DISCIPLINARY PROCESSES from the **inside**

Photo © Claudio Baldini / Dreamstime.com

By Stephen Keim SC

The two letters that arrived from the Bar Association of Queensland, dated 4 September 2007, advised me that complaints made to the Legal Services Commission (the LSC) had been referred to the Association.

As I opened the letters and read them and then saw them lying on my desk afterwards, I had a sick feeling in the pit of my stomach. I was the subject of a disciplinary complaint. This feeling passed within three minutes. It was the only time in the whole process that I felt any real concern.

I knew that a complaint had been made to the LSC, but wasn't sure whether the Bar Association would be able to investigate the matter. The issue was whether public statements on the subject of my conduct made by the President of the Bar Association had compromised its ability to carry out that function.

The fact that I had released the transcript of Dr Mohamed Haneef's interview with the Australian Federal Police (AFP) became public knowledge on 18 July 2007. Seven weeks (it felt like aeons) had passed, and the adrenalin of that day had well and truly passed. The threat of a disciplinary complaint had faded from my consciousness. Hence the sick feeling.

THE COMPLAINTS

The two complaints were very similar. Each attached a transcript of my *Lateline* interview with Tony Jones on 17 July. Each alleged a breach of rule 60 of the *Barristers' Rules 2007*.[1]

Mr Biddle's complaint was dated 20 July 2007. Mr Keelty's complaint was dated 8 August 2007, and was not received by the LSC until 17 August 2007.

Mr Biddle, a solicitor, complained that my conduct in releasing my client's record of interview amounted to arguing my client's case in the media, or engaging in political debate about my client's position.

Mr Keelty, the AFP Commissioner, raised the concern that my action might encourage 'media discussion of the quality of evidence yet to be led in a criminal trial'. He pointed to an 'incorrect conclusion reported by media outlets that police had added entries into Dr Haneef's diary'. Mr Keelty was concerned that releasing a client's record of interview might 'become a standard practice'.[2]

Both complaints mentioned that I had released the record of interview without instructions from my client.[3]

I AM THE CLIENT

My friends in chambers insisted that I should not act for myself. But I was keen to act for myself, if only so that I would not have to justify what I wanted to say in my defence to other people. I caved in to their insistence. I chose Brian Bartley, a well-respected and experienced Brisbane lawyer, whose areas of expertise included acting in professional disciplinary matters.

Of the many excellently qualified colleagues at the Bar who had offered to assist should anything come out of the furore that followed the release of the record of interview, I chose David Jackson of the Brisbane bar, with whom I had worked, and whose intellect and calm demeanour had always impressed me.

I rang Brian. I had already arranged an extension until the first Monday in October. We worked out timelines. I would prepare a document and then come and see him. He was excellent: the right balance of interest, empathy and detached professionalism. I still hated it. I was now the one told by the solicitor's receptionist to 'take a seat' – I was the client, the person with the problem.

THOSE LAZY, CRAZY, HAZY DAYS OF LATE SEPTEMBER

In late September 2007, my wife, Denise, and I took two weeks' holiday at Evans Head, a sleepy coastal resort half way between Ballina and Grafton.

It went like this. We slept in. Then we had breakfast, either at the house or at one of two coffee shops in the main street. After breakfast, I worked at the main dining-room table on the laptop. I had wireless internet access; a collection of newspaper clippings in the form of PDF files which Hedley Thomas had collected for me; a portable printer; and a manilla folder of documents that I thought might be useful and had gathered from the pile of material relevant to Dr Haneef's case that was, by now, filling my chambers.

> I had played Joe Cool about the complaint whenever I was asked about it. Most of the time, that was not an act.

I downloaded cases from Austlii. I toyed with a constitutional challenge to rule 60 for being in breach of the implied right to free speech, then put it away to be brought out again should times get more desperate.

We would take a couple of hours off in the late afternoon; maybe walk on the beach; cook and eat tea. After this, I would tap away into the night until tiredness said: 'Enough'.

Denise, the harshest editor anyone could wish not to have, would critique my work in ways that improved the document considerably.

