THE FUTURE FOR BARRISTERS:

"CAN WE AFFORD TO WAIT UNTIL THE PHONE RINGS?"

1. This paper explores the issues that confront the career choices facing Barristers in the current litigation climate. To better understand those issues, something must first be said about the aims of the adversary system in which barristers operate.

Our Adversarial System

2. A fundamental question affecting the Bar is whether legal system design should aim at discovering truth, or consequences.

3. The adversary system, as a manifestation of the power of Socratic dialogue, is said to be one of the greatest mechanisms for identification of truth that has ever been devised.[1]

4. But what is truth? *Quid est veritas*?[2] This was the profound question Pontius Pilate posed to Jesus in response to Jesus' claim that he was "witness unto the truth".[3] Pilate was in advance of his time, as the scientific method which underpinned Enlightenment thinking was founded upon the need to continually reinvent truth: *De omnibus dubitandum*, wrote Descartes ("Doubt everything").[4]

5. The adversary system is in fact not concerned with the pursuit of truth. Rather, it involves the arbitration of a contest between parties who assert different versions of the truth.[5] Hence the task of the Court is often described in terms of "doing justice", and not in ascertaining ultimate verities.[6]

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[1] Spigelman, J.J., "Truth and the law" - The Sir Maurice Byers Address was delivered by the Hon JJ Spigelman AC on 26 May 2011 in *Bar News*, Winter 2011, 99 at p.102.
[2] John 18:38.
[3] John 18:37 (KJV); Sir Owen Dixon famously borrowed from Francis Bacon's description of Pilate's questioning of Jesus. "Jesting Pilate" was the title of speech Sir Owen presented at the Twentieth George Adlington Syme Oration delivered on 20 August 1957, taken from the opening lines of the essay "Of Truth" in "The works of Lord Bacon", William Ball, 1837, vol 2, p 261 ("What is truth? said jesting Pilate; and would not stay for an answer").
[4] Descartes, René (1644) "The Principles of Philosophy" (Project Gutenberg, *trans.* John Veitch, 2003) ("That in order to seek truth, it is necessary once in the course of our life, to doubt, as far as possible, of all things"); *cf* Heidegger M., "On Time and Being" (New York: Harper and Row, 1972), pp. 69-70.
[5] Gageler S., "Evidence and Truth" 2 *The Judicial Review* (2017) 13 TJR 1.
[6] *Hickman v Peacey* [1945] AC 304 (Viscount Simon LC) at 318.

6. Sir Owen Dixon gave an insight into his own view of truth and justice at a dinner party once, when he said to a lady who commented on how grand it must be to dispense justice from the Bench:

> "I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence"[7]

7. This reality was well captured by Lord Wilberforce:

> "In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties – a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth."[8]

8. A long line of theoretical and empirical research suggests that competition between actors leads to the exposure or verification of false statements and, therefore, reveals truthful information and improves decision making.[9]

9. However, the parties' self-interest is not conducive to the search for truth in a system where:

   (i) opposing testimony is routinely discredited, regardless of whether it is true or not;

   (ii) material facts are often omitted from or denied in pleadings, or are withheld due to privilege claims[10];

   (iii) procedural exigencies exist to require proceedings to be completed in a reasonable time;

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[7] Ayres, P., "Owen Dixon's Causation Lecture: Radical Scepticism", 77 *Australian Law Journal*, 2003, 682 at 692.

[8] *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 438-439 (Lord Wilberforce).

[9] Boudreau C., & McCubbins M.D., "Nothing But the Truth? Experiments on Adversarial Competition, Expert Testimony, and Decision Making" *Journal of Epirical Legal Studies* Volume 5, Issue 4, 751-789, December 2008 at 752, 785.

[10] Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123(5) *University of Pennsylvania Law Review* 1031, 1056.

(iv) the *Evidence Act* and Civil Procedure Rules allow for the possibility of excluding probative evidence[11];

(v) Counsel can engage in sophistry and rhetorical manipulation, the primary objective of which to obscure the truth[12]; and

(vi) A party is not required to act candidly. Subject to discovery obligations, a party is under no duty to reveal the existence of evidence which is unfavourable and nor is that party's lawyer.[13]

10. The presence of litigation costs alone tells us that we will need to make trade-offs in arriving at an optimal system design. Spending the entire GDP to get as close as possible to the truth in, for example, a single torts case would destroy society, not maximize social welfare.

