

## KEIM ON THE MUZZLE RULE: A REPLY AND JOINDER

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### I BACKGROUND: DR HANEEF AND THE *KEIM* COMPLAINT

A commission of inquiry has now established that the handling of the ‘Haneef affair’ by the Australian Government and the Australian Federal Police (‘the AFP’) was affected by poor processes of decision-making.<sup>1</sup> The AFP’s and Immigration Department’s investigations into Dr Mohamed Haneef, his alleged association with terrorists who bombed Glasgow Airport, the laying of anti-terror charges against the doctor, and the cancellation of his visa relied on inaccurate evidence.<sup>2</sup> They also discounted benign assessments of Dr Haneef by the Australian Security Intelligence Organisation, and ignored the British authorities’ lack of interest in him.<sup>3</sup> Investigators had no forum ‘that enabled robust and open discussion with respect to the available evidence, the differences that existed, and the precise roles and functions of the relevant departments and agencies’.<sup>4</sup> Together, these led to ‘misconceptions and miscommunication’ about the doctor.<sup>5</sup>

The commissioner, John Clarke QC, had no comment on the complaints made to Queensland’s Legal Services Commissioner about Stephen Keim SC, Haneef’s barrister, by AFP Commissioner Michael Keelty and, separately, by solicitor Russell Biddle.<sup>6</sup> However, it is still possible to understand these complaints in the broader context of the policies, approaches and practices adopted by the AFP throughout the Haneef affair. If we do, to the mistakes made as a result of the decision-making processes used in the Haneef investigation we can add at least one other error: using Rule 60 of the *Legal Profession (Barristers) Rule 2007* (Qld) as the basis of the complaint.

I emphasise that the complaint about a breach of Rule 60 amounts to one more error *at the very least* on the part of the AFP. The mere lodging of the complaint itself might be yet another. Having only a limited opportunity to represent his client in the usual field where a barrister is expected to use partisan, adversarial tactics – the courtroom – Keim then outmanoeuvred the AFP and the Government in another field – the media. With hindsight, the complaint by Biddle (a suburban solicitor, and National Party candidate in a State election, who had no connection whatsoever to the Haneef affair) now looks political. The AFP’s complaint was unrelated to Biddle’s, but when the losing side lodges a complaint against the successful barrister it smacks of pique.<sup>7</sup> However, leaving appearances to one side, any solid evidence of

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<sup>1</sup> MJ Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008).

<sup>2</sup> *Ibid*, 218.

<sup>3</sup> *Ibid*, 224.

<sup>4</sup> *Ibid*, 230.

<sup>5</sup> *Ibid*, 230.

<sup>6</sup> Cf *ibid*, 285-6. See also Bar Association of Queensland, *Report to the Legal Services Commissioner - Biddle and Keelty v Keim*, 17 December 2007 <<http://www.lsc.qld.gov.au/31.htm>> at 30 October 2009.

<sup>7</sup> For a recent view that the AFP Commissioner’s complaint against Keim ‘exacerbate[d] the damage’ already caused by the AFP’s handling of the Haneef affair, see Editorial, ‘Keelty Expanded Size and Scope of the AFP’, *The Australian*, 7 May 2009, 15.

the AFP's true motive for making the complaint is presently lacking. It may well be that the AFP was legitimately concerned that a record of interview should not be made available to the public because it could affect any ongoing investigations or the conduct of any trial.<sup>8</sup> But we cannot be sure of this as the AFP did not express any concern about the selective leaks of the record of interview by unnamed sources from the government side of the Haneef investigation.<sup>9</sup> Without evidence of the motive for complaining, we cannot properly judge how sensible it was for the AFP to make the complaint. It is possible, though, to judge the wisdom of bringing the complaint against Keim on the basis of Rule 60 – which will be referred to as the 'muzzle rule'.<sup>10</sup> This is the very point that Keim himself has taken up in the preceding comment.

