Advocacy Training

By the Honourable Justice James Douglas, Supreme Court of Queensland

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I have been asked to talk about the Australian Advocacy Institute and the Queensland and New South Wales Bar Practice Courses.

The Australian Advocacy Institute was established in 1991, 20 years after the National Institute for Trial Advocacy was established in the United States of America. That Institute, NITA, was established at least in part in response to remarks by Chief Justice Warren Burger of the United States Supreme Court. He was critical of the quality of advocacy displayed by American lawyers, particularly in comparison with English barristers who specialised as advocates.

With typical American energy, the lawyers who created NITA rapidly established useful techniques for teaching advocacy as a performance skill. With significant help from academic lawyers, they developed practical exercises with accompanying teaching materials to assist American lawyers to hone their skills as advocates. NITA's workshops in America are normally conducted in conjunction with law schools, with most teachers drawn from the practising profession. There are many law schools in America which provide courses on trial advocacy whose teachers are also active in helping develop materials for the workshops. Their problems are often

of a high standard and highlight issues that can be made the focus of useful teaching techniques by the practitioners who run the workshops.

In my limited experience of visiting and teaching at two of their workshops I formed the view that the NITA workshop method was very effective, especially for inexperienced advocates. It is used to assist those commencing in practice as well as the many lawyers in the United States who are not specialist advocates, particularly in civil trials. Their limited exposure to the court room encourages them to hone their practical skills in mock hearings.

The driving force for advocacy training in Australia, before the Australian Advocacy Institute was established in 1991, was the recognised need to teach new barristers the skills they would need when they entered the court room. In Queensland the Bar Practice course commenced in 1983, not long after similar courses had been established in Victoria and New South Wales. I shall talk about the Queensland and New South Wales Bar Practice courses shortly but let me begin by adding some more detail to Justice Kellam's comments about the Australian Advocacy Institute.

The Australian Advocacy Institute

The Institute was launched on 11 September 1991 during the 27th Australian Legal Convention. It is a company limited by guarantee and owned by the Law Council but is financially independent from it because of the income it has earned over the years from its courses. Its programs are not aimed solely at barristers but at lawyers generally, both those in private practice and those employed by Government or other

institutions. From my observations its services are used more these days to assist lawyers who are not barristers.

Its aims include improving the standards of advocacy throughout Australia, providing an Australia-wide forum in which ideas and experience in advocacy and advocacy training can be shared and developed, designing and developing methods and materials for training lawyers in advocacy and training lawyers to teach advocacy skills. It is chaired by a board of directors under the Honourable Professor George Hampel QC, formerly a Victorian Supreme Court Judge. His career has been marked by an outstanding dedication to teaching and improving the skills of advocates throughout Australia and in many overseas jurisdictions.

The AAI focuses on teaching skills through a workshop method of performance and instruction "in a manner akin to coaching rather than by observing and acquiring information and experience." Its techniques are very similar to those employed by NITA and some of NITA's problems and materials have been adapted by the AAI to Australian conditions.

The workshops are normally held over a weekend and include an introductory lecture on the approach to good advocacy and workshop sessions comprising analysis, preparation and performance by the student advocates with demonstrations by instructors. Reviews are conducted before each group, normally consisting of about eight students and two teachers with video reviews of individual performances one-on-one. The group reviews focus on the mastery of substantive skills in examination, cross-examination, the making of addresses and applications. They deal less with the

presentation of legal argument than with the making of factual submissions and normally will include a workshop on the making of pleas in mitigation in criminal cases.

The workshops include overview sessions focussing on such topics as methods of preparation, organisation of evidence, techniques of examining in chief and cross-examining as well as structure in the making of addresses and legal argument. There is a significant focus on the development of communication skills in general.

The AAI also provides advanced workshops dealing with appellate advocacy, jury advocacy, the examination and cross-examination of expert witnesses and other more advanced trial techniques.

The workshops are usually conducted in court rooms. Normally more than 20 workshops take place each year in a number of cities throughout Australia. The AAI also conducts training for organisations such as the Offices of Directors of Public Prosecution, Government Solicitors' Offices, Legal Aid Offices and private firms of solicitors.

