New South Wales

Law Reform Commission

The Legal Profession
Discussion Paper No. 3

PROFESSIONAL INDEMNITY INSURANCE

1979

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

Chairman: The Honourable Mr. Justice J.H. Wootten

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PREFACE

The Commission has a reference from the Attorney General and Minister for Justice, the Honourable F.J. Walker, LL.M., M.P., to inquire into and review the law and practice relating to the legal profession. The full terms of reference are set out in Appendix 1 to Discussion Paper No. 1, The Legal Profession: General Regulation.

This Paper is one of a series of discussion papers which the Commission intends to publish in relation to various aspects of the reference. It deals with Professional Indemnity Insurance. Other papers issued to date are shown overleaf and further papers will follow on specific topics.

This Paper does not express any final views of the Commission. It is published for the purpose of stimulating discussion and obtaining comment on the matters with which it deals before the Commission prepares its final report on this aspect of the reference. The Commission will be most grateful for comment and criticism on the Paper as a whole or on any part of it and whether in writing or in discussion with a member of the Commission. Any communication of this nature should reach the Commission not later than the 30th June 1980.

Unless otherwise advised, the Commission will assume that any contributor of comment or criticism has no objection to the Commission quoting or referring to it, in whole or in part, or attributing it to him or her in any later publication of the Commission. Of course, any request for confidentiality or anonymity will be respected.

The Commission expresses its appreciation of the important contribution made to this paper by the research, administrative, secretarial and library staff of the Commission.

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LEGAL PROFESSION INQUIRY

PUBLICATIONS

Discussion Papers

1. General Regulation.
2. Complaints, Discipline and Professional Standards - Part I.
3. Professional Indemnity Insurance.

Background Papers

1. Background Paper - I.
2. Background Paper - II. (forthcoming)

OUTLINE

For many years, some insurers have offered policies to cover lawyers in New South Wales against claims for professional negligence and some other claims arising out of practice as a lawyer. The cover is usually known as "professional indemnity insurance".

At present, professional indemnity insurance is voluntary in New South Wales, although both the Law Society and Bar Association have negotiated the terms of a policy with a particular insurer and encourage their members to take out such a policy with that insurer. However, compulsory schemes created by statute have existed for several years in most Canadian provinces, for solicitors in the United Kingdom, and, since 1978, for solicitors in Victoria and Queensland. In New South Wales, Tasmania and Western Australia the law societies are seeking legislation to establish compulsory schemes.

In this Discussion Paper we consider whether professional indemnity insurance should be compulsory for legal practitioners. We also consider what form any such compulsory scheme should take.

We list here the major suggestions which we advance in this Paper for discussion. Facts and reasoning upon which those suggestions are based will be found in the Paper but are not repeated or summarised in this Outline.

Compulsory Insurance

(a) We suggest that, generally speaking, professional indemnity insurance should be compulsory for all legal practitioners in New South Wales.

(b) We suggest, however, two exceptions:

  (i) insurance for work as a practitioner employed by a principal in private practice should be the responsibility of the principal rather than the employee;

  (ii) work as a practitioner outside private practice should not have to be insured if it is for a client who is also one's employer.

(c) Other possible exceptions, which we do not presently favour, include:

(i) all work as a practitioner outside private practice;

(ii) unpaid work for friends, relatives or charities, by practitioners who are not otherwise practising and who have informed the client of their position concerning indemnity insurance.

(d) We suggest that the body controlling the compulsory scheme should have power to grant individual waivers in prescribed circumstances, notably to

(i) practitioners outside private practice who demonstrate that they have obtained cover as extensive as is required of them under the compulsory scheme;

(ii) practitioners employed by the Crown or other statutory agencies, for whom the Crown wishes to carry the risk itself.

(e) We do not favour an exception in favour of barristers. However, we suggest that it may be desirable for the Law Society to establish a compulsory scheme for solicitors in the near future, and for a decision as to the appropriate form for barristers' compulsory insurance (and particularly whether it should be separate from the solicitors' scheme) to be delayed until other decisions affecting the organisational and structural division of the profession have been made.

(f) We do not suggest an exception in favour of legal aid centres. However, we suggest various means by which they might be given reductions or subsidies in relation to premiums and deductibles.

Type of Scheme

(a) If a compulsory scheme for solicitors is established in the near future, we suggest that it should be a Master Policy scheme with the expectation that a Mutual Fund element might be introduced after a few years to provide the lower and middle levels of cover. In our view, the Master Policy and Mutual Fund types of scheme are significantly more desirable in the interests of both the public and solicitors than is an Approved Policies type. We are impressed particularly by the advantages in

relation to high-risk practitioners, monitoring, collective bargaining power, and centralised claims-handling and administration.

(b) We are not convinced that it would be undesirable or impracticable to establish a totally, or partially, Mutual Fund scheme from the outset, but we are inclined to believe that the possible advantages of such a course are not sufficiently great or certain as to outweigh the fact that the Law Society does not favour it. The Society's attitude is particularly significant since the major disadvantages of a Mutual Fund are the extra work and risk which it places on the body controlling the scheme, and the Society is likely to be that body, at least in the early years.

(c) We regard it as premature to suggest now whether barristers should be covered by a Master Policy or Mutual Fund scheme, or a combination of the two, but we do not favour an Approved Policies scheme.

Terms of Policy

We suggest that, generally speaking, policy terms required under the scheme should be similar to those in the present Victorian solicitors' scheme (see Appendix III). However, on a number of matters we make comments or suggest variations on the Victorian scheme. We summarise below some of the more important comments or suggestions.

Type of Claim

(a) The policy should cover any description of civil liability arising from a specified range of work.

(b) The question of the range of work which should be specified is a complex one which needs to be considered in conjunction with similar questions arising in other contexts, such as practising certificates and the Fidelity Fund. We shall return to this problem when considering these other areas in later Discussion Papers. If a compulsory scheme for solicitors is established in the meantime, we suggest that the specification in the present Victorian scheme would be acceptable for use at the commencement of the scheme. Broadly speaking, that specification covers work in connection with the business of practising as a solicitor (including

acceptance of obligations as trustee, executor, attorney-under-power, tax agent or as a company director).

(c) We suggest that if a compulsory scheme for solicitors is established in the near future it should commence without cover for liability arising out of dishonesty and that the situation should be reviewed in the light of developments over the next year or so. Major factors in this review should be whether there has been an increase in the proportion of the income of the Fidelity Fund which comes from the profession and whether the ambit of the Fund has been extended. In the light of the review, it may become desirable to provide dishonesty cover, at least for dishonesty by partners or employees, under the insurance scheme. Dishonesty by barristers or their employees should be dealt with by compulsory insurance or the Fund, but a decision as to the most appropriate system should be delayed so that it can be made in the context of other decisions affecting the Fidelity Fund and the division of the profession.

Amount of Cover: Solicitors

In relation to cover, premium and deductibles, our suggestions in this Paper are confined to compulsory insurance for solicitors. It would be premature to make any suggestions in relation to barristers on these issues until there has been further discussion on the general subject of the division of the profession.

(a) The required level of cover should be uniform within, and between, practices, at least during the early years of the scheme.

(b) If, however, variable cover between practices is prescribed in the early years of a compulsory scheme the basic criterion should be either the amount of gross fees or the number of legal personnel (without weighting). We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

(c) Experience under the scheme may indicate the desirability of using other, or additional, criteria for varying cover, such as type of work or claims experience.

(d) Unless cover is based on gross fees, it should be indexed, or regularly adjusted by some other means, to reflect inflation or other changes in the profession's overall income.

(e) The full level of cover should be avilable for each claim.

(f) We do not suggest precisely what amount of cover should be required. However, if a compulsory scheme for solicitors is established in the near future and cover under it is to be uniform, an appropriate level may be somewhere between $200,000 and $500,000. If cover for such a scheme is varied according to number of principals, it may be desirable to start at $200,000, increasing at $75,000-$100,000 per principal. Cover of similar magnitude should be required if, as we suggest, variation should be by gross fees or number of legal personnel, rather than number of principals.

(g) In choosing between competing insurers, attention should be paid to the terms upon which they offer voluntary excess layers of cover.

Premiums: Solicitors

(a) At least at the commencement of the scheme, premiums should not vary within a practice.

(b) Premiums should be variable between practices and, at the outset of the scheme, should be based on either the amount of gross fees or the number of legal personnel. We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

(c) A firm commitment should be made to introduce claims experience as an additional criterion within 3-5 years of the commencement of the scheme.

(d) After several years' experience under the scheme, other factors may prove to be valuable and practicable as additional criteria for fixing premiums. Examples include a practice's various types of work, its geographical location, and its administrative procedures.

(e) We do not suggest precisely what level of premiums would be appropriate. However, we suggest that, if a compulsory scheme for solicitors is established in the near future, a reasonable level at the outset might be somewhere between $700 and $1,000 per principal, or an equivalent level if premiums are varied on some basis other than number of principals.

Deductibles: Solicitors

(a) Three alternative methods are acceptable for prescribing deductibles, namely:-

(i) a uniform deductible per practice of, say, $1,000;

(ii) variable deductibles ranging from, say, $1,000 to $10,000 per practice;

(iii) deductibles under either (i) or (ii), at the option of the practice at the commencement of the insurance period.

(b) Either the level of gross fees, the number of principals or the number of legal personnel would be an appropriate criterion for variation of deductibles. Given the relatively restricted range of variation which we have suggested, the best course may be to promote simplicity by using whichever of these criteria, if any, is used for varying premiums.

(c) Experience under the scheme may indicate the desirability of using other, or additional, criteria for varying deductibles, such as claims record or type of work.

(d) The insurer should be required to make payments directly to the client, without subtracting the deductible. It would be responsible for reimbursing itself by collecting the deductible from the practitioner.

Control and Management

(a) A body such as the Legal Profession Council, the creation of which we suggested in our Discussion Paper on General Regulation, should be given power to make statutory regulations requiring practitioners to obtain professional indemnity insurance and specifying the terms upon which the insurance must be obtained.

(b) This body should be responsible for the overall control of the scheme and should establish an Insurance Committee to monitor closely the scheme's operation.

(c) Professional associations should be involved in the management of the compulsory insurance scheme, particularly in negotiating terms and conditions with the insurance industry and in claims-handling.

(d) It is possible that a body such as the Legal Profession Council will not be established, or that it will not commence operations until two or more years from now. In the meantime, it is desirable to establish a compulsory insurance scheme for solicitors. As an interim measure the Government should be given power to make regulations creating and controlling this scheme. The scheme should be managed by agreement between the Law Society, the insurers and the brokers. In order to provide a measure of public interest representation, the Attorney General should have a nominee on the monitoring committee.

(e) It is in the interests of the public and the profession to enable preventive, educative and disciplinary measures to improve the standards of the profession and reduce the cost of insurance. For these purposes, the following disclosure of claims information and other information concerning the operation of the scheme should be permitted:-

(i) general disclosure of statistics and other information in a form which does not enable individual practitioners to be identified;

(ii) disclosure to the scheme's monitoring committee;

(iii) disclosure by the monitoring committee to the professional standards authorities of information which in the opinion of the committee may indicate conduct which constitutes "reprehensible conduct" (in the sense used in our Discussion Paper on Complaints, Discipline and Professional Standards - Part 1) by a practitioner, provided that it is not information prepared by a practitioner for the purposes of a claim under the scheme.

(f) For similar reasons, the following disclosure of information should be required:

(i) disclosure by the claims committee to the monitoring committee of information which in the opinion of the claims committee may indicate conduct which constitutes "reprehensible conduct" by a practitioner;

(ii) disclosure by the monitoring committee to the professional standards authorities of information requested by those authorities, provided that it is not material which was prepared by a practitioner for the purpose of a claim;

(iii) disclosure by the monitoring committee in response to subpoenas issued by the professional standards authorities.

(g) These suggestions concerning disclosure are subject to suggestions which we shall make in a later Discussion Paper concerning application of rules of evidentiary privilege to the professional standards authorities.

CONTENTS

Chapter 1

Introduction

For many years, some insurers have offered policies to cover lawyers in New South Wales against claims for professional negligence and some other claims arising out of practice as a lawyer. The cover is usually known as "professional indemnity insurance". In this Paper we consider whether professional indemnity insurance should be compulsory for legal practitioners. We also consider what form any such compulsory scheme should take. Before doing so, we summarise the present voluntary insurance system in this State.

This summary, and many other parts of this Paper, draw heavily on information and opinion communicated to us in the course of extensive discussion and correspondence. In particular, we have communicated with insurers and brokers in various Australian States and with office-holders or staff of law societies and bar associations in Australia, New Zealand, the United Kingdom and North America. In some instances unreasonable prejudice (for example, to an insurer's competitive position) would be caused if we disclosed precise sources or precise information and accordingly we have refrained from doing so.

(1) Solicitors

The various professional indemnity insurance policies available to solicitors in New South Wales are broadly similar in scope. They provide cover for negligence in the course of legal practice and usually offer additional cover, for an extra premium, against other risks, such as dishonesty by one's partners or employees. However, the terms of policies may differ considerably in matters of detail.

In 1968 the Law Society of New South Wales negotiated the terms of a policy with a particular insurer and then encouraged its members to take out such a policy with that insurer. There was no compulsion to insure with the insurer or at all. This "voluntary scheme" continues broadly unchanged today, although there have been subsequent changes in insurers. The current policy is reproduced in Appendix I of this Paper. Statistics concerning claims made under the voluntary scheme will be found in Background Paper - II of our Legal Profession Inquiry.

The Law Society negotiates the policy and obtains general statistics on the claims and payments being made under the scheme, but practitioners negotiate individually with the insurers over premiums, amount of cover and so on.

The brokers to the present voluntary scheme have informed us that in June 1979 about 50% of solicitors' practices in New South Wales were insured under the voluntary scheme. They estimate that a further 20% are insured with other insurers, but two surveys suggest that this figure may be closer to 30% (Meredith, 1976, p.37; Tomasic, 1978, pp.54, 241). It seems, then, that 20%-30% of practices have no insurance whatsoever against liability for professional negligence. Little is known about the characteristics of these uninsured practices. They do not seem to be preponderantly metropolitan or rural although a few years ago suburban and rural practitioners may have been more likely to be uninsured (Tomasic, 1978, p.241; Meredith, 1976, p.37). The brokers to the voluntary scheme have informed us that sole practitioners are less likely than firms to be insured under the scheme.

(2) Barristers

Until very recently, barristers were generally regarded as having extensive immunity from civil liability arising from their professional work. In 1978, a decision of the House of Lords made it clear that the immunity was not as wide as had been thought (Saif Ali v. Mitchell).

Our investigations suggest that in mid-1979 about 20% of barristers in active practice in New South Wales had a professional indemnity insurance policy. Later in 1979 the Bar Association negotiated a voluntary scheme which it urged its members to join (see Appendix II). Broadly speaking, this and other policies available for barristers cover similar types of liability to those in solicitors' policies.

Chapter 2

Compulsory Insurance

A. Introduction

In this chapter we consider whether professional indemnity insurance should be compulsory for legal practitioners in New South Wales.

In recent years, compulsory insurance schemes for lawyers have been established in many jurisdictions.

Since 1971 all practising lawyers in the Canadian provinces of Ontario, Alberta, Nova Scotia and British Columbia have been required to hold a professional indemnity insurance policy. Compulsory schemes have been introduced subsequently in most other Canadian provinces, South Africa, the United Kingdom and several other European countries. In New Zealand, the Law Society is negotiating a proposed compulsory scheme.

In Australia, Tasmania was the first State to have a compulsory scheme. Since 1972, the Law Society of Tasmania has adopted the view that practitioners should not be given practising certificates unless they have an indemnity insurance policy. There is no specific statutory basis for this compulsion.

As from 1st July 1978, Victoria and Queensland have had statutory compulsory schemes for solicitors. A similar statutory scheme was proposed in mid-1979 by the Law Society in Tasmania for all practitioners. It has been approved by the Government and is expected to start in 1980. The Law Society in Western Australia also proposed in mid-1979 a similar statutory scheme for all practitioners but the Government has indicated an intention to examine the proposal in depth. In each of these States the schemes were endorsed by general meetings of Law Society members prior to their adoption by the Society.

In this Paper we sometimes make general comments about existing compulsory schemes. Unless otherwise indicated, our comments relate to the compulsory schemes in other Australian States, the United Kingdom and Canada, being jurisdictions which have much in common with this State.

In order to facilitate access for interested readers, we have decided to publish the policies of several compulsory schemes. The Victorian solicitors' policy is in Appendix III of this Paper. The policies under the schemes in Scotland and Ontario provide examples rather different from the Victorian one and they will be found in Background Paper - II. Statistics concerning the operation of several schemes, notably the English one, will also be found in that Paper. Further material on the compulsory schemes is referred to in the Notes on Sources later in this Paper.

B. Recent Developments in New South Wales

The New South Wales Bar Association submitted to us in 1977 that "there is no case for compulsory professional indemnity insurance" for barristers (1977, p.11). By contrast, the Law Society submitted to us that insurance for barristers should be compulsory (1977b, p.7). Despite the decision in Saif Ali v. Mitchell (1978), the Bar Association has not indicated a change of mind on this issue and has taken no action to establish a compulsory scheme.

The Law Society, however, has been exploring the possibility of a compulsory scheme for solicitors since 1972 and it resolved as long ago as 1974 that "as a matter of principle, professional negligence insurance should be compulsory" for solicitors (1977a, p.3). This policy is re-iterated in the Society's submissions to us (1977b, 1978a). In 1976 the Society approached the Attorney General for legislation to enable the introduction of a compulsory scheme and soon thereafter he included that topic in the terms of reference of our Legal Profession Inquiry.

The Commission took the view that professional indemnity insurance should not be considered in isolation from other aspects of the Inquiry, notably the general regulation of the profession, complaints and discipline and the division of the profession into barristers and solicitors. The Society, however, was anxious to introduce a compulsory scheme and in 1978 it again approached the Attorney General for legislation. The Attorney General asked the Commission to comment on this request.

A response to the Attorney General was prepared by the four members of the Commission to whom we have delegated the conduct of inquiries for the purposes of our Legal Profession Inquiry. If those members had had serious

doubts about the desirability of compulsory insurance for solicitors, or if the issue had been the subject of a significant degree of controversy within the profession or more generally, they would have suggested to the Attorney General that no compulsory scheme should be established until the Commission had reported on the topic and on topics which we regard as closely related. In the circumstances, they did not consider such a suggestion to be justified. Their reasons will appear from the discussion later in this Chapter.

They did suggest, however, certain guidelines which the Attorney General might wish the Society's scheme to satisfy. They emphasised that their preparation of these guidelines, for use if a scheme was to be introduced in the near future, did not imply that a scheme satisfying the guidelines would be entirely in accordance with their views, nor that when the Commission made its final Report on the topic it would not suggest that significant changes should be made later in the life of the scheme.

The Attorney General forwarded the guidelines to the Society and during 1979 further discussions on the Law Society's proposed scheme took place between the Attorney General (and his officers), the Law Society and members of the Commission. The latters' role in these discussions was on the same basis as their preparation of the guidelines. In October 1979 the Premier announced that legislation would be introduced to enable the creation of a compulsory scheme for solicitors.

The Law Society has not yet finalised its proposals but it has informed us that it hopes to commence the scheme in 1980. This will require the passage of enabling legislation and the making of statutory regulations embodying the terms of the scheme.

C. The Case for Compulsion

In the remainder of this chapter we consider general arguments for and against compulsory insurance for legal practitioners and then the desirability of granting certain exemptions or waivers if a compulsory scheme is established.

As with many forms of insurance, professional indemnity insurance has advantages for both the insured person and people claiming against him or her. The benefits go beyond protecting practitioners from a sudden,

substantial drain on their financial resources and ensuring that there will be adequate funds to meet clients' claims for damages. If a practitioner is insured then, to the extent that the policy permits, he or she may be more likely to be frank about mistakes and to co-operate in responding to claims by clients. Furthermore, by protecting a practitioner from drastic financial set-backs, and consequential intense pressure, insurance decreases the likelihood that he or she may lapse into further negligence or seek dishonest solutions.

It is generally accepted, both in New South Wales and elsewhere, that professional liability claims against lawyers are becoming more common. The increase has been particularly dramatic in the United States, where it has been estimated that the number of claims rose by about 400% between 1973 and 1977.

This increase may be due, at least in part, to the growing tendency towards consumer activism in society generally. Another factor may be the increasing complexity of the law in a society which is itself becoming more complex and in which the scope of regulation by law is becoming more extensive. Whatever may be the reasons for the increase, it accentuates the advantages of professional indemnity insurance from the viewpoint of lawyers as well as their clients. On the other hand, the increase might lead to such an escalation in premiums that some practitioners would decide not to renew their policies.

In the course of our Inquiry it has become clear to us that some claims with good prospects of success against lawyers may never be pursued because the clients are unaware of their rights, have insufficient money to pursue those rights, have difficulty finding a lawyer willing to bring an action for them, or will not entrust themselves to a profession which they feel has already failed them. Elsewhere in this Paper, and in our Paper on Complaints, Discipline and Professional Standards - Part I, we canvass proposals to reduce these obstacles. Further suggestions will be made in later Papers. If adopted, these proposals will make insurance cover yet more desirable.

Against this background of the benefits of insurance, we turn now to the main arguments in favour of establishing a compulsory insurance scheme.

Firstly, under a voluntary scheme there is a clear danger that some of the practitioners who fail to take out any, or adequate, insurance will be those whose inefficiency, irresponsibility or lack of financial assets is such that they are likely to incur claims and to be unable or unwilling to meet them. In the absence of compulsion, there may be no insurance protecting these practitioners who are most in need of it and substantial hardship for them or their clients may result.

Secondly, members of the public are more likely to have confidence in the legal profession, and to avail themselves of its services, if they know that all practitioners are required to be adequately insured against professional liability.

Thirdly, a compulsory scheme may make the profession as a whole more willing to institute, or co-operate with, attempts to improve and to police standards of conduct within the profession. This is likely to occur if the scheme is designed in such a way that the claims experience of the profession as a whole has a clear and direct impact on the general level of premiums under the scheme.

Fourthly, a compulsory scheme may enable the collective bargaining power of the whole profession to be brought to bear to obtain extensive cover on reasonable terms. This advantage is more pronounced if the scheme involves a uniform "master policy" with one insurer covering the whole profession. However, it is also a significant advantage even if the scheme merely requires each practitioner to negotiate his or her own policy and specifies certain terms which the policy must contain. Of course, it will not be in the public interest if the profession's bargaining power obtains terms that are unfair to insurers or provide inadequate protection for clients.

In this section we are concerned solely with the merits of making insurance compulsory and we have discussed these merits regardless of the particular type of compulsory scheme adopted. In the next chapter we discuss specific types of compulsory schemes and indicate a preference for either a Master Policy or a Mutual Fund scheme. As appears from that discussion, those schemes provide additional reasons for favouring compulsory insurance.

D. The Case against Compulsion

It may be argued that insured practitioners are more likely to be careless because they know that they will not have to bear the consequences personally. On the other hand, there is the likelihood that even if clients' claims are met by an insurer, the clients are likely to use a different practitioner in future and to advise their friends to do likewise. Furthermore, the argument loses force if the compulsory scheme imposes deductibles (sometimes known as "excesses"), bases its premiums on individual practitioners' prior claims experience, or leads to disciplinary sanctions being imposed on practitioners who are persistently or grossly negligent.

Another argument is that if insurance is compulsory, and is widely known to be so, there will be a substantial increase in the number of claims made against practitioners. Such an increase may eventuate. However, the argument is of no merit in relation to those "new" claims that are reasonable ones (whether or not they are successful). Our investigations suggest that any increase which may occur in the number of frivolous or vexatious claims is not likely to be great. On the other hand, there will be a desirable reduction in the present obstacles confronting clients having meritorious claims.

Some critics of compulsory insurance couch their opposition in terms of a philosophical dislike for the notion of compulsion. There can be no doubt that compulsion should not be imposed too readily, but it is relevant to note in this context that compulsion is already being used to regulate aspects of lawyers' activities. For example, solicitors in New South Wales and many other jurisdictions are compelled to contribute to a fund which re-imburses victims of solicitors' dishonesty. There seems no reason to regard compulsion as less justifiable when used to protect victims of negligence rather than dishonesty. Many of the considerations which have led legislators to give special rights and privileges to lawyers point also to the desirability of imposing correlative duties and responsibilities.

Some practitioners argue that they do not need insurance because they take special precautions to prevent mistakes. Some of these precautions may be expensive or time-consuming. It would be unfair, they say, to impose on them the financial burden of insurance. However, it must be borne in mind that a very costly mistake can occur even in an efficient and competent practice. Furthermore, as we

suggest later, a compulsory scheme can, and should, provide reduced premiums for practitioners with good claims records.

It is sometimes argued that if lawyers are under compulsion to take out insurance they will be in a weaker bargaining position with insurers and consequently will have to pay much higher premiums. However, our investigations suggest that there is sufficient competition within the insurance industry to prevent such an occurrence. At present, there are about a dozen insurers actively competing to write professional indemnity insurance policies for lawyers in New South Wales. Furthermore, a lawyer may find it easier to obtain particular terms in his policy if the insurer is made aware that the lawyer is required to obtain such terms. If the scheme involves one "master policy" covering the whole profession, some individual practitioners may lose the benefit of individual bargaining advantages, such as their close relationship with a particular insurer. On the other hand, they may benefit from the exercise of collective bargaining power.

E. An Alternative to Insurance

A supporter of compulsion in this context may nevertheless prefer a compulsory compensation fund scheme rather than a compulsory insurance scheme. The fund could be centrally-administered (for example, by the Law Society or Bar Association) and could compensate clients and others for loss caused to them by practitioners' negligence or other wrong-doing. It might be funded wholly, or partially, by contributions from the profession.

A compensation fund scheme enables clients to claim directly on the source from which they hope to obtain compensation, namely the fund. Under an insurance scheme, clients have to claim from their practitioners who then claim from the insurer. It can be argued that the more direct procedure increases the likelihood of compensation being obtained by clients without unreasonable opposition, delay or expense.

On the other hand, compulsory insurance schemes for lawyers in other jurisdictions include specialised claims-handling systems controlled or monitored by the Law Society. They deal directly with the client and can reduce the likelihood of unnecessary obstruction by the insurer or the practitioner. Furthermore, even under a compensation fund scheme claims cannot be settled in

disregard of the attitudes and interests of the practitioners involved in them. This is particularly true if practitioners may have to pay higher contributions to the fund, or incur disciplinary action, as a result of successful claims on the fund by their clients.

A compensation fund scheme, known as the Fidelity Fund, exists already in New South Wales for claims arising from solicitors' dishonest failure to account for money or other property entrusted to them. It can be argued that if all types of civil claims against practitioners were dealt with under one scheme there should be substantial benefits in simplicity, consistency and economy. Accordingly, it might be regarded as preferable to expand the existing compensation fund scheme rather than establish a new insurance scheme.

We suggest that this argument should be rejected. We shall discuss the Fidelity Fund scheme later in this Paper and, more fully, in a separate Discussion Paper. However, recent New South Wales experience suggests that, in relation to incidence, size and consequences, there are significant differences between claims for dishonest failure to account and the general range of other claims against practitioners. For example, the former may be more likely to be large, liquidated and incontrovertible, and to involve sole practitioners. They are most unlikely to involve practitioners who do not have trust accounts. The practitioner to whom they relate is more likely to be removed from practice, even imprisoned, before the claim has been dealt with; as a result, it may be more difficult to obtain his or her co-operation in the handling of claims, more difficult to obtain payment of deductibles, and less likely that the cost of claims against a particular practitioner can be partially recouped by requiring a higher premium from him or her in future. These differences suggest that a compensation fund approach is more appropriate for claims concerning dishonest failure to account than for those concerning negligence and other wrong-doing. If compensation is suitable for both categories, they may nevertheless be best dealt with in separate schemes.

Even if the Fidelity Fund scheme continued to be confined to claims for dishonest failure to account, there would be strong arguments for substantial changes in it. For example, it may be argued that there should be an increase in the proportion (presently about 10%) of its income which comes from compulsory contributions by the profession. It may be desirable to alter the apportionment

of those contributions within the profession. We shall discuss such issues in our Discussion Paper on the Fund but the the case for changes of this type would become incontrovertible if the Fund were expanded to cover all types of civil claim.

