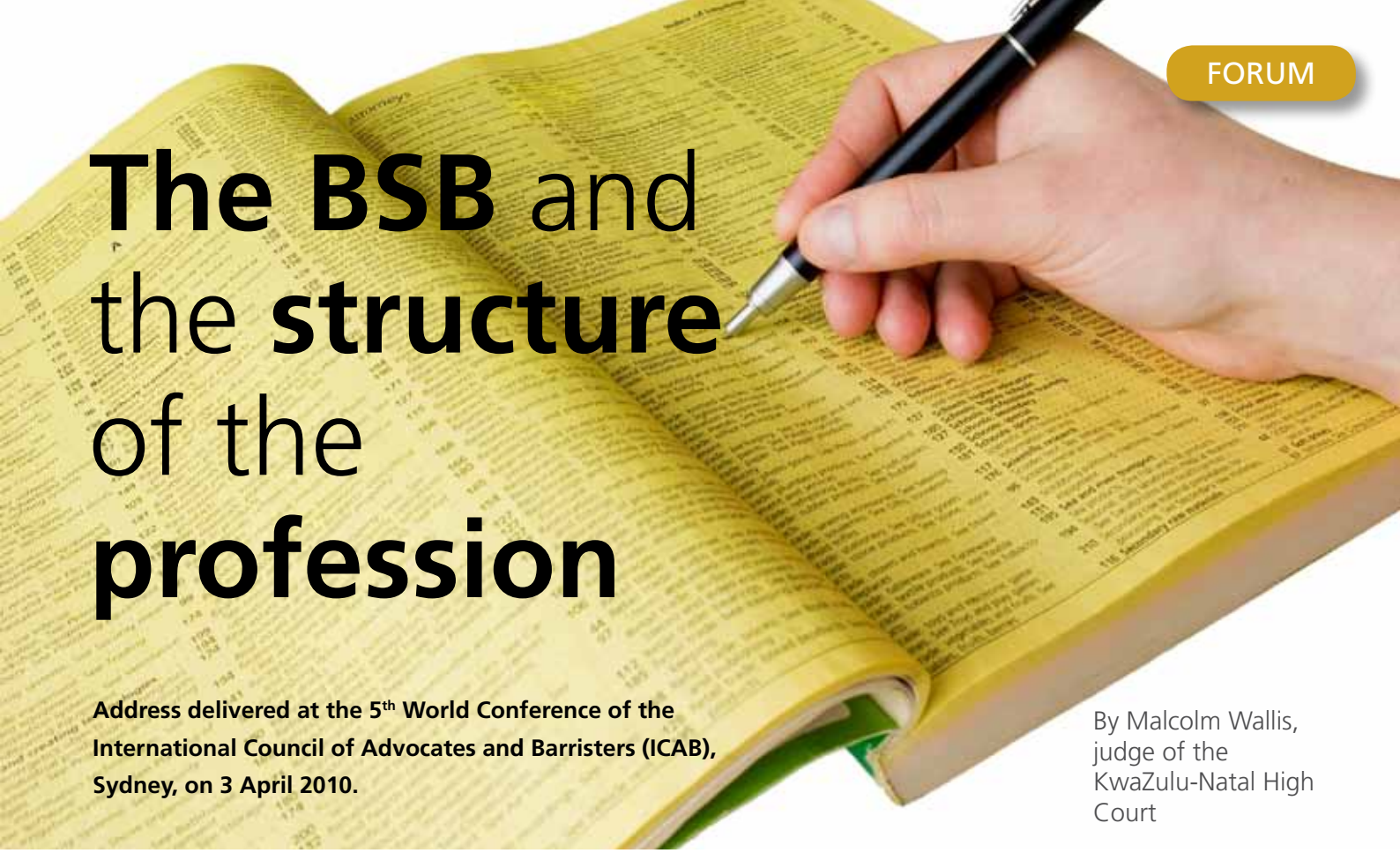

The BSB and the structure of the profession

Address delivered at the 5th World Conference of the International Council of Advocates and Barristers (ICAB), Sydney, on 3 April 2010.

By Malcolm Wallis, judge of the KwaZulu-Natal High Court

The debate today is about the changes proposed by the Bar Standards Board (the BSB) to long-established rules that apply to barristers in England and Wales and to advocates in South Africa and as far as I am aware wherever there exists an independent advocates' or barristers' profession. Those changes have been persuasively introduced and explained to us by Nicholas Green[1] this morning. In listening to him I was reminded that a good advocate appearing for the respondent in an appeal cannot simply prepare the argument in advance and deliver it because they may find themselves so persuaded by their opponent that there seems no point to their prepared argument. And if it is so, as Nicholas has said, that after the current changes have been implemented the English Bar will 'look and smell and feel the same' I wonder why we are having this debate. However I fear that this may not be entirely so and I trust that friendly concern for what is about to happen to the barristers' profession in England and Wales will not be taken amiss.

