



Specialisation at the Bar

By Duncan Graham

Greater public confidence in the quality, efficiency and cost of the services provided by the Bar could be achieved through a system of specialist accreditation. The potential for specialist accreditation of barristers is already recognised by virtue of section 86 of the *Legal Profession Act 2004* (NSW). No system has yet been devised. It is time for a system to be implemented.

Such a system should be introduced if only for the reason that a barrister's practice has changed. It is no longer enough to think of oneself as a specialist advocate. In many areas of practice, little time is spent in court. A barrister's practice involves a diverse range of out-of-court work. Solicitors and clients increasingly wish to engage independent specialist lawyers and not just advocates.

In order to move to a system of specialisation, it is first necessary to debunk the myth of the generalist. In the 'good old days', barristers could be generalists. The history of the Bar is replete with tales of the great generalists, able to practise in multiple jurisdictions with equal skill and success. Those days are gone. They will not return. The sheer weight of information to be read and understood in each particular area of law makes it impractical if not dangerous to be a generalist. This does not mean that it is inappropriate to practise in more than one area. But it is inappropriate to be a true generalist. Today, a barrister hoping to be a generalist will not end up being a champion of the Bar, but will instead become a 'jack of all trades'.

Lessons on the importance of specialisation can be learned from other professions. In medicine, for example, medical practitioners engage in a course of study and practical experience in order to be accredited as specialists in a particular area. It is only after this rigorous process has been completed that a doctor is entitled to hold himself or herself out as a specialist cardiologist or orthopaedic surgeon. Once accredited, the doctor becomes a member of a specialist association. The public, and referring general practitioners, are reassured by this process. They can be confident that patients will be managed by medical practitioners with the requisite expertise.

The situation for barristers is in stark contrast. At present, barristers may end up being 'specialists' in particular areas for a number of reasons, most of them unsatisfactory. Expertise may be illusory. A barrister could 'fall' into an area by accident. Barristers may hold themselves out as experts in various areas, even though they have had no relevant training or experience. A barrister may obtain briefs because he is a good 'long luncher' or a 'mate' of a particular solicitor. He or she may have written an article on drains, and then is forever typecast as a draining law expert.¹ A lot depends on luck. While frequently, through word of mouth, a client may end up in the hands of a barrister with acknowledged expertise in a particular area, it is not always the case. A client has no way of knowing that the barrister met in chambers has any relevant study or experience in the particular area. He or she blindly accepts the word of the solicitor that the barrister is such an expert. And if he or she sounds authoritative, the client will be none the wiser.

The point to all this is that it should not be a matter of luck or paying for expensive lunches or talking on the seminar circuit. A young lawyer should not have to write an article on drains in a Law Society publication. None of these problems would arise if there were a transparent system

of specialist accreditation. There would be no doubt about a barrister's expertise if he or she were an accredited specialist.

Specialisation promotes greater judicial confidence in a barrister. If matters involving a particular area of law are litigated in a specialist tribunal (e.g. Dust Diseases Tribunal, Land & Environment Court), then proceedings will be dealt with more efficiently and the bench will be reassured by hearing from counsel who are acknowledged specialists in the field. There can be no doubt that, for example, in the area of crime, it is not only imprudent for a barrister to 'dabble' in crime, but it is frowned upon by judges hearing criminal cases.

There may be teething problems with specialisation. Some areas of practice are easily compartmentalised: for example, crime, tax, insolvency, medical negligence, building and construction law. In other fields, the lines may be hard to draw. There may be some crossover between disciplines. A practical solution could be devised. Just because it may be difficult is not a good reason for dismissing the concept.

The broad areas of specialisation established by the Law Society do not go far enough. It is inappropriate to suggest that a general personal injury specialist will have expertise in medical negligence law. Medical negligence law requires some familiarity with, or study of, medical and scientific principles.

Specialisation would provide greater certainty for a young barrister's career progression. Junior barristers could follow a clear career path to become a specialist in a particular area of law. Specialisation would also make it easier to change direction in one's career. Unfortunately, the recent mentoring programme was unsuccessful. Specialisation would overcome many of the problems encountered in that programme. While studying to become an expert in taxation, for example, a young barrister (or a barrister wishing to change direction) could practise as a general advocate (or continue to practise in his or her old area). The absence of specialist qualifications would not prohibit practice in a particular area; it would simply indicate that the barrister had not yet undergone specialist training and experience. Whether a client or solicitor is content with a general practitioner providing a service (perhaps, at a lower cost) would then be a matter of informed choice.

In any system of specialisation, there would need to be a grandfathering period. Practitioners who have practised in a particular area for a number of years would need to be acknowledged as specialists in that field. Thereafter, specific training and study would need to be performed before accreditation could be given.

A note on change: The mere fact that some parts of practice at the Bar have been present for centuries is no excuse for avoiding change. The demands of practice have changed. The Bar should adapt to the changing environment. The current system runs the risk of entrenching laziness, inefficiency, unsafe practices and expertise by claptrap. A system of specialist accreditation should be conducted and approved by the Bar Council under section 86 of the *Legal Profession Act 2004*.

Endnotes

1. See: Lee Aitken 'Analysing a judgment or how to develop a practice' (2007) 30 ABR 114.