Hon. John Wild QC, Stephen Mills QC, Clive Elliott QC, Rt. Hon. Sir Ted Thomas KNZM QC, Hon. Justice Raynor Asher, Stuart Grieve QC and Kate Davenport QC, current President of NZBA

30 Years On

By Jacqui Thompson and Melissa Perkin*

In July this year the NZBA turned 30. The Annual Conference in September allowed everyone involved in the Association to reflect on the past and consider the future. At the Bar interviewed each of the former NZBA presidents and asked them to help us chart the organisation's progress. This article considers the journey for the NZBA to this point. In our next issue, we will look at views on where the organisation and the profession are heading.

In some jurisdictions it is common to mark the end of the presidency with the building of a library. The NZBA has marked the end of presidencies with a vote of thanks and the compilation of a new file box to go into storage. Rummaging through these boxes has been a fascinating journey back over the last 30 years and they contain some surprises too. The correspondence pieces together not just the beginning of the organisation, but the development of the independent bar within New Zealand.

Conception

In 1988, the bar in New Zealand was very small, with estimates of around 200 members. But there were those who could see even at that stage that it would grow quickly. However, towards the end of the 1980's the profession was facing calls for deregulation. Some saw this as a threat to the principles that guaranteed clients fair, impartial and independent representation.

C. P. Hutchinson QC was an English barrister who had brought with him to the New Zealand bar the traditions of the English separate bar. Mr Hutchinson was concerned about a proposal to allow law firms and accounting firms to amalgamate. He feared it would mean the end of the independence of lawyers as they would become totally commercial by being lumped in with accountants.

Sir Robin Cooke, who was President of the Court of Appeal at that time confided in Dr James Farmer QC that he also had concerns about the direction of the profession. He shared the view that there was a danger that barristerial standards would not be maintained as independent and objective advisors.[1] Sir Edmund (Ted) Thomas KNZM QC joined the independent bar after having been at Russell McVeagh for 22 years. He became concerned that the independent bar did not have a strong

[1]Sir Robin became one of the NZBA's strongest supporters and was the guest speaker at the very first Association dinner. He predicted that in time the Association would become a powerful voice for barristers and would be a leader in upholding the standards to which the legal system should adhere.

voice to look after its interests and most importantly, protect the quality of independence which distinguish those at the bar from those firms.

Sir Ted remembers that during his time with the firm he took the big firm view "...that we were barristers and equal status to barristers sole." He recalls that a there was a phrase that was used within the firm – QC equivalent. When partners met with a request from a client to have a QC, they would say that the firm had a QC equivalent so that they could keep the work within the firm.

When he joined the independent bar, Sir Ted's views changed. "If you feel yourself to be a member of the independent bar, when the need arises you are more likely to act in an independent manner. Because that is your function," he says. This was echoed by another barrister who was involved at the inception of the NZBA, Colin Carruthers QC, who describes the quality of independence as the essential keynote to being at the bar.

The drive to bring the NZBA into being was initiated by Ted Thomas QC (as he was then), Dr Farmer, Raynor Asher (now Justice Asher), Noel Ingram QC, Sonja Clapham and Peter Williams QC who, following the passing of a resolution proposing its establishment at a meeting on 2 November 1987, set about forming the Bar Association.

A common theme among those involved in the Bar Association's formation was the view that the Law Society could not represent the needs of the independent bar in a way that an organisation dedicated to those needs could. The Law Society had to represent a very wide group with different requirements and often not much in common. It was understandable that the relatively small bar would not receive as much attention as other areas.

Sir Ted himself sat on the Law Society as a delegate for three years and as President for one year. He stresses that there was no intention to ignore the independent bar, but simply that the focus was elsewhere.

The Law Society was strongly against the formation of the NZBA. Mr Carruthers worked alongside Sir Ted in the negotiations with the Law Society in respect of the issue of the entitlement of the Bar Association to have any role in the legal profession at all. Many within the Society took the view that the Law Society controlled the legal profession and it wasn't appropriate for there to be a professional organisation that was independent of its control.

Stuart Grieve QC says that at the time he had the feeling that he and his fellow barristers were regarded as renegades for wanting to set up their own Association. In retrospect, he acknowledges that on one level they were indeed renegades. He comments: "The personality of barristers is such that once you feel you are up against it, you are pretty determined to push back, and that is what happened."

