

# Chairman's report on the IBA Conference

The General Council of the Bar (GCB) was represented by Hodes SC and myself at the International Bar Association (IBA) Biennial Conference in Melbourne from 9 to 14 October 1994. I have asked Hodes SC to prepare a separate report on his impressions of the conference.

The major value of a conference of this type lies firstly in the opportunity which it gives a participant to consider legal issues across a very wide range of topics on a broad and general basis. This process is enhanced by the comparative perspective. What is most interesting is that it appears that many of the problems with which the South African legal system is wrestling are problems common to other legal systems throughout the world.

By way of example of the diversity of matters under discussion at the conference I attended, apart from the meetings of the IBA, sessions also took place on Gender and Language in Legal Documents and Statutory Instruments; Alternative Dispute Resolution in the Field of Maritime Law; Plant Closures and Related Issues in Labour Law and Advanced Legal Education. Each group involved the presentation of papers by persons well qualified in the field as well as extensive discussions from the floor. Here again the international and comparative perspective was most important.

The other major aspect of such a conference is the opportunity to make contact with people from other jurisdictions. In view of the changes which are facing the Bar in South Africa I made a point of having discussions with members of other separate Bars including the Scottish Bar and the English Bar – both generally and in discussions with the representative of the Commercial Bar – and

representatives of the Victoria and New South Wales Bars as well as the chairman of the Law Council of Australia, who is a silk practising at the South Australian Bar. In addition I had a discussion with one of the partners of Richards Butler concerning the impact on solicitors' firms in London of the extension of rights of audience to solicitors in the Crown Courts and the High Court.

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These discussions were most reassuring. All of them made the point that the nature of our legal system is such as to demand a very high level of expertise in litigation. It is this fact that underpins the need for an independent Bar. In Australia the position has been *de facto* that for many years all legal practitioners have had the same qualifications and have been admitted to practise on the same basis. Nonetheless in New South Wales the Bar has 1 800 members and in Victoria 1 200. There are substantial independent Bars in Queensland and South Australia. Perhaps the most dramatic story comes from Western Australia where the independent Bar was established a little over 30 years ago by Francis Burt QC. In the past 30 years the position has changed to one where the bulk of High Court work is performed by barristers in private practice and, as I understand the position, all judges in Western Australia are appointed from the Bar. Increasingly the former pattern of people practising for lengthy periods as solicitors before coming to the Bar has now altered and more and more people are following the typical South African practice of spending perhaps a year or two in some other form of legal work before coming to the Bar.

In regard to the position in London, notwithstanding endeavours to do so, none of the major London firms have successfully established litigation departments. In effect they have realised that they exist for the purpose of undertaking commercial work and the specialised nature of this work can be done more effectively and cheaply by the Commercial Bar. The area where solicitors will impinge upon the practice of barristers is in the Crown Courts which are in substance equivalent to our Regional Courts.

Overall therefore the picture arising from these discussions is encouraging for the future of the Bar. The only area where our exclusive rights of audience are challenged is in the Supreme Court and if overseas experience is anything to go by this work is likely to remain largely in the hands of the Bar. In effect questions of cost and experience tend to operate to exclude attorneys from this type of work.

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In terms of content the most important area addressed at the conference from the point of view of the South African Bar is the area of advocacy training. It is clear that in this area South Africa lags far behind other countries. Every country which has a separate Bar engages in education for advocacy. The contrast between the traditional South African attitude and that adopted elsewhere can best be shown by the following quotation from a booklet published by the Australia Advocacy Institute. The latter is a body established entirely by the profession to train lawyers – and particularly barristers – in advocacy. The following is the passage in question:-

"Advocacy is the art of persuasion in court. In order to persuade an advocate must be able to communicate effectively with the tribunal.

Good advocacy consists of a number of developed skills and individual talent.

Until about 20 years ago there was a common belief that advocacy could not be taught. It was thought that good advocates were born not made. They honed their skills by observation and experience, by reading texts on advocacy and by being 'thrown in at the deep end' in occasional mock trials but usually in real cases for paying clients.

Anecdotes and exposure to senior advocates were thought sufficient for new advocates to learn their skills by osmosis.