Few professional conduct rules, if any, that have been set for any branch of the legal profession in Australia have less credibility than the muzzle rule. The source of this discredit lies in the basic purpose of the rule – to limit severely, and even deny, public expression by barristers in relation to potential or current legal proceedings and in which the barristers are briefed. Keim's fundamental criticism of the muzzle rule is based on this, although it is also tied to the specific context of the Haneef affair and to a broad grouping of Dr Haneef's 'adversaries': AFP officers, the Prime Minister, the Attorney-General, the Minister for Immigration and Citizenship. Keim's release of the police record of interview with the doctor amounted to, as he puts it, 'communication on government action and political matters' and 'communication ... intended to reflect upon ... actions by the Ministers of the Crown'.<sup>11</sup> He therefore questions whether the muzzle rule, if it was broken by the release of the transcript, 'may not infringe the right to communication on government and political matters implied in and protected by the Constitution'.<sup>12</sup> In the second place, Keim questions the rule's compatibility with Chapter III of the Constitution, which deals with the federal judicature. If again the muzzle rule was broken by the release of the record of interview, it could undermine 'an essential incident of the judicial process': 'the ability to exercise one's rights as a barrister in defence of a client'.<sup>13</sup> In the context of the Haneef affair, effective defence demanded 'counteracting law enforcement leaks, falsely denigrating [the] client and destroying his occupation'.<sup>14</sup>

Keim's hope in this journal is 'to stimulate further discussion about the way in which disciplinary rules are used',<sup>15</sup> and this is certainly worth further inquiry and comment. To that end, I agree with Keim on the effect of the muzzle rule – but with

<sup>8</sup> The AFP submitted to the Clarke Inquiry that Mr Clarke should recommend that it should be an offence to release records of interviews. However, the recommendation was not made as Mr Clarke did not consider it to be within his terms of reference, and he did not have the benefit of submissions from other interested parties: Clarke, see above n 1, 285-6.

<sup>9</sup> For media reports of interviews with Haneef before Keim released the whole record, see Letter, Brian Bartley to Daniel O'Connor, 8 October 2007, Appendix 2 <<http://www.lsc.qld.gov.au/31.htm>> ('Bartley Submission').

<sup>10</sup> The term seems to originate in Greg Chamberlin's news reports in the *Courier Mail*: G Chamberlin, 'Lawyer Slams Media 'Muzzle' Rule', *Courier Mail*, 12 June 2007, 15 ('Chamberlin 1'); 'State Lawyers Act to Remove Media Muzzle', *Courier Mail*, 13 June 2007, 7; G Chamberlin, 'Gag Rule Threatens Balanced Comment', *Courier Mail*, 14 June 2007, 35 ('Chamberlin 2').

<sup>11</sup> S Keim, 'Fearless Advocacy and Bar Rule 60' (2009) 28(2) *The University of Queensland Law Journal* 325.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

qualifications. I suggest that there are serious *moral* flaws in the rule that emerge from its effect on expression and on the lawyer's role in the legal process. However, I am uncertain about the nature of any constitutional difficulties for the rule and the effect they could have. In all likelihood, the rule is not even purportedly law, and therefore might for that reason escape constitutional assessment. Still, the intrusion of the rule into the 'space' for expression secured by the right of free communication nevertheless raises intriguing questions as to how the muzzle rule could amount to an effective professional restraint on any barrister who finds him or herself in a position similar to Keim's in the Haneef affair.

## II THE MUZZLE RULE: A HISTORY

### A *The Bar: Adoption by Inaction*

The Queensland bar's muzzle rule originates in Rule 59 of the Australian Bar Association's *Advocacy Rules* (which are designed for barristers).<sup>16</sup> It provides:

- (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.
  
- (b) Subject to sub rule (a), a barrister must not publish or take any step towards the publication of any material concerning any current or potential proceeding which –
  - (i) is inaccurate;
  - (ii) discloses any confidential information;

<sup>16</sup> Australian Bar Association, *Model Rules*, 8 December 2002 ('Advocacy Rules').

