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Core Professional Values and Challenges to Independence from External Forces. The Benefits of Self-Regulation

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The starting point for any discussion about core professional values and challenges to independence is to identify what those core professional values are. In short, it is our core professional values that define us both as individuals and as independent advocates.

Core Professional Values

Whereas views will differ on those core professional values, to a significant extent, they are reflected in Barristers' Conduct Rules and include the following:

1. high Standards of Professional Conduct;[1]
2. as specialist advocates in the administration of justice - honesty, fairness, skill, courage, competence and diligence;[2]
3. our duties are to the courts, our clients and to our barrister and solicitor colleagues;[3]
4. excellence in the Law.

I have not included Independence in this list although it is undoubtedly a core value. I deal with it separately.

Although titled in part, "Core Professional Values and Challenges to Independence from External Forces" this paper will range slightly wider and address the challenges to some of the core professional values I have identified.

High Standards of Professional Conduct

This core professional value applies to a multitude of matters. It is reflected in part in Barristers' Conduct Rules so that, for example, a barrister:

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1 *Legal Profession Uniform Conduct (Barristers) Rules 2015,* Rule 4(b).
2 Ibid, Rule 4(c).
3 Ibid, Rule 4(d).

- must not deceive or knowingly or recklessly mislead the Court;[4]
- must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading;[5]
- has duties to his or her opponent which extends to alerting the opponent if any express concession is made which is believed by counsel to have been made by mistake;
- in ex parte interlocutory proceedings, has an utmost duty of good faith;
- is obliged to bring to the Court's attention any relevant authorities, whether favourable or not;
- allegations of fraud or dishonesty must not be made without a reasonable basis;
- should not make submissions or express views to a court which conveys or appears to convey the barrister's personal opinion on the merits of that evidence or issue.

When briefed, a barrister must seek to ensure that work is done in relation to a case so as to:

- confine the case to identified issues which are genuinely in dispute;
- have the case ready to be heard as soon as practicable;
- present the identified issues in dispute clearly and succinctly;
- limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
- occupy as short a time in Court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.[6]

These are some of the core values that come within the rubric of high standards of professional conduct. They define us as counsel and some of them are under challenge as I set out below.

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4 Ibid, Rule 25.
5 Ibid, Rule 25.
6 Ibid, Rule 58.

Specialist Advocates

What sets us apart as independent referral advocates is excellence in advocacy in both written and oral form.

There are a number of challenges to this core value:

(1) challenges from within the profession generally;

(2) maintaining the standard of advocacy;

(3) the cost of litigation and the lack of opportunity for juniors;

(4) external regulatory threats to advocacy, in particular a reduction in legal aid funding.

Challenge from within the Profession

As independent referral advocates, the Independent Bar is under challenge from within the profession itself. That is nothing new and has been the case, at least in Australia, to varying degrees for many years.

However, there is little doubt that the practice of the law is changing and over the last five years in particular has changed in a very significant way. In part this is due to:

(i) more sophisticated clients who now are far more conscious of costs, particularly corporate counsel; and

(ii) the advent of technology, particularly the internet and the emergence of on-line research and legal brokers.

Consequently, work that has traditionally been done by the Bar (except perhaps in some cases of criminal law advocacy), whether it be opinions, drafting and settling pleadings, advice on evidence, submissions, interlocutory applications and arguments, is now being done in increasing amounts by solicitors or in-house Counsel, some of whom are the ubiquitously named “Special Counsel” with the initials “SC” after their names. This is not a new phenomenon but we seem to be seeing more and more of it.

The burgeoning market of “legal brokers” might be contributing to this, but in Australia they are a relatively recent phenomenon and I don’t think they have had, as yet, a significant impact.

Thankfully, these are not yet by any means the norm, but it is not uncommon. We have no difficulty with competition of course but the issue comes down to efficiency, excellence and specialist skills.

Maintaining the Standard of Advocacy and the Declining Opportunity for Trial Advocacy

The standard of Advocacy is one of our defining features.

As noted above, one of the core professional values is that as specialist advocates in the administration of justice, we must act honestly, fairly, skilfully, bravely and with competence and diligence. Honesty, fairness, courage and diligence are personal traits. Skill and competence comes from experience and from training.

A lack of trial advocacy is a constant and justified lament, particularly from juniors at the common law and commercial bars. The lack of time on their feet doing advocacy, particularly trials, has the potential to affect our standards of advocacy. Trial work was the forum in which many of us who are more senior learnt (and continue to learn). I say more about the criminal bar below.

The downturn in the number of civil trials has a number of causes. The cost of litigation is one, the prevalence of Alternative Dispute Resolution, particularly Mediation, is another, although it is closely linked to the cost of litigation. The downturn in the number of trials highlights why we need advocacy training. Although advocacy training is very important, it is no substitute for the real thing.

There will always be advocacy and there will always be a body of advocates but standards and training must be maintained. Excellence in advocacy is one way to stave-off challenges to this core value.

