

## **Bar Association of Queensland Annual Conference 2012**

### ***Practice at the Bar – what has changed and what remains the same***

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It is to be expected that the Bar in Queensland will experience change. The society within which it operates is not static. Some changes may be structural, such as the emergence of a national legal profession with attendant regulation. Some are evident in the day to day practices of barristers and concern the very nature of the work of the Bar. Yet some features of the Bar are so fundamental that they cannot be allowed to change, for they define the Bar as a profession. Without them the Bar comprises a group of people who conduct law as a business.

The theme of this Conference, "Practice in the Modern Era", invites comparison with the past. In looking back I shall attempt to avoid the rosy spectacles of nostalgia.

The most obvious changes in recent times are the physical changes – to the places where barristers practise and the conditions in which they practise. The offices of the Bar Association of Queensland have also undergone a transformation. I take this opportunity to congratulate those who were involved in their planning and design. They have certainly taken offices out of the mundane and created something which is elegant yet functional.

Some groups of barristers in Brisbane, both old and newly formed, have relocated to new buildings in Turbot Street. In this respect the spread of chambers is not so different from what it was in 1975, when I was called to the Bar. In the 1980s there was an exodus, led by some fashionable silks, to the then new MLC Building, now the Hitachi Building. This heralded a new and much higher standard of accommodation, commensurate with that adopted by the larger solicitors' firms. The standard perhaps reflected a self-perception of lawyers generally, and the Bar in particular, as successful.

The Queensland Bar then comprised only some 212 members. The regional Bar was small and was centred in Townsville and Rockhampton. There are now 859 members practising out of Brisbane. The regional Bar has grown steadily, particularly over the past 10 years or so, to 223 members.

Given the then size of the Bar, it is easy to understand why my generation recall the Bar being especially collegiate. The Bar tended to socialise more, I think. Senior members of the Bar were readily accessible to younger barristers and took an interest in them. Some of them took the trouble to provide relatively new barristers with work of some kind. Such work might take the form of "devilling", or preparing a draft of a simple advice for a (small) proportion of a senior's fee; or taking a "straw brief", which involved no fee but which allowed a new barrister to sit in court and learn court-craft firsthand.

These days the focus appears to be more upon barristers forming themselves into relatively self-contained groups; with an inbuilt hierarchy of senior counsel, more experienced juniors and very

junior barristers. There are no doubt cost efficiencies and other benefits in barristers organising themselves in this way, but I would hope that the Bar, particularly the younger members of the Bar, is able to mix more widely. Here the role of the Bar Association can be important – in providing the opportunities for the Bar to get together in circumstances which encourage some familiarity and expose the younger members to those more senior, in order to maintain something of the collegiality of the Bar which was its hallmark in the past. This conference is an example of such an occasion.

Clearly the most profound change which has affected the Bar is to the nature of the work undertaken by barristers. I speak of course of Alternative Dispute Resolution ("ADR") and in particular mediation which has, for many at the Bar, become a significant part of their practice. It is a fact that in the earlier period at the Bar of which I have spoken, practice at the Bar was largely concerned with appearing in court. That was its great attraction. Now a barrister requires a mix of skills.

There was sufficient work, in the late 1970s and the 1980s, at all levels of courts, to provide something of a training ground for young barristers. New barristers learned basic trial skills in the Magistrates Court – doing mostly motor vehicle accident cases of small monetary value, for a correspondingly small fee. Matters heard in Chambers in the District Court provided a grounding for the more complex work in Supreme Court Chambers, where young barristers would often have their first chance to work with a silk. However, if you were not briefed to appear with a silk, their appearance on a Chamber day was not very beneficial, for the seniority rule was strictly applied and the most junior barrister might not be heard until 4.00 pm and sometimes not even until the next day.

There was no shortage of trial work. It is worth reminding ourselves that a long trial then was about four days. In the identification of the factors which were productive of shorter trials than those of today, the finger is often pointed at the development of more efficient methods of storing and reproducing documents. But however efficient the technology, machines cannot be entirely to blame. They do not run themselves. Their overuse may be the result of a non-discriminating mind.