These factors suggest that if it were considered advantageous to have one scheme covering all types of claim, the fact that the Fidelity Fund already exists provides little or no justification for preferring compensation rather than insurance as the basis of an omnibus scheme.

From the point of view of convenience and speed in establishing a comprehensive system, the preferable method is to have two schemes based respectively on the existing Fidelity Fund and the various precedents for compulsory insurance schemes. We know of no existing omnibus scheme upon which to draw as a model.

In the light of these considerations, we suggest that, at this stage, the compensation fund approach should not be extended beyond the realm of claims involving dishonesty. Other types of claim are more appropriately dealt with under an insurance scheme. Indeed, it may be argued that even claims involving dishonesty should be dealt with by an insurance, rather than a compensation, approach. We turn to this issue later in this Paper when considering the scope of a compulsory insurance scheme. In the present context we have been concerned only with the issue whether there should be any such insurance scheme at all or whether it might not be preferable to bring all claims within a compensation fund scheme.

If a compulsory insurance scheme is established, it will be desirable after several years' experience of its operation to re-examine whether some or all types of claim falling within its ambit should be dealt with by a compensation fund scheme.

F. Tentative Conclusion

We suggest that, generally speaking, professional indemnity insurance should be compulsory for all lawyers practising in New South Wales. We suggest that for reasons mentioned earlier such a course is in the interests of both the profession and the public. We turn now to consider whether exceptions should be made to this general requirement.

G. Exemptions and Waivers

I BARRISTERS

Should barristers be exempt from compulsory indemnity insurance? If not, should they have a separate scheme?

In the only fused professions which have a statutory compulsory scheme (namely those in the Canadian common law provinces), it applies to all private practitioners, regardless of the extent to which they are akin to barristers in a divided profession. In Tasmania, the existing non-statutory scheme applies to all except the handful of practitioners who have signed the Bar Roll and therefore have undertaken to practice as barristers only. In Western Australia, the Law Society proposal is that all practitioners should be under the same scheme but that those who have signed the Bar Roll and undertaken to practice as barristers only should have lower cover and premiums. We understand that the New Zealand Law Society intends to include all private practitioners within its proposed compulsory scheme.

In the divided professions with a compulsory scheme (namely in Queensland and the United Kingdom) and in Victoria, which is nominally fused but, in practice, divided, there is either no compulsory scheme for barristers or (in Scotland) it is separate from the solicitors' scheme.

The main arguments for requiring barristers to insure are those which have been mentioned earlier in relation to practitioners generally. We do not repeat them here.

In a submission to us, the New South Wales Bar Association raised several arguments in opposition to the concept of compulsory insurance for barristers. It is concerned about the problems of a barrister who cannot obtain the required insurance on reasonable terms. However, for reasons explained in the next chapter of this Paper, that problem does not arise if the compulsory scheme is of the Master Policy or Mutual Fund type.

The Association is also concerned about the burden of requiring "unlimited insurance", especially on new members of the Bar. We know of no-one who has proposed that unlimited insurance be required of lawyers. We suggest later that reasonable limits should be prescribed and that consideration should be given to reducing premiums for new practitioners.

The Association suggests that no insurer would "wish to be obliged to issue a standard professional indemnity policy to barristers on demand at a fixed premium which involved direct liability to third parties" (1977, p.11). By "direct liability to third parties" we take the Association to mean a responsibility on the insurer to make payments directly to the client who has been caused loss by the insured practitioner. Later in this Paper we suggest a measure of direct liability but this is not a necessary element of a compulsory scheme. Direct liability is not involved in any of the existing compulsory insurance schemes for lawyers.

Save for this matter of direct liability, the policy described in this quotation from the Association's submission is no different from those in many existing compulsory schemes for lawyers. Some of these schemes apply only to solicitors but we see no reason for anticipating difficulty in finding insurers willing to provide a compulsory scheme for barristers.

The major argument for exempting barristers is that most work of barristers is in advocacy and related matters, and in that work a lawyer has considerable immunity from liability. A further argument is that claims against barristers have been so rare that compulsory insurance is unjustified.

We shall discuss barristers' immunity in detail in a later Paper. It is now clear, however, from the recent decision of the House of Lords in Saif Ali v. Mitchell (1978) that there are significant limitations to the scope of the immunity. An increase in the number of claims against barristers can be expected to flow from this decision. Indeed, six months after Saif Ali one insurer in Australia informed us that, whereas previously such claims were almost unheard of, it had received about 10 claims since the decision. Other responses have been a marked increase in the number of barristers seeking insurance, the negotiation by the Australian Bar Association of a voluntary scheme for its members, and the creation by the English Bar of a committee to consider the establishment of a compulsory scheme. The New South Wales Bar Association has adopted and brought into effect the Australian Bar Association's proposed policy. We understand that a policy in identical, or not materially different, terms is likely to come into effect for Victorian and Queensland barristers in the near future.

There is now considerable potential for successful claims, including cripplingly large ones, against barristers. It must be borne in mind also that, under present arrangements, barristers are sole practitioners and therefore they do not have the combined resources of a firm to call upon if confronted with a large claim.

It seems unsatisfactory to have a situation where clients are protected by compulsory insurance if certain work is performed for them by a solicitor, but not if the same work is performed by a barrister. The likelihood of such an anomaly occurring is accentuated by the restrictions placed on the advocate's immunity in Saif Ali. In addition, if there is a dispute as to whether liability lies with clients' solicitors or with their barristers, there is a danger that claims will be less expeditiously resolved if the barristers are uninsured than if they, like the solicitors, are insured under a compulsory scheme.

In the light of these considerations, we suggest that barristers should not be exempt from compulsory indemnity insurance.

This suggestion is made in the context of current circumstances. The case for exempting barristers from compulsory insurance would be further weakened if advocates' immunity were to become more restricted in scope or be abolished. We shall canvass these possibilities in a later Discussion Paper. In this present Paper and in our Discussion Paper on Complaints, Discipline and Professional Standards - Part I, we suggest other reforms aimed, among other things, at reducing the obstacles confronting people with legitimate complaints against lawyers. Implementation of these proposals would also weaken the case for exempting barristers.

In a later Discussion Paper we shall consider whether there should be any changes in the present division of the profession into barristers and solicitors. If the division were to be reduced, the strength of the argument for exempting barristers from compulsory insurance would be reduced also.

If there is to be a compulsory scheme for barristers, the question arises whether it should be separate from the scheme for solicitors. A joint scheme would benefit from the economies of scale and would facilitate resolution of claims in which dispute arose as to whether fault lay with the barrister or the solicitor. It should be borne in mind that if any category of practitioners (such as barris-

ters, or, more generally, advocates) can demonstrate that they have, or, because of an immunity from liability, are very likely to have, a low incidence of claims against them, they may be able to obtain favourable premiums or other terms within the framework of a compulsory scheme covering the whole profession. We have mentioned earlier that in Western Australia the Law Society's proposed scheme would cover the whole profession but lower cover and premiums would be required of practitioners at the separate Bar.

We have suggested in our Discussion Paper on General Regulation that the whole profession should be subject to one regulatory body. We have mentioned above that in later Papers we shall canvass the desirability of changes in the advocates' immunity from liability for negligence and of reductions in the present division between the branches. If such changes occurred, they would affect the case for a separate scheme for barristers.

It may be that even if no significant changes occur in the present organisational and structural division of the profession, nevertheless the whole profession should be under the same compulsory professional indemnity insurance scheme. However, such changes might have considerable bearing not only on the desirability of a combined scheme but on many detailed aspects of the control and operation of such a scheme. It is unlikely to be clear for some time to what extent, if any, such changes will occur. In the meantime, there is a pressing need for a compulsory scheme for solicitors, and the Law Society is anxious to establish one.

Accordingly, we suggest that a compulsory scheme for solicitors should be established in the near future and that a decision as to whether barristers should join that scheme or have a separate scheme should be delayed so that it can be made in conjunction with major decisions affecting the division of the profession. On the assumption that the delay will not exceed one or two years, there may be no need to insist on establishing compulsory insurance for barristers in the meantime.

II PRACTITIONERS EMPLOYED BY PRIVATE PRACTITIONERS

Principals are vicariously liable for losses caused by work performed by their employees in the course of employment. The existing compulsory schemes in the United Kingdom and Australia require principals to take out cover for this liability and for the personal liability of their

employees for this work. Employed solicitors are not themselves required to obtain cover for work done by them in the course of their employment.

In our view, this is an appropriate arrangement, since it places the responsibility and cost of obtaining protection for the activities of an enterprise on those people who own, control and profit from or lose by the enterprise. The cost of administering and policing a compulsory scheme would be substantially increased by requiring employees to take out their own insurance.

It may be argued that these employees need protection against being sued by their principals for indemnification against claims caused by the employee. However, if the claim has been met by an insurer the employer cannot seek indemnification and existing Master Policy schemes prevent the insurer from seeking it unless the employee's conduct was dishonest or criminal.

Accordingly, we suggest that principals should be required to take out cover which includes losses caused by their employees, rather than that employees be required to take out their own insurance. However, if employees perform some legal work otherwise than in the course of their employment, they should be required to obtain insurance for that work.

At present, barristers do not normally employ other lawyers but if they do so they will be vicariously liable for the employees' work in the course of their employment. Existing policies for barristers, including those under the New South Wales Bar Association's voluntary scheme, provide cover for vicarious liability of this kind. In our view, such cover should be compulsory and the employees should not be required to take out their own insurance.

III PRACTITIONERS OUTSIDE PRIVATE PRACTICE

It is usual for compulsory schemes to exempt practitioners who do not engage in private practice, by which we mean practitioners who are neither principals in private practice nor employed by such principals. Apparently the rationale for this exemption is that such practitioners do not have any clients other than their employer, and that the employer can be relied upon to protect itself, whether by requiring its legal staff to be insured or by some other means.

Several factors need to be considered in assessing the desirability of the exemption. Firstly, it does not follow that because practitioners do not engage in private practice they do no work for clients other than their employer. Notable examples are practitioners employed by governmental or private legal aid organisations. Secondly, a practitioner can cause loss, and incur liability, to someone who is not his or her client. Thirdly, if the employer decides to carry the risk itself rather than take out insurance or require its legal staff to take out insurance, it may decide subsequently to sue a staff member whose negligence has caused it loss. Some lawyers employed in the New South Wales Public Service have expressed to us their desire to be protected against this possibility. Fourthly, it should not be assumed too readily that all employers of legal staff will give adequate attention to protecting themselves or their staff against the consequences of the latter's negligence.

We are by no means convinced that practitioners outside private practice (whether admitted as barristers or solicitors) should be exempt from compulsion. We suggest that, at the least, any practitioners who do legal work for clients other than their employer (whether or not at the request of the employer) should not be exempt in relation to such work. Later in this chapter we suggest a power to grant individual waivers which might be used on occasion in this context (e.g., in relation to the Public Solicitor).

Existing compulsory schemes provide reduced premiums for part-time practitioners. Analogous reductions should be provided for practitioners if only a small part of their legal work falls within the scheme.

It may be desirable and convenient for the employer to be permitted, or even required, to take out the insurance under the compulsory scheme for all its employed lawyers rather than for each employee to be required to do so individually. This would only apply, of course, to legal work done in the course of the employment. Each lawyer should be under an obligation to ensure that the requisite insurance in relation to his work has been obtained.

IV UNPAID WORK

In the context of compulsion to insure we are not inclined to draw a distinction according to whether legal

work is paid or unpaid. It may do clients a great disservice to provide them with free but uninsured legal work. Indeed, they may have a special need for protection if their lawyer has little enthusiasm for the work because it is unpaid, or has agreed as a favour to a friend or charity to do work of a type with which the lawyer is unfamiliar.

A further difficulty would arise in defining what constituted "unpaid" legal work. Clearly it could not be confined to work for which the client did not pay personally. But what about, for example, work which is performed without charge by a lawyer employed by a company for another employee but which may be regarded as part of the work for which the lawyer-employee gets his salary and as part of the client-employee's job benefits?

In England, the Law Society has exercised its power to waive the obligation to obtain insurance by granting a general waiver to practitioners who do not engage in private practice other than to do legal work without charge for clients with whom they have a special relationship, such as friends, relatives, charities, fellow employees on matters related to employment, companies associated with the practitioner's employer, and so on. The terms of the waiver will be found in Background Paper - II.

However, on the assumption that a scheme in New South Wales would be designed to provide reduced premiums for those who do little legal work of such a nature as to be covered by the scheme, we are not inclined to favour exemptions or waivers for unpaid work, even along the restricted lines of the English waiver.

Generally speaking, existing compulsory schemes provide cover for unpaid legal work by an insured practitioner. However, there is some debate whether this cover extends to unpaid work performed outside the practice to which the insurance relates; for example, by an employee of an insured private practice while attending as an unpaid volunteer at a legal aid office (see section V below). We are inclined to the view that such work constitutes private practice but is separate from the lawyer's "usual" practice. In any event, we suggest that it should be defined as such in this context, thus requiring insurance to be taken out for it under the compulsory scheme in addition to the insurance taken out under the scheme for the "usual" practice. This would apply whether or not the "usual" practice was private practice.

It may be desirable and convenient to permit, or even require, legal aid organisations using lawyers in this way to take out insurance under the compulsory scheme for all such work, rather than require each lawyer to do so individually. However, each lawyer should be under an obligation to ensure that the requisite insurance in relation to his work has been obtained.

V LEGAL AID CENTRES

A difficult problem arises in relation to legal aid centres. The suggestions we have made above would entail these centres being compelled to insure, even, for example, in relation to unpaid work by lawyers who are insured in their "usual" practice and attend the centre on a voluntary evening roster. The centres may experience difficulty in paying substantial premiums or in meeting substantial deductibles on any successful claims against them.

In Victoria, the Law Institute has sought to meet this problem by interpreting the compulsory scheme as not requiring legal aid centres to insure and as providing cover for unpaid work at the centres by practitioners who are insured in their usual practice. This solution has its problems. It may be regarded as depending upon strained interpretations of relevant wording. Also, it can be unfair to private practices. For example, if a practitioner from a private practice made a mistake in his or her work at a centre, the private practice might have to pay the deductible and, if claims experience affects premiums, be required to pay higher premiums in future.

With these and other considerations in mind, the Law Institute has negotiated a special scheme for the centres, providing an amount of cover which is calculated on a different basis from that under the compulsory scheme. This proposed scheme would have a limit on the cover available for each centre, and on the collective cover available under the scheme. Each centre would pay a premium of $100. Deductibles which become payable would be shared equally between the centres in the scheme. Both premium and deductibles would be substantially lower than would have been payable under the compulsory scheme. The terms of the scheme are reproduced in Background Paper - II.

The Law Institute considers that the special scheme should not come into operation unless at least ten centres support it. At present, it is unclear whether this support will be forthcoming. It is also unclear whether the Institute will insist that if centres do not join it they will have to join the compulsory scheme.

We have reservations about recommending a scheme of this type for use in New South Wales. The arrangements for collective limits on cover and collective deductibles may not provide a satisfactory long-term solution. The scheme depends on a considerable degree of cohesiveness and uniformity of approach among the legal aid centres. In New South Wales, at least, it is highly doubtful whether these characteristics exist to the requisite extent among the centres. Furthermore, it may be undesirable to deter individual centres from being independent and innovative in their activities.

We doubt whether it is in the centres' interests, or those of their clients, for them to be exempted from the compulsory scheme. We suggest instead that they should be given assistance in relation to the premiums and deductibles required under the scheme.

Several possibilities for such assistance occur to us. It seems likely that a substantial reduction in the centres' premiums could be justified on the ground that they rarely handle matters in which large sums of money are involved. Furthermore, the profession, the insurers, or both, might favour a reduction in premiums or deductibles for the centres in order to assist needy sectors of the legal services system from which they derive income. Another possibility is that the Legal Services Commission might agree to subsidise the centres' premiums or to meet all but, say, several hundred dollars of any deductible which became payable by them.

We suggest that an appropriate solution may be for the compulsory scheme to give substantial premium reductions and for the Legal Services Commission to assist with deductibles.

The question then arises as to which organisations or practitioners should be eligible for this assistance. One possibility is to provide it to those which do, at least, a specified percentage of their work without charge to the clients. An alternative is to ask the Legal Ser-

vices Commission to make the selection. However, this could be a step, in effect, towards a licensing system for legal centres, which might be regarded as undesirable.

VI INDIVIDUAL WAIVERS

Some compulsory schemes give the Law Society (in which expression in this paper we include the Law Institute of Victoria) power to grant to classes of practitioners, or individual practitioners, waivers from having to join the scheme. Usually the legislation does not prescribe the criteria for exercise of this power.

In our view, any general waivers in favour of classes of practitioners should be expressed as exemptions in the statutory rules governing the scheme rather than be made under a discretionary power of waiver. It may be necessary to give a discretionary power of waiver in individual instances but, if so, we suggest that some criteria should be prescribed in the enabling legislation.

One possible ground for granting waivers is to avoid unfairness during the transitional period in the establishment of a compulsory scheme. We suggest that there should be power to grant waivers during this period to individual practitioners who would suffer hardship if required to insure under the scheme while already holding adequate insurance obtained prior to the scheme's commencement.

Another ground is that some employers of practitioners outside private practice may be willing and able to obtain professional indemnity insurance for those employees as part of their enterprise's overall portfolio of insurance policies. In particular circumstances an employer may obtain substantial savings, or other benefits, from such an arrangement and it may be unreasonable to deprive the employer of them, provided the cover is as extensive as the practitioner would have been required to obtain under the compulsory scheme.

The Commonwealth and State Governments and various statutory bodies employ the overwhelming majority of practitioners outside private practice in New South Wales. If Governments wish to carry the risk of professional liability claims against all, or some of, these employees, it may be reasonable to grant waivers from the compulsory scheme for work done by such employees in the course of their employment. We do not favour extending this ground for waivers beyond the Crown. Such an extension might

involve difficult and invidious assessments of the financial resources of employers. In any event, no non-governmental organisations which might be large enough to justify a waiver presently employ more than a few lawyers. Accordingly, their premiums under a compulsory scheme are unlikely to prove a major burden.

H. Summary

We summarise here the main suggestions which we have advanced in this chapter.

(a) We suggest that, generally speaking, professional indemnity insurance should be compulsory for all legal practitioners in New South Wales.

(b) We suggest, however, two exceptions:

(i) insurance for work as a practitioner employed by a principal in private practice should be the responsibility of the principal rather than the employee;

(ii) work as a practitioner outside private practice should not have to be insured if it is for a client who is also one's employer.

(c) Other possible exceptions, which we do not presently favour, include:-

(i) all work as a practitioner outside private practice;

(ii) unpaid work for friends, relatives or charities, by practitioners who are not otherwise practising and who have informed the client of their position concerning indemnity insurance.

(d) We suggest that the body controlling the compulsory scheme should have power to grant individual waivers in prescribed circumstances, notably to

(i) practitioners outside private practice who demonstrate that they have obtained cover as extensive as is required of them under the compulsory scheme;

(ii) practitioners employed by the Crown or other statutory agencies, for whom the Crown wishes to carry the risk itself.

(e) We do not favour an exception in favour of barristers. However, we suggest that it may be desirable for the Law Society to establish a compulsory scheme for solicitors in the near future, and for a decision as to the appropriate form for barristers' compulsory insurance (and particularly whether it should be separate from the solicitors' scheme) to be delayed until other decisions affecting the organisational and structural division of the profession have been made.

(f) We do not suggest an exception in favour of legal aid centres. However, we suggest various means by which they might be given reductions or subsidies in relation to premiums and deductibles.

Chapter 3

Types Of Scheme

A. The Major Alternatives

Australian and overseas discussions on indemnity insurance have concentrated on three basic types of compulsory scheme. We summarise these types, and combinations of them, before discussing their relative advantages and disadvantages.

I APPROVED POLICIES

Under an Approved Policies scheme, insurance is compulsory and the policy is required to contain certain specified terms. It is then left to individual practitioners to obtain a policy from the insurers of their choice. Policy negotiations and dealings about claims are conducted between the practitioner (acting perhaps through a broker) and his or her insurer.

The current Tasmanian scheme (soon to be replaced) is an example of an Approved Policies scheme. The only prescribed terms are that the cover must be $50,000 or more and the excess must be no less than $500. No doubt there are other terms which would be prescribed were it not that they are to be found in each of the standard policies presently available to lawyers in Tasmania.

II MASTER POLICY

Under a compulsory Master Policy scheme, one policy (the "Master Policy") is taken out by some authorised body on behalf of, and covering, all practitioners who are required to be insured. The terms of the policy are negotiated between that body and a particular insurer or consortium of insurers. In Victoria, Queensland, the United Kingdom and some Canadian provinces, a Master Policy has been the preferred type since the inception of compulsory insurance. In each place the policy has been negotiated, and taken out, by the Law Society. The proposed schemes in Tasmania and Western Australia are of the Master Policy type. The New South Wales Bar Association's voluntary scheme is also a Master Policy type.

Generally speaking, the terms of the Master Policy do not distinguish between various types of practitioner except perhaps as to premium, cover or deductible. All practitioners who are required to be insured must pay their share of the overall premium as prescribed in the policy and until they have done so they are not entitled to practise law.

Most Master Policies specify a uniform premium for each insured practitioner, though some schemes prescribe, or permit, variations from it. In most Canadian schemes, neither cover nor deductible vary between practitioners, but in other schemes they are higher for practitioners in larger practices. The policies often have special premiums relating to practitioners who work only part-time.

In some jurisdictions, such as Victoria and Queensland, the Law Society, the broker and the insurer have established joint bodies to receive and handle claims under the scheme. Sometimes these bodies also have power to settle claims without resort to the insurers. In each jurisdiction, general statistical information as to claims experience is made available to the Law Society but only in some, such as Victoria, can claims information about an identifiable practitioner be communicated to the Law Society (which may then institute disciplinary or other action if considered appropriate). The Law Society representatives on joint claims-handling bodies receive such information, of course, but only on a personal and confidential basis.

III MUTUAL FUND

Under a Mutual Fund scheme the legal profession, in effect, acts as a group to insure its own members. For example, lawyers may be required to pay premiums to their Law Society which then issues them with a policy and meets claims out of its income from premiums. Such a scheme can allow the Society to vary the terms of the policy according to the particular lawyer being insured but discussion of Mutual Fund schemes usually envisages that, as with Master Policy schemes, there would be little variation.

We know of no place where a Mutual Fund scheme is the sole method of providing compulsory insurance for lawyers, although the creation of such a system is under

close consideration in California. Voluntary Mutual Fund schemes for lawyers exist in that State and elsewhere in the United States.

In New South Wales, builders are subject to a compulsory Mutual Fund scheme administered by the Builders Licensing Board (upon which they have some representation). At present, the Board has reinsured all its risk but it hopes to build up sufficient reserves to reduce the degree of reinsurance in future years.

Medical practitioners in New South Wales and in many other places have voluntary Mutual Fund schemes, often called Medical Defence Unions.

IV COMBINATIONS

In several Canadian provinces, including British Columbia, Alberta, Manitoba and Ontario, the compulsory schemes for lawyers are a mixture of Mutual Fund and Master Policy. In each of these provinces the Law Society takes out a Master Policy with an insurer but then, in effect, retains part of the premium to form a fund from which it pays all claims up to limits which are prescribed both per claim and per annum. Thus, the insurer receives only part of the premium and pays out only to the extent that a particular claim exceeds, say, $40,000 or the total annual payout exceeds, say, $2,000,000. In this way lawyers, through their Law Society, are acting as their own insurers to a considerable extent. The Law Society is closely involved in dealing with claims and, although individual claims records are usually made available only to people involved in administering the insurance scheme, it is accepted, at least in British Columbia and Ontario, that serious instances may be referred for disciplinary or other action by the Society.

We understand that the law societies in England and Victoria are considering the introduction of a Mutual Fund element into their existing Master Policy schemes. In the case of New Zealand, such a combination may be adopted from the commencement of a compulsory scheme.

B. Their Advantages and Disadvantages

In assessing the advantages and disadvantages of various types of scheme, our fundamental criterion is the public interest, a concept we have discussed in our Discussion Paper on General Regulation. We assume for present purposes that the body controlling any insurance scheme will be constituted so as to operate in accordance with that criterion. Later in this Paper, we consider how such a body should be constituted.

I APPROVED POLICIES

An Approved Policies scheme is attractive on the philosophical ground that freedom of choice is valuable in itself. Freedom of choice in this context also has the more tangible attraction for some individual lawyers of enabling them to reap the benefits of competition between insurers seeking their custom. By contrast, a Master Policy or Mutual Fund scheme denies individual lawyers the opportunity to "shop around" amongst insurers. Furthermore, lawyers with freedom to choose their own insurers can remain with an insurer who gives them special discounts (for example, because the insurer is also one of their clients) or has written their policies in the past and offers premiums reflecting their good claims record.

Another potential advantage of an Approved Policies scheme is that it is more likely than Master Policy or Mutual Fund schemes to enable flexible, accurate assessment of risk and premiums for particular practitioners. It is more capable of responding to special circumstances rather than adopting a mechanical, rule-of-thumb approach. However, insurers may vary considerably in the extent to which their criteria for fixing premiums are accurate and operate fairly.

From the viewpoint of practitioners and clients, an obvious disadvantage of an Approved Policies scheme is that it substantially reduces the scope for lawyers to obtain better terms by exercising the substantial collective bargaining power of the profession as a whole. This may adversely affect the breadth of cover obtained, the premium charged, the terms upon which cover can be refused (for example, for non-disclosure), the period for which the cover lasts, and many other significant aspects of the

policy. The consequences may be adverse to the interests of clients and the general public, as well as those of the profession.

There is also a danger that lawyers who are regarded, whether rightly or wrongly, by insurers as "bad risks" will find it impossible, or unreasonably expensive, to obtain insurance. Being compelled to obtain insurance, these lawyers will be in an extremely weak position to bargain with insurers. If they cannot obtain insurance, they will be excluded from legal practice. In this and other ways an Approved Policies scheme increases the possibility of the insurance industry exercising too much influence on the activities of the legal profession and individual lawyers, and doing so without sufficient knowledge of, or concern for, the interests of lawyers and the general community.

Serious disadvantages arise from the multiplicity of insurers likely to be involved under an Approved Policies scheme. Considerable time and expense may be required to ensure that each practitioner is insured and has a policy complying with the mandatory requirements. It might be necessary to inquire into the assets and practices of particular insurers. There would also be severe obstacles to any attempt to collect comprehensive statistics of the profession's claims experience and to monitor generally the operation and impact of the insurance scheme. Past experience indicates that it may be very difficult, or even impossible, to obtain prompt and comprehensive information from some insurers, especially those which, though still processing claims, are no longer interested in writing new policies.

We regard such statistical and other monitoring as being of major importance to the interests of both the public and the profession. Several reasons can be given for this view.

Firstly, monitoring enables an insurance scheme to go beyond merely recompensing the victims of negligence or dishonesty and to play a significant role in improving the standards of professional practice. Monitoring can indicate the need for preventive, disciplinary or educative measures, whether in relation to the profession generally or individual lawyers. For example, it can reveal aspects of law or practice which are causing difficulty and about which the profession, and perhaps others, should be warned

or advised. In our view this role provides significant benefits for the public but also, by educating the profession generally and by removing or improving the "high-risk" practitioners, it should increase the reputation of the profession and decrease the cost of the insurance.

Secondly, monitoring can reduce the danger of the profession generally, or particular parts of it, being charged premiums which do not truly reflect the risk they represent or which are undesirable in some other way. For example, monitoring could reveal that the general level of premiums for lawyers is exorbitant and is subsidising other aspects of insurers' activities. It might disclose that, say, young practitioners are being regarded as a high-risk group and are being charged premiums so high as to deter their activities to a greater degree than is in the public interest. Knowledge obtained through monitoring can indicate changes which may be necessary in the insurance scheme, increase bargaining power to obtain these changes from insurers, and facilitate the creation of a Mutual Fund scheme if this seems appropriate.