It would however be wrong to say that there was 100% support among those at the bar for forming an independent organisation. There was opposition from a few members. Reading through the historical documents, support was strongest in Auckland and weakest in Wellington. Some agreed with the Law Society that there should instead be a branch set up for barristers that would be under the ambit of the Society. The minutes of the meetings show that all options were well debated and discussed thoroughly among those who were involved. A real battle was waged, not just against the Law Society but also internally. Serious consideration was given to the branch proposal.

Sir Ted remained opposed to it and argued that as a section, the organisation would continue to be accountable to the Law Society. While some counselled conciliation, the minutes reveal that there were questions of the benefits of conciliation following past experiences. Indeed, the language was that of a battle, with one very well-known QC expressing the view that if they did not stand firm, they would be seen as surrendering.

In the end, perhaps Justice Asher summed it up best. "Perhaps this is the nature of barristers – we had already got out from the umbrella of a law firm and now we wanted to get out from the umbrella of the Law Society! Much as we respected those bodies, we wanted to do something for barristers," he says.

Birth of the organisation

Sir Ted could rightfully (if colourfully) be described as the midwife for the birth of the Association. Following the 2 November 1987 resolution, he threw himself into ensuring that the organisation got off the ground. This was a very tense time. One of the most significant battles related to the name, "The New Zealand

Bar Association", which had seemed to be the natural choice.

The Registrar of Incorporated Societies advised that there was already an incorporated society with that name. It appeared (according to the minutes of a meeting held at the time) that in 1984, the New Zealand Law Society had registered this name as a defensive measure when the Criminal Bar Association was being incorporated.

Sir Ted wrote to the Law Society requesting that it relinquish the name, but the Society refused to do so. Accordingly, the name "New Zealand Association of Independent Counsel" was adopted. On the night of signing of the application for incorporation, it was resolved that the Association would however call itself the New Zealand Bar Association. Sir Ted remembers that his view was that the Law Society "... could take us to court and I would have every QC in the country representing us. It was clear they would never do this."

There had been some suggestions that the Bar Association should take on the disciplinary role. This was vehemently opposed by the Law Society and on reflection the Association did not pursue it. As Mr Carruthers noted, in hindsight, many of those involved at the inception felt that this was a blessing, as it would have distracted the Association from its real work. "The fundamental reason for establishing the Association was to promote the bar as the relevant body to conduct litigation", he says.

The issue of who should be entitled to membership was also carefully considered and debated. A meeting was held on 10 December 1987 to identify the Association's aims and objectives.[2] One of the five key issues that were discussed was whether the membership should be restricted to barristers sole.

Justice Asher recalled that it was not easy to say no to membership for highly respected litigators from law firms who wished to join but it was felt that the correct decision was to refuse membership to anyone who was not a barrister sole. "The matters that ... led us to join the bar and to form the Association were all about the independence of barristers, the fact that they were not affiliated in any way to firms and ... [could give] undivided loyalty to a client in a particular case. We would have lost our uniqueness and we would have defeated our very reason for being if we had let that happen," says Justice Asher.

Growing pains

If Sir Ted Thomas was the midwife, it was Dr James Farmer QC who nurtured the Association in its early years. He became President following Sir Ted's appointment to the Bench in 1989. Dr Farmer served two consecutive terms as President and is credited by many for the successful growth of the Association during that time.

Dr Farmer had worked in Sydney for 10 years and been a member of the NSW Bar Council from 1983 to 1984 when Murray Gleeson (who later became Chief Justice of Australia) was the President. Dr Farmer was able to adopt some of the NSW bar's initiatives for the fledgling NZBA. A very important initiative was negotiating a preferential rate for indemnity insurance for barristers who were members of the Association. This was one of the strongest benefits offered by the Association and led directly to an increase in membership.

Growth was steady and incremental as expected. The organisation concentrated on developing its profile through the work that it did in its committees, through the people that represented it and through its education programme. This would demonstrate the attractions of the bar more generally to those who are still in firms.

However, there was an expectation that becoming a barrister would be more popular and the number at the bar would increase. This proved to be the case. Another former President of the Association, the Hon. Justice Dobson, says that "Escaping to the bar was like going from a well regimented school to anarchy, because there was no administration to take care of. I went into a no-frills chambers and there was nothing to take care of at all! I was in a small group that was lucky enough to be getting good work, working collegially but paddling our own canoes. The level of satisfaction rose because I was able to focus on doing the work."