- (iii) appears to or does express the opinion of the barrister on the merits of the current or potential proceeding or on any issue arising in the proceeding, other than in the course of genuine educational or academic discussion on matters of law.

The rule is also replicated precisely in Rule 19 of the Law Council of Australia's *Model Rules of Professional Conduct and Practice* (which is designed for solicitors).<sup>17</sup> The particular form that the muzzle rule in Rule 59 and Rule 19 now has, with its detailed restrictions on publishing material about potential or current proceedings, was introduced into the *Advocacy* and *Model Rules* in April 2002.

Neither the *Advocacy* nor the *Model Rules* are themselves directly applicable to any lawyers in Australia; but with adjustments here and there they have been adopted in most States and Territories. That said, when compared with other Australian lawyers' professional associations, the lawyers' guilds in Queensland have been amongst the slowest to engage with the development of comprehensive codes of professional conduct like the *Advocacy* and *Model Rules*. The principal result of their disengagement was that, as social and regulatory pressure built to put in place a conduct code of minimum standards of lawyer behaviour, the Bar Association and Queensland Law Society were effectively compelled to adopt those that had been developed out-of-State. Furthermore, the State and Territory guilds have assumed that the Australian Bar Association and the Australian Law Council have produced codes that reflect good ethics. So, the *Advocacy* and *Model Rules* were principally adopted in Queensland for securing interstate uniformity of conduct codes – rather than because of any close and independent survey of the ethics underlying the codes that were on offer.<sup>18</sup> The current pressure for uniformity is strong and there is a sense that it is a *fait accompli* that the national association's codes will be adopted. Consequently, State and Territory professional associations have undertaken, at best, only superficial reviews of the ethical groundwork of the code to be adopted, and it is quite possible for a rule to appear in a State or Territory code without explanation.

Still, the Bar Association of Queensland was the faster of the Queensland guilds to adopt a conduct code. It used the *Advocacy Rules* as a model for the *Queensland Barristers' Rules* as early as 1995. At that stage, in the complete absence of any regulation for the Queensland bar, these merely applied to members of the Bar Association as terms of the compact between them (and not all practising barristers were members). They were rules of a club, albeit a club that is most significant for the administration of justice.<sup>19</sup> However, in 2004 a new *Legal Profession Act* made the Bar Association a regulator of practising barristers, and the *Queensland Barristers Rules*, with adaptations, were given the status of subordinate legislation applying to all barristers as the *Legal Profession (Barristers) Rule 2004* (Qld).<sup>20</sup> The adaptations for the *Barristers Rule 2004* included the muzzle rule in

<sup>17</sup> Law Council of Australia, *Model Rules of Professional Conduct and Practice*, March 2002 ('*Model Rules*').

<sup>18</sup> For examples of State and Territory lawyers' guilds abandoning homegrown codes to adopt the *Model Rules*, see GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) v, ix.

<sup>19</sup> See R Mortensen, 'Becoming a Lawyer: From Admission to Practice under the *Legal Profession Act 2004* (Qld)' (2004) 23 *The University of Queensland Law Journal* 319, 338-9; GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (1996) x.

<sup>20</sup> Mortensen, see above n 19, 337-8, 341-2. For the status of the *Legal Profession (Barristers) Rule 2004* (Qld) as subordinate legislation, see *Legal Profession Act 2004* (Qld) s 215(1)(b) and the discussion below at nn 43-44.

Rule 60, which is Rule 59 of the *Advocacy Rules* word-for-word. No justification was given for its adoption. The *Advocacy Rules* were the only standard on offer, and so the muzzle rule passed into the *Barristers Rule* as part of the exercise of standardising the bar's professional conduct rules with those of other States. There was not a peep from the media, nor from barristers themselves, on the impact that this rule could have on effective practice. The muzzle rule was perpetuated without change as Rule 60 when, with the advent of the *Legal Profession Act 2007*, the *Barristers Rule 2004* was repealed and, although with a different legal status,<sup>21</sup> the *Barristers Rule 2007* replaced it.

