Law Reform Commission

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

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Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable F J Walker, QC, MP,

Attorney General for New South Wales.

FIRST REPORT ON THE LEGAL PROFESSION (GENERAL REGULATION AND STRUCTURE)

We make this Report under our reference from you to inquire into and review the law and practice relating to the legal profession.

Professor Ronald Sackville

(Chairman)

R D Conacher

(Deputy Chairman)

Denis Gressier

(Commissioner)

Julian Disney

(Commissioner)

His Honour Judge Trevor Martin QC

(Commissioner)

New South Wales Law Reform Commission

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

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr R D Conacher

Full-time Commissioners

Mr Julian Disney

Mr Denis Gressier

Part-time Commissioners

Mrs Bettina Cass

Mr David Kirby

His Honour Judge Trevor Martin, QC

The Hon Mr Justice P E Nygh

The Hon Mr Justice Adrian Roden

The Hon Mr Justice Andrew Rogers

The present Report has been prepared by a Division of the Commission. The members of the Division are listed in the Preface.

The Commission's Director of Research is Ms Marcia Neave. Members of the research staff are: Mr PaulGarde, Ms Ruthjones, Ms Gloria Lee (Librarian), Ms Philippa McDonald, Ms Helen Mills and Ms Fiona Tito.

The Secretary of the Commission is Mr Bruce Buchanan, and its offices are at 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, NSW 2000 (telephone: 02 - 238 7213).

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

Preface

The Commission has a reference from the Attorney General and Minister for Justice, the Honourable F J Walker, QC, MP, to inquire into and review the law and practice relating to the legal profession. The terms of reference are set out in full in Appendix I of this Report.
This is the first Report published in the course of our Legal Profession Inquiry. It deals with the following matters:

General Regulation of the Profession;

The Division of the Profession into Barristers and Solicitors,

Queen's Counsel;

Court Dress.

The Report contains our final recommendations on these matters.

Earlier in the Inquiry we published two Discussion Papers containing our tentative suggestions on these topics, and a Background Paper containing research reports relevant to the division into barristers and solicitors. These and other Papers issued in the course of the Inquiry are listed on page v.

This Report has been 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. [1] At the time of preparation of this Report the Division consisted of the following Commissioners:

Mr R D 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. The previous Chairman of the Commission, Mr Justice J H Wootten, was closely involved in earlier stages of the Legal Profession Inquiry and in the preparation of our Discussion Papers on the topics dealt with in this Report. He resigned from the Commission, however, prior to the commencement of work on this Report.

Parts I-III of this Report are the responsibility of three of the four members of the Division conducting the Inquiry, namely Messrs. Disney and Gressier, and Judge Martin. Part IV is the responsibility of Mr Conacher.

A large number of persons and organisations have made submissions to us on matters relevant to the Legal Profession Inquiry. We list them in appendix II. In addition, a number of articles, papers and editorials have commented on tentative suggestions which we made in Discussion Papers published in the course of the Inquiry. We list some of these articles and papers in Appendix III. We list in Appendix IV some of the many persons and organisations, both in Australia and overseas, that have responded to our requests for information or advice.

We are most grateful to all those who have assisted us in these ways. Appendix V comprises a Select Bibliography.

The Commission expresses its appreciation of the important contribution made by its research, administrative, secretarial and library staff. Research assistance in the preparation of this Report was provided by Ms Philippa McDonald. Secretarial assistance was provided principally by Mrs. Deborah Donnellan, Miss Judith Grieves and Mrs Zoya Wynnyk.

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Legal Profession Inquiry Publications

The following publications have been issued up to the present time in the course of the Legal Profession Inquiry.

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)

Summary of Principal Recommendations

The following is a summary of the principal recommendations made by the Commission in this Report. We indicate the paragraph numbers of the Report which deal with the respective topics.
The recommendations are made by a majority of the four commissioners responsible for this Report, namely Messrs. Disney and Gressier and Judge Martin. The views of the fourth Commissioner, Mr Conacher, on the Commission's recommendations are expressed in chapter 11 of the Report. He agrees with some of the recommendations, disagrees partially or entirely with some others, and expresses no view in relation to others.

In relation to some aspects of the matters dealt with in recommendations 7, 9 and 20 there is no view which has the support of a majority of the four Commissioners and accordingly there is no recommendation. We indicate, however, the views of each of the Commissioners.

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.

R.4 (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.4.29-4.31)

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(1)(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) Ingeneral,whentheAttorney-GeneralreceivesproposedregulationsfromtheLaw 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 In general, if the Attorney-General proposes regulations to be made by the Governor, 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 views 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 an 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 are subject to their respective governance.

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

Accepting Work Directly from Clients (paras.6.29-6.33)

R.31 (1) Subject to recommendations 29 and 30, no special training or experience should be required of practitioners on the ground that they wish to accept work directly from clients. But 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 account. 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 practice for five years or longer.

(3) This recommendation is not intended to preclude the Bar Council from continuing to 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 that prohibition to some extent.

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

R.32 (1)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 required 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 oneor 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 The amount specified in a fee scale, or allowed on a taxation, in relation to a particular 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 ref erring 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 or 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 on 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 this 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 this 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;

(iv) 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, at least for the time being. The question of its continuance could be re-examined when other recommendations made in this Report have been considered and, if implemented, their effects have been evaluated.

R.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 junior's 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 (1982) - FIRST REPORT ON THE LEGAL PROFESSION: GENERAL REGULATION AND STRUCTURE

1. The Legal Profession Inquiry and this Report

1.1 We have been asked to inquire into a wide range of matters in relation to the legal profession in New South Wales. Our terms of reference for this Legal Profession Inquiry are reproduced in Appendix I of this Report. This Part, and Parts II and II, of this Report are the responsibility of Messrs. Disney and Gressier, and Judge Martin. Part IV was prepared by Mr. Conacher.

I. The Scope of this Report

1.2 The present Report covers four topics, namely

> The General Regulation of the Profession;
>
> The Division into Barristers and Solicitors;
>
> Queen's Counsel;
>
> Court Dress.

The following portions of our terms of reference are of particular relevance to those topics.

