NSW Law Reform Commission

REPORT 31 OUTLINE (1982) - FIRST REPORT ON THE LEGAL PROFESSION: GENERAL REGULATION AND STRUCTURE

Table of Contents

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Preface

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

General Regulation of the Profession;

The Division of the Profession into Barristers and Solicitors;

Queen's Counsel;

Court Dress.

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

Mr RD Conacher (Deputy Chairman of the Commission)

Mr Julian Disney

Mr Denis Gressier

His Honour Judge Trevor Martin, QC

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

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

The Outline of the Report (pp.3-16) is a brief and general summary of the major recommendations made in the Report and the main reasons for them.

We reproduce as an annexure to the Outline (pp.17-31) the full list of recommendations which appears in the Report itself.

For many readers it may be sufficient to read the Outline only. But reference to all or part of the full list of recommendations is likely to be useful for some readers.

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Outline of the Report

I. INTRODUCTION

The Report and this Outline

1. As mentioned in the Preface, the preparation of the *First Report on the Legal Profession* was the responsibility of four members of the Commission. The first three Parts of the Report were prepared by the majority of these Commissioners, namely Messrs. Disney and Gressier, and Judge Martin. These Parts include the Commission's final recommendations on the matters dealt with in the Report. The remaining Part, entitled "A Separate View", was prepared by Mr Conacher. He agrees with some of the recommendations made in the Report, disagrees partially or entirely with some others, and expresses no firm view in relation to others. References in this Outline to "we", "us" and "our" are to the Commissioners comprising the majority.

2. This Outline is divided into four Parts corresponding to those of the Report. They are as follows.

> I. INTRODUCTION (paras.1-4)
>
> II. GENERAL REGULATION AND THE DIVISION INTO BARRISTERS AND SOLICITORS (paras.5-18)
>
> III. QUEEN'S COUNSEL AND COURT DRESS (paras.19-31)
>
> IV. A SEPARATE VIEW (paras.32-39)

The Outline concentrates on summarising the main recommendations made in the Report, but it includes outlines of the reasons given in the Report for making them. **The summaries of recommendations are printed in bold, and a cross reference is given (eg. R.3-R.6) to the relevant recommendations in the numbered list of recommendations at the back of the Outline.** The Outline must yield to the Report itself, and the summary of recommendations in the Outline must yield to the recommendations themselves as they appear in the numbered list.

Our Methods of Inquiry (Chapter 1 of the Report)

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

4. With the benefit of the information and ideas obtained by these means we prepared and published a series of six Discussion Papers and five Background Papers on various topics falling within the ambit of the Legal Profession Inquiry. The Papers are listed on p. 32 of this Outline. Two of the Discussion Papers, *General Regulation* and *The Structure of the Profession*, made tentative suggestions on matters about which we make final recommendations in the First Report. Responses to those suggestions have influenced

our final recommendations to a substantial extent, both on general issues and on points of detail.

II. GENERAL REGULATION AND THE DIVISION INTO BARRISTERS AND SOLICITORS (Chapter 2)

Introduction

5. In chapter 2 of the Report we summarise the present position in New South Wales in relation to the general regulation of the profession and the division of the profession into barristers and solicitors. We summarise also the tentative suggestions which we made on these matters in our Discussion Papers, some of the responses which those Papers evoked, and developments since the Papers were published.

General Regulation

6. At present, regulation of solicitors is effected principally by the Council of the Law Society of New South Wales. It has extensive statutory powers for that purpose. Regulation of barristers is effected principally by the Council of the New South Wales Bar Association, although the Council has no statutory powers of regulation. We refer to the Law Society Council and the Bar Council as the *general regulatory bodies* of solicitors and barristers respectively. The Governor has extensive powers to make statutory regulations in relation to solicitors, but has no such power in relation to barristers. The Supreme Court has inherent powers to regulate barristers and solicitors but they are exercised rarely.

7. In our Discussion Paper, *General Regulation,* we suggested that there should be one general regulatory body for the whole legal profession, that it should include a substantial number of non-lawyers, and that it should not also be the governing body of a professional association of lawyers. We suggested also the establishment of a statutory body, consisting principally of non-lawyers, which would have no regulatory functions but would provide a forum for the development and expression of views of non-lawyers on matters concerning the regulation of the profession and the delivery of legal services. Some responses to these suggestions were strongly favourable, some agreed with the general thrust but disagreed on some aspects, and others (including those from the Law Society and the Bar Association) opposed most of the principal suggestions.

8. Since we published *General Regulation,* the Law Society has taken some steps to involve non-lawyers in its committees, though not on its Council, and proposals for greater involvement of non-lawyers in the regulation of the profession have been made by Royal Commissions in England and Scotland, and by a government Committee of Inquiry in Western Australia. In many parts of the United States and Canada non-lawyers play a substantial and growing role in regulation of the legal profession.

Division into Barristers and Solicitors

9. At present, lawyers in New South Wales are admitted as either barristers or solicitors. A number of distinctions in law, and in the official practices of government and the courts, are based on whether a lawyer is a barrister or a solicitor. For example, a solicitor, unlike a barrister, must practise for 12 months as an employee before becoming entitled to practise as a principal must hold and pay for an annual practising certificate, and is subject to statutory procedures for direct review of his or her fees. On the other hand, there are a number of restrictive practices at the Bar which result in barristers being subject to certain restrictions that do not apply to solicitors. For example, barristers, unlike solicitors, must not act for a client without the intervention of an instructing solicitor (save in very limited circumstances) and must not practise in partnership. We describe other distinctions and restrictive practices in the Report.

10. In our Discussion Paper, The *Structure of the Profession,* we suggested that separate admission of barristers and solicitors should be abolished, that all legal and official distinctions between barristers and solicitors (or between those who practise in the style in which barristers presently practise and those who practise in other styles) should be abolished, that restrictive practices within the profession should be subject to regulation in the public interest, and that the Bar Council should consider relaxing or abolishing certain of the present restrictive practices amongst barristers. These suggestions met with general approval from some commentators. Other responses including that of the Law Society, agreed with many of the suggestions but either disagreed with some or considered that they were not necessary. Some responses, including that of the Bar Association, were opposed to most of the suggestions. The Discussion Paper also included suggestions by our colleague, Mr Conacher. They are referred to later in this Outline.

11. After the publication of *The Structure of the Profession,* the Law Society and the Bar Association established a Joint Working Committee to consider, in particular, the suggestions which we made concerning the abolition or relaxation of certain restrictive practices at the Bar. The desirability or otherwise of a division between barristers and solicitors has been considered recently by three official inquiries outside New South Wales. In Western Australia, where there is no such division, an official Committee of Inquiry has expressed opposition to proposals for change in that respect. Recent Royal Commissions in England and Scotland favoured retention of the present divided structure of the profession in those countries, but recommended the abolition or relaxation of certain distinctions between barristers and solicitors. In most parts of the world the legal profession does not have a rigidly divided structure akin to that in New South Wales.

SOME GENERAL CONCLUSIONS (Chapter 3)

General Regulation

12. In the first half of chapter 3 of the Report we discuss some basic issues relating to general regulation and we arrive at the following general conclusions.

