

The Public Defenders' Criminal Law Conference 2025

“Unpopular clients and causes – How could you? Why would you? How do you?”

Ken Averre MBE

Introduction

Samuel Johnson, an 18th Century English poet, playwright, essayist and moralist amongst other descriptions is credited with the phrase 'I do not care to speak ill of any man behind his back but I believe the gentleman is an attorney.'

This paper seeks to go beyond the antithesis towards lawyers and any analysis of the time honoured question at dinner parties, BBQs and social gatherings which inevitably arises once you have to reveal your role in the profession, namely “How can you represent someone you know is guilty?” and such other variations which invariably question how far you would go on behalf of clients and whether there are lines you will not cross.

It is not my intention to provide answers those questions since I am sure you are all dab hands at it but, instead, I want to explore the ethical duties owed and the consequences for some of adhering to those principles.

In 2006 Abbie Smith published a paper entitled “DEFENDING THE UNPOPULAR DOWN UNDER”¹ which I highly recommend you read. The paper explores the motivation and ethical practices of lawyers who represent unpopular clients and notes that it is a largely unexplored area of legal scholarship in Australia.

That paper was written some 19 years ago, and reference was made in the headnote to “...a time of growing unease”. Today with the prevalence of social media and the keyboard warrior together with a shift in politics, things have never been so difficult for those representing the unpopular.

Also of note is that in researching the paper the author had spoken to such luminaries as Phil Boulton SC, John Stratton SC and Justice Dina Yehia who, you might think, all know a thing or two about representing the unpopular.

¹ Melbourne University Law Review Vol 30 p 495

https://law.unimelb.edu.au/_data/assets/pdf_file/0006/1707936/30_2_7.pdf

Threats and risks to lawyers from state and non-state actors are ever present. This paper will provide some examples of that and look at some changes in NSW to address the issues.

My own personal experience was in working as the Public Solicitor in the Solomon Islands and representing many accused charged with murder arising from an ethnic conflict and the ensuing political unrest. The shooting of a former Police Commissioner, the killing of members of a religious order, the beheading of a Seventh Day Adventist Missionary and representing politicians charged with riot all attracted significant attention and those charged elicited little sympathy from the public. ~~Their~~ There was a fair amount of scrutiny from overseas governments, particularly Australia.

However, not only were they unpopular causes but add into the mix an attorney-general designate who was wanted for extradition to Australia and had requested representation on a bail application. Representation from an office receiving funding from the Australian Government. The pressure was very much on.

Representing the Governor General after he had dissolved Parliament and ordered a general election also raised a few eyebrows and incurred the wrath of some who will remain nameless.

The question as to the why has a very simple answer. It is for many “**the unwritten rule that I might not refuse**”.² In my case I was also mandated by the Constitution and the legislature to ensure that advice and representation was provided for those who requested it.

In her paper Abbie Smith refers to the observations of Barbara Allen Babcock who was a former Director of the Public Defender Service for the District of Columbia in organising the motivations of defenders into categories.³

Obligation to Accept A Brief

The first thing that springs to mind is the cab rank rule which is to be found at Rule 17 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)*.

A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:

- (a) the brief is within the barrister's capacity, skill and experience,*
- (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may,*

² Edward Bennett Williams, *One Man's Freedom* (1962) 20

³ Page 497

as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence,
(c) the fee offered on the brief is acceptable to the barrister; and
(d) the barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105.

It is of importance that all practitioners familiarise themselves with the rules!

Rule 101

Briefs which must be refused or must be returned

A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

- (a) the barrister has information which is confidential to any other person in the case other than the prospective client, and:
 - (i) the information may, as a real possibility, be material to the prospective client's case, and*
 - (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,**
- (b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate,*
- (c) the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer,*
- (d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,*
- (e) the brief is to appear on an appeal and the barrister was a witness in the case at first instance,*
- (f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,*
- (g) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee,*

(h) the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client,

(i) the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration,

(j) the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges,

(k) there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,

(l) the barrister has already advised or drawn pleadings for another party to the matter; or

(m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises.