> "To enquire into and review the law and practice relating to the legal profession and to consider whether and, if so, what changes are desirable in
>
> > (a) the structure, Organisation and regulation of that profession;
> >
> > (b) the functions, rights, privileges and obligations of all legal practitioners; and
> >
> > (c) the provisions of the Legal Practitioners' Act, 1898, and the Rules and Regulations made thereunder and other relevant legislation and instruments,
>
> with particular reference to but not confined to the following matters
>
> > (d) the division of the legal profession into two branches;
> >
> > (e) the rights of audience of legal practitioners;
> >
> > the existence or otherwise of monopolies or restrictive practices within the profession;
> >
> > (g) the right of senior counsel to appear without junior counsel;
> >
> > (k) the fixing and recovery of charges for work done by legal practitioners, in-cluding the charging by junior counsel of two-thirds of his senior s fee and the fixing of barristers' fees in advance for work to be done;
>
> but not including an examination of ... legal education prior to admission."

1.3 A number of issues arise in relation to each of the four areas considered in this Report. The following are amongst the more important of them.

General Regulation of the Profession

Which body or bodies should be responsible for general regulation of the profession? Should there be different systems of regulation for differentsectorsof the profession? Should there be a greater degree of public participation in the regulation of the profession; for example, should governing bodies of the profession include some non-lawyer members? Should there be a system for regulation of restrictive practices within the profession?

The Division into Barristers and Solicitors

Should lawyers be admitted to the profession under a common title rather than as either barristers or solicitors? Should some or all of the existing distinctions between barristers and solicitors be abolished? For example, should they be subject to the same training requirements after admission, and to the same systems for fixing and reviewing fees?

Queen's Counsel

Should Queen's Counsel continue to be appointed solely from the ranks of barristers, rather than, for example, also from the ranks of solicitors and academic lawyers? Should Queen's Counsel continue to be prohibited from appearing without a junior counsel? When both a Queen's Counsel and a junior counsel act for a party, what rules or practices, if any, should apply to the relationship between their respective fees?

Court Dress

Should there continue to be a special dress for advocates appearing in the higher courts in this State? if so, what should it be? For example, should gowns be retained but not wigs, bar jackets and other formal accoutrements?

1.4 The general regulation of the profession and its division into barristers and solicitors are closely related topics. We deal with them in Part II of this Report. Queen's Counsel and court dress are considered in Part III. In the remainder of the present chapter we describe briefly the principal methods which we have adopted in order to inform ourselves, and to canvass opinions, about the topics dealt with in this Report and the other topics falling within the scope of the Legal Profession Inquiry.

II. Our Methods of Inquiry

1.5 At the commencement of the Inquiry we issued a general invitation to lawyers and members of the public to make submissions to us. We have received more than 400 submissions from a wide range of people and organisations, including some from other parts of Australia and from overseas. A number of responses have been made in other forms such as articles in periodicals, speeches and press releases. 1

1.6 We have had discussions with a wide range of lawyers about issues relevant to the Inquiry. Some of these meetings were at our initiative, while others were in response to invitations. They included State and regional law society meetings, barristers meetings, national and international conferences of lawyers, and university seminars, as well as many private interviews. [1] We arranged meetings on a number of occasions with office-bearers of the Law Society of New South Wales and the New South Wales Bar Association in order to discuss particular aspects of the Inquiry.

1.7 We have also had discussions with a large number of non-lawyers, including members of other professional disciplines such as accountancy and medicine. A special effort was made to obtain the views and experiences of people who do not write submissions to Inquiries or speak at public meeting, but who may nevertheless have well-informed and responsible views to express. We conducted "open houses" in eight country and six suburban centres where, at well-publicised times, a member of the public could talk privately to a member of the Commission (or, less frequently, to a member of the Commission's staff about his or her experiences with lawyers. More than 300 people attended these open houses. More than 500 other people telephoned, visited or wrote to us at the Commission. In addition we examined over 600 files in which the Law Society of New South Wales or New South Wales

Bar Association had dealt with complaints against their members, and we obtained information about many hundreds of other complaints. [1]

1.8 A considerable amount of empirical research has been carried out, or initiated, by the Commission. Statistical analyses were made of extensive samples of complaints about lawyers. [1] The operation of the "fused" legal profession in South Australia was the subject of a series of statistical surveys, as was the work of accountants in examining solicitors' trust accounts in New South Wales and Queensland. [2] We co-operated with the Law Foundation of New South Wales in an extensive questionnaire survey of the profession in this State. [3]

1.9 We also undertook or commissioned bibliographical research into the history and present operation of the legal profession, and of certain other professions, in New South Wales and many other parts of the world. We have been assisted in this work by a number of academic consultants from law and other disciplines. [1]

III. Discussion Papers and Background Papers

1.10 With the benefit of the information and ideas obtained by these means, we prepared and published a series of six Discussion Papers on various topics falling within our terms of reference. These Papers described the present position in New South Wales and made tentative suggestions for change in certain respects. They were supplemented by five Background Papers containing further information about the position in New South Wales and in some other places. [1]

1.11 The Discussion Papers were published in order to obtain the benefit of responses to tentative suggestions before we decided upon final recommendations to be made in our Reports. The Papers received considerable publicity in the media, resulting in further submissions and other responses to us. They were also the subject of seminars and of sessions of lawyers' conferences in New South Wales and elsewhere.

1.12 Two of the Discussion Papers, *General Regulation and The Structure of the Profession,* covered the areas with which we deal in this Report. Suggestions made in them, and responses which they evoked, are referred to in subsequent chapters. The responses have influenced our final recommendations to a substantial extent, both on general issues and on points of detail.

FOOTNOTES

Para.	
1.5	1. Submissions and certain other responses are listed in Appendices II and III of this Report.
1.6	1. In New South Wales, meetings were held with the Liverpool and District Law Society, the St George-Sutherland Law Society, the Clarence River and Coffs Harbour Law Society, the Hunter Valley Law Society, the Near Western Law Society, the Central Western Law Society, the South West Slopes Law Society, and the Western Suburbs Law Society. Conferences at which discussions were held included those of the Law Society of South Australia, the Law Society of Tasmania, the Eastern Solicitors Law Association (Victoria), the Law Council of Australia (1979, 1981), the New Zealand Law Society, the American Bar Association and the International Bar Association. Two seminars were organised at the University of New South Wales in 1979 and 1981 respectively.
1.7	1. For further details of the inquiries mentioned in this paragraph, see our Discussion Paper, *Complaints, Discipline and Professional Standards-Part I*, and our *Background Papers I and III*.
1.8	1. The reports on this research are contained in *Background Paper - III .*

2. For the reports of these surveys see, respectively, Background Papers IV and V.

3. A report on the results of this survey has been published by the Law Foundation: see Tomasic and Bullard, *Lawyers and their Work* (1978).