The result was a most enjoyable holiday, in a funny sort of way. The document was 35 pages long; 17,500 words. It documented, painstakingly, the facts, and argued the law.

THE RESPONSE

I duly delivered my 'masterpiece' to Brian and David. We had a conference in David's chambers. I was a little burned out and eager to go back to working on other people's problems and, therefore, more than happy to hand over my 35 pages.

The result of their welcome revisions was a much more digestible and accessible package. The legal argument was extracted and refined and became the response. It weighed in at six pages. The factual treatment became an appendix >>

I was now the one told by the solicitor's receptionist to 'take a seat'. I was the client, the person with the problem.

entitled 'The Factual Context', with me as the narrator. It comprised a mere 14 pages.

A further minor extension was necessary. Brian's letter was dated 8 October. The copy posted on the LSC site is stamped as received on 9 October 2007.

The response canvassed a number of issues. However, the following paragraph encapsulates the kernel of the argument:

> 'The action to release the record of interview was taken in circumstances where Dr. Haneef was having his reputation destroyed and his freedom restricted by actions of the Executive and by the actions of law enforcement officers. The circumstances were such that action was necessary to protect Dr. Haneef's interests against these attacks. The action was a reasonable and appropriate way of responding to the circumstances faced by Dr. Haneef and by Mr. Keim as his advocate.'

THE BLACK HOLE

But other things were going on in the world. Dr Haneef had to defend his favourable decision from Justice Spender before a Full Federal Court on 15 and 16 November. There was an election in Australia on 24 November.[4]

The disciplinary matter had disappeared into the dark confines of the Bar Association.

The report of the Association is dated 17 December 2007. I did not receive any advice until after 9 January, when a three-line letter of that date advised me that the Association had completed its report and that the report had been sent to the LSC.

The Bar's view

The Bar did not agree with every submission made on my behalf. It found that I was in breach of rule 60.[5] The analysis and presentation of the report is of a high quality. The following paragraphs taken from the report's conclusions provide some idea of the way in which the Association conceived of and dealt with the matter:

> '(b) … publication was in extraordinary circumstances caused or largely contributed to by the Minister's having taken action which raised a public forum about Haneef's conduct and character in parallel with the pending criminal charge against Haneef.
>
> (c) the publication of the copy record of interview had no potential to interfere in the due administration of justice as regards the criminal charge (even before that charge was abandoned as hopeless);…
>
> the circumstance that the record of interview had not, at that point, been tendered when the inevitability was that it would have been tendered at some later time and it could as easily been tendered by then to our mind renders Keim's conduct a contravention of rule 60 of the least kind; …
>
> Keim made himself a proxy for his client in what he took to be urgent circumstances of a palpable injustice and did no more than Haneef or, indeed, Russo was entitled unremarkably to have done at that point …'[6]

FINALLY, A DECISION

The letter from Mr Robert Brittain (Manager, Complaints, for the Legal Services Commission) to my solicitors, Brian Bartley and Associates, is dated 1 February 2008.

I was in Maroochydore that morning, arguing that a breach of a court order and a planning condition by a national fashion retail chain was the mildest form of contempt of court that one could imagine. There were several missed calls on my phone. I returned Brian's call first.

I had played Joe Cool about the complaint whenever I was asked about it over the four months since our response had been submitted. Most of the time, that was not an act. During the last couple of weeks, however, I had come to feel that it had gone on long enough. I was sick of being the subject of a disciplinary complaint.

Brian gave me the good news. I was relieved. I was no longer 'the client'.

THE DECISION OF THE 'MANAGER – COMPLAINTS'

The decision of the de facto Deputy Legal Services Commissioner may be best appreciated by the series of factors that he regarded as 'particularly persuasive'. They read as follows:

'• The legislative intent behind Chapter 4 of the Act is not punitive but purely protective (not only of consumers but also the reputation of the legal profession);
- The publication of the record of interview did not interfere with the administration of justice in the particular circumstances of this case;
- Your client did not comment about the contents of the record of interview and simply released it to a journalist;
- The breach of rule 60 in the circumstances can in my opinion be categorised as at the minor end;
- There was no evident mischief with the premature publication of the record of interview;
- There was no subsequent abuse of the document by your client;
- Your client has an exemplary professional record with no previous findings by a disciplinary body.'