It may also be suggested, again rather simplistically, that society and therefore litigation was not so complex. This contains a seed of truth. But I believe the approach to litigation was different in a key respect. Lawyers – solicitors and barristers – tended to run trials on what were the real issues in dispute, the issues which would be productive of success. This may in large part have been the result of there being so much litigation that it was not considered fruitful to cogitate on numerous possible alternative pleas when there was a clear path home. Or it may have been the result of a mindset.

In any event, the result was that briefs were not then delivered on trolleys. Some care went into the preparation of a brief to counsel, including the reduction, not the proliferation, of inessential documents. So serious was the drawing of a brief taken that some solicitors were prepared to pay very junior counsel to prepare them – at least those to be delivered to Peter Connolly QC. I should add that their principal motivation was to avoid having an inferior brief returned to them in the most direct manner. (It is difficult to imagine how briefs today could be thrown.)

ADR is a relatively recent phenomenon, but it has changed the way litigation is approached and it has changed the work of the Bar.

ADR, more particularly mediation, was introduced partly as a response to the courts being overwhelmed with civil trial work, so much so that trial dates could often not be obtained for some years. The number of judges, who could deal with this perceived "blow-out" in litigation, had not

been substantially increased for years. It was also said, somewhat paradoxically given the flood of litigation, that the cost of litigation had become prohibitive. To those factors it may be added that there were some who believed that it was preferable for society that people attempt to resolve their disputes by negotiation where possible. No one could gainsay this.

Thus, ADR was intended to encourage a conciliatory approach to disputes, to weed out those disputes which did not warrant the full scale adversarial processes of a court, and to reduce the pressure on the resources of the courts.

The skills required for mediation differ from those required of an advocate, although some qualities of an advocate are no doubt useful in mediation. It is to be hoped that barristers remain conscious of this and that in the regular conduct of mediation they do not forget the very different skills required for a courtroom.

No one could suggest that a mediated outcome is not of benefit to all parties. At a personal level, they are spared the not inconsiderable stress of litigation. But assessing the other benefits of mediation requires comparison against some kind of benchmark, and the most obvious is the likely outcome of litigation, taking into account the attendant risks and the costs associated with it. In that sense, litigation is never entirely out of the picture.

The process of litigation does not of course allow lawyers as much input into the outcome as does mediation. The shape of litigation is influenced by the decisions taken by lawyers in framing a case, selecting witnesses, and the like. But the outcome of a case is not assured and all the advocate's skills must be brought to bear to achieve the best outcome for the client. In mediation, lawyers, in their capacity as mediators or advisors, are in a stronger position to influence or determine the outcome. Care must necessarily be exercised by them to ensure that the decision ultimately taken by the parties is theirs.

A barrister acting as a mediator may lose some of the essential characteristics of a barrister in conforming to the role of a mediator, whose task is to facilitate an outcome where possible. A barrister giving advice to a party to a mediation is in a different position. Here the barrister must fulfil the fundamental obligations of the profession – to give balanced, objective and independent advice, which is to say advice which is not committed to achieving an outcome.

There will always be some cases where litigation is likely to produce greater remedial benefits for a client than mediation. The obligations variously imposed upon barristers to consider mediation are not intended to create a mindset which rejects litigation as a method of resolving a controversy in every case. However, the reality is that the cost of litigation and the risk of exposure to an order for costs are significant, sometimes insurmountable, hurdles to a recommendation that litigation be pursued. In this regard nothing has changed. The cost of litigation has been on the agenda since the 1980s. It must be acknowledged that the number of competing interests which seek to be protected appear to be such as to deny the possibility of a solution to the issues surrounding costs. It is not apparent whether any real determination to effect change remains, or whether the high cost of litigation is now simply accepted as a fact, about which nothing will be done.

In making this comment, I do not undervalue the significant contribution made by the Bar and by solicitors' firms to pro bono work. But pro bono work was undertaken principally to meet the progressive withdrawal of funding of legal aid by federal and State governments. It is not an answer to the problem of the cost of litigation. I was interested to hear that the new Commonwealth

Attorney-General has spoken of revisiting funding arrangements for legal aid<sup>1</sup>, but there is nothing to indicate fundamental change is in the air.

There has been no shortage of discussion over the years about costs. I do not pretend to have the answers, but there are clearly some features of litigation practice which cry out for comment. Two of which I shall speak are inter-related: the identification of the real issues in dispute and discovery.

