

# **NSW Law Reform Commission**

## **REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION**

### **TABLE OF CONTENTS**

TABLE OF CONTENTS.....	1
Participants of the Commission.....	2
Preface .....	4
Outline of the Report.....	5
Legal Profession Inquiry Publications .....	23

## REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

### Participants of the Commission

#### **New South Wales Law Reform Commission**

The Law Reform Commission is constituted by the Law Reform Commission Act 1967. The Commissioners are:

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#### *Deputy Chairman*

Mr Russell Scott

#### *Full-time Commissioner*

Mr Denis Gressier

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## REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

### Preface

The Commission has a reference from the Attorney General and Minister for Justice, the Honourable FJ Walker, QC, MP, to inquire into and review the law and practice relating to the legal profession Pursuant to this reference we have published a *Third Report on the Legal Profession*. The Report contains our final recommendations in relation to

Advertising and other Attraction of Business;

Specialisation and Related Matters.

The Report was prepared by a Division of the Commission. By virtue of the Law Reform Commission Act, a Division is deemed, for the purposes of the reference in respect of which it is constituted, to be the Commission. At the time of preparation of the Report the Division consisted of the following Commissioners:

Mr Julian Disney

Mr Denis Gressier

His Honour Judge Trevor Martin, QC

The Chairman of the Commission, Professor Ronald Sackville, presides over meetings of the Division but is not a member of it.

Not everyone will have the time or inclination to read the full Report Accordingly, we publish this Outline of the Report, for the benefit of those who seek a brief statement of the Commission's views and recommendations. Any person who would like a copy of the full Report should contact the Secretary of the Commission, Box 6, GPO, Sydney 2001 (telephone: 238 7213).

## REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

# Outline of the Report

## I. INTRODUCTION

### The Report and this Outline

1. This Outline is divided into four Parts which correspond with those of the Report itself. They are as follows.

I. INTRODUCTION (paras 1-3)

II. SPECIALISATION AND RELATED MATTERS (paras 4-18)

III. INDIVIDUAL ADVERTISING BY SOLICITORS (paras 19-28)

IV. OTHER FORMS OF ATTRACTION OF BUSINESS (paras 29-39)

The Outline concentrates on summarising the main recommendations made in the Report, but it includes outlines of the present position and of the reasons for our recommendations. The summaries of recommendations are printed here in bold type, and a cross-reference is given (eg. R.3) to the relevant recommendation in the numbered list of recommendations which annexed to this Outline.

### Our Methods of Inquiry (Chapter 1)

2. In chapter 1 of the Report we describe the principal methods which we adopted in order to inform ourselves, and to canvass opinions, about the topics dealt with in the Report and about other topics falling within the scope of the Legal Profession Inquiry. Adoption of these methods resulted in the receipt of more than four hundred submissions, interviews with hundreds of clients or former clients of lawyers, discussions with a wide range of lawyers in New South Wales and elsewhere, examination of a large number of Law Society and Bar Association files, and extensive empirical and bibliographical research.

3. With the benefit of the information and ideas obtained by these means, we prepared and published a series of six Discussion Papers and five Background Papers on various topics falling within the ambit of the Legal Profession Inquiry. The Papers are listed at the back of this Outline. One of the Discussion Papers, *Advertising and Specialisation*, made tentative suggestions on matters about which we make final recommendations in the Third Report. The responses which we received to this Paper were taken into account in the preparation of our final recommendations.

## II. SPECIALISATION AND RELATED MATTERS

### THE PRESENT POSITION (Chapters 2-4)

#### Introduction

4. The general question with which we are concerned in Part 11 of the Report is:

To what extent and by what means, if any, should specialisation within the legal profession be regulated?

We use the term specialisation to embrace both of its common meanings, namely concentration and concentration and *expertise* in a particular field, and to cover a wide range of possible views about the degree of concentration and of expertise necessary to constitute specialisation.

5. In recent years there has been considerable discussion in Australia, and elsewhere, about regulation of specialisation within the legal profession. The focus of discussion has been on the regulation of advertising by practitioners about their particular fields of practice, whether in terms of "specialisation", or of such other characteristics as "experience", "expertise", or merely "willingness to accept work". Should any such advertising be permitted? If so, should it be confined to those practitioners who satisfy special criteria, such as academic or practical qualifications?

6. We too concentrate principally on the question of practitioners rights to advertise claims about particular fields of practice. We agree with the broad consensus that other types of action to regulate specialisation, such as prescribing special qualifications which practitioners must obtain in order to undertake work in a particular field, are not desirable. Accordingly, we do not discuss them in detail. For convenience of discussion we use the term "fields of practice scheme" to mean a body of rules in relation to advertising by practitioners about particular fields of practice. We describe various schemes of this kind along a spectrum from "low level" to "high lever", according to the level of qualifications, if any, which they require of practitioners who wish to advertise about fields of practice.

### **The Present Position**

7. In chapter 3 of the Report we summarise the present position in relation to specialisation, and the regulation of specialisation, in the legal profession in New South Wales. An increasing number of solicitors and barristers concentrate to a considerable degree in a particular field, but concentration of this kind is not necessarily an accurate indicator of expertise or of whether a practitioner is likely to be regarded within the profession as being a specialist. There is no official designation of specialists, and, with the limited exception of the Family Law Practitioners Association, there is no association of practitioners which seeks to confine or categorise its membership on the grounds of concentration expertise or specialisation in a particular field. Generally speaking, neither barristers nor solicitors are permitted to advertise claims about their fields of practice, whether in terms of specialisation or otherwise. The principal exception is that solicitors may indicate in the Law Society's Legal Services Directory those of the fourteen listed fields in which they are "willing to provide assistance".