(n) (Repealed)

Rule 101A

Refusal of briefs by barristers who are current and former judges or tribunal members

(1) In this rule:

court does not include tribunal.

former rules means the rule or rules of conduct (however described) in force immediately before 1 July 2015 governing the right of a barrister to appear before a court of which the barrister was a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, including rule 95 (n) of the New South Wales Barristers' Rules and rule 92A of the Victorian Bar Practice Rules 2009.

judge includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, but does not include a person appointed as a judge before 1 July 2015.

tribunal means a tribunal constituted by or under an Act or a disciplinary tribunal.

(2) A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

(a) the brief is to appear before a court:

(i) of which the barrister is or was formerly a judge, or

(ii) from which appeals lie to a court of which the barrister is or was formerly a judge, and

(b) the appearance would occur less than 5 years after the barrister ceased to be a judge of the court.

(3) A barrister must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if:

(a) the barrister is a full time, part time or sessional member of the tribunal, or

(b) the appearance would occur less than 2 years after the barrister ceased to be a member of the tribunal.

(4) A barrister must refuse to accept or retain a brief or instructions to appear before a tribunal that sits in divisions or lists of matters to which its members are assigned if:

(a) the brief is to appear in a proceeding in a division or list to which the barrister is assigned as a member of the tribunal, or

(b) the brief is to appear in a proceeding in a division or list to which the barrister was assigned and the appearance would occur less than 2 years after the barrister ceased to be assigned to the division or list.

(5) The former rules continue to apply to a barrister who was, before 1 July 2015, appointed as a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.

(6) For the purposes of subrule (2) (a) (ii):

(a) an appeal is not to be considered to lie to the Federal Court of Australia from the Supreme Court of a State or Territory, and

(b) the Supreme Court of Victoria (in the exercise of any of its jurisdiction) is taken to be a court to which an appeal from the County Court of Victoria lies, and

(c) the Supreme Court of New South Wales (in the exercise of any of its jurisdiction) is taken to be a court to which an appeal from the District Court of New South Wales lies.

(7) This rule does not apply in respect of a tribunal if a provision of an Act or a statutory instrument made under an Act prohibits a member or former member of the tribunal from representing a party before the tribunal or prohibits any such representation within a certain period after ceasing to be a member or in certain circumstances.

Rule 102

A barrister need not refuse or return a brief, notwithstanding the application of rule 101 (f) if the barrister believes on reasonable grounds that:

(a) allegations involving the barrister in such a way as to apply one of those rules have been raised in order to prevent the barrister from accepting the brief, and

(b) those allegations can be met without materially diminishing the barrister's disinterestedness.

Rule 103

A barrister must refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:

(a) the information may, as a real possibility, affect the prospective client's interests in the matter on which advice is sought or may be detrimental to the interests of the first person, and

(b) the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.

Rule 104

A barrister must not accept a brief to appear on a day when the barrister is already committed to appear or is reasonably likely to be required to appear on another brief

if by appearing on one of the briefs the barrister would not in the normal course of events be able to appear on the other brief or briefs.

Rule 105

Briefs which may be refused or returned

A barrister may refuse or return a brief to appear before a court:

- (a) if the brief is not offered by a solicitor,*
- (b) if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements,*
- (c) if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee,*
- (d) if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement,*
- (e) if the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relative,*
- (f) if the solicitor does not comply with a request by the barrister for appropriate attendances by the instructing solicitor, solicitor's clerk or client representative for the purposes of:*
 - (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief,*
 - (ii) ensuring that the client adequately understands the barrister's advice,*
 - (iii) avoiding any delay in the conduct of any hearing, and*
 - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused,*
- (g) if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be,*
- (h) if the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has*

refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm,

(i) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief does not require the services of a Senior Counsel,

(j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed,

(k) where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party,

(l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give rise to the apprehension that there may not be a fair hearing, or

(m) in accordance with the terms of a costs agreement which provide for return of a brief.

Rule 106

A barrister may return a brief accepted under a conditional costs agreement if the barrister considers on reasonable grounds that the client has unreasonably rejected a reasonable offer to compromise contrary to the barrister's advice.

Rule 107

A barrister must not return under rule 105 a brief to defend a charge of a serious criminal offence unless:

(a) the barrister believes on reasonable grounds that:

(i) the circumstances are exceptional and compelling, and

(ii) there is enough time for another legal practitioner to take over the case properly before the hearing, or

(b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this rule.