Discovery is now commonly a large endeavour, engaging the efforts of many, with attendant costs and delays to the process of litigation through the courts. I have only on a very few occasions seen a crucial document emerge during the course of trials, and even then that did not occur as a product of initial discovery. Perhaps the time has come to ask whether discovery is worth its cost.

The Australian Law Reform Commission has recently published a report on the management of discovery<sup>2</sup> and the Australian Institute of Judicial Administration and the National Judicial College of Australia have recently conducted a Seminar devoted to the topic. These are but a few dialogues about the problem. One of the threshold questions posed in the Seminar was whether discovery is required at all. It was suggested that, if it is, the question may be how to ensure that the time and cost associated with it are proportionate to the matters in dispute. That suggestion, that cost and benefit need to be measured, points to the problem rather than its solution. An approach which is both principled and practical is required. The very basis of discovery, including notions of relevance, requires reconsideration. A widely stated obligation to discover encourages uncritical minds to be brought to the task of discovery.

A number of reasons have been advanced as to why trials are now more complex and therefore lengthy and costly. We might begin by asking ourselves whether the fact that so much more litigation is complex should be accepted. Is it truly the case that the nature of litigation has altered so much, or is it the approach lawyers take to it that is productive of less simple, and direct, courses of action being taken?

It may be accepted that the sheer volume of statutes, particularly in the federal sphere, has added another dimension to litigation in the last 25 years or so. And I accept that within that period there was a time when it seemed that some areas of the law were in a state of flux, thus reducing a lawyer's ability to predict. But factors such as these cannot really account for the shape which cases now take. That inevitably comes down to fundamental decisions about pleading. It has been obvious to judges for a long time now that there is a habit which has been growing in the profession of pleading multiple causes and creating unnecessary issues.

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<sup>1</sup> Attorney-General's Office, "Review of legal assistance services" (Press Release, 30 January 2012).

<sup>2</sup> Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115 (2011).

As I was revising this speech I chanced upon some observations made by the Chief Justice of the Federal Court of Australia in a judgment involving a regulator, who should of course be an exemplary litigant<sup>3</sup>:

"I should note here that, at trial and in this Court, the case was complicated by [X's] presentation of a number of arguments. Some of these arguments are strong, while others are not. The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues in the case."

The arguments to which his Honour referred followed a pleading entitled "Further Re-Amended Second Substituted Statement of Claim". Polite comments such as his Honour's are likely to mask the very real sense of frustration of judges when faced with a hydra-headed pleading of, say, 200 paragraphs, densely cross-referenced, which require the best part of a day to deconstruct, when they know full well that somewhere in there is a fairly straightforward claim or claims. That will be the claim which provides the basis for the judgment. Proof of the relative narrowness of most cases lies in the law reports. The cases reported rarely reflect the complex pleading which commenced them. Mostly the courts will discern the real issue – after much time and effort in court and out – but there is always a chance that the real issue will be lost sight of.

Pleading unnecessarily complex cases may result from too much input from too many people. Effective pleading requires someone to be in control, to take responsibility for the outcome. This was the intention of the rules of court which require the pleader to be named. The practice does not make litigation, for the client, the lawyers or the court, easier or any more likely to be successful. Yet there appears to be a growing reluctance by pleaders to make hard decisions and limit a case to its essentials.

What I have said about the standard of professionalism and independence required of a barrister in the conduct of litigation is something that cannot change if the Bar is to endure. Dixon CJ went so far as to say that a counsel (and I quote) "who brings his learning, ability, character and firmness of mind to the conduct of causes and maintains the very high tradition of honour and independence of English advocacy, in my opinion makes a greater contribution to justice than the judge himself."<sup>4</sup> It is not clear what inspired Sir Owen Dixon to such uncharacteristic raptures. I am more disposed to judicial restraint on this subject. Yet it must be acknowledged that a case well framed and presented – by the identification of real issues, to which relevant evidence is led and which is followed by succinct and well researched argument – is of enormous assistance to courts. But that is not the only reason why judges such as Sir Owen Dixon have been moved to speak in this way. It is in large part because judges recognise the importance of the role of the advocate in an institution which is fundamental to our society. Members of the Bar should not lose sight of this.