(1) Regulation of the profession should be directed towards the public interest.

(2) Assessment of the public interest is a complex value judgment involving consideration of a wide range of interests, including those of lawyers, clients, would-be clients and others.

(3) The perception and balancing of these interests requires substantial participation of lawyers and non- lawyers in the regulation of the profession.

(4) In order to preserve due independence for members of the profession, the profession's sense of responsibility for its standards, and its respect for the rules by which it is governed, the general regulatory bodies of the profession should consist predominantly of lawyers chosen by the profession itself.

(5) There are substantial advantages and substantial disadvantages in the Law Society Council and the Bar Council being general regulatory bodies responsible for protecting the public interest, as well as being governing bodies of professional associations, responsible for advancing the interests of their own members. If they are to retain these dual roles, it will be necessary to provide additional safeguards for the public interest.

(6) Practitioners' rights to vote in elections for the general regulatory body to which they are subject should not depend upon whether or not they are members of a particular professional association.

(7) Whether or not the Law Society Council and the Bar Council remain as general regulatory bodies, a committee, consisting principally of non-lawyers, should be established by statute to advise the Government and the general regulatory body or bodies on matters relating to the regulation of the profession.

(8) The Government is entitled to a significant role in the regulation of the profession in order to ensure that the profession is being regulated in the public interest. But its role should not be dominant and should not be of such a kind as to threaten the existence of a legal profession which is willing and free to represent clients against Government without fear of reprisal.

(9) The courts are not appropriate bodies to have a greater role in regulation of the profession than they have at present. In particular, it would not be appropriate for them to be given general responsibility for the regulation of the profession.

13. These general conclusions leave unresolved one fundamental issue, namely whether the Law Society Council and the Bar Council should continue as general regulatory bodies. We return to that issue, and to many other issues concerning general regulation, in later chapters of the Report. Before doing so, we consider whether the profession should continue to be divided into barristers and solicitors. The answer to that question must obviously affect our recommendations about the future regulatory roles, if any, of the Law Society Council and the Bar Council.

Division into Barristers and Solicitors

14. In the second half of chapter 3 we discuss the present divided structure in New South Wales and we express the view that the present structure has the following disadvantages, amongst others.

(1) In many cases, two lawyers (a barrister and a solicitor) are used where one lawyer would be sufficient and more economical.

(2) Where a barrister and a solicitor are used, the division of labour between them is often determined by rules or practices which are not appropriate to the particular circumstances, with the result that duplication, omission, or confusion may occur.

(3) Many solicitors are unduly deterred from handling matters on their own without reference to a barrister, and therefore they do not develop their ability to undertake advocacy and to advise on difficult questions of law.

(4) Especially in relation to litigation, firms of solicitors are deterred from providing a complete service to their clients, yet in many circumstances such a service might be more efficient than one which involves a barrister.

(5) The number and calibre of specialist solicitors tends to be under estimated, especially by members of the public, thus inhibiting the supply and accessibility of such specialists.

(6) In practice, the ranks of leading advocates and advisers (including Queen's Counsel) and the judiciary are deprived of much valuable talent to be found amongst solicitors.

(7) Specialist advocates and advisers are less readily accessible to clients in country and outer suburban areas.

(8) There are undue restrictions on the freedom and incentive for lawyers to introduce new methods of providing legal services, or to extend existing methods into new areas.

15. The responses to these weaknesses in the present structure should be based, in our view, on the following premises.

(1) In view of the diverse needs and preferences of lawyers and their clients, the structure of the profession should not restrict the style in which practitioners may practise, unless the need to do so is clearly demonstrated. Freedom of choice in this respect encourages flexibility, diversity, competition and innovation

(2) The style in which barristers presently practise is appropriate for many practitioners, and the use of such a practitioner can be beneficial for many clients. It should continue to be a prevalent style within the profession and there should be no discrimination against it.

(3) But there are other styles of practice which are better for some practitioners, and which are of greater benefit to many clients, than the style of a barrister. This applies to those types of work which barristers presently do, namely advocacy and advisory work on the instructions of another practitioner, as well as to other types of work.

(4) The present divided structure of the profession involves a combination of, on the one hand, legal and official distinctions between barristers and solicitors, and, on the other hand, restrictive practices at the Bar. This combination substantially restricts practitioners flexibility and freedom of choice in relation to the style in which they practise.

(5) The restrictive nature of the present divided structure applies particularly to practitioners who wish to practise in the same fields and in the same style as barristers, save that they wish to practise in partnership or to do some types of work without the intervention of an instructing practitioner.

(6) In order to remove any undue restrictions on these and other styles of practice, each of the existing legal and official distinctions between barristers and solicitors should be examined in order to consider whether it is justified.

(7) If unjustified distinctions between barristers and solicitors are removed, restrictive practices at the Bar will be less likely to constitute unreasonable restraints on practitioners. Practitioners who do not wish to comply with the practices will have greater freedom to practise outside the Bar.

(8) Nevertheless, these restrictive practices should be carefully reconsidered to see whether they are contrary to the public interest, and, if so, whether they should be relaxed or abolished, either voluntarily or otherwise.

(9) In considering the impact of these restrictive practices on the public interest, it is necessary to recognise the important role which the Bar plays in nurturing a group of practitioners who, generally speaking, have a valuable degree of independence, accessibility and expertise.

RECOMMENDATIONS (Chapters 4-8)

16. In chapters 4-8 of the Report we make recommendations on a number of matters concerning general regulation and the division into barristers and solicitors. The recommendations are given in detail in the numbered list at the end of this Outline. Some of the more important changes which we recommend are as follows.

Common Admission (see Recommendation R.1)

All persons admitted to the profession should be admitted under a common title. The common title could be either "barrister and solicitor" or "lawyer".

Practising Certificates (RR.2, 13, 14)

All practitioners should be required to hold a practising certificate.

General Regulatory Powers (RR.3-12)

The Law Society Council should be the general regulatory body for all practitioners save those who elect to be governed by the Bar Council and who undertake to comply with its rules concerning professional practice. Generally speaking, the statutory powers of the Law Society Council and the Governor in relation to practitioners subject to the Law Society Council should be the same as their present powers in relation to solicitors, save that Mr Gressier considers that the Governor's general power to make regulations should be exercisable only on the recommendation of the Law Society Council. The Bar Council and the Governor should be given certain statutory powers in relation to practitioners who are governed by the Bar Council.

Public Membership of General Regulatory Bodies (RR.15-22)

Five "public members" should be added to the Law Society Council and the Bar Council respectively. Three should be chosen by the Public Council on Legal Services (see below) and one each by the Attorney General and the Leader of the Opposition. These members might not be entitled to vote but they should have extensive rights and responsibilities to make reports to the Parliament and the Attorney General. In addition, public members, with voting rights, should be added to the Councils' committees.

Practitioner Membership of General Regulatory Bodies (R.4)

Practitioners who are governed by the Law Society Council should be entitled to vote for the practitioner members of that Council without having to join the Society. A similar principle should apply to practitioners who are governed by the Bar Council.