The duty can be traced back to medieval times where a lawyer had an obligation to provide representation when he (given that only men could practice law) may not have desired to. The professional even had the obligation to provide free services if so requested.⁴

⁴ The Cab Rank Rule: A reappraisal of the duty to accept clients, Maree Quinlivan (1998) VUWLR 113

Of course, the cab rank rule does not apply to all practitioners given that there is no analogous rule for solicitors in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW)*.

However, my experience is that in criminal defence in NSW it would be difficult to find a practitioner who did not consider that they had an obligation to provide representation notwithstanding the absence of such rules.

As an aside it is also of importance to note the requirements for withdrawal of solicitor in the *Uniform Civil Procedure Rules 2005 (NSW)* and relevant Practice Notes but for the criminal practitioner you also need to consider the issue of a client not putting you in funds in sufficient time for the trial, that can also include counsels' fees.

Rule 53.3 of the *District Court Rules 1973* provide:

(1) A legal practitioner whose authority to act for a party in any proceedings has not been terminated by the party shall not, without the leave of the Court, cease to act for the party unless he has given reasonable notice of his intention to so cease to act to all parties to the proceedings, the registrar and the Criminal Listing Director.

(2) An application for the leave of the Court as mentioned in subrule (1) shall be made on notice to all parties to the proceedings, the registrar and the Criminal Listing Director of the day and the place where, and the grounds on which, the leave is to be sought.

(3) Non-payment of professional costs or counsel's fees shall not of itself constitute adequate grounds on which the Court may grant leave as mentioned in subrule (1).

(4) A statement by a legal practitioner that he desires for ethical reasons to cease to act shall, without any explanation being required by the Court, constitute adequate grounds for the granting of leave as mentioned in subrule (1), and the fact that such a statement has been made by the legal practitioner shall be recorded on the Court file.

(5) A solicitor or, where a barrister acts uninstructed by any solicitor, a barrister who acts for a party in any proceedings and has reason at any time to believe that he has lost contact with the party shall as soon as practicable, in writing, so inform every other party, the registrar and the Criminal Listing Director.

(6) Without limiting the generality of subrule (5), a solicitor or, where a barrister acts uninstructed by any solicitor, a barrister who acts for a party in any proceedings shall, not less than 1 month nor more than 2 months before the date fixed for the hearing of the proceedings, ascertain whether he remains in contact with the party.

The consequences of representing the unpopular

You just have to think back to those awful lawyer jokes of the past to appreciate the ubiquity of the animosity towards lawyers. That sentiment like the cab rank rule is not a new thing. Here's another literary example.

In Shakespeare's Henry IV, Part II Dick the Butcher says, "The first thing we do is, let's kill all the lawyers". Dick the Butcher is a murderer and is also the right-hand man who is leading a rebellion against King Henry. Together they are anti-intellectual, kill anyone who can read and burn all the books and documents they encounter. They know they will be able to take over an ignorant population with greater ease than one where everyone understands their rights.

What Shakespeare suggests is that society cannot exist in a state of fairness and peace with the protection of the law and its guardians. Lawyers are represented as the fundamental defence against the worst manifestations of the power hungry. Disposing of lawyers is seen by Shakespeare as a step in the direction of a totalitarian form of government.

There are other interpretations of what Shakespeare was suggesting including that the phrase was directed to a protest against an unfair legal system and those who were implementing it.

However, irrespective of the interpretations, what the words recognise is the importance of maintaining a fair rule of law that protects the people and ensuring that a fair and just law system is maintained.

Lawyers experience various forms of harassment and threats, ranging from professional disciplinary procedures to disbarments as retaliation for their work, to arbitrary detention, civil and criminal prosecutions, physical violence, and in some cases death.⁵

In many countries, bar associations are unable to fulfill this role because national Ministries of Justice regulate, monitor, and often manipulate the activities of the associations. This allows the government, through the bar association, to engage in retaliatory disciplinary procedures, random qualification exams, and frivolous disbarment procedures. One example is Afghanistan, another is Belarus. The article by Jasmine Cameron refers to other examples.