8. We also summarise in chapter 3 a number of recent developments in relation to the regulation of specialisation in legal professions outside New South Wales, and in professions other than law. These developments range from giving practitioners greater scope to advertise that they are willing to accept work in particular fields (as in England and Scotland), to introducing high level fields of practice schemes which allow practitioners to advertise themselves as specialists in particular fields provided that they satisfy certain rigorous qualifications (as in California and Texas).

### **Our Discussion Paper**

9. In chapter 4 we outline the tentative suggestions which we made in this area in our Discussion Paper, *Advertising and Specialisation*. Our principal suggestion for change was that solicitors should be permitted to advertise in newspapers and other publications their willingness to accept work in particular fields of practice. We made a similar suggestion in relation to barristers, but we said it might be appropriate to restrict barristers' advertising to publications which circulate principally amongst lawyers.

10. We did not suggest in our Paper that practitioners should be permitted to advertise about their fields of practice other than in terms of willingness to accept work. But we said that we did not necessarily oppose introduction of a fields of practice scheme under which

practitioners could advertise that they “prefer”, or are “specially interested in”, particular fields, provided that the qualifications required for doing so are not above medium level. We outlined a low-medium scheme which might be suitable for such a purpose.

11. The principal responses to our Paper were from the Law Society of New South Wales and the New South Wales Bar Association. Their responses are outlined in chapter 4 of the Report, and particular aspects of them are referred to in subsequent chapters. The Law Society agreed with our general view that solicitors should be given greater freedom to advertise about their fields of practice. But it considered that advertisements about willingness to accept work in particular fields should continue to be confined to the Legal Services Directory, and it proposed that solicitors should be entitled to advertise themselves as “specialists” in particular fields provided that they meet what it described as “medium” level qualifications. The Society did not favour the low-medium “preferred fields of practice” scheme described in our Paper. The Bar Association said that in the light of our Paper it is considering whether to publish a directory in which barristers may indicate the fields of practice in which they will accept work. The Association noted with approval that we did not suggest the introduction of what it called “specialisation schemes”.

## **OUR GENERAL CONCLUSIONS (Chapter 5)**

### **Introduction**

12. In chapter 5 we consider the impact of specialisation within the legal profession and the consequences of different ways of regulating specialisation. We look at the consequences in relation to fragmentation of the profession the quality of legal services, the identification of appropriate practitioners for particular work, the speed and cost of legal services, and the interests of particular sectors of the profession (namely general practitioners, small or outlying practices, and young practitioners). We conclude that the principal question of present relevance in relation to regulation of specialisation is whether solicitors should continue to be prohibited from advertising about their fields of practice, and we arrive at the following conclusions on that question.

### **Advertisements about Willingness to Accept Work**

13. Generally speaking, wealthy or sophisticated users of legal services, such as many business corporations, are able to find their way to practitioners who have appropriate skills for their problems, even in narrow fields of practice. On the other hand, there is a pressing need to assist less sophisticated users, or would-be users, to locate appropriate practitioners. For these people, it would be a significant advance if they could more readily obtain information about the broad fields of practice in which particular solicitors are willing to accept work. However, if solicitors were permitted to advertise their willingness or unwillingness to accept work in particular fields, there would need to be some controls to reduce the dangers of misleading or ambiguous advertising.

### **Other Advertisements about Fields of Practice**

14. Many clients would benefit from greater assistance in seeking a solicitor who is competent or expert in the field of practice relevant to their problem. One possibility is to permit solicitors to advertise themselves in terms such as “specialising in”, or “experienced in”, particular fields, provided that they meet certain medium or high level qualifications such as a specified degree of concentration in a field or the completion of formal examinations in it. Another possibility is to allow such advertising subject only to low level requirements such as that it must not be “false or misleading”.

15. We do not favour adoption of either of these possibilities. We consider that medium or high level fields of practice schemes can have gravely adverse consequences on the cost and accessibility of legal services, and even on the quality and speed of service. They can have an unfair and undesirable impact on some sectors of the profession especially general

practitioners and young practitioners. On the other hand, low level schemes can lead to a high incidence of advertising which is consciously or unconsciously misleading, and which it is difficult to police effectively. Moreover, the incidence of misleading advertising under such schemes is likely to lead to compelling demands for the introduction of a medium or high level scheme, with the consequential disadvantages to which we have referred.

16. It may be possible, however, to devise a low-medium level scheme which encourages practitioners to develop and maintain competence in particular fields, and which gives the public some assistance in identifying practitioners who do so, without having the serious weaknesses of higher or lower level schemes.

### **Special Interest Associations**

17. The growth of associations of practitioners having a special interest in particular fields ("special interest associations") can provide advantages for the profession and the public. But it is of the greatest importance that solicitors who are members of these associations should remain subject, in practice as well as in theory, to the general regulatory body for all solicitors. The introduction of a medium or high level fields of practice scheme would increase the danger of fragmentation of the profession into largely autonomous groups which then use their dominant position in a field to restrict competition, and increase fees, to an unjustifiable extent.

### **OUR RECOMMENDATIONS (Chapters 6 and 7)**

18. In the light of the general conclusions mentioned above, we make a number of specific recommendations in chapters 6 and 7 of the Report. The recommendations are reproduced in full in the numbered list annexed to this Outline (see recommendations 1-12), but we mention here some of the more important of them.