1.9 1. Some of the results of this research have been summarised in our Discussion Papers and in Background Papers II and IV. Our principal academic consultants on topics relevant to the present Report are listed in Appendix IV.

1.10 1. The Discussion Papers and Background Papers are listed on page v of this Report.

2. Introduction

I. Introduction

2.1 This Part is concerned with two topics, namely the general regulation of the Profession and the division of the profession into barristers and solicitors. The present position in New South Wales in relation to these topics was described in our Discussion Papers, *General* Regulation and *The Structure of the Profession.* We do not reiterate all of that description in this Report, nor do we describe in detail here all the tentative suggestions for change which we made in those Papers. We do, however, begin our consideration of these topics with a brief outline in this chapter of the present position in New South Wales, of the principal suggestions made in the two Discussion Papers, and of some of the responses which they evoked. In each of these respects we go into greater detail in subsequent chapters, when looking at particular issues. We conclude the chapter with a summary of relevant developments in New South Wales since the publication of the Discussion Papers, and a summary of the general regulatory system, and the structure, of legal professions in a number of places outside New South Wales.

II. General Regulation: the Present Position

2.2 Regulation of solicitors in New South Wales is effected principally by the Council of the Law Society of New South Wales ("the Law Society Council"). [1] Accordingly, we describe it as the general regulatory body for solicitors. Its regulatory powers stem from two main sources. First, it has extensive statutory powers to regulate the conduct of solicitors, including powers to make statutory regulations. [2] Secondly, it has a general power, under the Society's Articles of Association, to make rules for the observance of members of the Society. [3] The Legal Practitioners Act, 1898, provides that all solicitors must hold a practising certificate and thereupon are entitled to be members of the Society without payment of any fee other than is required to obtain the certificate. [4] Few, if any, practising solicitors decide not to take up this entitlement. Accordingly, the Council's powers over members of the Society apply to all, or virtually all, practising solicitors.

2.3 Regulation of barristers in New South Wales is effected principally by the Council of the New South Wales Bar Association ("the Bar Council"). [1] Accordingly, we describe it as the general regulatory body for barristers. The Bar Council has no statutory powers to regulate barristers. Its position as the general regulatory body arises from the fact that the great majority of barristers in private practice are members of the Bar Association, and from the fact that the Supreme Court, which has extensive inherent powers over all barristers, pays great regard to the views of the Bar Council and regards it as the principal authority to commence disciplinary proceedings before the Court in relation to barristers, whether members of the Association or otherwise. [2] The Association's Articles of Association give the Council general power to make rules governing the conduct of its members, subject to any contrary rules made by a general meeting of the Association. [3] Strictly speaking, the Council has no power over barristers who do not belong to the Association, some of whom are in private practice, some of whom are employed as legal officers of the Federal or State Government or of corporations, and others of whom are not undertaking work of a legal nature. [4] In general, barristers who are not in private practice are ineligible for membership of the Association.

2.4 In addition to the central roles played by the Law Society Council and the Bar Council, the Supreme Court and the Governor have certain powers in relation to general regulation. As the body responsible for admission to the profession, the Court has broad inherent powers of general regulation over both barristers and solicitors. [1] These powers, however, are exercised rarely. The Governor has extensive power to make statutory regulations in relation to solicitors, and also has the power to veto regulations made by the Law Society. [2]

2.5 A central feature of the present systems for general regulation of barristers and solicitors is that the Law Society Council and the Bar Council are not only general regulatory bodies but also the governing bodies of their respective professional associations, the Law Society and the Bar Association. In the former role they are relied upon to protect the public interest, but in the latter role they have responsibilities, analogous to those of trade unions, for advancing the interests of the members of their association. The Law Society Council is elected solely by members of the Law Society. [1] The Bar Council is elected solely by members of the Bar Association, save that the State Attorney General is a member ex officio, as is the Federal Attorney General if he or she is a barrister from this State. [2] In practice, Attorneys General play no active part as members of the Council.

III. General Regulation: Our Discussion Paper

2.6 In our Discussion Paper, *General Regulation* , we considered the advantages and disadvantages of the present system. In the light of that discussion we suggested a number of substantial changes. [1] In particular, we suggested that

there should be one general regulatory body for the whole profession;

the general regulatory body should not also be a professional association of lawyers having the responsibility for advancing the interests of its members;

there should be significant and effective public participation in the regulation of the profession, including some public membership of the general regulatory body.

2.7 We suggested that these changes should be implemented by creating a body called the Legal Profession Council to carry out the general regulatory functions presently performed by the Law Society Council and the Bar Council. The Legal Profession Council was to be an independent statutory body consisting of 21 members, of whom 11 would be elected by the practising profession and 10 (whom we called “public members”, and some of whom were to be non- lawyers) would be chosen in other ways. The suggested composition was as follows:

11	members elected by and from practising barristers and solicitors, including not less than two solicitors with restricted practising certificates and (if the profession were to remain divided into barristers and solicitors) two barristers;
5	members nominated by a new body called the Community Committee on Legal Services (see para.2.8 below), not less than three of them to be non-lawyers;
1	member elected by and from full-time law teachers at the three universities and the NSW Institute of Technology;
1	member nominated by the Commissioner for Consumer Affairs;
1	practising lawyer nominated by the Attorney General;
1	non-lawyer nominated by the Legal Services Commission, which is the principal body responsible for the provision of legal aid in New South Wales.

We made no specific suggestion as to how the remaining public member should be chosen.

2.8 We suggested also that a Community Committee on Legal Services should be established by statute. This Committee was to consist principally of non-lawyers nominated by a variety of community organisations. A primary object of the Committee was to be to provide a forum for the development and expression of views of non-lawyers on legal matters. It was to have no regulatory functions, but it was to

choose five of the members of the Legal Profession Council, to support them with information, views and opportunities for discussion, and to act as a channel of communication between them and the community. It was envisaged that its role could extend beyond the subject of the legal profession into such areas as the court system and legal aid.

2.9 The Community Committee on Legal Services was to consist of up to 31 members, most of whom were to be chosen by organisations representing such interests as those of country residents, senior citizens, consumer organisations, trade unionists, industry and commerce, social work agencies, local government and so on. We anticipated that most of these organisations would nominate non-lawyers, but we did not suggest that lawyers should be excluded. In addition, two members of the Committee, only one of whom could be a lawyer, would be chosen by each of the following official sources: the Attorney General, the Commissioner for Consumer Affairs, the Ethnic Affairs Commission and the Legal Services Commission.

