Protecting our interests: The proper role of the Bar Council

By Anna Katzmann SC *

Conflict of interest is antipathetical to barristers. We have rules that require us to refuse a brief or instructions to appear in cases of potential, as well as actual, conflict of interest. Yet, increasingly our professional association is being pushed in a direction where conflicts of interest may arise. At the same time, publicly, conduct that accords with or advances our interests is criticised or marginalised, if not ignored, because it is said to be motivated by self-interest. How do we reconcile our public interests with our private concerns? Does the present system of professional discipline afford the best protection for either?

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I have long been troubled by the public perception, fostered, if not created, by the popular media outlets, that the opinion of a barrister on a question of law reform is of little value because it is tainted by self-interest, for example where one outcome is to deprive or restrict the citizens' right of access to the courts or to receive legal advice. After all, no-one thinks twice about a builder who advises on rectification works that might be necessary as a result of another builder's activities although he has an obvious financial interest in recommending the works. The problem is exacerbated by the inclination of political parties to follow or pre-empt the views of the popular press.

Recently, in his contribution to the collection of essays published to coincide with the centenary of the NSW Bar,[1] the Director-General of the Attorney General's Department, Laurie Glanfield, insisted that a clear distinction must be drawn between 'issues which have no appreciable self-interest and those which have the capacity to give rise to a conflict of public and personal interests for barristers.' He cited such topics as mandatory sentencing, police powers and human rights and foreign policy questions as examples of the former and matters relating to fee scales, alternative dispute resolution and professional entry requirements as examples of the latter. He wrote that to the extent that lawyers are heard to speak more of the latter than the former then 'the impact of the lobbying is lost for the motives are automatically anticipated as being of self-interest.'

In spite of the public perception, however, the real problem for the Bar Association is not self-interest. There is nothing inherently wrong with individuals who have a common interest combining to advance that interest. Indeed, that is the essence of community and social organisation. Wherever the self interest of the association or its members accords with a wider community interest, the voice of the association is likely to attract greater attention. That stands to reason. Yet, merely because there will be other issues where self-interest is apparent, we should not feel inhibited from speaking out and otherwise acting in support of our members. It is likely, however, that the methods we use will differ according to the extent to which our interests coincide with the interests of others. Yet, the real problem is not self interest but conflict of interest.

At the conclusion of his speech at the 2002 Bench and Bar Dinner David Jackson QC questioned whether the association could adequately perform all the disparate roles it presently occupies. Justin Gleeson SC took up the issue in his last editorial in this journal. Undoubtedly the question has been raised in the context of the special powers conferred on both the Bar and the Law Society councils with the introduction in 2001 of Part 3 Division 1AA of the *Legal Profession Act 1987*.

This conflict of roles, however, is not new. From the outset the Bar Association has not been a mere 'trade union.' Indeed, until the establishment of an independent commissioner, all disciplinary matters were dealt with internally or via application to the Supreme Court with the association discharging the role of prosecutor. The difference in recent times is that the Bar Association is now required to investigate, prosecute and decide whether its members may practice. The 2001 amendments to the Legal Profession Act effectively transformed the council of the Bar Association into what Justin in his editorial aptly referred to as judge and jury.

The objects of the Bar Association are set out in detail in its constitution. They include promoting the administration of justice, maintaining and improving the interests and standards of local practising barristers, promoting 'fair and honourable practice amongst barristers' and suppressing, discouraging and preventing 'malpractice and professional misconduct,' assisting members and ex-members and generally doing all things that it is thought might assist local barristers.[2]

On their face there is no necessary conflict between these objects. However, the proper role that the Bar Association has of protecting and promoting the interests of its members in individual cases is arguably at odds with the role its governing body, the council, now has in deciding whether its members are unfit to practice. An association member falling on hard times may seek the assistance of the Benevolent Fund, the trustees of which are the Bar Councillors, the same individuals who may move to cancel the member's practising certificate that may have been actuated by the same circumstances that prompted the claim on the fund. The Bar Association provides legal assistance pro bono for those who can't afford it and association members advise and appear for others who are being

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investigated and prosecuted by the Bar Council. Although no application has yet been made for a member of Bar Council to disqualify himself or herself from hearing a case because of apprehended bias, it is inconceivable that bias for or against a barrister will not intrude (whether consciously or not) into the deliberations of council members. This raises a real question about the fairness of the process. Yet, the government must have recognised that possibility by reposing decision making powers in the council.[3] All these conflicting roles would seem very peculiar to a lay observer.