#### **Advertising about Willingness to Accept Work (see Recommendations 1-4, 8-9)**

**Legal practitioners should be permitted to advertise their willingness to accept work in particular fields of practice. In the case of barristers, it may be appropriate to restrict such advertising to publications which circulate principally amongst lawyers.**

**The existing Legal Services Directory should be supplemented by a Referrals Directory, intended principally for use by lawyers, indicating those fields in which individual practitioners are willing to accept work. The fields would be more numerous, and many would be defined more narrowly, than those in the Legal Services Directory. There could be one Referrals Directory for the whole profession, or separate directories for barristers and solicitors respectively.**

#### **Other Advertising about Fields of Practice (RR.5-6, 10)**

**Practitioners should not be permitted to advertise themselves in terms such as "specialist" or "expert". We are not necessarily opposed, however, to the introduction of a scheme under which, subject to meeting certain qualifications, practitioners are permitted to advertise themselves as having certain "preferred" fields of practice. The required qualifications should be of a low-medium level and should not involve substantial levels of concentration in a particular field, attendance at lengthy courses of continuing legal education, the successful completion of written or oral examinations, or the provision of references from other lawyers.**

#### **Special Interest Associations (RR.7, 11)**



**Associations of this kind should not be permitted to become, in reality, the regulatory bodies for practitioners who work in their particular fields. Distinctions in law or official practice (such as the practice of courts and the Government) should rarely, if ever, be based on whether or not a solicitor belongs to a special interest association.**

### **III. INDIVIDUAL ADVERTISING BY SOLICITORS**

#### **THE PRESENT POSITION (Chapters 8-10)**

##### **Introduction**

19. In chapter 8 we explain that Parts III and IV of the Report are concerned with conduct by lawyers which is intended, or is likely, to attract business to their practice. In particular, we look at four forms of attraction of business. The four categories are not mutually exclusive, but they reflect distinctions which are commonly drawn in discussions of this general topic. They may be summarised as follows.

##### **Individual Advertising**

**We use this term to cover communications which are made publicly and are likely, or are intended, to attract business to an individual practice or practitioner rather than to the profession generally.**

##### **Community Discussion**

**This term is used to cover comments made by lawyers about particular legal or non-legal issues, whether made in public or at meetings of community organisations and the like. Some community discussion may also constitute advertising or solicitation.**

##### **Solicitation**

**We use this term to cover public or private communications which are directed towards attracting business from a particular person or a small number of people, rather than being directed more generally. Solicitation may or may not occur face-to-face with the person or persons to whom it is directed. When occurring in public, solicitation also constitutes advertising and may constitute community discussion.**

##### **Institutional Advertising**

**This term is used to cover public communications which are likely, or are intended, to attract business for the profession as a whole, or for a large group of practitioners, rather than for a particular practice or practices.**

In Part III of the Report we consider individual advertising by solicitors, other forms of attraction of business are considered in Part IV.

##### **The Present Position**

20. In chapter 9 we describe the present position in relation to individual advertising by solicitors in New South Wales. Generally speaking, such advertising, whether in printed publications, radio, television or other media, is prohibited by statutory regulations. The main exception is that some basic information may be included in recognised legal directories. However, the Law Society has power to approve advertising which otherwise would be prohibited, and this has led to two significant developments in the last few years. First, the Law Society has published a Legal Services Directory, in which solicitors' practices may

indicate basic information such as their name and location languages spoken by their principals or staff, fields of practice in which they are "willing to provide assistance," and whether they are willing to provide a 30 minute initial interview for \$20. Secondly, having announced its intention to amend the regulations in order to allow greater scope for advertising, the Society has approved some newspaper advertisements on the basis that they comply with the proposed new regulations.

21. The Society's proposed regulations are in an advanced stage of preparation. The principal effect of the changes would be that advertisements could be published in newspapers and periodicals, rather than being confined largely to legal directories, and some additional types of information could be advertised (notably in relation to languages spoken, and fees for an initial consultation).

22. We also summarise in chapter 9 a number of significant developments in legal professions outside New South Wales, and in some professions other than law, in relation to restrictions on advertising. The restrictions applying to lawyers in other parts of Australia are similar to those which presently apply in New South Wales. The same used to be true throughout the common law world, but during the last few years there has been some relaxation of the restrictions in the United Kingdom (and three official Commissions have suggested further relaxation), and substantial relaxation in some parts of Canada and in many parts of the United States. Legal action under the Commonwealth Trade Practices Act has led to major relaxation of the restrictions on advertising by engineers in Australia, and the restrictions on accountants have also been eased somewhat.

### **Our Discussion Paper**

23. In chapter 10 of the Report we outline the tentative suggestions for change in this area which we made in our Discussion Paper, *Advertising and Specialisation*. We suggested in the Paper that, save in four special areas, advertising by solicitors should be permitted, provided that it complies with certain basic rules such as that it must not be false, misleading, or disreputable to the profession. Advertising in the special areas (namely fees, fields of practice, clientele, and speed of service) would be prohibited unless it relates only to items on a specified list and complies with certain requirements about terminology. We suggested that this relaxation of the present restrictions should apply not only to printed publications (including, for example, newspapers, brochures, and telephone directories) but also to other media such as radio, television and office signs.

24. In its response to our Paper, the Law Society reiterated its wish to relax the present restrictions along the lines which it had proposed earlier. It rejected the more substantial relaxation suggested in our Paper, and it opposed radio or television advertising. However, some other responses to the Paper were generally in favour of our suggestions.