Let me start by saying first, by way of comparison, that there are important differences between the organisation of the Bar in South Africa and that in England and Wales. In South Africa numbers are about 2 000, based in 13 centres in an area roughly the size of mainland Europe. In each centre there is a separate Bar and the General Council of the Bar is a federal body. The South African Bar, like many European jurisdictions, only covers advocates in private practice and does not include advocates in employment, even those in the service of the National Prosecuting Authority. Nor is membership compulsory and there are some small groups of dissidents although the GCB is the major representative body. Whilst advocates form groups for administrative reasons and share administrative facilities, the system of clerks is unknown and relationships between advocate and attorney are direct, not mediated through a clerk.[2] Lastly, the Bar is not as yet subject to regulation or oversight by any governmental body although that is under debate with a proposed Legal Practice Bill.

Having said that, however, the similarities are far greater than the differences. In both countries individual practice, collegial relationships, the operation of the cab-rank rule, and the rules of client confidentiality and the avoidance of conflicts of interest are recognisably similar. In both the focus is on the representation of clients in courts and tribunals and the furnishing of expert legal advice. In both the practitioner is required to be independent and owes a fundamental duty to the court. We train young advocates in the same way. We share a common heritage.

Inevitably therefore fundamental alterations to the manner in which the profession operates in England and Wales will be felt in jurisdictions such as our own where politicians, legislators and competition authorities will look to what has happened there for guidance. And once those changes occur in England and Wales they will, as the BSB recognises, be irreversible. It will be surprising if they are not picked up in South Africa, in debates over the pending Legal Practice Bill or by the Competition Commission.

I want to look briefly at the drivers of these changes and then at what we should demand of the profession of advocate or barrister. My overwhelming impression as an outsider is that two commercial considerations are central. First there are the perceived interests of consumers and second there is the concern of the Bar at the prospect of being excluded from various types of legal work. The Solicitors Regulation Authority (the SRA) website says this about the Legal Services Act:

'The Government introduced the Legal Services Act 2007 under which ABSs will be permitted to allow greater competition in service delivery *and innovative ways of meeting* consumer demand *for legal*

services, subject to appropriate consumer safeguards.' (My emphasis.)

The BSB's press release announcing the proposed changes explains its decision by saying that:

'The BSB has taken significant decisions in order to open up the legal services market so that consumers have access to even better value, quality, legal services in fulfilment of the Regulatory Objectives of the Legal Services Act 2007.'

This is what permeated the Clementi Review that led to the passage of the Legal Services Act.[3] The perspective was a commercial one and a belief that the proposed changes would benefit consumers by making it simpler and cheaper for them to obtain access to legal services. Whether that occurs in practice I take leave to doubt but that is the theory. It is hardly a surprising one coming from a banker and financial regulator with an accounting background. What is a puzzle to me, having recently seen the corresponding report by Ben Thomson in Scotland, is why bankers and accountants are thought to be the people who should enquire into the legal profession, but that is a debate for another occasion.

My second point emerges from the discussion of ProcureCos in the road show handout distributed by the Bar Council of England and Wales when it was explaining the proposals to its own members. It reads:

'ProcureCo is able to enter into contracts with local authorities, insurance companies or other large purchasers of legal services in order to outsource advice, litigation and advocacy work. ProcureCo then contracts with firms of solicitors to provide the litigation services and with self-employed barristers to provide advice and advocacy services … The strength of ProcureCo is to enable chambers to retain their current structure, whereby members are self-employed and not in partnership with each other, whilst at the same time enabling barristers to team up with other professionals to bid for and participate in work that might involve advice, litigation and advocacy.'

Again viewing matters as an outsider and stripping away the oddity of creating a company to 'procure legal services' when what you mean is procuring legal work for lawyers, this is about enabling barristers to compete for work. Its underlying premise is the commercial advantage of barristers. Similarly the creation of different practice structures is for the benefit of practising barristers to facilitate their being in practice. The Bar is being subjected to substantial commercial pressures and so the drivers of change are commercial as Nicholas has freely conceded in his remarks this morning.

I find this focus on the commercial troubling because it does not start with a concern for the function of the legal profession in a democracy. Is it part of – indeed an essential part of – the ongoing pursuit of justice under the rule of law or have we finally achieved the doom, stated by Marx and Engels in The Communist Manifesto, of converting the lawyer into a paid wage labourer? It poses a challenge to the notion that apart from their commercial worth there are broader and more important values that should enjoy priority in assessing the lawyer's role. When it is proposed to tamper with the structure of the legal profession these questions need to be answered. However I have found little clear evidence in the Clementi Report or the approach of the Bar Standards Board of any deep-seated concern over these issues.

