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# Artificial Stuff

by John de Meyrick

It was one of those crowded cocktail parties where one is confronted by so many strange faces that you begin to wonder if you've come to the right function.

"Did I hear you say you are a barrister?" A matronly lady standing nearby took my arm and asked.

"Yes, that's right," I responded a little apprehensively.

"What a coincidence," she beamed with motherly pride (as though barristers were some rarity of the human race). "My son's one of those."

"Really, poor chap," I was about to say when she added... "You probably know him — Damien Bloggs."

I pondered for a moment in order to convey a sense of due respect for this unknown colleague. "I don't think I've come across him. What field of law does he practise in?"

"Oh, I think he's in food law, or something like that. He handles all the contracts for Quikquid Supermarkets," she informs me with authority.

"Well," I assure her, "He's lucky to have such an important commercial client. Where are his chambers?"

"Chambers?" she says, with a blank expression.

"Yes, what's the name of the offices where he has his practice," I translate.

"Oh, he works out at Smithfield somewhere. He's got a big office with a company car and all that," she assures me. "He's one of the top knobs in the company, next to the senior legal man."

"Oh, I see. He's a legal officer with Quikquid, is he?"

"Oh, no!" she quickly corrects me. "He's a barrister just like you. I was there when he got his wig and gown, you know. In the Supreme Court."

"But he doesn't practise as a barrister though," I politely suggest, hoping to establish some measure of distinction.

"Oh, yes," she insists. "He has to look over all their buying orders. Some of them cost thousands of dollars."

"But he doesn't conduct cases in court, does he?"

"Oh, yes. He can do that if he wants to," she affirms

with growing indignation at my reluctance to recognise her talented offspring.

Eventually I extricate myself from this doting, non-practising barrister's mother, but not before she impresses upon me the importance of her brilliant son's immense legal responsibilities and assures me that if ever I want to know anything about food law (or something like that) she felt sure her Damien would only be too pleased to spare me a few minutes of his valuable time, without charge, should I care to telephone him and mention that I'd been talking to her.

As I thank her and head towards the door she restrains me by the arm and adds, "By the way, what's your name in case you ring Damien? I'll let him know."

"Tell him, Lord Denning," I reply in confidence, and depart with the best air of regal carriage I can muster.

As I return to my humble chambers next day (devoid of company car and expense account) I realise that for every barrister in private practice there are very many more non-practising barristers dispersed throughout the workforce and the community who benefit considerably from being able to call themselves "barristers," even though in all but a few cases where practitioners may have retired or left the Bar to take up administrative appointments, they have never conducted a case in court, nor perhaps have ever been to a court except on the day of their admission.

What then is a barrister?

*The Macquarie Dictionary* says, simply, a barrister is "a lawyer admitted to plead at the bar in any court." (That is not strictly correct, of course. Admission is only

in respect of the system of courts for which it applies, and "lawyer" is not really a term recognised by legislation in Australia even though it is a useful, and well understood term of general reference for all forms of legal qualification and practice.)

*The Macquarie Dictionary* gives a second (and in respect of some colleagues I know, a more appropriate) definition of barrister as: "A tropical climber of Eastern Australia, with strong recurved prickles."

The more dependable *Shorter Oxford English Dictionary* defines barrister as: "A student of law who has been called to the bar, and practises as advocate in the superior courts of law."

Here, the *OED* envisages that a barrister is one who *actually* practises as an advocate. That, surely is the public understanding and image of a barrister: an advocate who appears in court — not a legal officer who sits behind a desk in a corporate setting surrounded by telephones and secretaries.

Clearly, however, anyone (in NSW) who completes an approved course of law and who meets certain other formal requirements of the rules, may be admitted by the Supreme Court as a solicitor or barrister. Whether they ever actually practise in these branches of the profession is another matter.

In the case of solicitors, the (NSW) Legal Practitioners Act provides for a system of registration (practising certificates) without which persons qualified in law cannot practise as solicitors, or even hold themselves out to be solicitors. On the other hand, persons admitted as barristers may properly hold

themselves out to be barristers even if (as in the majority of cases) they do not practise as such.

Thus, many graduates who have no intention, nor immediate plans of going into private legal practice, and especially those who may already be in commerce or industry, or in the public service, will choose to be admitted as barristers rather than as solicitors. (This also avoids the need to complete the six months post-graduate course for solicitors at the College of Law.)