### **OUR GENERAL CONCLUSIONS (Chapters 10 and 11)**

25. In chapter 11 of the Report we consider a number of advantages and disadvantages which may arise from relaxation of the present restrictions in New South Wales. We conclude that the present restrictions are unduly restrictive, especially in relation to advertising about fees and fields of practice. They deprive members of the public, especially those who are socio-economically disadvantaged, of access to important information about lawyers. As a result, some people choose lawyers who are not well suited for the work in question and others are deterred from seeking legal assistance. The restrictions inhibit competition, innovation and efficiency in the profession and, as a consequence, the quality, speed and cost of legal services are adversely affected. New practices and small practices are especially disadvantaged by the present restrictions. These weaknesses would be reduced somewhat by the Law Society's proposed amendments to the present regulations, but they would remain substantial.

26. In the first part of chapter 11 we describe three possible approaches to relaxation of the restrictions. Each of these approaches would require advertising to comply with four basic rules, including, for example, a rule against false or misleading advertising. Under the *Broad Approach*, there would be no further restrictions. Under the Medium Approach, additional restrictions would apply to four special areas, namely fees, fields of practice, clientele and speed of service. Under the *Narrow Approach*, there would be additional restrictions in all areas rather than only in the four special areas.

27. We discuss the relative merits of these three approaches and we conclude that the Medium Approach is preferable to the Narrow Approach because it gives greater encouragement to initiative and efficiency within the profession and is likely to be simpler to administer. We prefer it to the Broad Approach because it applies stricter controls to special areas, such as fees and fields of practice, in which there might otherwise be a serious risk of undesirable types of advertising. In addition, its specificity in those areas might encourage practitioners to venture into advertising in them, rather than being deterred by a fear of contravening the less precise restrictions of the Broad Approach.

28. We make detailed recommendations in the Report for the adoption of a scheme which follows the Medium Approach (see paragraph 29 below). But in case it is considered that this scheme would constitute too great a relaxation of the restrictions, at least for the immediate future, we describe in an Appendix to the Report another scheme, adopting the Narrow Approach which might be suitable for implementation pending introduction of our recommended scheme. We emphasise that this interim scheme would allow some advertising in the four special areas, and that if it did not do so it would, in our view, be an inadequate relaxation even on an interim basis.

#### **OUR RECOMMENDATIONS** (Chapters 12 and 13)

29. We summarise here the principal recommendations which we make in the Report in relation to individual advertising by solicitors. The full list of our recommendations on this topic is reproduced in the annexure to this Outline (see RR.13-20).

##### **Basic Rules (R. 13)**

**Generally speaking, advertising by solicitors should be permitted, provided that it complies with four basic rules, namely**

- (i) it must not be false or misleading;**
- (ii) it must not claim superiority over other solicitors;**
- (iii) while it may make clear the intention to seek custom, it must not be vulgar, sensational or otherwise of such a character as to be likely to bring the profession into disrepute;**
- (iv) it must not contain testimonials or endorsements concerning the advertising solicitor.**

##### **Special Areas (RR.14-16)**

**Advertising by solicitors in relation to fields of practice, fees, clientele, or speed of service, should be subject to special restrictions in addition to the basic rules described above. First, advertising about these special areas should be confined to the types of information on a specified Special Areas List (see R.15). Secondly, in certain circumstances solicitors should be required to give advance notice to the Law Society of the terminology which they intend to use in advertisements about these special areas.**

## Particular Media (RR.17-20)

Generally speaking, the above recommendations apply to advertising in any medium. We do not anticipate, however, that radio or television advertising by solicitors would be likely to become widespread, at least in the near future. If problems of over use of those media do occur, consideration could be given to introducing restrictions on frequency and expenditure.

We recommend that a number of additional types of information should be included in the Legal Services Directory, and that the nature and availability of the Directory should be advertised widely on a continuing basis.

## IV. OTHER FORMS OF ATTRACTION OF BUSINESS

### SOLICITORS: COMMUNITY DISCUSSION AND SOLICITATION (Chapter 14)

30. In the first part of chapter 14 we consider the regulation of community discussion by solicitors. The Law Society's rulings in this area are to the effect that, generally speaking, discussion in public media (such as newspapers or television) is not permissible unless it is anonymous or does not indicate that the speaker or writer is a solicitor, and addresses to club meetings are permissible provided that the invitation to deliver them has not been solicited and they are arranged in good faith for the benefit of club members. Approval may be sought from the Law Society to depart from these restrictions.

31. In our view, it is in the interests of both the public and the legal profession that solicitors should be allowed to participate in community discussion of issues, whether they be of a legal or non-legal nature, and in doing so to give some information about themselves which is relevant to those issues and to the perspectives from which they view them. We quote in the Report a statement of policy which has been adopted in this area by the Law Society in England. **The English statement is less restrictive than the present Law Society rulings in New South Wales and, subject to further liberalisation in some respects, we recommend its adoption in this State (R.21).**

#### Solicitation

32. In the second part of chapter 14 we consider three types of solicitation namely solicitation by public media (such as in newspapers and on television; but not including face-to-face communication such as at public meetings), by mail (but not including mail addressed by solicitors to their present or former clients), and by the use of business cards. The effect of Law Society rulings in these areas is that, generally speaking, solicitors may not engage in solicitation by public media or by mail to non-clients, but that a solicitor may use business cards containing basic information such as name and address provided that their use "is discreet and is confined to occasions on which it is proper that he should establish his professional identity".

