

The profession of the Bar as an ethical institution

There are many definitions of the profession. I have found that of the American jurist Roscoe Pound to be quite apt. He described the profession as “a group of people practising a learned art as a common calling in the spirit of public service”.

As you will appreciate much has been, and continues to be, written about ethics. It is a field which is often not capable of precision or pronouncing upon a universally correct answer. I think you will find when you embark upon discussion of the ethical problems in this session the point will be demonstrated.

It is also demonstrated by the experience of the Bars in Australia. In 1990 when I was President of the Australian Bar Association, the Bars embarked upon the formulation of a common set of ethical rules. This proved to be quite challenging; it was eventually achieved. It has been subject to subsequent iterations. What was instructive was to observe the different implementation of basic principles amongst the Bars. I remember different approaches to speaking to a witness during cross-examination as one example.

Until very recent times it seemed to be accepted that the hallmark of a profession was the ability to set its own standards. This was based upon the public trust that was reposed in it, and the reciprocal acceptance of that trust by the selfless delivery of a high standard of service.

Times have changed.

The unquestioned reverence of the public for any institution has been replaced by a much more questioning, if not sceptical, attitude. Coupled with this is the rationalist bottom line approach that marches under the banner of such terms as competition, economical provision of service and consumerism generally.

Such a ground swell cares little for high sounding concepts or the principles which underpin them. The tide carries with it the encouragement of aggressive advertising, a clamour for one-stop shopping under definition of multi-disciplinary partnerships, the fusion of the legal profession and the encouragement of less than professionally trained persons to enter the field of practice of the profession.

The concept and the practice of ethical behaviour cannot be confined to some ethereal isolation. Reality has it that ethical behaviour is very much in the eye of the beholder. So much is this so that in making a judgement on conduct the ultimate result transpires that perception is reality.

In the same way that the courts at the highest level have adopted the test of bias as the perception of a reasonable person properly informed, so it is that the likely accepted test of ethical behaviour generally will be to posit the reaction of some reasonable person.

This is very much so in the field of conflict of interest which is an area which by statute I am called upon to give advice to senior persons in government, if asked.

In practice it is often demonstrated that the application of any test does not provide an absolute determinant. Who in this room will not be a reasonable person properly informed when in a group approaching the problems which will be part of this session? Does that mean there will be unanimity in the answers as a result?

Where does all of this leave the Bar?

To my mind it leaves it with the imperative that it behaves and delivers services to the community in a way which is deserving of respect. No longer is it sufficient to rely upon cultural traditions or the mystique of the art which is practised. Coupled with this must be the jealous guarding and fostering of the Bar's priceless capital of independence.

The collective institution of the Bar is something of a paradox. It is composed of individuals each of whom is fiercely independent. This notwithstanding the common calling to the learned art previously mentioned creates a bond by which common values can be adopted. These common values reflect the notion of service to the community and upholding the highest principles of ethical conduct.

Ever so gradually the commercial world, catalysed by scandals, is coming to accept that “being a good corporate citizen”, has perhaps some attraction not only for esoteric but also commercial reasons. Profit for shareholders as the all embracing guideline is in some quarters being questioned. There is still a long way before appreciable change is recognised, but the swing of the pendulum may be commencing. Younger members of the legal profession seem more often to be questioning whether the unyielding task master of a target of billable hours should dominate their professional activity.

In the public sector by the provisions of *Public Sector Ethics Act 1994* the Queensland Parliament has legislatively demanded that public officers adhere to ethical principles there enunciated and said to be fundamental to good government. These are:

- Respect for the law and system of government
- Respect for persons
- Integrity
- Diligence; and
- Economy and efficiency.

In an area where minds might differ practical guidelines can prove useful. Let me suggest that an understanding of the concept embodied in the description “the capital of the Bar” can assist in resolving ethical difficulties.

The Bar as a profession has survived for centuries in the common law world and for more than a century in Queensland. It carries with it traditions and a hard won reputation. It forms a key part of our judicial system. It has a collegiate spirit which supports and encourages its high standards. All of these factors and more are components of its capital. A number of points flow from this:

- Its capital is fragile and more readily diminished than augmented.
- It behoves each of us to recognise that as members of the profession it is our duty to augment rather than diminish this capital.
- The all important component of independence must not be called in aid to justify behaviour that detracts from the capital. For example ethical behaviour demands courtesy and respect for the court, colleagues (whether opponents or not) and clients, alike.
- Another more delicate area which may readily give rise to an ethical dilemma is the issue of tolerating or acquiescing in misconduct by a professional colleague. Whilst there are systems in place to ensure fitness before admission, transgressions will occur.

One aspect of the changing tide is the recent introduction of an ethical guideline at the English Bar requiring members to report unsatisfactory conduct of a colleague.

Let me draw on an example not removed from real life. A career criminal has made allegations of corruption against a police officer. The police officer arranges for an acquaintance to speak with the barrister who has represented the criminal on many occasions. The meeting takes place in a hotel bar. The barrister becomes drunk and in a loud voice discloses matters about his client which are obviously the subject of legal professional privilege. You unwittingly overhear all of this. What do you do?

Let me suggest that if you are placed in a situation where you are aware of unacceptable conduct you should think very squarely of the capital of the Bar before you decide to do nothing about it. One of the finest attributes of a true profession is that its members themselves set their own high standards. By consensus and peer pressure they do not accept those who do not come up to those high standards. A truly ethical environment at the Bar is one where unacceptable conduct will not be tolerated and the unworthy will be spurned. At the Bar you develop a reputation through your dealings with your colleagues. Usually this is a reliable indicator of your adherence to ethical principles and behaviour. If you are aware that your reputation is wanting you should ensure

by your conduct both in word and deed that this grievous shortcoming is corrected.

Fostering ethical behaviour is no simple matter. Hopefully the main component will be a spontaneous one. The Bar is quite concerned to uphold its standards in this area.

Training for ethics is included in any undergraduate degree, in the Bar Practice Centre course and in continuing education such as this seminar. It is also manifested in the daily obligation of the barrister's duty to the court.

A code of ethical rules is an important adjunct to the establishment of an ethical profession. It cannot be anything like the complete answer.

The issue is a complex one and the subject of interaction with a number of factors. My feeling is that a basic sense of what is right or wrong must underpin any approach by an individual. This will come from instinctive origins moulded with an understanding not merely of the rules of conduct but more importantly of the basic principles which underpin them.

Be careful however if you are faced with an ethical problem of any complexity. It is unwise to deal with it alone. It is like the old adage "a litigant who appears for himself has a fool for a client".

It happens all too often in the ethical sphere that a person is found to have blundered because of effectively pulling him or herself up by their own ethical boot strings. In such a case the dilemma is confronted from the stand point of in effect saying “this behaviour may be questionable in general but because of my undeniable ethical attributes I will be able to manage it”.

A moment’s thought will demonstrate the fallacy of this approach. In almost all circumstances ethical behaviour will be judged not by one’s own subjective thinking and rationalisation but by the perception of the reasonable, well-informed outsider.

At the Bar we are privileged by having an open door policy of consultation. There is always an open door to discuss problems. Your senior colleagues will discuss ethical issues with you and in any matter of any complexity you should avail yourself of this opportunity.

As you proceed to the ethical problems to be discussed I encourage you to take into your consideration the concept of the capital of the Bar and the basic principles encompassed in the range of duties which are categorised by the ethical rules.