W(h)ither the Bar?

Murray Tobias Q.C. addressed the future of the Bar at the ABA Conference held in July 1994.

W(h)ither the Bar? - the title of this paper postulates two questions. The first, will the Bar survive? The second (which can only be relevant if the first is answered in the affirmative), what is the Bar's future: in what direction is the Bar headed?

In short, my answer to the first question is, yes, the Bar will survive notwithstanding the attacks upon it from without, and, I should add, from some elements within. The answer to the second question is, I think, more complex. There is no doubt that the Bar is undergoing change but it is a change for the better. It is change which will ensure the Bar's survival and, in particular, its continued relevance. So the direction in which the Bar is headed is upwards but our progress rests on our willingness to jettison those things about ourselves which are irrelevant to our survival but detract from our image and the positive aspects of our functions.

But why change? It is unnecessary at this point of time to chronicle the attitudes of solicitors, the media, politicians and the public towards the profession in general and the Bar in particular. They are well known. Regretfully, few are interested in the positive contribution which the independent Bars play in the due administration of justice. We receive no brownie points for the pro bono work we perform; we receive no credit for the fact that for decades the common law Bars have been accepting personal injury cases on a "no win, no pay" basis; we receive no recognition of the massive amount of voluntary time, energy and skill that we devote to the airing of issues of public importance involving the administration of justice and the law generally. Thus, for example, no politicians, least of all those in opposition, are prepared to acknowledge the unpaid assistance we provide to them by commenting upon draft legislation, Government reports or discussion papers. Our comments enable them to publicise any injustices which such legislation or reports might perpetrate upon those who can least defend themselves. Yet, those who criticise us are the first to seek our assistance when they themselves are in trouble and that, of course, includes the Government of the day and those individuals who constitute it!

"... Those who criticise us are the first to seek our assistance when they themselves are in trouble..."

We are told in practically every press or media report about the greed of barristers; we are informed that we all earn $7,000 per day, 365 days per year; we are told that we are elite, arrogant, rude and insensitive. Stereotypical attitudes abound!

At the conference of this Association held in London in July 1992 the problem was put thus by Sir Anthony Mason:

> "The plain fact is that, in contemporary society, people are not prepared to accept at face value what professional people tell them. That attitude, coupled with the ostensible shortcomings of the legal system, has generated a debate about the legal system which is quite fundamental in its reach ... The virtues of an independent Bar are not as widely accepted as they used to be ..."

In that address the Chief Justice went on to extol the virtues of an independent Bar. Recognising the idealism and the concept of public service which were its basic tenets and calling for their conscious renewal, he nevertheless exposed the Bar's current vulnerability in this cryptic message:

> "Unfortunately, the public perception of the Bar does not match the Bar's perception of itself."

Why has this happened? How has the Bar's image and status in the community suffered such a decline?

I believe it is primarily our own failure. For over 20 years, certainly in New South Wales - but I suggest right around Australia too - the Bar has failed to address the increasing questions in the community's mind about its function and attitudes. Often we have not even recognised that such questions existed - or if we perceived the doubts, dismissed them as unimportant or irrelevant. We failed to join in the public debate. Worse, too often we let it be known that we held the debate in disdain as superficial or unprincipled. By this response we disparaged those who did participate. By our failure to join the debate in any substantial way, we left a vacuum for our critics to fill with distortions and inaccuracies. Much of the criticism of the Bar is stereotypical and deserves exposure for that reason alone. But, regretfully, many of the criticisms, some of which I have mentioned above, are true. We do regard ourselves as an elite, that is, as a special group of intellectuals. At times it appears we imagine ourselves untouchable. In a fashion which antagonises others, we can often appear to assume that we have exclusive right to the high moral ground. Some of our members do exhibit a tendency to greed. Unfortunately, it is they who attract the attention of the media rather than the majority who struggle to make a living or who earn no more than other professionals of their age and experience. No attention is paid to those, particularly at the criminal Bar, who are earning the bulk of their income from legal aid briefs or from briefs at fees significantly below those being earned by their less numerous colleagues at the commercial Bar. But we do have a tendency to be arrogant, rude and insensitive to our solicitors and their clients. Not unnaturally, they do not like this. What is more, they should not have to tolerate it. It is not difficult to illustrate the bad habits of barristers. We have all been guilty, at some time or other, of one or more of the following:

