Common Law Listing Liaison

The most important work of this Committee has been preparation for and participation in the delay reduction and case management project presided over by Mr. Justice Woods.

The Committee organised a discussion group with experienced practitioners and clerks. The Chairman (Coombs Q.C.) prepared a detailed list of proposals for improvement of the system and to deal with the current crisis, a summary of which is set out below.

Proposals having no Budgetary Implications:

1. Abolish the present variable or floating vacation of 4 weeks a year which is taken by different Judges at different times during the year and restore the fixed short vacation in July each year.
2. Change the present listing procedures so that cases would be fixed not more than 6 weeks ahead, thus enabling more accurate assessmeent of the probable length of the cases listed, and of the judicial resources available for their disposal.
3. As in the Commercial Division, require exchange of statements of witnesses 2 weeks before the hearing date. (Sydney cases only at this stage).
4. Before the case is fixed for hearing each Solicitor to file and serve a Statement of Issues. The rules should provide cost penalties in respect of issues included on such statements and not seriously litigated at the trial.
5. Bail applications in District Court criminal cases should be dealt with by the District Court and not in the Supreme Court as at present.
6. Renewed applications for bail should only be permitted if there has been a change of circumstances. Second or subsequent applications for bail should require the leave of a Judge granted without an oral hearing after consideration of the Affidavit material.
7. The Court of Criminal Appeal should have regular sittings of 1-2 weeks a month and should sit continuously during those sittings. This would achieve a more efficient use of Judges than the existing system whereby the Court sits 2 days a week every week.
8. The jurisdiction of Supreme Court Masters should be extended to include actions for the recovery of possession of land. The evidence in these cases tends to be largely formal or documentary.
9. Amend the Supreme Court rules to allow applications for summary judgment for damages to be assessed in personal injury cases where liability is clear e.g. passenger cases.
10. The daily list of actions for trial should be under the control of the List Judge and not a Registrar as at present.
11. The Common Law Division should try civil jury cases for 2 weeks a month, and non jury cases for the other weeks.

Proposals with Budgetary Implications:

1. Appoint additional Judges.
2. Amend the Supreme Court Act to allow the Chief Justice and/or Heads of Divisions to appoint or call back retired Judges for judicial work. In the first instance this could be up to age 72 (the retiring age in Victoria). Later, if the scheme proves successful, the age could be lifted to 75 (retiring age in U.K.).
3. Appoint a significant number of acting Judges (at least six) to try accident cases in the last three weeks of the long vacation in January 1989, and during the short vacation of four weeks in July 1989.
4. Establish "circuit" Courts in the Metropolitan area e.g. Parramatta, Penrith, Glebe, Balmain, Newtown, and also in Sutherland and Warringah if suitable premises are available in those centres.
5. Act on Bar Association proposals for simplifying and shortening criminal proceedings in the Supreme Court.

O'Keefe Q.C. (alternate Coombs) was appointed to the Woods Committee and several meetings have been held. A seminar was conducted on the topic by the Institute of Judicial Administration on 17 September which was attended by many Judges of the Supreme Court and members of the Bar. ❑

Finance Committee

The Association's Finances are in good order. During the last 18 months, the office systems have been dramatically upgraded with the assistance of consultants. The result is a smooth running office with excellent morale. Additional space has assisted in these regards.

The Council was able to reduce "subscriptions" for junior members for the year 1988/89. The Treasurer has reduced or waived payment, in confidence, in cases of special need.

One hundred new members joined the Association during May, June and July. There are now 1,179 full members and 353 non-members plus associates. We hope all will join since the fee is the same whether one joins or not and there are real benefits to us all from a unified collegiality.

In both the last and the current financial years, the Bar has received a grant for the Law Society's Statutory Interest Account for its part in administering professional conduct matters. This was an unexpected benefit, worth $68,000 in the current year. This, combined with early and more certain payment of "subscriptions", has contributed to a sound financial basis. ❑

Criminal Law Committee

The Criminal Law Committee has had a number of urgent problems to deal with over the last year due to the rush of legislation passed by the old Government at the end of 1987 prior to the election announcement in early 1988 and due to changes introduced by the new Government after the election. There were a very large number of Acts which came into force on 18th December. These were largely procedural but the procedures greatly affected the rights of an accused - for example the cross examination of the victim at committal proceedings and the reduction of jury challenges to three. Although it was not possible to procure copies of all Bills prior to their being passed, representations were made concerning a number of them.

