

Bar Association Rules

Peter Taylor SC examines the changes brought about by the new Bar Association Rules.

The introduction of the "New South Wales Barristers Rules" was an important development for the Bar. Some of the changes that the new rules contain are significant. They are intended to have a real impact upon the Bar, its perception within the legal profession and by the public at large and, most importantly, upon the Bar's ability to demonstrate that it is committed to meeting the public interest. But whilst the changes in the Rules are important, they represent a development rather than a revolution.

In many respects what is now contained in the "Barristers Rules" reflect a consolidation and refinement of principles that are fundamental to the advocate's profession and represent the traditional values of the Bar. It is instructive, therefore, to reflect not only upon the changes to the Rules but also upon the extent to which they have remained substantially the same.

Fundamental Differences

There are 5 fundamental ways in which the Barristers Rules are different from the previous rules of the New South Wales Bar Association:-

1. The Barristers Rules have statutory authority by virtue of sections 38G and 57D(i) of the *Legal Profession Act* and practice as a barrister cannot be restricted by any other guidelines or rulings of the Bar Association. However, breach of the Rules carries no specific statutory sanction other than the risk of a finding of professional misconduct or unsatisfactory professional conduct s57D(iv).
2. Because of their statutory force, the Rules apply to all barristers and not just members of the Association. However, a barrister cannot practise without a certificate {s25(ii) and s48B} and a holder of a practising certificate is automatically entitled to be a member of the Bar Association {s57M(i)}.
3. The Rules are subject to review by an Advisory Council s57(h). They may be declared inoperative by the Attorney General if the Advisory Council reports that any provision of the rules is not in the public interest s57I(i).
4. They discard, partly because of statutory changes (see e.g.s.38J and s38K in relation to advertising and specialisation and s38M in relation to co-advocacy), merely ethical limitations.
5. The Rules involve a significant change of emphasis. They attempt to do this by articulating, specifically in the Preamble, the essence of the barristers function and obligations.
6. As part of the change of emphasis, the commitment to public interest is stated in a way that has never been articulated before in the body of the Bar's rules - see the Preamble, Rule 111 and (more arguably, having regard to the previous Rules 33 and 33A) Rule 87(k)).

Irrelevance of the Old Rules

1. The Act declares that practice as a barrister is not subject to any other rules, practice guidelines or rulings of the Bar Association or the Bar Council - s38G(ii). Whether or not in obedience to that declaration - but certainly consistent with it - the new Rules specifically declare that they are not to be read by reference to any former rules made by the Bar Association before 1994 and whether or not the substance of any former rule is reflected in the new Barristers Rules.
2. To say, in the light of this, that the new Barristers Rules represent no innovation or departure from the past would invite different reactions from different audiences. And it would ignore the significant aspects in which the rules do differ. But the reality is that there are many aspects of the new Rules which simply restate the Bar's fundamental values and ideals. Indeed, it is the inescapable fact that very much of the content of the new Rules can be shown to have originated in the earlier Bar Association Rules. That continuity should be neither surprising, discomfoting or a matter of criticism.

Fundamental Similarities - Continuity of Philosophy

1. Although the Rules are now quite different in both their authority and their format, they are, and should be understood as, part of the Bar's tradition of integrity, service and dedication to the public interest in the administration of justice.
2. The fundamental concepts which are readily identifiable in the Rules as part of that history are the concepts of Integrity - Preamble 2
Independence - Preamble 1 and 5
Service - Preamble 3, 6 and 7.

Illustration of the Continuity of Particular Values

It is possible, and useful, to identify the specific provisions of the new Rules that embody particular values common to both the old and the new Rules. Without stopping to restate the provisions of individual Rules, that identification is not at all difficult to carry out. I suggest that it yields the following particular values:-

1. Service to the client and competence - Rules 16, 17, 110 and 111
2. Confidentiality - Rules 103-110 (but see the special exception in Rule 34)
3. Independence - Rules 18 and 19
4. Candour, honesty and commitment to the integrity of the curial process - Rules 21-31, Rules 35-42
5. Fostering the integrity of and confidence in curial determination - Rules 43-50

6. Commitment to the fairness of curial procedures - Rules 51-58
7. Special ethical obligations applying to particular situations
 - a. Guilty clients - Rules 32 and 33
 - b. Prosecutors obligations - Rules 62 to 72

Cab Rank Principles - Acceptance and Return of Briefs

The provisions relating to the cab rank principle merit special consideration. As a general proposition it can be said that this area of the Rules has been the subject of some of the important changes in the Rules. Again, however, it is useful to recognise the respects in which the Rules adhere to the Bar's basic traditions. The matters that have not changed involve these propositions:-

1. The barristers role should be accepted as limited to the primary function of advocacy and its ancillary activities - Rules 74, 75, 78, 80 and 87(k).
2. Barristers must embrace the cab rank principle - Rules 85 and 86.
3. Barristers must not accept briefs which threaten either as a matter of substance or appearance the impartiality or curial proceedings - Rules 87 and 88, 101 and 102.
4. Barristers must not allow either mismanagement or ambition to endanger the client's ability to secure appropriate representation - Rules 93-100.

Conclusion

The changes contained in the Barristers Rules are important. But it is equally important to appreciate the continuity in the Bar's fundamental values that the new Rules represent. The precise and elegant drafting of the Rules provides an opportunity to revisit those values and affirm the Bar's continued adherence to them. □

Sounds of Silence

Priestley J: "The formal orders that I propose therefore are that the appeal be upheld, the judgment below be set aside except as to costs, that a new trial be ordered limited to damages and that the respondent pay the appellant's costs of the appeal."

Meagher JA: "I agree but resist the opportunity of not saying anything further."

Handley JA: "I also agree and also resist the temptation."

(*Kotevski v Government Insurance Office of New South Wales*, Court of Appeal, ex tempore judgment - 14 October 1994). □

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Getting the Timing Right

(New South Wales Court of Appeal; Coram: Handley, Sheller and Powell JJA at 12.45pm)

Handley JA: I see what the time is. For the benefit of your opponent, Mr Graham, how much longer do you think you will be, bearing in mind you have been allowed to speak for about one third of the time?

Graham: Can I go for one minute and finish?

Handley JA: The Court can't resist that offer.

(*Smith v Parker & Anor*, Friday 11 February 1993) □