The workshops are based on case files and materials that have been developed over the years. The workshop system consists of short individual performances by students in front of their peers. They are video taped. The performance might last for no more than four to five minutes. Normally each participant would perform at least three tasks in a weekend. Each would be reviewed. The students will also observe reviews of the other members of their group and see demonstrations by the teachers of

different techniques to use in court. There is a particular technique of instruction used by the teachers who are normally experienced advocates trained in this method.

First there is a review of questions of substance arising from a student's courtroom performance. One of the two teachers conducting a class will enunciate a "headnote". This will identify "what needs help" by the selection and identification of a specific point to review. It may be as simple as pointing out that the student persistently asks leading questions in examination in chief, something contrary to our rules. The headnote provides a focus and flags to a student what the review is about. One issue per student is normally more than enough to raise. If a teacher tries to tell a student all of his or her faults, very little will sink in. Instead the student will end up confused and probably in despair. Different issues should, however, be raised with different students. That gives embarrassment the chance to change into schadenfreude.

After identifying the headnote, the teacher will then "playback" what the student did, if possible in the student's own words, to pinpoint, illustrate and focus the point to be reviewed. The teacher should do that from a note of what the student said.

A "rationale" is then provided to establish why it is better to do what the student did differently: to make sure, for example, when dealing with the desirability of using open questions in examination in chief, that the witness tells his own story persuasively and without prompting. The teacher should relate the performance of the student to one such principle of advocacy, providing the reason to perform the task differently.

There follows a “prescription” (how to do it differently). The teacher illustrates, advises, demonstrates and models how to do the task differently next time. This requires the teacher to be a good advocate and role model for the student. It will often be useful to ask the student to perform part of the task again to reinforce the message that has been taught. These reviews before the other students in the class focus on questions of substance and deal with the principles of persuasive advocacy as applied in our courts.

After that review there is a video review conducted individually. It focuses more upon issues such as communication skills and style and again requires the teacher to demonstrate how the student can behave differently. These reviews are done individually because most students are embarrassed about seeing themselves performing in public and benefit more from the teacher’s feedback than if the review were done before the whole class. Students generally are more critical of themselves on video than the instructors are. The videos are retained by the students for personal review later. In my experience it is remarkable to observe the improvement in students from the beginning of such a workshop to the end as recorded on the videos.

Students also learn during the group reviews from the substantive points made by teachers about the performances of other students. As I have said, the object of the teachers in a group review should be to focus on one or at the most two points per student and to deal with a number of possible issues during a session so that all the students learn from each other's performances.

Much more could be said about the teaching techniques used and about the workshops' focus on the development of good communication skills to enhance the analytical skills used in developing arguments. It can be seen, however, that the focus of the AAI is improvement of the standard of advocacy of lawyers already admitted. Its existence has encouraged better analysis of the techniques of persuasion used in Australia and greater awareness among practitioners of how best to prepare for performance in our courts.

Bar Practice Courses

The aim of the Bar Practice courses is to provide effective training for barristers about to commence in practice. The focus of the course in Queensland has changed recently. Until mid-2004 practitioners here were admitted either as solicitors or barristers. Now they are admitted as legal practitioners and choose whether to have a barrister's or solicitor's practising certificate. It was a prerequisite for admission as a barrister that the applicant for admission complete the Bar Practice course. Now it is a prerequisite for an admitted legal practitioner who wishes to take out a practising certificate as a barrister. In other words, such a practitioner will already have completed approved practical legal training requirements. It is likely that the focus of the Bar Practice course may change a little to take into account previous training already undertaken by the students.

At present the stated objectives of the Queensland Bar Practice course are "to develop and enhance the practice skills of persons enrolled as students at law who are about to seek admission to practise at the Bar of the Supreme Court of Queensland". The objectives of the New South Wales Bar course are only slightly more detailed; they

include the teaching of advanced advocacy, mediation and other barrister's skills, and an awareness of special considerations and requirements of different jurisdictions. It is also intended that the course provide practical insights into life and practice at the New South Wales Bar and provide a strong spirit of professional support among new members.

The Queensland course is conducted in conjunction with the Queensland University of Technology which provides three council members for the Course's management committee and a warden who is a member of the academic staff of the QUT law faculty. The teaching is conducted by members of the Bar and the judiciary but the warden plays a significant role in assisting students in their learning and in co-ordinating the course. The New South Wales Bar course is conducted in-house and has a staff of four who co-ordinate instruction, which is delivered by practitioners and judges.