IV. General Regulation: Some Responses to Our Paper

2.10 The Discussion Paper evoked responses from a wide range of lawyers and non-lawyers, both in New South Wales and elsewhere. The responses covered a broad spectrum ranging from enthusiastic approval of the suggestions made in the Paper to outright rejection of them or indeed of any significant change in the present system. Many of the views expressed are considered in later chapters of this Report. We refer briefly here to some generate themes which emerged.

2.11 Many non-lawyers and some lawyers supported the creation of a Legal Profession Council and a Community Committee on Legal Services along the general lines which we suggested. The Law Consumers Association, for example, said that the proposals "provide a sound basis for proper regulation of the profession". [1] The Australian Consumers Association, other groups and many individual members of the public expressed their enthusiasm about the degree of community participation in the suggested system. [2] Some saw the Community Committee as being of special importance. The Redfern Legal Centre, for example, described the Community Committee as an "exciting innovation" which would provide "a new and democratic element with an important role in the selection of public members for the Council". [3] Some groups, such as the Women's Electoral Lobby and the Marrickville Legal Centre, agreed with the general thrust of our proposals but said that we did not go far enough. They argued that the Legal Profession Council should have a majority of non-lawyers. [4] The New South Wales Council of Social Service, like some other commentators, generally favoured the system which we suggested, but said that the Community Committee would be unwieldy unless it was reduced in size. [5] Differences on points of detail concerning the composition of the Council and the Committee were also expressed in some responses to the Paper.

2.12 A number of responses favoured increased community participation in regulation, but not of the kind suggested in the Paper. For example, a judge of the Supreme Court, Mr Justice Needham, proposed the addition of two lay people to the existing general regulatory bodies, the Bar Council and the Law Society Council. [1] Mr. Maurice Neil, a barrister and (at the time of making his submission) a member of the Federal Parliament, favoured retention of the existing general regulatory bodies but suggested the establishment of a "community review and assessment body which could consist of persons drawn from the wider community with the role of monitoring the profession and making suggestions for improvement to the Attorney General, and Leader of the Opposition and to the profession". [2]

2.13 General disagreement with the suggestions in our Paper was expressed by the Law Society and the Bar Association, and by a number of individual lawyers. [1] The proposed Legal Profession Council was described as constituting, in the words of the Law Society, a "threat to the independence and identity of the legal profession". [2] The Council and the Community Committee, it was said, would be "cumbersome and impractical", [3] and unduly expensive by comparison with the existing system. The non-lawyer members would lack the knowledge and experience necessary for members of a body responsible for regulating lawyers. Both the Society and the Association said that creation of the Council as the general regulatory body for the whole profession would have a substantial impact on the present division between barristers and solicitors, and said that they would reserve further comment on that

division until we published our Discussion Paper on the subject. An alternative to our suggestions, namely the addition of non-lawyers to the governing Councils of the Society and the Association, did not attract their support. The Society did indicate, however, a willingness to add non-lawyers to some of its committees. [4]

V. Structure: the Present Position

2.14 At present, lawyers in New South Wales are admitted to the profession 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 solicitor. [1] For example, a solicitor, unlike a barrister,

(i) must attend the College of Law prior to admission;

(ii) must practise for twelve months as an employee before becoming entitled to practise as a principal;

(iii) must hold and pay for an annual practising certificate;

(iv) must carry professional indemnity insurance [2] and contribute to the Fidelity Fund;

(v) is subject to statutory fee scales and procedures for review ("taxation") of his or her fees;

(vi) cannot wear a wig and gown when appearing as an advocate in the higher courts;

(vii) has contractual obligations to his or her clients; and

(viii) if he or she wished to practise on the basis of not acting for clients without the intervention of an instructing solicitor, would have no ready way of advising the profession to that effect.

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,

(i) must not act for a client without the intervention of an instructing solicitor, save in specified circumstances of a very limited nature;

(ii) must not practise in partnership;

(iii) generally speaking, must not employ, or be employed by, another practitioner;

(iv) generally speaking, must not appear in court, or attend conferences with clients or witnesses, without being accompanied by an instructing solicitor.

We describe these and other aspects of the present divided structure in greater detail in later chapters.

VI. Structure: Our Discussion Paper

2.15 The major portion of our Discussion Paper, *The Structure of the Profession ,* was concerned with the division of the profession into barristers and solicitors. Our tentative views on this and other matters dealt with in the Paper were expressed in two Parts, the first Part containing the views of three of us (Messrs. Disney and Gressier, and Judge Martin) and the second Part containing the views of the other Commissioner involved in the Inquiry (Mr Conacher).

2.16 In Part I of the Paper, three of us expressed the view that the present division into barristers and solicitors

"unduly restricts the extent to which practitioners can practise in a style which suits them and their clients, and which enables them to conduct individual matters in the most appropriate manner". [1]

We suggested that in order to remove these restrictive effects:

> separate admission of barristers and solicitors should be abolished;
>
> laws and official practices should cease to discriminate between lawyers who practise in the style of a barrister and the remainder of the profession;
>
> restrictive practices amongst lawyers should be regulated in the public interest along lines similar to those of the Commonwealth Trade Practices Act.

The suggested changes did not include abolition of the Bar. Those of us who proposed them said that a strong and vigorous Bar is in the public interest and would continue to exist if the proposals were implemented. The suggestions were aimed at creating greater flexibility in the structure of the profession, along the lines of the existing structures in Western Australia, South Australia and most other parts of the English-speaking world. [2]

2.17 A different view of the present structure of the profession was expressed by Mr Conacher in Part II of the Paper. He described the present structure as generally satisfactory. In his view, limited changes might be desirable but those proposed by the other three Commissioners went too far and would have a harmful effect, especially on the Bar. Mr Conacher was inclined to favour retention of separate admission of barristers and solicitors, although he said that there are some unfair handicaps on solicitors and that they should be removed. He did not agree with the proposals made in Part I concerning regulation of restrictive practices.