Public Council on Legal Services (RR.23-28)

A nine-member Public Council on Legal Services, consisting largely of non-lawyers, should be established to act as a reviewing and advisory body in relation to the legal profession and the delivery of legal services. Three of its members should be chosen by the Attorney General, three by the non-practitioner members of the Legal Services Commission and of the Board of the Law Foundation, two by the Consumer Affairs Council and one by the Leader of the Opposition.

As mentioned earlier, the Public Council should play an important role in selecting public members for the Law Society Council and the Bar Council and it should have statutory rights to be consulted before regulations are made in relation to the profession. It should have its own modest premises and staff, and should be entitled to make reports, whether to Parliament or otherwise, and other public state-ments.

Distinctions between Barristers and Solicitors (RR.29-43)

Legal or official distinctions should not be drawn between barristers and solicitors in relation to matters such as

(i) requirements concerning training and experience after admission;

(ii) rights of audience and other rights to do legal work;

(iii) contractual capacity, rights to sue for fees, and immunity from liability;

(iv) fee scales and procedures for independent review of fees;

(v) the appointment of judges.

These recommendations apply also to distinctions based on whether or not a practitioner practises in the style of a barrister. Distinctions in other areas, such as indemnity insurance, court dress, complaints and discipline, and restrictions on advertising, are dealt with later in the Report or will be covered in other Reports.

Regulation of Restrictive Practices (R.44)

The Law Society Council and the Bar Council should have power to prohibit practitioners who are subject to their governance from engaging in particular restrictive practices which, in the opinion of the relevant Council, substantially affect competition and are not in the public interest.

Restrictive Practices at the Bar (RR.45-48)

The Bar Council should consider relaxation of its existing rules against barristers

(i) acting without the intervention of an instructing solicitor;

(ii) practising in partnership;

(iii) employing, or being employed by, another barrister.

It also should consider abolition or substantial relaxation of the restrictive practices concerning barristers

(iv) appearing with solicitors as fellow advocates for the same party;

(v) attending conferences, interviews or hearings without being accompanied by a solicitor;

(vi) attending conferences at solicitors' offices.

We refer in the Report to certain circumstances under which it may be desirable to take specific legislative action in relation to one or more of these six practices.

Periodic Reviews (RR.50, 51)

The Attorney General should be under a statutory obligation to establish every five years a special committee to review the general regulation and structure of the profession. This obligation should not apply if the Attorney-General reports to Parliament that, in his or her opinion, special circumstances make it undesirable to proceed with that review.

THE WAY AHEAD

17. We regard the recommendations in the Report as constituting a substantial step, but only a first step, towards the reform which we consider necessary. Implementation of them should not be seen as the end of a period of reform, but rather as a first phase. On a

number of important issues we may have erred on the side of caution; we are confident that we have not gone too far. These issues include the following.

Two General Regulatory Bodies or One?

Our recommendation that there should continue to be two general regulatory bodies, rather than one, stems from practical considerations under present circumstances, not from considerations of principle. Implementation of other recommendations in the Report would be likely to lead to a substantial reduction in the present degree of division within the profession, thus making it feasible to proceed with the introduction of one general regulatory body.

Mr. Disney joins in the recommendation for the continuance of two bodies, and in the recommendations which flow from it, on the ground that its implementation would lead to a substantial improvement in the present system. But he considers that a preferable course would be to have one general regulatory body for the whole profession.

General Regulatory Bodies and Professional Associations

Experience may demonstrate that, despite the adoption of our recommendations concerning public membership, the Public Council on Legal Services, and other matters, it is undesirable for the Law Society Council and the Bar Council to continue with the dual roles of being general regulatory bodies and the governing Councils of professional associations.

Voting Rights for Public Members

Our present view is that public members on the Law Society Council and Bar Council are more likely to be effective if they do not have voting rights. On that assumption we recommend that they should not have voting rights. Events may indicate, however that they would be more likely to be effective if they did have voting rights and, according-ly, that they should be given such rights.

18. We recommend in the Report (R.51) that these and other issues should be reconsidered in the course of the periodic reviews but that the prospect of a periodic review should not be a reason for delaying the introduction of necessary reforms in advance of any such review.

III. QUEEN'S COUNSEL AND COURT DRESS

19. In chapters 9 and 10 of the Report we consider a number of issues relating to Queen's Counsel and to the dress worn by practitioners when appearing as advocates in court. We mention here some of the more important changes which we recommend. In doing so, we give cross-references (e.g., R.53) to the recommendations themselves as they appear in the numbered list at the end of this Outline.

QUEEN'S COUNSEL (Chapter 9)

Appointment

20. Queen's Counsel in this State have been appointed solely from the ranks of barristers and, with very few exceptions, they have been practising barristers when appointed. In our view, the present Queen's Counsel system fails to give due recognition to eminent lawyers outside the ranks of practising barristers. Accordingly we recommend expansion of the range of eligibility for appointment

21. Our main recommendations may be summarised as follows (see R.53).

Practitioners having outstanding integrity, competence and deep learning in the law should be eligible for appointment as Queen's Counsel, whether or not they practise in the style of a barrister.

Eligibility for appointment should not be confined to practitioners who practise as advocates.

Non-practising lawyers should be eligible for appointment *honotis causa* if they have served the law with distinction as academics or in fields such as government, commerce or industry.

Two-Counsel Rule

22. A most important consequence of a barrister being appointed a Queen's Counsel is that thereafter, for a large range of work, clients cannot retain that barrister unless they retain a junior barrister as well. This "two-counsel" rule, as it is commonly called, is embodied in the rules of the Bar Association.

23. In our view, the rule constitutes an excessive restriction on competition between Queen's Counsel and junior counsel in certain areas of work, and between Queen's Counsel. Moreover, there are many cases which fall within the ambit of the rule but in which, while it may be appropriate to instruct a Queen's Counsel, it maybe inappropriate or unnecessary also to instruct a junior counsel. We consider that the advantages of the existing rule to the personal interests of junior and senior barristers are far greater than the advantages to the public, and that its overall disadvantages outweigh its advantages.

24. We recommend adoption of a new rule along the following lines (see R.54).

Queen's Counsel should not be entitled to assume that a junior counsel is also to be instructed unless it is so stated at the time of the delivery of instructions to the Queen's Counsel.

Queen's Counsel should have an unfettered choice of undertaking work with or without a junior counsel, save that (i) if a Queen's Counsel is to appear with a junior, the junior should be entitled to be involved in the associated written work, and (ii) if a Queen's Counsel considers that the use of two counsel in a particular contentious matter is not justified, he or she either should not require a junior or should decline to accept the work.

Where a junior counsel is to be used, the junior's style of practice should be a matter for the client and the instructing practitioner. The junior should not have to be a person who practises in the style of a barrister; indeed, the junior could be also the instructing practitioner.

Fees of junior Counsel

25. Until 1966, a rule of the Bar Association was to the effect that in a two-counsel case the junior counsel must not charge less than two-thirds of the fee charged by the senior counsel. The effect of the present rule is that, unless the fees have been agreed in advance, the junior must not, in general, charge more than two-thirds. In practice, the effect of the present rule, where the fees have not been agreed in advance, seems to be little different from that of its predecessor.