33. We consider that some types of solicitation can play a valuable role in communicating information about legal services. They can be better directed, and can provide fuller information of greater relevance to the recipient, than may be possible through advertising. The principal dangers of solicitation arise from the possibility of duress or coercion being brought to bear on particular individuals and, if the solicitation occurs in private, from the reduced possibility that such abuses as occur will come to light and be provable. The dangers are more significant when the solicitation is face-to-face.

34. In our view, some relaxation of the present general prohibition on solicitation is desirable, but cautious experimentation with limited changes may be necessary before considering substantial reforms. **Accordingly, we recommend that, subject to certain stringent restrictions, some forms of solicitation by public media and by mail should be permitted and that business cards should be permitted to include a wider range of**

**information than at present (RR.22-24).** We emphasise that these recommended changes would not apply to face-to-face solicitation

## **ATTRACTION OF BUSINESS BY BARRISTERS** (Chapter 15)

### **The Present Position**

35. In chapter 15 of the Report we consider the regulation of three forms of attraction of business by barristers, namely individual advertising, community discussion and solicitation. The Bar Association has made rules which generally speaking, prohibit individual advertising or solicitation by barristers, and impose tight restrictions on their involvement in community discussion (subject to waiver in particular instances). In our Discussion Paper, *Advertising and Specialisation*, we suggested some relaxation of these rules. The Bar Association's response did not adopt our suggestions but the Association said that it would give further consideration to those which related to community discussion.

### **Recommendations**

36. *Individual Advertising.* The principal difference between barristers and solicitors in this context is that the choice of a barrister for a particular matter is commonly made by the solicitor rather than by the client. Accordingly, the need for barristers to be permitted to advertise to *the public* is substantially less than the need for solicitors to do so. **We recommend that the restrictions on individual advertising by barristers should be the same as those recommended earlier in relation to solicitors, save that advertisements by barristers could be confined to publications which circulate principally amongst lawyers (R.25).**

37. *Community Discussion.* We consider that for reasons similar to those given in relation to solicitors, the current rules of the Bar Association in this area are unduly restrictive. **The corresponding rules of the English Bar are more liberal and we recommend their adoption in New South Wales (R.26).**

38. *Solicitation.* Generally speaking, we see no substantial need, at least at the present time, to change the present restrictions on solicitation by barristers. **We recommend, however, that the present prohibition on barristers visiting solicitors' offices should be abolished or relaxed substantially, and that the Bar Association should relax its policy in relation to business cards by adopting the relevant rule of the English Bar (R.27).**

## **INSTITUTIONAL ADVERTISING** (Chapter 16)

39. In chapter 16 we refer to some recent projects undertaken by the Law Society of New South Wales in the area of institutional advertising and the related area of community legal education. We then recommend certain principles by which in our view, further developments in these areas should be guided. **In particular, we make recommendations concerning the desirability of involvement by the Bar Association in these areas, of striking a balance between promotional and informational advertising, and of placing particular emphasis on the informational needs of people who are economically, linguistically or geographically disadvantaged (R.28).**

## **REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION**

### **List of Recommendations**

The Report includes a numbered list of the recommendations which are made in the body of the Report. We reproduce that list here. The Part, chapter and paragraph numbers indicated in the list relate to the Report itself.

### **SPECIALISATION AND RELATED MATTERS**

(Part II of the Report)

#### **I. Solicitors (Chapter 6)**

##### **Advertising about Willingness to Accept Work in Particular Fields (paras 6.10-6.21)**

###### **R.1 (1) Solicitors should be permitted to advertise**

their willingness or unwillingness to accept work in particular fields of practice;

their willingness or unwillingness to accept work directly from clients, whether generally or in particular fields.

(2) Such advertisements should be subject to the rules which we recommend below (recommendations 13-20) in relation to advertising in general. Accordingly, they should be able to appear in newspapers and other printed publications, and on radio and television, but they should not be permitted to be false, misleading, disreputable to the profession or to claim superiority over other solicitors (see recommendation 13).

**R.2 (1)** From time to time, the general regulatory body for solicitors should publish lists of terminology which it considers suitable for use in advertisements of the types described in recommendation 1. For example, it should suggest terms for describing particular fields of practice (including "General Practice"), and it should give detailed definitions of these terms, where appropriate. In addition, it should publish examples of terms which it does not consider suitable because, for example, they are misleading.

(2) If solicitors wish to use terminology which the regulatory body has defined, they should be required to use it in accordance with that definition and to supply a copy of that definition to any client, or would-be client, who requests it.

(3) If solicitors wish to use terminology which has not been suggested by the general regulatory body, they should be required to notify that body a specified period in advance. It should not be compulsory, however, to obtain the approval of that body, provided that the terminology complies with the restrictions referred to in recommendation 1. The requirement of prior notification should not apply to advertisements in publications which circulate principally or solely amongst lawyers.

**R.3 (1)** The types of information included in the Legal Services Directory should be expanded to allow solicitors to indicate whether they do not accept work directly from clients, either generally or in particular fields.

(2) The list of fields in the Directory should be kept under review with the assistance of non-lawyers who are familiar with the needs and perspectives of users or would-be users of legal services.

**R.4** The Legal Services Directory should be supplemented by a Referrals Directory, intended principally for use by members of the legal profession. By contrast with the Legal Services Directory, this Directory should contain information about individual solicitors in a practice rather than the practice as a whole, and the fields of practice listed in it should tend to be narrower and should be considerably greater in number.

### **Other Advertising about Fields of Practice** (paras 6.22-6.42)

**R.5** (1) Solicitors should not be permitted to advertise themselves in terms such as “specialists” or “experts” in particular fields, whether subject to meeting specified qualifications or otherwise.