Another weakness of an Approved Policies scheme is that, unlike the other two types of scheme, it does not enable the creation of a centralised, specialist body to handle claims against lawyers. If appropriately constituted, such a body can benefit both the public and the profession through timely, expert and co-operative efforts to minimise the damage caused by negligence and to settle claims fairly.

II MASTER POLICY

The centralised administration enabled by a Master Policy scheme provides major advantages in relation to monitoring, statistical analysis, loss prevention, enhancement of professional standards, specialised claims-handling and the economies of scale. The importance of these matters has been discussed above in relation to Approved Policies.

Significant economies may be achieved under a Master Policy scheme if the Law Society, Bar Association or other body negotiating on behalf of the profession dispenses with brokers and deals directly with the insurers. Alternatively, it should be possible to obtain a substantially

reduced brokerage fee on the ground that the whole profession is delivered to the broker as a captive market. Whether directly or indirectly, this reduction has been obtained under current Master Policy schemes.

We have mentioned the difficulties which arise under an Approved Policies scheme in relation to practitioners who are regarded by insurers as such bad risks that they cannot obtain insurance or are charged prohibitively high premiums. It is clearly unsatisfactory to give insurers the power, in effect, to determine which lawyers shall be permitted to practise. A Master Policy scheme can provide a reasonable solution to this problem. Collective bargaining power can be used to obtain from the Master Policy insurers an agreement to insure all practitioners, and then the monitoring system which a Master Policy scheme enables can be used to reduce the incidence of "high-risk" practitioners. Those whose claims record demonstrates serious incompetence can be dealt with by educative, preventive or disciplinary means; in the worst instances, they may be struck off. This system also reduces the extent to which practitioners have to pay inflated premiums because of the failings of other members of their profession. It should be noted that even under an Approved Policies scheme individuals' premiums will be affected somewhat by the general level of claims against lawyers, and the absence of a monitoring system will inhibit attempts to reduce this level.

From the viewpoint of practitioners and clients, a further advantage of a Master Policy scheme is that it enables the use of the collective bargaining power of the whole profession to obtain wider cover on more favourable terms than might have been obtained through negotiations between individual practitioners and insurers. The exercise of this power is particularly significant at the present time, when premiums for professional indemnity insurance are escalating sharply for lawyers and many other professionals, both in Australia and elsewhere.

There seems no doubt that, in those jurisdictions where compulsory Master Policy schemes have been introduced, the cover is at least as broad, and usually broader, than most practitioners had prior to the introduction of the scheme. For example, there is usually much better continuity of cover, and the insurer waives his right to avoid liability on the ground of non-disclosure by the insured in the proposal.

However, some practitioners in these jurisdictions have complained that they are paying higher premiums than when they arranged their own insurance. Many of these complaints may stem from insufficient appreciation of the better cover and other terms available under the compulsory scheme, or of the rapidity with which most insurers' professional indemnity insurance premiums are rising. Of course, some practitioners may be able to obtain very favourable policies by individual negotiation, whether because they have an excellent claims record or a special relationship with an insurer or for some other reason. However, it seems reasonable to suppose that collective bargaining power works to the advantage of the profession generally and will benefit the majority of practitioners. Furthermore, the use of more sophisticated criteria for fixing premiums (especially the use of claims records) might reduce the incidence of unfairness. We return to these criteria later in this section.

A possible disadvantage of Master Policy schemes is that if the same insurer is used for several years, other insurers may lose interest in competing for the business when the Master Policy expires and, in any event, will be seriously hampered by lack of recent experience in the field.

This problem could be reduced by limiting the Master Policy to one year's duration and, perhaps, trying to change insurers occasionally. However, such a course would lose the advantages of the continuity of cover which can be obtained under a Master Policy scheme. A better approach, adopted by most existing Master Policy schemes, is to seek a consortium of insurers willing to write the policy. When the policy comes up for renewal there should then be competition between the members of the consortium as to their respective shares of the business. These members, of course, will have detailed information as to the recent operation of the scheme and the monitoring system should also make it possible to disclose some helpful information to other insurers who wish to compete for a share in the consortium for the new Master Policy. In addition to these methods for preserving competition between insurers, it may also be desirable to preserve competition between brokers, or for the broking to be conducted by the Law Society, Bar Association or whichever other body is negotiating on behalf of members of the profession.

A further argument which is raised against Master Policy schemes is that they are more likely than Approved Policies schemes to set unfair premiums in some instances. The criteria under a Master Policy scheme may be simpler, and less flexible, than under a scheme where each insurer can adopt its own criteria, need not spell them out in specific terms, and is competing to attract business from individual lawyers.

There is undoubtedly some strength in this argument. On the other hand, its merits can be exaggerated. Some insurers now rely on rather rigid criteria which do not necessarily bear a close relationship to the risk borne. Furthermore, Master Policies need not be thoroughly inflexible. Although the existing compulsory Master Policy schemes in Australia and the United Kingdom prescribe a basic uniform premium, they allow variations according to gross fees in the case of part-time practitioners. The English scheme recently introduced differential premiums according to the geographical location of the practice and according to claims experience. In Scotland a bad claims record can lead to a practitioner being charged a higher premium. In other jurisdictions, such as Victoria, the law societies have expressed a desire to start taking claims records into account sometime in the future.

In any event, the basic Master Policy concept should not be judged solely by reference to existing Master Policy schemes. There are several means by which their inflexibility and any consequential unfairness could be reduced. We discuss some of those methods in the next chapter.

The search for a fair combination of criteria will be assisted greatly by the fact that under a Master Policy scheme comprehensive statistical information can be obtained in relation to <u>all</u> insured practitioners.

III MUTUAL FUND

A Mutual Fund scheme has the obvious attraction that, being a form of self-insurance, it achieves significant savings through not having to provide profit for an insurer. Like a Master Policy scheme, it also provides major advantages in relation to monitoring, statistical analysis, loss prevention, enhancement of professional standards, specialised claims-handling and economies of scale.

Under a Mutual Fund scheme, there are fewer worries as to whether appropriately broad cover can be obtained. There is no worry as to whether continuity of cover and of insurer can be achieved, nor as to whether adequate competition between insurers can be preserved. Monitoring can be achieved even more conveniently than under a Master Policy scheme. The avoidance of the need to use "outside" insurers increases the likelihood that the problems of setting fair premiums (especially for high-risk practitioners) will be met in ways conducive to the public and professional interest.

A significant disadvantage of a Mutual Fund scheme is that, whereas ordinary insurers usually have additional assets and sources of income from fields of insurance other than lawyers' indemnity insurance, the Fund might be entirely dependent upon premiums from this one field. Admittedly this means that lawyers will be sure that they are not subsidising other forms of insurance. However, there can be little doubt that the Mutual Fund's inability to "spread the risk" within its own operations, and to achieve the economies of scale available to a large insurer, will counteract to some extent the Fund's financial advantages mentioned earlier. Unfortunately, it is very difficult to quantify either the savings or the extra costs.

In addition to these continuing disadvantages, a Mutual Fund scheme may face problems in its early years. In a period of pronounced inflation, and of increasing frequency and size of claims, the Fund would need to have substantial funds from the outset. Our investigations, particularly into the Law Society's voluntary scheme in New South Wales, show that claims against lawyers tend to have a "long tail". In other words, there is likely to be a period of several years between the making of the claim and its final resolution. It is usually five or more years before the final results of a year's claims under an insurance scheme can be determined.

In turn, this means that insurers handling such business have a relatively high level of continuing contingent liabilities, for which they must hold sufficient assets. The difficulty occurs particularly in the early years of the scheme when potential liabilities are building up but relatively few claims are being finalised. Against these problems must be weighed the advantages of not having

a very high level of actual pay-outs in the early years and thus being able to invest a good portion of the premium income. Also, premiums would be due in advance of the period to which they relate.

Some of these disadvantages of a Mutual Fund scheme could be reduced by re-insurance, especially in the early years. This approach has been adopted in the Builders' Licensing Board's insurance scheme. However, re-insurance of this kind can be expensive. Another possibility would be to seek a Government guarantee for the Fund during the initial period when its reserves are being built up.

It is important to bear in mind that many practitioners will want cover substantially in excess of the compulsory minimum. A Mutual Fund may have to seek re-insurance for a greater share of this additional cover than would have been considered necessary by most insurers, who can spread the risk across their various fields of insurance business.

Apart from considerations of prudence, economy and responsibility in this context, it is necessary to consider the requirements of Federal insurance legislation. A Mutual Fund would need to obtain an authority to carry on insurance business under the Insurance Act 1973 (Commonwealth) and therefore would need to satisfy the Federal Treasurer that its assets amount to at least $200,000 and exceed its liabilities by at least $100,000 (section 29). It would then need to maintain a level of assets which exceeds its liabilities by at least $100,000 or 15% of its premium income during the previous financial year, whichever is greater. The latter alternative requirements do not go beyond what any responsibly-conducted Mutual Fund would impose on itself. However, the requirement as to assets at the proposed commencement of operations, which would be prior to receipt of premiums, presents some additional problems. Possible solutions include a levy on all practitioners or assistance from either the Statutory Interest Account (which would necessitate statutory amendments) or the Government.

An alternative approach, which has been investigated by the Law Society, is for the Mutual Fund to seek exemption, at least for its initial stages, from these Insurance Act requirements. There are two main problems with this proposal. Firstly, the power to grant exemption is vested in the Commonwealth Insurance Commissioner by section 37 of the Act. The Commissioner has indicated to the Society

that he does not regard professional indemnity insurance as a permissible class of insurance for exemption under section 37. Secondly, even if exemption were legally permissible, it could only be granted if the total premium income of the Fund did not exceed $200,000 per annum. This sum is less than 10% of the total premium pool likely to be regarded as adequate in a compulsory scheme for New South Wales practitioners. For these reasons, the possibility of exemption from the provisions of the Insurance Act does not seem likely to be of significance in this context.

The general effect of the various disadvantages to which we have referred is to increase the premiums which a Mutual Fund would need to charge. In particular, higher premiums, or a special levy, might be necessary in the early years. However, these difficulties can be exaggerated and would decrease substantially after the first few years. Also, as we have mentioned, a Mutual Fund scheme could provide various savings by comparison with other types of scheme.

A further alleged disadvantage of a Mutual Fund scheme is that those controlling it will lack sufficient experience and information in this field of insurance and consequently, in the early years, will find great difficulty in devising a premium rating system which is fair and yields a premium pool of the intended size. Several reservations need to be made about this argument. The Mutual Fund could reasonably expect to attract to its staff people with expertise acquired in the employ of insurers previously writing indemnity insurance for lawyers. It is important, too, to remember that in New South Wales there is far more publicly available information about experience with voluntary insurance of this type than is available elsewhere in Australia and overseas. Whether the scheme is Mutual Fund or Master Policy, those fixing premiums in the early years will be similarly hampered by uncertainty as to the impact of having to cover all practitioners. Also, a Mutual Fund scheme's criteria for fixing premiums may not need to be expressed as specifically as with a Master Policy scheme and, therefore, may have the advantages of greater flexibility.

A Mutual Fund scheme is likely to be more difficult, and slower, to establish than a Master Policy scheme. Fewer

useful precedents are available and there would be a greater need to create new bodies to administer the scheme. The absence of an insurer would cause heavier responsibilities and additional work for whatever body was in overall control of the Fund.

Of course, by comparison with an Approved Policies scheme, a Mutual Fund scheme suffers through the lack of freedom of choice and the likelihood that premiums will not be as well-fitted to individual cases.

The relatively small size of the Bar would probably make it impracticable to establish a Mutual Fund scheme solely for barristers.

IV COMBINATIONS

It would be theoretically possible to combine an Approved Policies scheme with some elements of a Master Policy or Mutual Fund scheme. Practitioners would be required to obtain certain minimum cover and could obtain it from the insurer of their choice. A Master Policy or Mutual Fund scheme would provide cover for those who preferred it or could not obtain insurance elsewhere. This combination would have the advantages of the Approved Policies scheme while avoiding the problem of the high-risk practitioner who cannot obtain insurance on reasonable terms. However, if the Master Policy or Mutual Fund became a haven for high-risk practitioners it would not be an attractive proposition for other practitioners, insurers or reinsurers. Furthermore, there remains the difficulty of monitoring and supervising a multiplicity of policies and the advantages of collective bargaining power would not be obtained.

A more attractive possibility is a combination of the Master Policy and Mutual Fund concepts. Such a combination might be adopted from the commencement of compulsory insurance, as occurred in British Columbia, or the Mutual Fund element could be added a few years later, as occurred in Ontario, Manitoba and Alberta. Bearing in mind the problem of the Mutual Fund's limited asset-backing, the obvious combination is for the Mutual Fund to provide cover up to a limit per claim, per annum, or both, with the remaining cover being provided under a Master Policy with "outside" insurers. This is the model adopted in the four Canadian provinces we have mentioned.

By commencing with a Master Policy providing part of the cover, one avoids the worst dangers and disadvantages of a Mutual Fund while still obtaining many of its advantages, particularly the savings it affords. Subsequently, the Mutual Fund component can be increased if appropriate and, eventually, it could take over entirely.

Alternatively, the scheme could commence as solely a Master Policy, with a Mutual Fund element being added when sufficient information and experience has been obtained as to the operation of a compulsory scheme. If, as under some compulsory Master Policy schemes, insurers and brokers are required to pay the professional association a commission in return for obtaining a captive market, this commission could be accumulated to provide the asset-backing required by the Federal insurance legislation for the creation of a Mutual Fund. The possibility, or actuality, of the addition of a Mutual Fund element could solve any difficulty that might emerge as to lack of effective competition after a few years of a Master Policy scheme.

C. The Attitude of the Professional Associations

The Law Society of New South Wales has spent considerable time over the last few years discussing which type of scheme it considers most appropriate. Its preferences on this issue are of considerable importance. Firstly, the Society can be assumed to reflect the views of a substantial portion of the profession and, as we have mentioned, the interests of the profession should be a prominent consideration in establishing the scheme. Secondly, it is likely that, at least in the initial years, compulsory insurance would apply only to solicitors and that the Society would be the appropriate body to have overall control of the scheme. We return to this question of overall control in Chapter 5.

After favouring at various times an Approved Policies scheme and a Mutual Fund scheme, the Society decided in 1978 that a Master Policy scheme would be preferable. Its Insurance Committee gave the following reasons in favour of such a scheme.

> "(i) It provides advantageous policy terms to the profession, which terms are not available under the other schemes.

(ii) It provides certainty and continuity of cover during the contract period.

(iii) It ensures a supply of statistics from the profession as a whole showing the claims record of the profession, statistics alone will tell the profession whether the premiums charged by insurers are justified, whether and if so to what extent it should become a self insurer and, most importantly, the areas in relation to which greater educational efforts are necessary.

(iv) It avoids the situation where an insurer in effect decides whether a solicitor should have the right to practise.

(v) It gives the profession and the Law Society an opportunity to control claims; to educate, where necessary, the profession and to negotiate with the insurers in a way not available under the approved insurances scheme." (1978a, p.3)

However, it seems from the Society's submissions and other communications to us that it does not rule out the desirability of introducing a Mutual Fund element, or even converting entirely to a Mutual Fund, after some years experience with the Master Policy scheme. It considers, apparently, that a Mutual Fund is too risky and difficult for the Society to operate, at least at the outset of a compulsory scheme, and would require very high premiums in the early years.

As we have mentioned, the New South Wales Bar Association does not favour a compulsory scheme for barristers. It has not expressed to us a preference between the various types of scheme. Its present voluntary scheme is a Master Policy type.

D. Tentative Conclusions

We have suggested earlier that a compulsory scheme for solicitors should be established in the near future. We suggest that it should be a Master Policy scheme with

the expectation that a Mutual Fund element might be introduced after a few years to provide the lower and middle levels of cover.

In our view, the Master Policy and Mutual Fund types of scheme are significantly more desirable in the interests of both the public and solicitors than is an Approved Policies scheme. We are impressed particularly by the advantages in relation to high-risk practitioners, monitoring, collective bargaining power, and centralised claims-handling and administration.

We are not convinced that it would be undesirable or impracticable to establish a totally, or partially, Mutual Fund scheme from the outset, but we are inclined to believe that the possible advantages of such a course are not sufficiently great or certain as to outweigh the fact that the Law Society does not favour it. The Society's attitude is particularly significant since the major disadvantages of a Mutual Fund are the extra work and risk which it places on the body controlling the scheme, and the Society is likely to be that body, at least in the early years.

We have suggested that compulsory insurance for barristers should be introduced in a few years' time. We have explained our reasons for not expressing a view at this stage as to whether the scheme should be separate from the scheme for solicitors. For similar reasons it would be premature to suggest now whether barristers should be covered by a Master Policy or Mutual Fund scheme, or a combination of the two, but we do not favour an Approved Policies scheme.

We have sought to discuss the merits and demerits of the various types of scheme in terms of general concepts, rather than by reference to particular examples of the various types. However, the next chapter discusses the particular terms which a compulsory policy should contain and, in so doing, illustrates some of the attractions of the Master Policy and Mutual Fund schemes.

Chapter 4

Terms Of The Policy

A. Introduction

In this section we discuss the terms which should be mandatory under a compulsory insurance scheme. Our discussion is primarily in the context of a standard policy, whether under a Master Policy or a Mutual Fund scheme. However, similar considerations would apply to the terms to be required under an Approved Policies scheme.

We do not discuss here every term which would be necessary to include in the policy. In general, we regard as satisfactory the terms adopted in the Victorian solicitors' scheme, which we reprint in Appendix III to this Paper. We discuss only those aspects upon which we differ from the Victorian scheme or with which it is important to explain our reasons for agreeing. In its submissions and other communications to us, the Law Society of New South Wales has expressed general agreement with the terms of the Victorian solicitors' scheme, which are broadly similar to those in most other Master Policy schemes in Australia and the United Kingdom. The New South Wales Bar Association's voluntary scheme uses a Master Policy which was derived from, and is broadly similar to, the Victorian solicitors' scheme.

The policies under the schemes in Scotland and Ontario provide examples rather different from the Victorian one and they will be found in Background Paper - II.

Most schemes have a Master Policy and a Certificate of Insurance. The latter reiterates some of the terms in the Master Policy and usually includes some additional terms of the insurance. There is no practical significance in whether the terms are in the Policy or the Certificate. For the sake of convenience and simplicity, we refer to them in this Paper as if they are all in the Policy.

B. Types of Claim

I GENERAL

Most of the existing compulsory schemes in the United Kingdom and Australia (and the voluntary scheme for barristers in New South Wales) cover all loss to the insured arising from any claim against the insured or the insured's practice in respect of "any description of civil liability whatsoever incurred in connection with the practice" (see, e.g., the Victorian solicitors' scheme's Certificate of Insurance, cl.2(a)). We consider here whether the cover should include "any description of civil liability". In section III below we consider the latter part of the definition.

In New South Wales, some current indemnity insurance policies for lawyers provide somewhat narrower cover than do the compulsory schemes, with various types of extra cover ("options") available if an extra premium is paid. For example, the basic cover might be for "breach of professional duty", with options available for "libel and slander", "loss of documents", dishonesty by employees and so on. The Law Society's voluntary scheme includes libel and slander and some types of loss of documents within its basic cover, rather than merely as options.

In our view the broad cover for "civil liability" is desirable and should be required in New South Wales. Not only does this cover provide more protection for practitioner and client but its simplicity reduces the scope for dispute over its extent.

Several exceptions are made in the Victorian solicitors' scheme to the general cover for "civil liability" but, save for the exception in relation to liability arising from dishonesty, they are uncontroversial and are common to most of the Master Policy schemes. They relate, for example, to liability arising out of trading debts or death or bodily injury. We suggest that they should be adopted in New South Wales.

II DISHONESTY

A major issue arises over the extent to which the policy should be required to cover liability for dishonesty. In this context we use dishonesty to mean, in the words of some existing policies, "dishonest or fraudulent acts or omissions".

1. The Present Situation

(1) New South Wales

(a) Insurance

Most policies available to New South Wales solicitors, including those under the Law Society's voluntary scheme, provide, in return for an additional premium, optional cover for insured practitioners for liability arising from dishonesty by their partners or employees. The standard cover under the Bar Association's voluntary Master Policy scheme includes barristers' vicarious liability for dishonest employees.

It is illegal, as being contrary to public policy, to provide cover for dishonesty by insured people themselves. Even if such cover were legal, insurers have informed us that they would not be willing to provide it.

(b) Fidelity Fund

We have mentioned earlier that a person suffering loss through a solicitor's dishonest failure to account can obtain compensation from the Fidelity Fund. At present, about 90% of the Fund comes directly or indirectly from the Statutory Interest Account (which consists of interest earned on clients' money in solicitors' trust accounts) and the remainder is raised by compulsory annual contributions from solicitors. The various levels of contribution are:

(i)	Principal in private practice	$75
(ii)	Practitioner employed by private practitioner	$10
(iii)	Practitioner employed solely by the Crown or a prescribed corporation	Nil
(iv)	Practitioner employed otherwise than under (ii) or (iii)	$20
(v)	Chamber magistrates, ombudsmen, Consumer Claims Tribunal referees	$5

The Fund is under the control of the Law Society. It is required by statute to compensate for dishonest failure by solicitors (or their employees) to account for property entrusted to them in the course of practice. It does not compensate for other types of dishonesty. There is an upper limit of $200,000 compensation in relation

to any one firm or sole practitioner but the Law Society can decide to exceed this limit and thus far no claim has been refused on the ground that it exceeded the limit. The Fund's annual income and expenditure have increased substantially in recent years and presently are of the order of several million dollars.

The relationship between the Fund and indemnity insurance is complex. The former is confined to dishonest failure to account while the latter usually covers dishonesty generally. If claimants receive payment from the Fund and subsequently receive money from another source (such as their practitioner's insurer) to cover the same loss, they must repay to the Fund any amount by which their total receipts exceed the amount of their loss (Legal Practitioners Act, 1898, s.57(3)). The managers of the Fund are subrogated to the claimants' rights against practitioners (s.61), but not to practitioners' rights against their insurers. However, some insurance policies, including those under the Law Society's voluntary scheme, provide that cover does not extend to losses compensated by the Fund.

We have referred earlier to the general differences between insurance and a compensation scheme like the Fidelity Fund. There may also be considerable differences between an insurance policy and the Fund in relation to the maximum payment obtainable and various other terms and conditions.

There is no equivalent of the Fund in relation to barristers, who do not have trust accounts.

(2) Elsewhere

(a) Insurance

None of the existing compulsory schemes provides cover for dishonesty by the insured. They adopt differing approaches, however, to dishonesty by the partners or employees of insured practitioners. In the United Kingdom (for solicitors) and some Canadian provinces, the schemes cover both these types of dishonesty. In Western Australia the Law Society's proposed scheme is similar but provides a lesser amount of cover for dishonesty than for other types of liability. The Victorian scheme covers dishonesty by employees but not by partners. In Queensland, under the proposed Tasmanian scheme and in some Canadian provinces, neither of these types of dishonesty is covered.

(b) Fidelity Fund

There is a wide variation between these jurisdictions in relation to their equivalents of the Fidelity Fund. Some Funds are restricted in a manner analogous to the "dishonest failure to account" restriction in New South Wales, but in England, for example, the Fund covers dishonesty generally. Some derive little of their income from practitioners' contributions while others rely solely on such contributions. By comparison with New South Wales, some have less generous rules, or have adopted less generous practices, concerning payment of claims.

The Funds do not apply to barristers in divided professions nor to practitioners in fused professions who have undertaken to practise as barristers only.

Generally speaking, it seems that where a claim comes within the ambit of both the Fund and the insurance scheme, the latter is primarily responsible and the Fund's role is confined to the amount, if any, by which the claim exceeds the limit of the insurance cover.

The following table summarises for three different jurisdictions the source of cover or compensation available under compulsory insurance and Fidelity Fund schemes relating to solicitors. The insurance cover indicated in the table is not available if every insured person in the practice was involved in the dishonesty.

Dishonest Failure to Account (or similar category)			Other Dishonesty		
By a Sole Practitioner	By a Partner	By an Employee	By a Sole Practitioner	By a Partner	By an Employee
ENGLAND					
Fidelity Fund	Insurance*	Insurance*	Fidelity Fund	Insurance*	Insurance*

Dishonest Failure to Account (or similar category)			Other Dishonesty		
By a Sole Practitioner	By a Partner	By an Employee	By a Sole Practitioner	By a Partner	By an Employee
VICTORIA					
Fidelity Fund	Fidelity Fund	Insurance*	Nil	Nil	Insurance
QUEENSLAND					
Fidelity Fund	Fidelity Fund	Fidelity Fund	Nil	Nil	Nil

NOTE: * denotes that the Fidelity Fund may provide the amount by which the loss exceeds the limit of insurance cover.

2. Possible Systems

(1) Solicitors

(a) All Dishonesty under Insurance

It can be argued that all dishonesty cover for solicitors should be provided through the compulsory insurance scheme rather than the Fidelity Fund. If cover is provided by insurance its cost is met by solicitors, through premiums. If it is provided through the Fund, present arrangements mean that only about 10% of it is met by solicitors. There seems no good reason why the solicitors' branch should have to meet the cost of its members' negligence but, save to a very limited extent, not have to do so in relation to their dishonest failure to account. Indeed, if the solicitors' branch were made to bear more of the cost of its dishonest members, then solicitors individually and generally might increase their efforts to reduce the incidence of dishonesty by solicitors.

Furthermore, a reduction in the demands on the Fund would enable more of the Statutory Interest Account (of which, in recent years, about 40% has gone to the Fidelity Fund) to be used for its other specified purposes, such as legal aid, education and research.

If all claims against solicitors (whether alleging dishonesty or otherwise) were dealt with under the insurance scheme, there might be benefits in terms of simplicity, consistency and administrative economy. By contrast with the Fund's compensation-type approach, an insurance scheme may be more likely to ensure that solicitors are given an adequate opportunity to be heard in the handling of claims arising from their conduct. Furthermore, the insurance scheme may provide more sophisticated and fairer methods for assessing solicitors' contributions in accordance with the risk which they represent.

Several considerations must be weighed against these arguments. For example, it might be possible to increase substantially the proportion of the Fund's income derived from solicitors' contributions. As a result, they could be made to bear a greater share of the cost of solicitors' dishonest failures to account and the drain on the Statutory Interest Account would be reduced.

The major drain on the Fidelity Fund in recent years has stemmed from solicitors in sole practice. Between 1968 and 1978, about 45% of the total amount paid out of the Fund related to such sole practitioners. At the end of that period about 90% of the total value of outstanding claims related to sole practitioners. We have mentioned that cover for dishonesty by the insured is illegal and that even if it were made legal insurers are unlikely to be willing to provide it. Accordingly, insurance is unlikely to be able to relieve the Fund of the heavy burden of liability for sole practitioners' dishonesty or to achieve the benefits of having all claims under one scheme.

If, by some means, cover for dishonesty by the insured was legalised and was provided by the insurance scheme, it would raise premiums to a very high level. If these premiums varied according to the risk represented by particular categories of solicitor, those in sole practice would probably be confronted with massive premiums which some of them could not pay.

(b) Some Dishonesty under Insurance

Should dishonesty by the insured be dealt with by the Fund and other types of dishonesty be dealt with by insurance? Our investigations indicate that insurers would add about 10-15% to their premiums if required to provide cover for dishonesty by partners or employees. Such a loading is not prohibitively high and subsequent experience of the risk may indicate that it can be reduced. However, this separation in dishonesty cover could lead to anomalies. For example, it would be most undesirable to have substantial differences in the amount of cover or compensation available, and in the method of claims-handling, according to whether the dishonesty was by a sole practitioner or by his or her employee.

These anomalies might be reduced by harmonising the Fund and the insurance scheme (particularly as to levels of cover). Alternatively, if the Fund's limits on compensation are higher than those on cover under the insurance scheme, the Fund could provide "topping-up" compensation for claims arising from dishonesty by partners or employees. If, however, the Fund's limits were lower than those of the insurance scheme and dishonesty by the insured is uninsurable, claims arising from such dishonesty would be discriminated against by comparison with those concerning other types of dishonesty, which would fall under the insurance scheme.

