

IBA Conference
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"Independence - What does it mean for the Legal Profession?"

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Chief Justice of Australia

Mr President, Mr Attorney, other distinguished guests, members of the International Bar Association, ladies and gentlemen.

Thank you Mr President for this opportunity to speak to this significant gathering of practitioners and judges from around the world. May I extend a welcome to those of you from other jurisdictions. On the occasion of the opening of this Conference, I thought I would touch upon a topic which the International Bar Association has addressed in a number of ways and which it clearly considers to be importance. It is the independence of the legal profession.

It is a defining feature of any profession that those practising it are able to exercise independent judgment in giving advice or recommending a course of action. In common law and other legal systems it is commonplace to speak of the legal profession as being independent. The independence spoken of is the ability to act and to exercise judgment free from external pressure. This independence assumes particular importance for lawyers in the conduct of litigation.

One source of pressure upon the exercise of independent judgment by lawyers may be their clients. Lawyers, barristers and other advocates in particular, cannot be influenced by a client about what they say or do. They cannot tailor advice to the expectations or desires of a client and cannot allow the needs of a client to affect the attainment of professional ethical standards.

Lawyers acting for clients in litigation have a special role. They speak on behalf of their client in court, but that is not to say that they speak as if they were the client or are dictated to by the client as to how the client's case is to be conducted in court and what the lawyer is to say to the court. It has been

observed by a former Chief Justice of Australia¹ that to describe a barrister as a “mouthpiece” of a client is amongst the greatest insults that can be offered.

This is not to say that a lawyer does not owe a duty to the client. But that duty can only properly be fulfilled by the lawyer exercising her or his own judgment about the advice given to the client concerning litigation and the actual conduct of it. Moreover, in our system, a lawyer’s duty to the court overrides that to the client. The public interest demands that this be so. The lawyer’s duty is to be frank and honest to the court in all things. It requires what has been described as an “independent discretion or judgment in the conduct and management of a case”, not only with a view to the client’s success, but also to “the speedy and efficient administration of justice”².

So it is the case that, regardless of a client’s demands, it is the lawyer, more often the lead barrister, who must exercise judgment about matters such as the number of issues and points of law to be raised, the number of witnesses to be called and the questions to be asked. It is not possible for a lawyer to meet her or his obligations to the court and at the same time be under instruction from the client in relation to these matters.

I have mentioned an external pressure, that from the client. It is possible for lawyers themselves to create pressures which may affect the exercise of their professional judgment. This may arise where they allow business or other self-interested motives to intrude on their professional judgment. In the IBA’s report on *The Independence of the Legal Profession* published last year³, one of the indicia of independence identified was the “ability to adapt and react to business practices and quasi-legal practices without undermining [the] exercise of

¹ Murray Gleeson, “Bench and Bar” (2002), 22 *Australian Bar Review* 95, 97.

² *Giannarelli v Wraith* (1988) 165 CLR 543, 556.

³ IBA Presidential Task Force on the Independence of the Legal Profession, *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society* (2016) 9.

independent judgment in the best interest of the client". The Report recognised that there was a "growing commercialisation" of the legal profession and that it was essential that it did not undermine the independence of lawyers.

The IBA seeks to promote lawyers' independence through the setting of standards. One such standard requires the profession and state organs to educate the public about the importance of independence to both lawyers and the judiciary⁴. The importance of judicial independence is well understood. Without it, it would be difficult to maintain the confidence of the citizens in the courts and their belief that they will be treated fairly.

The IBA's 2016 Report on independence describes the relationship between judicial independence and the independence of lawyers as one of "mutual reliance and co-dependence"⁵. Just as judicial independence is not a privilege which is granted to judges in order that they may be shielded from criticism, the independence of the legal profession is not intended to prevent them from being accountable in the performance of their duties, but rather is granted in order that a truly independent legal profession may serve as a "bulwark of a free and democratic society"⁶.

An aspect of an independent legal profession which sets it apart from other professions is that lawyers are sometimes required to act for clients who are in dispute with, or challenge, the government or are unpopular with the media or the public. In order for a lawyer to be free to advocate fearlessly for a client's interests it is necessary that the lawyer be free of pressure from the State or its agencies.

