The role of barristers in the 'national legal profession'

By Bret Walker SC

One of the satisfying tasks of the Bar Association is to help permit the members of the Bar to get on with their basic function of appearing for and advising their clients, without constantly dealing with broad political issues. But the trade-off is that the Bar Association is, like it or not, always involved in politics. For us, there are two major dimensions to this: true parliamentary politics, and the politics of the legal profession.

The former is always more obvious. In the last twelve months, one only has to reflect on the quick-and-dirty law reform (whether amelioration or the contrary) of tort law by our state – sure to be an example for the nation – with which our association has grappled. Some regard changes to the legislation governing sentencing and bail laws, at the state level, as even more grave. And the moves, still current, at Commonwealth level, to empower agents of the executive to detain and question non-suspects (including minors) in relation to terrorist offences are quite clearly much more important than the run of the mill issues in the so-called political cycle.

The Bar Association has, as it must, concerned itself with advocacy of principle with respect to all of these current controversies. We have tried to avoid any colour of bias, let alone in favour of miscreants, in these interventions, but are unashamed in our defence of liberty according to law in all these arguments. We believe that the section of the legal profession most acquainted with the structural inequality of the individual against the state – viz the Bar, defence or prosecution – is uniquely qualified to speak to legislators and the public about the implications (and dangers) of such proposals. Written submissions, and testimony to parliamentary committees, have been our tool, and volunteers have been our strength.

The Bar has also continued and deepened its disinterested role of rapid assistance to any member of parliament with questions concerning the administration of justice, across a broad range of topics, with the aim of ensuring, at least, that debate does not proceed without knowledge of the principled and technical questions which so often are obscured in the hurly-burly of daily political controversy.

These matters are undoubtedly of wide social import, and thus, so long as it remains scrupulously non-partisan, the Bar's institutional contribution should be vigorous and plain-spoken. Just as judges may entertain private opinions about the merits of laws – legislative or judge-made – even more freely should barristers disagree with each other about those merits. For this reason, at the Bar Association level, we try hard to convey views which eschew mere matters of opinion, and rather represent a commitment to the rule of law and of impartial justice. Of course, we proceed on the bases of the presumption of innocence and the need for adequate evidence before individual liberties are affected. In this, to date, we feel confident of the Bar's consensus.

The questions which are more sensibly seen as legal politics are somewhat different. For one thing, they are (mercifully, at present) scarcely of any wider public curiosity. Secondly, they are at once closer to our daily professional lives and also quite remote from the concerns of the barrister at work. Let me explain that seeming paradox, and its present relevance.

There is no better demonstration of the Bar's social contribution, and its vital importance, than our serious discharge of our individual duties as counsel in each brief. The contrast between stereotyped blackguarding of the legal profession on the one hand, and the glowing testimonials to individual barristers, efforts for their clients (not only so-called pro bono) received by the Bar Association and its members, on the other hand, speaks volumes for the preference we should have for the particular over the (spuriously) general. This manifestation of the value which robust, honest and honourable advocacy adds to the administration of justice on the daily level is the sure foundation of the Bar Association's attempts to protect the independent Bar – in New South Wales and nationally – against the various threats facing us.

These threats are not traditional. I don't expect they will long remain as they presently are. In the short term, we face the imminent crushing of nearly all personal injuries litigation of the familiar kind. It is, I believe, the single largest decrement to the work of the Bar that we have suffered since 1788 (or whatever later date to which we trace our real origins). We face it together with our solicitor colleagues, and by no means alone internationally, but it is real and will have serious and personal impacts. Given the vehemently bi-partisan parliamentary support these so-called reforms enjoyed in 2001-2002, and apparently (and electorally) still, they are a given.

On a slightly longer time-scale, maybe several years long, there are the almost unheralded changes which the Standing Committee of Attorneys-General seems to be fostering under the guise of a project to alter state and territory legal profession legislation, in order to advance the motherhood cause of the national legal profession. The Bar Association has been closely entrained in this process. Our senior members of staff have been prominent in guiding the national profession's response to the drafting exercise, and I have recently participated in the Law Council of Australia's reference group to settle and co-ordinate the policy response to the bureaucratic proposals. There is both good and bad – or, perhaps, foreboding – about this hitherto remarkably unremarked exercise.

