



Our Ref: RHB:SAM: 71004291/71004292
Your Ref: BDB : 8001237
1 February 2008

Mr Brian Bartley
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Dear Brian

COMPLAINTS BY MR KEELTY AND MR BIDDLE AGAINST STEPHEN KEIM SC

1. I refer to the complaints against your client by Mr Keelty (dated 8 August 2007) and by Mr Biddle (dated 20 July 2007) ("**complaints**").
2. As you are aware, I have been delegated¹ by the Legal Services Commissioner his power to decide the complaints against your client. This was not, as you can appreciate, as a result of any actual bias on the Commissioner's behalf but on concerns by the Commissioner of perceived or apprehended bias given the Commissioner's occasional professional dealings with Mr Keim over the last 14 years.
3. The regulatory scheme under the Act enables the Commission to investigate complaints about legal practitioners. In particular, the Commission may investigate complaints of professional misconduct² or unsatisfactory professional conduct³ as defined in the Act. Before a complaint can be dismissed, I must be satisfied of one of the following:
 - there is no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct⁴; **or**
 - it is in the public interest to dismiss the complaint⁵.
4. In relation to the complaint of Mr Biddle, the Commissioner referred⁶ that complaint to the Bar Association of Queensland ("**BAQ**") on 6 August 2007. In relation to the complaint of Mr Keelty, I referred this complaint on 21 August 2007 (pursuant to the Commissioner's delegated power) to the BAQ for investigation.

¹ Section 596 Legal Profession Act 2007

² Section 419 Legal Profession Act 2007

³ Section 418 Legal Profession Act 2007

⁴ Section 448(1)(a) Legal Profession Act 2007

⁵ Section 448(1)(b) Legal Profession Act 2007

⁶ Section 435(2) Legal Profession Act 2007

5. By letter dated 19 December 2007, the BAQ returned the investigation files to the Commission with a report containing a recommendation⁷ that the complaints be dismissed. I **enclose** a copy of the BAQ report. I wish to make it perfectly clear that the BAQ recommendation is a recommendation only and is not binding on me. I have, as is apparent in these reasons for my decision, adopted some aspects and commentary as contained within the BAQ report for the sake of completeness and consistency.
6. The complaints, in short, were that your client contravened Rule 60 of the *Legal Profession (Barristers) Rules 2007* by releasing a copy of a record of interview to a journalist. I have now had an opportunity to consider the investigation files in respect of the complaint against your client together with the BAQ report.

Relevant Material

7. In reaching this decision, I have considered the following relevant material:

No	Document	Date
1.	Complaints dated 8 August 2007 and 20 July 2007	
2.	Respondent's submissions dated 8 October 2007	
3.	BAQ Investigation report dated 19 December 2007	
4.	Rule 60 and 61 <i>Legal Profession (Barristers) Rules 2007</i>	
5.	Section 227 <i>Legal Profession Act 2007</i>	
6.	Section 418 <i>Legal Profession Act 2007</i>	
7.	Section 419 <i>Legal Profession Act 2007</i>	
8.	Section 448 <i>Legal Profession Act 2007</i>	

Background

8. The complaints by Mr Keelty and Mr Biddle raised concerns about your client's release of a record of interview to a journalist. In particular, the concerns raised were that the release of the record of interview:
 - (a) was prompting media discussion of the quality of evidence yet to be led in a criminal trial which was not consistent with the administration of justice;
 - (b) was likely to engender "speculation and discussion as to the nature of the evidence which may or may not have been heard by jurors in the future";
 - (c) contravened Rule 60.

