

Corporatisation & Professional Ethics

A presentation to the North Queensland Law Association Conference
by the Honourable Alan Demack AO, Queensland Integrity Commissioner
at Mackay, Friday 3 October 2003

Having reached the age when short term memory is confused and long term memory reconstructed, I hesitate to recall an incident in the Sixties. However, what my memory has stored is apposite to my topic, so, with an appropriate disclaimer, I offer the following story.

Marilyn Monroe had been out of the public gaze for a time and on her return to media exposure received the comment from a journalist, “You’re looking great, Marilyn.” She replied, “So I should be, I’ve been incorporated!”

There is a certain magic about corporatisation, a guarantee of commercial health. There have been discussions about its place within the practice of a solicitor for at least two decades. There was a mention of it in the news media shortly before I was invited to present a paper at this conference. That is the reason for the topic.

However, while doing some background reading about the topic, I came across a review of a book by Christine Parker with the long title, Lawyers’ Ethics and Access to Justice: Just Lawyers: Regulation and Access to Justice. The review by Professor Webb of the University of Westminster is in Legal Ethics¹. The review encouraged me to look at the issues that arise from corporatisation in a much broader context. My responsibilities as Integrity Commissioner are found in the *Public Sector Ethics Act 1994*. As I have worked with that Act over the past three years, I have found that the principles that it contains are of considerable utility. It seems to me that it is worth exploring these principles in the wider content that the review of Christine Parker’s book reveals.

¹ (2003) Volume 6, part 1

Access to Justice

It is important to begin with the affirmation that the purpose of practising as a solicitor is to provide access to justice. This is so whether the client is seeking advice about a business transaction or wanting to defend a proceeding in respect of a traffic offence. Very often the issues that have to be considered may need to be elucidated by someone with professional skills not possessed by a lawyer. The client with the concerns about the business transaction may also need advice from an accountant. The client who is alleged to have committed a traffic offence may also need evidence from a traffic engineer.

In those circumstances it is not surprising that people have formed the opinion that access to justice would be enhanced if solicitors could form multi-disciplinary practices. If the desirability of that concept is accepted, incorporating such practices would make it easier to raise capital to provide enhanced technological resources which could make the multi-disciplinary practise more efficient and effective. Discussion about these ideas has been extensive. There was a useful article in Proctor². The stimulus is generally ground in what is known as “competition policy”.

This discussion has been only a part of the changes which, over the past fifty years, have improved access to justice for many people. First, there was the development of legal aid, then the introduction of class actions, and then the use of alternative dispute resolution. The impact of competition policy has followed these initiatives.

Solicitors as Officers of the Supreme Court

Over many centuries the authority and status of solicitors have been derived from the fact that they are officers of the superior courts, in Queensland, the Supreme Court. This has meant that the standards required for admission are determined by the Judges and that issues of discipline are ultimately a matter for the Supreme Court. It has also meant that solicitors have certain duties to the courts, that is all courts, not just the

² March 1998

Supreme Court. These include the duty not to mislead a court and the duty to make relevant legislation and decisions known to the court even if they are contrary to a client's case.

The earlier changes to give greater access to justice did not interfere with this relationship of solicitors to the Supreme Court. One of the concerns that have been raised in the discussion about multi-disciplinary practices has been the possible dilution of the duty that solicitors have to the court.

Underlying the concept that solicitors are officers of the Supreme Court is the fundamental idea that, within our constitutional framework, the courts are the agents of justice. While Parliament exercises the law making power and the departments of government provide the services which Parliament determines, justice for individuals is found in the courts. Solicitors provide some of the professional skills needed to allow individuals to have access to justice in the courts. As our society has become more complex, Parliament has added a significant number of tribunals which gave people access to the rights Parliament has recognised. Some of these tribunals are disciplinary in nature, eg. Health Practitioners Tribunal. Some deal with disputes between parties, eg. Commercial and Consumer Tribunal. Others determine rights, eg. Queensland Gas Appeals Tribunal. Others oversee departmental decisions, eg. Children Services Tribunal.