2.18 Mr Conacher also returned to some matters on which we had made suggestions in our earlier Paper, *General Regulation .* He said that he saw merit in the existence of separate general regulatory bodies for barristers and solicitors, and therefore opposed the suggested Legal Profession Council. But, he said, the bodies should have adequate safeguards for the public interest. He suggested [1]

> the creation of a new general regulatory body for the Bar, to be called the Bar Governors, the voting members of which would be chosen by election amongst all practising barristers rather than only amongst those who are members of the Bar Association;
>
> the addition to this body of three non voting members, namely the Attorney General and two others, one chosen by the Attorney General and the other by the Leader of the Opposition in the Legislative Assembly, with the latter two members reporting annually (or making special reports) to Parliament;
>
> the creation of a generally similar body for solicitors.

VII. Structure: Some Responses to Our Paper

2.19 As with our paper on General Regulation, responses to *The Structure of the Profession* ranged across a wide spectrum. Some were generally in favour of the suggestions made by the majority of us in Part I. For example, those suggestions were seen by the Australian Legal Workers Group and the Society of Labour Lawyers as being moderate reforms and worthy of support. [1] It was argued by others that the suggestions might well be justifiable but would not make a great deal of difference. [2] Mr Marcus Einfeld, QC, expressed such a view, although he favoured common admission and the removal of some restraints on barristers such as the rules against partnership and against accepting work directly from clients.

2.20 A number of responses were opposed to some aspects of the suggestions made in Part I, but were in favour of others. For example, the Law Society of New South Wales [1] favoured retention of the present divided structure, at least for the time being. It did not regard as necessary the abolition of separate admission, or of certain distinctions between barristers and solicitors relating, for example, to appointment of Queen's Counsel, and rights to sign court documents. It did not support legislative intervention to regulate restrictive practices and it did not favour abolition of certain practices, such as the Bar rule against partnerships. But the Society favoured reduction of distinctions between barristers

and solicitors in relation, for example, to practising certificates, court dress, professional indemnity insurance, and regulation of fees, and it favoured voluntary abolition or relaxation of certain restrictive practices relating for example, to barristers visiting solicitors offices and barristers attending at conferences or hearings without a solicitor. Looking further into the future, however, the Society envisaged that if the specialisation scheme proposed by it in an earlier submission was introduced, the structure of the profession would be "re-organised to differentiate between specialist practitioners and non-specialist practitioners", [2] with the same specialisation scheme applying to all practitioners.

2.21 General opposition to the suggestions in Part I was expressed by, for example, the New South Wales Bar Association and the Liberal Party (New South Wales Branch). The liberal Party said that

> "any initiative intended to obscure the status of practitioners in the two branches is likely to have long term detrimental effects on the quality and administration of justice". [1]

The Bar Association said that the distinctions between barristers and solicitors referred to in our Paper

> "merely reflect that they are lawyers who are involved in two different functions, though there is an occasional area of overlap". [2]

It said that the suggestions in Part I

> "would strongly reduce the effectiveness of the Bar and would tend to favour only large city firms of solicitors". [3]

The Association's response did not propose any change in the present structure, although it said "there may be some matters which would benefit by discussion". [4] As with other responses to our Paper, many of the arguments advanced by the Association are referred to later in this Report.

2.22 Most responses concentrated on the suggestions made by the majority of us in Part I. But several opponents of those suggestions, including the Bar Association, said that they agreed with Mr Conacher's criticisms of Part I. The Association said that it differed from Mr Conacher in one respect, however, in that it did not favour non-lawyer members on the governing body of the Bar. [1] The Law Society opposed the addition of non-lawyers to its Council, but it re-iterated its willingness to have non-lawyers on some of its committees. [2]

VIII. Developments Since the Discussion Papers

2.23 We refer briefly here to some developments in relation to general regulation and the division of the profession which have occurred since the publication of our Discussion Papers on those topics.

2.24 Shortly after the publication of *General Regulation* , the Law Society proposed that "lay persons be appointed to its Committees, including the Complaints Committee, so that the lay persons' point of view may be expressed".[1] That statement was made in September 1979. By the end of 1981 a non-lawyer, chosen by the Society, had been added to 7 of the Society's 40 committees. The committees having a non-lawyer member or members, and the occupations of those members, were as follows:

> Complaints Committee (surveyor, retired air force officer), Legal Aid Policy Committee (Salvation Army officer), Rulings Committee (medical practitioner), Insurance Review Committee (stockbroker), Insurance Monitoring Committee (administration manager), Costs Review Committee (accountant), Family Law Committee (no regular member).[2]

2.25 At the same time as we published *General Regulation*, we published a Discussion Paper on Complaints, *Discipline and Professional Standards ,* in which we suggested, amongst other things, that one-third of the members of lawyers' disciplinary tribunals should ,be non-lawyers. Shortly after the publication of that Paper, the Society asked the Attorney General to amend the relevant legislation to give the Chief Justice power to appoint non-lawyers to] the principal disciplinary tribunal for solicitors, the Solicitors' Statutory Committee. [1] The legislation was amended in 1980 to give the Attorney General

power to appoint non-lawyers to the Committee, [2] and since mid-1981 one-third of the Committee have been non-lawyers. This and other recent changes in the complaints and discipline system are considered in greater detail in our *Second Report on the Legal Profession .*

2.26 After the publication of *The Structure of the Profession* in mid-1981, the Law Society and the Bar Association decided to establish a Joint Working Committee. The role of the Committee is, in the words of the Society, "to discuss matters relating to the workings of the profession in the light of the Law Reform Commission's deliberations". [1] The Bar Association has described the Committee's role as being "to consider if there is any practice in the professions which has outlived its usefulness and to modify it accordingly". [2] We have been informed by the Society that the Committee has no formal terms of reference, but was formed to consider, in particular, the comments made in Part I of *The Structure of the Profession* concerning the desirability of abolishing or relaxing certain restrictive practices at the Bar.

IX. The Position Outside New South Wales

2.27 In this section we make some general comments about the general regulation and structure of legal professions in jurisdictions elsewhere in Australia, and in New Zealand, the United Kingdom, Canada and the United States. We described the position in these jurisdictions in much greater detail in two of our Discussion Papers [1] and in *Background Paper - IV.*

General Regulation

2.28 Our focus in this summary is on the roles played in regulation of legal professions by

professional associations, such as a Law Society or a Bar Association;

other bodies of practitioners, not having the responsibility of professional associations to advance the interests of their own members;

bodies or persons outside the practising profession, such as courts, governments or individual non-lawyers.

2.29 In most of the jurisdictions to which we have referred in paragraph 2.27, the general regulatory body of the profession, or, in divided professions, of each branch of the profession, is a professional association akin to the law Society or Bar Association in this State. In the following jurisdictions, however, there is a different system.