Three changes are particularly pertinent to the Bar as an institution. They are barristers practising in legal disciplinary practices regulated by the Solicitors Regulation Authority without re-qualifying as solicitors; the possibility of barristers practising in barrister only partnerships and the operation of the cab-rank rule. Time does not permit me to undertake a detailed analysis of each of these so I must confine myself, Cassandra-like, to brief predictions as to their effect.

Barristers practising in LDPs will in effect become solicitors. The fact that the SRA is the regulator signals that clearly but I can speak from our own experience. This is what has in substance happened with the Legal Resources Centre that was established in 1979 as a public interest law firm involving advocates and attorneys committed to the protection of civil liberties. It is now to all intents and purposes a firm of attorneys, although its focus is broadly the same as it pursues constitutional litigation, and I predict that the same will happen with LDPs. The BSB aspires to oversight of barristers practising in LDPs but there is no indication that the SRA will agree to this and in effect barristers who join such firms will leave the Bar albeit nominally continuing to practise as such.

The other two changes, which I view as linked, are more significant than one that in substance merely enables people to change sides in the profession. The latter has always happened and if it is thought desirable to facilitate it then so be it. I am also not concerned about the spectre of fusion. If barristers continue to provide a highly skilled litigation service they will survive as a separate group within the legal profession. If they do not, then they do not deserve to survive. More important are the reasons that underpin the prohibition on partnerships and the cab-rank rule.

Identifying those values is not always easy. Broadly they fall under the rubrics of access to justice and independence. They find their greatest purchase in times when society is under stress and the lawyer's role is to serve as a barrier between the individual and the State or the individual and an angry populace. The need for them seems less when 'all's for the best in the best of all possible worlds'[4]. Also where there is a substantial body of barristers, as there is in England and Wales it is easier to discount them because numbers mask the issue of access to justice.

The attractions of partnership seem to me obvious in terms of greater security; ease of commencement of practice; the ability to manage work within the practice and the ability to cover for one another when a barrister is unavailable. It may enable the firm to take on more work than could the individuals operating separately. Perhaps it relieves some of the pressures of administration and the stress of individual practice. Whilst Nicholas tells us that in his discussions there is no interest in partnerships that does not surprise me because he is speaking to people who enjoy the advantages of individual practice in reasonably secure circumstances. Had someone approached me when I had been at the Bar for twenty years and suggested partnership I would not have been interested. But it is not from there that the interest will come.

For me the people it will attract will come from the frightening figures he gave us this morning – 1 800 calls a year and only 500 pupillages and a like number of tenancies in chambers. What happens to the balance? I predict that the attractions of barrister-only partnerships will initially come from this group as they strive to obtain access to the profession and its attractions will grow from there. The problem may not be immediate but will arise in the next five years. I am afraid therefore that I cannot share the view that the Bar of England and Wales will continue to 'look and smell and feel the same'. I view barrister partnerships as a danger there and even more so in countries that are smaller or where there needs to be an emphasis on resisting government overreach. Let me explain briefly why I say that.

First, partnership limits the availability and accessibility of counsel with particular skills. There is a natural tendency in advocates' groups or sets of chambers to bring together people with common practice areas. At present that does not limit availability but a partnership will, certainly in smaller countries where those skills are in short supply. It will do so directly, because rules against conflicts of interest will pre-

vent members of the same partnership from acting on opposite sides in a case, but also I think in other more subtle ways. It will limit the amount of pro bono or limited fee work any one member can undertake because the firm will dictate what can be done as occurs in the pro bono units of large law firms in other countries. It will I predict increase costs because the costs of partnerships of attorneys and solicitors are always higher than those of the independent Bar. It subjects the barrister to constraints that infringe independence of thought and action because the partnership relationship will demand it, where chambers arrangements are directed at reducing costs per capita.

Importantly there will be a reluctance to represent unpopular clients that is characteristic of most larger law firms. It is perhaps foolish to admit this in a cricketing nation such as Australia, but one of my clients was the late Hansie Cronjé. Many people, including my own son, queried how I could act for him. Had I been a member of a partnership I am sure there would have been a suggestion, and perhaps an instruction, that he was not the kind of client the firm wished to have. The point is that partnerships inevitably undercut the independence of the practitioner by making her or him subject to the discipline of the group in a way that cannot happen at present. In a partnership obligations are owed to one's partners that necessarily constrain the ability of the barrister to act independently. Lastly, I fear that the time will arrive when the ProcureCo tail will wag the barrister dog.