26. In our view, there is little need to demonstrate the undesirability of a practice which is to the effect that one person receives a fixed proportion of another person's fee, whatever

the relative eminence of the two people and whatever the relative work and responsibility undertaken by them.

27. We recommended in an earlier chapter of the Report that barristers' fees should be subject to a greater degree of regulation than is presently the case. Adoption of such an approach should reduce the present difficulties concerning junior counsel's fees. In addition, however, we make the following recommendations (see R.55).

The present Bar Association rule concerning fees of junior counsel in a two-counsel case should be changed to require that, where a fee is not agreed in advance, the junior counsel should charge such a fee as he or she consider proper and reasonable in all the circumstances, but without having regard to the standing of the senior counsel.

The Law Society Council and the Bar Council should consider further action to encourage and assist instructing practitioners to agree junior counsels' fees in advance.

COURT DRESS (Chapter 10)

28. At present, barristers in New South Wales wear a special dress when appearing as advocates in the higher courts. The dress comprises a wig, gown, bar jacket, wing collar and neck bands. Barristers who are Queen's Counsel wear a somewhat different form of this dress. Solicitors, however, do not wear special court dress when appearing as advocates. It appears that opinion amongst barristers is divided about the desirability of retaining their special court dress. There is also a considerable division of opinion amongst solicitors about whether barristers' court dress should be changed, and about whether solicitor advocates should wear the same dress as barristers. In most parts of Australia, all practitioners are admitted as "barristers and solicitors" and they wear a special court dress, similar to that of barristers in New South Wales, when appearing in the higher State or Federal courts.

29. In our view, the present distinction between barristers and solicitors in relation to court dress is inappropriate and unfair. It unduly inhibits solicitor advocacy, to the detriment of both the profession and the public, and it can lead clients to consider that they are at a disadvantage if represented by a solicitor advocate, no matter how competent that advocate may be.

30. What special dress, if any, should be worn? The gown hides inappropriate dress and thus reduces the need to prescribe what must not be worn. It reduces the likelihood of unfair distinctions between advocates on the grounds of differing quality or style of dress. It emphasises the seriousness of the business of the courts and lends some support to their dignity and authority. It identifies the wearer as an advocate. Wigs, however, can contribute to excessive formality and old-world ceremonially in courts which are striving to be, and to be seen as, efficient and relevant to modern society. They can contribute to witnesses being so overwhelmed by courtroom atmosphere that the accuracy and comprehensibility of their testimony is impaired. They are expensive and they are uncomfortable for many wearers. Wing collars, neck bands and bar jackets have some of the disadvantages of wigs and they do not serve sufficient purpose to justify the inconvenience of using them.

31. Our main recommendations in relation to court dress may be summarised as follows (see R.56).

All practitioners should be required to wear gowns when appearing in courts in which gowns are presently worn by barristers. But we do not oppose gowns being dispensed with in certain courts for all advocates.

Gowns should be the same for all practitioners, save that Queen's Counsel might continue to wear a distinctive gown.

Wigs, bar jackets, wing collars and neck bands should no longer be worn.

Judge Martin joins in this recommendation, but he considers that a greater improvement would be achieved by abolishing the gown as well as the other items of present court dress.

IV. A SEPARATE VIEW (Chapter 11)

32. In the final Part of the Report, Mr Conacher expresses his views on recommendations made by the Commission in the earlier Parts. As was mentioned earlier in this Outline, he agrees entirely or in part with some recommendations. disagrees with some others, and expresses no firm view about others. The principal matters on which he comments are as follows.

33. Common Admission. Mr Conacher is not necessarily opposed to common admission as such, but he opposes it in the context of other recommendations made in the Report. He considers that in this context it would only be change for the sake of change or for the sake of theory unrelated to realities. In his view, some of its aims could be achieved by other means, it might not achieve some of its aims, and it might have adverse consequences.

34. Government Regulation. At present, the Governor has extensive power to make regulations in relation to solicitors. The majority of the Commission recommends that the governor should have such a power in relation to all practitioners, although Mr Gressier considers that it should be exercisable only on the recommendation of the Law Society Council or the Bar Council. Mr Conacher does not favour the Governor having an extensive power of such a kind in relation to any practitioners, even when qualified in the way Mr Gressier suggests. He thinks that such a power strikes at the root of professional independence and is contrary to the overwhelming weight of informed opinion. He does not necessarily oppose, however, the Governor having power to make regulations in relation to some specific matters.

35. Public Council on Legal Services. Mr Conacher considers that the proposed composition of the Council makes it too open to being controlled by Government. In his view, it is potentially a body merely responsive to the wishes of the executive government.

36. The Law Society Council and the Bar Council. Powers on Sufferance. Mr Conacher considers that the recommendations concerning public membership On the governing Councils, the role of the Public Council on Legal Services, and the holding of periodic reviews, might promote discord amongst those who are involved in regulating the profession or in reviewing the manner in which it is regulated. The governing Councils might see their powers as precarious and themselves as being regarded as unworthy of abiding trust. This situation, he believes, would militate against the introduction of successful reforms.

37. Public Members. In Mr Conacher's view, the majority places too much emphasis on what he sees as merely theoretical conflicts between interest and duty when a general regulatory body is also the governing Council of a professional association. He is not necessarily opposed to some public members on the governing Councils, but he considers that the Commission's recommendations create too great a risk of government interference in professional self-regulation, especially as they leave open the possibility of public members being given voting rights at some future time.

38. Queen's Counsel. Mr Conacher considers that eligibility for appointment as a Queen's Counsel should be confined to practising barristers. He thinks there may be merit in amending the two-counsel rule to some extent, but that it should be left for discussion

between the governing Council. which, he has no doubt, will give weight to the Commission's recommendations on this matter. He agrees with the recommendations concerning fees of junior counsel, but he would not favour any introduction of taxation of barristers' fees.

319. Court Dress. Mr Conacher sees merit in the special court dress for all practitioners consisting only of a gown. The gown might differ perhaps in some details between solicitors, Queen's Counsel and junior barristers. But the Law Society does not favour a gown for solicitors and he does not consider that its view should be overridden. Accordingly, a distinction would remain between barristers and solicitors. If uniformity in court dress between barrister and solicitor is not to be achieved, Mr Conacher considers that there would be no utility, and some harm, in altering barristers' present dress by abolishing the wig or other items. He would leave the matter to be decided by the courts.

List of Recommendations

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

List of Recommendations

CHAPTER 4: ADMISSION, GENERAL REGULATORY BODIES AND THE RIGHT TO PRACTISE

Admission to the Profession (paras.4.3-4.9)

R.1 (1) All persons should be admitted to the profession under a common title.

(2) The common title should be either "barrister and solicitor" or "lawyer". We have no firm preference between these alternatives, but we adopt "barrister and solicitor' for use in this Report.