(2) We are not necessarily opposed, however, to a scheme which permits solicitors, subject to meeting certain requirements, to advertise themselves as, for example, “preferring” or “being specially interested in” particular fields.

(3) If such a scheme is established, the requirements for advertising under it should be modest. For example, they should not involve substantial levels of concentration in a particular field, attendance at lengthy courses of continuing legal education, the successful completion of written or oral examinations, or the provision of references from other lawyers.

**R.6** (1) We do not positively recommend the establishment of a scheme of the kind described in recommendation 5(2) and (3). But we recommend that, if it is introduced, it should be a low-medium scheme along the following lines.

(2) Subject to meeting certain qualifications, solicitors would be permitted to advertise themselves as having certain “preferred” fields of practice, or as being “specially interested” in particular fields, or in such equivalent terms as are approved by the general regulatory body.

(3) The qualifications for advertising under the scheme would be:

three years in active practice as a lawyer;

(i) for two years prior to commencing to advertise, attendance at specified continuing legal education (say, 20 hours each year); (ii) for each year after commencing to advertise, attendance at specified continuing legal education (say, 20 hours for each of the first two years after commencing advertisements, and 10 hours for each subsequent year); and

payment to the general regulatory body of a modest registration fee for each field advertised, the fee to be used to defray the cost of administering the scheme.

(4) Advertising under the scheme would be restricted to certain broadly-defined fields, such as those listed in the present Legal Services Directory. One field would be General Practice. There would be no limit on the number of fields in which any one practitioner could advertise, provided that he or she meets the specified requirements.

(5) The scheme, and especially the determination of the requirements for advertising under it, would remain both in law and in practice, under the control of the general regulatory body for all solicitors rather than of associations of practitioners interested in particular fields.

### **Special Interest Associations** (paras 6.43-6.51)

**R.7** (1) Associations of people interested in particular fields of practice (“special interest associations”) can be beneficial, but they should not be permitted to become, in reality, the regulatory bodies for solicitors who work in those fields.

(2) Distinctions in law or official practice (such as the practice of courts, the Government, or general regulatory bodies of the profession) should rarely, if ever, be based on whether or not a solicitor belongs to a special interest association.

(3) In our First Report on the Legal Profession we recommended vesting the Law Society Council with statutory power to regulate restrictive practices amongst practitioners who are subject to its governance (see recommendation 44 of that Report). The restrictive practices covered by that recommendation include those which are engaged in by solicitors as members of special interest associations.

## **II. Barristers (Chapter 7)**

### **Advertising about Willingness to Accept Work in Particular Fields (paras 7.7-7.9)**

**R.8** Barristers should be permitted to advertise about their willingness to accept work in particular fields to the same extent as we recommended in recommendations 1 and 2 above in relation to solicitors, save that it may be appropriate to restrict barristers to advertising in publications which circulate principally or solely amongst lawyers.

**R.9** The Bar Association should arrange for the publication of a directory in which barristers may indicate their willingness or unwillingness to accept work in particular fields. The directory should be similar in nature to the Referrals Directory which we have recommended above in relation to solicitors (see recommendation 4) and could be combined with it.

### **Other Advertising about Fields of Practice (para 7.10)**

**R.10** (1) Barristers should not be permitted to advertise themselves in terms such as “specialist” or “experts” in particular fields, whether subject to meeting specified qualifications or otherwise.

(2) We do not recommend the establishment of a "preferred fields of practice" scheme for barristers but we do recommend that if such a scheme is established it should be along the lines of the scheme described in recommendation 6 in relation to solicitors.

### **Special Interest Associations (para 7.11)**

**R.11** We make the same recommendations in relation to special interest associations which include barristers as we made in recommendation 7 above in relation to special interest associations which include solicitors.

### **In an Undivided Profession (para 7.12)**

**R.12** In our *First Report* we recommended the abolition of the present division of the profession into barristers and solicitors. If that recommendation is adopted, the recommendations which we have made above in relation to barristers (recommendations 8-11) should be applied to all practitioners who do not accept work directly from clients, whether or not they are in sole practice (as barristers presently are) and whether they are subject to the governance of the Bar Council or that of the Law Society Council.

## **INDIVIDUAL ADVERTISING BY SOLICITORS**

(Part III of the Report)

### **I. A General Scheme (Chapter 12)**

#### **Basic Rules (para 12.16)**

**R.13** Generally speaking, advertising by solicitors should be permitted, subject to the following four basic rules:

it must not be false or misleading in any material particular;

it must not claim superiority for the advertising solicitor over any or all other solicitors;

while it may make clear the intention of the solicitor to seek custom, it must not be vulgar, sensational or otherwise of such a character as to be likely to bring the profession into disrepute;

it must not contain testimonials or endorsements concerning the advertising solicitor.

#### **Special Areas (paras 12.19-12.28)**



**R.14** Advertising by solicitors in relation to any of the following areas, namely

fields of practice;

fees;

actual or potential clientele;

speed of service;

should be subject to special restrictions, in addition to those described in recommendation 13 above. We describe these special restrictions in recommendations 15 and 16 below.

**An Approved List**

**R.15** Advertising in the four special areas should be confined to the types of information on the following Special Areas List.

*Fields of Practice:*

(i) willingness to accept work, either generally or in particular fields of practice;

(ii) unwillingness to accept work in particular fields;

(iii) willingness or unwillingness to accept work directly from clients, either generally or in particular fields of practice;

(iv) (if the low-medium fields of practice scheme described in recommendation 6 above is established), such information about fields of practice as it is permissible to advertise under that scheme.