#### B *The Proposal to Muzzle Solicitors: A Noisier Process*

The Queensland Law Society's experience with professional rule-making, and the muzzle rule in particular, could have hardly been more different. For many decades, the Law Society's professional rule-making was *ad hoc*. The Society's closest equivalent to a comprehensive professional code – the *Solicitors' Handbook* – was by the early 2000s still a mere pastiche of subordinate legislation and Law Society Council rulings. It had nevertheless long been thought in the solicitors' branch that, despite its mottled quality, the *Handbook* was a solicitors' conduct code, until in 2003 the Supreme Court held that much of the *Handbook* could not be enforced.<sup>22</sup> Even so, as Gino Dal Pont points out elsewhere in this journal,<sup>23</sup> the Law Society had been excessively reluctant for clients to be able to appeal to the *Handbook* as a professional standard that solicitors could be held to, and had gone to some lengths even to hide the contents of the *Handbook* from the general public. And, although in the *Legal Profession Act 2004* there was express provision for the making of an enforceable solicitors' conduct rule,<sup>24</sup> the Law Society still never presented one for promulgation. It was only as the commencement of a new *Legal Profession Act 2007* on 1 July 2007 loomed, that preparations were made for the Law Council's *Model Rules* to be adopted as a professional conduct code for Queensland solicitors. At that point, over June 2007, the Law Society met a barrage of media criticism about the effect that adoption of the muzzle rule in Rule 19 of the *Model Rules* would have on litigation practice.

Two sectors generated the criticism: journalists in the Murdoch stable,<sup>25</sup> and solicitors who typically acted against the Government.<sup>26</sup> The recurring theme was the importance of free expression to client interests, especially in light of Queensland Government efforts to limit freedom of information at a time when there was ample evidence of dangerously negligent administration of State hospitals.<sup>27</sup> Showing some

<sup>21</sup> See text below at nn 45-47.

<sup>22</sup> *Holland v Queensland Law Society Inc* [2003] QSC 327, [11]-[12].

<sup>23</sup> GE Dal Pont, 'Regulation of the Queensland Legal Profession: The Quinquennium of Change' (2009) 28(2) *The University of Queensland Law Journal* 183.

<sup>24</sup> *Legal Profession Act 2004* (Qld) s 215(1)(a).

<sup>25</sup> G Chamberlin, 'State Gags Lawyers by Media Ban', *Courier Mail*, 2 June 2007, 17; Editorial, 'Lawyer Gag Not in the Public Interest', *Courier Mail*, 7 June 2007, 28; S Leahy, 'Freedom from Information ...', *Courier Mail*, 12 June 2007, 23 (Cartoon); C Merritt, 'Two States Reject Gag', *The Australian*, 29 June 2007, 32.

<sup>26</sup> P Carter, 'In the Public's Interest to Fight Gag', *Courier Mail*, 5 June 2007, 14 (Letter); C Merritt and H Thomas, 'Lawyers Choke over Plan for Media Gaggling', *The Australian*, 8 June 2007, 27; Chamberlin 1, see above n 10; 'State Lawyers Act to Remove Media Muzzle', see above n 10; Chamberlin 2, see above n 10.

<sup>27</sup> For the circumstances that led to these criticisms, see generally C Burgess, 'Can "Dr Death" Receive a Fair Trial' (2007) 7 *Queensland University of Technology Law Journal* 16, 16-17.