(a) In Western Australia, the general regulatory body of the whole profession is the Barristers Board, which comprises the Attorney General, the Solicitor General, all Queen's Counsel who are not judges, and seven practitioners elected annually by the practising profession. [1] The Attorney General does not usually play an active role on the Board. The Board has no responsibilities analogous to those of a trade union; that role is played principally by the Law Society of Western Australia. The Western Australian Government's Committee of Inquiry into the Future Organisation of the Legal Profession issued a Working Paper in 1981 which favoured retention of the Barristers Board (to be renamed the Legal Practice Board) as the general regulatory body, subject to the addition of a non-lawyer member chosen by the Government. [2]

(b) In many parts of the United States the general regulation of the profession is the responsibility of the Supreme Court of the State in question. [3]

2.30 General regulatory bodies, whether professional associations or otherwise, are commonly given powers to make statutory regulations. However, the regulations are often subject to approval by the Governor or in some instances the courts, and are subject to disallowance by Parliament. [1] In some instances, powers to make statutory regulations are vested in the Governor (sometimes to be exercised only on the recommendation of the general regulatory body) rather than in the general regulatory body. in some instances these powers are very extensive, [2] while in other instances they relate to specific

areas, such as the control of trust accounts. [3] In some places, powers to make regulations or rules are vested in the courts.

2.31 In some jurisdictions, the general regulatory body has a number of non-lawyer members, even though it is a professional association. Also, some high-level committees consisting solely or to a substantial degree of non-lawyers have been established, or proposed, to play a monitoring and advisory role in relation to the regulation of the profession. The following are some examples of actual, or proposed, involvement of non-lawyers in one or other of these roles.

(a) In each Canadian province, the general regulatory body is the Council of a professional association, but in most provinces the Council includes non-lawyer members appointed by the Government. [1] In Ontario, for example, four members of the Council of the Law Society are non-lawyers chosen by the Government. They comprise about 10% of the Council. [2] In Quebec, there are four non-lawyer members, comprising about 15% of the general regulatory body. They are appointed by the Office of the Professions, a supervisory body whose primary function is to ensure that the general regulatory bodies of the various professions perform their duties properly. [3]

(b) In the United States, six of the twenty-one members of the general regulatory body of the Californian profession, which is also its principal professional association, are non-lawyers appointed by the Governor. After 1983, two of these six will be appointed by the State legislature rather than by the Governor. [4] In Washington, DC, there are three non-voting non-lawyer members on the Board of the Bar Association, [5] which is the general regulatory body and principal professional association for the whole profession. These members are chosen by a body of non-lawyers, called the Citizens Advisory Committee, the general role of which is to advise the Bar Association, the courts and the public on matters relating to the Association, the legal profession and the administration of justice. [6] The Committee was established by the Association but it has achieved considerable independence from the Association and now chooses its own members.

(c) In the United Kingdom, the recent Royal Commissions on Legal Services in England and Wales (the Benson Commission) and in Scotland (the Hughes Commission) made broadly similar recommendations for the establishment of a committee, consisting of approximately equal proportions of lawyers and non-lawyers, to advise the Government in relation to the legal profession. [7]

(d) In New Zealand, the Law Society has formulated a proposal for a Legal Services Advisory Council, half of the membership to be non-lawyers, to advise it and the Government on the legal profession and legal services. [8]

2.32 In recent years, non-lawyers have been added to a number of regulatory bodies and advisory committees concerned with particular aspects of regulation of the profession. This has occurred in relation to disciplinary tribunals in many of the jurisdictions to which we have referred. [1] In addition, some non-lawyers sit as voting members on a wide range of committees of the general regulatory bodies in parts of Canada and the United States, and to a lesser extent in Australia and the United Kingdom. The Benson and Hughes Commissions in the United Kingdom favoured the addition of non-lawyers to committees of the general regulatory bodies. [2] As to the method of selection of non-lawyers for these roles, the non-lawyers on disciplinary tribunals are usually chosen by the Government or the courts, while those on committees of the general regulatory body are usually chosen by that body. In the District of Columbia, the Citizens Advisory Committee plays a major role in the selection of non-lawyers for committees. [3]

Structure

2.33 It is common to speak of legal professions as either “divided” or “fused”. However, these terms are often used in different senses by different people, and the term “fused” has misleading connotations. In this Report we speak of “divided” and “flexible” structures. The difference between them is a matter of degree.

In a *divided* structure there are substantial legal and official distinctions between barristers and solicitors or, where practitioners are admitted as “barristers and solicitors”, between those who practise in the style of barristers and the remainder of the profession.

In a *flexible* structure there are few, if any, distinctions of such a nature.

The position in relation to admission and general regulation is of particular significance, but it is not necessarily conclusive as an indication whether a structure is divided or flexible. If barristers and solicitors are admitted separately and have separate governing bodies, the structure is likely to be divided. If there is common admission and a common general regulatory body, it is likely to be flexible. But if, for example, there is common admission yet separate general regulatory bodies, the structure may be divided or flexible, depending on the number and nature of other distinctions.

2.34 The structures of a number of Australian and overseas legal professions were described in some detail in our Discussion Paper, *The Structure of the Profession,* [1] and in our *Background Paper - IV*. [2] The following is a brief summary.

(a) Of the professions in Australia, we regard those in New South Wales, Queensland, Victoria and the Australian Capital Territory as divided, and those in South Australia, Western Australia, Tasmania and the Northern Territory as flexible. In each of the professions with a flexible structure there is a group of practitioners who practise in the style of barristers, but there are few legal or official distinctions between them and other practitioners. In particular, there is common admission and a common general regulatory body.

(b)ElsewhereinthecommonlawworlddividedstructuresexistinEngland,Scotland, Eire and Hong Kong. Few, if any, other common law jurisdictions have a divided structure. A number of countries, such as Sri Lanka and Jamaica, have changed from a divided structure to a flexible structure in recent years. In New Zealand and some other Commonwealth-countries, as in the flexible professions in Australia, there is a group of practitioners who practise in the style or barristers out there are few, if any, legal or official distinctions between this group and other practitioners. There is, for example, common admission and a common general regulatory body. In the United States and Canada, there is no recognised category of practitioners who practise in the style of a barrister.

2.35 We refer briefly here to some recent developments and proposals concerning structures in professions outside New South Wales.