The notion of providing "topping-up" compensation from the Fund has some attractions and has been adopted in England. It reduces the drain on the Fund while also reducing some undesirable anomalies. Its main weakness is the need to claim on two schemes, with the resultant possibility of undue delay and expense and of differing criteria and practices in claims-handling.

Another consideration to be borne in mind is that if the Fidelity Fund's ambit is confined to dishonesty by the insured (perhaps with some topping-up cover for dishonesty by partners or employees) there may be a demand for variation of the present allocation within the profession of liability to contribute to the Fund. If this allocation was varied to reflect the risk represented by various categories of the profession the contribution required of solicitors in sole practice would be very high indeed.

(c) No Dishonesty under Insurance

Would it be preferable for all claims arising from dishonesty to be solely within the Fidelity Fund scheme? This solution would be simpler, and perhaps less productive of anomalies, than to distinguish between dishonest failure to account (to which the Fund is presently confined) and other types of dishonesty, or between dishonesty by the insured and dishonesty by partners or employees. The creation of a compulsory insurance scheme is likely to be achieved more simply and quickly if it does not have to provide dishonesty cover.

It may be argued, that while reducing some anomalies, this solution unjustifiably discriminates between dishonesty and other types of conduct such as negligence. Why for example should dishonesty be dealt with by compensation but the other types of conduct by insurance? Why should there be differences between these two categories in relation to the amount of cover or compensation, the claims-handling techniques, and the total share and internal distribution of the contribution by the solicitors' branch to the overall cost? Some justifications have been given earlier in discussing the characteristics of claims for dishonest failure to account (Chapter 2, Section E). These characteristics are perhaps more pronounced in relation to dishonest failure to account than other types of dishonesty. However, the difference between these two categories of dishonesty may be insufficiently great, and the latter category may be too unlikely to be a relatively substantial source of claims, to justify them being allocated to different schemes.

Of course, it must also be borne in mind that it is possible to reduce the differences between the Fund and an insurance scheme, for example in relation to the level of cover and the extent to which the client can deal directly with the ultimate source from which he hopes to obtain compensation.

For reasons explained earlier, the main argument against looking to the Fidelity Fund to handle all types of dishonesty is that the profession provides such a small percentage of the Fund's income. The present situation is unsatisfactory in this respect and it would be aggravated if the scope of the Fund were extended from dishonest failure to account so as to include all types of dishonesty. On the other hand, it may be possible to reduce the problem by increasing the share provided by the profession.

(2) Barristers

The preceding discussion of possible systems has been concerned with solicitors. However, losses may be caused by dishonesty (though rarely, if at all, by dishonest failure to account) on the part of barristers or their employees.

In our view, it is in the interests of both barristers and their clients that cover or compensation should be provided in relation to dishonesty by barristers and their staff. Under present arrangements barristers do not have partners but we shall discuss in a later Paper whether or not this situation should change. If it does change, cover or compensation for dishonesty by partners should also be provided.

Many of the considerations raised above in relation to dishonesty by solicitors apply equally to dishonesty by barristers. Furthermore, there are obvious merits in dealing with dishonesty in the same way regardless of whether it involves barristers or solicitors. If any reduction occurs in the future in the extent of division of the profession into these two branches the case for a uniform approach will be strengthened.

However, there are some other significant considerations in relation to barristers in this context.

Firstly, barristers do not fall within the present ambit of the Fidelity Fund. If they were brought within it, and even if the Fund were extended to cover dishonesty generally, it is likely that there would be very few claims against it arising from the conduct of barristers. It might be argued that it would be unnecessary, or unfair, to impose on barristers a liability to contribute to the Fund. On the other hand, some present contributors, such as lawyers employed by non-governmental corporations, also present little or no risk to the Fund. Their contributions are fixed at a nominal level and the same might be appropriate for barristers. We discuss these issues in a later Paper.

Secondly, if barristers are required to have insurance cover for dishonesty, they will represent a much lower risk, on average, than solicitors, especially solicitors who have trust accounts. It may be argued that this lower risk should be reflected in lower premiums.

3. Tentative Conclusion

We suggest that if a compulsory scheme for solicitors is established in the near future it should commence without dishonesty cover. The situation should be reviewed in the light of developments over the next year or so. Several factors lead us to make these suggestions.

Firstly, the difficulties and controversies which inevitably arise in the creation of a compulsory insurance scheme might be increased if the scheme were to cover dishonesty.

Secondly, the strongest argument against leaving dishonesty to be dealt with by the Fidelity Fund is that the profession does not provide a sufficient share of the Fund. In a later Discussion Paper we shall discuss whether that share should be increased. If a substantial increase occurred, it might be justifiable to continue to exclude dishonesty from the insurance scheme.

Thirdly, it would be difficult and perhaps impossible to provide insurance cover for dishonesty by the insured, which is presently the major drain on the Fidelity Fund.

Fourthly, some experience of the insurance scheme will be of considerable assistance in deciding whether dishonesty cover can be combined conveniently and fairly in an insurance scheme which provides general civil liability cover.

Fifthly, in a later Discussion Paper we shall suggest changes to the Fidelity Fund scheme and the system for controlling solicitors' trust accounts, and other reforms aimed at reducing the incidence of dishonesty. It would be preferable to await this Paper, and the subsequent discussion of it, before deciding whether to transfer responsibility for compensation for dishonesty from the Fund to the insurance scheme. At present, the Fund's ambit is restricted to dishonest failure to account. It is desirable that other types of dishonesty be dealt with, whether by extending the ambit of the Fund or by including them within the insurance scheme. We shall discuss these alternatives in our Paper on the Fund.

We stress that this exclusion of dishonesty cover for solicitors should not become permanent without a thorough re-appraisal in the light of developments over the next year or so. It has weaknesses, particularly

arising from the present sources of income of the Fund and the fact that the Fund does not cover dishonesty generally. These weaknesses can perhaps be accepted during a transitional period but are unlikely to be acceptable in the long term. It may become desirable to provide dishonesty cover, at least for dishonesty by partners or employees, under the insurance scheme.

We suggest that cover or compensation should be provided for barristers' dishonesty. A decision as to whether it should be provided under the Fund or the insurance scheme or a mixture of the two should be delayed so that it can be made in the context of other decisions concerning the Fund and the future extent of division in the profession.

III TYPES OF WORK

What types of work should be required to be covered? The Victorian solicitors' scheme seeks to encourage an expansive interpretation by defining the cover as applying to all loss to the insured arising from any claims in respect of civil liability incurred "in connection with the practice" of the solicitor (Certificate of Insurance, cl.2(a)). "The practice" is defined as "the business of practising as a solicitor ... (including acceptance of obligations as Trustee, Executor, Attorney-under-power, Tax Agent, or Company Director) undertaken by the solicitor or his predecessors in business alone or with others, provided always that whenever any fees or other income accrue therefrom they inure to the benefit of that business" (cl.1(c)). The scheme includes within the definition of the insured "any service, administrative or nominee company or trust insofar as its activities are carried out in connection with the practice" (cl.1(b)).

Most of the other statutory schemes in Australia and the United Kingdom, and the Law Society's voluntary scheme in New South Wales, adopt a rather similar approach, though, for example, in Queensland the parenthesis includes reference to a company officer, in England the definition omits from the parenthesis all but a trustee, and in New South Wales reference to a liquidator is included and a tax agent is absent. Under the Law Society's proposals in Western Australia, only half of the income need inure to the benefit of the business.

The Scottish solicitors' scheme defines "practice" as meaning "the business of practising as a solicitor undertaken by the insured ... while acting as a solicitor and shall cover all manner of business carried on or transacted by the insured which is customarily (but not necessarily exclusively) carried on or transacted by solicitors in Scotland" (Certificate of Insurance, Interpretations, cl.4).

The New South Wales Bar Association's voluntary scheme differs from the Victorian solicitors' scheme in that it speaks, of course, of "practising as a barrister" and excludes reference to a tax agent, or company director. It also includes "advice given or services performed of whatsoever nature by the Assured provided always that any fee accruing from such work shall inure to the benefit of the practice" and "work done without fee providing that such work is undertaken in relation to the practice" (Certificate of Insurance, cl.1(b)). The Scottish advocates' policy demarcates the type of work covered merely by saying that it applies to any "breach of professional duty" by an advocate (see Preamble to Policy).

Many of the Canadian Master Policy schemes provide cover for work in the insured's "capacity as a lawyer", and other work "for which in the usual solicitor-client relationship the insured would be legally responsible as solicitor for a fiduciary", but exclude "professional services rendered in his capacity as an employee of ... a corporation" other than a law office management corporation (e.g., British Columbia Master Policy, clause IV and Exclusions).

It is relevant also to refer here to the "cover" provided by Fidelity Funds. In New South Wales the comparable criterion covers a solicitor's dishonest failure to account in the course of his or her practice as a solicitor, including as a solicitor-trustee (Legal Practitioners Act 1898, s.56(1)). In many other jurisdictions the criterion is simply "in the course of the solicitor's practice". Prima facie, it is undesirable to have any difference between the types of work covered by the insurance scheme and the Fund.

It may be argued that the cover required under a compulsory scheme should not extend beyond work performed in connection with legal practice, and perhaps should be confined further, for example, to work "in the course of legal practice". Imposition of any wider obligation might be regarded as going beyond the legitimate scope of regula-

ation of legal practitioners and would also create the danger of the profession as a whole having to pay increased premiums as a result of the "outside" activities of some of its members.

On the other hand, "the cover" should not be defined too narrowly, lest clients and practitioners are deprived of protection which they reasonably expected to obtain under the insurance scheme. Furthermore, if the scope of the definition is too uncertain, delay and expense may occur (and legitimate claims may be abandoned) in the course of resolving the uncertainty in particular instances.

Activities which can raise difficulties in this context include acting as a trustee, a company director or an investment broker. In some situations, activities of these kinds are clearly within legal practice, while in other situations they are clearly outside and in others there is room for uncertainty.

Similar difficulties arise in other contexts, such as trust accounts, the Fidelity Fund and practising certificates. Some variation in definition for different contexts may be inevitable, but it should be avoided as far as possible. Accordingly, we propose to delay formulation of a precise definition until its applicability in other contexts has been considered in later Discussion Papers. If, in the meantime, a compulsory insurance scheme for solicitors is established, we suggest that the definition used in Victoria would be adequate for use at the commencement of the scheme.

IV VOLUNTARY EXTENSIONS

It may be desirable for the body negotiating a compulsory scheme to seek an insurer for the scheme which, for an additional premium, is willing to provide voluntary cover, outside the scheme, for additional types of liability or work. For example, some practitioners may wish to have dishonesty cover in addition to any protection afforded by the Fidelity Fund to their clients or themselves. Some offices which may be held by practitioners commonly require the holder to take out a special bond or other security. If practitioners' indemnity insurance covered their work in such offices they might be relieved from the other security requirement. Some of these offices, such as administrator of a deceased person's estate, receiver or liquidator, are covered under some compulsory

schemes. If they were not included in New South Wales, it might be beneficial to promote their availability on a voluntary basis.

C. Amount Of Cover: Solicitors

We have suggested earlier that a compulsory scheme for solicitors should be established in the near future. In this section and the next two sections we are concerned primarily with the cover, premium and deductibles which should be required at the outset of such a scheme.

We do not make any suggestions in these three sections in relation to barristers. It would be premature to do so until there has been further discussion on the general subject of the division of the profession into barristers and solicitors. We shall discuss that subject in a later Paper. Changes in the extent of the division may affect whether or not barristers and solicitors are under the same insurance scheme and, both for that reason and others, may affect the extent, if any, to which they should have different cover, premiums or deductibles. It is for similar reasons that we have suggested that the introduction of compulsory insurance for barristers should be delayed.

We include in these sections, however, some information about the present situation concerning barristers. We do so partly because it has relevance for comparative purposes in relation to solicitors and partly to lay groundwork for subsequent consideration of these issues in relation to barristers.

1 REINSTATEMENT

The Victorian solicitors' scheme provides cover on a per claim basis. In other words, if a solicitor has $100,000 cover, there is no limit to the number of separate claims which can be made against him or her during the insurance period and on each of these claims the insurer will be liable for up to $100,000. This feature is sometimes known as "reinstatement", because the full cover is reinstated for each claim. However, it should be added that the policy also provides that "all claims against the insured arising from the same act or omission shall be regarded as one claim" (Certificate of Insurance, cl.2(c)). All other existing Master Policies in Australia, the United Kingdom and Canada have reinstatement, although in Canada

it is common for policies to provide that all claims arising from "acts or omissions in connection with the same professional service" are to be regarded as one claim.

By contrast, in most New South Wales policies for solicitors, including those under the Law Society's voluntary scheme, the standard terms provide for cumulative cover. Thus, if a solicitor's cover is $100,000 and two claims arise within the insurance period, one of $75,000 and then one of $50,000, the insurer will not be liable for more than a combined total of $100,000 for the two claims, even though the claims may have been entirely unrelated to each other. In many such policies it is possible to pay an extra premium to obtain reinstatement and we have been informed by insurers that this is a popular option. However, the option usually specifies a cumulative limit as well; for example, it may provide cover up to $50,000 per claim, with the cumulative total per annum not to exceed $100,000.

Reinstatement gives much better protection for the public and the profession, and we regard it as an essential feature of an adequate compulsory insurance scheme. Without it, the protection afforded by the compulsory scheme may turn out to be fortuitous or illusory.

II UNIFORM OR VARIABLE

1. Within a Practice

We have suggested earlier that insurance should have to be taken out by each principal, rather than by each principal or employee or by the practice itself. Theoretically, one might vary cover within a practice according to the individual characteristics of the principal in question. However, save perhaps in relation to claims arising from dishonesty by a principal in a firm, there would be little point in doing so. Since partners are jointly liable a claim could be made by whichever partner has the highest cover.

Accordingly, we suggest adoption of the same approach as in every existing compulsory Master Policy scheme, namely that the amount of cover should be assessed according to characteristics of the practice to which the insured practitioner belongs, rather than those of the practitioner himself or herself. Although each scheme

specifies cover per insured practitioner, the amount of cover does not vary between insured practitioners in the same practice.

2. Between Practices

(1) The Present Situation

The question then arises as to whether cover should vary between practices. In this respect existing schemes fall into two broad categories.

(a) Variable Cover

The statutory Master Policy schemes in Australia and the United Kingdom, are variable cover schemes. Each principal solicitor is an insured person. The limit of cover provided under the compulsory scheme varies according to the number of principals in the insured person's practice. For example, in Victoria a sole practitioner is covered for $100,000 and each partner is covered for $50,000 multiplied by the number of partners in his firm (e.g., $250,000 in a five-partner firm). This cover is not accumulable between partners. For example, assume A and B are partners with $100,000 non-accumulable cover each. Professional negligence by A causes loss to a client. A and B will be jointly and severally liable for that loss and usually each will be entitled to claim under his indemnity insurance policy. However, if both A and B make a claim the combined total of cover available for their claims will be the same as if only one of them made a claim, namely $100,000.

Broadly speaking, each insured person pays the same premium, but the deductible also varies according to the number of principals, so that a sole practitioner is not covered for the first $1,000 of each claim but a partner in a five-partner firm is not covered for the first $2,500 (5 x $500). In Western Australia, the Law Society's proposals envisage the compulsory cover varying per principal up to a maximum of $1 million. The Scottish scheme also imposes an upper limit on the variable cover.

(b) Uniform Cover

By contrast, the Canadian schemes are uniform cover schemes. They require each private practitioner, whether

a principal or an employee, to insure, and they provide a uniform limit of cover for each insured person. As the cover is not accumulable between practitioners within a practice the total cover for each claim against a practice remains the same whatever the size of the practice. In most provinces the cover is $100,000. Generally speaking, the premium and deductible are also set at uniform levels. We understand that the New Zealand Law Society favours uniform cover and in negotiating its scheme is seeking quotes for various possible uniform levels ranging between $100,000 and $250,000.

(2) Advantages and Disadvantages

Under the statutory schemes with variable cover, members of large practices (in terms of the number of principals), and thus indirectly their clients, have much higher compulsory cover per claim than members of small practices and their clients. It may be regarded as undesirable for a compulsory scheme to vary the protection which it provides for clients according to the size of the practice to which they take their business. In any event, the size of a practice (whether measured by the number of principals or of staff, or the amount of gross fees, or some other criterion) is not necessarily an accurate indicator of the likelihood of large claims being made against it. Some large practices may have little need for high-level cover while some small practices may be handling matters in which very large sums of money are at stake. It is noteworthy, too, that the limit on compensation available under the Fidelity Fund does not vary according to the size of the practice involved.

Furthermore, our inquiries indicate that larger practices are, if anything, more likely than smaller practices to take out cover which insurers and brokers regard as adequate. Broadly speaking, larger practices may also be more likely to be able to meet substantial losses from their own resources, if their insurance proves inadequate. A particular problem of providing very high cover for some practices under the compulsory scheme is that if a very large claim of, say, $1 million is made, it may wreck the scheme or cause a drastic increase in premiums. We understand that this danger has been causing some concern to the law societies in Victoria and England.

The major argument in favour of variable cover is that many practices (and their clients) will need higher cover than could be required uniformly of all practices

and that not all these practices can be relied upon to take out sufficient cover voluntarily. Cover may be more important to clients than is the premium or deductible, and it can be argued that the scheme should place considerable emphasis on setting cover at appropriate levels for varying circumstances. It can be argued that variation of compulsory cover to meet likely variations between practices in the risk of incurring large claims is obviously desirable and should not be eschewed because no precisely accurate indicators of variations in risk can be found.

In the next section we discuss possible criteria for varying cover. At least in the early years of the scheme, the criterion should be simple. We know of no simple criterion which is likely to be an accurate indicator of the risk of large claims. However, as the scheme develops it may become possible to identify and apply reasonably accurate indicators.

A further justification which is often given for variable cover is that if premiums are uniform, larger practices should be given higher cover because, it is said, experience shows that they have better claims records than smaller practices. Also, large practices are able, and often eager, to accept higher deductibles in return for higher cover at the same premium.

We suggest, however, that there is no need for premiums to be uniform. Indeed, they are not uniform in England or Scotland, and the law societies in Victoria and Queensland have indicated that they will consider introducing differential premiums according to claims experience. If premiums do not need to be uniform, then any adjustment to allow for good claims records or high deductibles can be made by varying premiums rather than cover.

Variable cover may bring additional premium income into the scheme, thus achieving advantages of scale which are particularly valuable in the field of insurance. On the other hand, experience with existing compulsory schemes indicates that much of this additional income will be obtained by the insurer in any event because many practices voluntarily taking out higher cover obtain it from the scheme's insurer. It must be remembered also that with the increased cover would come the danger of the scheme being weakened by very high claims.

(3) Tentative Conclusions

We are inclined to favour uniform cover, at least for the early years of a compulsory scheme. Under a compulsory scheme, uniformity of cover should not be departed from lightly. We suggest that too little is known at this stage about possible variations in the risk of large claims to justify the imposition of variable cover. Furthermore, our investigations suggest that practices for which higher levels of cover are desirable can be expected to obtain adequate cover voluntarily.

In the course of our discussions with insurers and brokers we have found considerable support for, and little opposition to, the notion of uniform cover. We have been informed that close consideration is being given to introducing it in the Victorian and English schemes for solicitors.

III CRITERIA FOR VARIATION BETWEEN PRACTICES

1. Possibilities and Considerations

Although we favour uniform cover, we do not reject variable cover as totally unacceptable. Indeed, we envisage that it may become desirable after some years of experience of a compulsory scheme. In this section we discuss possible criteria for variation if variable cover is introduced either at the outset or later in the history of a compulsory scheme.

Assuming that reinstatement of cover is provided, the predominant consideration in assessing the appropriate level of cover for a particular practice should be the maximum payment likely to arise from a single claim against the practice. The likely frequency, and average size, of successful claims should be reflected in premiums, and perhaps deductibles, rather than in cover.

Possible indicators of likely maximum payment include the size of the practice (whether measured by gross fees, number of principals, number of legal personnel, or total number of personnel), the type of work handled by the practice (for example, conveyancing in relation to major commercial and industrial properties may give rise to huge claims), and the practice's prior record of incurring large, successful claims. Our discussions with insurers indicate that, when fixing a recommended level of cover for a practice, they may consider each of these

factors to varying degrees and perhaps others such as the length of experience of the principals in the practice. As we have mentioned, current Master Policies in Australia and the United Kingdom prescribe minimum cover by reference solely to the number of principals in the practice.

Simple, mathematical criteria for prescribing cover have several attractions under a compulsory scheme, especially if the scheme is of the Master Policy or Mutual Fund type. By reducing the scope for exercise of individual discretion by the managers of the scheme, they may reduce the likelihood of complaints by particular lawyers that they have been discriminated against. Specificity of criteria facilitates evaluation by those responsible for selecting between insurers competing to run the scheme and for subsequent monitoring of the scheme. It also increases the likelihood of getting insurers to join a Master Policy consortium. On the other hand, of course, such criteria can be so rigid as to cause unfairness and unrest among the profession, and in some instances may leave the public without reasonable protection.

If variable cover is to be prescribed under the compulsory scheme, we share the view of those law societies which have negotiated the existing Master Policies that, at least at the outset, the scheme should use a simple, mathematical criterion to prescribe cover.

What should that criterion be? Our investigations suggest four major possibilities:

(i) number of principals;
(ii) number of legal personnel (weighted perhaps according to status in the practice);
(iii) total number of personnel (weighted perhaps according to qualifications and status in the practice);
(iv) amount of gross fees (either actual past fees or estimated future fees).

We turn now to consider various factors relevant to a choice between these possible criteria.

(a) Amount of Work

It may be argued that the greater the volume of legal work handled by a particular practice, the greater the statistical probability of a large claim arising.

Due to wide variations between practices in the ratio between the number of principals and the number of legal personnel in the practice, the former number is a very inaccurate indicator of the amount of legal work done, whether in terms of hours or fees. In some practices the number of principals may be as low as 25% of the number of lawyers in the practice; in others it may be as high as 100%. The criterion also raises difficult questions as to who is a principal. For example, current professional usage of terms such as "consultant", "partner" and "associate partner" is not sufficiently consistent to enable the drawing of firm conclusions as to whether or not they connote status as a principal.

The number of legal personnel (whether principals or employees) may be a good indicator of the amount of work done. It avoids the main disadvantage of gross fees as an indicator namely that some practices may do a considerable amount of work for which they charge no fees or reduced fees. On the other hand, it may be an inaccurate indicator in relation to practices where a considerable amount of income-producing work (such as conveyancing) is performed by non-legal personnel. The latter problem might be reduced by counting all personnel, rather than only those who are legally qualified, though there might then need to be some weighting for the lawyers. Any criterion relying on number of personnel will have to make allowance for people who work only part-time.

(b) Types of Work

Some types of work, such as commercial conveyancing, may be more likely than others to produce large claims. Accordingly, it may be desirable, after some years of experience under a compulsory scheme, to incorporate into the formula for prescribing cover some criterion based on the amount of work of various types handled by the particular practice. For reasons mentioned above, good indicators of the amount of work done of a particular type might be the amount of gross fees obtained from it or the number of legal, and perhaps other, personnel involved in it. The ease and accuracy with which this information could be calculated or estimated might vary considerably between practices.

(c) Indexation

The use of gross fees provides a simple method for keeping cover in pace with inflation. On the other hand, our investigations indicate that insurers may be willing to index cover in some manner or to specify in the policy an annual increase in cover.

(d) Actual or Estimated Fees

If the amount of actual gross fees is to be used as the criterion, it will have to relate to a period prior to that covered by the insurance. This may lead to excessively generous or harsh results where a practice's fees increase or decrease substantially during the insurance period. In most instances, however, any imbalance will be balanced out by a similar imbalance in the next insurance period. Unless the gross fees are independently audited or certified there may be scope for inaccuracy or deception. This scope increases substantially if gross fees are estimated, though the problem of unfairness through reliance on past fees is avoided. Whether actual or estimated gross fees are used, the same data should be used, in the interests of simplicity, for any indexation of cover based on gross fees.

(e) Disclosure of Fees

The argument raised most commonly against the use of gross fees as a criterion for assessing risk is that lawyers may not wish to disclose their fees. The force of this argument, which seems to have weighed heavily with the law societies in England and Victoria, is weakened considerably by the fact that the compulsory Master Policies in Queensland and Tasmania include a provision for indexation of premiums in subsequent years of a triennial policy and this provision depends for its operation upon solicitors confidentially reporting their gross fees to the brokers. In Victoria, a voluntary sample survey of gross fees has been used for a similar indexation provision, but the Law Institute has informed us that in future it proposes to request all practices to report their gross fees to some independent body on a confidential basis. In New South Wales, most insurers, including those under the Law Society's voluntary scheme, request disclosure of gross fees on proposal forms.

(f) Weighting

Difficulties may arise in weighting according to the qualifications or status of personnel, particularly lay staff. For example, in some practices one or more stenographers may do a lot of relatively high-level work which generates considerable income and involves considerable risk of claims; in other practices, stenographers may be more strictly confined to shorthand and typing work.

(g) Statistics

When establishing a scheme, including the fixing of premiums, insurers need to know how much cover they are providing under it. At present, statistics are available as to the number of principals and employed solicitors in New South Wales, but not as to the number (or type) of lay employees of solicitors nor as to the level of gross fees. Accordingly, it may be much easier, at least in the early stages of a compulsory scheme, for insurers to use criteria based on the number of principals or the number of legal personnel rather than on the other factors.

(h) Customs and Opinions

The general consensus among lawyers, brokers and insurers with whom we have discussed these issues is that, save under the Master Policy schemes, insurers do not use the number of principals as the basic criterion for assessing an appropriate level of cover. The consensus was that either the amount of gross fees, the number of legal personnel or the total number of personnel is a better basic criterion, although some consider that in the interests of simplifying the establishment of a compulsory scheme the number of principals should be used at the outset. Often insurers rely primarily on one but take the others into account if they indicate that the practice is markedly atypical in some respect.

(i) Premiums

For reasons given later in this Paper, we sugest that either the amount of gross fees or the number of legal

personnel (without weighting) may be the most desirable single criterion for fixing premiums. The scheme is likely to be simpler in its operation if the same criterion is used for fixing cover and premium.

(j) Solicitors Voluntary Scheme Experience

We have been supplied with some information concerning nineteen out of the twenty-four claims under the Law Society's voluntary scheme which as at the end of 1978 had been settled for, or carried a reserve of, greater than $50,000. The sample is too small to permit firm conclusions, but it is of interest that of these nineteen claims:-

(i) ten involved sole practitioners, six involved practices with 2-4 principals and three involved larger practices;

(ii) thirteen involved city practices, three involved suburban practices and three involved country practices;

(iii) thirteen involved practices with less than 5 legal personnel, three involved practices with 5-10 legal personnel, and three involved practices with more than 10 legal personnel;

(iv) four involved practices with a total number of personnel less than 5, eight involved practices with 5-10 personnel, and seven involved practices with more than 10 personnel.

2. Tentative Conclusions

In the light of those considerations, we suggest that if variable cover is to be prescribed in the early years of a compulsory scheme the basic criterion should be either the amount of gross fees or the number of legal personnel (without weighting). We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

After some years, it may become desirable to take additional criteria into account, such as claims records and types of work. If such factors are to be taken into consideration, we suggest that the policy should then be reasonably specific about the way in which they will be used. It will be important for their use to be monitored closely. Perhaps the policy should lay down limits within which particular factors can affect the minimum cover. For example, it might provide that an adverse claims record could add no more than, say, 50% to the standard minimum cover. However, it will be necessary to leave some discretion with the managers of the scheme, with perhaps some provision for an "appeal" by aggrieved practitioners to an independent committee established for the purpose.

IV AMOUNT OF COVER

1. The Present Situation

How much cover should be required under a compulsory scheme? We look first at the levels of cover presently considered necessary by practitioners in New South Wales and elsewhere.

A survey of solicitors in New South Wales and the Australian Capital Territory indicated that in 1972 the average cover for a sole practitioner was $45,734 and for a four-person partnership, $146,000. The average cover per practice was $131,352. However, it is not known how many practices had cover with reinstatement.