In his speech on the appointment of the first SCs, in a passage which Mr Glanfield cited in the article I mentioned above, the then NSW chief justice Murray Gleeson AC averted to what he called 'the confusion as to what people expect of the legal profession': regulation and de-regulation, commercialism and professionalism, free competition and price control.[4]

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That confusion is shared by our own members and promoted by government. Our members question why we devote so much time to investigating their behaviour and so little time protecting their businesses. Governments extol the virtues of competition and its concomitant business activity but cannot cope with the resultant and predictable increase in litigation and seek to shift to the profession the responsibility for outcomes of government policy that it dislikes. For example, parliament removed[5] the restrictions on advertising, MPs criticised the profession for failing to embrace the need for such a change and then complained when lawyers took advantage of the change and started to advertise.

Undoubtedly it is in our interests to achieve and maintain the highest standards of honesty, integrity and professionalism. Equally, it is in the self-interest of our members to maintain an internal investigatory system sympathetic to the demands and strictures of a barrister's life and practice. To the extent that a system that removed the professional associations from the process would put intolerable demands on the public purse it is also in the public interest to keep the professional associations involved. However, adequate protection of all these interests can be secured if the power to remove the right to practice were withdrawn.

The Bar Council's role and its powers in other disciplinary matters are different. Apart from council-initiated complaints, all complaints about a legal practitioner must first be made or forwarded immediately to the Legal Services Commissioner. At his discretion the commissioner may refer the complaint to the appropriate council. When the investigation is complete the council has no power to determine that the practitioner is guilty of professional misconduct and no power to remove his or her right to practice on that account. The power of the Bar Council is restricted to dismissal of complaints, administering a reprimand where it is thought appropriate but only where the practitioner consents and only in cases of unsatisfactory professional conduct but otherwise to referring the matter to the Administrative Decisions Tribunal where there is a possibility that the barrister may be found guilty of professional misconduct or unsatisfactory professional conduct.[6]

Under the scheme introduced in 2001 the Bar Council is not only empowered but required to refuse to issue, suspend or cancel a barrister's practising certificate in certain circumstances which it considers show that the holder or applicant is unfit to have one.[7]

The genesis of the problem I suppose is the power given to the councils to issue practising certificates which was introduced with the 1987 Act. That power includes a power to impose conditions.[8] The new provisions may seem like a logical extension of the existing powers.

However, it is one thing to empower the professional bodies with the right to issue a certificate and impose conditions and quite another to enable them to decide whether an individual should be able to ply his or her trade or, more correctly, to practise his or her profession.

The difficulties presented by the conflicting roles and the different public perceptions are matched, if not exceeded, by the disquiet and discomfort that council members feel about the obnoxious task of deciding the fate of our colleagues. In my opinion, that power should be removed.

I see no problem with the Bar Council continuing its role with respect to the issue of practising certificates, both conditionally and unconditionally, and with it continuing to supervise conditions attached to practising certificates. However, maintaining the council's power to determine unfitness to practice and to withhold or remove a practising certificate is another matter.

Either the ADT or the Supreme Court is better placed to make such decisions. Both fairness and transparency in decision-making are better served if those tasks were vested in an independent arbiter. The public is entitled to have greater confidence in the process. The barrister concerned need not fear that he or she will be the victim of any undisclosed prejudice. It might be said that the current appeal rights adequately cater for these concerns. However, an appeal with the inconvenience and costs it involves is a poor substitute for getting the process right in the first place. The council can still carry out its investigative role and make recommendations in the same way it carries out its ordinary disciplinary functions but it should be divested of the powers to make a final determination of unfitness to practice and to impose sanctions that prevent a barrister from practising.

1 *No mere mouthpiece: Servants of all yet of none*, edited by Geoff Lindsay and Carol Webster (Butterworths, 2002)

2 For a full account of the objects of the association see cl 3 of the Constitution of the Bar Association reproduced in full at http://www.nswbar.asn.au/Public/About%20us/Content_about.htm

3 The position of the Bar is more vulnerable to criticism than that of the Law Society because of the comparative sizes of the two branches of the profession. Because there are vastly more solicitors than barristers, there is likely to less familiarity between the council and its members and hence greater objectivity in the process of decision-making than there could ever be in the case of the Bar.

4 3 December 1993, cited in Lindsay and Webster, *op cit* at p 46.

5 Against our protests

6 See Part 10 *Legal Profession Act 1987*.

7 Part 3 Division 1AA.

8 See Part 3 Division 1.