11. An appreciation of these realities leads one to conclude that complete, substantive (as opposed to "legal") truth is often unachievable. Once complete truth is off the table, we confront the lack of an obvious metric for degrees of truth.[14] As a result, the adversarial model is undergoing rapid changes as litigants come to realise that 'victory' is often pyrrhic when weighed against the costs involved in achieving it.

12. A simplistic preference for the truth may therefore not comport with more fundamental social welfare objectives. System design that is concerned with social welfare needs to aim explicitly at consequences.[15] Recognition of this need has informed the direction seen taken in adversarial justice in recent years and particularly the proliferation of alternative dispute mechanisms within that design.[16]

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[11] *Funk v United States* 290 US 371 (1933) at 381 (Sutherland J).
[12] Finkelstein R., "The Adversarial System and the Search for Truth" *Monash University Law Review* Vol 37, No 1, 135 at p.136.
[13] Finkelstein R., "The Adversarial System and the Search for Truth" *Monash University Law Review* Vol 37, No 1, 135 at p.143.
[14] Kaplow, L. "Information and the Aim of Adjudication: Truth or Consequences?, " *Stanford Law Review*, 67, no. 6 (2015), at p.1306.
[15] Kaplow L., "Adjudication: Truth or Consequences?" *Stanford Law Review* Vol. 67:1303 at 1305.
[16] Bathurst, T.F. "The Role of Courts in the Changing Dispute Resolution Landscape" (2012) 35(3) *UNSW Law Journal* 870.

13. An appreciation of this background and where the Bar is heading will in turn inform the choices made by those choosing careers in the profession.

Current state of play

14. As described above, the current structure of that part of lawyers' work concerned with dispute resolution is based on the premise of adversarial justice – with rights-based disputes being resolved by courts of law. The associated premise is that the adversarial system is the best way to achieve "justice".

15. Whilst fusion of the profession is raised from time to time, the division between solicitors and barristers is still maintained in many jurisdictions because it is seen as the most efficient way to conduct litigation. That is, with barristers as the independent special forces type soldiers best equipped to be sent into the litigation battle.

16. Whilst direct access to barristers has been possible for a long time, it is still not favoured by barristers (for various reasons, including restriction imposed by the Bar Rules) and so the vast bulk of barristers still rely on solicitors for their work. That is, they wait in anticipation that "the phone will ring" often enough for them to put food on the table (and hopefully an extension on their house or houses).

17. But is this state of play stable and sustainable, such that the traditional career and income expectations of the majority of barristers can be said to be realistic?

18. This question invites barristers to conduct a risk analysis with respect to their chosen profession which, in turn, involves consideration of the changes that are adversely impacting on what has traditionally been regarded as "barristers work". A number of things come to mind:

    (a) in many areas of the law, the government has changed the law in such a way as to remove or at least limit legal rights (eg, the repeal of the unfair contracts law in New South Wales; severe restrictions on the right for parties to have representation before the Fair Work Commission; legislative changes that have impacted on plaintiff's rights to claim for personal injuries).

(b) The court system, at least in some jurisdictions, is haemorrhaging due to the governments' non-preparedness to invest enough resources to prevent unconscionable delays (eg, in family law and general federal circuit court litigation).

(c) The community is becoming more educated and less tolerant of those delays and the overall costs and risks associated with adversarial justice. It is also learning about dispute resolution options other than litigation that are proving to be effective (eg, mediation). Slowly but surely, it is also the case that important sections of the community are seeing real value in engaging in dispute prevention and early intervention strategies so as to minimise the prospect of disagreements escalating into entrenched litigation.

(d) The government has responded to community concerns about the cost and delays associated with litigation by mandating that mediation attempts take place before matters proceed to trial, or at least bestowing on judicial officers the power to order mediation as a matter of discretion.