*Fees:*

(i) acceptance of credit cards;

(ii) availability of information about a practice's methods for determining fees;

(iii) willingness to give written estimates of fees;

(iv) fixed or maximum fees charged for specific services;

(v) fixed or maximum hourly rates charged for specific services;

(vi) ranges of fees charged for specific services, provided that the maximum does not exceed the minimum by more than a prescribed percentage (say 25%);

(vii) fixed or maximum proportions of statutory scale fees which will be charged for the services defined in the scales.

*Actual or Potential Clientele:*

(i) willingness to accept or interest in accepting, work from particular types of client.

*Speed of Service:*

(i) willingness to give written estimates concerning completion of particular work;

(ii) maximum times within which specific services will be completed;

(iii) ranges of times within which specific services will be completed, provided that the maximum does not exceed the minimum by more than a prescribed percentage (say 25%).

### **Controls on Terminology**

**R.16** (1) From time to time, the general regulatory body should publish lists of terminology which it considers suitable for use in advertisements about types of information on the Special Areas List. For example, it should suggest descriptions for particular fields of practice (eg, "family law"), and for particular services in relation to which solicitors might wish to advertise their fees (eg, "standard family company incorporation"). It might also give detailed definitions of some of these descriptions. In addition, it should publish examples of terms which it does not consider suitable because, for example, they are likely to be misleading.

(2) If solicitors wish to use terminology which the regulatory body has defined, they should be required to use it in accordance with that definition and to supply a copy of that definition to any client, or would-be client, who requests it.

(3) If solicitors wish to use terminology which has not been suggested by the general regulatory body, they should be required to notify that body a specified period in advance. It should not be compulsory, however, to obtain the approval of the general regulatory body, provided that the terminology complies with the rules described in recommendations 13 and 15 above. The requirement of prior notification should not apply to advertisements in publications which circulate principally or solely amongst lawyers.

**N.B.** It may be considered that the scheme recommended above (recommendations 13-16) constitutes too great a relaxation of the present restrictions, at least in the immediate future. We do not take that view, but in case it is adopted, we describe in Appendix II of the Report a scheme which might be suitable for implementation pending introduction of our recommended scheme. We emphasise that this interim scheme would allow advertising in the four special areas to the same extent as would be permissible under the scheme recommended above. If the scheme prohibited such advertising it would not, in our view, constitute an adequate relaxation even on an interim basis.

## **II. Particular Media** (Chapter 13)

Generally speaking, recommendations 13-16 apply to advertising in any medium. But we make the following recommendations in relation to particular media.

### **Radio and Television** (para 13.5)

**R.17** (1) Subject to (2), advertising on radio or television should be permitted, provided that it complies with the rules in recommendations 13-16 above.

(2) We do not anticipate that radio or television advertising is likely to become widespread, at least in the near future. If problems of over-use occur eventually, consideration could be given to introducing restrictions on frequency and expenditure.

### **Signs And Brochures** (paras 13.6-13.8)

**R.18** (1) Subject to (2), advertising by signs or brochures should be permitted, provided that it complies with the rules in recommendations 13-16 above.

(2) We do not necessarily object to specific restrictions on the size and appearance of office signs, provided that they are necessary to avoid advertisements which by reason of their size or appearance, are vulgar, sensational or otherwise likely to bring the profession into disrepute. But the restrictions should not be aimed at prohibiting content which could be advertised in other media.

### **Telephone Directory**

**R.19** Advertising in the classified section (Yellow Pages) of the telephone directory should be permitted, provided that it complies with the rules in recommendations 13-16 above.

### **Legal Services Directory**

**R.20** (1) The Legal Services Directory should include the following types of information in addition to those which it presently contains:

- (i) willingness or unwillingness to accept work directly from clients, rather than only from instructing practitioners;
- (ii) the names of principals and employed solicitors in each practice;
- (iii) types of credit card accepted;
- (iv) date of admission as a solicitor;
- (v) after hours or emergency telephone numbers;
- (vi) (provided it fits in a small space made available next to each practice's entry), any information such as opening hours, which solicitors would be permitted to advertise in other printed publications;
- (vii) (in a part of the directory separate from the main listings), admission as a lawyer in other jurisdictions.

(2) The Directory should be advertised widely and repeatedly in accordance with a continuing plan A thorough and independent survey of the level and pattern of use of the Directory should be conducted.

## **OTHER ATTRACTION OF BUSINESS**

(Part IV of the Report)

### **I. Community Discussion and Solicitation by Solicitors** (Chapter 14)

#### **Community Discussion** (paras 14.9-14.10)

**R.21** (1) Solicitors should be allowed to participate in community discussion of legal and non-legal issues, and to give some information about themselves which is relevant to those issues and to the perspectives from which they view them.

(2) The existing rulings of the Law Society of New South Wales in this area are unduly restrictive. Subject to certain modifications, the statement of principles which has been adopted by the Law Society in England (see paras 14.5 and 14.7 of the Report) should be adopted in this State.

#### **Solicitation** (paras 14.28-14.31)

**R.22 Public Media.** Solicitation in public media (such as newspapers, radio and television; but not including face-to-face communication such as at public meetings) should be permitted, provided that

it complies with the same restrictions as we recommended earlier (see recommendations 13-20) in relation to advertising (including, for example, a prohibition on advertising which is false, misleading or disreputable to the profession), save that an indication of willingness to accept work from a particular class of clients could be more specific than would be permissible under those restrictions;

it does not involve coercion, duress or harassment;

details of the intended solicitation are notified to the general regulatory body a prescribed period in advance.