Julian Miles QC followed Dr Farmer as the next President. His description of how he came to take on the presidency is not too dissimilar to that of others who innocently agreed to step

[2] The role and functions of the NZBA are spelt out in its constitution and these can be viewed on our website.

up. Mr Miles said that Justice Asher was on the Council at that time and had asked Mr Miles to stand. When he asked Justice Asher what was involved, in what Mr Miles says was a "rather disingenuous suggestion", Justice Asher replied that there might be one or two meetings a year and that he might have to deal with the odd issue, but really there was nothing to it.

Mr Miles says that: "I have never forgotten it and I have never let him forget how utterly misleading that was. I think that I probably lost more friends in those two years than ever before. I took the job on because I was seduced by the proposition that I could be useful, and that really there was very little I had to do."

Mr Miles concluded that after those two years as President, he could probably survive anything. "It is a very hard role and a very important one" he says. "Although it was way more challenging than Raynor Asher told me, it was irresistible, and I enjoyed it. I have continued to be a major supporter of the Association."

At the time he took over in March 1994 the biggest need was consolidation. The primary concern was to establish the NZBA as the authoritative voice of the independent bar in the face of an ongoing (minority) view that the Association was unnecessary, and in the face of continuing scepticism by the Law Society. The judiciary however gave its support to the Association.

One of the major controversies that Mr Miles faced was a proposal by a former High Court Judge who had resigned from the Bench that he be entitled to a practising certificate and resume his career at the bar. This was very much opposed by the judiciary, but it wasn't clear cut. There had been a move in the UK and in Australia for developments along these lines. The Association formed a clear view that the traditional approach was correct. It decided that there would be issues around perceived bias and that it would cause problems for the judiciary itself.

Mr Miles believes that a very important role for the NZBA is to speak out where members of the judiciary had been unfairly criticised. Judges themselves cannot speak out and explain themselves, and it therefore falls to the profession to do so. The importance of this was brought home to Mr Miles at the final sitting for a High Court Judge. The judge summarised the highlights of his judicial career. "One of these was a letter that I had written on behalf of the Bar Council to the Herald explaining one of his judgements for which he had been criticised," says Mr Miles. "He said that was literally one of the most important occurrences and how important it was to know that he had a support structure."

Mr Miles notes that on the other hand, the role of the Bar Association is not to support the unsupportable. He says that if judges make comments that are unsupportable, then the Bar Association has an obligation to say so. It is important to adopt a principled approach in these matters. Nor should lawyers who speak out in a reasonable way be disciplined.

Raynor Asher QC took over the presidency from March 1996 for a two-year term. At that time, he had been very heavily involved in Law Society work and continued to be so. After his role as President of the NZBA, he became Vice-President of the New Zealand Law Society and President of the Auckland District Law Society. But he still held entirely to his initial feelings on the need for the Association. Justice Asher describes the relationship between the two organisations as symbiotic. It is only infrequently that there is a difference, but it is a difference between friends and can be worked through. "The well-being of the profession as a whole is dear to both organisations – no doubt about that," he says.

Mr Carruthers agrees with this view. He says he was fortunate to work with Law Society presidents who are sympathetic to the Bar Association and he made a point of raising issues with them. There was a degree of reciprocity in the relationship.

Following Justice Asher's term, John Wild QC (later Justice Wild) took on the role as President in March 1998. He was the first President from the Wellington area. His tenure was short as he himself was appointed to the Bench in August of that same year.

Mr Wild notes that at that time the Association was not dealing with the large range of activities that it does today, but one thing he remembers being involved in was providing comments to the then Solicitor-General, John McGrath, on the candidates for Silk. This process was very time-consuming because the Bar Association had been requested to comment on all of

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the potential appointees and not just on the candidates that it supported for appointment.

Mr Wild says that if the appointment process operates properly, and the appointees meet the criteria set out in the Queen's Counsel rules, it is an excellent office because the public will know that the QCs are leaders of the bar. The office indicates absolute integrity and reliability – two different but important concepts. He is a strong supporter of the rank of Queen's Counsel.

Clive Elliott QC, whose presidency finished in October 2018, agrees that the rank is a mark of excellence and "...any mark of excellence is to be encouraged and not denigrated. It tells you something about a person who has achieved that status, that their own peers have chosen to anoint them," he says. "Every profession has its sign of seniority. It is also something to aspire to."

Stuart Grieve QC assumed the presidency after Mr Wild. He served two terms from September 1998 to September 2002. He agrees with Mr Wild that in many respects, times were not as testing as they now are. This does not mean that it was plain sailing during Mr Grieve's presidential term. There were ongoing issues related to the intervention rule, which was always problematic.