(a) In Western Australia, [1] the Bar Association submitted in 1980 to the Committee of Inquiry into the Future Organisation of the Legal Profession that the Association’s members should be subject to a separate disciplinary system from other practitioners and should have the right to choose their own representatives on the general regulatory body of the profession. These proposals were opposed by the Law Society. In its Working Paper the Committee did not propose any distinctions between Association members and other practitioners in relation to discipline, general regulation or any other matters.

(b) In Victoria, [2] the Law Institute, which is the professional association and general regulatory body of all practitioners who are not at the Bar, was unsuccessful in 1978 in seeking the introduction of a common disciplinary tribunal for all practitioners. In the same year, its members voted overwhelmingly in favour of having a single professional Organisation enforcing uniform ethical standards for all practitioners. However, there continues to be a separate general regulatory body for practitioners at the Bar.

(c) In the United Kingdom, [3] the Benson and Hughes Commissions received a number of submissions in favour of the existing divided structures in England and Scotland and a number of submissions favouring structures which fall within our definition of flexible structures. Each Commission recommended retention of the existing structure, but the Benson Commission proposed that barristers employed outside private practice should be entitled to do certain types of work, such as conveyancing, previously regarded as the exclusive preserve of solicitors. This

proposal has been implemented. As we have mentioned, each Commission recommended creation of an advisory committee on the legal profession and legal services. There was to be only one committee, rather than separate committees for the two branches of the profession.

(d) In New Zealand , the Government introduced in 1981 a Bill which, amongst other things, would lead to all practitioners being admitted as “barristers and solicitors”. At present, admission is as a “barrister” or as a “solicitor” but practitioners can be, and usually are, admitted under both titles at the same time. The proposed change is supported by the New Zealand Law Society, which is the general regulatory body for the whole profession.

(e) In the United States, [5] Chief Justice Burger and some other judges in Federal courts have expressed concern at the standard of advocates appearing before them. A pilot scheme for licensing advocates has been introduced in some Federal courts. In order to appear in those courts, practitioners must satisfy certain training and experience requirements in relation to advocacy. The requirements are not onerous and do not involve practice in the style of a barrister. The Chief Justice has expressed admiration for standards of advocacy in the divided structure in England, but he has stated explicitly that he does not propose the introduction of such a structure in the United States.

FOOTNOTES

Note: Submissions referred to here and in footnotes to other chapters are submissions to the Commission in relation to the Legal Profession Inquiry, unless otherwise indicated. Copies of submissions are available to the public for reading at the Commission’s offices.

Para.

2.2 1. For a fuller description, see our Discussion Paper, *General Regulation* , chapter 2.

2. See Legal Practitioners Act, 1898 (esp. s.86 for the principal regulation-making powers).

3. Article 71. See also Article 65.

4. Legal Practitioners Act 1898, s.69.

2.3 1. For a fuller description, see our Discussion Paper, *General Regulation* , chapter 2.

2. See eg. *Clyne v. New South Wales Bar Association* (1960) Commonwealth Law Reports, vol.104, p.186 at 189.

3. Article 61.

4. In 1981 approximately 800 barristers in private practice in NSW were members of the Association (NSW Bar Association, Annual Report, 1981, pp.7-8). The total number of barristers in private practice is not known. The number of barristers employed as legal officers is not known, but is probably less than 100.

2.4 1. See eg. *Re Antigua Justices,* (1830) 1 Knapp, p.268.

2. See Legal Practitioners Act, 1898, ss.86, 87.

2.5 1. See Articles of Association, esp. Article 51.

2. See Articles of Association, esp. Article 46.

2.6 1. The suggestions summarised in paragraphs 2.6-2.9 appear in greater detail, together with our reasons for making them, in chapters 5 and 6 of our Discussion Paper, *General Regulation .*

2.11 1. See Sydney *Morning Herald,* 26 October 1979, p.8.

2. See letter to the Editor from Dr. P. Colebatch of The Australian Consumers' Association, The *Australian Financial Review ,* 3 May 1979, p.3. See also, for example, Professional Negligence Action Group, Submission No.322; D. Bauer, Submission No.345; B. Buffier, Submission No. 353; Georges River Community Service, Submission No.360.

3. Redfern Legal Centre, Submission No.318.

4. Women's Electoral Lobby, Submission No.383; Marrickville Legal Centre, Submission No.368.

5. New South Wales Council of Social Service, Submission No.379. See also, for example, R. Bowen-Thomas, Submission No.332; A. Warland, Submission No.346; M. Campbell, Submission No.351.

2.12 1. The Honourable Mr Justice Needham, Submission No.271, p.9.

2. M. Neil, MHR, Submission No.313, p.2.

2.13 1. New South Wales Bar Association, Submission No.266 (“Reply to Discussion Paper No.1 - General Regulation”); Law Society of New South Wales, Submission No.269 (“Reply to The Law Reform Commission's Discussion Paper No. I in Relation to the General Regulation of the Legal Profession”). See also, for example, Borthwick, Simpson Smith and Mitchell, Submission No.304:

2. J. Anderson & Co., Submission No.319.

2. Law Society of New South Wales, Submission No. 269, para.2.1(3) (a).

3. Ibid., para.7.1.

4. *Ibid* ., para.8.3.

2.14 1. The nature of these distinctions is described in detail in our Discussion Paper, *The Structure of the Profession ,* Part I, Chapter 2. Many of them are described in chapters 6, 9 and 10 of this Report.

2. This applies to solicitors who are practising as principals, whether as a sole practitioner or in partnership, but not to employed solicitors.

3. For a description of these practices see *The Structure of the Profession,* Part I, Chapter 2. See also chapter 7 of this Report.

2.16 1. *The Structure of the Profession ,* Part I, p.166.

2. For the suggestions in detail, see *The Structure of the Profession* , Part I, Chapters 5-7.

2.18 1. For the suggestions in detail, see *The Structure of the Profession ,* Part II, Chapter 16.

2.19 1. Australian Legal Workers Group, *Press Release,* 15 June 1981; Society of Labor Lawyers secretary, Mr T Kelly, in *Sydney Morning Herald*, 15 June 1981, p.2.

2. See “Barristers and solicitors: should they be one”, article by J Farmer, *Sydney Morning Herald*, 25 June 1981, p.8. See also letter to the Editor from M Einfeld QC, *Sydney Morning Herald,* 20 June 1981, P.8.

2.20 1. Law Society of New South Wales, Submission No.402 (“Reply to the Law Reform Commission of New South Wales Discussion Paper No.4 on The Structure of the Profession”).