We have been informed by the brokers to the Law Society's voluntary scheme that for the year 1978-9, a typical sole practitioner who was insured had $100,000-$200,000 cover, a typical four-person partnership had $250,000-$500,000, and a typical eight-person partnership had $500,000-$1 million cover. All these figures refer to non-accumulable cover with reinstatement. They are very approximate, of course, but they give a general sense of the cover which practices of various sizes tend to consider appropriate. They indicate total amounts of cover being taken out at a rate of between $60,000 and $125,000 per principal. We have been informed that the very large firms may take out cover equivalent to a rate of $200,000 or more per partner, and that there are some firms in Sydney with $10 million cover. Country firms tend to take less cover than metropolitan firms of comparable size.

The Law Society of New South Wales proposed in 1974, and subsequently in its submissions to us, that the prescribed cover under a compulsory scheme should be $100,000 for sole practitioners and $50,000 per partner, as it is in the existing compulsory Master Policy schemes in Australia. However, since the Law Society first proposed these levels, the Australian economy has experienced inflation of about 70%. It is also relevant to note that, according to the information summarised in the previous paragraph, these levels are significantly below those taken out voluntarily by most practices in New South Wales. Our recent discussions with the Law Society indicate that the Society now favours higher levels of cover than originally proposed.

Our inquiries suggest that in mid-1979 most insured barristers had at least $200,000 cover, with a few having $1 million cover. Subsequently, the New South Wales Bar Association developed a voluntary scheme providing cover ranging from $250,000 to $1,000,000. Under the scheme proposed by the Law Society in Western Australia, practitioners at the separate Bar would be required to have a minimum cover of $50,000.

Overseas comparisons are of limited assistance in this context, but the United Kingdom schemes for solicitors require £50,000 for a sole practitioner and £30,000 per partner. The scheme for Scottish advocates requires cover of £25,000 but some advocates have taken voluntary cover up to £250,000. The Canadian schemes, where cover is uniform for all insured practitioners, prescribe $100,000 (Can.), save in Saskatchewan, where it is $200,000 (Can.).

In assessing the level of cover which should be required under a compulsory scheme, it is obviously important to consider recent claims experience in New South Wales and in other jurisdictions which may be reasonably comparable. In Background Paper - II we set out statistics concerning claims made under the voluntary scheme of the Law Society of New South Wales from the inception of the scheme in 1968 until the end of 1978. The following table summarises the larger amounts which, as at the latter date, had either been paid out in relation to a finalised claim ("Payments") or were the insurers' estimates of the total payment which might be needed to finalise a claim ("Reserves").

NUMBER OF PAYMENTS OR RESERVES

DATE OF CLAIM	AMOUNT OF PAYMENT OR RESERVE			
	$50,000-$100,000		$100,000 or more	
	Payments	Reserves	Payments	Reserves
July 1968-September 1971	-	-	-	-
October 1971-September 1974	1	2	1	1
October 1974-September 1976	1	5	-	3
October 1976-December 1978	-	8	1	1

It should be mentioned that in this type of insurance the reserve figure is often significantly higher than the eventual payment. On the other hand, there have been some instances in New South Wales of the reserve being too low. Also, one would expect to see more of the big claims in the "reserve" rather than "payment" category, because big claims are likely to take longer to finalise.

The vast majority of payments under the New South Wales are small. For example, of the claims made between October 1974 and September 1977 on which, by the end of 1978, final payments had been made or reserves remained, about 80% were less than $1,000 each. Of those where final payments had been made, about 93% were for less than $1,000.

Our discussions with the insurers and brokers handling the great majority of lawyers' indemnity insurance business in New South Wales, and in Australia generally, indicate that payments and reserves exceeding $100,000 are rare but are becoming more frequent. We know of no such instances relating to barristers in divided professions or practitioners in fused professions who have undertaken to practice as barristers only.

We know of several recent instances in Australia of payments, or reserves, between $200,000 and $400,000. We understand that in one such instance under a compulsory scheme the payment exceeded the compulsory minimum cover but the practice had sufficient voluntary excess cover. In Ontario, late in 1977, three claims had reserves of $920,000, $2,400,000 and $3,000,000 respectively. In England early in 1978, after 18 months experience of the compulsory scheme for solicitors, sixty-two claims were reserved at £50,000 or more. Of these, six were reserved at between £250,000 and £500,000, and a further two claims reserved at between £500,000 and £850,000.

A rough estimate, drawn from our discussions and the above statistics, is that at present in New South Wales one might expect up to half-a-dozen claims against solicitors to arise each year which will eventually require payments exceeding $100,000 each. Most of these large payments would be between $100,000 and $200,000. The incidence of large claims, and the size of the highest claims, can be expected to rise steadily in the foreseeable future, even if only due to inflation.

It is most important in prescribing cover to bear in mind that a claim may not be finalised until several years after the date on which it is made. The relevant limit on the insurer's liability is that which was prescribed as at the date of the claim (or, in some United States policies, the date on which the loss occurred) rather than at the date of payment, and thus its real value may have been eroded substantially by inflation.

The general opinion among Australian insurers in this field seems to be that, under voluntary arrangements, if Australian lawyers decide to obtain insurance they usually take sufficient cover. The brokers to the Law Society's voluntary scheme in New South Wales inform us that they have never had a case where the cover was insufficient to meet the loss. We have heard of no more than a handful of instances around Australia in which this was so. Of course, the "long tail" of insurance in this field may mean that some claims which are presently unfinalised will join this handful eventually.

We have been advised that during the first eighteen months of the Master Policy scheme in England there were fourteen instances where the amount of cover was insufficient.

Although the size of premiums should not be decisive as to the appropriate level of cover, it is obviously a material consideration. Later in this Paper we indicate typical premiums, and corresponding cover, under some existing schemes. We have also been supplied with some preliminary, confidential premium quotations which were obtained from brokers by the Law Society after consultations with us.

2. Tentative Conclusion

Against this background, what should be the level or levels of cover prescribed under a compulsory scheme in New South Wales? It would be premature to suggest a precise or firm answer. However, our investigations lead us to the view that the levels of cover prescribed under the existing Australian compulsory schemes may be too low.

If uniform cover is prescribed, it may be desirable for it to be fixed at a level somewhere between $200,000 and $500,000. Even a level within that range will mean that some successful claims are unlikely to be fully covered unless the practices involved have taken out additional voluntary cover.

If variable cover is prescribed, the range may need to start at $200,000. If, as in the existing Australian Master Policy schemes, it varies according to the number of partners, it may need to be about $75,000-$100,000 per partner (subject to the minimum of $200,000). If, as we suggest, it varies according to gross fees or legal personnel, further research will be necessary to determine an appropriate rate per dollar or per person respectively. It will probably be desirable also to specify a ceiling of, say, $2 million to the variable cover required.

We stress that these suggestions on levels of cover are particularly tentative. We give them here as merely a general and approximate indication of our present views.

Such existing Master Policies as have a duration of more than one year provide for indexation of premiums but not of cover. If cover is not based on gross fees, we consider that it should be indexed by reference to gross fees or to some indicator of the rate of inflation in the economy, or that an annual increase should be specified in the policy.

V VOLUNTARY COVER

Under each of the Master Policy schemes, the insurers also offer extra layers of cover, above the compulsory level, for any practice wishing to take it out. Up to a specified maximum, the cover is usually on the same terms and conditions as the compulsory cover but premiums are fixed by the insurers at their discretion rather than in accordance with prescribed criteria. Usually the insurers publish some typical premiums for practices with no adverse claims record.

In our view, this facility for additional voluntary cover is most important, particularly if the compulsory cover is fixed at a uniform level. Those responsible for seeking quotations from insurers wishing to provide the Master Policy scheme should seek indications as to typical premiums which it is proposed to charge for additional cover and should take them into account in deciding between competing insurers.

D. Premiums: Solicitors

I UNIFORM OR VARIABLE

1. Within a Practice

We know of no existing compulsory schemes which vary premiums within a practice. Under the Law Society's present voluntary system in New South Wales, insurers insure practices rather than individual practitioners. They fix premiums for the practice as a whole though, in some instances, the overall figure may be affected by such individual characteristics as length of practising experience.

We do not suggest any variations within a practice, at least at the outset of the scheme. Assuming that the cost of premiums will be borne by the practice as a whole, many possible premium variations (for example, according to type of work handled) can be effected more conveniently, and will be sufficiently apposite, by reference to the characteristics of the practice to which the insured practitioner belongs rather than those of the insured himself or herself.

2. Between Practices

All existing compulsory Master Policy schemes, including the Canadian ones which provide uniform cover, prescribe variable premiums between practices. One reason for variation is that by reason of its volume of work a "typical" large practice may be likely to incur a higher liability for the insurer than a "typical" sole practitioner. This rationale is adopted, in differing ways, by all the existing compulsory schemes. In our view, some variation between practices is clearly desirable. We turn now to consider possible criteria for variation.

II CRITERIA FOR VARIATION BETWEEN PRACTICES

1. The Present Situation

In considering methods for fixing premiums under a compulsory scheme it is necessary and appropriate to have regard to the customs and opinions of experienced insurers and to the methods adopted in the existing compulsory schemes.

Except under compulsory schemes, most insurers in this field in Australia do not fix premiums solely by reference to a rigid mathematical formula, though some do rely substantially on a formula relating to either the level of gross fees, the number of legal personnel or the total number of personnel (sometimes weighted according to qualifications and status). Some insurers also use a formula relating to type of work measured by gross fees; usually the formula increases premiums if the firm concentrates on conveyancing or litigation. Other insurers will advert to these criteria, though they may not use precise formulae.

Among other information sought by many proposal forms, and sometimes taken into account in fixing premiums, is the age of the practice, the qualifications and length of practising experience of the lawyers in the practice, and the nature of office procedures for preventing or remedying errors or omissions. Insurers usually place considerable significance on a practice's claims experience, though they do not necessarily use any mathematical formula for the purpose.

The Bar Association's voluntary scheme provides a standard premium for each barrister which varies only according to the amount of cover sought. Under the Law Society's voluntary scheme, the dominant criteria affecting the premiums in recent years have been the total number of personnel (whether legal or not) and claims experience. In 1977 the Law Society submitted to us that premiums under a compulsory scheme should be based on a solicitor's "previous year's gross fee income, rather than based upon the number of partners or number of partners and employees in the firm" (1977b, p.22). More recently the Society has indicated to us that it now favours using the number of principals, at least in the early stages of a compulsory scheme.

Most Master Policies in Australia and the United Kingdom base premiums primarily on the number of principals in the practice. Each scheme, however, provides that for part-time practitioners premiums vary according to gross fees.

The English scheme commenced with premiums on a per principal basis but after three years the adverse claims record of inner London practices led to them being required to pay a 35% surcharge. A year later, in 1979, the surcharge was reduced to 30%. In addition, variation according to claims experience was introduced. Broadly speaking, the latter variation is based on a comparison of the premiums paid by a practice over the previous three years with the amount paid out during the same period in claims against the practice. Depending on the percentage amount by which the claims paid exceed the premiums collected, a loading is placed on the premium for the following year. The amount of loading can be seen from the following table:-

Excess of Claims over Premiums	Premium Loading
Less than 100%	Nil
100-199%	20%
200-299%	30%
300-399%	40%
400% or more	50%

The Law Society in England is currently considering whether premiums should be based primarily on gross fees.

In Scotland, the solicitors' Master Policy scheme has a flexible premium structure. So far as we are aware, the precise formula has not been disclosed generally by the insurers but apparently it is based on the number of principals and the total number of other personnel. "Typical" premiums have been published and they indicate that the rate per person in each of the two categories (namely principals and other personnel) decreases as the overall number of personnel increases. In other words, larger practices pay lower premiums per capita. In addition, the insurers have power to add up to 150% to a practice's premium if it has a poor claims record. The scheme enables practitioners to appeal to a committee against the premium set for them by the insurers. The committee comprises representatives of the Law Society, insurers and brokers.

In Canada, the Master Policy schemes charge each practitioner (whether principal or employee) a uniform premium. In effect, this means that the total premium paid by a practice varies according to the number of legal personnel in it.

Some people closely involved in the creation of the compulsory Master Policy schemes, at least in England and Victoria, considered that the level of gross fees is a more appropriate criterion than the number of principals for fixing premiums. Indeed, the Law Institute of Victoria favoured gross fees until fairly late in the planning stage. However, that criterion was eventually rejected, mainly because it was believed by leaders of the profession that practitioners might be reluctant to disclose information concerning their fees and, perhaps, that compulsory disclosure would aggravate antipathy to the basic concept of a compulsory Master Policy scheme. Also, at least in England, it was felt that a compulsory scheme should not be introduced without the approval of the profession and that, before being asked to approve, practitioners were entitled to know the premium they would have to pay. Without statistics about the total gross fees of the profession it was impossible for the Law Society to estimate the requisite rate per pound of gross fees and thus enable practitioners to calculate their own premium. It was felt that any attempt to obtain such statistics would cause too much delay in the commencement of the scheme.

At one stage of planning the Law Institute in Victoria intended that its scheme would vary premiums according to the particular practice's mixture (measured by gross fees) of litigious work and non-litigious work. The premium for the former was to be 2/3rds higher. This distinction arose from the Law Institute's discussions with Victorian insurers about their claims experience but the Institute did not obtain any statistical information. When it was decided not to base premiums on gross fees, this proposal lapsed.

2. Possibilities and Considerations

We have mentioned earlier, in discussing variation of cover, our reasons for favouring simple, mathematical criteria at least at the outset of a compulsory scheme. Broadly speaking, similar reasons apply to variation of premiums. However, the Scottish solicitors' scheme was accepted by the profession and appears to be working satisfactorily despite the insurers having considerable discretion under the Master Policy in relation to premium-fixing.

On balance, we favour a simple and specific formula for determining premiums in the first few years of the scheme. Several possibilities emerge from the previous summary of methods in current use:-

(i) number of principals;
(ii) number of legal personnel (weighted perhaps according to status in the practice);
(iii) total number of personnel (weighted perhaps according to qualifications and status in the practice);
(iv) amount of gross fees (either actual past fees or estimated future fees);
(v) claims experience.

We turn now to consider various factors relevant to a choice between these possible criteria.

(a) Amount of Work

A practice's premium should reflect that practice's likely cost to the insurance scheme, whether the cost arises through compensation payments or through legal and administrative expenses incurred in processing or defending

claims. Accordingly, the likely size and frequency of claims against the practice should be the most important factors in fixing premiums. In turn, it may be argued that these factors are likely to be affected by the amount of work handled by a particular practice. We have given our reasons earlier for suggesting that the number of legal personnel, the total number of personnel or the amount of gross fees may be good indicators of amount of work, though gross fees may not be accurate for practices which do a considerable amount of work for which they charge no fees or reduced fees. We also explained why we regard the number of principals as a less satisfactory indicator.

(b) Comments on Cover

Several other comments in our discussion on variation of cover are relevant also in this context, namely those relating to using type of work as a criterion, indexation, the use of actual or estimated gross fees, disclosure of gross fees, weighting personnel according to qualifications or status, the need for statistics in establishing a scheme and the advantages of basing cover and premium on the same criterion.

(c) Sliding Scales

It may be argued that premiums should be on a sliding scale so that practices with higher gross fees, or more personnel, pay at a lower rate per dollar of fees or per person. Such a sliding scale might be justified if the scheme requires larger practices to take out higher cover. It is generally accepted among insurers that higher layers of cover should be provided at a cheaper rate per dollar than lower layers. A sliding scale might also be justified if the scheme required higher deductibles for the larger practices (see section E of this chapter). Another justification might arise if it could be shown that larger practices have a substantially superior claims record. However, unless and until the benefit of good individual claims records is available to all practices which have them, a very strong case needs to be made before giving the benefits to one category, namely large practices, can be justified.

(d) Claims Experience

Many practitioners and insurers are eager for practices' claims experience to be taken into account when fixing their premiums. Some law societies, when setting up a Master Policy scheme, have said that they hope to take claims experience into account after their schemes have been operating for a few years. The English and Scottish schemes do so already.

There can be no doubt that claims experience is a valuable indicator of risk and, thus, of appropriate premium levels. However, several problems can arise in using them.

Firstly, there are major difficulties in collecting and comparing claims records under varying policies held with different insurers prior to the commencement of the compulsory scheme. Secondly, there may be considerable opposition from some lawyers to having to disclose claims records relating to periods before the scheme started; other lawyers will object if their records for such periods are not taken into account. Thirdly, if it is decided that records prior to the scheme should be ignored, it will be several years before records of any significance accumulate. Claims in this area of insurance often take a long time to be finalised, and, generally speaking, claims should not be taken into account unless they have been finalised.

The difficulties mentioned loom larger in the first few years of the scheme than after the scheme has been established for some time.

(e) Customs and Opinions

The general consensus among lawyers, brokers and insurers with whom we discussed these issues was that either the amount of gross fees, the number of legal personnel or the total number of personnel is fairer than the number of principals as a basic criterion for fixing premiums. Some, however, considered that in order to facilitate the establishment of a compulsory scheme the number of principals should be used in the early years. Save under Master Policy schemes, insurers often have regard to several of these criteria.

3. Tentative Conclusions

We suggest that at the outset of a compulsory scheme, premiums should be based on either the amount of gross fees or the number of legal personnel. We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

We suggest that a firm commitment should be made to introduce claims experience as an additional criterion within 3-5 years of the commencement of the scheme.

Several other factors may prove to be valuable and practicable as additional criteria for fixing premiums. Examples include a practice's various types of work, its geographical location, its office procedures, and the length of experience of its lawyers. However, despite the experience gained through the Law Society's voluntary scheme, there may be insufficient information available at present to enable these criteria to be used without causing great and justifiable dissatisfaction among some sectors of the profession. Furthermore, there is a limit to the complexities which should be built into the scheme at the outset.

Accordingly, we suggest that these criteria should not be introduced immediately but that active consideration, supported by monitoring and statistical analysis of the operation of the scheme, should be given to their introduction after a few years. If and when they are introduced, it may be preferable to leave some discretion in the hands of the insurers rather than to prescribe rigid rules. However, we suggest that exercise of the discretion should be monitored and should be confined within prescribed limits. For example, the insurers might be permitted to add up to a prescribed percentage to the basic premium, according to a particular firm's mixture of types of work.

It is usual for Master Policy schemes to provide reduced premiums for part-time practitioners and to base the reductions on gross fees. This approach seems generally desirable. The Victorian scheme provides reductions which, for gross fees below $5,000, are more generous than in Queensland and may merit adoption in New South Wales.

III AMOUNT OF PREMIUM

Comparisons between premium levels under various insurance schemes can be misleading, particularly if there are considerable differences between the cover provided. However, the following table indicates typical premium levels, and the corresponding cover and deductible, applying to sole practitioners late in 1979. In Queensland, Victoria and England, the premiums shown (but not the cover and deductibles) are also the premiums per principal in a firm.

	SOLE PRACTITIONER		
SCHEME	Cover	Deductible	Premium
SOLICITORS			
New South Wales Voluntary	$100,000 (abc)	$2,000	$520 (d)
Ontario Compulsory	$80,000 (f)	$3,800 (f)	$520 (f) (+ $520 per employed lawyer)
Queensland Compulsory	$100,000 (ab)	$1,000	$522
Victoria Compulsory	$100,000 (a)	$1,000	$558
Scotland Compulsory	$150,000 (f)	$950 (f)	$800 (df)
England Compulsory	$100,000 (f)	$800 (f)	$1,770 (ef) $1,360

SCHEME	SOLE PRACTITIONER		
	Cover	Deductible	Premium
BARRISTERS			
New South Wales Voluntary	$250,000 (a)	$1,000	$200
Scotland Compulsory	$50,000 (f)	(h)	$60 (f)
BARRISTERS AND SOLICITORS			
Western Australia Compulsory (Law Society Proposal)			
- Barristers only	$50,000	$1,000	$100
- Other Practitioners	$100,000	$1,000	$440
OTHER PROFESSIONS			
New South Wales Accountants Voluntary	$100,000 (abc)	$1,000	$300
South Australia Land Brokers Compulsory	$100,000 (ab)	$1,000	$550 (g)

NOTES:
a. Cover for Partners' Dishonesty not included.
b. Cover for Employees' Dishonesty not included.
c. Automatic Reinstatement not included.
d. Premium increases with higher number of total staff.

e. Higher premium applies to Inner London Area only.
f. Approximate rounded conversions from original currency.
g. The scheme bases premiums on gross fees. This premium is for gross fees of $50,000.
h. Information not available.

In addition to this information, we have been provided by the Law Society of New South Wales with preliminary confidential quotations which it obtained from insurers late in 1979. Broadly speaking, these quotations were for uniform cover at various levels between $100,000 and $500,000 and for variable cover at $100,000 or $150,000 per principal.

We do not intend to express a precise view as to an appropriate level of premiums. However, in the light of levels elsewhere and of the recent confidential quotations obtained by the Law Society, we suggest that if a compulsory scheme for solicitors is established in the near future and premiums are based on the number of principals, an appropriate level per principal would lie between $700 and $1,000 per annum. At present this would produce an overall premium income of approximately $2-$3.5 million if the scheme applied to principal solicitors in private practice in New South Wales. If, as we have suggested, premiums should be based on gross fees or number of legal personnel, the premium rate per dollar or per person should be such as to produce an overall premium income of similar size to that suggested above. In assessing a reasonable level for premiums it must be borne in mind that they will be tax deductible for the practitioners by whom they are paid.

E. Deductible: Solicitors

I THE PRESENT SITUATION

Under the present voluntary scheme of the Law Society of New South Wales, no insured practitioner is covered for the first $2,000 of any successful claim made under the policy. For practices with higher numbers of staff the size of this deductible (or excess, as it is sometimes called) increases to $5,000 or $10,000. We have

been informed by the scheme's broker that practices can arrange higher deductibles in exchange for a lower premium but that they rarely do so. The Bar Association's voluntary scheme provides a uniform deductible of $1,000.

In setting deductibles, other Australian voluntary policies adopt methods which are broadly similar to those of the New South Wales voluntary schemes, though there may be differences as to the amount of the basic deductible and as to the relationship between the deductible and the premium. However,some years ago in Australia, one leading insurer's policy fixed the deductible as a percentage of the total payment made on the claim. This method is common in the United States but not in Australia at present.

The Australian and United Kingdom statutory schemes impose variable deductibles according to the number of principals. For example, under the Victorian scheme the deductible is $1,000 per principal, so that a five-partner practice will not be covered for the first $5,000 of any successful claim. The schemes usually prescribe a ceiling of, say, $5,000 or $10,000 to this variation. We understand that the United Kingdom statutory schemes permit practices to elect to pay higher premiums in return for a lower deductible, but do not permit deductibles to be increased by paying lower premiums. Generally speaking, the Canadian Master Policies prescribe a uniform deductible per practice, though the amount varies between provinces within a range of $1,000-$5,000.

II POSSIBILITIES AND CONSIDERATIONS

Deductibles have several purposes. They are intended to act as a deterrent to negligence and to encourage lawyers to meet small losses themselves rather than make a claim on the insurers with all the attendant administrative and, perhaps, legal expenses. By reducing the insurer's outgoings, deductibles help to keep down the general level of premiums and to preserve the insurance fund for the larger claims which a practitioner cannot be expected, or relied upon, to meet from his or her own resources.

Deductibles must be set at a level high enough to have the benefits we have mentioned, yet low enough to preserve adequate insurance protection for both insured lawyers and their clients. If deductibles are too high, some lawyers may be unable to meet them. We have been informed of one instance in Australia where a practice

was unable to meet a deductible of $500. Also, lawyers may conceal from their clients those mistakes for which the lawyers will have to pay from their own resources, or they may be unjustifiably obstructive in response to claims arising from these mistakes. Thus, many significant advantages of an insurance scheme may be lost if, by setting high deductibles, it requires lawyers to bear too much of the cost of their own mistakes.

Some of the disadvantages of high deductibles might be reduced if, where the client's loss exceeds the deductible, the insurer was made responsible for collecting the deductible from the practitioner. The insurer would be required to pay the deductible to the client (or other person who suffered loss) whether or not it had been obtained by the insurer from the practitioner.

Of course, insurers may be reluctant to accept a responsibility to collect deductibles and certainly can be expected to increase premiums to compensate for such a responsibility. However, we understand that in the Victorian scheme the claims-handling body makes payments direct to clients, rather than practitioners, and seeks to collect deductibles and include them in these payments.

Should deductibles be uniform or variable? There are several arguments in favour of prescribing higher deductibles for larger practices (whether size of practice is measured by gross fees, number of principals, or number of personnel).

Firstly, the larger practices may be more able to absorb high deductibles without creating risks of bankruptcy for the partners and inadequate compensation for the aggrieved client. Some large practices prefer to have high deductibles in return for reduced premiums. It is unclear which of the measures of size of practice is the best basic indicator of ability to absorb high deductibles, though the number of principals is obviously relevant to the prospects of successful recourse to personal assets.

Secondly, it may be argued that a deductible of, say, $2,000 has much less deterrent effect when spread among, say, twenty partners in a firm than when borne entirely by a sole practitioner. There may be some truth in this, although it must be remembered that, at least in theory, the larger firm will incur more claims and therefore have to bear more deductibles.

Thirdly, it may be argued that deductibles should bear a relationship to the size of the claim. We consider the merits of this argument below, but if it is accepted, one way of implementing it to some extent might be to require higher deductibles of those practices likely to incur large claims. We have mentioned earlier, in discussing cover, the argument that there is a correlation between size of practice and the likelihood of large claims.

Another possible criterion for varying deductibles is to vary them according to the size of claim. The variation would need to be confined between a lower limit necessary to avoid small claims on the scheme and an upper limit demanded by the need to protect both client and lawyer. The main advantages of this method are that it reduces the drain on the fund from large claims and perhaps increases the deterrent effect. On the other hand, pursuit of these aims must not be allowed seriously to erode the protection provided by insurance. If the maximum is set low enough to provide protection for a practice (and its clients) having few resources, it may be much lower than is an appropriate deterrent for a practice with very substantial resources and will do little to reduce the scheme's liability for large claims.

Deductibles might be varied according to the amount of cover. In 1978 the Law Society submitted to us that the deductible "should not be more than 1% of the sum insured, with a minimum of $1,000 and a maximum of $10,000" (1978, p.8). As the Society favours varying the required cover in accordance with the number of principals in the firm, this proposal means that the deductibles also would vary in accordance with the number of principals. More recently the Law Society has indicated to us that it favours variation on a per principal basis between $2,000 and $10,000.

Other possibilities are to permit practitioners to opt for higher deductibles in return for reduced premiums, or for lower deductibles in return for increased premiums. We see no objection to the latter possibility, but there may be insufficient demand to justify its inclusion. The former possibility creates the danger that some practitioners may choose deductibles which, if the occasion for payment arises, they are unwilling or unable to pay. This danger might be reduced if the scope for optional variation was restricted, and was determined by some criterion (perhaps relating to size of practice) relevant to the practitioner's capacity to pay higher deductibles.

III TENTATIVE CONCLUSIONS

At present, we are not convinced that any indicator of ability to bear higher deductibles is sufficiently accurate to justify its use in prescribing a wide range of deductibles. Since protection for clients must remain a major goal, we do not favour deductibles being permitted to exceed about $10,000 for any practice and for very small practices we do not favour deductibles greater than about $1,000 or so. We suggest the following three possibilities as acceptable:-

(i) A uniform deductible per practice of, say, $1,000.

(ii) Variable deductibles ranging from, say, $1,000 to $10,000 per practice. Either the level of gross fees, the number of principals, or the number of legal personnel would be an appropriate criterion for variation in this context. Given the relatively restricted range of variation which we have suggested, the best course may be to promote simplicity by using whichever of these criteria, if any, is used for varying premiums.

(iii) Deductibles under either (i) or (ii), at the option of the practice at the commencement of the insurance period.

As with cover and premiums, though perhaps to a lesser extent, it may be desirable eventually to introduce variations in deductible according to criteria such as claims experience, type of work, length of professional experience and so on. In British Columbia, for example, the deductible for most types of claim is $3,000 but for claims arising from missed limitation periods concerning automobile accidents it has been increased to $10,000. However, we consider that, due primarily to the dearth of relevant information and the need to commence the compulsory scheme on a relatively simple basis, these variations should not be considered for introduction at the outset of the scheme.