Cost of litigation and the lack of opportunity for juniors

One of our core professional values relates to the efficient administration of justice and our role in it. As counsel presenting cases, we have an obligation to do so competently and efficiently.[7] Part of the efficient administration of justice is the use of juniors. That serves two purposes:

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[7] Ibid, Rule 58.

1. It trains juniors and gives them opportunities;

2. It helps reduce the overall cost of litigation.

Apart from declining opportunities for advocacy, a casualty of the cost of litigation is the non-use of juniors, which deprives junior counsel of the opportunity to learn by working with senior counsel. Appearing as a junior was a privilege and an opportunity presented to a number of us. Although becoming less of an occurrence, it is not at all uncommon for instructing solicitors to be put forward as juniors - a practice I resist. It does not work because the instructing solicitor is too busy running the matter from his or her perspective. In my view it is incumbent upon us to insist on juniors both from the perspective of efficiency in terms of cost and effort but also with the advantage of achieving and maintaining excellence in advocacy.

External Regulatory Challenges to that impact upon Advocacy

External regulatory challenges which impact upon advocacy fall into at least two categories:

(i) the influence of external regulation on the institutions of the Law such as the courts, in particular, court fees; and

(ii) access to justice, in particular, lack of Legal Aid funding.

External Regulation of the Institution of the Law

In Australia we are seeing the court system being used as a profit centre. There are some institutions in our society that are the cornerstones of society and need to be maintained as such. Undoubtedly our justice system is one of those cornerstones. Whereas no one would deny that courts need to be run efficiently and cost effectively, that does not necessarily mean that they have to turn a profit. Excessive court fees merely keep people out of court or force them to settle on unfavourable terms.

Certainly there is some, albeit limited, merit in the argument that high daily court fees will promote efficiency but one of our core values is efficiency. Using a financial measure as a means to extract efficiency is not the answer, however using independent counsel is one of the answers.

Efficiency can be brought about by counsel identifying and limiting issues in any particular matter to what is really in dispute. Counsel retained early in a matter can and do bring about efficiencies in litigation. It is incumbent upon us as counsel and indeed upon the judiciary, to ensure that matters are run as efficiently as possible; experienced counsel can and do assist in this process. It is part of the development of excellence as counsel.

It had been thought that the use of counsel increased costs.

Section 6 of the *Legal Practitioners Act (1981) (South Australia)* provides that as a matter of public policy the Legal Profession should remain a fused profession. That extends so far as to making void for public policy, an undertaking given by counsel to practise solely as a barrister. That undertaking, curiously, has an exclusion which is the undertaking given to the Supreme Court by Queen's Counsel or Senior Counsel that they will practise only as a barrister. In fairness, that is not a new provision, but is one the South Australian Bar is fighting to have removed. The Parliamentary debate in Hansard records the rationale for that provision as being, in part, the prospect of an increased cost of litigation brought about by the existence of the Independent Bar – a rationale which has been shown over time to be without foundation.

Legal Aid Funding

I referred above to the lack of advocacy for common law and commercial juniors. My impression is that the situation with juniors at the Criminal Bar is slightly different.

What was once done by junior counsel at the criminal bar on a regular basis is now either kept in-house or paid at legal aid rates that are desultory, such that junior counsel cannot survive. This impacts not only on the development of skills as advocates, it impacts on Rule of Law and it is a false economy.

It is not uncommon to hear governments boasting of being "hard on crime". Apart from increased penalties, concepts such as mandatory sentencing, minimum sentences and evidentiary provisions which allow ease of conviction have been introduced to varying degrees. However, there is always an uneasy balance in our justice system and the result of changes such as those is that without incentives to plead guilty such as a reduced sentence, more accused will go to trial. That means there is a greater demand for Legal Aid, but no

increase in Legal Aid funding. A greater demand for judges, but no increase in the number of judges. A greater demand for courts with the facilities to conduct criminal trials, but no increase in the number of courts. Add to that insufficient gaol space and the whole system becomes unbalanced.

I referred above to cuts in Legal Aid funding as a Rule of Law issue and a false economy; that is because one of the symptoms of the imbalance to which I refer is the lack of representation leading to an increased number of self-represented litigants. Paradoxically, the decrease in Legal Aid funding delays justice and increases the cost of justice overall because of the time that is required to conduct trials with self-represented litigants. Self-evidently, a self-represented litigant means counsel has not been briefed, denying the Court the assistance and efficiency that results from the use of independent counsel.

The result of course is even a further demand for pro bono work which, increasingly, is now organised by a dedicated body within the profession. It is not putting it too highly that the criminal justice system, in particular, continues to operate as a result of the goodwill of the legal profession and of the independent bar in particular.

The lack of Legal Aid funding is a significant challenge to the Independent Bar and to achieving and maintaining excellence in advocacy.

Excellence in the Law

We hold ourselves out as specialists. There is an ongoing challenge from on-line legal advice sites and research facilities. The concern manifests itself in the number of self-represented litigants.