The Right to Practise (paras.4.9, 4.36-4.39)

R.2 (1) A person who is admitted as a barrister and solicitor should not be entitled to practise unless he or she holds a current practising certificate.

(2) The term "legal practitioner" should be used to denote a barrister and solicitor who is entitled to practise.

General Regulatory Bodies (paras.4 10-4.23)

R.3 (1) The Law Society Council and the Bar Council should continue as the general regulatory bodies of the profession. This recommendation is to be read in conjunction with recommendations 4 (respective ambits of the Councils), 6-11 (powers of the Councils and of the Governor), 15-21 (public membership on the Councils) and 22-28 (creation of a Public Council on Legal Services).

(2) Our recommendation that there should continue to be two regulatory bodies, rather than one, stems from the practical difficulties involved in introducing one general regulatory body for the profession under present circumstances. Implementation of other recommendations in this report is likely to lead to a substantial reduction in the present degree of division within the profession, thus making it feasible to proceed with the introduction of one regulatory body for the whole profession. This question should be kept under review (see, in particular, R.50, 51).

(3) Experience may demonstrate that, despite adoption of measures along the lines of those referred to in (1) above, it is undesirable to continue to have as a general regulatory body of the profession a body which is also the governing council of a professional association such as the Law Society and the Bar Association. This question should also be kept under review (see, in particular, R.50, 51).

(4) Mr. Disney joins in this recommendation, and in the recommendations which flow from it, on the ground that its implementation would lead to a substantial improvement on the present system. But he considers that a preferable course would be to have one general regulatory body for the whole profession.

(1) The Bar Council should be the general regulatory body for legal practitioners who elect to be governed by it and who undertake to comply with its rules concerning professional practice. These practitioners should be entitled to vote in elections for practitioner members of the Bar Council, but they should not be required to become members of the Association.

(2) The Law Society Council should be the general regulatory body for all other legal practitioners. These practitioners should be entitled to vote in elections for practitioner members of the Law Society Council, but they should not be required to become members of the Society.

R.5 Under the system recommended above, the terms “barrister” and “solicitor” would not be appropriate for distinguishing between practitioners who are subject to the Bar Council and the Law Society Council. They should not be used for that purpose in legislation, or, for example, by the courts, the Government or the general regulatory bodies.

Powers of General Regulatory Bodies (paras.4.24-4.28)

N.B. This section and the next section contain general recommendations about powers to regulate practitioners. Recommendations about powers in particular areas of regulation, such as complaints and discipline, will be made in other Reports.

R.6 (1) Generally speaking, the Law Society Council should retain its present statutory powers. These powers include broad powers to make regulations, subject to the approval of the Governor. The Council's statutory powers should be exercisable in relation to practitioners for whom it is the general regulatory body.

(2) The Council should continue to have non-statutory powers, arising from the Society's Memorandum and Articles of Association, to make rules and rulings in relation to practitioners who are members of the Society.

(3) In exercising its statutory power, the council should not be subject to direction or restraint by a general meeting, or any other organ, of the Law Society.

R.7 (1) The Bar Council should have some statutory powers, including some powers to make regulations with the approval of the Governor, in relation to practitioners for whom it is the general regulatory body. Mr. Disney and judge Martin consider that the Council should have powers of this kind in the area of investigation of complaints, and perhaps in certain other specific areas. Mr Conacher and Mr Gressier consider that the powers should include a general power, such as the Law Society has at present, to make regulations concerning "professional practice, conduct and discipline".

(2) The Council should continue to have non-statutory powers, under the Bar Association's Memorandum and Articles of Association, to make rules and rulings. We have recommended earlier that any practitioner who elects to be governed by the Council should have to undertake to comply with its rules in relation to professional practice.

(3) In exercising its statutory powers, and in making non-statutory rules in relation to professional practice, the Council should not be subject to direction or restraint by a general meeting, or any other organ, of the Bar Association.

R.8 Disciplinary authorities considering action in relation to a particular practitioner should have regard to any relevant rules or rulings of the general regulatory body to which that practitioner is subject, and to whether or not the practitioner is under any obligation to observe the rules or rulings in question.

Powers of the Governor (paras.4.29-4.3 1)

R.9 (1) The Governor should have certain powers to make regulations in relation to the legal profession.

(2) These powers should include powers to make regulations in relation to specific matters, such as those in relation to which, by virtue of s.87(l)(a)-(d) of the Legal Practitioners Act, 1898, the Governor already has power to make regulations concerning solicitors.

(3) In addition, Mr. Disney and Judge Martin consider that the Governor should have a broad power to make regulations in relation to any practitioner, as has been the case in relation to solicitors since 1980. Mr Gressier considers that any such power should be exercisable only on the recommendation of the Law Society Council or the Bar Council. Mr Conacher considers that the Governor should have no such power.

Regulation-making Procedures (paras.4.32-4.34)

R.10 (1) In general, if either the Law Society. Council or the Bar Council prepares draft regulations it should give the other Council, and the Public Council on Legal Services (the establishment of which is recommended in recommendation 23 below), an opportunity to express its views before a final draft is sent to the Attorney General for the approval of the Governor.

(2) When the Law Society Council or the Bar Council sends regulations to the Attorney General for the approval of the Governor, it should send at the same time a copy of those regulations to the other Council and to the Public Council on Legal Services.

(3) In general, when the Attorney-General receives proposed regulations from the Law Society Council or the Bar Council, he or she should give the other Council, and the Public Council on Legal Services, an opportunity, before the regulations are sent to the Governor, to express its views about them to him or her.

R.11 Ingeneral,iftheAttorney-GeneralproposesregulationstobemadebytheGovernor, the Attorney-General should give the Law Society Council, the Bar Council and the Public Council on Legal Services an opportunity to express their views to him or her before a final draft is sent to the Governor.

Annual Reports by General Regulatory Bodies (para.4.35)

R.12 (1) The Law Society Council and the Bar Council should be required to make an Annual Report on the discharge of their regulatory functions to the Attorney General, for presentation to Parliament.

(2) The Governor should have power to require, by regulation, that the Annual Reports must contain information on prescribed aspects of the profession and of the work of the Councils.

Practising Certificates (paras.4.21-4.23, 4.39-4.45)

R.13 Practising certificates should be issued by the general regulatory body of the practitioner in question. But they should not be described as “barristers” or “solicitors” practising certificates.

R.14 (1) The fee payable for a practising certificate should be fixed by the general regulatory body by which it is issued, subject to approval by the Attorney General.

(2) Practising certificate fees should not be fixed at a level higher than is reasonably necessary to meet the cost of regulatory functions, as contrasted with "trade union", social and other non-regulatory activities.

(3) Practising certificate fees should not have to be be fixed at the same level by both general regulatory bodies, nor should they have to be the same for all practitioners who are subject to a particular general regulatory body.

(4) Payment of a practising certificate fee should not entitle a legal practitioner to membership of the Law Society or Bar Association.

N.B. See recommendations 29-30 below in relation to the requirements for obtaining a practising certificate, and the rights and obligations of certificate holders.