Both courses' objectives would benefit from further thought about the detail of the skills needed by a new barrister. In Queensland's case that task has been commenced with a review of the Bar Practice course currently being undertaken by Mr Christopher Roper from the College of Law Alliance in Sydney.

The New South Wales course requires that readers pass examinations in evidence, procedure and professional ethics before they can commence the Bar Practice course. The pass mark required for each of those examinations is 75 per cent. That requirement reflects the need for barristers to have high ethical standards and a well-developed knowledge of the rules of evidence and procedure. There is no such

prerequisite for the Queensland course now but I am reliably informed that there is likely to be such a requirement in the future.

The Queensland course lasts for six weeks full time. It covers a number of topics whose content has varied slightly over the years. At present they include the following:

- Setting up practice;
- Court procedures;
- Interlocutory steps;
- Preparation for trial;
- Appeals;
- Evidence;
- Ethics and etiquette;
- Advocacy;
- Opinion writing and advices;
- Alternative dispute resolution;
- Drafting documents;
- Research;
- Dealing with people from minority groups;
- Family Court practice;
- Planning & Environment Court practice;
- Criminal law practice;
- Civil law practice;
- Tribunals.

There are several mock hearings of a variety of types throughout the course.

In New South Wales the course comprises 95 sessions over five weeks full time and is designed to cover essential topics in a logical order. In outline, its structure is:

Week 1	Fundamentals of commencing civil and criminal proceedings – preparation and presentation of evidence;
Week 2	Professional regulation, interlocutory procedures, equity practice;
Week 3	Trial evidence – evidence in chief and cross examination, the “day with judges”;
Week 4	Hearing workshop exercises, including Federal Court and Family Court exercises – trial evidence revision;
Week 5	Hearing workshop exercise, mediation, financial administration issues, final trial preparation.

Again there are several workshops requiring the students to perform on their feet.

The teachers in each course should have undergone teacher training, sometimes through the AAI. In my view there is a need to focus more on defining in greater detail the aims of each course. It is important too that the teachers are aware of the objectives of the courses and of how to use their teaching techniques to achieve those ends. Because the teachers are volunteers, and often change identity from course to course, it is difficult to ensure consistency of teaching techniques, even accepting that there are many different ways of being a good barrister.

In New South Wales one of the "founding beliefs" of its Bar Practice course is that "the skills of a barrister are best learnt by a process involving exposition, understanding, practice and review". That is a useful teaching model and there is an attempt to provide consistency through that course by the division of students into groups which remain together during the course. Each group is supervised by the same two teachers throughout the course, barristers who make themselves available

for consultation with the students in the evenings after their court hours and the normal tuition periods for the students.

Apart from the teaching techniques related to advocacy the courses also include a number of subjects where teaching consists of a presentation rather than a practical exercise. On the whole the students seem to prefer hands-on exercises to lectures and much of what can be conveyed in lectures could also be conveyed in writing. Other teaching techniques involve the use of video-taped reviews as occurs in the AAI workshops. Queensland makes less use of those reviews than New South Wales or the AAI. Queensland students' performances are video-taped but they are not always provided with feedback as occurs at the AAI and in New South Wales. There is not as much familiarity among some of the Queensland teachers with the techniques of video review which may explain why it is used less.

The New South Wales course also has some continuity in that the one case is used throughout the whole course for practice in opening, examining in chief, cross-examining and the making of closing addresses. The advantage of that is the students can become very familiar with the facts of that case. In Queensland several case examples are used in the different workshop exercises which, no doubt, has the advantage of exposing students to a wider variety of work, something that is likely to happen to them in practice anyway.

By all accounts from students these courses provide intense but beneficial learning experiences. Can they be improved?

I would like to see more attention given to:

- the objects and structure of the Bar Practice courses;
- the assessment of each student's performance;
- the standard of written materials provided for practical problems;
- improved consistency in teacher training;
- greater provision of individual feedback to students including more sustained use of video reviews in Queensland at least;
- linking the work done at the course with the training required during pupillage and compulsory professional development at the commencement of a barrister's career.

