Enduring values and change

An address by The Hon. Justice D A Ipp, delivered at the Tutors and Readers dinner, on 8 June 2001

The Bar is an ancient institution. The *Black Books* of Lincoln's Inn contain a continuous record of the Inn's proceedings that date back to before 1450. In them you can read accounts of Bar dinners that took place in the 15th century, where pupils ate with their Masters. What is happening here this evening had its origins in the 15th century, and I doubt whether even the menu has changed.

In the 600 or so years of its existence the Bar has stood for certain values that have had a major influence over the way in which the law has been practised and our society has developed.

The existence of an independent Bar is no accident. It derives from its history, traditions and customs, its rules of conduct and the quality of its members. These days, as we all know, the Bar is under constant threat. It faces attacks by the media, the government and others who demand that fundamental changes be made to the way in which barristers practise the law.

Many of these demands are made by the envious and the ignorant, but I think nevertheless that there is agreement amongst most that the practice of the law must change. Many articles have been written and papers delivered on the need for change and the nature of the changes that should be made. Rest easy. I am not going to discuss that. I have three main propositions this evening. Firstly, there is little that is new in the criticisms that are now being made of barristers and lawyers. Secondly, no matter what changes are made, the traditional values and attitudes of barristers are likely to endure. Thirdly, despite this comforting thought, there is a strong need to protect the institution, to remain vigilant in doing so and to adapt to change.

Let me start with the first proposition, that is, there is little new in the criticism that we hear so often.

Some 50 years ago the great English barrister and judge, Lord Birkett, remarked that 'the courts are open to all - like the Ritz Hotel'. This aphorism was uttered as part of a critical comment concerning the costs of litigation and the fees earned by barristers. Lord Birkett was later asked if the aphorism was his own. He said that he was compelled to answer that it had been attributed to Mr Justice Matthew but, in fact, said Lord Birkett, before that it had been attributed to Lord Bowen and, indeed, before that, to Lord Justice Chitty. Subsequent research, however, has revealed that words to the same effect were spoken by John Horne Tooke, a radical British politician who was prominent towards the end of the 18th century[1]. Who knows when they were first spoken? They remain as fresh as ever.

Nowadays there is a prevailing view that commercialism in the legal profession is so rampant and such an evil influence that fundamental changes are required. Law reform commissions throughout the country have been occupied in investigating how to reduce lawyers' fees. In the United Kingdom it has been suggested that silks should earn no more per hour than a successful surgeon, which as I understand it is less than half what busy silks in London are presently charging. This is in a context in which the senior partners of Slaughter and May now earn 1.2 million pounds per annum and partners of less than a year 600,000 pounds. The incomes of the leading silks in London are nearing two million pounds per year[2]. Younger lawyers in large firms are also earning relatively high amounts. New York law firms in London are paying New York rates. Millbank Tweed's London office now pays newly qualified lawyers nearly 80,000 pounds per annum. That is over A$200,000.

What does this all mean? Is it a novel modern phenomenon that will result in the corruption of those who practise the law?

Any such concern should be alleviated by a brief historical examination of like fears. At the end of the nineteenth century there was already a sense that the profession had compromised its integrity by becoming too commercial. In 1895 *The American Lawyer* complained:

> The Bar has allowed itself to lose, in large measure, a lofty independence, a genuine learning, a fine sense of professional dignity and honour ... For the past 30 years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.[3]

In other words, the dreaded spirit of commerce had begun infecting the Bar since 1865. There are several instances in the early part of the 20th century of complaints that the law had become a business and profits were the main concern of lawyers. In 1934 the then chief justice of the United States described the successful lawyer as 'the proprietor or general manager of a new type of factory, his legal

product is increasingly the result of mass production methods'[4]. He deplored the commercialisation of practice, which he felt was to be profoundly at odds with professional traditions of autonomy and public service.

Against this, it will be a surprise to learn that in the 1870s and 80s the legendary leader of the English Bar, Judah P Benjamin, was earning 45,000 pounds per annum at the London Bar at a time when a successful country doctor was earning 500 pounds per year[5]. 90 times more. The equivalent ratio today would put modern Queen's Counsel at more than 20 million pounds a year. It seems that silks today have a way to go.

Another complaint, frequently heard is that barristers utilise their talents in the service of the wealthy, occupying their time in ways to advise others how to get round the law. This sentiment is not new. About 100 years ago, the American author, John Dos Passos, complained:

> It may safely be said that the prevailing popular idea of the lawyer, too often justified by the facts is that his profession consists in thwarting the law instead of enforcing it... It is the common belief, inside and outside of the profession, that the most brilliant and learned of the lawyers are employed to defeat or strangle justice.[6]