CHAPTER 5: COMMUNITY PARTICIPATION IN THE REGULATORY SYSTEM

Public Members on the Law Society Council and the Bar Council (paras.5.2-5.19, 5.24-5.25)

R.15 Both the Law Society Council and the Bar Council should include five "public members" who are not elected by practitioners.

R.16 (1) The five public members of each Council should be selected as follows:

(i) one by the Attorney-General;

(ii) one by the Leader of the Opposition in the Legislative Assembly;

(iii) three by the Public Council on Legal Services.

(2) Generally speaking, public members should not be legal practitioners. But practitioners should be eligible for appointment.

(3) Public members should be appointed for renewable two-year terms of office.

R.17 Subject to recommendations 18-20, the public members should have the same rights and duties as other members of the Council in question.

R.18 (1) Our present view is that subject to the adoption of recommendations 18(2)-(5),19 and 20, the public members would be more likely to play an effective role in safeguarding the public interest if they did not have voting rights. On this assumption, we recommend that they should not have voting rights. Events may indicate, however, that the public members would be more likely to be effective if they did have voting rights and, accordingly, that they should be given such rights.

(2) The public members of each Council should be required to make an annual Report to the Attorney General for presentation to Parliament The report should be submitted together with the Annual Report of the Council in question.

(3) The public members should have the right to report to the Attorney General whether for presentation to Parliament or otherwise, on such occasions as they see fit.

(4) The Attorney General should have the right to request or require a report from public members at such times and on such issues as he or she sees fit.

(5) The purpose of public members' reports should be to express their views on issues concerning the regulation of the profession, including the work of the governing Council of which they are members, and on other issues relating to the delivery of legal services.

R.19 (1) The public members should be paid an annual honorarium for their services. This cost should be met from the Statutory Interest Account, practising certificate fees, government funds, or a combination of these sources.

(2) The Attorney General should make arrangements for the public members to be provided with access to such reasonable resources as they may request for the purpose of preparing reports to the Attorney General.

Public Members on Committees of the Law Society Council and the Bar Council (paras.5.20-5.25)

R.20 (1) Generally speaking, every committee of the Law Society Council and the Bar Council should have at least one "public member". In the case of committees having more than six members, approximately one-third of the members should be public members.

(2) Mr Disney and Judge Martin consider that the public members on committees should be chosen by the public members on the Council in question. Mr Gressier considers that they should be chosen by the President of the Council in question after consultation with the public members of that Council. Mr Conacher considers that the question of public membership on committees of any person not a member of the general regulatory body, and of the method by which such members, if any, should be selected, is a matter for the general regulatory body itself.

(3) The requirement to have public members on committees should be able to be waived in relation to particular committees by the public members of the Council or by the Attorney General.

R.21 (1) Public members of committees should not have to be chosen exclusively from the ranks of public members of the Council in question.

(2) Generally speaking, the public members on committees should not be legal practitioners. But practitioners should be eligible for appointment.

R.22 Public members of committees should have the same rights and duties, including voting rights, as other members of those committees.

Public Council on Legal Services (paras.5.26-5.40)

R.23 A new body, to be called the Public Council on Legal Services, should be established by statute to act as a reviewing and advisory body in relation to the regulation of the legal profession and the delivery of legal services.

R.24 (1) The members of the Public Council on Legal Services should be appointed by the Attorney General and should be selected as follows:

(i) three by the Attorney General;

(ii) three by those members of the Law Foundation and the Legal Services Commission who are not legal practitioners;

(iii) two by those members of the Consumer Affairs Council who are not legal practitioners;

(iv) one by the Leader of the Opposition in the Legislative Assembly.

(2) The chairperson of the Council should be chosen by the Attorney-General from amongst the members. The chairperson should not be a practitioner or a judge.

(3) One of the members appointed by the Attorney General should be a practitioner, and another of them should be a person who is admitted to the profession but not necessarily a practitioner. The remaining members of the Council should not be practitioners or judges.

(4) Members should be appointed for renewable two-year terms of office.

R.25 (1) The Public Council on Legal Services should be entitled, of its own initiative, to investigate and consider any issue in its designated areas of interest (ie. the regulation of the legal profession and the delivery of legal services).

(2) The Council should be entitled to request information relating to its areas of interest from, amongst others, the Law Society Council, the Bar Council and the Attorney General.

(3) The Council should be entitled to obtain reports from the members nominated by it to the Law Society Council and the Bar Council, subject to such legal duties of confidentiality as apply to all members of the Council in question in their capacity as members.

N.B. See recommendations 10 and 11 in relation to notifying the Public Council on Legal Services of proposed regulations and giving the Council an opportunity to express its news about them before they are made.

R.26 (1) The Public Council on Legal Services should be entitled to make public statements within its areas of interest.

(2) The Council should have a duty to submit an Annual Report to the Attorney General for presentation to Parliament.

(3) The Council should be entitled to report to the Attorney General, whether for presentation to Parliament or otherwise, on such occasions as it sees fit.

(4) The Attorney General should be entitled to request or require the Council to consider and report upon any issue within its areas of interest.

R.27 (1) The Public Council on Legal Services should have its own office and should be entitled to appoint its own Executive Officer and supporting staff.

(2) The Council should be entitled to appoint subcommittees and to co-opt as members of such sub-committees persons who are not members of the Council.

R.28 (1) The Public Council on Legal Services should be funded from the Statutory Interest Account or by the Government, or from a combination of these two sources.

(2) Members of the Council should be paid an annual honorarium for their services.

CHAPTER 6: LEGAL AND OFFICIAL DISTINCTIONS BETWEEN BARRISTERS AND SOLICITORS

Introduction

The following recommendations apply whether separate admission of barristers and solicitors is retained or abolished. References to "barristers" in these recommendations should be read as meaning, if there is separate admission, those practitioners who are admitted as barristers, and if there is common admission, those practitioners who practise in the style in which barristers now practise. An analogous interpretation should be given to references to "solicitors".

Requirements for Admission (paras.6.7-6.19)

Our terms of reference render it inappropriate for us to make recommendations in this area. But in order to put our other recommendations in context, it is necessary to express our views concerning legal and official distinctions in this area between barristers and solicitors. In our view, there should be no such distinctions in relation to the academic, practical or other requirements prior to admission, nor in relation to the bodies by which those requirements are determined and administered. In particular, we consider that both would-be barristers and would-be solicitors should be required to attend a College of Law course prior to admission, and that the content of the course should be the same for both these categories of students.

Practising as a Principal (paras.6.21-6.28)

R.29 (1) Practitioners who wish to practise as a principal, otherwise than under pupillage, should be required to hold a full practising certificate.

(2) Practitioners should not be eligible for a full practising certificate unless they have practised for 12 months on a qualifying practising certificate.

(3) Practitioners who wish to practise as a principal under pupillage should be required to hold a qualifying practising certificate.

(4) The holder of a qualifying practising certificate should be restricted to practising as an employee or under pupillage.

(5) Employers and tutors (ie. practitioners under whose guidance pupillage is served) should be subject to the same general regulatory body as their employees and pupils respectively, should hold full practising certificates, and should have held such certificates for not less than a prescribed number of years.

