The future of the Bar – a response

By Kavita Balendra

Let's be honest, litigation to the average person is expensive. However the ongoing debate about the costs of litigation has somewhat unfairly focussed on the role of barristers in particular. There have been attempts to reduce the involvement of lawyers through the use of technological innovation and legislative change. Whether this has resulted in better outcomes for litigants is questionable, but what it has done is cause a worrying decline in the availability of work for the junior bar, especially the very junior bar.

Anthony Cheshire SC has provided a number of innovative solutions. One suggestion is conducting hearings without the presence of solicitors. This is a phenomenon that, to some extent, already occurs in certain jurisdictions.

The Workers Compensation Commission for instance is one of the jurisdictions where the role of solicitors and barristers is clearly delineated. Barristers are usually only briefed to appear at the hearing (or rather the conciliation/arbitration) and are typically only provided with documents filed in the proceedings. In the Workers Compensation Commission, barristers are used principally for advocacy. It therefore came as no surprise when the Workers Compensation Commission announced their online system:

> … envisages that many solicitors will not send a traditional brief to counsel and that instead barristers will read most of their brief by accessing the filed documents through the WCC 'portal'.

Barristers, especially those appearing for respondents, often appear without a solicitor. Appearing for an applicant without a solicitor present is almost unheard of, and would create a number of difficulties not the least of which is the possibility of transgressing, or being accused of transgressing ethical duties.

It is not unusual when appearing without a solicitor to seek breaks in order to obtain instructions from a solicitor (and an insurer) that is only availably by telephone. But this process is not more efficient than having a solicitor present in Court. One is often left to wait a frustrating period of time in order

to obtain instructions, as one needs to raise a solicitor on the telephone who in turn then has to raise a client. This process is not helped by the fact that the costs available to a respondent (whether solicitor or barrister) is significantly less than that available to an applicant.

The system can be efficient, but only in very limited circumstances where the issues are narrow.

Legislative changes in jurisdictions such as Motor Accidents has attempted to limit or even remove the involvement of lawyers in the claims process. While this has resulted in a massive loss of work, recent media releases by the Bar Association illustrate that the loss of work has not necessarily resulted in better outcomes for claimants.

Courts have embraced technological change which in attempting to reduce litigation costs by introducing the online Court system. However this too is not without its flaws.

For instance the nature of the communication in the online Court system is not clear. What does a message on the online Court mean? Is it a submission or correspondence with the Court? If it is correspondence, does it fall foul of the requirements of the obligations under Rules 13(b), 54 and 56 of the *Legal Profession Uniform Conduct (Barristers) Rules* and the equivalent provisions in the Solicitors Rules? Is it even appropriate to allow parties to make submissions online? What happens if a matter is raised that is not immediately relevant to the orders sought? Should each party, as a matter of fairness be provided with an opportunity to respond? And what of principles of open justice?

Moreover where submissions are made online rather than face to face it is all too easy for practitioners to take on the role of a keyboard warrior, lowering both the tone and the content of communication. Anecdotally there appears to be a reduction in the civility and discourse in the online messaging system.

There is no doubt that, for matters that are by consent, the online Court system is more efficient and less expensive than Court attendances. Matters where parties cannot come to an agreement, where submissions need to be made or where a listing for hearing is required should, in my opinion, still require attendances in Court.

There is also the very difficult issue of the massive reduction in work that the online Court system has heralded. This loss of interlocutory advocacy work is devastating to the junior bar, not just in a monetary sense but for the valuable advocacy experience and contact that could be gained.

When I began at the bar the bulk of my practice involved interlocutory work. Briefs were rarely delivered at the outset for an entire matter, rather I was briefed to attend on specific interlocutory issues with my instructions quite often comprising little more than a brief email or phone call. Attending a registrar's list several times a week for directions hearings meant that I not only gained valuable advocacy experience, but also made important contacts among solicitors. More importantly it meant that I had a cash flow that kept me afloat. I imagine my experience is not very different to many who commenced at the bar before the advent of the online Court, but it is one that may not be available to the junior bar in the future.

So what can be done?

I agree with Anthony Cheshire SC that we should be trying to maintain our traditional advantages. Learned senior counsel has suggested that there is room for individual barristers, floors and the Bar Association

to do more to shift the debate to a more nuanced one, and on this I agree.

There is a significant gap in understanding what costs savings a barrister can bring to a matter. Trying to explain to a lay client, who is faced with the burden of paying their legal fees out of pocket, that their matter requires not one but two types of lawyers is a herculean task. This is not assisted by the lack of understanding of what a barrister's role is in a matter that does not proceed to hearing. It appears to me to be increasingly necessary for barristers to advocate for barristers – to provide opportunities for clients and members of the public to understand the role of barristers by emphasising our areas, namely our independence, deep understanding of the Court system and advocacy expertise.

The only issue that I, respectfully, disagree with learned senior counsel on is the focus on costs. The Junior Bar are already competitive on fees. It is not unusual for a very junior barrister to charge a similar amount or less than an agent for appearance work. Working for government clients or in jurisdictions with set statutory rates also provide significant costs limits on barristers fees.

Duty Barrister Schemes, which is effectively work that barristers do not get paid for do provide both an opportunity for junior barristers to market themselves and an opportunity to gain valuable advocacy experience. The junior bar, particularly those who cannot afford to donate their time, cannot and should not be required to rely on these schemes for work, nor should they be used as an opportunity for the State to absolve itself of its responsibility to properly fund legal aid for both civil and criminal matters.

There is increasing pressure and competition, with universities churning out ever-greater number of law graduates and costs pressures causing an expansion of solicitors into traditional barristers' work. It is incumbent upon us, as individuals, floors and as an association to ensure that we are able to advocate and present ourselves as a separate, valuable and relevant part of the legal profession. BN