- dumping briefs at the last moment often because of taking on too much work or in the hope that the brief will settle (and it doesn't), or that the current case will finish before the next is due to start;
- accepting a brief and then returning it after receiving a better (and, no doubt, more lucrative) offer;
- leaving preparation to the last moment in the hope that the case will settle resulting in unreasonable last-minute demands on solicitors which should have been dealt with earlier by counsel;
- failing to read the brief, particularly before a conference to advise;

- arrogance and rudeness to solicitors and/or clients by treating them as inconsequential or even as idiots;
- overcharging including "double-dipping" where a daily fee is charged for a case which has settled and the full fee is earned for the same day on another brief.

The foregoing touches on the major matters about which solicitors legitimately complain. But there can never be any excuse for discourtesy especially where we are dependent upon solicitors for work and, ultimately, for payment.

With the increasing impetus towards alternative dispute resolution, the Bar needs the solicitors more than the reverse. Simply put, we are there to serve them and their clients. They are entitled to courteous and efficient service. The failings I have identified above involve, essentially, examples of bad manners. Each is unacceptable. Each has contributed to the attitudes now exhibited by solicitors, the media, politicians and the public towards the Bar and which, if we are to survive, must be addressed and addressed quickly. We have lost much goodwill and we must strive to recover it. I believe that we have the will to change our attitudes towards others and, if we do so, they will change their attitudes towards us. The Bar will then be seen for what it truly stands for. In changing our practices for the better, we will regain the respect of those with whom we deal. In the process, we will regain our self-respect as well as our proper, albeit privileged, position in the eyes of the community we are committed to serve.

The impetus for change, however, is not confined to our personal attitudes towards those with whom we come into professional contact. We have also been required to reform many of our practices which had for many years been a matter of resentment from solicitors but which remained unexpressed and, on our part, unnoticed.

Approximately two years ago the attitude of many solicitors in this regard changed. We were in the middle of a recession and clients were putting pressure on solicitors to reduce costs. The Bar sailed on as if nothing had happened. True, a large proportion of the Bar was also hit with the recession resulting from a general downturn in litigation in some areas. But in part our loss was the solicitors' gain. Being the first point of contact with clients, solicitors became more circumscribed in the amount of work they referred to the Bar. Direct competition for work developed between the two branches of the professions. One member of the Bar recounted a solicitor who told him:

> "The work's contracting and we want your share".

A senior silk was just as blunt when he observed:

> "Rarely now in matters which come to me after litigation has commenced do I find that a junior counsel's opinion has been obtained. Almost invariably there are, however, lengthy, and no doubt costly, solicitors' letters of advice ... someone from a large firm ... (said) that he was now occupying his time doing mainly advice work of the type that used to be sent to the Bar ... I think that the solicitor's role in mediation is the thin end of the wedge so far as advocacy is concerned ... If a client sees the solicitor arguing his cause at the mediation, he will have little difficulty in accepting that the solicitor is equipped to argue his cause in court."

It was in the foregoing context that, suddenly, we became aware of the antipathy of solicitors and their clients towards the following restrictive practices: the two-counsel rule; the two-thirds rule; the conference rule (whereby solicitors were, generally speaking and with some exceptions, required to attend conferences in the barrister's chambers); the attendance in court rule (whereby a barrister was required to be instructed in court by a solicitor or his or her clerk); the boycott rule - whereby a barrister could not appear with a solicitor - (notwithstanding that solicitors have generally had the same rights of audience before the superior courts as barristers since the turn of the century).