I doubt whether the cab-rank rule can prevent this. I would be interested to know when last in any of the jurisdictions represented at this conference there was a complaint that the cab rank rule had been breached. The 'rule' is less a rule than an ethos that barristers understand and follow and it provides a protection for them in taking on unpopular cases, which are the ones that matter. No-one gives a jot about a barrister representing a client accepted by society. The rule exists for outlaws and unpopular causes. We pride ourselves that in our countries what happened to Timothy McVeigh[5] could not happen. That is probably true but no decent size firm of solicitors in South Africa would touch such a case and similar pressures will apply to LDP's and barrister only partnerships.

The cab-rank rule can only be enforced against an individual, not a firm, and in a firm its impact will be diluted because conflict of interest rules mean that it can only apply to one member of the firm at a time. In addition the structure of the firm will make it easy to find ways of avoiding the obligations imposed by the rule. I predict that the BSB will find it impossible to persuade the SRA that it should be imposed in an LDP. To the best of my knowledge no solicitors have ever accepted such a rule. And once the rule is confined, as it will be in practice, to individual practitioners some enterprising specialist in competition law will point out that it is discriminatory and anti-competitive and that will be its quietus. And when that happens who will represent the truly unpopular people and causes in society?[6] These rules exist for times of stress and crisis and once lost they will not be recoverable. As the BSB has said the change is irreversible.

You may think me unduly fearful and lacking in confidence in both profession and regulator so let me make it clear where I come from in this debate. I started practice at the Bar in 1973 at the height of the apartheid regime's dominance of South Africa and became the chairman of the GCB in 1994 with the advent of democracy in South Africa. During the 20 years in between I appeared in the case that stopped the National Party from implementing apartheid by giving away large tracts of South Africa to a feudal monarch in Swaziland. I advised and represented trade unions, church organisations and my local university when they were under attack by the government. I appeared for detainees held under the 1985 state of emergency. That was my experience but it is merely a footnote to the work that many of my colleagues at the Bar did throughout this time. There is a lengthy honour roll of names such as Maisels, Fischer, Mahomed, Kentridge, Langa, Chaskalson and Bizos to mention only those who may be familiar to you and many others less familiar to an international audience.

South African lawyers know what it is like to practise law in a society where the rule of law is ignored; where law is an instrument of oppression not a guarantor of freedom, and where the legal profession's independence – not only instrumental independence but independence in mindset and approach to the practice of law – is essential in order to protect ordinary members of society from an over-powerful government. It was that independence, nurtured by the fact that every advocate was bound by the cab-rank rule; that every advocate was available in every case to high and low; that every advocate was free from the commercial restraints that partnerships and corporate structures impose upon their members, that enabled many (but by no means all) advocates in South Africa to fight for the rule of law, to resist apartheid and to use the courts creatively to bring about change. I stress advocates because with only a very few honourable exceptions the large firms of attorneys would not touch that kind of case for fear of its commercial implications and it was left to small, under-resourced attorneys to come to the Bar to ensure that their cases were properly contested.

It is largely because of those traditions of independence that we were able to reconstruct our legal system after apartheid and create legal institutions that function in a democratic society under the rule of law. Tampering with these fundamentals places the ability of the profession to play that role at risk. And we should remind ourselves that it is when societies are at risk that we need lawyers to play that role. It is easy when the mood is sunny and the waters seem tranquil to say that we have a society governed by the rule of law. But storm clouds gather easily. As we sit here, in the UK there is detention without trial; there are measures that viewed from 6000 miles look like house arrest and there are hearings where neither the party whose liberty is at risk nor that party's lawyer is entitled to know who is giving evidence against them or what, beyond a redacted version, that evidence is. Similar measures are, I understand, in place in Australia. I little thought that in my lifetime I would find on the Oxford University Press site a book entitled Bonfire of the Liberties written about the inroads on civil liberties wrought by the current British Government.[7] Nor did I think to find in a bookshop near to where we are meeting a similar work by Julian Burnside QC about the situation in Australia. Cassandra's fate was to prophesy accurately and not be believed. I do not think warnings such as mine will be heeded. That leaves the cold comfort of hoping that some at least of my predictions will prove wrong.

Endnotes

[1] Nicholas Green QC the chairman of the General Council of the Bar of England and Wales.

[2] Recently there has been some movement towards a clerking system in at least one group based in Johannesburg.

[3] His mandate was to devise a regulatory framework that would 'promote competition, innovation and the public and consumer interest'.

[4] A misquotation from Voltaire's *Candide*.

[5] He could not find a single lawyer admitted to practise in the federal court in Oklahoma to defend him.

[6] I am reminded of Martin Niemöller saying: 'When Hitler attacked the Jews, I was not a Jew, therefore I was not concerned. And when Hitler attacked the Catholics, I was not a Catholic, and therefore, I was not concerned. And when Hitler attacked the unions and the industrialists, I was not a member of the unions and I was not concerned. Then Hitler attacked me and the Protestant church – and there was nobody left to be concerned.'

[7] By Professor K D Ewing, Professor of Public Law at King's College, London.