We suggest that the scheme should require insurers to make payments directly to those who have suffered the loss and without subtracting the deductible. It would be up to the insurer to reimburse himself by collecting the deductible from the insured practitioner.

F. Fraudulent Claims

The Victorian solicitors' scheme, like most other Master Policy schemes, provides that if the insured practitioner makes any claim which he knows to be "false or fraudulent as regards amount or otherwise this insurance shall become void and all claims hereunder shall be forfeited" (Certificate of Insurance, cl.4(f)).

In our view it is unreasonable to deny protection to a client (or other person suffering damage) who was not party to the lawyer's fraud. We suggest that the policy should provide this protection by subrogating such clients or other people to the rights which their lawyers would have had under the policy but for the fraud. This should apply to the fraudulent claim itself, as well as to non-fraudulent claims by the same lawyer.

G. Other Terms

We have indicated earlier that, save to the extent specifically suggested in this Paper, we favour adoption of the terms of the Victorian solicitors' scheme. Those terms appear in Appendix III to this Paper but we mention here some which we regard as particularly important.

1. Avoidance of Liability by the Insurer

Subject to clause 4(f), concerning fraudulent claims, "the insurers will not seek to avoid, repudiate or rescind this insurance upon any ground whatsoever, including in particular non-disclosure or misrepresentation" (Certificate of Insurance, cl.3(a)). Our endorsement of this term is subject to our comments above about clause 4(f).

"Where the Assured's breach of or non-compliance with any condition of this Insurance has resulted in substantial prejudice to the handling or settlement of any claim against the Assured or the Firm in respect of which the Assured is insured hereunder the Assured shall reimburse to the Insurer the difference between the sum payable by the Insurers in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that they shall have fully indemnified the Assured in accordance with the terms hereof" (cl.3(b)).

2. Proceedings to Defend Claims

"Neither the Assured nor his Firm nor the Insurers shall be required to contest any legal proceedings unless a Queens Counsel (to be mutually agreed upon by the Assured and the Insurers or failing agreement to be appointed by the President of the Law Institute for the time being) shall advise that such proceedings should be contested" (cl.4(a)(ii)).

3. Actions Against Employees

"The Insurers waive any rights of subrogation against any employee of the Assured save where those rights arise in connection with a dishonest or criminal act by that employee" (cl.4(c)).

4. Former Practitioners

"In respect of former solicitors (which expression in this Policy and in the Certificate attached hereto shall include solicitors who have ceased by reason of death, retirement or otherwise, to practise as principals in private practice, and their personal representatives) certificates need not be issued and no premium shall be payable. A former solicitor who has at any time been insured hereunder (or whose successors in business have at any time been insured hereunder) shall be entitled to be indemnified by the Insurers in respect of any claim or claims first made against him during the currency of this Policy, as if a Certificate in the terms attached hereto had been issued to him hereunder and as if there were specified in the Schedule to such Certificate (a) as the Period of Insurance the period during which this Policy shall be in force, and (b) as the Sum Insured the sum of $100,000 if he was practising alone immediately before he ceased so to practise and in any other case, the sum of $50,000 multiplied by the number of members immediately before he ceased so to practise in the partnership in which he last so practised." (Master Policy, cl.5)

Our endorsement of this term is subject to our earlier general suggestions about variation and level of premiums. It should be applied also to former barristers.

5. Arbitration

Generally speaking, "any dispute or disagreement between the Assured and the Insurers arising out of or in connexion with this insurance shall at the request of either of them be referred to the sole arbitrament of a person to be appointed (failing agreement between them) by the President of the Law Institute for the time being whose decision shall be final and binding upon both parties" (Certificate of Insurance, cl.4(e)).

We are inclined to regard this clause as beneficial, although not essential, for reducing dispute, delay and expense. However, in this State, by virtue of section 19 of the Insurance Act 1902 (N.S.W) it would not be binding on the insured unless given overriding statutory force. Under an insurance scheme that is controlled to the extent we have suggested, and in which those insured are legal practitioners, we do not consider that the mischief at which section 19 was aimed is likely to arise. Accordingly, it may be appropriate to override the section in this instance.

H. Summary

In this chapter, we have suggested that, generally speaking, policy terms required under the scheme should be similar to those in the present Victorian solicitors' scheme. However, on a number of matters we make comments or suggest variations on the Victorian scheme. We summarise below some of the more important comments or suggestions.

I TYPE OF CLAIM

(a) The policy should cover any description of civil liability arising from a specified range of work.

(b) The question of the range of work which should be specified is a complex one which needs to be considered in conjunction with similar questions arising in other contexts, such as practising certificates and the Fidelity Fund. We shall return to this problem when considering these other areas in later Discussion Papers. If a compulsory scheme for solicitors is established in the meantime, we suggest that the specification in the present Victorian scheme would be acceptable for use at the commencement of the scheme. Broadly speaking, that specification covers

work in connection with the business of practising as a solicitor (including acceptance of obligations as trustee, executor, attorney-under-power, tax agent or as a company director).

(c) We suggest that if a compulsory scheme for solicitors is established in the near future it should commence without cover for liability arising out of dishonesty and that the situation should be reviewed in the light of developments over the next year or so. Major factors in this review should be whether there has been an increase in the proportion of the income of the Fidelity Fund which comes from the profession and whether the ambit of the Fund has been extended. In the light of the review, it may become desirable to provide dishonesty cover, at least for dishonesty by partners or employees, under the insurance scheme. Dishonesty by barristers or their employees should be dealt with by compulsory insurance or the Fund, but a decision as to the most appropriate system should be delayed so that it can be made in the context of other decisions affecting the Fidelity Fund and the division of the profession.

II COVER: SOLICITORS

In relation to cover, premium and deductibles, our suggestions in this Paper are confined to compulsory insurance for solicitors. It would be premature to make any suggestions in relation to barristers on these issues until there has been further discussion on the general subject of the division of the profession.

(a) The required level of cover should be uniform within, and between, practices, at least during the early years of the scheme.

(b) If, however, variable cover between practices is prescribed in the early years of a compulsory scheme the basic criterion should be either the amount of gross fees or the number of legal personnel (without weighting). We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

(c) Experience under the scheme may indicate the desirability of using other, or additional criteria for varying cover, such as type of work or claims experience.

(d) Unless cover is based on gross fees, it should be indexed, or regularly adjusted by some other means, to reflect inflation or other changes in the profession's overall income.

(e) The full level of cover should be available for each claim.

(f) We do not suggest precisely what amount of cover should be required. However, if a compulsory scheme for solicitors is established in the near future and cover under it is to be uniform, an appropriate level may be somewhere between $200,000 and $500,000. If cover for such a scheme is varied according to number of principals, it may be desirable to start at $200,000, increasing at $75,000-$100,000 per principal. Cover of similar magnitude should be required if, as we suggest, variation should be by gross fees or number of legal personnel, rather than number of principals.

(g) In choosing between competing insurers, attention should be paid to the terms upon which they offer voluntary excess layers of cover.

III PREMIUMS: SOLICITORS

(a) At least at the commencement of the scheme, premiums should not vary within a practice.

(b) Premiums should be variable between practices and at the outset of the scheme should be based on either the amount of gross fees or the number of legal personnel. We are not necessarily opposed to a criterion based on the total number of personnel (with weighting for qualifications and status) but we do not favour the number of principals as the basic criterion.

(c) A firm commitment should be made to introduce claims experience as an additional criterion within 3-5 years of the commencement of the scheme.

(d) After several years' experience under the scheme, other factors may prove to be valuable and practicable as additional criteria for fixing premiums. Examples include a practice's various types of work, its geographical location, and its administrative procedures.

(e) We do not suggest precisely what level of premiums would be appropriate. However, we suggest that, if a compulsory scheme for solicitors is established in the near future, a reasonable level at the outset might be somewhere between $700 and $1,000 per principal, or an equivalent level if premiums are varied on some basis other than number of principals.

IV DEDUCTIBLES: SOLICITORS

(a) Three alternative methods are acceptable for prescribing deductibles, namely:-

(i) a uniform deductible per practice of, say, $1,000;

(ii) variable deductibles ranging from, say, $1,000 to $10,000 per practice;

(iii) deductibles under either (i) or (ii), at the option of the practice at the commencement of the insurance period.

(b) Either the level of gross fees, the number of principals or the number of legal personnel would be an appropriate criterion for variation of deductibles. Given the relatively restricted range of variation which we have suggested, the best course may be to promote simplicity by using whichever of these criteria, if any, is used for varying premiums.

(c) Experience under the scheme may indicate the desirability of using other, or additional, criteria for varying deductibles, such as claims record or type of work.

(d) The insurer should be required to make payments directly to the client, without subtracting the deductible. It would be responsible for reimbursing itself by collecting the deductible from the practitioner.

Chapter 5

Control And Management

Having discussed some of the issues which arise in formulating and operating a compulsory insurance scheme, we turn now to consider who should have the power and responsibility to decide such issues, that is, to control and manage the scheme.

A. Existing Systems

I STATUTORY SCHEMES

1. Establishment

Two slightly different approaches have been adopted in the establishment of the statutory schemes in Australia and the United Kingdom. They can be illustrated by reference to Queensland and Victoria.

(a) In Victoria, the first stage was the passage of an amendment to the Legal Profession Practice Act 1958, enabling the Law Institute to enter into an arrangement with insurers to provide solicitors with professional indemnity insurance. The amendment also enabled the Governor, on the recommendation of the Council of the Law Institute, to make statutory rules requiring solicitors, or certain categories of solicitors, to take out insurance in accordance with the arrangement made by the Law Institute.

The second stage was the exercise of this rule-making power to make the Indemnity Insurance Regulations 1978 which required all principals in private practice to obtain insurance under a Master Policy, the terms of which were set out in a schedule to the regulations.

(b) In Queensland, an amendment to the Queensland Law Society Act 1952 empowered the Society to make Indemnity Rules, subject to the approval of the Governor. The amendment enabled the rules to create an Approved Policies, Master Policy or Mutual Fund scheme, or a combination thereof, and to require solicitors to obtain insurance under the scheme.

The Indemnity Rules authorised the Law Society to enter into a Master Policy (the terms of which were set out in a schedule to the rules) and required all principals in private practice to have insurance under the policy.

2. Control and Management

Parliament and Government controlled the creation of each of the existing statutory schemes. However, subsequent control and management is left in the hands of the Law Society and the scheme's brokers and insurers, subject, of course, to amendments to the Act or Regulations.

Each scheme gives the Law Society an important role in control and management. The usual practice in the insurance industry is for claims to be notified by the insured to his broker who then negotiates payment with the insurer. The insurer has the sole right to decide whether any, and, if so, how much, payment will be offered in settlement of the claim. Claims are confidential to the insured, the broker and the insurer. However, the Victorian scheme, and the other statutory schemes in Australia and the United Kingdom, vary these traditional arrangements in the following respects.

(1) Claims-handling

Under each scheme, the Law Society, the brokers and the insurers agreed to establish a special body to receive and handle claims. In some instances the body operates from Law Society premises and has a very close administrative link with the Society.

In addition, under each scheme there is a Claims (or Claims-handling) Committee, comprising representatives of the Law Society and of either the insurers or brokers or both . The Law Society representatives are a majority on the Committee and are usually experts drawn from a range of different types of legal work such as conveyancing and litigation.

All claims are received by the special body. It investigates them and forms an opinion as to whether they should be rejected, settled or litigated. It may also take action, or suggest that the insured practitioner takes action, to remedy the situation or to reduce the loss which has been caused.

The body is subject to varying degrees of control by the Claims Committee and insurer. In some instances, for example, the body may be empowered to settle small claims, but usually it is necessary to obtain the approval of the Claims Committee or the insurers.

The Committee's roles are broadly similar to those of the special body, but they are more of a supervisory or advisory nature. In Victoria (as in Ontario and British Columbia) the Committee can bring a particular practitioner to the attention of the disciplinary authorities if it considers that his or her claims record warrants it. Such action cannot be taken under the other schemes. We return to this point later in the Paper.

The Society and the insurers usually choose a panel of private practitioners to whom, where appropriate, claims may be referred for handling. This is likely to occur with claims which are particularly lengthy or complex or which may lead to litigation.

(2) Monitoring

Under most schemes the Claims Committee also operates as a Monitoring Committee. In Victoria the committees are theoretically separate, though all members of the former Committee belong to, and form a majority of, the latter.

The nature of the monitoring role is not clearly defined and varies between schemes. Broadly speaking, the monitoring role in the Australian schemes is to keep the operation of the scheme under review, to advise the Council of the Law Society about the scheme and to recommend or implement general preventive or educative programmes.

II OTHER SCHEMES

We have mentioned earlier two compulsory schemes, in Tasmania and Scotland, which have been established on a non-statutory basis.

In Tasmania, the Law Society uses its statutory power over the issuance of practising certificates to require indemnity insurance of all principals in private practice. There is no specific statutory basis for this requirement. The scheme is an Approved Policies type and

the Society has no involvement with claims-handling. It does little in the way of statistical or other monitoring. A statutory Master Policy scheme is due to be established in 1980.

In Scotland, the Faculty of Advocates requires all its members to obtain indemnity insurance under a Master Policy negotiated by the Faculty. The Faculty is a private organisation but, in effect, the Court has delegated to it the power to determine qualifications for admission as an advocate (i.e. barrister) and all advocates are members of the Faculty. We understand that the Faculty expects to play little role in claims-handling or monitoring but that no claims have yet been made under the scheme. Apparently it is expected that individual claims could come to the attention of the Dean of the Faculty for consideration of disciplinary action.

The present voluntary scheme for solicitors in New South Wales was negotiated by the Law Society and the Society receives from the insurers general statistical information as to the nature and size of claims and the corresponding reserves and payments. Its pressure on insurers has been successful in extracting fuller statistics than are available in relation to voluntary schemes elsewhere, but they have been used primarily for negotiating new schemes rather than to identify needs for preventive, educative or disciplinary measures.

In mid-1979 the Society established an Insurance Advisory Panel comprising "six solicitors with a wide range of expertise, its primary purpose being to provide a service to the solicitor against whom a professional negligence claim has been made and who consents to the panel assisting" (1979d, p.1). If the solicitor does not consent, the panel may nevertheless assist the insurer to handle the claim but the solicitor's identity will not be disclosed to it. The panel is also to "assemble data concerning claims and danger areas" to "keep members of the Society informed as to danger areas" (p.1).

The Society imposed a "continuing obligation of confidentiality" on the members of the panel and "subject only to the requirements of law ... relieved them from any ethical requirement to report unbefitting conduct on the part of a solicitor to any disciplinary committee" (p.1).

The Bar Association recently negotiated a voluntary Master Policy scheme. It is too early to say what role, if any, the Association will play in claims-handling and monitoring.

B. A Suggested System

We suggest that the Legal Practitioners Act should be amended to enable the making of regulations concerning indemnity insurance for legal practitioners. The regulations should be enabled to specify categories of practitioners who must obtain insurance and the terms upon which the insurance must be obtained.

We suggest that the power to make regulations should not be vested in the Law Society or Bar Association. Our reasons may be summarised as follows.

In our Discussion Paper on General Regulation, we considered at length the need for substantial representation of the public interest on the body having general regulatory powers over the profession. We shall not repeat that discussion here, but the arguments in favour of public interest representation apply with considerable force in this field of insurance. The creation and operation of compulsory insurance schemes have substantial impact on the public. This is true not only of broad principles but also of the fine detail of policies and the precise manner in which insurers, brokers and others involved in the administration of the scheme exercise the discretionary powers vested in them. We have given many examples in earlier sections of this Paper but obvious instances are the criteria used to fix cover and deductibles.

Parliament cannot, nor should it, be expected to take responsibility for protecting the public interest at this detailed level. The Government may be able to do so but for reasons given in General Regulation a more suitable body would be a body such as the Legal Profession Council, which we have suggested in that Paper should be established to exercise general regulatory powers over the profession.

Of course, the legal profession as a whole, and individual members of it, have a very substantial interest in the operation of a compulsory insurance scheme. Decisions as to minimum cover, premiums, breadth of cover, disclosure to disciplinary authorities and so on can affect practitioners' expenditure, and can have substantial impact

on the way they conduct their practice or indeed on whether they practise at all. Decisions which are beneficial to one practitioner or type of practitioner (such as barristers, country practitioners, or partners in large firms) may be very detrimental to another. The Legal Profession Council which we have suggested as appropriate for general regulation of the profession would be constituted so as to be responsive to the interests of the profession and its various members, both generally and in relation to compulsory insurance.

The need for adequate representation of various public and professional interests on the body controlling the scheme will be even greater if, as we and many practitioners expect, it becomes desirable to increase the scope for discretion in the fixing of minimum cover, premiums and deductibles. The need will also be accentuated if barristers and solicitors are under the same scheme.

For these reasons, we consider that overall control of a compulsory indemnity insurance scheme, including the power to make regulations (subject to Government approval), should be vested in a body such as the Legal Profession Council. Although this body should retain general control of the scheme, it will need to delegate many detailed aspects of these tasks to an Insurance Committee. Such a committee need not consist solely of members of the body but it should be selected by it and should comprise substantial public interest representation. This Committee should bear primary responsibility for closely monitoring the scheme and keeping the regulations under review. It should be represented on the scheme's Claims Committee.

In our view, professional associations should play a prominent role in the conduct of the scheme. Certainly they should be closely involved in negotiations with insurers and brokers over policy terms, claims-handling arrangements and other such matters. It may well be appropriate for their representatives to comprise the majority of the Claims Committee. If the scheme is wholly or partially a Mutual Fund, it may be desirable for one or more professional associations to establish and manage the Fund, subject to overall control by the Legal Profession Council.

C. Interim and Alternative Systems

It is possible that our final Report will not recommend the creation of a body such as the Legal Profession Council. It is also possible that we shall recommend its creation but that Government or Parliament will not adopt our proposal. If a body such as the Council is established it is most unlikely to commence operations before 1981 or 1982.

In the meantime, it is desirable to establish a compulsory scheme, at least for solicitors, and the Law Society is anxious to do so. We suggest the following interim system.

(i) Section 87(1) of the Legal Practitioners Act should be amended to enable the Government to make regulations establishing a compulsory insurance scheme for practitioners and specifying the required terms of insurance.

(ii) The regulations should establish a compulsory scheme for solicitors which, subject to the regulations, should be established, controlled and managed by agreement between the Law Society and insurers and brokers.

(iii) The scheme should have a Claims Committee and a Monitoring Committee, with compositions and roles similar to those under the Victorian scheme. However, in order to provide some safeguard for the public interest, the regulations should enable the Attorney-General to nominate a representative on the Monitoring Committee.

If a body such as the Legal Profession Council has not been established by the time the compulsory solicitors' scheme comes up for renewal (which is likely to be three years from its commencement), it will be necessary to reconsider this interim system. In particular, it will be necessary to consider whether barristers should be brought under the scheme (and given a voice in its control and management) and whether greater provision for representation of the public interest should be made.

D. Loss Prevention

I GENERAL

We have referred to recent increases in the size and frequency of claims against lawyers, both in Australia and overseas, and we have suggested reasons for expecting this upwards trend to continue. Recent experience in Canada and England shows that the introduction of compulsory insurance does not, of itself, halt this trend and may even accentuate it.

In Ontario, the profession's reaction to the increasing cost of insurance has not been to abandon a compulsory scheme but rather to concentrate on prevention, education and discipline in an attempt to reduce the incidence of claims. These steps, including the decision to refer lawyers with bad claims records for consideration by disciplinary authorities, were taken by the Law Society largely in response to pressure from its members, who were alarmed at having to pay increasing premiums as a result of claims against their colleagues. Bringing home to the profession the true cost of the failings of its members is one of the major benefits of a compulsory insurance scheme. It can reasonably be expected to have a salutary effect on the profession's willingness to impose or accept rigorous measures aimed at improving its general standards.

Other law societies, notably in Victoria and England, have also placed great emphasis on loss prevention. Their monitoring of claims has enabled pitfalls, whether in relation to substantive or procedural law or office management, to be brought to the attention of the profession generally.

The following measures are among those which can be taken to reduce the incidence of claims:-

(i) preparing and distributing to the profession a Loss Prevention Manual, which indicates procedures for preventing or avoiding claims for negligence (such a manual could build on the pioneering work of the Sydney solicitor, Mr. Michael Rosser, whose manual was distributed to the profession throughout New South Wales in 1974);

(ii) publishing warnings or educational articles in professional journals or elsewhere as to particular laws and practices which have given rise to claims;

(iii) establishing mandatory or optional continuing legal education courses on fields of law which are proving productive of claims;

(iv) imposing individual preventive or educative measures by, for example, requiring individual lawyers to work only as employees rather than as principals, or to undertake a course of continuing legal education;

(v) disciplining individual lawyers by, for example, reprimand, fine, suspension or disbarment.

In our view each of these measures can play an important role in improving the standards of the profession and reducing the cost of insurance. They would operate in the interests of both the public and the profession. The last two should be carried out by bodies such as the professional standards authorities which we have suggested in our Discussion Paper on Complaints, Discipline and Professional Standards - Part I, while the other measures may be implemented by a body such as the Legal Profession Council or its committees, and by professional associations. However, in each case the initiative will come most appropriately from detailed monitoring of the insurance scheme, which we suggest should be primarily the responsibility of the Legal Profession Council's Insurance Committee. Under the interim arrangements we have suggested, the primary responsibility would rest with the Law Society's Monitoring Committee.

The extent to which these measures can be instituted depends heavily on the degree of disclosure of information about the operation of the scheme.

II DISCLOSURE OF INFORMATION

Four categories of disclosure to people beyond those responsible for claims-handling can be distinguished. We

include the Claims Committee amongst the claims-handling bodies.

1. General Information

There seems to be widespread agreement that statistics, and other general or anonymised information, should be made generally available by the insurers. Information of this type enables the first three, though not the last two, of the above measures to be implemented to some extent. A considerable amount of such information has been published in professional journals in jurisdictions where a Master Policy scheme already exists. We regard extensive collation and dissemination of this kind as most desirable and important.

2. Disclosure to Monitoring Committee

In our view, a monitoring committee is unlikely to be able to fulfil its functions adequately unless, on occasion, it can look in detail at particular claims. Anonymised claims information will often, but not always, be sufficient to enable adequate monitoring. It may be largely for this reason that in some places, such as Queensland, there is a joint Claims and Monitoring Committee.

We suggest that monitoring committees should be entitled to obtain claims information on request, even in a form which enables identification of people involved. However, save in the exceptional circumstances mentioned in the next two sections, members of a monitoring committee should be prohibited from disclosing identifiable information to anyone outside the committee.

We have suggested that monitoring should be the responsibility of an Insurance Committee of a body such as the Legal Profession Council or, in the interim, a Monitoring Committee established by the Law Society. In either case the committee might have lay membership. Some lawyers assert that, by contrast with lawyers, such lay people could not be trusted to maintain confidentiality. In our Discussion Paper on General Regulation we discuss this and other issues concerning confidentiality in regulatory bodies. For reasons explained there, we suggest that the assertion is misconceived. We suggest, however, that those responsible for appointing members (whether lawyers or lay

people) to regulatory bodies should bear in mind the importance of having members with due respect for confidentiality.

3. Disclosure to Professional Standards Authorities

(1) The Present Situation

We first briefly describe the present law and practice where a lawyer voluntarily obtains professional indemnity insurance. An insurer who discloses information concerning claims by a person whom he has insured may incur liability for breach of confidence or for defamation. No doubt there would often be a good defence, but whether for fear of legal liability or for some other reason (e.g., that disclosure would drive away business, or might be seen as a betrayal of the insured, or would tend to stifle full disclosure by the insured), we understand that it is not the practice of insurers to make disclosures to professional disciplinary bodies. However, the insurer may be compelled by subpoena to produce documents in court for use in proceedings of any kind (including disciplinary proceedings) against the lawyer, save that sometimes the lawyer will have a legal professional privilege by which he can resist production. Where the insurer finds that the insured is too bad a risk, he may be able to terminate the insurance under a term of the policy, or he may decline to renew the insurance.

In relation to compulsory schemes, there is considerable disagreement as to whether information obtained by claims-handling or monitoring authorities should be disclosed in an identifiable form to the professional standards authorities (i.e., those persons or bodies having power to commence proceedings for, or to impose, disciplinary, preventive or educative measures).

In Victoria, the Law Institute does not necessarily oppose such disclosure in appropriate circumstances; the scheme does not prohibit it and the Claims Committee has been given discretion in the matter. However, the Council of the Institute has resolved that "material (written or oral) that is prepared for the purpose of a claim, and supplied by a solicitor to the Claims Committee, the brokers or the underwriters of the Scheme cannot be used in disciplinary proceedings against that solicitor" (Law Institute, 1977). In Queensland, however, the Law Society

is opposed to such disclosure and the scheme forbids it. The schemes proposed by the law societies in Western Australia and Tasmania also forbid disclosure.

The Law Society in England remains opposed to disclosure but our inquiries indicate that, as has occurred in British Columbia and Ontario, escalating claims and premiums may induce a change in this attitude, perhaps at the urging of members of the profession. In British Columbia, the claims-handling committee refers to the monitoring committee any claims which it thinks deserve disciplinary review. The monitoring committee then decides whether to refer them to the disciplinary authorities. We understand that a broadly similar procedure is being adopted in Ontario.

The Law Society of New South Wales takes a halfway position (1977a, p.24). It may be summarised as follows. Claims records should not be disclosed so as to initiate disciplinary action, but should be able to be disclosed to the disciplinary tribunal once such action has been commenced, provided:-

(i) the information concerns the particular conduct to which the action relates; or
(ii) the action is for repeated and persistent acts of negligence and the information is relevant to the alleged misconduct or to sentence.

(2) Advantages and Disadvantagees

In some circumstances, disclosure to the professional standards authorities could provide considerable benefits for both the public and professional interests. The creation of a compulsory insurance scheme increases the desirability of taking appropriate preventive, educative or disciplinary action against negligent or incompetent practitioners. Such measures not only help to retard the rapidly rising cost of insurance but they provide the only adequate solution to the problem of the abnormally high-risk practitioner. In these ways they assist the public, the profession generally and the insurer.

Apart from its impact in the insurance context, a link between the scheme and the professional standards system would be an important addition to the means by which practitioners with inadequate professional standards can be identified and either improved or removed from practice.

In our Discussion Paper on Complaints, Discipline and Professional Standards - Part I we emphasised the need for better methods in this area. Understandably, many clients will be concerned to obtain compensation for their lawyer's mistakes rather than to seek the imposition of professional standards measures. If, as would happen under the scheme we have outlined in this Paper, clients become more aware of indemnity insurance and more likely to obtain compensation, they may become even less likely to make a complaint to the professional standards authorities. Accordingly, there may be greater justification for permitting the insurance authorities to transmit certain information to their professional standards counterparts. Just as the professional standards system should not concentrate so much on the public interest that it neglects clients' private rights, so, it may be argued, the insurance scheme should not be devised with private compensation solely in mind.

It will often be possible to restrict the detail of information disclosed in a particular case without losing the advantages mentioned above. Indeed, if professional standards authorities are merely advised that they should investigate a particular practitioner, they may be able in some cases to gather sufficient evidence themselves without obtaining further information from claims files. They may not be seriously hampered in many instances by a Victorian-type restriction on disclosure of information prepared by the practitioner for the purpose of the claim.

On the other hand, a strong argument against disclosure is that, through fear that a claim may lead to disciplinary action, lawyers may be more inclined to conceal from clients that a mistake has been made and a remedy is available. This could be seriously adverse to the public interest.

It is argued, too, that disclosure will mean that if claims are made against practitioners they may be excessively obstructive in providing information about the matters in question, lest their "admissions" be used against them in the disciplinary process. A related objection is that it is unfair to require practitioners to make full disclosure to their insurers and then allow that information to be used against them in disciplinary proceedings. However, if the Victorian restriction were adopted, these objections would lose most of their force.

It may be argued, too, that it would be unfair to insured practitioners to require them to pay for insurance but then create a situation in which if they make a claim they may risk action by professional standards authorities.