(e) Community confidence in the judiciary generally is diminishing. Fuelled by the exposure of cases of judicial incompetence and fanned by unprincipled journalists, it is inevitable that this trend will continue. Dyson Heydon recently suggested that criticism of the judiciary should be regarded as fair game and would serve a purpose:

> "There are many admirable Australian judges, with respect. But Australian courts have several faults. Some judges lack the capacity to have merited appointment. A few are unjustifiably rude. A few are bullies. Some are appallingly slow, through inefficiency or laziness or indecisiveness. Some are insensitive. Some are ignorant. Some are undignified. As a result, some judicial work is poor. The whole system is rotten with excessive delay, some of which, but certainly not all of which, judges are responsible for. It

is in the public interest for these failings, whether they are widespread or not, to be exposed with a view to their eradication." [17]

(f) In 2016/17, 84 readers completed the two Bar courses to be admitted into the profession.[18] Meanwhile, the push and pull factors that are aimed at achieving lower levels of litigation overall and a decrease in the levels of legal proceedings going to trial, means that there is likely to be less litigation work available to support the Bar:

(i) In 2016-2017, the High Court decided 483 Special Leave Applications. This translated into the hearing of 57 appeals, two cases involving an application for constitutional writs and 16 other cases (including appeals as of right from Nauru). The proportion of special leave applications filed by self-represented litigants during 2016-2017 was 42%, down from 46% out of a total of 536 applications filed in 2015-2016).[19] The High Court rules now allow special leave and certain other applications to be dealt with on the papers.[20]

(ii) During 2016–17, the Fair Work Commission finalised 14,587 unfair dismissal applications. 93% of the applications were resolved informally by agreement of the parties, through conciliation or because the applicant withdrew the application. Of the matters settled by agreement, more than 20% involved payments of less than $2,000, almost 67% of payments were less than $6,000, and the vast majority of payments (84%) were less than $10,000. Only 2% of the total number of applications were finalised by a decision about the merits of the application made by the Commission. The rest were dismissed because of jurisdictional objections or because the applications were not pursued by the

[17] Heydon, J.D. "Does Political Criticism of Judges Damage Judicial Independence?" A speech to the Policy Exchange, *Policy Exchange Judicial Power Project Paper*, February 2018 at p.16.
[18] New South Wales Bar Association Annual Report 2016–17 at page 12.
[19] High Court Annual Report 2016-2017 at page 21.
[20] Rule 26.07.1 and 41.08.1.

employee.[21] These figures do not disclose a jurisdiction ripe for barristers to earn a living.

(g) In this context, solicitors, both due to the cost cutting demands of their clients and their own professional and financial self-interest, are increasingly "hogging the work" that was formerly flowing to barristers. This is evidenced by trends in providing in-house advice, drafting pleadings, preparing affidavits and increasingly getting their own in-house "special counsel" or other solicitors to appear and run contested matters in court.

(h) Settlement conferences are very often conducted by solicitors without barristers present and, similarly so, mediations are very often attended by solicitors appearing for their clients without seeing any need to brief counsel to attend.

19. The consequence of the above changes is that barristers are increasingly briefed late when all the necessary preparation work has been done (and often done poorly). There is then real pressure to settle rather than to run cases. With many Senior Counsel appearing now without juniors, the consequence is that many junior barristers are spending less and less time in court and in fully contested hearings. It is therefore hardly surprising that junior barristers have reported not cross-examining a witness in their time at the Bar, or not having developed or honed their skills for extended periods of time.

20. The traditional role of the Clerk, including at least the old-style Clerks who could advise solicitors as to suitable counsel, has now largely disappeared. Solicitors now often select counsel on account of their Floor, possibly by their public/social media profile; appearance in celebrated, reported cases; or in response to a website or other marketing strategies adopted by an increasing number of barristers. It now seems more common to see an aggregation of enormous amounts of work into the hands of fewer and fewer barristers, many of whom have utilised marketing strategies to maximum effect.

[21] Fair Work Commission Annual Report 2016-2017 at page 77.

21. Given the above, is it safe for barristers to continue to wait until the phone rings?

22. The answer to this question depends to some extent on why a barrister chooses to go to the Bar, and on any particular difficulties they may be experiencing getting work (or getting more of the work they want). For example, are barristers at the Bar to make as much money as possible (with the particular work undertaken being a secondary consideration) or are they determined to get on their feet to advocate the client's case and to cross-examine witnesses?