It was put to us that there was no justification for a silk declining to appear with a solicitor particularly in some specialised areas where the solicitor may well have as much, if not more, expertise in the particular subject as the barrister, subject only, no doubt, to the barrister's (allegedly) superior advocacy skills. We were told that it was simply insulting that barristers were prohibited from attending the offices of solicitors and that solicitors and their clients were always required to attend the chambers of barristers for conferences. Although there were functional differences between us the time had long since passed when barristers could claim any inherent superiority over solicitors. They were no longer prepared to tolerate the label - "the junior branch of the profession". Accordingly, the pressure for reform became inevitable and irresistible.

It began in New South Wales. To be precise, it commenced in early 1992 in a letter from the managing partner of Freehill Hollingdale & Page to the then President of the Law Society, John Marsden, calling on the Bar to reform approximately four of its rules. The request was met with aggressive resistance by the then New South Wales Bar Council. Yet, it is noteworthy that each of the basic reforms then called for has now been incorporated into the *Legal Professional Reform Act* 1993 (NSW). The rule prohibiting attendances of barristers at solicitors' offices has now been abolished; so has the boycott rule and the rules prohibiting direct access and advertising. In my view, we are better off as a consequence of these reforms.

I should, however, say this. The distinct impression I have is that the deterioration which occurred in relations between the Bar and the solicitors was generally confined to Queensland, New South Wales and Victoria. The relations between the independent Bar and those who practise in amalgams in the other States and Territories has always been cordial and still is. Some would say that this is due to the fact that in those States and Territories the profession is "fused". I think by this is meant that all members of the independent Bar are also members of the Law Society: further, co-advocacy has always been the rule (although becoming less so in practice) in the amalgam jurisdictions. It is said that these factors explain, at least in part, the good relations within the profession in those places. There is no doubt that the boycott rule or the prohibition against co-advocacy has bred a deal of resentment amongst solicitors in the States where that rule prevails. It is to be observed, however, that where co-advocacy exists, the co-advocate to the barrister is generally a

practitioner who has had some experience in advocacy and often as much as many junior members of the Bar. That has rarely been the case in the eastern seaboard States where solicitor advocates have been the exception rather than the rule. Today, however, more and more solicitors conduct their own advocacy in the Magistrates Courts and some, but relatively few, are specialist criminal advocates.

However, I do not believe that the antipathy that affected relations between the Bars and the Law Societies in the eastern seaboard States can be explained simply upon the basis that it would not have occurred had the profession been "fused" as in the amalgam States. That is far too simplistic. A great deal of the antipathy was generated from the larger city firms of solicitors. The Bar seems to have retained its support from the suburban and country solicitors as well as the small city firms. I think, therefore, that the reasons were twofold. The first was the effect of the recession, particularly upon the megafirms who were highly geared, especially in corporate work which suddenly disappeared. Consequently, they had to find work for many highly-trained personnel if they were not to be made redundant. That new work lay in litigation. The second reason was the attitudinal change on the part of partners of megafirms who were no longer prepared to tolerate the attitudes of many members of the Bar, especially those who still thought that solicitors comprised the junior (and, by implication, inferior) branch of the profession. Those solicitors justifiably considered that their skills and experience were equal, if not superior, to many of those who they briefed.

"There can be no justification for a rule which requires two lawyers when only one will do."

It is in the foregoing context that the Bar has been forced to reconsider its role, and particularly its rules and practices. We have been required to jettison that which we can no longer justify. This process is under way. At its meeting on 16 June last the representatives of the constituent members of this Association, with only one (hopefully temporary) dissent, resolved to adopt the New South Wales Barristers' Rules as the national rules of the independent Bars. Local variations will be accommodated (due to jurisdictional differences) and a set of national guidelines is also in preparation. Those rules were the result of a great deal of consultation, discussion and vigorous debate over six months. Gone are the restrictive practices of which complaint had been made by the Trade Practices Commission. Only one remains, namely, our insistence on retaining the sole practitioner rule. This is not the occasion to debate the merits of that rule except to confidently assert two things. First, as with the cab-rank rule and the functional distinction between barristers and solicitors which constitute the true essence of the Bar, a further touchstone of the independent Bar is the sole-practitioner rule. Secondly, we can be confident that the rule is pro-competitive for various reasons, none of which has been addressed, let alone answered, by those who seek its abolition.