The Task Force Against Violence to Women and Children set up by the Labor Government put forward a very radical discussion paper. This was the genesis of the legislation permitting television evidence of child victims. Both written submissions and oral argument were addressed to the Task Force. Donovan, who made the main oral argument to the Committee in conjunction with the Law Society's Criminal Law Committee, received a cool reception from some members of the Task Force. Representations were further made when the legislation was drafted. These were unsuccessful. Since then the present Attorney General has kindly invited the committee with many others to view the current technology. In the Committee's view, apart from the question of principle, the technology is crude - you cannot see the whole person (e.g. hands) and the picture does not show subtleties of expression. Also the procedure is unsatisfactory - the demonstration witness looked at a person off camera from time to time giving an impression of being prompted. The general feeling at the demonstration was that the procedure was unsatisfactory. The Committee believes it cannot safely be introduced at this time.

In a calmer environment the Committee for Review of Commonwealth Criminal Law has issued 15 discussion papers since the middle of last year dealing with a variety of topics ranging through the common law of the Commonwealth Conspiracy, Drugs and Security. Because the Law Council did not have a functioning criminal law committee, the Bar Association's Criminal Law Committee made submissions on almost all the papers (there are also two outstanding). Of particular controversy was the submission on conspiracy. It is hoped that a shortened version of the submission can be published in Bar News. The Committee is particularly grateful to Cowdery Q.C. for his submission to the Council which set out many matters which the Committee had not fully considered, particularly as his great experience in Commonwealth prosecutions for the D.P.P. enabled him to give the Council a different perspective on conspiracy.

There were three discussion papers on sentencing issued by the Australian Law Reform Commission toward the end of 1987 and submissions were made in response to all three. A member of the Association raised with the Council whether circulars could be issued setting out changes in criminal procedure, particularly where Rules such as the new District Court Criminal Rules are involved. The Committee in response has issued information circulars. It must be emphasized, however, that not always are changes in procedure brought to the attention of the Committee and members should not presume that circulars will be up to date. If members could bring these matters to the attention of the Committee it would be of assistance.

Finally the Committee wishes to express its gratitude to the President and Adams Q.C. for their extensive work in making representations about the Independent Commission against Corruption Bill. Although strictly this matter was not within the province of the Criminal Law Committee members should be aware of the extensive work done by others than those on the Committee. ❑

Legal Education and Reading

The number of new barristers coming to the Bar is on the increase again.

With the introduction of Practising Certificates from 1 July, all current Readers have been issued with a certificate bearing the following restriction:

> 'The holder of this certificate is subject to the conditions and restrictions imposed on pupils by the Rulesof the New South Wales Bar Association.'

The Reading Programme is for the benefit of two groups - the public and newly admitted barristers. As a consequence the Reading Committee has been vigilant to ensure that those who are part of the Readers Course gain the benefits which flow from it. Without an examination system of the kind adopted in some jurisdictions in the United States, attendance at lectures and exercises and fulfilment of the formal requirements has been adopted as the measure of satisfactory completion.

A total of twenty barristers have had their pupillage extended for failing to complete pupillage satisfactorily.

Of those, fifteen had failed to attend a satisfactory number of Reading lectures and to read for a period of two weeks with a Crown Prosecutor or Public Defender. The remaining five failed to satisfy the latter requirement.

On a brighter note, the Bar's Continuing Legal Education programme continues to expand. In March of this year Handley Q.C. and Tobias Q.C. gave us an insight into the workings of the new Legal Profession Act and in July, Lord Justice Kerr gave us the benefit of his knowledge about proposed changes to the English legal system.

Two lectures on Forensic Chemistry and Biology took place in late August and a seminar on Legislative Drafting is proposed for 12 October 1988.

The Reading Committee wishes to thank all lecturers for their continued support and looks forward to further improvements in the programme in 1989. ❑

Accident Compensation Committee

The Transcover Committee was convened under the Chairmanship of the Attorney General. Coombs Q.C. is the Bar's delegate (alternate Morris Q.C.) and Maurie Stack represents the Law Society.

The Committee has met a number of times, and despite some vigorous debate is proceeding towards finalising the main options for consideration by the Government.

The next stage is to arrange independent costings of the main options, as this will determine the extent to which private insurer involvement in any new arrangements will be possible.

It seems to be generally agreed that any new arrangements are likely to retain some features of Transcover, particularly in relation to small claims with emphasis on quick processing of an initial decision on liability and provision for structured settlements where appropriate in the view of the court and ongoing payments of medical and rehabilitation expenses for seriously injured accident victims.