prescience, a criminal defence solicitor, Michael Bosscher, noted the anomaly that the muzzle rule's restrictions applied to lawyers when there was no equivalent restriction on politicians or police who might speak about the same proceedings.<sup>28</sup> And the earlier refusal to adopt the rule in Victoria undermined any claim that the muzzle rule was demanded merely in the interests of national uniformity.<sup>29</sup> The criticism had the desired effect. The President of the Law Council of Australia, Tim Bugg, offered the disingenuous argument that the muzzle rule was 'a restraint on speech, but not a restraint on free speech',<sup>30</sup> and then that lawyers did not enjoy free speech anyway because 'they can only speak on behalf of the client'.<sup>31</sup> However, after submissions from Queensland solicitors and consultation within its own management and committees,<sup>32</sup> the Queensland Law Society rejected the rule. Instead, following the Victorian precedent,<sup>33</sup> the *Solicitors Rule* that came into force on 1 July 2007 merely stated that '[a] solicitor must not publish, or take steps towards the publication of, any material concerning current proceedings for which the practitioner is engaged which may prejudice a fair trial of those proceedings or prejudice the administration of justice'.<sup>34</sup> The rationale given by Law Society President Megan Mahon in July 2007 was, by Australian standards, an unusually broad defence of free expression.<sup>35</sup>

... as a general principle, the presumption must be in favour of free expression and a burden on expression should only be permitted if it promoted some significant and compelling interest of good governance or the interests of justice. [The Queensland Law Society] Council also considered that any such burden must be the minimal restraint needed on expression in order to realise that interest and took the view that no such interest has been clearly articulated in support of draft Rule 19.

### III ANALYSING THE MUZZLE

#### A *Lawyers and the Right to Expression*

The practical difficulties that the muzzle rule would create when dealing with the media were also mentioned in Megan Mahon's rationales for rejecting the *Model Rules*' standard,<sup>36</sup> but it is the moral justification for rejecting it that was stunning. Anyone familiar with American constitutional law will immediately recognise that Mahon's language incorporated the 'strict scrutiny' analysis used by the United States Supreme Court for determining whether legal standards are compatible with

<sup>28</sup> Chamberlin 1, see above n 10; Chamberlin 2, see above n 10; and also see Merritt and Thomas, see above n 26.

<sup>29</sup> Merritt and Thomas, see above n 26; 'State Lawyers Act to Remove Media Muzzle', see above n 10; C Merritt, 'Law Council Plans Media Gag Review', *The Australian*, 15 June 2007, 21.

<sup>30</sup> 'State Lawyers Act to Remove Media Muzzle', see above n 10.

<sup>31</sup> Chamberlin 2, see above n 10.

<sup>32</sup> An amusing sideshow to the debate was the rush by some senior solicitors to claim responsibility for the Queensland Law Society's rejection of the rule, even though they intervened after the Society had settled its position internally: see Merritt, see above n 25; C Merritt, 'Tangled Webb Departs', *The Australian*, 6 July 2007, 34.

<sup>33</sup> *Professional Conduct and Practice Rules 2005* (Vic) r 19.1

<sup>34</sup> *Legal Profession (Solicitors) Rule 2007* (Qld) r 19.1.

<sup>35</sup> Queensland Law Society, President's Message' <<https://www.qls.com.au/content/lwp/wcm/connect/QLS/For+the+Profession/Conduct+Rules/>> at 30 October 2009.

<sup>36</sup> *Ibid.*

some rights recognised in the US Bill of Rights.<sup>37</sup> In practice, if strict scrutiny were applied to rights of expression the resulting standards would be much more speech-protective than anything guaranteed by the Australian right to free communication in public and political matters. Indeed, given that the Queensland *Solicitors Rule* merely bans expression that goes directly to the conduct of a fair trial or the administration of justice, it is unlikely that any moderately broader restriction on expression could be justified by the Queensland Law Society's strict scrutiny standards. Rule 19 of the *Model Rules* is seriously incompatible with a strong moral presumption that a lawyer can speak unless the administration of justice is actually prejudiced. And the presumption that the lawyer can speak rests on the same principles that John Clarke QC thought would improve government decision-making when terrorism allegations arose. There is a need for 'robust and open discussion with respect to available evidence [and] the differences that existed'.<sup>38</sup>

The Queensland bar's Rule 60 is therefore just as problematic. The Bar Association never gave a rationale for the muzzle rule when adopting it,<sup>39</sup> but then it was never forced into the position that the Law Society was. However, the difference leaves Rule 60 exposed to precisely the same criticisms. A barrister has no greater duties to the court, and no fewer duties to a client, than a solicitor has. Traditionally, barristers may have regarded themselves as being in a more ministerial, removed and even – perhaps – impartial position in relation to clients than solicitors were, but the modern expression of barristers' and solicitors' roles has emphatically denied that there could be any functional difference between them.<sup>40</sup> Resting within the same web of ethical responsibilities as the *Solicitors Rule*, Rule 60 therefore has little to commend it.