**R.23 Mail to Non-Clients.** Solicitation of non-clients by mail should be permitted, subject to the same restrictions as we have recommended above for solicitation in public media (see recommendation 22), and to the following additional restrictions:

a copy of any material to be mailed, and a description of the manner of selection of addressees, should be supplied to the general regulatory body a prescribed period before mailing;

if more than one mailing is to be made to an address, a reply-paid card should be included in the first mailing so that the addressee may indicate that he or she does not wish to receive further material and it would be prohibited for a solicitor to send further material after receiving such an indication.

**R.24 Business Cards.** The range of information which may be shown on a business card should be extended to include the following items:

(i) such information about the solicitor's fields of practice as would be able to be advertised in accordance with recommendations 13-16 above;

(ii) languages spoken by the solicitor;

(iii) jurisdictions outside New South Wales in which the solicitor is entitled.

**R.25 (1)** Barristers should be permitted to advertise to the same extent as we recommended above in relation to solicitors (see recommendations 13-20), save that it might be appropriate to restrict barristers to advertising in publications which circulate principally or solely within the legal profession.

(2) If (1) above is not accepted, at least the following types of information should be allowed to be advertised by barristers, in addition to basic information such as name, address and telephone number:

(i) commencement of practice as a barrister (ii) change of address or telephone number;

(iii) willingness to accept work in particular fields of practice;

(iv) knowledge of foreign laws;

(v) date of admission;

(vi) fixed fees for clearly specified services.

#### **Community Discussion** (paras 15.25-15.26)

**R.26 (1)** Barristers should be allowed to participate in community discussion of legal and non-legal issues, and to give some information about themselves which is relevant to those issues and to the perspectives from which they view them.

(2) The existing rules and rulings of the New South Wales Bar Association in this area are unduly restrictive and somewhat unclear. The relevant rules of the English Bar (rules 102 and 104) should be adopted, with minor modification, in this State.

### **Solicitation** (para 15.27)

**R.27** (1) Barristers should be permitted to use business cards of the type, and in the circumstances, permitted by rule 106 of the English Bar.

(2) We recommended in our *First Report* that the present prohibition on barristers visiting solicitors' offices should be abolished or relaxed substantially.

### **In an Undivided Profession**

**R.28** If the division of the profession into barristers and solicitors is abolished (as recommended in our *First Report*), the recommendations made above in relation to barristers (recommendations 25-27) should be applied to all practitioners who do not accept work directly from clients, whether or not they are in the sole practice (as barristers presently are) and whether they are subject to the governance of the Bar Council or that of the Law Society Council.

### **III. Institutional Advertising** (Chapter 16)

**R.29** (1) Institutional advertising of a predominantly promotional nature is acceptable provided that it is accurate, fair and temperate, and that it is financed solely or principally by the profession itself rather than from public funds. It would be unsatisfactory if the profession restricted its institutional advertising to reactive campaigns against competitors, rather than initiating positive campaigns in areas of unmet need.

(2) The profession should not concentrate its institutional advertising on promotional goals. Informational advertising, whether in conjunction with promotional material or otherwise, is an important means by which the profession can demonstrate its high ideals of public service.

(3) Institutional advertising and community legal education should not be regarded as the exclusive preserve, or responsibility, of solicitors. The Bar should take initiatives in this area or, perhaps preferably, contribute human and financial resources to joint projects with bodies such as the Law Society and the Law Foundation.

(4) The Law Society and the Bar Association should consider the preparation of a manual, and the provision of funds, in order to facilitate institutional advertising by groups of lawyers who practise in the same locality or in the same field of practice.

(5) In the areas of institutional advertising and community legal education, particular emphasis should be placed on the needs of disadvantaged sectors of the community. We refer especially to economic, linguistic and geographical disadvantages. Non-lawyers closely familiar with the particular target audience should usually play a leading role in devising and implementing projects.

(6) The primary goals of institutional advertising should be helping members of the public to prevent legal problems from arising, to identify an appropriate source of assistance when they do arise, and to

find their way to such a source. In many instances it will be feasible to achieve these goals, but not to communicate detailed information or advice about particular problems.

## REPORT 33 OUTLINE (1982) - THIRD REPORT OF THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

### Legal Profession Inquiry Publications

The following publications have been issued up to the present time in the course of the Legal Profession Inquiry. An asterisk indicates that an Outline of the publication has also been issued.

#### Reports

*First Report on the Legal Profession* (General Regulation, The Division into Barrister and Solicitors, Queen's Counsel and Court Dress) \*

*Second Report on the Legal Profession.* (Complaints, Discipline and Professional Standards) \*

*Third Report on the Legal Profession* (Advertising and Specialisation) \*

#### Discussion Papers

1. *General Regulation* \*
2. *Complaints, Discipline and Professional Standards - Part 1.*  
\*
3. *Professional Indemnity Insurance.* \*
4. (1) *Structure of the Profession - Part 1.* \*  
  
(2) *Structure of the Profession - Part 2.*
5. *Advertising and Specialisation.*
6. *Solicitors' Trust Accounts and the Solicitors' Fidelity Fund.*

#### Background Papers

1. *Background Paper - I* (Complaints, Discipline and Professional Standards)
2. *Background Paper - II* (Professional Indemnity Insurance)
3. *Background Paper - III* (Complaints, Discipline and Professional Standards)
4. *Background Paper IV.* (Structure of the Profession)
5. *Background Paper - V.* (Solicitors' Trust Accounts and the Solicitors' Fidelity Fund)