Legal officers are employed by many public and private organisations (e.g. banks, local councils, companies, building societies, insurance offices, government departments and commissions). Where these officers are solicitors with current practising certificates, then there is no legal barrier to them acting for their employers as such, provided they remain personally responsible for their professional work.

The concept of the staff solicitor has long been established in Australia, but (except for Crown advocates) the employee-barrister is not part of our system (in NSW) principally because, as a matter of practice, barristers are received in our courts, only as briefed by a solicitor.

A colleague, David Wetmore, who has recently joined the NSW Bar from the Toronto Bar, informs me that the concept of the in-house legal officer is so well entrenched in Canada and the USA that these house counsel (as they are called) now represents a very substantial proportion of the legal profession. Big companies provide attractive employment packages to draw the best of them away from other organisations, and even from private practice.

Also, because there is no professional distinction between the work of attorneys (solicitors) and the role of counsellors (barristers), salaried house counsel are received in courts without the need to be briefed by intermediary legal representatives. These house counsel represent a significant proportion of advocacy work.

The employee-advocate arrangement of course, puts the practitioner's professional independence at risk. It also weakens the degree of trust which courts may have in the advocates who appear before them.

In the USA, where contingency-fee advocacy abounds, these factors may not be of much concern. But would they be acceptable here, in Australia?

For many years, certain statutory tribunals (principally administrative and industrial arbitration tribunals) have allowed paid agents (e.g. employer association officers and union officials, as well as privately-practising industrial relations consultants) to appear before them. Mostly these persons are lay advocates, but with wider educational opportunities many such advocates are now legally qualified.

Curiously enough, in most of these statutory tribunals the legislation provides that a solicitor or barrister may be denied the right of audience upon the objection of a lay opponent. This is so in respect of both federal and state industrial arbitration tribunals (although the Full Bench of the WA Industrial Commission has held in *AMIEU (WA Branch) v. Anchorage Butchers Pty Limited*, 1980 AILR rep. 40, that, despite objection, a practising English barrister could appear in a matter before it because he was not admitted to practise anywhere in Australia and therefore was not a "legal practitioner" excluded by its Act).

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In recent times there have been a number of non-practising barristers described in the media as "barristers" in connection with matters not relevant to legal practice. The latest is a recent newspaper report of a NSW police inspector who has been charged with two counts of misconduct and who was referred to as a "barrister and former member of the Armed Hold-Up Squads."

Clearly, unless the profession is able to institute appropriate controls, this kind of confusion and misunderstanding will continue to reflect upon the reputation of the privately-practising barrister.

Unfortunately, admission to practise does not mean that one must practise. Nor is it subject to a declared intention to practise.

At one time an admission ceremony was a very special occasion for the legal profession and the community generally. Few people were ever admitted without intending to become a private practitioner. Nowadays, with the hordes of graduates emanating from a growing number of law schools which cater in large measure for persons preparing themselves for administrative and commercial careers, admission days (usually with several sittings and hundreds of admittees, relatives and friends packed into the Banco Court) have become little more than a tiresome form of graduation ceremony serving to fortify the notion that it is in recognition of qualification rather than admission to the practice of law.

Surely it is time to stop conferring this status on people who have no intention, desire or likelihood of ever opening their mouths in a court, except to take the oath of admission.

It is time to distinguish between the graduate who is actually to practise as a barrister and those who merely want the status of "barrister" added as a gloss to their employment prospects, and in order perhaps to enhance their standing amongst their business associates, relatives and friends.

Certainly, one may be (say) a plumber, electrician, accountant, engineer, or architect, and be so described whether in private practice or in employment. But if one does not practise as an advocate how can one be properly described as a barrister? It is not a qualification. It is an occupation.

If the Damien Bloggs of this world want to practise food law at Smithfield, good luck to them. But let them do so as "lawyers" or "legal officers", or whatever fancy title best describes their function within the corporate enterprise that employs them.

A "barrister" is someone "who has been called to the bar" and who actually "practises as an advocate in the superior courts" (OED). That term of reference should be related and confined as such by statutory provision if necessary in keeping with the public's understanding of what a barrister is and does. Not with what someone may be qualified to be.

Without proper regulation, this distinction will become increasingly blurred, and it would be a great pity indeed, if the Bar were to ultimately find it necessary (as privately-practising accountants have found) to engage in extensive media advertising in order to distinguish in the public's mind the difference between "certified" practising barristers and your friendly, neighbourhood, non-practising kind.

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