No public benefit in single-member corporations model

By Phillip Boulten SC

At its essence, practise as a barrister involves independence. All of us at the private, independent bar are sole practitioners – employed by no one, in partnership with no one and bound by the cab rank rule. We are different from solicitors. We play a different role to solicitors. The justice system would be very different without independent barristers.

The basis of our practice has been developed over centuries. Because we are not bound professionally to any other person or entity we exercise our skills and abilities for the benefit of our clients, no matter who they are or what they have done. Solicitors are free to decline to act where we are required to act.

Yet, the pressure of the legal market has led to major changes to barristers' practices in England where barristers can now initiate and conduct litigation and form corporations for the purpose of contracting legal services – especially legal aid services. Barristers can even form associations with solicitors and other non-barristers to allow the pooling of risks and resources. It is a brave new world for English barristers.

Time will tell whether these changes deliver public benefits but they are clearly aimed at reducing the costs of legal services and making barristers' practices flexible and efficient.

What seems clear is that the only rationale for this model of incorporation is to reduce barristers' exposure to tax. No other policy is advanced by the move.

Our association's Practice Development Committee has considered some of these English proposals without formulating a decided or committed view about their utility. It is inevitable that the Bar Council will need to consider various aspects of barristers' practice.

In the moves over the last few years to establish a national set of Barristers' Rules and a national legal profession, the New South Wales Bar Association fought hard to maintain the existing concept of an independent bar bound by the cab rank rule, separate and apart from legal practice as a solicitor. Inventive new structures have not been on the bar's horizon.

But now sufficient members have signed a petition requisitioning a general meeting of the Bar Association to consider a resolution calling on the Bar Council to amend the Barristers' Rules to permit barristers to offer services through a single-member, sole director company. I oppose this move.

The general meeting will be held on 17 September 2013. I trust that the meeting considers the issues carefully. Prior to the meeting the Bar Association will distribute three legal opinions that the Bar Council has sought on the issues.

What seems clear is that the only rationale for this model of incorporation is to reduce barristers' exposure to tax. No other policy is advanced by the move. No one is suggesting that single-member corporations will provide more work opportunities for the bar or that they will cut the costs of barristers' services or that they will lead to a more efficient administration of justice.

To my mind, cutting barristers' tax payments is a wholly unacceptable reason to seek a change in the rules and to convince the government to make the necessary amendments to the *Legal Profession Act 2004* to achieve this objective. If we are going to attempt to change the basis of practice at the bar, we ought to do it to deliver a clear public benefit.

If we are going to attempt to change the basis of practice at the bar, we ought to do it to deliver a clear public benefit.

To actively seek these changes on the basis of tax minimisation would endanger the standing and reputation of the bar with the government, parliament and the community as a whole, particularly at a time when the Bar Association is pursuing improvements to legal aid funding in the public interest.

In the past the Bar Council sought advice about the tax advantages of such a scheme. They are not obvious. Recent advice that will be circulated emphasises that there is, in fact, no material tax advantage conferred by the proposed model. Nor is there any other advantage. Rather, profits made by such entities are likely to be the subject of a determination under Part IVA of the *Income Tax Assessment Act 1936*. This is unsurprising where the sole purpose of incorporation seems so obviously to be to obtain a tax saving.

Recent advice that will be circulated emphasises that there is, in fact, no material tax advantage conferred by the proposed model.

The proposal would not only require amendment to the New South Wales Barristers Rules, but also significant changes to the Legal Profession Act and the upcoming national legal profession legislation.

Further, the proposed changes would not be of any assistance to those members of the bar in government practice, such as Crown prosecutors and public defenders.

In these circumstances it would be intolerable for the leaders of the bar to change the Rules, seek to have them gazetted and then advocate for changes in the Act for this purpose. If alternative practice structures are to be considered and advanced, it must be for a better reason.

On a completely different note, I am pleased to advise that the Australian Bar Association and the Law Council of Australia recently resolved to run a joint campaign to bring national attention to the appalling rates of imprisonment of Indigenous Australians. The campaign will involve advocacy of justice reforms, the adoption of strategies to prevent incarceration, the establishment of restorative justice models in each jurisdiction and the reform of harsh sentencing laws – such as mandatory sentencing – that work disproportionately to the disadvantage of aboriginal communities.

Much work needs to be done. The onus will fall heavily on our bar to both develop and then advocate appropriate policies that will make a difference.

Meanwhile, the Bar Association is continuing its fight against the New South Wales Government's proposed changes to the motor vehicle accident scheme. Andrew Stone and the Common Law Committee have had remarkable success in convincing members of parliament that the current proposals seriously disadvantage many people who are injured in motor accidents. More work is ahead on this issue but the bar is leading the debate.

Phillip Boulten SC
President