But these feelings are much older. The renowned Livia, the wife of Emperor Augustus of Rome was a promiscuous and sexually licentious woman when young. When she grew old, she became puritanical in nature. She thought that there was far too much adultery in Rome. She prevailed on her husband to pass an edict making adultery punishable by death. This law was very unpopular, not least amongst the prostitutes, many of whom were married. It prevented them from earning their living. They persuaded Livia to ask Augustus to exempt them from the edict, which he did. Thereupon, many women, seeing a loophole in the edict, pretended to be prostitutes, and escaped its consequences. On advice from his lawyers, Augustus created a register of prostitutes. Thenceforth no woman not on the register would be exempt from the proscription against adultery. Human nature being what it is, however, several aristocratic women, also on legal advice, registered as prostitutes to circumvent the prohibition. Augustus did not let this pass. He made a further edict to the effect that any registration as a prostitute, solely for the purpose of committing adultery, would be void. The courts in Rome thereupon became clogged with cases involving the question whether woman who had registered as prostitutes were genuinely bona fide prostitutes. Augustus was furious. He made a speech in the Senate damning lawyers for spending all their energies on advising rich women how they could legally commit adultery and not in promoting justice.

The message is obvious: the nature of humans in general and lawyers in particular is unchanging. The great feature of the Bar, however, is that it trains and produces independent barristers and demands ethical conduct from its members, notwithstanding the inherent defects in the raw material with which it has to work.

Nevertheless, amongst many there is despondency about the decline of law practice from its legendary virtuous and collegiate past. Within the legal profession itself many share the sense that law has freshly descended, from a noble profession infused with civic virtue, to crass commercialism. This sense of decline reflects the gap between practice and professional ideology. In the flesh, working life is experienced as more mundane, routine, commercial, money driven, and client dominated than it is supposed to be. It is doubtful, however, that the belief that the way it is supposed to have been - in whatever golden age is in contemplation - is the way that it truly was.

In other words, I suggest that there is no need to be melancholic about the attacks on the profession. These are but part of the facts of life with which lawyers have always had to live.

I now come to my second proposition, namely, that no matter what changes are made, the traditional values and attitudes of barristers are likely to endure.

I commence by stating the obvious, namely, while many facets of the law have not altered, many changes have been made that represent fundamental alterations in the way that law is practised. Let's look at some of them.

The law is far less closed. Religion and race are no longer matters that prevent participation in the profession, or admission to a particular set of chambers. Women are joining the Bar in far greater numbers. Generally, new barristers are now recruited from a far wider range of universities and schools and new recruits come from a far wider range of socio-economic backgrounds. The Bar is no longer the last preserve of the well connected.

In consequence, the membership of the Bar has become more diverse and the loose consensus that once existed among barristers has largely broken down. But the nostalgia for the narrow non-professional solidarity that the Bar afforded in the past should not obscure the moral and broadening gain that the increase in openness represents.

Then the actual practice of the law has changed so much. In a lecture delivered in Oxford I believe some 30/40 years ago, Patrick Atiyah, the well-known academic, said

> The judicial process in modern times lavishes a care and time on fact finding which would have been inconceivable 150 years ago. Time taken by a trial in the High Court was multiplied many times over during this period. Where Lord Ellenborough in the first decades of the 19th century used to try an average of 20

> cases a day, Lord Abinger 20 to 30 years later was depressed at his inability to get through more than six or seven. A modern judge would think himself fortunate if he completed two cases in a day[7]

Two cases a day? These days the average Supreme Court case takes between three and five days to complete and the average District Court case around three days. The length and complexity of cases require a different kind of advocacy. Case management has also brought vast changes to advocacy. Much more importance is accorded to written material and brevity and succinctness are very much appreciated by judges. Barristers have to work more quickly and this does not suit everyone.

But changes of this kind do nothing to affect the fabric of the Bar. True it is that styles of advocacy change. The florid melodrama of Marshall Hall would fall flat in the modern Court of Appeal. But it is the essence of a good advocate that he or she will adapt to circumstances. Moreover, the basic elements of great advocacy are universal.

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Practice at the Bar breeds an independence of mind and attitude. Sub-consciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice. The Bar hones the legal mind to these ends.

What you may ask is the legal mind? The best illustration I know is that given by Lord Bowen, who told the story of his seven year old grandson, who was sitting on his grandmother's knee when she explained to him that the Lord created the world in six days and rested on the seventh. The child was silent for some time and then asked: 'What has He being doing since then?' Lord Bowen, who was obviously world weary and somewhat cynical, when told about this suggested that the answer was 'having his portrait painted'. But the boy's inquiry reveals a mind well-suited to a barrister. Taking nothing for granted, questioning everything.

It is this sceptical, inquiring mind, together with a resentment towards injustice, that leads the Bar, generally, to oppose movements to do away with the basic rights of individuals.

There is a long tradition of this kind of behaviour. Outside the forbidding prison in Paris, where Marie Antoinette and Louis XIV were incarcerated, there is a statue of the lawyer who defended the queen at her trial. He was warned that, should he proceed to represent her, he too would meet the guillotine. Notwithstanding this threat he did so and was shortly thereafter executed. You may think that this is an extreme example of the cab rank rule. It was a demonstration of great courage and self-sacrifice. One that some may find difficult to comprehend.

