) were understandably unwilling to raise the issue.

The Hon Dyson Heydon AC QC recently gave a speech in which, in the context of discussing delays in delivering judgments, he referred to 'a mentality of procrastination' and warned against 'a torpid shared culture of slackness, languor and drift' in the judiciary. There are often delays in meeting court deadlines, but would it be fair to describe those as resulting from a similar culture on the part of barristers and solicitors?

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In the *Australian Law Journal* (Current Issues (2018) 92 *ALJ* 855), Kunc J responded to that speech. His Honour described those comments as 'very unfair to all but a tiny minority of the country's judicial officers' and concluded that 'the moment has come to reconsider seriously, and with the benefit of modern human resources management insights, how judges do their work'. The same could be said for barristers and solicitors.

So what, if anything, is being done?

Work is already underway within many Australian courts to take steps to address judicial stress (as noted for example at (2018) 92 *ALJ* 855 at 859, 862).

WorkSafe Victoria began an investigation into one large law firm in response to a complaint about alleged health and safety breaches arising from staff being required to work unsafe hours in order to meet Royal Commission deadlines. While the Royal Commission was ongoing, law firms instituted additional support measures, including engaging additional staff, running matters with split teams, extending kitchen hours, giving gifts to staff and engaging nutrition consultants, fitness assessments, clinical psychologists, massagists and well-being coaches.

It is to be hoped that these responses are not regarded as extraordinary measures required in response to an extraordinary situation, but that they continue, at least in some form, beyond the Royal Commission. Calls from many within the profession for the culture of excessive work hours to cease offer some hope in that regard.

But what about the bar? Being self-employed, we should be in a position to control any excessive workload and engage any external support services that we need. The reality is, however, that we are not good at saying no to work or admitting to ourselves, let alone anyone else, that we need help or support.

While we may wish to maintain a public face of being busy and important, we need to have support networks already in place to deal with problems when they arise. Several years ago, a colleague set up a small group of barristers of a similar age to meet about once a month over wine and cheese and share personal and professional issues in a 'cone of silence'. The aim is not to provide solutions, but to enable people (if they wish) to identify, admit and share problems with friends and colleagues in an informal context. I have found being able to discuss problems with work, family or finances to be calming and to break the spiral of stress that can sometimes feel overwhelming.

In a more formal context, there are organisations such as BarCare, which provides counselling services to members of the bar and their immediate families and also has access to a wide network of medical and related professionals.

Such measures as exist, however, are largely ad hoc and rely upon the barrister identifying an issue and seeking assistance, which often does not occur. We need to be more prepared to admit to each other when we are experiencing difficulties.

Each branch of the profession then has its own internal support mechanisms, but there is little discussion across the three branches, even though stress in one can give rise to problems in another. Thus a stressed judge may bully a barrister, but a stressed barrister may add to a judge's workload and stress by not giving accurate or complete submissions on legal issues.

It seems to me that there needs to be much greater debate between judges, barristers and solicitors about the issue of stress and how we can, and are expected to, deal with it, in particular in the context of preparing for and

running cases. Short deadlines are still often imposed that will impact upon personal and family lives; and barristers will often be too proud or timid to mention a mother's 80th birthday or an excessive workload and ask for more time.

Events such as Bench and Bar lunches and morning teas in judges' chambers, where barristers are able to mix with judges, are likely to contribute positively to a bilateral dialogue in court about such issues, but a more formal extensive discussion between the three branches would be useful. The bar should be able to give guidance, such as in the Bar Course and CPDs, to junior members as to what is acceptable to raise with the bench.

For instance, should one suggest to the judge that a four day case begin on a Tuesday so as not to ruin the weekend with young children; that a long case not sit on a Friday (which might also benefit the Judge in advancing the judgment); that a trial not be listed in school holidays; or that a timetable be extended to allow for a weekend away or a family celebration? There needs to be debate and guidance on these issues.

As I have previously commented, notwithstanding the notorious work hours and practices of lawyers, I do not believe that courts should operate on the assumption that lawyers must work during weekends and holidays.

The sympathetic words of Brereton J in *JKB Holdings Pty Ltd v Alejandro De La Vega* [2011] NSWSC 836, in the context of an application to rely upon evidence served late, are often ignored:

> As I have previously commented, notwithstanding the notorious work hours and practices of lawyers, I do not believe that courts should operate on the assumption that lawyers must work during weekends and holidays.

In reporting on the stress to lawyers arising from the Financial Services Royal Commission, the Financial Review recorded a comment from a lawyer that 'somebody is going to die'. It is easy to dismiss such comments as headline-grabbing or melodramatic, but to suggest that stress has been a factor in none of the deaths that have already occurred is naïve and unhelpful. A conversation across judges, barristers and solicitors about the issue of stress and what we can do to help each other is urgently needed.