In fact, the only change in the rules which met with any degree of dissension and/or debate at the New South Wales Bar was the abolition of the referral rule. The opponents of direct client access would see this rule as essential to the survival of an independent Bar, but I have no doubt that they are wrong. As was pointed out in the consultation paper issued in February 1994 by the Policy Unit of the General Council of the Bar of England and Wales, the essential distinction between barristers and solicitors is functional: we perform different functions. We will remain different and relevant so long as we retain that distinction. The New South Wales Barristers' Rules, now of national significance, highlight that distinction. A barrister bound by those rules may only perform what is defined as "barrister's work": provided he or she does so, it matters not from whom he or she receives instructions.

It is this type of reform, namely, permitting (but not requiring) barristers to perform barristers' work on the instruction of the lay client that will enable the Bar, and particularly the junior Bar, to effectively compete with solicitor advocates (and I include in that term those who practise as such in amalgam firms). It will enable the very junior Bar to compete with solicitors for advocacy work in the Magistrates Courts, the most productive environment in which a young barrister can learn his or her trade. It enables barristers to advise clients as to whether they in fact need a solicitor. It will enable barristers to retain mediation work for the Bar rather than cede that work to solicitors simply by lack of contact with the client. Barristers can now advise clients on the Bar's comparative costs rather than let stereotypical attitudes of expense and greed prevail. The nature of the work barristers can do will not change (the rules so provide) but the initiative to obtain that work, to direct its course, and to significantly increase the share which is allocated to the Bar will change as a result of increased client contact. But there is an even more important reason and it is economic. The only valid point the Trade Practices Commission made in relation to the Bar rules was its criticism of how the referral rule forces a client who only wants and needs a barrister to also retain a solicitor with the attendant, but unnecessary, cost. There can be no justification for a rule which requires two lawyers when only one will do. Two lawyers are certainly justified where the functions performed by each are required to meet the client's needs. But where those needs can be achieved by the performance of only one of those functions and it happens to be that of a barrister, then no proper basis exists for prohibiting the client from direct access.

The Bars have responded positively to the challenge laid down to them by the politicians. Some Bars have accepted, and others will do so in the not too distant future, many of the proposed reforms and the challenges they pose. We have produced a set of Barristers' Rules which reflect those reforms and which will, I suggest, withstand scrutiny in terms of the application thereto of the *Trade Practices Act* or any other form of competition policy which government may adopt. Having so responded in that positive fashion, and provided we continue to strive for excellence in our chosen field of advocacy and do so in an efficient and cost-effective manner, the Bar will have ensured its survival. It will be more streamlined and more competitive to face the challenges of the next century.

There are, however, two further matters upon which I

wish to touch. Both the Trade Practices Commission and the Sackville Committee would seek to deny self-regulation to the legal profession. It seems that the aim is to vest regulation in a single statutory authority upon which the representatives of the practising profession would be in a minority. It would leave the professional bodies as merely voluntary associations without statutory recognition performing essentially trade union functions.