As to the good, I think it is safe to record that the past conflictual relation between the referral Bars – of which we are the most numerous, in the most litigious jurisdiction – and the private solicitors, has no contemporary resonance at all. It is a considerable achievement of the last decade's Law Council that we have reached that position. Nor does there seem to be any atavistic state-of-origin rivalry in the discussions about these trans-generational issues. Again this rather indicates that the private practitioners are much closer to being a national profession than some politicians – especially the Commonwealth Attorney-General – have been prepared to acknowledge publicly.

Practically the whole endeavour concerns private solicitors, and really only in large or otherwise sophisticated firms – because it is about removing impediments to efficient, minimally regulated national (private) practice, such as

disparate admissions disciplining insurance trust account and fidelity fund requirements. So far as the true Bars are concerned, we have either virtually achieved national portability (with the combination of federal jurisdiction and travelling practising certificate régimes), or else the remaining difficulties affect very few of us. And beneficent laws as to the practice of foreign law, on the current New South Wales model, will help by promoting this country as the most liberal and welcoming venue for international arbitrations. So why should this national-profession project be of concern to New South Wales barristers?

I have no doubt that the probably irresistible alliance of about two decades of consumerism and one decade of competition policy means that mercantilism is the reigning guide to professional governance so far as the would-be reformers are concerned. The pre-eminence of personal ethics enforced by a corporate profession is already, and has long been, the lode-star of lawyers in Australia. The reformers are not basing themselves on that approach alone. If they were, the need for change would fade away. The push is for something new, however speciously. Using a constitutional analogy, this is all about sec 92, not secs 117 or 118.

Mercantilism, the drive for maximised profit, should not be seen as a sure guide to lawyers' virtue, even if it provides a pointed battering ram against protectionism and unjustified stuffiness. It will be, I think, a betrayal of legal ethics if it much longer remains the only impulse to the generally admirable drive towards a national profession. A better guide is a simultaneous recognition of a commonality between all lawyers in Australia, and of the functional divide amongst us.

The commonality is, or should be, axiomatic. All of us are in a common endeavour, of crucial social and national importance. It is none the less so – to the contrary – in light of the fact that we spend our days (and nights) working on the apparent minutiae of individual cases, at the Bar. Law students, their teachers, legal scholars, jurisprudes, solicitors, barristers, corporate lawyers, government lawyers, statutory office-holders (like our members the Solicitor-General, the Crown Advocate, crown prosecutors, public defenders, parliamentary counsel, etc), legal aid solicitors, and (especially) judicial officers, are all engaged in the same everyday, noble, project: the rule of law. This, I hope, is by now a commonplace. It remains a pity that there is no one body in which these different groups are all represented. Perhaps the Law Council should take on the daunting task of expanding its mandate accordingly.

But the functional differences are manifest. The most pressing, I believe, is the divide between those of us primarily concerned with the administration of justice and those for whom that is really not much more intimately connected with their usual work than it is for any citizen, corporation or person present in the jurisdiction who are, simply, subject to the general law.

I can foresee a time when a more organic, radical differentiation between different kinds of lawyers will see the Bar as part – maybe be the leading segment – of a recognizable cadre of lawyers whose function it is to minister to justice. Certainly, the business-services nature of a great deal of city solicitors' work, and the personal or household services equivalents in the suburbs and the country, are a long way removed from ideals of cab-rank (i.e. disinterested) forensic lawyering. And government lawyers, and corporate lawyers, are often necessarily well away from litigious concerns.

The Bar Association should therefore be ready, regardless of structural or nomenclatural changes, to urge and deepen its commitment to continuing the availability of skilled, fearless and detached advocacy and associated advice to those needing legal services. We must, and I believe will, resist absorption into a culture of purely commercial instruments of clients. For these reasons, while New South Wales barristers should applaud the move to a so-called national profession, we should markedly resist assimilation into a generalised view of 'lawyers in private practice'. We should also, therefore consider the prospect of alliances or associations with a body or bodies of our solicitor colleagues who are actually litigators, as opposed to those (i.e. the majority) for whom litigation never or rarely arises.