23. If courtroom work is the barrister's goal, then they need to gravitate towards areas of practice wherein the prospects and incidence of settlement (either via mediation or otherwise) is low (or lower) and unlikely to change dramatically in the future (eg, the criminal law, occupational health and safety prosecutions, industrial disputes, civil penalty matters, or land and environment work).

24. However, if the barrister's principal desire is to maximise earnings and still believe that being at the Bar is better than the other options that are available, then they may need to think more laterally and be much more flexible in deciding how they can and should practice as a barrister in the future (ie, so as to respond and adjust to the changes, and better protect themselves from the threats to the Bar that have occurred already and will continue to surface in the future).

25. Whilst the steps identified below will hopefully underpin and secure fundamental career aspirations, they should be seen as necessary but hardly sufficient steps to protect careers going forward. That is, many of the solutions suggested will also need to be employed if the barrister wants to be a successful (contented and well paid) member of the Bar.

26. The Bar rewards results. But the issue is how to get in a position to achieve results. We need a much better understanding as to what clients and solicitors want from barristers and how they make their decisions as to who they brief, what weight is given to criteria such as quality of education and experience; prior relationships; cost; public profile; track record and demeanour.

A Cautionary Note

27. Demeanour is something to be wary of at the Bar. Lawyers often operate by a default rule of toughness. The incentives and rewards at law firms and at the Bar are often aligned to the default position of being "tough".[22] This leads to a culture of hyper-adversarialism that takes place in an environment where clients are uninterested in moral dialogue and lawyers are motivated to please.[23] Such a culture has the very real potential to create a tension with our fundamental ethical obligations, tarnish our image as independent practitioners, and ultimately hasten the demise of the Bar.

Some Strategies to Employ

28. The following steps or strategies need to be earnestly considered:

    (a) Fully develop internet and social media profile and get your face on the internet, TV and in the newspapers (for the right reasons) as much as possible;

    (b) Taking steps to identify solicitor firms that still do rely on the Bar and value its independence – try to get on their 'lists';

    (c) Get your name, face and professional profile in front of soon-to-graduate law students, College of Law students and junior solicitors;

    (d) Identify peak bodies and professional associations that are likely to need advice regarding areas of law within your areas of expertise – meet with them, offer to speak at their functions, conferences and the like.

    (e) Market yourself as available to do direct access work as the larger corporations are increasingly interested in this idea because it is often cheaper and more efficient to brief directly;

[22] Cramton, Roger C., "Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable" (2002). *Cornell Law Faculty Publications*. Paper 1161, 1599 at 1064-5.
[23] Posner, Richard A. "An Economic Approach to the Law of Evidence" (John M. Olin Program in Law and Economics Working Paper No. 66, 1999) at 7, 14-15.

(f) Take courses and seek accreditation as a mediator and arbitrator. Get training or train yourself to be a skilled negotiator, effective communicator, expert facilitator and conflict coach;

(g) Market yourself as someone available to do arbitrations and mediations in one process ("med/arbs") – already recognised in S. 27D of the *Commercial Arbitration Act 2010* (NSW)[24] – but not yet favoured by many people (watch this space!);

(h) Read and consider the contents of a book called "The Trusted Advisor"[25] and consider how you could become one whilst still being a barrister;

(i) Set up a solicitors firm effectively 'staffed' by barristers (eg, called "Litigators Pty Ltd") and then market the firm extensively as a one stop shop for those who wish to brief directly but who may need a law firm to go on the record and deal with matters such as issuing process and writing letters. The barristers on the Floor could probably own shares in that corporate law firm, albeit not serve as directors thereof.

(j) Give earnest consideration as to just how long you want to be at the Bar and, more specifically, how long you would like to be a litigator and whether you want to be (or accept you may have to be) a dispute preventer/resolver, so that you can then consider how and when you might transition from being a litigator into a facilitator/dispute preventer or move into a solicitor's firm (as Consultant or Special Counsel!) or into some other field of endeavour.

M J Kimber SC
State Chambers
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[24] Section 27D(1): "An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement"
[25] by David H. Maister, Charles H. Green and Robert M. Galford.