Excellence in the law however is not limited to a knowledge of the law. If a party finds itself in litigation it deserves to be represented by independent counsel, who are knowledgeable about what they do and how to go about it.

Duties to barrister and solicitor colleagues

Insofar as the Independent Bar is concerned, as well as being an enshrined duty, it is also part of the nature of the Bar. At one level, members of the Bar will, if they are able, always help a colleague who is in need of advice or assistance. At another level, when dealing with one's opponent, there are quite specific duties which are owed, both to the opponent and

to the Court. The challenge to both duties, which I classify as a core professional value as well as a duty, is not new and comes from pressure from the client, who of course is looking for the best possible result. It is incumbent upon us as independent counsel to ensure that we maintain our professional standards and act in accordance with our duties to the Court and to each other without compromising our duties to the client. The challenge, therefore, is not new and the Bar has, in general terms, steadfastly resisted it.

Challenges to Independence from External Forces – External Regulation - Conduct Rules and Regulation Generally

Our independence is enshrined in the rules which govern us. They are reflected in rules such as:

1. Barristers owe their paramount duty to the administration of justice;[8]

2. Barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients;[9]

3. Barristers must accept briefs regardless of their personal beliefs, must not refuse briefs to appear except on proper professional grounds and compete as specialist advocates with each other and with other legal practitioners as widely and as often as possible.[10]

The importance of a strong and independent Bar to the Rule of Law and efficient operation of the courts has been the subject of many judicial musings over many years. In *Ziems v The Prothonotary of the Supreme Court of NSW*,[11] for example, Dixon CJ acknowledged that the Bar exercises a unique but indispensable function in the administration of justice. Reflecting on the unique character of the Bar, Kitto J said in the same case:

> *"It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confident, adviser and advocate, and must therefore possess more than honesty,*

[8] Ibid, Rule 4(a).
[9] Ibid, Rule 4(e).
[10] Ibid, Rule 4(f).
[11] (1957) 97 CLR 279.

> *learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional obligations."*

Independence

Our independence demands that we be, and we be seen to be, beholden to no one. It is a principle that we hold dear and protect fiercely. Our overriding duty as independent counsel is to the court, a duty recognised in Conduct Rules:

> "23. A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice."

That independence and the duty to act in the interests of the administration of justice underscore the cab-rank principle which, of all our rules, is probably the most significant. It defines who we are and what we do and it reinforces our independence.

The cab-rank principle may be stated in these terms:

> "A barrister must accept a brief from a solicitor to appear before a Court in a field in which the barrister practises or professes to practice if:
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> (a) the brief is within the barrister's capacity, skill and experience;
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> (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interest to the best of the barrister's skill and diligence;
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> (c) the fee offered on the brief is acceptable to the barrister; and
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> (d) the barrister is not obliged or permitted to refuse the brief on other grounds.[12]"

Challenges

In several jurisdictions there are independent regulatory bodies that regulate the Independent Bar. In other jurisdictions, particularly fused professions, the characteristics that define the Independent Bar are merged into general regulatory provisions. Amongst those general regulatory provisions, the core professional values of the Bar need to be

[12] Ibid, Rule 17. Similar provisions appear in other Bar Conduct Rules.

identified and maintained. Our independence and our contribution to the interests of justice is part of the Rule of law, upholding the independence of the judiciary and access to justice.

One of the challenges to the Independent Bar's independence arises from the fact of our independence. Within reason, the Bar says what it thinks. That is sometimes unpopular. The recent events in Malaysia when three members of the Malaysian Bar were called in to be interviewed by the police because they moved a motion calling for the resignation of the Attorney-General, is a good example. This sort of pressure is a challenge to our independence and maintaining our independence is a fundamental component of the Rule of law.

Direct Briefing/Direct Access

When I make this distinction, I refer to direct briefing by corporate counsel, as opposed to direct access to counsel by members of the public. In my view, the former is or may be appropriate, the latter is not. Direct access by a member of the public places us in an invidious position and goes to our independence. It is a short step from direct access to removing independence because there is a significant risk that counsel then becomes beholden to the client.

Self-Regulation?

The question is: Does it work?

The answer is: undoubtedly yes.

In any population of independent advocates, which holds its independence and its commitment to core values with the zeal and rigour that these concepts demand, self-regulation works.

The rules under which we operate have, in the main, operated for a very long period of time. There is no warm and welcoming atmosphere in a Disciplinary Tribunal involving counsel.

Conclusion

The challenges to the Independent Bar and our core values are ongoing. The Independent Bar prevails and will continue to do so. However it needs to evolve and adapt whilst still maintaining its core values. In particular, excellence is what sets it apart and will continue to do so.

The key to resisting these challenges is to maintain vigilance, to resist changes to our core professional values and to maintain our professional standards, which is not only one of our greatest advantages, it is one of our greatest assets.