In many instances the members of these tribunals will include lawyers, as well as people drawn from other professions and from the community. What ethical standards do lawyers take in to their work in tribunals? Are there issues here which are similar to those raised in multi-disciplinary practices and in corporatisation?

Looking for a General Ethical Template

The *Public Sector Ethics Act 1994* ("the Act") applies to public officials. The definition of those words excludes a "judicial officer". The definition of those latter words refers to both "a court" and "a tribunal". Consequently, the opinion is held among the departments that administer tribunals, that tribunal members are not bound by the Act.

However, most, but not all, tribunal members are appointed by the Governor in Council or a Minister to an office established under an Act to which a person may only be appointed by the Governor in Council or a Minister. This means that those who are appointed in that way are statutory office holders within the meaning of the *Act*.

Statutory office holders are among the people who can seek advice on conflict of interest issues from the Integrity Commissioner. In giving advice about a conflict of interest issue, the Integrity Commissioner must have regard to approved codes of conduct, which are based on the ethics obligations stated in the *Act*. In turn, these ethics obligations spell out the matters stated succinctly as ethics principles in the *Act*. Consequently, I have formed the opinion that, although tribunal members who are statutory office holders are not bound by the express terms of the *Act*, as a matter of necessary implication they should conform to the ethics principles of the *Act*. That is because any advice on conflicts of interest will be based on those principles. Against this background, it seems to me that the ethics principles in the *Act* provide a useful ethical template not only for tribunal members, but for solicitors working in multi-disciplinary practices. It would be seem to be helpful if the discussion about the professional ethics of all those involved in multi-disciplinary practices has some agreed ethical template with which to test any proposals.

The Ethics Principles

The *Act* states five ethical principles which it declares are fundamental to good public administration. They are :-

- ? respect for the law and the system of government
- ? respect for persons
- ? integrity
- ? diligence
- ? economy and efficiency

While these concepts may not fit into every ethicist's definition of ethical principles, they do, in my opinion, represent core values for professional people involved in providing access to justice. In order to demonstrate this, let us look at them, one by one.

Respect for the law and the system of government

We live in a representative democracy which permits every citizen to be involved in the political processes through which Parliaments exercise their law making responsibilities. While lawyers may talk about the common law, the fact is that today there is very little of our law which is not found in legislation.

It is important to recognise that, in calling "respect for law and the system of government" an ethics principle, the Queensland Parliament has recognised the close relationship of law and the system of government. Respect for both law and the system of government allows every citizen to contribute to the content and intent for our laws. The contribution may be made by voting at elections, by joining a political party, by joining a pressure group seeking specific changes to law or practice and by advocacy from within community service or professional organisations.

Once this symbiosis of law and system of government is recognised, it is clear that this ethics principle is an essential part of any ethical template for professional people providing access to justice. Justice will be sought through existing laws and if that does not result in a just outcome, advocacy for change can be pursued.

Respect for persons

One of the perennial issues raised by people seeking access to justice concerns the way they will be treated. This is so whether a person who has been abused wishes to have the perpetrator prosecuted or the purchaser of a business believes the financial documents produced by the vendor are erroneous.

Those who believe they have been wronged may prefer the pain of that wrong to the indignity they expect to experience if they seek redress of the wrong. It is a

significant challenge to the community to face this issue which extends across all parts of life. However, in the access to justice sector, it is important that it is not only recognised as an issue, but that practices are adopted which respect the people who seek access to justice.

This requires courtesy and patience as well as an ability to speak in a way that each person can understand. Every profession develops its own language style. It is not unlikely that a client of a multi-disciplinary practice may find that, in the course of speaking with different professionals in the practice, similar concepts are named differently. It should not be the client who has to make the adjustments in thought processes. The practice should speak with an agreed common language. An example of this problem is found in the way in which terms used in accounting have changed in recent years. There is little point in the solicitor in the practice talking to the client about “stationery expenses” if the accountant in the practice calls these items “consumables”.