The illustrious Erskine, in his first decent brief, destroyed the reputation of the corrupt Earl of Sandwich, a powerful cabinet minister. Had he failed to reveal Sandwich's corrupt practices then, merely because he had acted against Sandwich, Erskine would probably have received no more briefs and his incipient career would have come to an end. This did not deter him. On the contrary, he launched a dramatic attack on Sandwich and concluded by declaring him 'a shameless oppressor, a disgrace to his rank and a traitor to his trust.' Needless to say Erskine succeeded and went on to become one of the greatest advocates ever. The Bar has changed a great deal since the time of Erskine, but there have always been barristers who have been cast in the same mould. In this country men like Evatt and Byers, to name but a few, are shining examples.

In the worst periods of the apartheid regime in South Africa the Bar and sections of the Church and the press were the only institutions that maintained a practical and public opposition to the injustices that were perpetrated on a daily basis. The Bar made its major contribution by arranging for the pro bono defence of defendants who were charged with political offences. Many of the defendants faced the death penalty for charges of terrorism or sabotage. Others were teenagers who faced mandatory sentences, for burning schools or government buildings, of a minimum of 15 years imprisonment. In the climate of the day, the establishment was inimical to the defendants, and believed that the government was justified in its laws and prosecutions as the defendants were threatening the very existence of their way of life. Those who objected were regarded almost as traitors and subversives, themselves. Nevertheless, at most Bars in the country, there was a large core of barristers who were ready to defend these persons, largely because of a belief that they were the subject of appalling injustice.

It was not an easy task. Firstly, the big commercial clients were uneasy about being represented by barristers who represented people accused of being communists or terrorists. The barristers were identified by some as having the same views as the defendants, or at least being sympathetic

to them, and the clients felt that they would in turn be identified with the barristers. Some barristers found that after a couple of political trials their commercial practices went into sharp decline.

Then the cases themselves would be really unpleasant. The judge would be hand picked, as would the prosecutor. They would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants. The security police would be strongly in evidence, doing their best to intimidate. The court would be packed with black people who would provide a very hostile counter-balancing force. But perhaps the most difficult aspect was the client, usually a 16 year old kid who had tried to burn down a school and who faced a mandatory 15 years in jail, with the onus of proof switched by legislation. These boys were inevitably themselves hostile to the white defence counsel. Once one told me that I need not think that defending him would get me into credit when the regime changed, I would still be punished like the other whites. If defence counsel were particularly unlucky they would receive anonymous phone calls telling them the route their children went to school and informing them that if they continued representing the accused, they would be fortunate to see their children again. And all this for $20 per day, day after day.

But many members of the Bar responded to the need - leading silks and busy juniors. This contributed to the consequence that, when the regime changed, very few alterations were made to the legal system. It was felt that it had reasonably attended to the needs of the oppressed.

Curiously, the same response was not shown generally by solicitors, at least not to the same degree. They were far too much under the influence of their commercial clients and their allegiances to political points of view were too strong. The very large majority could not bring themselves to act for people whose views and interests were so much opposed to their own.

Nothing in what I have said is intended to convey that I think that barristers are better people than solicitors or that they show more courage under crisis. All I mean to say is that the institution of the Bar is such that by the nature of its structures it develops an independence of mind, an integrity and spirit that becomes second nature. Its members are trained and become accustomed to guard against injustice, to question authority and to speak up for the disadvantaged. This is truly a wonderful thing for a democratic country, and it is a pity that it is not more widely recognised and understood. But these matters underpin the need to maintain and preserve those structures.

My last point is the need to be vigilant to ensure that there is continuance of the structures and attitudes that I have described. In this context I wish to say something about the technological developments that have brought a major change to the practice of the law. To my mind, the greatest challenge that these represent is the tendency they have to allow the places of work of barristers to become more spread out. This effect is exacerbated by the huge increase in the numbers of barristers which has caused a loss of collegiality in the Bar as a whole.

One of the foundations of the Bar is the strong discipline that convention exercises over the behaviour of its members. Critical to this is that wrongdoing by a member should become known early and by many. I think I still suffer withdrawal symptoms from not having the daily injection of malice I used to receive from the daily visit to the Bar common room. This important feature of Bar life will be lost if technology and size result in large numbers of barristers working at home or in disparate and scattered venues.

In conclusion, I have noticed that many in this country take our way of life and our rights and freedoms for granted. I have personally, in my lifetime, seen rights of this kind be eroded gradually but fundamentally. It is the task of the Bar to guard against this happening in Australia. It is necessary to guard the ramparts well.

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1 Galanter, 'Dining at the Ritz: Visions of justice for the individual' in Stacy, H and Lavarch, M (eds), *Beyond the adversarial system* (Leichhardt, NSW, Federation Press, 1999), p.118

2 *The Lawyer*, 26 June 2000

3 Galanter and Palay, 'Large law firms and professional responsibility', in Ross Cranston, *Legal ethics and professional responsibility* (Oxford, Clarendon Press, 1995), p.190

4 ibid, p.191

5 Duman, Daniel, *English and colonial bars in the nineteenth century* (London, Croom Helm, 1983), p. 145

6 Galanter, op. cit., p.191

7 Quoted in Beaumont, B A, 'Legal change and the courts', Keynote address to the Australian Law Teachers Association, July 2000