(3) Tentative Conclusions

In our view, there is no sufficient justification for preventing disclosure to professional standards authorities of conduct which is so serious that it may merit suspension or removal from practice. In our Paper on Complaints, Discipline and Professional Standards - Part I we described such conduct as "reprehensible conduct", being the more serious of two categories of conduct which we consider call for action by the professional standards authorities.

At present, we are not inclined to suggest that disclosure concerning less serious conduct should be permitted. However, in the light of some experience with the scheme and of any developments which occur in the area of discipline and professional standards, it may well become desirable to permit some such disclosure.

Whether or not disclosure is confined to "reprehensible conduct", we consider that it should not be permissible to disclose material which was prepared by a practitioner for the purpose of his or her claim under the scheme.

We envisage that the broader composition of the monitoring committee will make that committee more appropriate than the claims-handling committee to balance the various interests and decide whether disclosure to the professional standards authorities is desirable. The claims-handling committee should be responsible for referring to the monitoring committee information which may merit disclosure.

These suggestions are subject to our comments in the next section concerning disclosure at the request of professional standards authorities.

They are subject also to suggestions we shall make in our Discussion Paper, Complaints, Discipline and Professional Standards - Part II, concerning the extent to which the general law on legal professional privilege and other privileges should apply to professional standards authorities.

4. Disclosures at Request of Professional Standards Authorities

Another difficult issue is whether the professional standards authorities should be entitled to require production of specific claims information or of all claims information about specific lawyers. In our Discussion Paper on Complaints, Discipline and Professional Standards - Part I we refer to the question of the powers of these authorities to obtain information. We shall consider the issue more fully in Part II of that Paper. However, we make here some preliminary comments in relation to the specific topic of obtaining claims information.

At present, courts have extensive powers to obtain by subpoena information held by insurers. We see no justification for depriving the professional standards authorities of similar powers. Among other consequences, this would mean that, subject to certain privileges, they would be able to obtain information prepared by a practitioner for the purpose of a claim.

Subpoenas are not issuable until proceedings have commenced. Should the authorities which are responsible for investigating complaints against practitioners and for deciding whether to institute professional standards proceedings be given power to obtain information from insurers even though no proceedings have been commenced? We are inclined to oppose extensive "fishing expeditions" by such authorities. On the other hand, investigators should not be unreasonably impeded nor unduly exposed to the temptation to commence proceedings without first obtaining sufficient evidence. A satisfactory compromise may be to enable them to require disclosure other than of information prepared by a practitioner for the purpose of a claim.

As we have mentioned, we shall discuss the application of evidentiary privileges to the professional standards authorities in a later Discussion Paper.

E. Summary

(a) A body such as the Legal Profession Council, the creation of which we suggested in our Discussion Paper on General Regulation, should be given power to make statutory regulations requiring practitioners to obtain professional indemnity insurance and specifying the terms upon which the insurance must be obtained.

(b) This body should be responsible for the overall control of the scheme and should establish an Insurance Committee to monitor closely the scheme's operation.

(c) Professional associations should be involved in the management of the compulsory insurance scheme, particularly in negotiating terms and conditions with the insurance industry and in claims-handling.

(d) It is possible that a body such as the Legal Profession Council will not be established, or that it will not commence operations until two or more years from now. In the meantime, it is desirable to establish a compulsory insurance scheme for solicitors. As an interim measure, the Government should be given power to make regulations creating and controlling this scheme. The scheme should be managed by agreement between the Law Society, the insurers and the brokers. In order to provide a measure of public interest representation, the Attorney General should have a nominee on the monitoring committee.

(e) It is in the interests of the public and the profession to enable preventive, educative and disciplinary measures to improve the standards of the profession and reduce the cost of insurance. For these purposes, the following disclosure of claims information and other information concerning the operation of the scheme should be permitted:-

(i) general disclosure of statistics and other information in a form which does not enable individual practitioners to be identified;

(ii) disclosure to the scheme's monitoring committee;

(iii) disclosure by the monitoring committee to the professional standards authorities of information which in the opinion of the committee may indicate conduct which constitutes "reprehensible conduct" (in the sense used in our Discussion Paper on Complaints, Discipline and Professional Standards) by a practitioner, provided that it is not information prepared by a practitioner for the purposes of a claim under the scheme.

(f) For similar reasons, the following disclosure of information should be required:-

(i) disclosure by the claims committee to the monitoring committee of information which in the opinion of the claims committee may indicate conduct which constitutes "reprehensible conduct" by a practitioner;

(ii) disclosure by the monitoring committee to the professional standards authorities of information requested by those authorities, provided that it is not material which was prepared by a practitioner for the purpose of a claim;

(iii) disclosure by the monitoring committee in response to subpoenas issued by the professional standards authorities.

(g) These suggestions concerning disclosure are subject to suggestions which we shall make in a later Discussion Paper concerning the application of rules of evidentiary privilege to the professional standards authorities.

APPENDIX I

Current Policy under Law Society of New South Wales Voluntary Scheme

The Law Society voluntary scheme commenced on 1st July 1968. The current policy is underwritten by a consortium of insurers through G.E. Brown Underwriting Agencies Pty. Ltd. with Baillieu Bowring (Professional Indemnity) Pty. Ltd. acting as brokers. Participation in the scheme is optional, and current figures indicate that approximately 50% of solicitors in private practice in New South Wales are insured under the scheme. Further information concerning the scheme is given in Chapter I. The policy wording appears below.

"WHEREAS THE PARTY OR PARTIES named on the proposal form (hereinafter called the "Insured") have made to the INSURERS as listed hereon for their respective percentages each for their own part and not one for another (hereinafter called "The Company") a written proposal bearing the date stated in the Schedule and containing particulars which it is hereby agreed are the basis of this contract and are to be considered as incorporated herein:

NOW THIS POLICY WITNESSETH that in consideration of the payment of the Premium stated in the Schedule the Company will to the extent and in the manner hereinafter provided;

(1) indemnify the Insured, up to but not exceeding in the aggregate for all claims under this Insurance the total sum insured stated in the Schedule, against any claim or claims in respect of the coverage under Sections 1, 2, 4 and 6 which may be made against them during the period specified in the Schedule, and in respect of the coverage under Sections 3 and 5 against any claim or claims or loss or losses which may be discovered by the Insured during the period of insurance specified in the Schedule.

(2) in addition, pay the costs and expenses incurred with the written consent of the Company in the defence or settlement of any such claim, provided that, if a payment in excess of the amount of indemnity available under this Policy has to be made to dispose of a claim, the Company's liability for such costs and expenses shall be such proportion thereof as the amount of indemnity available under this Policy in respect of that claim bears to the amount paid to dispose of that claim.

The term "Insured" shall mean

(a) the Partner(s) and/or Principal(s) named on the proposal form

(b) any person(s) who may at any time during the subsistence of this Policy become a Partner or Principal in the insured firm, but only in respect of acts committed subsequent to the date of joining the insured firm.

(c) any Partner(s) and/or Principal(s) named in the Schedule whilst acting as an Executor, Trustee, Attorney, Liquidator, Director or Company Secretary, provided the fees for so acting form part of the income of the insured firm.

(d) any other person or persons for whose acts the Partner(s) or Principal(s) are legally liable except where otherwise limited by the terms of the Policy.

The term "Documents" shall mean

deeds, wills agreements, maps, plans, records, books, letters, certificates, forms and documents of any nature whatsoever, whether written or printed or reproduced by any other method (other than bearer bonds, coupons, bank notes, currency notes and negotiable instruments).

SECTION 1

for breach of professional duty as Solicitors including any professional duty of the Insured which may be owed other than in contract arising out of the giving of information or advice by reason of any negligent act, error or omission whenever unless limited by the retroactive date stated in Item 3 of the Schedule or wherever committed or alleged to have been committed.

SECTION 2

for Libel or Slander by reason of words written or spoken by the Insured.

SECTION 3

for loss or deprivation of or damage to Documents which can be specifically identified by the Insured.

(a) owned by the Insured or in their physical custody or control on or from any premises within the territorial limits named in Item 3 of the Schedule.

(b) whilst in transit until delivery to the addressees or their representatives.

(i) in and between any country in the world.

(ii) by airmail anywhere in the world.

SPECIAL EXCLUSIONS RELATING TO SECTION 3

The Policy does not insure:-

(a) loss or deprivation of or damage to Documents entrusted to the care of the Insured enclosed in boxes or other covers the contents of which are unknown to the Insured when such loss deprivation or damage occurs.

(b) loss brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the Insured or their employees.

SECTION 4

If a limit for this section is specified in the Schedule, notwithstanding General Exclusion 1(c), this Policy is extended under Sections 1 and 3 of the Policy to indemnify the Insured against any claim brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the Insured, or their employees, provided always that in the case of any claim brought about or contributed to by or at the direction of a partner or partners the indemnity granted under this Policy is restricted to liability in excess of amounts recoverable from the dishonest, or fraudulent partner or partners, or any partner or partners who condone or acquiesce in such dishonest, fraudulent, criminal or malicious act or omission.

Subject otherwise to all the terms, exclusions and conditions of the Policy.

SECTION 5

If a limit for this section is specified in the Schedule, this Policy will indemnify the Insured for loss of money and/or property arising from any dishonest, fraudulent, criminal or malicious act or omission of any person at any time employed by the Insured in the conduct, by or on behalf of the Insured firm of any business conducted in their professional capacity as Solicitors.

For the purpose of this Insurance "Employee" shall mean any person or persons who are engaged in the service of the Insured in the course of their business and are remunerated in any way.

SPECIAL CONDITIONS RELATING TO SECTION 5

(a) In the event of a claim under this Section, the Insured shall give all necessary information and assistance to enable the Company to sue for and obtain reimbursement by the employee concerned or by his estate of any moneys paid or payable by the Company.

(b) Any moneys which but for an employee's fraud or dishonesty would have been payable to him by the Insured, and any moneys of the employee in the hands of the Insured shall except where prohibited by statute be deducted from the amount otherwise payable under this Section.

Subject otherwise to all the terms, exclusions and conditions of the Policy.

SECTION 6

If a limit for this extension is specified in the Schedule, notwithstanding the definition of the "Insured" this policy is extended to indemnify the person or persons named on the proposal form as Incoming or Outgoing Partners in respect of their Previous Business.

Subject otherwise to all the terms, exclusions and conditions of the Policy.

SECTION 7

If the word "included" is specified in the Schedule adjacent to "Section 7" it is hereby agreed that in respect of Sections 1 to 6 inclusive covered by this Policy subject to the General Conditions, and Exclusions of the said Policy (except as herein provided) upon notification to the Company during the period specified in the Schedule or any claim made against the Insured or of circumstances which are likely to give rise to a claim, this Policy shall be deemed to be reinstated for such amount, if any, as may ultimately be paid by the Company in respect of such claim, so as to remain in force during the Policy period for the total sum insured stated in Item 4 of the Schedule of this Policy, provided always that the aggregate of the amounts so reinstated shall not exceed an amount equal to the said sum insured.

It is the intention of this extension that the sum reinstated shall provide cover in respect of subsequent claims or losses which are totally unrelated to the claims or circumstances that gave rise to the claim already notified. Notwithstanding anything contained herein to the contrary it is agreed that the liability of the Company under Sections 1 to 6 inclusive shall not exceed twice the total sum insured specified in Item 3 of the Schedule, except that (subject to the provisions of this Policy) the Company will in addition pay the costs and expenses incurred in the defence or settlement of any claim.

Nevertheless in the event that the Insured has additional coverage in excess of this Policy then this extension will operate only when such coverage is exhausted.

Subject otherwise to all the terms, exclusions and conditions of the Policy.

GENERAL EXCLUSIONS

1. This Policy shall not indemnify the Insured against any claim or claims.

(a) made or threatened or in any way intimated on or before the commencement of the period of insurance of the Policy as specified in Item 5 of the Schedule, or

(b) involving a circumstance which at any time prior to the commencement of the period of insurance, irrespective of whether the contract came into existence prior to said date, the Insured should have reasonably foreseen could give rise to a claim against them at some future date. This exclusion shall not apply to Insureds who were insured in the Law Society of New South Wales Group Scheme prior to the date that this Policy came into existence, or

(c) brought about or contributed to by any dishonest, fraudulent, criminal or malicious act or omission of the Insured or their employees, or

(d) arising from the conduct of any business not conducted for or on behalf of or for the financial benefit of the Insured firm named in the Schedule, or

(e) in respect of liability assumed by the Insured by express warranty or agreement unless such liability would have attached to the Insured notwithstanding such express warranty or agreement, or

(f) directly or indirectly occasioned by, happening through or in consequence of war, invasion, act of foreign enemy, hostilities (whether war be declared or not), civil war, riot, strike, lockout, labour disturbance, civil commotion, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalisation or requisition or damage to property by or under the order of any government or public or local authority, or

(g) directly or indirectly caused by or contributed to by or arising from

(i) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel,

(ii) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear component thereof.

2. This Policy does not cover any liability:

(a) which is insured or would, but for the existence of this Policy be insured by any other policy except in respect of any excess beyond the amount which would have been payable under such other policy had this Policy not been effected.

(b) where protection is provided by any Fund, whether Fidelity or otherwise, which is organised or administered either by Statute or The Law Society of New South Wales or the Society's equivalent within the Australian Capital Territory.

GENERAL CONDITIONS

1. The Company's total liability for any one claim or in the aggregate for all claims shall not exceed the Total Sum Insured in Item 3 of the Schedule except and subject to the special provisions of Section 7 when the Policy is extended to cover automatic reinstatement.

2. The Liability of the Company hereunder shall only extend to claims which are notified by the Insured during the period of Insurance set forth in the said Schedule and arise out of acts committed subsequent to the Retroactive Date specified in the Schedule, or within 7 days after the expiration of the said period provided the insured continues to effect insurance under the terms and conditions of the professional indemnity group scheme approved by the Law Society of New South Wales.

3. In respect of each and every claim against the Insured the amount of the Excess specified in the Schedule shall be borne by the Insured at their own risk and the Company shall only be liable to indemnify the In-

sured in Excess of such amount. For the purpose of this condition the term "Claim" shall be understood to mean any and all claims which are within the scope of this Policy and which arise by reason of the same negligent act, error or omission.

4. The Insured shall not admit liability for or settle any claim or incur any costs or expenses in connection therewith without the written consent of the Company, who shall be entitled at any time to take over and conduct in the name of the Insured or the said firm, as the case may be, the defence or settlement of any claim. Nevertheless, the Insured shall not be required to contest any legal proceedings unless a Queen's Counsel (to be mutually agreed upon by the Insured and the Company) shall advise that such proceedings should be contested.

However, if the Insured shall refuse to consent to any settlement recommended by the Company and shall elect to contest or continue any legal proceedings in connection therewith, the Company's liability for the claim shall not exceed the amount for which the claim could have been so settled plus the costs and expenses incurred up to the date of such refusal, subject always to the aggregate limit of the Company's liability for all claims under this Policy not exceeding the Total Sum Insured specified in Item 3 of the Schedule.

5. The Insured shall as a condition precedent to their right to be indemnified under this Policy give to the Company immediate notice in writing.

(a) of any claim made against them,

(b) of the receipt of notice from any person of an intention to make a claim against them.

6. The Insured shall give to the Company immediate notice in writing of any circumstances, of which they shall become aware during the subsistence hereof, which is likely to give rise to a claim against them. Such notice having been given, any claim to which that circumstance has given rise, which may be made after the expiration of the period specified in the Schedule, shall be deemed for the purpose of this Policy to have been made during the subsistence thereof.

7. The Company will not exercise its right to avoid this Policy where it is alleged that there has been non-disclosure or misrepresentation of facts or untrue statements in the proposal form, provided always that the Insured shall establish to the Company's satisfaction that such alleged non-disclosure, misrepresentation, or untrue statement was innocent and free of any fraudulent conduct or intent to deceive.

8. If the Insured shall prefer any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void and all claims hereunder shall be forfeited.

9. If any payment is made under this Policy in respect of a claim and the Company is thereupon subrogated to all the Insured's rights of recovery in relation thereto the Company shall not exercise any such rights against any employee of the Insured unless the claim has been brought about or contributed to by the dishonest, fraudulent, criminal or malicious act or omission of the employee.

10. The Insured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss hereunder.

11. Where the Insured's breach of or non-compliance with any condition of this Policy has resulted in prejudice to the handling or settlement of any claim, the indemnity afforded by this Policy in respect of such claim (including costs and expenses) shall be reduced to such sums as in the Company's opinion would have been payable by them in the absence of such prejudice."

APPENDIX II

Current Policy under New South Wales Bar Association Voluntary Scheme

A Master Policy has been effected with A.M.P. Fire & General Insurance Co. Ltd. by Minet James Professional Services Ltd. on behalf of the Bar Associations of Australia. The scheme commenced in N.S.W. in October, 1979. Certificates of Insurance, renewable annually, and identical in their operative wording to the Master Policy are issued by the brokers to barristers choosing to join the scheme.

CERTIFICATE OF INSURANCE

"This is to certify that in accordance with the authorisation granted to the undersigned under the Master Policy referred to in the Schedule by the Insurers subscribing such Master Policy (hereinafter called 'The Insurers') insurance is granted by the Insurers in accordance with the terms and conditions following, the Assured having made a written proposal bearing the date shown in the schedule containing particulars and statements which it is hereby agreed are the basis of this contract and are considered to be incorporated herein and in consideration of the payment of the premium stated in the Schedule.

1. Interpretation

   (a) 'The Assured' means the Barrister named in the Schedule, and the estate and/or the legal representatives of the Barrister.

   (b) 'The Practice' means the business in practising as a Barrister (including the acceptance of obligations as Trustee, Executor, Attorney-under-Power) and includes advice given or services performed of whatsoever nature by the Assured provided always that any fee accruing from such work shall inure to the benefit of the practice. It also includes work done without fee, providing that such work is undertaken in relation to the practice.

   This Certificate shall also indemnify the Assured in respect of any liability arising from the utilization of the services of a Barristers' Clerk.

Where a Bar Association or Law Society's rules provide for joint membership as both Barrister and Solicitor, this Certificate shall not indemnify the Assured in respect of any liability arising from work undertaken by the Assured in connection with the practice as a Solicitor.

(c) 'The Period of Insurance' means the period specified in the Schedule.

2. Insuring Clauses

(a) On the terms and conditions herein contained the Insurers shall indemnify the Assured against all loss to the Assured whensoever occurring arising from any claim or claims first made against the Assured during the Period of Insurance in respect of any description of civil liability whatsoever incurred in connection with the Practice.

(b) The liability of the Insurers under this Certificate shall not exceed in respect of each such claim and claimants' costs the Sum Insured specified in the Schedule and in addition all costs and expenses incurred with the Insurers' consent (such consent not to be unreasonably withheld) in the defence or settlement of any such claim, provided that if a payment in excess of the said Sum Insured is made to dispose of any such claim the Insurers' liability for any such costs and expenses so incurred shall be limited to such proportion thereof as the said Sum Insured bears to the amount of the payments so made.

(c) For the purposes hereof all claims against the Assured arising from the same act or omission shall be regarded as one claim.

3. Special Conditions

(a) Subject to Clause 4(e) (General Conditions) the Insurers will not seek to avoid repudiate or rescind this insurance in the event of innocent non-disclosure or misrepresentation on the part of the Assured.

(b) Where the Assured's breach of or non-compliance with any condition of this insurance has resulted in substantial prejudice to the handling or settlement of any claim against the Assured in

respect of which the Assured is insured hereunder the Assured shall reimburse to the Insurers the difference between the sum payable by the Insurers in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that it shall be a condition precedent to the right of the Insurers to seek such reimbursement that they shall have fully indemnified the Assured in accordance with the terms hereof.

4. General Conditions

(a) (i) The Assured shall not admit liability for, or settle, any claim falling within the Insuring Clauses hereof or incur any costs or expenses in connection therewith without the consent of the Insurers (such consent not to be unreasonably withheld), and subject to (ii) below the Assured shall procure that the Insurers shall be entitled at their own expense at any time to take over the conduct in the name of the Assured of the defence or settlement of any such claim.

(ii) The Assured or the Insurers shall not be required to contest any legal proceedings unless a Queen's Counsel (to be mutually agreed upon by the Assured and the Insurers or failing agreement to be appointed by the Chairman for the time being of the relevant Bar Association), shall advise that such proceedings should be contested.

(b) The Assured shall procure that notice to the Insurers shall be given in writing as soon as practicable of any claim the subject of the Insuring Clauses hereof made during the Period of Insurance against the Assured or of the receipt of notice from any person of any intention to make a claim against the Assured. The Assured shall also give notice in writing to the Insurers of any circumstances of which the Assured shall become aware during the Period of Insurance which may give rise to such a claim. If a notice is given to the Insurers under this paragraph any claim subsequently made (whether before or after the expiration of the Period of Insurance) pursu-

ant to such an intention to claim or arising from circumstances so notified shall be deemed to have been made at the date when such notice was given.

(c) Notices to the Insurers to be given hereunder shall be deemed to be properly made if given to Minet Australia Ltd. Professional Services Division.

(d) Save as provided in General Condition (a) (ii) above any dispute or disagreement between the Assured and the Insurers arising out of or in connection with this insurance may at the request of either of them be referred to the sole arbitrament of a person to be appointed (failing agreement between them) by the Chairman for the time being of the relevant Bar Association whose decision shall be final and binding upon both parties.

(e) If the Assured shall prefer any claim hereunder knowing the same to be false or fraudulent as regards amount or otherwise this insurance shall become void and all claims hereunder shall be forfeited.

5. General Exclusions

(a) This Insurance shall not indemnify the Assured in respect of the first $1,000.00 of any one claim.

(b) This Insurance shall not indemnify the Assured in respect of any loss arising out of any claims:

(i) for death, bodily injury, physical loss or physical damage to property of any kind whatsoever (other than property in the care, custody and control of the Assured in connection with the Practice for which the Assured is responsible, not being property occupied or used by the Assured for the purposes of the Practice);

(ii) for the payment of a trading debt incurred by the Assured;

(iii) in respect of any circumstance or occurrence which has been notified under any other insurance attaching prior to the inception of this Certificate;

(iv) brought about by the dishonesty or fraudulent act or omission of the Assured;

(v) directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, the radio-active toxic explosive or other hazardous properties of any explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; directly occasioned by pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, or from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power;

(vi) in respect of any liability incurred in connection with a practice conducted wholly outside of the Commonwealth of Australia.

6. Jurisdiction and Service of Suit

Notwithstanding anything contained in 4(d) above Insurers agree that

(a) In the event of a dispute arising under this insurance, the Insurers at the request of the Assured will submit to the jurisdicion of any competent Court in the Commonweath of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

(b) Any summons notice or process to be served upon the Insurers may be served upon Ellison, Hewison and Whitehead, Solicitors, of Melbourne, or Davenport and Mant, Solicitors, of Sydney, who have authority to accept service and to enter an appearance on Insurers' behalf, and who are directed at the request of the Assured to give a written undertaking to the Assured that they will enter an appearance on Insurers' behalf.

(c) If suit is instituted against any one of the Insurers, all Insurers will abide by the final decision of any competent Court or any competent appellate Court in the Commonwealth of Australia."

A Schedule, incorporating a specimen proposal form and the signature of the Brokers, follows the body of the policy. The Schedule has been omitted from this Appendix.

APPENDIX III

Current Victorian Master Policy Scheme

The Victorian Master Policy scheme commenced on a voluntary basis on 1st January 1978. Participation in the scheme became compulsory for Victorian solicitors on 1st July 1978, unless temporary exemption was granted on the basis of adequate pre-existing insurance. The policy is underwritten by a consortium of Lloyd's underwriters and other insurers with Minet Professional Services Ltd. acting as brokers. Approximately 2,800 practitioners are currently insured under the scheme. Legislation implementing the scheme and the wording of the Master Policy and Certificate of Insurance appear below.

A. THE ACT

The power to establish the scheme is vested in the Law Institute of Victoria by virtue of Section 88A of the Legal Profession Practice Act, 1958:

"(1) The institute and authorized insurers may enter into an arrangement for or with respect to the provision by authorized insurers to solicitors or former solicitors who are members of a class prescribed for the purposes of this section of professional indemnity insurance, and the institute and authorized insurers may do all acts and things necessary or expedient for giving effect to an arrangement entered into by authority of this sub-section.

(2) An arrangement under sub-section (1) may include provision with respect to any one or more of the following matters, namely:-

(a) the terms and conditions to which the provision of professional indemnity insurance is to be subject;

(b) the amount or amounts of insurance cover to be provided;

(c) the amount or amounts payable by way of premiums;

(d) the circumstances in which insurance cover is to be limited or denied;

(e) the period during which professional indemnity insurance is to be provided;

(f) the issue of certificates to persons covered by professional indemnity insurance and the form of those certificates;

(g) the payment by or on behalf of the insurers to the institute of any sum by way of brokerage or reimbursement for expenses incurred in connexion with any arrangement entered into by authority of this section; and

(h) any other matters in connexion with professional indemnity insurance agreed between the institute and authorized insurers.

(3) The institute and authorized insurers may by a subsequent arrangement rescind or vary an arrangement authorized by sub-section (1).

(4) The Governor in Council may on the recommendation of the council of the institute make regulations for or with respect to --

(a) requiring solicitors and former solicitors or specified classes of solicitors and former solicitors to take out and maintain with authorized insurers professional indemnity insurance on the terms and conditions specified in and in accordance with any arrangement authorized by sub-section (1);

(b) the issue of certificates in relation to professional indemnity insurance and the form of those certificates;

(c) empowering the council --

(i) to exempt from compliance with any of the regulations solicitors or former solicitors or specified classes of solicitors or former solicitors;

(ii) to grant any such exemption indefinitely or for a specified period or subject to any other conditions determined by the council; and

(iii) to revoke any exemption granted by it; and

(d) generally prescribing any thing authorized or required to be prescribed or necessary or expedient to be prescribed for giving effect to this section.

(5) In this section --

'Authorized insurers' means any person who or bodies of persons, whether corporate or unincorporate, which carry on insurance business in Victoria or elsewhere and are for the time being approved by the council for the purposes of this section; and

'Professional indemnity' means insurance against loss arising from claims in respect of any description of civil liability (other than the prescribed descriptions of civil liability) incurred by a solicitor or former solicitor in connexion with his practice or with the practice of a firm of solicitors of which he is or formerly was a member or with any trust of which he is or formerly was a trustee or by an employe or former employe of a solicitor or former solicitor in connexion with that solicitor's practice or with the practice of a firm of solicitors of which that solicitor is or formerly was a member or with any trust of which that solicitor or that employe is or formerly was a trustee.

(6) This section shall be read and construed as in aid of and not in derogation from the provisions of Section 71.".

B. THE REGULATIONS

The following Regulations have been made under Section 88A:

"1. (1) These Regulations may be cited as the Professional Indemnity Insurance Regulations, 1978.

(2) These Regulations shall come into operation upon the date of commencement of Section 88A of the Legal Profession Practice Act, 1958.

2. In these Regulations --

'The Act' means the Legal Profession Practice Act 1958;

'The Master Policy' means the arrangement entered into between the Institute and authorized insurers, a copy of which arrangement is set out in Schedule 1 to these Regulations.

3. For the purpose of Section 88A of the Act, the prescribed classes of solicitors and former solicitors are --

(a) Solicitors who are or are held out to the public to be practising as solicitors solely upon their own account or in partnership, other than any solicitor whose name appears upon any nameplate letterhead or stationery used in connexion with his practice or the practice of a firm of solicitors where there also appears on that nameplate letterhead of stationery in relation to that solicitor the description 'associate', 'consultant', 'assistant' or any other description implying or that may reasonably be understood to imply that the solicitor is not practising solely on his own account or in partnership with any other solicitor or solicitors;

(b) any former solicitor who was at any time a member of a class of solicitors prescribed by paragraph (a).

4. (1) Subject to sub-regulation (2) of this Regulation, every solicitor who is a member of a class of solicitors prescribed by Regulation 3 (a) of these Regulations shall take out and at all times maintain with authorized insurers professional indemnity insurance on the terms and conditions specified in and in accordance with the Master Policy.

(2) Sub-regulation (1) of this Regulation does not apply to any solicitor or class of solicitors for the time being exempted by the Council from compliance with the provisions of that sub-regulation.