Integrity

Integrity is a word that has three shades of meaning and each is important. First, it means being complete, and in that sense it describes wholeness. It is the product of integration, the bringing together of various parts of a community, a project or a work of art. Secondly, it means an unimpaired condition and in this sense it describes soundness. Thirdly, it means uprightness, honesty and sincerity³.

When the three meanings are brought together, they should find full expression in a multi-disciplinary practice. The various professional skills are brought together to produce a sound practice based on uprightness, honesty and sincerity. But the integrity of the practice does not guarantee that it will always act with integrity.

It must always be kept in mind that the purpose of this is to enhance the individual client’s access to justice. It does not imply that the practice can discharge conflicting duties for a client or clients.

³ Collins Concise English Dictionary

One of the issues that has concerned solicitors looking at multi-disciplinary practices has been the way in which different professions deal with conflicts of interest. In this respect the language of the *Act* is very helpful. The *Act* defines a conflict of interest issue involving a person as a conflict between the person's personal interests and the person's official duties. On many occasions in the public sector, the difficult issues involve a conflict between official duties, where the official has no personal interest which could impugn the decision.

However, in popular speech, such conflicts of duty are called conflicts of interest. When this happens it makes the analysis of the issue difficult. Suppose that a multi-disciplinary practice received instructions from both the vendor and the purchaser of a business. It can be said that this would not involve any conflict of interest in the sense that there is no personal interest that any member of the practice has in the transaction which would stop them dealing with the matter properly.

However, it cannot be said that there is no conflict of duty. The vendor and the purchaser have different interests in the sale and purchase of the business. Both the vendor and the purchaser are entitled to expect that they will receive independent, reliable, professional advice about the issues involved. A practice which acts for both vendor and purchaser cannot provide each with independent advice.

It has been fashionable for large accounting and legal firms to erect "China Walls" which allow the different functions which the firms perform to be carried out independently. Some accounting firms have been able both to keep the books of a company and to perform an audit of the books, on the basis that two separate parts of the firm are involved. This has been seriously and properly questioned following recent financial scandals. Hopefully "China Walls" will disappear, because it is hard to see how a professional entity, no matter how large, can discharge conflicting duties on behalf of one client or on behalf of several clients. It is important that clients not only receive independent advice, but that it appears that the advice is independent. It will be important in multi-disciplinary practices that this is so.

Conflict of duty will also be a significant issue if practices are corporatised in order to raise capital from people outside the membership of the practice. If this is done through a share issue, the directors will have a duty to shareholders which may not always allow them to discharge the duty owed to clients.

Diligence

Every client seeking access to justice will expect that the people who offer the professional skills which provide that access will do the best they can for the client. This is a very basic expectation, but, in the day to day conduct of a practice, it may not receive the priority it should have. A common human trait is identified by the words “pass the buck”. It will be possible to do this more readily in a multi-disciplinary practice, where it may be assumed specialisation may occur. If the allocation of clients to members of the practice is done on the basis of expertise, clients may well be impressed by such diligence. If clients are given the impression that they are being passed around because no one is really interested in their problem, this will not be seen as diligence.

Economy and efficiency

Although competition policy is supposed to achieve economy and efficiency, our technological proficiencies are making those goals illusory. We now produce such a flood of emails, faxes, and glossy documents that it becomes impossible to find the substance of what is said or to have the time to digest it before the next inundation occurs. One of the temptations of a multi-disciplinary practice will be to produce endless emails and other communications so that the cost which the client is expected to meet will be excessive.

The provision of services that allow access to justice will always be labour intensive. It is the responsibility of all who become involved in this service to ensure that that labour is used economically and efficiently.

I have not attempted to gauge the existing professional ethics of solicitors against the template I have suggested. That was not my purpose. Rather I have suggested that the ethical interactions that multi-disciplinary practices and corporatisation involve are similar to the ethical interaction which will occur when solicitors and other professional people constitute the various tribunals which today are a significant part of the justice service delivery in Queensland. I have referred throughout to solicitors because the Bar has correctly set its face against multi-disciplinary practices and corporatisation. However, many tribunal members are from the Bar so that the issues raised are relevant to the Bar as well.

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