A related "reform" proposed by both the Commission and the Committee is the abolition of any statutory recognition of the division between barristers and solicitors. It would seem that this "reform" is required in order to encourage more competition in the provision of advocacy services between barristers and solicitors. The idea appears to arise from the assumption that a solicitor advocate does not compete on a level playing field with a barrister. As I understand it, it is asserted that this level playing field exists in the amalgam States where all practitioners are admitted as barristers and solicitors although all do not practise as such. Accordingly, it may be that the so-called "reform" is directed only at Queensland and New South Wales because in Victoria all practitioners are admitted as barristers and solicitors. If the assumption that solicitors compete more equally with barristers who are members of the independent Bars in the amalgam States is correct, then there may be some force in the underlying assertion that, at least in Queensland and New South Wales, the public may perceive solicitor advocates in a different and less favourable light to barristers. However, I have some reservation as to the accuracy of the assumption. It would not, for instance, apply to Victoria. It may apply in South Australia, Western Australia, Tasmania and the Northern Territory where there are small independent Bars but where amalgam advocates are more prevalent. This may be because practitioners do not join the independent Bar until they have practised, often for some years, as an advocate in an amalgam firm. But as the Bars in those States and Territories become more numerous, they may well attract amalgam advocates earlier in their career which will denude the amalgam firms of their advocacy talent and potential. It will, however, involve a process of choice by those who wish to adopt the style of practice as a barrister at the independent Bar. There can be no economic objection to such a trend, if it occurs. Accordingly, the assumption referred to may simply be a product of the historical development of the Bars in the amalgam States. No one seeks to deny that a strong, independent Bar of specialist advocates is beneficial to the administration of justice. Further, the more numerous the Bar the greater will be the competition between its members. From this the public must benefit. What is it, therefore, that requires that this group of specialist advocates known as the Bar should not be recognised in a formal way? Such formality need go no further than empowering the Bar Associations to make rules of conduct binding upon barristers and to issue barristers' practicing certificates. There is no reason why the functional distinction that marks out the work of the specialist barrister from that of the non-barrister or combined barrister/solicitor should not be recognised in the public interest. After all, the public should be aware of the distinction so that they can make appropriate choices.

So far as the level playing field argument is concerned, let solicitors in New South Wales and Queensland call themselves "barristers and solicitors" as they do in all other States and Territories. Such practitioners will be subject to the rules of the Law Society and be issued by the Society with a barrister and solicitor's practising certificate. This is appropriate as such practitioners will, by choice, generally practise both as an advocate as well as a solicitor thus blurring the functional distinction between the two. Those who wish to practise with both functions should clearly be permitted to do so: but those who only wish to practise as a specialist barrister should equally be able to do so. They should be entitled to have that fact formally recognised.

Finally, lest it be suggested that the Bar Association as a voluntary association is good enough, let me remind those who advocate that approach of this. Although the position may be different for purely practical reasons where a particular Bar is numerically small, where the Bar is large as it is in Victoria, New South Wales and Queensland, it is important to maintain a formalised and recognised corporate identity vested with the power of self-regulation. The organisation to which barristers belong becomes of significance not because of any trade union function which it may perform, but because it represents the repository and arbiter of professional standards and conduct to which its members are required to aspire. Moreover, the corporate identity of the organisation and its power of self-regulation provide the vehicle for the application of peer group pressure to maintain high standards of conduct and professional responsibility. In particular, self-regulation by their own statutory recognised organisation is the way the members of that organisation commit themselves to their professional obligations and ideals. Something imposed from without does not have the same force as something voluntarily generated from within. Barristers need to be able to directly participate in and be responsible for devising the values which we swear to uphold. I therefore believe that a Bar Association so recognised, with its traditions and esprit de corps, is more able to encourage and foster the peer group pressure necessary to effectively control a generally idiosyncratic, if not defiant, group of practitioners who have a specialised, and therefore constrained, functional role to play in the administration of justice. A Bar Association which is able to generate not only co-operation and trust between its members but also, and more critically, that high degree of trust required between advocate and bench, makes an essential contribution to the justice system. Without that contribution the efficient administration of justice must inevitably deteriorate. The culture and ethos so required can only be generated by a strong and independent Bar Association whose existence and functions are properly recognised by the Parliament in the legislation governing the structure of the profession. With proper understanding of the role of the Bar and the contribution it makes to the administration of justice, and in light of the reforms made or proposed by Government and to which the Bars have responded in a positive manner, I believe that not only will the Bar survive but also it will be inherently strengthened and thus able to fully satisfy the high level of service which the community will demand of it. ❑