As a result, Keim suffered complaint and investigation for breaking a rule that, less than a month before he released the record of interview on 17 July 2007, had been carefully weighed in the professional and public arena, and had been found wanting. It is an even deeper irony that Michael Bosscher's prophecy was fulfilled. Just a month earlier, Bosscher had foreshadowed the risk that the muzzle rule would ban lawyers from talking about cases that police and politicians would be free to speak about.<sup>41</sup> And, in effect, that is what happened. It was the side that had first

<sup>37</sup> Especially the Equal Protection Clause: see E Chemerinsky, *Constitutional Law* (2<sup>nd</sup> ed, 2005) 818-21. Comparable legislative infringements of the First Amendment's rights of expression would more typically be analysed in terms of 'overbreadth' or 'vagueness': GR Stone, LH Siedman, CR Sunstein, MV Tushnet and PS Karlan, *The First Amendment* (2<sup>nd</sup> ed, 2003) 117-24.

<sup>38</sup> Clarke, see above n 1, 230.

<sup>39</sup> An explanation for the rule was given *ex post facto* in the Bar Association's report on the Keim investigation. The aim of limiting barristers' expression in litigious matters to the courtroom is evident, but is explained by 'an obvious unseemliness' in contributions that might be made in an extra-curial forum. If extra-curial expression does not prejudice the administration of justice, it is hard to see that 'unseemliness' can amount to a moral justification for the rule: Bar Association of Queensland, see above n 6, 31.

<sup>40</sup> The clearest expression of this has been in cases involving the immunity of advocates – advocates regardless of whether they were barristers or solicitors. No difference between barristers and solicitors exists in role, liability or immunity. The parallel standards hold even between counsel and instructing solicitor: *Rees v Sinclair* [1974] 1 NZLR 180, 186, 189-90; *Feldman v A Practitioner* (1978) 18 SASR 238, 239; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 215, 224, 227; *Giannarelli v Wraith* (1988) 165 CLR 543, 559, 576-77, 592, 593, 596; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 32, 120-1. See Bartley Submission, see above n 9, 5, where the claim that barristers have different duties is described as 'anachronistic'.

<sup>41</sup> See above note 28.

given public expression to Dr Haneef's record of interview in the media, albeit only in part, which then complained that the barrister did the same.

The muzzle rule could certainly never survive the Law Society's strict scrutiny standard, and Keim has a good argument that, if it were a law, in the context of the Haneef affair the muzzle rule might have violated Keim's constitutional right to free expression in public and political matters. However, the muzzle rule in Rule 60 is not a law, and its peculiar status raises tricky questions as to how it could be affected by the barrister's constitutional rights.

#### *B It's Not Even Law!*

As mentioned, the first *Queensland Barristers Rules* were rules of a club, enforceable as terms of a compact or contract amongst the barristers who were members.<sup>42</sup> Then, in 2004, when they were formalised as the *Barristers Rule 2004*, they became subordinate legislation. This is because, although presented to the Government by the Bar Association, they were made rules by the Governor in Council under the authority of statute.<sup>43</sup> According to Queensland's statute law, this gave the rule the status of subordinate legislation.<sup>44</sup> It was law.