(6) It should be permissible to serve some of the 12-month qualifying period as in employee and some under pupillage.

R.30 (1) Pupils should not have to be barristers, but, whether barristers or not, they should be prohibited from acting without the intervention of an instructing practitioner, save in prescribed circumstances.

(2) Tutors should not have to be barristers, but, whether barristers or not, they should have to be practitioners who, generally speaking, do not act without the intervention of an instructing practitioner. They should have to be approved by their general regulatory body as satisfying this requirement.

(3) Pupils and tutors should be subject to pupillage regulations requiring a significant degree of informal training and supervision by tutors. The Law Society Council and the Bar Council should take steps to ensure the observance of these regulations by practitioners who ire subject to their respective governance.

(4) The prescribed circumstances referred to in (1), and the regulations referred to in (3), should be the same for all pupils, whether subject to the Bar Council or the Law Society Council.

R.31 (1) Subject to recommendations 29 and 30, no special training or experience should be squired of practitioners on the ground that they wish to accept work directly from clients out practitioners who wish to operate a trust account should be required to have practised Previously for at least six months as an employee of a practitioner who operates a trust count. This period could be served during the 12 month qualifying period referred to in recommendation 29.

(2) The requirement in (1) should not apply to practitioners who have been in active ,ractice for five years or longer.

(3) This recommendation is not intended to preclude the Bar Council from continuing o prohibit practitioners who are subject to its governance from accepting work directly from clients. But in recommendation 45 we recommend that the Council should consider relaxing hat prohibition to some extent.

Practising in the Style of a Barrister (paras.6.34-6.38)

R.32 Subject to recommendations 29 and 30, no special training or experience should be required of practitioners on the ground that they wish to practise in the style in which barristers now practise.

(2) This recommendation is not intended to preclude the Bar Council from requiring Practitioners who are subject to its governance to undergo special training or to acquire special experience. But if any such requirements include a period of pupillage, the period ,acquired of any practitioner who has been in active practice for three years or more should not exceed six months, and credit should be given for pupillage served during the 12 month qualifying period proposed in recommendation 24.

Returning to Practice (paras.6.39-6.42)

R.33 Where an applicant for a practising certificate has not held a certificate during the preceding two years, the general regulatory body to which he or she applies for the certificate should have a discretion to require the practitioner to complete up to 12 months as an employee or pupil on a qualifying practising certificate before becoming entitled to a full practising certificate.

Rights of Audience and Other Rights to do Legal Work (paras.6.43-6.46)

R.34 (1) Rights of audience and other rights to do legal work might vary according to one or more of a number of factors, but they should not vary according to whether a practitioner is a barrister or a solicitor.

(2) This recommendation is not intended to preclude practitioners from binding themselves, whether by joining an association or otherwise, not to accept work in particular fields.

Civil Rights, liabilities and Immunities Concerning Professional Work (paras.6.47-6.55)

R.35 All practitioners should have legal capacity to enter into contractual relationships concerning their professional work.

R.36 All practitioners should be entitled to sue for their professional fees.

R.37 (1) Any immunity from civil liability in relation to a type of legal work should apply to both barristers and solicitors.

(2) It is beyond the scope of this Report to recommend which types of work, if any, should have the benefit of such an immunity.

Regulation of Fees (paras.6.56-6.75)

R.38 The rights of a client or other person to obtain a taxation or other review of a practitioner's bill might vary according to one or more of a number of factors, but they should not vary according to whether the practitioner is a barrister or a solicitor.

R.39 Theamountspecifiedinafeescale,orallowedonataxationinrelationtoaparticular item of work might vary according to one or more of a number of factors, but it should not vary according to whether the work was performed by a barrister or by a solicitor.

R.40 Adequate recognition should be given in all fee scales, taxations, and other reviews of bills, to the additional work and responsibility involved for a legal practitioner who undertakes all the work in a particular matter, rather than referring some of it, such as any advocacy which may be required, to another practitioner.

Duties to Accept Work (paras.6.76-6.81)

R.41 (1) The Bar Council should continue to have an ethical rule along the lines of its present cab-rank rule" (rule 2).

(2) The Law Society Council should consider making an ethical rule in relation to the duties of practitioners to accept instructions from other practitioners. The rule could be similar to the Bar Council's present cab-rank rule.

Appointment as Judges (paras.6.82-6.87)

The general question of judicial appointments is not within our terms of reference. But the existence of legal or official distinctions between barristers and solicitors in this area can have a substantial effect on the structure of the profession Accordingly, we express the following views. First, as a matter of law, the conditions of eligibility should not vary according to whether a practitioner is a barrister or a solicitor. Secondly, as a matter of practice, appointments to judicial office should not be regarded as having to be made solely from the ranks of barristers rather than also from amongst solicitors.

Judicial and Official Attitudes (paras.6.88-6.91)

R.42 It has been suggested to us that the attitude adopted by some judges towards advocates who appear before them tends to vary according to whether the advocate is a barrister of solicitor. A judge's attitude towards advocates should not vary on such a basis.

R.43 There should be no rule or practice to the effect that barristers are to be given precedence over solicitors, or vice versa, in court or at official functions.

CHAPTER 7: RESTRICTIVE PRACTICES

Regulation of Restrictive Practices (paras.7.2-7.11)

R.44 (1) Legal practitioners should be prohibited by statute from entering into, or remaining party to, an agreement or understanding which their governing body (ie. the Law Society Council or Bar Council) has declared by regulation to be one which

(i) substantially affects competition in a legal services market; and

(ii) is not in the public interest.

These two criteria are expressed here in general terms. Their precise wording could be based an the language in sections 45(2) (a) (ii) and 90(6) and (7) of the Commonwealth Trade Practices Act 1974.

(2) Agreements or understandings which are specifically authorised or approved by an act or regulation should be exempt from this prohibition.

(3) The Commonwealth Trade Practices Act would continue to apply to the legal profession to the same extent as it does at present.

Some Existing Restrictive Practices at the Bar (paras.7.12-7.40)

R.45 (1) The Bar Council should consider relaxation of the existing restrictive practices in relation to barristers

(i) acting without the intervention of an instructing solicitor (Bar rule 26);

(ii) practising in partnership (rule 16);

(iii) employing, or being employed by, another barrister.

(2) The Bar Council should be asked to have regard to, amongst other possible changes, those which are referred to in paragraphs 7.21, 22, 26 and 30 of the Report.

R.46 The Bar Council should consider abolition of the existing restrictive practice in relation to barristers appearing with a solicitor as a fellow advocate for the same party.

R.47 (1) The Bar Council should consider abolition or substantial relaxation of the existing restrictive practices in relation to barristers

(i) attending conferences, interviews or hearings without being accompanied by a solicitor (Bar rule 33);

(ii) attending conferences at solicitors offices or the premises of clients or witnesses (rule 34).

(2) The Bar Council should be asked to have regard to, amongst other possible, changes, those which are referred to in paragraphs 7.33 and 37 of the Report.