Coombs Q.C. acknowledges the vigorous and effective Chairmanship of the Attorney General who has brooked no nonsense and made it clear that in his view the pre-election commitment is to be met. ❑

Professional Conduct Committee # 2

1. A client complained about the conduct of a barrister who had expressed considerable reservations about her prospects of success in a proposed medical negligence action. The complaint was not that the barrister had acted unprofessionally, dishonestly or discourteously, but rather that he did not share the client's convictions about the merits of the proposed action. After investigation, the complaint was dismissed on the ground that it did not raise any matter amounting to professional misconduct or to a breach of any Bar Rule.

2. A barrister who was the subject of a complaint and who failed to respond to a number of requests by the Bar Association for his comments on the complaint was fined $1,000.00 by the Bar Council for breaching Bar Rule 67 after he failed to show cause why he should not be so fined for his failure to respond to the Bar Association's requests.❑

Professional Conduct Committee # 3

The Professional Conduct Committee No. 3 has dealt with 10 complaints. Nine were dismissed and one was referred to Bar Council for referral to a Disciplinary Tribunal.

A number related to claims by litigants that they had been unduly pressured into settlement. This points up the need for the client to feel that he has in fact the right to choose whether he/she wishes to settle or not. Others were directed to claimed excesses in cross-examination, emphasising the need for counsel to strictly observe Rules 47, 48, 51 and 52. In a number of cases, no breach of the rules was found, but the Committee and the Council felt that the particular barrister would benefit from counselling, which is fraternal and designed to produce effective and correct behaviour in the future. ❑

Fees

The Bar's submission on a long-overdue increase in loadings was formally accepted by the District Court Rule Committee on 31 May 1988 and there has now been published a new set of loadings for country towns visited by that court. It is substantially in accordance with the Bar's submission. It is proposed to make regular submissions for increases in the loadings to reflect upward movement in components which go to calculating the loadings (e.g. airfares). The new scale of loadings has been accepted in principle by the Supreme Court for its relevant towns and it is understood that taxing officers will allow loadings at the increased rate pending their formal implementation.

The Committee's next task will be to examine the question of interstate loadings in response to enquiries from some members who do a fair amount of interstate work in the Federal Court and other tribunals. A set of proposed or recommended loadings for capital cities will be assembled shortly.

So far as recoveries of fees are concerned, members are reminded to check each issue of the list of defaulting solicitors published by the Registrar to ensure that they are not accepting briefs from thos esolicitors without complying with Rule 85 (fee upon delivery of brief). Members are also reminded that, in the absence of special circumstances, fees are regarded as "stale" if a period of more than four years has elapsed between the time when the fees were first rendered and the time of the first complaint to the Bar Council. ❑

Commercial Liaison
Commercial Legal Aid Scheme

On 1 September 1988, the Bar Council approved in principle a scheme designed to assist indigent litigants in the commercial list, primarily defendants, who are unable to obtain legal aid.

The principles which govern the organisation of this scheme are as follows:-

1. The scheme is confined to the commercial list where legal aid is not normally granted.

2. It is not intended to be a panacea for a social problem. It is merely intended to provide some amelioration for the general failure of legal aid to operate in the commercial list.

3. It is designed primarily for defendants (including cross claimants) in proceedings already commenced. While we would not refuse to consider applications by intending plaintiffs, the scheme will not be advertised in a way which would encourage them.

4. The commercial judges would be invited to advise the Committee when a case comes before them which they consider might be appropriate for our scheme. A pupil doing his "time" will attend (on a roster system) all Friday motion days as "duty barrister" to discuss potential applications when the judge refers litigants to him. In appropriate cases he might apply for adjournments - this would require a general dispensation to permit him to appear for that purpose only without any instructing solicitor. As the procedure thus far is analogous to dock briefs, the dispensation has a respectable history.

5. The commercial committee or a member of it would interview applicants with a view to determining whether the case is an appropriate one. In general, the criteria would be:-

(a) a meritorious case;
(b) not too heavy a case;
(c) inability of the litigant to finance the case.

6. It will be necessary for the Solicitors' Commercial Court Committee to be invited to participate in the scheme so that a firm of solicitors could be provided.

7. The initial proof-taking and perhaps the commercial mentions or some of them could be carried out by pupils doing their three months time as part of their pupillage. Their work in this regard should, however, be checked by their masters. The master would not normally interview the client but the master would explain to the pupil how to take a statement and vet the statement ultimately obtained possibly suggesting a second conference at which further questions would be asked. Similarly the master would be expected to give the pupil some specific advice in relation to the commercial list mentions.