In the UK the previous conservative government came under significant criticism for its press briefing against members of the profession representing those wishing to challenge rulings around immigration decisions.

As we know from our own experience here in Australia with "Stop the boats" and the hysteria surrounding asylum seekers, populism in politics and demonisation of groups are

⁵ Lawyers Under Threat: Highlighting Their Plight: Just Security, Jasmine D Cameron 23 January 2023: [Lawyers Under Threat: Highlighting Their Plight](#)

commonplace. The law and order auction and whipping up hysteria are high on the agenda in a bid to win votes.

These are some of the headlines from the past few years in the UK where, like in Australia, public funding for challenges to immigration decisions is virtually non-existent.



The screenshot shows a mobile phone interface with a status bar at the top displaying the time 7:22, a profile picture, and signal strength. Below the status bar is the 'The Observer' logo. A yellow banner indicates 'This article is more than 4 years old'. The main headline reads 'Ministers take swipe again at lawyers with accusation of 'playing politics''. The sub-headline states: 'In a letter seen by the Observer, the immigration minister, Chris Philp, condemned lawyers for challenges to the deportations of asylum seekers'. The author is 'Mark Townsend' and the date is 'Sun 22 Nov 2020 17:15 AEDT'. A 'Share' button is visible. The article text begins: 'Ministers have launched fresh attacks on the legal profession, this time accusing lawyers of undermining the justice system by "playing politics", prompting renewed despair. In a letter, seen by the *Observer*, the immigration minister, Chris Philp, condemns lawyers for last-minute challenges to the deportation of asylum seekers, in remarks that critics say betray a fundamental lack of understanding of how the courts system'. At the bottom, there is an advertisement for 'Settle in with Belong nbn' with a 'LEARN MORE' button. The bottom of the screen shows the URL 'theguardian.com' and a 'Private' indicator.

7:22

The Observer

This article is more than 4 years old

Ministers take swipe again at lawyers with accusation of 'playing politics'

In a letter seen by the Observer, the immigration minister, Chris Philp, condemned lawyers for challenges to the deportations of asylum seekers

Mark Townsend

Sun 22 Nov 2020 17:15 AEDT

Share

Ministers have launched fresh attacks on the legal profession, this time accusing lawyers of undermining the justice system by "playing politics", prompting renewed despair.

In a letter, seen by the *Observer*, the immigration minister, Chris Philp, condemns lawyers for last-minute challenges to the deportation of asylum seekers, in remarks that critics say betray a fundamental lack of understanding of how the courts system

Advertisement

Settle in with Belong nbn

SPONSORED BY BELONG, BY...

LEARN MORE

theguardian.com — Private

7:22



NEWS

Home Office monitoring immigration lawyers' activities, says minister

By [John Hyde](#) | 21 February 2023



The Home Office is 'monitoring the activities' of immigration lawyers, a minister has told parliament in a statement that will be interpreted as an attempt to intimidate parts of the legal sector.

Immigration minister Robert Jenrick said in the Commons yesterday that the government is keeping tabs on a 'small number' of legal practitioners, although he declined to expand on how this monitoring is taking place.

PARTNERSHIP

 e.co.uk — Private



Australia is not immune from such similar dog-whistling. Politicians, police and others need to be cautious in their approach.

Take for example, this headline from the Sydney Morning Herald Editorial of 23 February 2025:

“The North Shore Rapist should have had the book thrown at him. Instead the courts kept giving him a chance”

The editorial ends “... a good place to start would be for our courts to hand out decent sentences to revolting offenders like Kay”.

On 13 June 2019, the NSW Law Enforcement Conduct Commission decided to conduct an investigation pursuant to s 44(1)(a) of the *Law Enforcement Conduct Commission Act 2016* (NSW) to investigate whether on 28 and 29 May 2019 police officers harassed and intimidated a legal practitioner. The Law Society Journal Online reported as follows⁶:

Their investigation, dubbed Operation Monza, concluded the officers embarked on behaviour designed to “intimidate and harass” the solicitor in 2019, following a request he made for police to give evidence in-person during a hearing for his client, appearing on animal cruelty charges in a local court in regional NSW.