R.48 It may prove desirable to take specific legislative action in relation to the restrictive, practices mentioned in recommendations 45-47 if

(i) our recommendations concerning abolition of a number of legal and official distinctions between practitioners are not adopted;

(ii) such abolition occurs but does not substantially reduce the adverse effects of the restrictive practices under consideration; or

(iii) the restrictive practices in question are not reconsidered by the Bar Council within a reasonable time.

CHAPTER 8: THE WAY AHEAD

R.49 (1) The Attorney-General, the Law Society Council the Bar Council and the Public Council on Legal Services should keep the regulation and structure of the profession under continuing review.

(2) In this context special regard should be had to the reports submitted to the Attorney-General by the Public Council on Legal Services, and by the public members of the Law Society Council and the Bar Council.

R.50 (1) The Attorney-General should be required by statute to establish five years after a specified date, and thereafter every five years, a special committee to review the general regulation and structure of the profession. The statute should provide that any particular review need not be held if the Attorney General reports to Parliament that, in his or her opinion, special circumstances make it undesirable to proceed with that review.

(2) The review committee should be small in size but, collectively, it should be independent of the profession and of the Government.

(3) The prospect of a periodic review of this kind should not be a reason for delaying the introduction of necessary reforms in advance of any review.

R.51 The following should be prominent amongst the matters to be kept under review, and, in particular, should be dealt with in the report of the first review committee:

(i) the number, manner of selection, and powers (especially in relation to voting) of the public members on the Law Society Council and the Bar Council;

(ii) the size, manner of selection powers and resources of the Public Council on Legal Services;

(iii) the desirability or otherwise of the Law Society Council and the Bar Council continuing to be general regulatory bodies as well as professional associations,

the desirability or otherwise of having one general regulatory body for the whole profession;

(v) the desirability or otherwise of introducing a new system for regulation of restrictive practices in the profession, including practices engaged in or approved by the Law Society Council or the Bar Council;

(vi) the legislative or executive action, if any, which should be taken to relax or abolish restrictive practices, of the kind referred to in recommendations 45-47.

CHAPTER 9: QUEEN'S COUNSEL

R.52 The Queen's Counsel system should continue, atleast for the time being. The question its continuance could be re-examined when other recommendations made in this Report have been considered and, if implemented, their effects have been evaluated.

53 (1) For appointment as Queen's Counsel, a practising barrister and solicitor should have at least the qualities of outstanding integrity and competence, and a deep learning in the law.

(2) Given these qualities, a practising barrister and solicitor should be eligible for appointment as Queen's Counsel, whether or not he or she practises in the style in which barristers now practise or in some other style, and whether or not he or she practises as a sole practitioner or in a partnership of practitioners.

(3) In making appointments as Queen's Counsel special regard might be given to practising barristers and solicitors who are eminent advocates. This special regard should not, however, preclude the appointment as Queen's Counsel of practising barristers and solicitors who are eminent in other fields of practice.

(4) A non-practising barrister and solicitor should be eligible for appointment as Queen's Counsel *honoris causa* if he or she has served the law with distinction either in the academic field or in the field of public service, whether as a public servant or not.

Two-Counsel Rule

R.54 (1) A new "two-counsel" rule should be adopted.

(2) In its application to appearances as an advocate, the rule should be that a Queen's Counsel may accept instructions in any matter with or without a junior but where, in the opinion of the Queen's Counsel the use of two counsel in the matter is not justified, he or she should either

(i) refrain from making it a condition of his or her acceptance of the instruction that a junior be instructed; or

(ii) decline to accept the instructions.

(3) In its application to contentious written work (pleadings, and other documents necessary for the conduct of litigation), the rule should, subject to one qualification, be the same as the rule stated in (2) above. The qualification is that if a Queen's Counsel has agreed to appear in a matter as an advocate without a junior, he or she ought to be able to do the associated written work without a junior. If, however, the Queen's Counsel is to appear in the matter with a junior, he or she ought not to do the associated written work without the involvement of the junior.

(4) In its application to non-contentious work, the rule should be that a Queen's Counsel has an unfettered choice of undertaking the work with or without a junior.

(5) A Queen's Counsel should not be entitled to assume that a junior counsel is also to be instructed unless it is so stated at the time of the delivery of the instructions to the Queen's Counsel.

(6) For the purposes of this recommendation "junior 'includes a person who practises in the style in which barristers now practise, or a person who practises in some other style, whether in a partnership or otherwise. The identity and style of practice of the Junior should be a matter for the client and the instructing practitioner. The junior could be also the instructing practitioner.

(7) Nothing in this recommendation is intended to have the effect that the "cab-rank" rule should oblige a Queen's Counsel to appear without a junior.

Fees of junior Counsel

R.55 (1) Where two counsel are instructed and the junior receives an unmarked brief, the junior should mark such fee as he or she considers proper and reasonable having regard to:

(i) the work and responsibility which he or she foresees as being involved in the brief;

(ii) his or her standing as a practitioner; and

(iii) all other circumstances, except the standing of the senior counsel.

(2) The Law Society Council and the Bar Council should consider taking further steps to encourage instructing practitioners to mark or agree juniors fees in two-counsel cases and to provide them with advice and assistance for that purpose.

N.B. See also our earlier recommendations concerning regulation of fees (R.38-40).

CHAPTER 10: COURT DRESS

R.56 (1) Generally speaking, all practitioners should be required to wear gowns when appearing as advocates in the courts in which gowns are presently worn by barristers. But we do not oppose gowns being dispensed with in those courts in particular cases, or being dispensed with in any new court which might be created.

(2) The requirements concerning the material colour and design of gowns should be the same for all practitioners, save that Queen's Counsel might continue to wear a gown of distinctive material and design.

(3) Wigs, bar jackets, wing collars and neck bands should not be worn by practitioners when appearing as advocates in the courts of New South Wales.

(4) Judge Martin joins in this recommendation on the ground that its implementation would constitute a substantial improvement on the present position But he considers that a greater improvement would be achieved by abolishing the gown, as well as the wig and the other items of present court dress.

REPORT 31 OUTLINE (1982) - FIRST REPORT ON THE LEGAL PROFESSION: GENERAL REGULATION AND STRUCTURE

Legal Profession Inquiry Publications

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

REPORTS

First Report. (General Regulation, The Division into Barristers and Solicitors, Queen's Counsel, and Court Dress) *

Second Report. (Complaints, Discipline and Professional Standards) *

DISCUSSION PAPERS

1. General Regulation. *

2. Complaints, Discipline and Professional Standards - Part 1. *

3. Professional Indemnity Insurance. *

4. (1) Structure of the Profession - Part 1. *

(2) Structure of the Profession - Part 2.

5. Advertising and Specialisation.

6. Solicitors' Trust Accounts and the Solicitors' Fidelity Fund.

BACKGROUND PAPERS

1. Background Paper - I (Complaints, Discipline and Professional Standards)

2. Background Paper - II (Professional Indemnity Insurance)

3. Background Paper - III (Complaints, Discipline and Professional Standards)

4. Background Paper - IV. (Structure of the Profession)

5. Background Paper - V. (Solicitors' Trust Accounts and the Solicitors' Fidelity Fund)