Mr Grieve is also a firm believer that the bar has a role in speaking up for the judiciary in the face of unfair criticism or attack. Mr Grieve still advocates for this and has at times drawn inappropriate comment to the attention of the Association, allowing it to respond publicly to these comments. "Experienced people at the bar know when the line has been crossed," he says, "and when that happens, we need to urgently bring it to the attention of the Association which can then decide whether something should be done."

This is a sentiment shared by former President, Judge Paul Mabey QC, who during his term had to speak out strongly in support of a High Court Judge after the Judge's refusal to impose a preventive detention sentence. At the time the Judge noted that the media criticism in that case was neither balanced or fair and served no purpose "... other than to falsely and wrongly undermine public confidence in our system of justice."

A measure of deregulation was in the wind by the time Robert Dobson QC (now Justice Dobson) became President in October 2002. The Association was involved in discussions over the shape of the proposed new Law Practitioners Bill. The Law Society wanted the three years practical experience placed on solicitors to be extended to barristers and that they pass the Stepping Up Programme before practising on their own account. "The NZBA Council accepted that this was in order but there were regional differences," says Justice Dobson. "In some centres, established members of the bar recognised their responsibility to take on juniors and effectively have them as pupils. But in other areas and with other practitioners, they thought that this was unnecessary."

Justice Dobson notes that there were also discussions around pupillage and tutelage. Everyone recognised that there was a need for those at the bar to have discrete training for advocates. Litigation skills was seen as a partial answer but beyond that it was left to the senior practitioners to stand up and take on juniors.

For some barristers who had escaped from firms where they had been expected to manage junior staff, there was a reluctance to commit themselves on an ongoing basis where the commitment might be for three years. "Having said that, several of the large chambers committed to taking on juniors to allow them to gather experience and do well," Justice Dobson comments.

Another issue which loomed large during this period was concern over increases in court fees. The Association combined with the Law Society to produce what Justice Dobson calls a "... thorough and stinging critique of the bases on which officials had recommended an increase in court

fees." There were adjustments to some of the increases, but not nearly what was hoped for. The increase trend has continued since then, notwithstanding that it is a core function of government to provide competent, objective and unbiased adjudication.

In October 2004, Dr Farmer again took over the presidency. By this time, it was apparent that the work of the organisation had grown so much that a full time Executive Director was required. Monique Pearson was appointed to this post in 2006 and the immediate effect was the development of a robust administrative framework. Her appointment allowed the President and Council to concentrate on growing the standing of the Association while she focussed on growing the membership and the benefits offered to the members.

The Association had developed a suite of strategic priorities, and in Ms Pearson's view, the top two priorities she faced were being able to provide value to Bar members and secondly, revisiting the constitution. The constitutional change was important for creating a pathway for juniors at the bar. "Looking at the demographics back then, the bar was not viewed as an opportunity for young barristers," says Mrs Pearson. The constitution was therefore modified to introduce the role of junior barrister and the junior bar.[3]

Colin Carruthers QC describes himself as having been "shepherded" into the role of President by Dr Farmer in 2008. He was one of the Wellington practitioners who was very much involved at the inception of the organisation. He had served on the Council for several years before becoming President. A key objective for him was the promotion of the bar through its advocacy training. He believed strongly that senior litigators should pass on their skills and knowledge to their more junior colleagues in the same way as they had acquired them from those who came before them.

Mr Carruthers was also keen to expand the focus of the NZBA into participating in the international community of bar councils and associations. "I had the sense that we weren't making the most of ourselves as an Association by focusing on local interests," he says. "We could develop a much broader base by looking to overseas connections. In particular, I had been advocating for some time and taken a number of initiatives to get contact with the Australian Bar Association and the Australian state bars." He believed that promoting the trans-Tasman relationship would result in better access to developments and resources. "I got to the stage with the Australian Bar Association where we were given a place at their meetings," he notes.

The first woman president of the Association was Miriam Dean CNZM QC who took over in October 2010. Ms Dean identified an agenda of key areas for action during her time as president which included training, member benefits, fostering collegiality, and advancing the equitable briefing policy. Her presidency had a focus on training, particularly for the junior and middle bar. But Ms Dean also launched specialised training for women barristers to encourage them to step up to lead roles such as the "Walk the Talk" events, which had very high numbers attending. Another event for women was an opportunity to meet the judges which also proved to be very successful.