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<sup>3</sup> *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 at 371 [16].

<sup>4</sup> Woinarski (ed), *Jesting Pilate*, 2nd ed (1997) at 247-248.

Practice in court has altered markedly over the years, by the decline of oral argument. Much has been said on this topic. The impression sometimes gained is that the mastery of written outlines of argument distracts attention from the presentation and structure of oral argument. Yet the two methods should work in tandem. The High Court has recently introduced a requirement of a very short outline which is produced prior to commencement of oral argument<sup>5</sup>. This appears to provide a helpful guide both to counsel and to the Court in following argument, which often used to depart from the longer written argument, which had been prepared some time before the hearing.

As to the oral aspects of evidence, I shall say only that not all judges are convinced of the usefulness and efficiency in all witnesses' evidence-in-chief being given in writing. The skills required for the taking of evidence-in-chief are considerable, as are those for cross-examination, and the risk is they will be largely lost if the current method is utilised in nearly every case.

The appointment of silks is in question again. On this subject it may also be timely for the Bars in Australia to consider what the appointment means – not for the individual – but for the Bar. This may be especially important if the Bar is to continue to seek a role for the judiciary in the process of appointment.

The appointment of senior counsel is not just an acknowledgement of a person's ability. It is an acknowledgement by the Bar and judiciary that a person has qualities of leadership. A senior counsel is intended to lead others in court, and to be a leader by example at the Bar – by participation in matters affecting the Bar, and by their encouragement and advice to the very junior at the Bar.

The two counsel rule was useful to define the role of a senior counsel as a leader. It was accepted that a person appointed as senior counsel would ordinarily only appear in matters which warranted two counsel. The abolition of the rule permitted a senior counsel to appear alone, in a case where a senior counsel was, but a junior counsel was not, essential. But this could not alter the expectation, arising from the history of the institution of senior counsel, that they would not appear alone. To do so regularly would diminish the perception of that person as a leader.

There is emerging in Australia, but I believe less so in Queensland, a practice of senior counsel appearing together. This may present a contradiction, at least for the one who is being "led" by another, usually more senior, senior counsel.

It must of course be acknowledged that there have always been cases which are so large and complex as to require more than one senior counsel. In such cases labours are often divided by reference to discrete issues. There may be occasions where a newly appointed senior counsel may feel obliged to conclude a matter which he or she commenced as a junior. But I am not talking here of such cases. The current practice extends well beyond these. The practice would seem to diminish the basis for appointments to a mere recognition of a level of ability. If that be so, the question is, whether that is sufficient for its retention.

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<sup>5</sup> *High Court Rules* 2004, r 44.08.1.

The role which senior counsel can have for junior members of the Bar was evident when so many women senior counsel were lost to the Bar on their appointment to the Bench soon after they took silk. The acceptance of an appointment is not the issue. It is difficult to decline such an appointment. Those appointing do not, however, have the welfare of the Bar in mind. The result was to deny to younger women and men at the Bar the benefit of the presence and models of senior women barristers.

In the course of preparing this speech I read what others have said on occasions such as this, when reflecting upon changes which have occurred to the Bar. One theme which emerged from speeches to Bar Associations in the USA in the last century was the sense of loss of the former public influence that lawyers had. Lawyers were influential in times past in Australia. The part they played in the drafting of our Constitution is an example. This may not be so much the case now, except for lawyers who become politicians (and there is certainly no shortage of them, it seems). And in former times influence was more likely to have been wielded by particular individuals, like Sir Samuel Griffith. Now the Bar Associations speak for barristers and it does so often, in commenting on matters such as legislation, the judiciary, the regulation of the profession and intrusions into civil liberties.

Little, if any, acknowledgement is given for the considerable work carried out by the professional associations, or for the considerable work undertaken, even by the most highly paid senior counsel, pro bono. These are contributions made, collectively and individually, to society. They acknowledge that the Bar understands the importance and responsibility of its part in that society. To my mind, there is no need for barristers individually to undertake a greater public role. There is no greater contribution that a barrister can make than to maintain the Bar's standards of professionalism, integrity and independence. That is how the Bar continues to be relevant. In those respects, practice at the Bar must remain the same.