The advent of the *Legal Profession Act 2007* changed the procedure for formalising professional conduct rules. Instead of being made by the Governor in Council, rules are made by the Bar Association or the Queensland Law Society.<sup>45</sup> They only take effect once notified by the Minister for Justice.<sup>46</sup> The reason for the change was nothing more than State Government tidiness. It was well known that the rules would largely replicate the *Advocacy* and *Model Rules*, and it was important for the sake of interstate uniformity that the original wording of these codes be used. However, the *Advocacy* and *Model Rules* use a different drafting style to that used by the Queensland Government, and the Government did not want to have responsibility for rules that would be expressed according to different protocols, formulae and styles. So, rule-making was relegated to the professional associations, with some Government control of the substance of the rules preserved by the notification procedure. The effect of the change in rule-making procedure is that the *Barristers Rule 2007* – including its muzzle rule – is no longer subordinate legislation.<sup>47</sup>

<sup>42</sup> See text above at n 19.

<sup>43</sup> *Legal Profession Act 2004* (Qld) s 215(1)(b). A similar process was available for rules applicable to solicitors under s 215(1)(a), although it was never used.

<sup>44</sup> The *Statutory Instruments Act 1992* (Qld) provides that 'a rule' is a statutory instrument if the rule is made under an Act: ss 7(2)-(3). 'A rule' is only a statutory rule if made by the Governor in Council or, if made by another person or body, must be approved by the Governor in Council or is subject to its disapproval: s 8. Under the *Statutory Instruments Act*, a statutory instrument amounts to subordinate legislation when it is 'declared to be subordinate legislation by an Act or a regulation made under the [*Statutory Instruments Act*]: s 9(1)(c). In general, a rule that is a statutory rule is subordinate legislation: s 9(1)(a); see also s 9(2)(c).

<sup>45</sup> *Legal Profession Act 2007* (Qld) ss 219-220.

<sup>46</sup> *Legal Profession Act 2007* (Qld) s 225(1).

<sup>47</sup> The *Legal Profession (Barristers) Rule 2007* (Qld) is made under an Act [ie, the *Legal Profession Act 2007* (Qld)] and is therefore a statutory instrument: *Statutory Instruments Act 1992* (Qld) ss 7(2)-(3). It is not, however, a 'statutory rule' (and therefore subordinate legislation) because it is not made by the Governor in Council, or approved by the Governor in Council, or subject to its disapproval: s 8. Under s 9 *Statutory Instruments Act*, a statutory instrument that is not a statutory rule is only subordinate legislation if it is 'declared to be subordinate legislation by an Act or a regulation made under the [*Statutory Instruments Act*]: The *Statutory Instruments Regulation 2002* (Qld) does not declare legal

Equally, the muzzle rule cannot be characterised as merely a consensual or contractual obligation along the lines of that assumed by members of the Bar Association before the Act of 2004. The *Legal Profession Act 2007* (Qld) states clearly that the rules ‘are binding on’ barristers, and ‘failure to comply with legal profession rules is capable of constituting unsatisfactory professional conduct or professional misconduct’.<sup>48</sup> As a result, barristers are liable to be scrutinised for their conformity with the rules by an independent regulator – the Legal Services Commissioner – and can suffer discipline for breaking a rule.<sup>49</sup> In these situations, where the rule applies because someone practises a profession, it is unlikely that there is a voluntary assumption of consensual or contractual obligations as there is when someone joins a club or any other association.

So the statute law in Queensland provides that the muzzle rule is not a law, but it also provides that the rule is ‘binding’ on barristers in some non-consensual sense. If the muzzle rule purported to be law because the *Barristers Rule* was subordinate legislation (as under the Act of 2004), then it would undoubtedly be invalid if its standards violated the constitutional right to free communication or a constitutionally protected role for a defence lawyer under Chapter III of the Constitution. On the other hand, if the standards of the rule were merely shouldered willingly (as they were before the Act of 2004), then, even though those standards would be contractually binding on members of the Bar Association, their compatibility with the Constitution would be irrelevant. There is the freedom to agree to obligations that restrict a freedom that the Constitution recognises. However, the present status of the muzzle rule is not easily characterised in accordance with these traditional categories of positive law. It makes no claim to be law, yet the law does claim that the rule is binding regardless of what the barrister agrees to. A non-legal rule that the law makes binding.