Ms Dean is also very proud of the work that went into expanding the membership of the Association at this time. Associate membership was offered to those in Crown Law, the Crown Solicitors Network, the Public Defence Service and Parliamentary Counsel.

In October 2012 Stephen Mills QC became President of the Association. He knew how demanding the role would be, but there were two things that proved to be particularly demanding. The first was the very serious push in some quarters to have the intervention rule abolished or heavily modified.

This rule was believed to be vital for the long-term health of the NZBA as well as for consumers, who needed the protection of barristerial independence. The Association worked hard to get support for the retention of the rule from the Minister of Justice, the Law Society and the judiciary. Although the outcome was not perfect, Mr Mills says that it was a much better outcome than what was threatened at various stages.

The second matter that proved demanding was the World Bar Conference in Queenstown in 2014. In an exciting development, Mr Carruthers

[3]Other constitutional changes related to succession for the President and regional representation. The result was the creation of the President-Elect position, and four Vice-Presidents, each representing a region.

had persuaded the governing body of the World Bar Conference, ICAB, to agree to New Zealand hosting this event. As it turned out, it was not possible to deliver on the original date and location and format selected and Mr Mills then flew to Boston persuade ICAB to agree to a later date. The conference proved to be a great success and was responsible for raising the NZBA's profile but involved considerable work.

Paul Mabey QC was another of the NZBA presidents who was appointed to the Bench part way through his term. He was the NZBA's first provincial President, having practised mainly in Tauranga. As a specialist criminal barrister, he wanted to expand the work of the NZBA criminal committee. Having another President from the criminal bar was advantageous as it made it clear to all that the NZBA was the voice for all barristers and not solely the commercial and civil bar. During his time as President, Judge Mabey was able to increase the awareness externally of the criminal bar as an essential part of the NZBA.

Judge Mabey was also committed to promoting training and education and, in particular, to supporting advocacy training. Judge Mabey believes that the NZBA is the obvious body to promote advocacy training and it was under his presidency that the Association branched out into online training and advocacy skills workshop.

The workshops proved very popular with members. These had begun with the inaugural NZBA Appellate Advocacy Workshop, organised by Kate Davenport QC and Christopher Gudsell QC following the World Bar Conference in 2014. Many of the international senior counsel and judges who had attended the Conference stayed on to teach at this very successful workshop. Subsequently Judge Mabey attended the International Advocacy Training Council's Conference in Belfast in 2016 on behalf of the NZBA and was able to see just how the 2014 event had enhanced NZBA's standing in international advocacy training.

Clive Elliott QC took on the presidency for an extended term from April 2016 – September 2018. His first task was to improve the systems and processes of the Association so that it would run on a more professional basis. From the outset he was also concerned that it developed a strong sense of strategic direction. This led to the development of the NZBA strategic plan. A council member (Greg Hollister Jones, just prior to becoming a District Court Judge and with a bit of help from a close personal friend who is a professional facilitator) ably facilitated the process. This allowed key objectives to be identified, after some robust debate. "It was very much a bottom up process," says Mr Elliott. "Everyone who contributed (and that was everyone) was very engaged and positive." It also proved to be a good bonding exercise for the council to work together in the future and the input from the junior members of council was extremely valuable.

The Present

On 1 October 2018, Kate Davenport QC took over the presidency. In her column in this issue she outlines some of what she has been working on. Like all the presidents before her, she faces a hectic schedule. But each of the presidents that we interviewed for this article described their time at the helm as worthwhile. We thank all of them for their work and commitment to the independent bar.

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Presidential Role Call

Jun 1989 – 1990	Ted Thomas QC
1990 – Feb 1992	Jim Farmer QC
Mar 1992 – Feb 1994	Jim Farmer QC
Mar 1994 – Feb 1996	Julian Miles QC
Mar 1996 – Feb 1998	Raynor Asher QC
Mar 1998 – Aug 1988	John Wild QC
Sep 1998 – Feb 2000	Stuart Grieve QC
Mar 2000 – Sep 2002	Stuart Grieve QC
Oct 2002 – Sep 2004	Robert Dobson QC
Oct 2004 – Sep 2008	Jim Farmer QC
Oct 2008 – Sep 2010	Colin Carruthers QC
Oct 2010 – Sep 2012	Miriam Dean QC
Oct 2012 – Sep 2014	Stephen Mills QC
Oct 2014 – Mar 2016	Paul Mabey QC
Apr 2016 – Sep 2018	Clive Elliott QC
Oct 2018 –	Kate Davenport QC