(3) The Council is hereby empowered --

(a) to exempt from compliance with the provisions of sub-regulation (1) of this regulation any solicitor or class of solicitors specified by the Council;

(b) to grant such an exemption as is mentioned in paragraph (a) either indefinitely or for a specified period or subject to such other conditions as the Council determines; and

(c) to revoke any exemption granted by it.

5. (1) Upon compliance with the provisions of the Master Policy authorized insurers or the Institute or Minet Professional Services Ltd. on behalf of the authorized insurers shall cause to be issued annually to every solicitor who takes out professional indemnity insurance pursuant to these Regulations, a

certificate of insurance in or to the effect of the form in Schedule 2 to these Regulations.

(2) Upon compliance with the provisions of the Master Policy authorized insurers or the Institute or Minet Professional Services Ltd. on behalf of the authorized insurers may cause to be issued annually to every former solicitor who has taken out professional indemnity insurance pursuant to these Regulations a certificate of insurance in or to the effect of the form in Schedule 2 to these Regulations."

C. MASTER POLICY

Schedule I to the Regulations appears below.

"1. The insurers agree with the Law Institute of Victoria on behalf of --

(a) all solicitors who may from time to time be required to be insured under the Legal Profession Practice Act 1958 as amended or under Rules or Regulations made pursuant to that Act;

(b) former solicitors;

(c) solicitors who prior to their being required to be insured as stated in paragraph (a), voluntarily request to be so insured;

to provide to the solicitors described in paragraphs (a), (b) and (c) such insurance in accordance with the terms of the Certificate attached hereto. Subject as hereinafter appears in respect of former solicitors, such Certificates will be issued annually on request on receipt of the premium payable in accordance with Clauses 2 and 3 hereof.

2. This policy commences on the first day of January, 1978, and shall be extended on the 1st day of January, 1979, and the 1st day

of January, 1980, for a further twelve months' period in each case. At each extension date the rates of premium payable in respect of the year next following shall be the annual rates of premium applicable in respect of the immediately preceding period as increased by 12 1/2 per cent or by the percentage increase in the gross fee income of the members of the Institute for the year immediately preceding that year as estimated by the Institute's consulting actuaries whichever percentage is the less. This Policy can be extended subsequently for successive periods of one year on each first day of January subject to the rates of premium for each renewal being agreed by the Insurers and the Law Institute at least six months before such renewal. In the event of any failure to agree such rates of renewal premium all cover under this Policy shall cease on the expiry of the period for which the Policy was last extended.

3. (a) In respect of the period of insurance prior to the first day of January, 1979, the premiums payable hereunder shall be pro-rata to the annual premium of $500 per sole practitioner or per partner. For the period of insurance commencing the first day of January, 1979, and subsequent periods of insurance the premium for solicitors who are first required to be insured hereunder during the period of insurance shall be calculated pro-rata to the premiums which applied at the beginning of the relevant period of insurance.

(b) For part-time sole practitioners the premiums will be calculated in accordance with the following scale:

Certified Gross Fee Income for Previous Financial Year	Premium Reduction
$0 -- $2,000	80%) of the
$2,001 -- $5,000	33 1/3%) relevant
$5,001 -- $10,000	25%) annual premium

4. All claims and notices required to be given by the Assured under the terms of the Certificate attached hereto shall be notified to Law Claims, 191 Queen Street, Melbourne on behalf of the Insurers. Claims will be handled in accordance with the following procedure:

   (a) All reasonable assistance and advice as to his position and professional duty will be given forthwith to the Assured, Law Claims having the Insurers' authority in emergency situations to take such immediate steps on the Assured's behalf as Law Claims may deem necessary.

   (b) As soon as practicable brief details (in a form to be agreed with the Leading Underwriters) shall be reported to the Leading Underwriters and further reports will be submitted as and when required by the Insurers.

   (c) A Claims Committee shall be established to consider and advise on claims and shall be comprised of a representative of the insurers and solicitors agreed between the Law Institute and the Insurers.

   (d) The Law Institute and the Insurers shall establish rules of procedure and conduct as may be necessary for the operation of the Claims Committee.

   (e) A Panel of Solicitors to conduct the defence of claims may be agreed between the Law Institute and the Insurers.

5. In respect of former solicitors (which expression in this Policy and in the Certificate attached hereto shall include solicitors who have ceased by reason of death, retirement or otherwise, to practise as principals in private practice, and their personal representatives) certificates need not be issued and no premium shall be payable. A former solicitor who

has at any time been insured hereunder (or whose successors in business have at any time been insured hereunder) shall be entitled to be indemnified by the Insurers in respect of any claim or claims first made against him during the currency of this Policy, as if a Certificate in the terms attached hereto had been issued to him hereunder and as if there were specified in the Schedule to such Certificate (a) as the Period of Insurance the period during which this Policy shall be in force, and (b) as the Sum Insured the sum of $100,000 if he was practising alone immediately before he ceased so to practise and in any other case, the sum of $50,000 multiplied by the number of members immediately before he ceased so to practise in the partnership in which he last so practised.

6. Authority is hereby given by the Insurers to Minet Professional Services Ltd. or the Law Institute of Victoria to issue on behalf of the Insurers to solicitors seeking insurance in accordance with Clause 1 hereof certificates in the form attached hereto.

7. Expressions used in this Policy have the meanings given to them by the Certificate attached hereto.

8. For the payment of an additional premium to be determined by the Leading Underwriters the terms of any Certificate issued hereunder may be extended by endorsement.

9. It is agreed that the Insurers will allow the Law Institute a Profit Commission calculated at 15 per cent of the nett ascertained profit to Insurers under this Master Policy for each period as defined in 2.

The formula for arriving at the nett ascertained profit will be as follows:

(a) INCOME: the nett premium income to this Master Policy for each period as defined in 2 i.e. Gross premium income less brokerage.

(b) OUTGO:

(i) total paid claims including Insurers costs and expenses during the same period.

(ii) estimates for outstanding claims and costs arising from insurances attaching during the same period.

(iii) Underwriters expenses calculated at 7 1/2 per cent of income as described in (a) above.

(iv) deficit from previous years, (or periods) if any, shall be brought into this calculation until extinguished.

The Profit Commission calculation shall be first made on figures compiled at 31st December, 1980 for the period 1st January 1978 to 31st December 1978, and shall be adjusted annually thereafter on the figures applicable to the formula at 31st December each year for each subsequent period or year of account.

10. Jurisdiction and Service of Suit.

The Insurers agree that --

(a) In the event of a dispute arising under this Master Policy, the Insurers at the request of the Law Institute will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

(b) Any summons notice or process to be served upon the Insurers may be served upon Phillips, Fox and Masel, Solici-

tors, of Melbourne, who have authority to accept service and to enter an appearance on Insurers' behalf and who are directed at the request of the Law Institute to give a written undertaking to the Law Institute that they will enter an appearance on Insurers' behalf.

(c) If suit is instituted against any one of the Insurers, all Insurers will abide by the final decision of any competent Court or any competent appellate Court in the Commonwealth of Australia.

Witness whereof this Master Policy has been signed on behalf of the undermentioned Insurers who severally agree each of the proportion set against its name to be bound to the Law Institute in accordance with the terms and conditions contained herein or endorsed hereon.

		per cent
(a)	Underwriters at Lloyd's evidenced by contract No. 0556200..	21 1/2
(b)	Guardian Royal Exchange Assurance Group ..	15
	General Accident Fire & Lift Assurance Corporation Ltd.	15
	Ennia Insurance Company (U.K.) Limited ..	10
	A.M.P. Fire & General Ins. Co. Ltd. ..	15
	Sun Alliance Insurance Limited.	9
	Legal & General Assurance Society Limited. ..	7
	Insurance Company of North America.	4
	Royal Insurance Australia Limited.	2 1/2
	Traders Prudent Insurance Co. Ltd.	1

Signed on behalf of the above named
Minet Professional Services Ltd., 155 Queen Street,
Melbourne, 3000.

Dated at Melbourne, the

M.J. EDWARDS, Director"

D. CERTIFICATE OF INSURANCE

Schedule 2 to the Regulations appears below.

"This is to certify that in accordance with the authorisation granted to the undersigned under the Master Policy referred to in the Schedule by the Insurers subscribing such Master Policy (hereinafter called 'The Insurers') insurance is granted by the Insurers in accordance with the terms and conditions following, and in consideration of the payment of the premium stated in the Schedule.

1. Interpretation

(a) 'The Solicitor' means the person named as such in the Schedule.

(b) 'The Assured' means the solicitor, any person employed in connexion with the practice (including any articled clerk, and any solicitor who is a consultant or associate with the firm) and the estate and/or the legal representatives of any of the foregoing, and also including any service administrative or nominee company or trust insofar as its activities are carried out in connexion with the practice, to the intent that each of the foregoing shall be severally insured hereunder.

(c) 'The Practice' means the business of practising as a solicitor (including the acceptance of obligations as Trustee, Executor, Attorney-under-Power, Tax Agent, or Company Director) undertaken by the solicitor or his predecessors in business alone or with others, provided always that wherever any fees or other income accrue therefrom they inure to the benefit of that business.

(d) 'The Period of Insurance' means the period specified in the Schedule.

(e) 'The Firm' means the firm as from time to time constituted carrying on the Practice.

(f) 'Partner' means any solicitor held out by the Firm as a partner in the Firm.

2. Insuring Clauses

(a) On the terms and conditions herein contained the Insurers shall indemnify the Assured against all loss to the Assured whensoever occurring arising from any claim or claims first made against the Assured or the Firm during the Period of Insurance in respect of any description of civil liability whatsoever incurred in connection with the Practice.

(b) The liability of the Insurers under this Certificate and any other Certificates issued under the Master Policy shall not exceed in respect of each such claim and claimants' costs the Sum insured specified in the Schedule and in addition all costs and expenses incurred with the Insurers' consent (such consent not to be unreasonably withheld) in the defence or settlement of any such claim, provided that if a payment in excess of the said Sum Insured is made to dispose of any such claim the Insurers' liability for any such costs and expenses so incurred shall be limited to such proportion thereof as the said Sum Insured bears to the amount of the payment so made.

(c) For the purposes hereof all claims against the Assured or the Firm arising from the same act or omission shall be regarded as one claim.

3. Special Conditions

(a) Subject to General Condition (f) the Insurers will not seek to avoid, repudiate or rescind this insurance upon

any ground whatsoever, including in particular non-disclosure or misrepresentation.

(b) Where the Assured's breach of or non-compliance with any condition of this insurance has resulted in substantial prejudice to the handling or settlement of any claim against the Assured or the Firm in respect of which the Assured is insured hereunder the Assured shall reimburse to the Insurers the difference between the sum payable by the Insurers in respect of that claim and the sum which would have been payable in the absence of such prejudice. Provided always that it shall be a condition precedent of the right of the Insurers to seek such reimbursement that they shall have fully indemnified the Assured in accordance with the terms hereof.

(c) (i) For the purpose of this paragraph 'the relevant date' means the date when a claim the subject of the Insuring Clauses hereof is first made against the Assured or the date, if earlier, when circumstances which may give rise thereto first came to the notice of the solicitor or of any solicitor or former solicitor (including the personal representatives of any such solicitor or former solicitor) liable with the solicitor in respect thereof.

(ii) If on the relevant date the solicitor is practising as a solicitor in partnership with one or more solicitors, or is a partner in more than one such partnership, the Schedule shall, subject to (iii) below, be deemed to specify as the Sum Insured in respect of that claim, an amount of $50,000 multiplied by the number in partnership or in the largest such partnership (measured by the

number of partners who are members thereof) on the relevant date or on the 1st January preceding that date, whichever number is greater.

(iii) If on the relevant date one or more solicitors who are liable to the claimant are practising as solicitors in partnership but there is no such partnership of which all of them are members the Schedule shall be deemed to specify as the Sum Insured in respect of that claim an amount of $50,000 multiplied by the number of partners in the largest partnership (measured as aforesaid) in which any such solicitor is practising on that date or on the 1st January preceding that date, whichever number is greater.

(iv) The number by which the amount $50,000 falls to be multiplied under (ii) and (iii) above is herein called 'the multiplier'.

4. General Conditions

(a) (i) Neither the Assured nor the Firm shall admit liability for, or settle, any claim falling within the Insuring Clauses hereof or incur any costs or expenses in connexion therewith without the consent of the Insurers (such consent not to be unreasonably withheld), and subject to (ii) below the Assured shall procure that the Insurers shall be entitled at their own expense at any time to take over the conduct in the name of the Assured or the Firm of the defence or settlement of any such claim.

(ii) The Assured, the Firm or the Insurers shall not be required to contest any legal proceedings unless a Queen's Counsel (to be

mutually agreed upon by the Assured, the Firm and the Insurers or failing agreement to be appointed by the President of the Law Institute for the time being) shall advise that such proceedings should be contested.

(b) The Assured shall procure that notice to the Insurers shall be given in writing as soon as practicable of any claim the subject of the Insuring Clauses hereof made during the Period of Insurance against the Assured or the Firm or of the receipt by either of them of notice from any person of any intention to make a claim against them. The Assured shall also give notice in writing to the Insurers of any circumstances of which the Assured shall become aware during the Period of Insurance which may give rise to such a claim. If a notice is given to the Insurers under this paragraph any claim subsequently made (whether before or after the expiration of the Period of Insurance) pursuant to such an intention to claim or arising from circumstances so notified shall be deemed to have been made at the date when such notice was given.

(c) The Insurers waive any rights of subrogation against any employee of the Assured save where those rights arise in connexion with a dishonest or criminal act by that employee.

(d) Notices to the Insurers to be given hereunder shall be deemed to be properly made if given to Law Claims, 191 Queen St., Melbourne, (Tel. 676455).

(e) Save as provided in General Conditions (a) (ii) above any dispute or disagreement between the Assured and the Insurers arising out of or in connexion with this insurance shall at the request of either of them be referred

to the sole arbitrament of a person to be appointed (failing agreement between them) by the President of the Law Institute for the time being whose decision shall be final and binding upon both parties.

(f) If the Assured shall prefer any claim hereunder knowing the same to be false or fraudulent as regards amount or otherwise this insurance shall become void and all claims hereunder shall be forfeited.

5. General Exclusions

(a) This insurance shall not indemnify the Assured in respect of the first $1,000 of any one claim or (in the case of any claim to which special condition (c) applies) the first $1,000 multiplied by the Multiplier.

(b) This insurance shall not indemnify the Assured in respect of any loss arising out of any claim:

(i) for death, bodily injury, physical loss or physical damage to property of any kind whatsoever (other than property in the care, custody and control of the assured or the Firm in connexion with the Practice for which they are responsible, not being property occupied or used by them for the purposes of the Practice);

(ii) for the payment of a trading debt incurred by the Assured or the Firm;

(iii) in respect of any circumstance or occurrence which has been notified under any other insurance attaching prior to the inception of this Certificate;

(iv) brought about by the dishonesty or fraudulent act or omission of the Solicitor or any other Solicitor for whose acts he is jointly liable. Save that this exclusion shall not apply to liability arising out of any claim brought about by the dishonesty or fraudulent act or omission of any person employed in connexion with the Practice (including any articled clerk and any solicitor who is a consultant or associate with the firm).

(v) directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, the radio-active toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; directly occasioned by pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, or from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power.

(vi) in respect of any liability incurred in connexion with a practice conducted wholly outside the State of Victoria.

6. Jurisdiction and Service of Suit

Notwithstanding anything contained in 4 (e) above Insurers agree that --

(a) In the event of a dispute arising under this insurance, the Insurers at the request of the Assured will submit to the jurisdiction of any competent

Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court.

(b) Any summons notice or process to be served upon the Insurers may be served upon Phillips, Fox and Masel, Solicitors, of Melbourne, who have authority to accept service and to enter an appearance on Insurers' behalf, and who are directed at the request of the Assured to give a written undertaking to the Assured that they will enter an appearance on Insurers' behalf.

(c) If suit is instituted against any one of the Insurers, all Insurers will abide by the final decision of any competent Court or any competent appellate Court in the Commonwealth of Australia.

A Schedule, incorporating a specimen proposal form, details of the insurers consortium, and the signature of the Brokers, follows the body of the Certificate of Insurance. The schedule has been omitted from this Appendix.

NOTES ON SOURCES

The following are references to some major sources for information in the text. It is not exhaustive of the sources consulted by the Commission.

Chapter 1. Introduction

(1) Solicitors

On the New South Wales Voluntary scheme, see generally

Law Society of New South Wales (1977a, 1977c, 1978b).
Note (1968, 1972).
Rosser (1971a, 1971b, 1974).

(2) Barristers

Generally, see New South Wales Bar Association (1977). On the Saif Ali case, see Zander, (1979).

Chapter 2. Compulsory Insurance

A. Introduction

The following legislation establishes compulsory insurance schemes in the respective jurisdictions indicated. Reference may also be made to the Master Policy and Certificate of Insurance where these are not embodied in rules or regulations, and to the additional material cited.

(a) Australia

Victoria: Legal Profession Practice Act 1958 s.88A.
Professional Indemnity Insurance Regulations 1978.
Note (1977, 1978a, 1979a, 1979b); Law Institute of Victoria (1977); Jones (1978).
See generally, regular 'En Garde' columns in Law Institute Journal.

Queensland: Queensland Law Society Act 1952 s.5.
Indemnity Rules 1978.
Peterson (1977).
Queensland Law Society (1978).

Tasmania: Roach (1979).

Western Australia: Law Society of Western Australia (1979).

(b) United Kingdom

England: Solicitors Act 1974 s.37.
Solicitors Indemnity Rules 1975, 1978, 1979.
Denby (1978); Marshall (1978); Leach (1979); Note (1975a, 1979c).
Law Society (England) (1977); Royal Commission on Legal Services (1979).

Scotland: Solicitors (Scotland) Act 1976 s.8.
Solicitors (Scotland) Professional Indemnity Insurance Rules 1978.
Law Society of Scotland (1977a, 1977b); Faculty of Advocates (1977).

Northern Ireland: Solicitors (Northern Ireland) Order 1976 Art.63.
Solicitors Indemnity Regulations 1976.

(c) Canada

Alberta: Legal Profession Act 1970, ss.85-88, Rules 129-139A.

British Columbia: Legal Professions Act 1960, s.36A, Rules Ch.4 Art.1.

Manitoba: Law Society Act 1970, s.30.1, Rule 60B.

New Brunswick: Barristers Society Act 1973, Regulation 69.

Nova Scotia: Barristers and Solicitors Act 1967, ss.32A-32D, Regulation 37.

Ontario: Law Society Act 1970, s.53. Stinton (1977).

Prince Edward Island: Law Society and Legal Profession Act 1974, s.37(t).

Saskatchewan: Legal Profession Act 1965, s.39A.

For the South African insurance scheme see Note (1972, 1973, 1975b, 1978b).

On New Zealand proposals for compulsory insurance, see New Zealand Law Society (1977), Note (1979d).

On professional indemnity insurance in the United States of America, see Denenberg (1970), Woytash (1976), Morel (1977), Gates (1977), Stern (1978).

B. Recent Developments in New South Wales

Generally, see Law Society of New South Wales (1977a, 1977b, 1978).

C. The Case for Compulsion

Generally, see Law Society of New South Wales (1977b, 1978a); New South Wales Bar Association (1977); Letters to (English) Law Society's Gazette reprinted in Law Society of New South Wales (1977a).

D. The Case Against Compulsion

As for C. above.

E. An Alternative to Insurance

For details of the Fidelity Fund in New South Wales, see Legal Practitioners Act 1898, Part VIII, and Law Society of New South Wales (1977d).

On Fidelity Funds elsewhere see e.g:

England: Solicitors Act 1974 s.36.

Ontario: Law Society Act 1970 s.51.

Victoria: Legal Profession Practice Act 1958 s.64.

Queensland: Queensland Law Society Act 1952 s.24.

G. Exemptions and Waivers

I Barristers

For existing schemes see:

New South Wales: Bar Association voluntary scheme, in Appendix II to this Paper.

Scotland: Faculty of Advocates (1977).

On committees set up to investigate barristers insurance see:

Australian Bar Association: Note (1979e)

England: Note (1979f).

II Practitioners Employed by Private Practitioners

Generally, see e.g., Victoria, Queensland and England, Certificate of Insurance, clause 1(b).

III Practitioners Outside Private Practice

On application of schemes to private practice only see e.g., Victoria, Queensland and England: Certificate of Insurance, clauses 1 and 2.

On liability of negligent employee to the employer see Lister v. Romford Ice (1957), Davenport v. Commissioner for Railways (1953).

IV Unpaid Work

For waivers for unpaid work under the English scheme see Note (1976).

V Legal Aid Centres

The Legal Services Commission of New South Wales was established by the Legal Services Commission Act 1979, No.78 of 1979.

VI Individual Waivers

For existing powers to grant waivers, see e.g:

Victoria: Legal Profession Practice Act 1958 s.88A(4)(c).

Queensland: Queensland Law Society Act 1952 s.5(9)(vi).

England: Solicitors Indemnity Rules 1975, Rule 5.

Chapter 3. Types of Scheme

For details of the particular schemes mentioned, see the sources listed for Chapter 2 A.

A. The Major Alternatives

III. Mutual Fund

For the Builders Licensing Board Insurance Fund, see Builders Licensing Act 1971, Part VI.

IV. Combinations

On the Ontario scheme see Stinton (1977).

B. Their Advantages and Disadvantages

On the merits of the alternative schemes, see generally,

Law Society of New South Wales (1977b, 1978a).
Law Society (England) (1977).
Law Society of Scotland (1977a, 1977b).
Law Institute of Victoria (1977).
Queensland Law Society (1978).

II. Master Policy

On complaints concerning higher premiums see generally letters to Law Society's Gazette (England) and Law Institute Journal (Victoria).

On taking claims records into account in Victoria, see e.g. Jones (1978).

III. Mutual Fund

On exemption under section 37 of the Insurance Act 1973, see letter from Australian Insurance Commissioner to Law Society of New South Wales, reprinted in Law Society of New South Wales (1977a).

C. The Attitude of the Professional Associations

For development of Law Society views, see Law Society of New South Wales (1977a, 1977b, 1978a).

Chapter 4. Terms of the Policy

Generally, see the sources listed for Chapter 2 A.

B. Types of Claims

I. General

On width of cover in Master Policy schemes, see e.g., Victoria, Queensland and England: Certificate of Insurance clause 2(a).

On width of cover in New South Wales Voluntary Scheme, see Appendix I to this Paper, section 1.

II. Dishonesty

1. The Present Situation

(1) New South Wales

(a) Insurance

On illegality of cover for dishonesty by the insured, see e.g., Treitel (1970).

(b) Fidelity Fund

For contribution rates to Fund, see e.g., Law Society of New South Wales (1979a).

On Fund generally, see Legal Practitioners Act 1898 Part VIII, Law Society of New South Wales (1977d, 1979b).

(2) Elsewhere

(b) Fidelity Fund

On application of Funds see e.g.,

England: Solicitors Act 1974 s.36.

Victoria: Legal Profession Practice Act 1958 s.64.

Queensland: Queensland Law Society Act 1952 s.24.

Ontario: Law Society Act 1970 s.51.

2. Possible Systems

(1) Solicitors

(a) All Dishonesty under Insurance

On the Statutory Interest Account see Legal Practitioners Act 1898 Part VII A, Law Society of New South Wales (1979b, 1979c).

Statistics on payments from the Fidelity Fund related to sole practitioners are drawn from information supplied to us by the Law Society of New South Wales.

III Type of Work

For discussion of what is meant by "in the course of practice" and like terms, see e.g.

Baker v. Law Institute of Victoria (1974).
Downey v. O'Connell (1951).
In re Hunt (1976).

C. Amount of Cover: Solicitors

Generally, see the sources listed under Chapter 2 A.

II Uniform or Variable

2. Between Practices

On cover in the Proposed New Zealand scheme see Note (1979d).

III Criteria for Variation Between Practices

1. Possibilities and Considerations

(j) Solicitors' Voluntary Scheme Experience

Information on large claims made under the Law Society of New South Wales Voluntary Scheme supplied by the brokers to the scheme.

For indexation of premiums based on gross fees increases, see

Queensland: Master Policy, clause 2.

Tasmania: Proposed Master Policy, clause 2, Roach (1979).

IV Amount of Cover

1. The Present Situation

On the survey of solicitors in New South Wales and the A.C.T., see Meredith (1976). See also Tomasic (1978).

For Law Society views on amount of cover under a compulsory scheme, see Law Society of New South Wales (1977b, 1978a).

The table of payments and reserves (p.87) is compiled from statistics supplied to the Commission by the brokers to the Law Society of New South Wales Voluntary Scheme.

For claims experience in Ontario, see Stinton (1977).

D. Premiums: Solicitors

Generally, see the sources listed under Chapter 2 A.

II. Criteria for Variations Between Practices

1. The Present Situation

On the Inner London area weighting in the English Scheme, see Marshall (1978), Leach (1979). On the introduction of claims experience see Note (1979c).

On premium loading in the Scottish scheme, see Law Society of Scotland (1977b), Scottish Solicitors Master Policy, clause 4(b).

2. Possibilities and Considerations

On the sliding scale under the Scottish scheme, see Law Society of Scotland (1977b).

3. Tentative Conclsuions

On reduced premiums for part-time practitioners, see

Victoria and Queensland: Master Policy clause (3)b.

England: Master Policy clause 3(d).

III. Amount of Premium

For current overseas premiums, see

England: Master Policy (1979-80) clause 3(1)(a).

Scotland: Law Society of Scotland (1977b).

Ontario: Law Society of Upper Canada (1979).

In the table on p.98: premiums for New South Wales solicitors' and accountants' voluntary schemes supplied by Baillieu Bowring (Professional Indemnity) Pty. Ltd.; premium for New South Wales barristers' voluntary scheme supplied by Minet Australia Ltd.; premium for Victorian solicitors' compulsory scheme supplied by Law Claims; premium for Queensland solicitors' compulsory scheme supplied by Queensland Law Society; premium for South Australian land brokers' scheme supplied by Land Brokers' Society; premium for proposed Western Australian compulsory scheme contained in Law Society of Western Australia (1979).

E. Deductible: Solicitors

Generally, see the sources listed under Chapter 2 A.

I The Present Situation

For deductibles under compulsory schemes see Victoria, Queensland and England: Certificate of Insurance, clause 5(a).

For deductibles under the Scottish compulsory scheme, see Law Society of Scotland (1977b), Scottish Solicitors' Master Policy, clause 5.

For deductibles in Canada, see e.g. Ontario Master Policy, Condition 2 and Declarations.

III Tentative Conclusions

For variation of deductibles in British Columbia, see Master Policy, Condition 1 and Declarations.

Chapter 5. Control and Management

A. Existing Systems

I. Statutory Schemes

2. Control and Management

(1) Claims-Handling

For a special claims-handling body, see e.g. Law Claims established under Victorian Master Policy, clause 4.

On the composition and function of claims committees, see e.g. Victoria and Queensland: Master Policy, clause 4(c), Ontario: Stop Loss and Management Agreement clause 1.

On the panel of solicitors, see e.g. Victorian Master Policy, clause 4(e).

(2) Monitoring

See e.g. Law Institute of Victoria (1977), Queensland Law Society (1978).

II Other Schemes

On proposals for a Master Policy scheme in Tasmania, see Roach (1979).

For the disciplinary nexus in the Faculty of Advocates schemes, see Faculty of Advocates (1977), p.19.

D. Loss Prevention

I General

On loss prevention measures in Ontario, see Stinton (1977) and Morham (1977); in Victoria, see regular 'En Garde' columns in Law Institute Journal.

For a Loss Prevention Manual in New South Wales, see Rosser (1974b).

II Disclosure of Information

Generally, see Law Society of New South Wales (1977b).

2. Disclosure to Monitoring Committee

For a discussion of issues concerning confidentiality, see Discussion Paper No.1, General Regulation, pp.146-8.

3. Disclosure to Professional Standards Authorities

(1) The Present Situation

For position in Australia, see Law Institute of Victoria (1977b), Queensland Master Policy clause 4(f), Law Society of Western Australia (1979) and Roach (1979).

Details of the position in British Columbia were provided by the Law Society of British Columbia. For the position in Ontario, see e.g. Law Society of Upper Canada (1977).

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