

Future directions

By Michael Slattery QC



Periodically we should consider where current trends are taking the New South Wales Bar. This is my last president's column for *Bar News*. I thought, therefore, it might be useful to give a personal view of trends that I believe are already marking out the future shape and direction of the Bar. Some of these trends in public affairs, in local and overseas practice and in membership are quite surprising. By examining them it is possible to foresee what the Bar will look like five or even ten years from now.

Public affairs and resources for the criminal justice system

The Bar's profile as a commentator on public issues relating to the administration of justice will continue to increase. Defending the administration of justice has been one of the objects of the New South Wales Bar Association since it was first formed in 1903.

Two factors have recently brought this role into greater focus. The traditional role of attorneys-general (both state and federal) in defending the judiciary as the first law officer of the Crown has substantially withered. Public debate and legislative action since 11 September 2001 have tended to reward authority and security at the expense of individual freedoms. Neither of these factors is likely to change much in the short run. Politicians now do not readily defend either the judiciary or those freedoms. The Bar Association is one of the few public voices doing so. What may surprise many members though is that currently the association's voice in this area is welcomed by the media and the public. I believe this

reflects a widespread community desire for an authoritative but independent voice that will contest political ideas shaped by opinion polls.

The Bar Association is repeating what it has long said: that the law is there to protect us all and very often to protect from the consequences of popular prejudice. Our message closely reflects the crisp sixteenth century warning attributed to Sir Thomas More, 'What do we do if those chasing after devils decide to chase after us?' I expect that this role will grow for a long time to come.

One example of the major public issues on which the Bar is now speaking arises out of the recent state budget. Constant attention by the profession is needed to the adequate resourcing of this state's criminal justice system. The New South Wales Government plans to increase police numbers by 750 and the corrective services recurrent expenditure budget by close to nine per cent. Both the DPP and the Legal Aid Commission budgets should have commensurate increases, so they will have sufficient resources to meet the consequently higher demand for their services.

Local practice

New barristers can give us refreshing insights into why many young lawyers are choosing to practise at the Bar rather than pursue other career options. In the last eighteen months I have met and listened to their stories, which have common themes. Most were senior associates who left medium to large city firms. Many wished to practise without the distractions of compulsory marketing and other features of semi-corporate hierarchies. Many do not wish to supervise work and billing by junior solicitors for the benefit of more senior lawyers. Many new barristers are content to charge a significantly lower fee for the same written advice they would have drafted as a senior associate. All of them want a less corporatised existence and to get closer to the law. I have found that all of them are quite passionate about moving to the Bar. This anecdotal evidence was confirmed by our new barrister surveys, which found that satisfaction levels among new barristers persist at extremely high levels.

The reasons these lawyers are abandoning other forms of practice reaffirm the Bar's longer term advantages and point to areas where its work is likely to grow in the future – for the good of clients. Barristers are highly competitive on price for the same service provided by solicitors and as sole practitioners provide the assurance of quick, conflict-free advice. I expect this will lead to many changes for the Bar in the next five years. Here are three examples of what is emerging.

First, corporate clients are now discovering how price competitive the Bar's services really are and that barristers can be accessed directly by in-house counsel. There is a rising phenomenon of in-house corporate counsel directly briefing the Bar. They are doing so without retaining external solicitors, especially where quick, informal advice is needed about:

- ◆ potentially litigious issues:
- ◆ small to medium size transactional work; and
- ◆ specialised areas of practice such as tax, environmental law and intellectual property.

One senior corporate in-house counsel recently said to me that the senior junior Bar 'provides the best value for money for legal advice anywhere in Sydney'. The low overheads and uncomplicated structure of the Bar account for its highly competitive fees for the same advisory service from a lawyer of the same or greater experience than will be found in a firm. Direct briefing for this kind of general advisory work is likely to expand substantially in the next five to ten years.

Second, significant sub-components of the major transactional work undertaken by firms require independent advice to avoid conflicts of interest or to satisfy due diligence requests arising in the course of these transactions. Barristers who are experienced in commercial and corporate practice are equipped to give such advice as an adjunct to large transactional work. In the future, much of this advice could just as readily be given by barristers as by firms of solicitors.