⁷ Section 439(3) *Legal Profession Act 2007*

9. The matters referred to in paragraphs (a) and (b) above are really one in the same with the complaint that Rule 60 has been contravened.
10. Though the factual circumstances which led to the complaint are well documented and not in dispute, I will briefly set out some of the more relevant facts so that my decision can be understood in context. The BAQ report in that respect is of considerable assistance and I have adopted some aspects of the report here for the purposes of consistency.
11. On 2 July 2007 Dr Mohamed Haneef ("**Haneef**") was arrested by the Australian Federal Police ("**AFP**") under s.3W of the Crimes Act 1914 (Cth). The then intended charge was Haneef's allegedly having intentionally provided assistance to a terrorist organisation. Haneef retained as his solicitor Mr Peter Russo of Ryan & Bosscher, solicitors.
12. On 3 July 2007 Haneef participated in an extended recorded interview ("**first record of interview**") with the AFP. This was the record of interview which was later released by your client and the act which became the subject of the complaint.
13. Your client was retained by Mr Russo to act on behalf of Haneef over the weekend of 6-9 July 2007.
14. A second interview was then conducted by the AFP with Haneef over the night of 13 July to 14 July 2007 ("**second record of interview**"). Following that interview Haneef was charged with recklessness rather than intentional conduct. Later that morning, Haneef applied for bail. In opposing bail, the Crown offered a version of events to the Court which turned out to be materially inaccurate in important respects. (In reaching my decision I do not consider it necessary to comment on the conduct of the prosecution case or the manner in which they went about releasing information).
15. In parallel with the investigation and court proceedings there was obviously a great deal of media interest in Haneef's case. The publicity featured, in part, allegations and statements about Haneef and the case against him which were attributed to "sources" on the Crown's side. This is relevant as it goes to your client's submission to have been entitled to release the record of interview so as to seek balance and an informed "debate".
16. On 16 July 2007 Haneef was granted bail. Shortly after that decision was announced, the Minister for Immigration exercised a discretionary power under the *Migration Act* 1958 to cancel Haneef's work visa with the consequence that he was then likely to be transferred to the Villawood Detention Centre. This obviously meant that there would be the attendant difficulties in providing proper instructions and obtaining legal advice.
17. The basis for the cancellation of Haneef's visa was that, on the information supplied to the Minister by the AFP, the Minister reasonably suspected that Haneef had an association with persons involved in criminal conduct. At that time the Minister was actively promoting the Government's position against Haneef in the media.
18. On 17 July 2007, the day after the exercise of the Minister's discretion, your client released a copy of the first record of interview to a journalist. In releasing the record of interview, your client did not make any statement about what it revealed or conveyed. He did not suggest any

meaning or argument which should be attached to it. I understand that your client, in an interview on "Lateline" explained that he published the record of interview as a self explanatory primary record of what had been put to Haneef.

19. On 27 July 2007 the charge against Haneef was abandoned.
20. At this point it is important to draw the distinction between your client engaging in debate about broader issues dealing with Haneef compared with the release of the record of interview. The enquiry for the purpose of my decision is whether your client contravened professional standards by publishing of the record of interview, the seriousness that attaches thereto and whether such contravention warrants a disciplinary response.

Did your client contravene Rule 60?

21. In short, the real crux of the complaints is that your client breached Rule 60. The Barristers Rules were made under section 220 of the Act. Rule 60 relates to publication by a barrister of material concerning current proceedings and is in the following terms:

Integrity of hearings

60. (a) A barrister must ***not publish*** or assist the publishing of ***material concerning a current proceeding*** except by supplying only:

(i) copies of pleadings or court documents in their current form, which have been filed and which have been served in accordance with the court's requirements;

(ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

(iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;

(iv) copies of exhibits admitted in open court and without restriction on access;

(v) answers to unsolicited questions concerning the current proceeding and the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case;

(vi) copies of submissions used in open Court and available to the parties,

provided that where the barrister is engaged in the current proceeding, the barrister does so only with the ***consent*** of the client ***first*** obtained.

22. Rule 61 is in the following terms:

61. A barrister will not have breached Rule 60 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in

relation to that report, that the client may take appropriate steps to present the client's own position for publication.

23. Though the record of interview is not within the class of documents referred to in the rule it is "*....material concerning a current proceeding*". It has been suggested that a record of interview is perhaps analogous to a witness statement (Rule 60(a)(ii)) and is often tendered for a variety of purposes with the consequence it will become an exhibit. If the transcript had been tendered in Court at the Bail hearing, then your client would have been entitled to have provided a copy outside of Court. But this is not what happened.
24. I note that Haneef subsequently ratified the publication of the record of interview by your client. I do not believe that the fact that it may have been difficult to obtain Haneef's instructions is of much weight given that there is no evidence that your client attempted to obtain Haneef's consent to publication or sought Mr Russo's assistance to gain such consent. In that respect Mr Keim acted alone in releasing the record of interview.
25. In the circumstances, the evidence is that your client published *material concerning a current proceeding* without the consent of his client. I am of the view that your client has clearly breached Rule 60.

Unsatisfactory Professional Conduct or Professional Misconduct

26. However, my consideration of the complaint does not cease with that conclusion. The next issue is whether or not your client's conduct in releasing the record of interview in breach of Rule 60 requires a disciplinary response. In other words, is there a reasonable likelihood that a disciplinary body would find your client guilty of unsatisfactory professional conduct or professional misconduct on the basis that there has been a breach of Rule 60?
27. The first point to make clear is that not every breach of a rule will in my opinion automatically lead to that conduct being characterised as unsatisfactory professional conduct or professional misconduct, nor does it necessarily follow that contravention will result in disciplinary action. As with all conduct the subject of complaint, it must be assessed in light of its own facts and circumstances.
28. Relevantly section 227 of the Act provides:

227 Binding nature of legal profession rules

(1) Legal profession rules are binding on Australian legal practitioners, Australian-registered foreign lawyers and government legal officers to whom they apply.

