

# Unearthing the history of barristers

By Catherine Douglas

In 2002, I was grateful for the support of the New South Wales Bar Association as I commenced my doctoral dissertation on the history of barristers in Australia. Since beginning work, I have travelled the country and been indebted to the assistance of past and present members of the Bar wherever I have visited.

My review in detail of the available records has allowed me to complete in draft a written history that synthesises and compares the story of advocates in Australia in the period extending from white settlement to 1856 (the year in which Britain granted responsible government to the majority of Australian colonies.) The tale that has

unfolded is an extraordinary one, which resonates deeply with the issues faced by the modern Bar Australia wide, or so it seems from my discussions with the barristers who have been kind enough to share their thoughts with me. The early life and practice of advocates in New South Wales form a major part of this dissertation, as these lawyers were, for first thirty years of white settlement, alone on a strange new continent and paving the way for those who came after them.

My work will first be presented for consideration as a doctoral dissertation in July this year and it is then my intention to publish it more widely as Part One of a three part series on

barristers in Australia. I have already made great inroads into unearthing the history of barristers from 1856 and into the twentieth century, and will continue the work of telling this story after the completion of the doctorate.

The prime minister recently made remarks that root and branch reform is needed in the presentation of Australian history and the backbone of that effort relies on the support of institutions like the New South Wales Bar Association to see that the critical work of preserving and recording a major part of Australian legal history remains living and available. Again, I thank the New South Wales Bar Association and its members for their continuing support and generosity.

## Urgent ethical guidance for members

Barristers may require urgent ethical guidance such as during an adjournment at court. Barristers are reminded of the current system in place which is available to members of the Bar Association allowing for assistance over the telephone.

1. Barristers may telephone senior counsel currently serving on the association's professional conduct committees. The names and telephone numbers of senior counsel can be obtained by telephoning the association's Professional Conduct Department: ph: (02) 9232 4055.
2. As soon as practicable after speaking with senior counsel, if the barrister wishes to have a record of his or her discussion with senior counsel, he or she should send a letter to senior counsel recording the facts and the guidance given.
3. A copy of the letter may also be sent to the director, professional conduct. However, any decision and all responsibility is that of the individual barrister. The role of senior counsel is to provide an opportunity for discussion to assist members in reaching a conclusion, not to give advice or a 'ruling'.

A previous system for providing 'ethics rulings' to barristers (both urgently and non-urgently) was reviewed by the Bar Council some time ago and is no longer in place.

Section 81 of the *Legal Profession Act 2004* provides:

- (1) Practice as a barrister is subject to the barristers rules.
- (2) Practice as a barrister is not subject to any other rules, practice guidelines or rulings of the Bar Association or Bar Council.

### Ethical guidance in non-urgent circumstances

Members requiring ethical guidance in non-urgent circumstances may contact senior counsel on the association's professional conduct committees.

The names of senior counsel currently serving on the association's professional conduct committees can be obtained:

- from the Bar Association's web site: [www.nswbar.asn.au](http://www.nswbar.asn.au)
- by contacting the association's Professional Conduct Department: ph: (02) 9232 4055

As with urgent matters, if the barrister wishes to have a record of their discussion with senior counsel, he or she should send a letter to senior counsel recording the facts and the guidance given.

A copy of the letter may also be sent to the director, professional conduct.

However, any decision and all responsibility is that of the individual barrister. The role of senior counsel is to provide an opportunity for discussion to assist members in reaching a conclusion, not to give advice or a 'ruling'.

In matters in which a conflict of interest or potential breach of confidentiality is alleged, members should always err on the side of caution.

When there is any practical potential for breach of Barristers' Rule 107, consideration of the matter should always begin with the view that the brief should be returned.

Members should, of course, be familiar with the *New South Wales Barristers' Rules*, which are published on the Bar Association's web site: [www.nswbar.asn.au](http://www.nswbar.asn.au)