⁴ *IBA Standards for the Independence of the Legal Profession* (1990) Principle 5.

⁵ IBA Presidential Task Force on the Independence of the Legal Profession, *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society* (2016) 10.

⁶ *Ibid*, 5, quoting Michael Kirby, "Independence of the Legal Profession: Global and Regional Challenges" (speech presented to the Law Council of Australia, 20 March 2005)..

Standards adopted by the IBA in 1990 reflect earlier draft principles developed in the preceding decade by jurists and align closely with similar principles endorsed by the United Nations General Assembly in the same year⁷. The preamble to the *IBA Standards for the Independence of the Legal Profession* recognises that lawyers' independence is an "essential guarantee for the promotion and protection of human rights"⁸. This has long been recognised in Australia. At the first Conference of Australia's Legal Societies in 1933, Sir John Latham, who would later be appointed as Chief Justice of the High Court of Australia, said that:

"[T]he independence of the profession is one of the strongest safeguards that any community has"⁹.

The Standards provide, among other things, that lawyers must discharge their duties "without any inhibition or pressure from the authorities or the public" and that lawyers must not be sanctioned or harassed for having "legitimately advised any client or client's cause"¹⁰. They require that appropriate safeguards be implemented to preserve the independence of lawyers "dealing with persons deprived of their liberty"¹¹.

The indicia of lawyers' independence included in the IBA's 2016 Report include effective, independent regulation of the profession, in order to minimise external influences on the profession¹²; freedom from fear of prosecution in

⁷ The *Basic Principles on the Role of Lawyers* were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and were subsequently "welcomed" by the General Assembly: GA Res 45/121, UN GAOR, 45th sess, UN Doc A/RES/45/121 (14 December 1990)..

⁸ *IBA Standards for the Independence of the Legal Profession* (1990).

⁹ Hon J G Latham, "Duties and Opportunities of the Legal Profession in Australia" (1933) 7 *Australian Law Journal* 15, 18.

¹⁰ *IBA Standards for the Independence of the Legal Profession* (1990) Principles 6, 8.

¹¹ *IBA Standards for the Independence of the Legal Profession* (1990) Principle 12.

¹² IBA Presidential Task Force on the Independence of the Legal Profession, *The Independence of the Legal Profession: Threats to the bastion of a free and democratic society* (2016) 20..

controversial or unpopular cases, in order to ensure that lawyers can represent “unpopular clients, or clients who are critical of, or even hostile to, the government”¹³; and the ability to respond to political, media or community pressures in times of war, terror or emergency, so as to mitigate the effects of these pressures on the rule of law¹⁴.

The question of how pressures which can be exerted from governments should be dealt with is a large one. It requires as a minimum education of the public and of those involved in governance about the role of the legal profession and the importance of it in our societies. This is recognised by the IBA in its Report. How individual lawyers deal with such pressures is largely a matter for them. It requires a strong sense of duty and ethics, which may be promoted by further legal education and by regulation of the profession, as is stated in the IBA’s Standards.

The IBA Standards also require that independent self-governing lawyers’ associations be established in each jurisdiction¹⁵. The functions of these bodies include ensuring the independence of the legal profession¹⁶ through education, the setting of standards and monitoring for compliance.

Independent self-regulating professional associations are essential to the independence of lawyers and to the maintenance of the rule of law. There have been attempts, in recent times, by governments in our region to seek to control such bodies. Such action must be resisted. There have been other examples where the treatment of lawyers and the recognition of their independence has improved, not the least because of the support from other lawyers’ associations which has been made evident to the governments in question.

¹³ Ibid, 25.

¹⁴ Ibid, 30.

¹⁵ *IBA Standards for the Independence of the Legal Profession* (1990) Principle 17.

¹⁶ *IBA Standards for the Independence of the Legal Profession* (1990) Principle 18.

Individual bar associations can be assisted by their equivalent associations from other jurisdictions. The effectiveness of the support of bodies calling in aid internationally accepted standards, such as those of the IBA, should not be underestimated. The IBA, through the standards it sets and the reports it undertakes into lawyers' independence, plays an important role in the maintenance of that critical characteristic of the legal profession: its independence.

I wish the members of the IBA a stimulating and productive conference.