LAST DRINKS

The support of my colleagues throughout the whole of Dr Haneef's matter, including during the disciplinary complaint phase, was of great comfort to me.[6] Walter Sofronoff's[7] letter

to me at the height of the initial furore, suggesting that what I had done was an example of the independence of the Bar, which is extolled on ceremonial occasions, was probably the most beautifully composed example of this support. The full text of Walter's letter was contained in the body of the response to the complaints that went to the Bar Association.

It was very good for my soul to be forced to be the client. Every professional service-provider should have to experience that phenomenon, occasionally. It never hurts to have a little insight into how your customer feels. ■

Notes: **1** Rule 60 provides as follows: 'Integrity of hearings

60 (a) A barrister must not publish or assist the publishing of material concerning a current proceeding except by supplying only:

(i) copies of pleadings or court documents in their current form, which have been filed and which have been served in accordance with the court's requirements;

(ii) copies of affidavits or witness statements, which have been read in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

(iii) copies of transcripts of evidence given in open court, ...

(iv) copies of exhibits admitted in open court and without restriction on access;

(v) answers to unsolicited questions concerning the current proceeding and the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgement given including any reasons given by the court and the client's intentions as to further steps in the case;

(vi) copies of submissions used in open Court and available to the parties, provided that where the barrister is engaged in the current proceeding, the barrister does so only with the consent of the client first obtained.

(b) Subject to sub-rule (a), a barrister must not publish or take any step towards the publication of any material concerning any current or potential proceeding which –

(i) is inaccurate;

(ii) discloses any confidential information;

(iii) appears to express the opinion of the barrister on the merits of the current proceeding or on any issue arising in the proceeding, other than in the course of genuine educational or academic discussion on matters of law.'

2 Mr Keelty failed to mention that the release of the transcript had led to a journalist identifying, correctly, that one of the officers working for Mr Keelty had wrongly told a magistrate (in a statutory declaration) that Dr Haneef had said in his interview that he had lived with his two cousins, Sabeel and Kafeel, at 13 Bentley Street, Liverpool. He also failed to mention that a senior AFP counter-terrorism officer, David Craig, had sat in court and allowed the Crown Prosecutor to wrongly tell the court that Dr Haneef's SIM card had been located in a burning jeep at Glasgow airport. The latter statement had also been corrected by a journalist, one whose sources appear to have been British police officers and not Dr Haneef's record of interview. See Mr Craig's email, contained in an AFP FOI release provided to Dr Haneef's lawyers, pp283-5. **3** Dr Haneef gave me a fulsome ex post facto ratification of my actions on his behalf. This was included as an appendix to the response to the complaints. **4** In the last week of the election campaign, in the electorate of Lindsay in the western suburbs of Sydney, the husband of the candidate and the husband of the retiring member were found distributing fake pamphlets purportedly on behalf of a local Islamic organisation purportedly expressing gratitude to the Labor Party for its assistance. The prime minister, Mr Howard, without any hint of irony, said that neither of the respective partners of the two men should be adversely judged according to the actions of their husbands. His feeling for 'association' appeared to have narrowed over the preceding four months. Four months earlier, he seemed to have felt that one should bear large slabs of responsibility for what one's second cousin might get up to. **5** The response had argued that rule 60 should be read down so as not to extend to my action in the circumstances in which it was taken. **6** The Australian Lawyers Alliance was a particularly consistent source of that support, going to bat for me in public statements and in letters to public officials. **7** Walter is the Solicitor-General of Queensland.

Stephen Keim SC *is a Brisbane barrister of 23 years' standing, vice-president of the Queensland chapter of the International Commission of Jurists, and a member of the Lawyers Alliance.*

Most of the documentation referred to in this article may be found at the Legal Services Commission site at http://www.lsc.qld.gov.au/31.htm (accessed 20 May 2008)