*(2) Failure to comply with legal profession rules is **capable** (my emphasis) of constituting unsatisfactory professional conduct or professional misconduct*

29. In determining the characterisation of the respondent's conduct, it is necessary to understand the intent behind Rule 60 which is essentially two-fold:

- (a) It reflects the important public interest in avoiding the potential to interfere in the administration of justice;
- (b) The unacceptability generally of a barrister conducting litigation extra-curially. However, it is clear that Rules 60 and 61 do not reveal any intention to remove a barrister retained in litigation from any involvement in out-of-court statements entirely. The intent behind Rule 60 in my view is directed at preventing a barrister conducting the case in the media instead of the Court (I suspect that the Rule is also there in order to ensure the appearance of detachment and objectivity by barristers in the representation of their client's case).
30. Accordingly, whilst recognising the importance of Rule 60, I do not believe that every breach of that Rule will result in disciplinary action. In order to determine whether or not to dismiss the complaints, it is important to consider the purpose behind the rule together with the particular factual circumstances of the case including the material published and the extent of the publication.
31. I have noted your client's submissions in respect to the reasons why his conduct should not be characterised as unsatisfactory professional conduct or professional misconduct. In particular, I note your client's submissions that Rule 60 is based on all parties observing its requirements and in the context of criminal proceedings, that the Crown will discharge its duties to prosecute the matter fairly in the Courts. You submit that where the prosecution breaches those obligations, then defence counsel should be free to respond in a responsible and restrained manner without being subjected to disciplinary proceedings. In its report, the BAQ referred to this "mutuality" observance submission and rejected it. I agree entirely. The acceptance of this argument would defeat the purpose of Rule 60. As your client is an Officer of the Court, I do not consider it appropriate that practitioners pick and choose which rules (or laws) they will follow. I do not find much sympathy in the argument that the conduct of an opponent permits a practitioner to breach the rules.
32. As you can no doubt appreciate, in any particular case, it may be difficult to delineate the precise point at which a breach of a Rule or ethical obligation will demonstrate a reasonable likelihood that a disciplinary body will find a practitioner guilty of unsatisfactory professional conduct or professional misconduct.
33. Taking into account all the facts and circumstances I am of the view that the following factors are particularly persuasive in determining what action to take:
- the legislative intent behind Chapter 4 of the Act is not punitive but purely protective (not only of consumers but also the reputation of the legal profession);
 - the publication of the record of interview did not interfere with the administration of justice in the particular circumstances of this case;
 - your client did not comment about the contents of the record of interview and simply released it to a journalist;
 - the breach of Rule 60 by your client in the circumstances can in my opinion be categorised as at the minor end;
 - there was no evident mischief with the premature publication of the record of interview;

- there was no subsequent abuse of the document by your client;
- your client has an exemplary professional record with no previous adverse findings by a disciplinary body.

Decision

34. Before I conclude, I wish to raise some further matters. Firstly, there have been a number of submissions received by the Commission and the BAQ in support of your client from academics and members of the profession which I have read. My decision is not based on any of that material.
35. Secondly, I understand that Mr Keelty has expressed concern that barristers may be more likely to follow your client's example in publishing records of interview before those have been tendered in proceedings. As I explained above, I do not believe that concern is warranted given that each case must be determined on its own facts and circumstances.
36. Thirdly, I suspect that flowing from that apprehension will be some who will say "what is the point of Rule 60" if contravention is not enforced. I wish to make it perfectly clear that my decision should be understood on the basis that the facts of this case were exceptional and my decision should not be seen as encouragement for any member of the profession to contravene the Rules or their common law professional obligations.
37. Finally, I trust that your client will note those comments and appreciates that in the future he should be extremely careful of any conduct which may contravene the Rules. In keeping with the educative approach which the Commission adopts in respect of the complaints and disciplinary processes provided by the Act, I cannot help but remark that the complaints and subsequent investigation could have been avoided by your client first obtaining Haneef's consent to release the record of interview or perhaps arrange for his solicitor to release the document (as contemplated in Rule 19.1 Solicitors Rules). This, I appreciate, is the obvious benefit of hindsight. I would hope that your client will in the future err on the side of caution in his professional dealings if presented with a similar situation.
38. Accordingly, after considering all of the relevant factors and material discussed above, I am **not** convinced that there is a reasonable likelihood of a finding that your client's breach of rule 60 would result in a finding of guilt by a disciplinary body of unsatisfactory professional conduct or professional misconduct. I am of the view therefore that the complaints be dismissed pursuant to section 448(1) (a) of the Act. Thank you for your assistance.

Yours faithfully



Robert Brittan
Manager - Complaints
Legal Services Commission