8. Work done would be recorded and a notional bill would be prepared and sent to the solicitor for all work done.

9. The solicitor would be advised that, in the event of failure in the litigation, it would not be the intention either of the pupil or of the barrister ultimately conducting the case that his bill should be met. The result would be that, in practice, the solicitor would not render a bill unless the litigation were successful and an order for costs made.

10. Everyone would receive scale party/party costs in the event of success of the litigation and an order for costs being made against the other party.

11. The committee would select a barrister who appears in the commercial list to conduct the case. In normal circumstances the case would be conducted by a senior junior although, in exceptional cases, silk and a junior might be briefed.

12. In general, no-one should be asked to do more than one a year.

13. The committee would make up a list of barristers to whom it would entrust aided litigation. Such a list might be compiled by a dragooning process assisted by a circular inviting volunteers.

14. The solicitors should be asked to provide their services on a corresponding basis. In general, as this is to be our scheme, it is not proposed that a heavy burden should be placed on the participating solicitors. ❑

Rules

Three amendments have been made to the Rules during the last few weeks.

1. Rule 17 has been repealed. That rule provided:-

> A barrister shall not express any views or opinion, whetheroral or in writing, for the purpose of being used as evidence as to the duties or responsibilities of registrars, magistrates, mining wardens or persons holding similar positions in connection with any applications by such persons relating to salaries, emoluments or seniority.

No-one knows why this rule was first introduced but it seems to be singularly pointless. One would have thought that if there were some issue before a public service tribunal of some kind as to the appropriate public service designation of registrars or the like, it would be quite appropriate for members of the Bar, if asked, to express their views.

If the Rule was originally intended to prevent barristers ingratiating themselves with such persons by giving them glowing references, it fails to achieve that purpose because the prohibition relates not to commenting on the merits of individuals, but to commenting on the nature of their duties or responsibilities. There would seem to be no reason for such prohibition.

2. Rule 33 has been replaced by a more elaborate code of three rules governing the situations in which a barrister may confer or appear without an instructing solicitor being present. The rule is designed to cover situations in which it is reasonable to do this while not relaxing the strictness of the prohibition in cases where it should not occur. The full text of the new rules is as follows:-

> 33. A barrister shall require the attendance of his/her instructing solicitor (or the solicitor's clerk or the city agent of a country solicitor or the country agent of a city solicitor) at any conference with a lay client or with any witness and may only dispense with such attendance if:
> (a) he is satisfied that no prejudice will be suffered either by the barrister or by the lay client due to the absence of such solicitor (or clerk or agent) ; and

(b)(i) it is not anticipated that there will be any instructions for settlement given directly from the client to the barrister or any advice concerning settlement given or any offer of settlement suggested or considered ; or

(ii) compelling circumstances so require in the interests of the client; or

(iii) the Council gives permission.

33A. Subject to the requirements of Rule 33 above, a barrister may dispense with the attendance of his/her instructing solicitor (or the solicitor's clerk or the city agent of a country solicitor or the country agent of a city solicitor) at the hearing of any proceedings in which that barrister is briefed if:

(i) the barrister is satisfied that no prejudice will be suffered either by that barrister or by the lay client due to the absence of such solicitor or clerk or agent; and

(ii) (a) the barrister is of the opinion that the presence of the solicitor or clerk is unnecessary having regard to the following matters:

(I) the complexity of the matter;

(II) the extent of the barrister's written instructions;

(III) the distance or time or cost involved in requiring the attendance of the solicitor or clerk or agent;

(IV) the jurisdiction in which the matter is being heard;

(V) whether the hearing is of any nterlocutory or final nature;

(VI) the improbability of the matter being settled;

(VII) in a civil action, the amount in issue;

(VIII) in a criminal matter, the seriousness of the charge preferred against the lay client and the nature of the plea to be entered; or

(b) the Council gives permission.

33B Paragraphs (b)(i) and (b)(ii) of Rule 33 and paragraph (ii)(a) of Rule 33A shall not apply in relation to attendance at prisons.

3. There has been considerable controversy about the provisions of the rules dealing with the giving of private seminars and the like to individual firms of solicitors or government departments. The Bar Council has resolved to adopt a rule in the following terms:-

79B 1. Subject to sub-rule 2, a barrister may give a lecture or paper or participate in any public or professional function, seminar or course concerned with legal or quasi-legal education.

2. A barrister may not participate in accordance with sub-rule 1 where the persons invited or eligible to attend the occasion are substantially confined to persons associated with one or more firms of solicitors, commercial organisations or government departments. ❑