The result was that many did learn and some who had talent became excellent advocates. However, often that took time and it sometimes occurred at cost to clients in the process. It was also apparent that many did not learn from experience and simply perpetuated bad advocacy practices.

The past 20 years have seen the demise of the attitude that advocacy could not be taught.

The breakthrough came with the realisation that skills are best taught by performance and analysis under supervision, with instruction in a manner more akin to coaching, than the mere provision of information.

This process enabled the trainee advocates to improve their performance and their ability to analyse their performances and those of other advocates. This enables them to continue learning more effectively from experience in practice.

There is no one correct method of advocacy and individual styles and abilities must be developed. However an analysis of the work of good advocates shows that there are fundamental common features although the expression of them differs with individual style and ability."

The universal feature of training schemes in the practice of advocacy is that they are undertaken by the profession itself. In the one session which I attended there was agreement that a line needs to be drawn between the technical base of legal knowledge which can be acquired by study at a university and the

acquisition of practical legal skills which can broadly only be taught by persons having experience in the field in question.

Apart from the conventional problems which every new advocate encounters in South Africa there is a further and major difficulty in the fact that an increasing number of aspirant members of the Bar come from communities where the skills which are necessary for successful practice as an advocate have been either neglected or ignored. I think the time has come for the Bar to abandon its "sink or swim" approach to advocacy and to move towards playing a greater role in advocacy training. Indeed this seems to me the logical next step in the process which commenced some 21 years ago with the introduction of the compulsory pupillage system followed as it has been by the Bar examinations and the system of informal lectures which has been instituted at most, if not all, constituent Bars.

I propose therefore that the GCB should decide to explore and establish within the next 12 months a system of advocacy education to be made available both to pupil members and to existing members of the Bar who wish to take advantage of such training. To this end a sub-committee of the GCB should be established with authority to contact other Bars throughout the world and associations such as the American Bar Association which conducts trial advocacy training with a view to defining parameters for such training, identifying and training the trainers and placing such a programme in operation by the beginning of 1996.

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My attendance at the IBA Conference has reinforced my conviction that our participation in organisations such as the IBA and the Commonwealth Law Association can be highly advantageous. Unfortunately as matters stand at present it is usually only the senior and experienced members of the Bar who have the opportunity of attending such conferences. This is a function of cost. However, younger members of the Bar would greatly benefit from the exposure to a wider range of views which attendance at such a conference generates. This is particularly so in relation to those whose knowledge and experience in commercial matters has been limited.

Against that background there would

seem to me to be merit in the GCB establishing a system whereby it granted scholarships to, for example, two members annually to attend such a conference. I have not worked out the precise parameters for the institution of such scholarships but would suggest that they should be open to junior members of the Bar of more than three, but less than ten years standing. The applicants should be screened on merit and scholarships awarded on the basis that they go to those most likely to benefit from attendance at such a conference and most likely to make some input into the life of the Bar on their return. The basis of the scholarship would be the payment of an economy class return airfare to the conference destination plus an allowance of say R2 500,00 per person to meet accommodation costs and incidental expenses. I am aware that this would not cover all the costs of attending the conference but if the scheme is to be worthwhile I have little doubt that aspirants will be willing to pay the additional costs themselves. Overall at current levels of airfares the provision of two such scholarships in each calendar year would not, I think, cost more than about R15 000,00. This could comfortably be met within the present parameters of our budget.

I have limited the capacity of the GCB to institute such a scheme to two scholarships per year. It would obviously be beneficial for as large a number of persons as possible to attend conferences on a similar basis. If the idea is thought to be worthwhile, I would urge at least the major constituent Bars, whose budgets could accommodate such an expenditure, to consider instituting a similar scheme for members of their own Bars. On that basis it would be possible overall to ensure that at least six and possibly more – if some of the small Bars felt they could participate – members a year would secure the benefit of attending either an IBA Conference or a Commonwealth Law Association Conference. In regard to the benefit of the latter I draw attention to the fact that our involvement in the Commonwealth Association has already resulted in the selection of one of our members, Ms Leona Theron from Durban, as a Commonwealth Fellow for 1995. My concern in this proposal is to extend that opportunity to as many of our members as possible.

MJD Wallis SC  
Chairman: GCB

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