

# Don't be a d\*\*\*head

(The Ethics edition)

Ingmar Taylor SC

In this special edition *Bar News* examines what constitutes ethical practice.

As the Hon T F Bathurst AC QC identifies in our lead piece, compliance with ethical obligations is critical to ongoing respect for the administration of justice and the rule of law.

The days when a barrister could obtain an 'ethical ruling' from a silk have gone. But it remains common (and sensible) when faced with an ethical dilemma to seek advice from a senior member on a Professional Conduct Committee. How are these questions to be answered?

Bathurst QC's conclusion is that while it is possible to learn the Barristers Rules by heart, what is really important when considering whether particular conduct is or is not ethical is to ask first, would it be regarded as such by your peers and, second, would it or would it not have the tendency to bring the administration of justice into disrepute or lessen public confidence in the administration of justice?

## Ethical practice - bullying, discrimination and sexual harassment

A particular area of inappropriate conduct that the Bar Association has focussed on in recent years is bullying, discrimination and sexual harassment by barristers.

To that end the Bar Association has recently released updated Best Practice Guidelines. As Winnie Liu explains, the guidelines assist chambers and floors to adhere to relevant laws, including the Barristers' Conduct Rules, by adopting policies that aim to eliminate and prevent all forms of unlawful harassment, discrimination, vilification, victimisation and bullying. The guidelines also provide a framework and options for dealing with complaints.

Another development is examined by David Townsend in *A fifth pillar for CPD*: the Bar Council has recently resolved to



recommend that a fifth CPD category be mandated, which would see all barristers complete at least one hour of CPD training focussed on anti-discrimination, harassment and bullying every year.

The need to adopt appropriate policies and guidelines is more important in light of changes to the *Sex Discrimination Act 1984* (Cth), which extend its prohibitions on sexual and sex-based harassment to barristers, as discussed in the article by Penny Thew and Justin Hogan-Doran SC. Noting the existence of accessorial liability for such conduct, the authors suggest that senior counsel and senior juniors now find themselves under an obligation to act if sexual harassment comes to their attention, lest they be accessorially liable for not preventing, or by allowing, the situation to continue.

Advocatus explains why sexual harassment is properly viewed as a breach of ethical standards:

Conduct that involves bullying, harassment and discrimination is often discreditable to a barrister. It frequently involves dishonesty, particularly when a barrister seeks to deny it or cover it up. It is definitely likely to bring the legal profession into disrepute, because, put crudely, people expect barristers not to be d\*\*\*heads.

## The Bar Association's role in regulating the ethical conduct of its members

At a bench and bar dinner many years ago David Jackson QC compared the Bar Association to a trade union, and asked: shouldn't it be supporting a member who is the subject of a complaint, rather than determining the complaint?

If it were a trade union the Bar Association would boast the best membership density of any in the country. At 98.7% of all practising barristers, it would leave the CFMMEU's construction division in the shade.

In regulating its members, the Bar Association carries on a practice common to forerunners of trade unions, craft guilds. Medieval craft guilds set quality standards and policed their members' professional practices. Members could be brought before a guild court, and fines levied for a breach of guild rules and standards.

Farid Assaf SC's article titled (in part) *A truncated history of the medieval origins of barristers' ethical obligations* reminds us that the bar grew out of something akin to a guild. In the 14th century it had 'apprentices' (Assaf QC: 'what we now refer to as the junior bar'), and ethical duties which included a ban on acting for both parties (being 'an ambidexter'), and from making proffers at the bar that were baseless or involved slander.

As David Jackson QC identified, the Bar Association spends a lot of time focussed on actively investigating and determining complaints against its own members.

The most complicated civil penalty proceeding will be decided by a single judge, or possibly up to 11 judges if it goes all the way to the High Court. In comparison every professional conduct matter is considered by 40 barristers (19 at the PCC stage, 21 at the Bar Council), including around 15 silks, plus three community members (at the PCC).

Michael Izzo SC's article *The work of PCCs* sets out the life cycle of a complaint. Complaints are made to the Legal Services Commissioner who refers most complaints against barristers to the Bar Association. They are then allocated to one of four Professional Conduct Committees, each made up of 19 barristers and three community members.

In 2020-21 the Bar Association dealt with 120 complaints, 58 made in that year and 102 made in previous years. 69 of them were determined that year, of which nine resulted in a caution or reprimand; and three were referred to NCAT.

A member of the PCC prepares a report as to whether the complaint ought to be investigated. If the PCC so decides the member then obtains relevant information from the barrister and complainant and prepares a second report with a draft recommendation. Once approved by the PCC it is sent to the barrister and complainant for comment. A further draft report is then prepared and considered by the PCC. Having satisfied themselves that it is appropriate, the report with its recommended outcome is then forwarded for determination by the Bar Council. About 50% of time spent in Bar Council meetings involves professional conduct matters.

Members reading Izzo SC's article are hopefully comforted by the fact that even the simplest complaint will involve many many hours of combined barrister time, in investigation, report writing and consideration.

Ian Denham acts for barristers who are the subject of professional complaints. He writes:

Being subject to a professional conduct complaint is almost a professional hazard, given the situations in which barristers act, where rights are being argued about and determined and where people feel very strongly about the outcome.

*When considering whether particular conduct is or is not ethical ask, first, would it be regarded as such by your peers and, second, would it or would it not have the tendency to bring the administration of justice into disrepute or lessen public confidence in the administration of justice?*

Denham's article contains some excellent advice as to what to do if you are the subject of a complaint, the most important being to involve colleagues or a solicitor to attain a degree of objectivity in any response to a complaint.

#### **Ethical issues**

This special edition has a number of articles that explore different aspects of ethical practice.

Talitha Fishburn writes about Barristers and advertising. Simon Phillips deals with *Ethical issues arising when communicating with the court and opponents online*. Douglas McDonald-Norman and Brenda Tronson examine conflicts of interest in two contexts: an application for a personal costs order against a barrister, and holding confidential information. Kavita Balendra writes about Christeas and the limits of friendship between barristers and judges.

In Mark Steele SC's thought-provoking piece titled *The ethics and practice of witness preparation* he identifies the risk that 'the process by which a witness statement is prepared can distort or corrupt that witness's recollection.' He refers to a seminal study that involved participants viewing a video of a traffic accident and being asked to estimate the speed of the car. Those who were asked how fast it was travelling when it 'smashed into' the other car estimated a speed 25% higher than those who were asked how fast it was travelling when it 'connected' to the other car (and produced recollections of broken glass on the road when there was none).

Should we have a rule, as there is now in the UK, prohibiting interviewers asking witnesses leading questions when interviewing them? What ethical issues arise when witnesses are shown documents to 'refresh' their memory?

#### **Interview with Bell CJ**

Our last edition went to print just after the elevation of the Hon A S Bell to Chief Justice of New South Wales. This edition carries an interview with his Honour in which he spoke candidly about his plans for the court and his hopes for the bar.

On the latter subject Bell CJ expressed disappointment at the relatively small number of people voting and standing for Bar Council over the last two years.

I am concerned about that because the Bar as an institution is very important. It has to thrive and that is what lies behind a lot of my outspoken statements about people coming back to chambers, people participating in the corporate life of the Bar as opposed to just being focussed on their own cases.

#### **Brennan CJ**

Our cover, front and back, honours the life and service of Sir Francis Gerard Brennan AC KBE GBS, tenth chief justice of the High Court.

As Chief Justice Bell said, Sir Gerard was the personification of decency and a man of deep principle, fierce intellect, profound empathy and strength of character. It is fitting he is on the cover of this special ethics edition. **BN**