I have mentioned the objects of the Queensland and New South Wales courses already. They suffer by comparison with the more detailed objects of the Victorian course. The general aims of that course are to facilitate the adjustment by new barristers to their life at the bar and to develop their understanding and performance of the basic skills required of a barristers, in particular, to:

- develop an understanding of their role and responsibilities as barristers
- acquire basic skills in drawing pleadings
- acquire basic skills in preparation of cases for hearing
- acquire basic skills in settlement negotiation
- acquire basic skills in the presentation of cases before various courts and tribunals
- enhance their understanding of aspects of the social environment which are relevant to their work as barristers.

Even those objects are expressed at a level of generality that makes it difficult to determine how well the course meets the objectives and how well the students can perform the tasks expected of them. In that context, clearer objects should lead to better-structured courses and more informed assessment of the students' performances.

Each of the courses assesses the progress of students and reserves to itself the right to fail them. That does not happen often, but there have been problems in the past, at least in Queensland, about the standard of some applicants whose main objective may have been to obtain admission rather than actually to practise as barristers. That is not likely to be such a problem in the future given the change in status of the course from a prerequisite to admission to a prerequisite of obtaining a barrister's practising certificate.

There is a need, however, to develop better techniques to define the standards students are expected to reach throughout the courses and to measure their performances against those standards. That has become an issue in England and has been addressed in two reports prepared for their Bar Council by a working party chaired by Mr Tim Dutton QC. Their second report of February 2004 referred solely to the issue of assessment of advocacy.[1] They referred to the need for assessment in the public interest to ensure that there was no danger of barristers representing the public in court whilst not yet competent in advocacy.

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1 Advocacy Working Party, *Report on Assessment of Advocacy*, February 2004.

My observation of the materials used in the Queensland course and in the AAI is that most of them are not at a level of sophistication sufficient to challenge more experienced practitioners. Many of them are helpful for students or new practitioners but would benefit from review to see how best they may be used to meet the teaching objectives of the course. Practitioners have difficulty in setting aside the necessary time to do that work. In the United States, much of that work is done by academic lawyers in consultation with practitioners. If it is to be done well it deserves to be paid well. That will be more likely to happen with a co-ordinated national approach to develop further useful practical problems designed to achieve particular teaching aims.

Teacher training is already offered by the AAI and is sometimes delivered by the individual Bar Associations to their own members. There is a role for the Australian Bar Association to co-ordinate and supervise the provision of teacher training on a national level. Each of the major courses in Australia, conducted in New South Wales, Victoria, Queensland and Western Australia, benefits from developments in other States, something which the Australian Bar Association attempts to monitor. The dissemination of information from each course to the others assists in their continuing improvement. The AAI should also be well placed to assist with the development of materials.

Once a new barrister is released on the public it remains important to support him or her by providing access to further training in advocacy. There is far less work for barristers in the Magistrates Courts compared to the amount available to earlier generations. Young advocates are finding it difficult to develop the skills they started

to learn during the Bar Practice course. The Queensland Bar has commenced a system of compulsory professional development in advocacy based on more difficult and realistic problems drawn from real life. They are intended to require younger barristers to develop their skills more effectively by taking part in several workshops dealing with such problems during their first three years of practice. This is meant to form an additional layer of training to that already provided by the Bar Practice course and the pupillage system.

The Bar Practice courses and the AAI provide much more assistance than used to be available to the new barrister to develop the skills needed for the role of an advocate. There may also be more practitioners who think in a sustained and organised way about the technique of persuasion. The most realistic hope for such training is that fewer barristers will make obvious errors in the conduct of the cases entrusted to them. Those who would have been outstanding advocates in any event will represent their clients better than they might have without training and are probably more aware of why they do what they do.

Our willingness to think about these issues and to try to improve this vital part of our system of justice may illustrate an Australian character trait I was not aware of until I went to Bangladesh more than two years ago with Justice Kellam and Dan O'Gorman. There, the students graduating from the course we taught were congratulated by the Chief Justice of Bangladesh and told how privileged they were to be taught by us. Our chief virtue was the same as that exhibited by the Australian cricket team, perfectionism! When you know the enthusiasm the Bangladeshis have for cricket you will appreciate what high praise the Chief Justice was directing our way!