#### IV CONCLUSION

All of this raises constitutional and regulatory questions for which there are no easy answers. Let us assume that Keim’s substantive argument is correct. The muzzle rule, either on its face or in the context of circumstances like the Haneef affair, tries to invade a space that the Constitution secures against invasion – a space where expression is guaranteed, or a space where a lawyer’s role in legal proceedings is protected. Is the rule, despite its explicit non-legal quality, invalid? Or, is the Queensland Parliament’s legislative attempt to make the rule ‘binding’ (without the barrister’s agreement)<sup>50</sup> the point at which invalidity would arise?<sup>51</sup> Or

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profession rules to be subordinate legislation. The position is made even clearer in that *Legal Profession Act 2007* (Qld) s 225(2), provides that the Minister’s *notice* that legal profession rules have been made is subordinate legislation. It does not state that the rules themselves are subordinate legislation. This has not prevented some barristers from assuming that the *Legal Profession (Barristers) Rule 2007* (Qld) is ‘legislation’: see D Jackson and P Franco, ‘The Reintroduction of the Two Counsel Rule’, *Hearsay*, December 2007, [6]-[7], where it is argued that the two counsel rule could be reintroduced by amendment to the *Barristers Rule*, but not by ‘any non-statutory alternative’. It might well be, given the analysis in this article, that the *Barristers Rule* is itself a ‘non-statutory alternative’ – although it is a ‘statutory instrument’.

<sup>48</sup> *Legal Profession Act 2007* (Qld) s 227.

<sup>49</sup> *Legal Profession Act 2007* (Qld) s 452.

<sup>50</sup> See, eg, *Legal Profession Act 2007* (Qld) s 227(1).

<sup>51</sup> For example, because where the effect of a provision is to violate the implied freedom of public and political communication, it is in violation of the Constitution: *Nationwide*

again, given that the rule only takes effect – and only becomes ‘binding’ – once the Minister for Justice notifies that it has been made,<sup>52</sup> is the Minister’s notification void *ab initio* because it exceeds the limits of any constitutionally legitimate power? Would any investigation, or any discipline application lodged, by the Legal Services Commissioner (who is invested with powers exclusively by statute)<sup>53</sup> be regarded as a nullity because, once more, it would necessarily exceed any possible constitutional power?

Any one or more of these questions might receive a positive response. It might at first seem that, in raising the question of the effect that the Constitution might have on ‘the way that disciplinary rules are used’,<sup>54</sup> Keim and I are simply pettifogging. However, the alternative is a more basic challenge to the Australian constitutional settlement. The alternative is that rules could be made and imposed under statutory authority, and yet, merely by denying them legislative status, they could escape judicial review for their compatibility with the Constitution’s standards. There is no indication that constitutional issues were considered in any of the referral of the investigation of Keim to the Bar Association, the Bar Association’s investigation and recommendation, or the Legal Service’s Commissioner’s (delegated) decision. It may also be that Keim’s substantive arguments of the muzzle rule’s possible violation of the freedom of public and political communication or of Chapter III are groundless. However, Biddle’s complaint about Keim was that that the release of the record of interview had broken Rule 60 and ‘amounted to ... engaging in a political debate’.<sup>55</sup> That phrase alone, not to mention the politically-charged circumstances of the Haneef affair, should have at least alerted the regulators to the possibility that the release of the record of interview could amount to constitutionally-protected expression. It is a dimension of lawyer regulation and discipline that should be considered. And, if it is the complexity of the constitutional issues that deters the Commissioner or the Bar Association from considering them, there is a simpler answer. There is no moral justification for a ban on lawyer expression beyond what is needed to assure a fair trial or the proper administration of justice. The muzzle rule should be abandoned.

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*News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

<sup>52</sup> *Legal Profession Act 2007* (Qld) s 225(1).

<sup>53</sup> *Legal Profession Act 2007* (Qld) ch 4.

<sup>54</sup> Keim, see above n 11, 328.

<sup>55</sup> Bar Association of Queensland, see above n 6, 1.