Third, briefing barristers may not often be the first thought of firms tendering

to provide legal services to government. Providing legal services to public authorities wholly from within a firm tends to be more profitable to the firm than for the firm to brief the Bar to provide some of those services. An unexamined assumption by a firm that it will not be briefing barristers for any of its legal services to government may actually disadvantage the client. The time is coming when government authorities, grasping the price competitiveness of the Bar's legal advice and related legal work, will let tenders for legal services on the basis that tendering firms should specify in their tenders the way that they will save the government client money by indicating what kinds of legal services can be briefed out to barristers. As the Bar is not a direct competitor of the tendering firm there can be little objection to this from tenderers. Calls for tenders for legal services may well contain such a requirement in the near future.

International practice

International practice can seem far away for a sole practitioner but it is becoming rapidly more accessible to all of us. More barristers are recognising this as a viable practice option and not one to be left to the large law firm. Several of our members are already leading what I am sure will be one of the more noticeable changes to our mode of practice in the next five years.

Already New South Wales and New Zealand barristers are taking advantage of the *Trans Tasman Mutual Recognition Act 1997* and are practising across the Tasman. In September 2006 Jonathon Sumption QC described to us his international practice based in London. In March this year Chief Justice Myron T Steele of Delaware spoke in the common room about the resolution by the United States Conference of Chief Justices in February 2007 to recognise qualifications from Australian universities as giving a direct entitlement to sit for Bar exams in most US states. The chief justices, the Department of Foreign Affairs and Trade and the Law Council of Australia are all helping to implement the legal services provisions of the US-Australia Free Trade Agreement, which will open US legal services markets to Australian barristers. Already a number of local barristers are admitted to practice in London, New York

and Hong Kong and are taking referral work in and from all of those cities.

Those barristers who regularly practise overseas maintain a steady focus, at the most, on one or two jurisdictions. In the final few months of my presidency I will, among other things, attempt to highlight the real opportunities that we have for foreign practice.

Over the rest of this year many of our members practising overseas will highlight the path they have taken and some of the pitfalls they have encountered. Their central messages should inspire confidence tempered by realism. Their personal experience is that local barristers have at least as broad a range of highly effective advocacy skills as the advocates we encounter in major foreign jurisdictions. However patience, flexibility and long term planning are needed to establish overseas practice.

Mary Gaudron and Bar demographics

When contrasted with the previous fifteen years the growth in the numbers of women practising at the Bar in this decade is at last showing an increased upward trend. Between 1985 and 2000 the number of women in practice increased from about nine per cent to a little over 13 per cent of practising barristers. The rate of increase and retention of women at the Bar accelerated between 2001 and 2007 and I expect will continue to do so. In these six years the percentage of women barristers rose from about 13 per cent to about 17 per cent. Thus it is now taking six, not 15, years to achieve a similar four per cent increase.

Some of this positive change can be traced back to the Bar Association's programmes commencing around 2000, which were aimed at supporting women and parents at the Bar. The female university students' visits programme, the childcare scheme, the mentoring scheme and the Equitable Briefing Policy have all had an effect on this trend. The last of these was modelled on a briefing practice pioneered by the Hon Mary Gaudron when she was solicitor general of New South Wales.

The inspiring portrait of Mary Gaudron by Sally Robinson, appearing on the front

cover of this edition of *Bar News*, was unveiled in the common room in February. The New South Wales Bar is proud to have commissioned this portrait of Mary, who is one of its leaders and a great Australian jurist. Her experience at the Bar is one of heroism and great endurance. Against many obstacles she won a leading practice and in turn created opportunities for all women barristers. As solicitor general she fostered the careers of other women, who have now themselves become leaders of the profession. In her speech of thanks at the unveiling Mary emphasised the profound value to our society of having an independent Bar, which speaks publicly for the rights of individuals.

The Fair Go for Injured People Campaign

Finally, I wish to thank all members who were involved in the Fair Go for Injured People campaign over the last six months. The campaign was ground breaking from the time it started on 19 September 2006.

Since the introduction of both the Motor Accidents Act in 1999 and the workers compensation legislation of November 2001, this was the first sustained public campaign in which all people in this state injured by the negligence of others have had an organised and united voice.

The four legal bodies involved, the Australian Lawyers Alliance, the Law Council of Australia, the New South Wales Law Society and the Bar Association of New South Wales, formed an alliance with a common set of principles and remained unified all the way through the campaign.

The campaign resulted in commitments to the principles of the campaign from the Greens, the Australian Democrats, the Christian Democrats and almost all other independents standing for election. Just before the polling day the Liberal Party made a commitment to review this state's compensation legislation to attempt to achieve the objectives of the campaign. These commitments provide an important platform from which the campaign will now continue. I expect that the success of this campaign will be revealed over the medium term.