During private hearings held by the Commission in 2020, two officers told the inquiry they had acted on the instructions of a supervisor when they “inconvenienced” the solicitor with minor traffic offences as he made his way to court. The supervisor confirmed to the inquiry that he gave those instructions.

The solicitor told the inquiry he noticed police parked outside his house at 6.30am and that they followed him as he drove a neighbour to a car repair store on his way to court.

The inquiry heard the solicitor was pulled over by the two officers, who asked to see his licence because he had not indicated when he reversed from his driveway. He was then stopped again a short time later for a road worthiness check on his car and served with a vehicle defect notice. A mechanic later inspected the car and found no defects.

Law Society of NSW President Juliana Warner wrote to the NSW Police Commissioner in the wake of the Commission’s report and findings from the investigation, tabled in Parliament on March 26.

“I have written to the NSW Police Commissioner, Michael Fuller APM, on behalf of the legal profession expressing my concerns about the conduct uncovered by the [LECC report],” Warner said in a statement. “The deliberate targeting of a solicitor, as uncovered by the Commission, so as to impede his or her ability to represent his or her client at court, is completely unacceptable and has raised significant concerns across the legal profession. It presents a real threat to the community’s belief that the criminal justice system is operating as it should.”

“I also noted in my letter to the Police Commissioner that the LECC found that three officers engaged in serious police misconduct and recommended

⁶ [Police targeting of NSW solicitor ‘completely unacceptable’ - Law Society Journal](#)

that further action be considered in relation to that misconduct. I look forward to the Police Commissioner's response to the Commission's report."

The incident itself and the subsequent LECC investigation attracted a lot of press attention and ultimately led to a legislative amendment to laws enacted to protect judges, prosecutors, witnesses and others involved in cases against those accused of committing crimes from threats and reprisals.

Section 322 of the *Crimes Act 1900* (NSW) provides

- (1) A person who, without reasonable excuse, threatens to do or cause, or does or causes, any injury or detriment to any person--
- (a) intending to influence a person called or to be called as a witness in any judicial proceeding to give false evidence or withhold true evidence or to not attend as a witness or not produce anything in evidence pursuant to a summons or subpoena, or
 - (b) intending to influence any person (whether or not a particular person) in the person's conduct as a juror in any judicial proceeding or to not attend as a juror in any judicial proceeding, whether he or she has been sworn as a juror or not, or
 - (c) intending to influence any person in the person's conduct as a judicial officer, or
 - (d) intending to influence any person in the person's conduct as a public justice official in or in connection with any judicial proceeding, or
 - (e) intending to influence a person in the person's conduct as an Australian legal practitioner acting--
 - (i) for a defendant in a criminal matter, or
 - (ii) in connection with criminal proceedings,

is liable to imprisonment for 10 years.

(2) In this section--

"reasonable excuse" includes--

- (a) making, or threatening to make, a complaint about a person to a person or body acting in an official capacity, including the following--

- (i) a professional body,
 - (ii) the Judicial Commission of New South Wales,
 - (iii) the NSW Legal Services Commissioner, and
- (b) ending, or threatening to end, a retainer.

There are many examples from around the globe of lawyers losing their liberty and their lives in their commitment to their professional obligations.

I want to conclude with one such example from Northern Ireland and “the Troubles” as they are commonly referred to, somewhat euphemistically. Pat Finucane was an Irish lawyer specialising in criminal defence work and came to prominence due to his successful challenge of the British government in Human Rights cases in the 1980s.

He was shot dead in front of his family on 12 February 1989 by loyalist paramilitaries from the Ulster Defence Association acting in collusion with British Security Services.

Conclusion

Here in Australia legal practitioners (and judicial officers) for that matter are not immune to criticism in the media.

When that criticism comes from the government, then opposition or the police then it is likely to undermine the public’s confidence in the administration of justice.

There are many examples in the press of lawyers being physically attacked both overseas and closer to home.

“Family lawyer assaulted at Whangārei courthouse”⁷

It is not prevalent which I think is a testament to the way in which lawyers conduct themselves.

March 2025
K H Averre

⁷ <https://www.nzherald.co.nz/northern-advocate/news/family-lawyer-assaulted-at-whangarei-courthouse-one-in-custody/MUDGILCMJFEDBMDAOCM5D3HOQM/>