2. *Id.,* p.19.

2.21 1. Liberal Party of Australia (NSW Division), Submission No.404, p.1.

2. NSW Bar Association, Submission No.401 (“Reply to the Law Reform Commission's Paper on the Structure of the Profession”), pp.2-3.

3. *Ibid* p.9.

4. *Ibid* p.10. See paragraph 2.26 of this Report concerning the appointment of a joint Working Committee by the Association and the Law Society.

2.22 1. New South Wales Bar Association, Submission No.401 (“Reply to the Law Reform Commission's Paper on The Structure of the Profession”), p.8.

2. Law Society of New South Wales, Submission No.402 (“Reply to the Law Reform Commission of New South Wales Discussion Paper No.4 on The Structure of the Profession”), pp.31, 32, 35.

2.24 1. Law Society of New South Wales, Submission No.269 (“Reply to the Law Reform Commission's Discussion Paper No.1 in Relation to the General Regulation of the Legal Profession”), para.8.3.

2. Information supplied by the Law Society.

2.25 1. Law Society of New South Wales, *Special* Bulletin to *Members* , No.4 of 1979, p.6.

2. Legal Practitioners (Further Amendment) Act 1980.

2.26 1. Law Society of New South Wales, Submission No.402 (“Reply to the Law Reform Commission of New South Wales Discussion Paper No.4 on the Structure of the Profession”), p.27.

2. New South Wales Bar Association, Submission No. 401 (“Reply to the Law Reform Commission's Paper on the Structure of the Profession”), p.10.

2.27 1. *See General Regulation* , chapter 4, and *The Structure of the Profession ,* Part I, chapter 3.

2.29 1. See generally, on the Barristers Board, Legal Practitioners Act, 1893, s.4. The elected practitioners must be of at least three years standing. See also Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia, *Working Paper No.1* , July 1981, p.8.

2. *Working Paper No.1* , pp.31-32.

3. See eg. Rules of the Supreme Court of Arizona, 17A, Ariz. Rev. Statutes.

2.30 1. Eg. Subject to approval by the Chief Justice and the governor, Legal Profession Practice Act, 1958, s.88 (Victoria); subject to the concurrence of the Master of the Rolls, Solicitors Act, 1974, s.31 (UK); subject to approval by the Governor, Queensland Law Society Act, 1952, s.5(9).

2. Extensive powers to make regulations are vested in the Governor by, eg. Legal Practitioners Act, 1981, s.97 (South Australia); Queensland Law Society Act, 1952, s.46; Legal Practitioners Act 1898, s.87 (NSW): and in the Attorney General, by Legal Practitioners Ordinance, 1970, s.133 (Australian Capital Territory). Under the Queensland and New South Wales Acts extensive powers are vested severally in both the Law Society (subject to the approval of the Governor) and the Governor.

3. Powers to make regulations in relation to a particular subject, such as trust accounts, are vested in the Governor by, eg. Legal Profession Practice Act, 1958, ss.30, 50 (Victoria), Legal Contribution Trust Act, 1967, s.56 (Western Australia): and in the Governor, on the recommendation of the Law Institute, by Legal Profession Practice Act, 1958, s.88A (Victoria).

4. Eg. in the Master of the Rolls by the Solicitors Act, 1974, s.28 (UK).

2.31 1. For a summary, see our Discussion Paper, *General Regulation* , pp.80-86.

2. Law Society Act (Ontario), ss. 10-26, and see the sources cited in *General Regulation,* pp. 199-200.

3. See Professional Code (Quebec), Divisions III and VI. See also *General Regulation* , pp.82-85.

4. See Business and Professions Code (Calif.), ss.6011-6016, 6026, 6046, 6086. See also, *General Regulation* , p.90.

5. For further details see *General Regulation* pp.90-92.

6. For further details see *General Regulation* pp.90-92, 102-103.

7. Royal Commission on Legal Services, Report , (1979, Cmnd. 7648), paras.6.14-6.26; Royal Commission on Legal Services in Scotland, Report , (1980, Cmnd. 7846), para.20.9.

8. *Lawtalk* , Newsletter of the New Zealand Law Society, No.117 (November, 1980), p.2.

2.32 1. For a description of the position in England, see Royal Commission on Legal Services, Report ,(1979, Cmnd. 7648), paras.25.47, 26.8,26.21. In Victoria, see Legal Profession Practice (Discipline) Act, 1978, s.14C; and the Legal Profession Practice (Solicitors Disciplinary Tribunal) Act 1978, s.7.

2. Royal Commission on Legal Services, Report , paras.29.41, 32.77; Royal Commission on Legal Services in Scotland, Report (1980, Cmnd. 7846), para. 15.11.

3. See eg. (1980) *District Lawyer Journal of the Bar Association of the District of Columbia*) vol.4, p.51.

2.34 1. Chapter 3.

2. Part 1.

2.35 1. For the proposals mentioned in this paragraph, see Western Australian Bar Association, “Submission to the Committee of Inquiry Into the Future Organisation of the Legal Profession in Western Australia” (1980), pp. 14-15, 16-17; Law Society of Western Australia, “Submissions to the Committee inquiring into the Future Organisation of the Legal Profession in Western Australia” (1980), pp. 30, 46-47; Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia, *Working Paper No.1* (1981), pp.40, 72-81. See also our *Background Paper - IV*, pp.23-24.

2. See generally *Background Paper - IV*, pp.14-16. See also (1978) *Law Institute Journal* , vol.52, pp.471, 543.

3. See Royal Commission on Legal Services, Report, (1979, Cmnd.7648),chapter 17, and paras.20.21-20.40; Royal Commission on Legal Services in Scotland, Report, (1980, Cmnd.7846), paras.15.43-15.50. New provisions concerning conveyancing by barristers who are not in private practice are set out in the *Code of Conduct for the Bar of England and Wales* (1980), rule 183 and Annex 17.

4. See Law Practitioners Bill, 1981, cl.42, and Law Practitioners Act, 1955, ss.6, 7.

5. See eg. Burger, “The Special Skills of Advocacy” (1973) Fordham Law Review, vol.42, p.227; Burger, “Annual State of the Judiciary”, address to the American Bar Association, 1978; Committee to Consider Standards for Admission to Practice in the Federal Courts, *Final Report to the Judicial Conference of the United States* (1979); Kaufmann, “The Court Needs a Friend in Court” (1974) American Bar Association Journal, vol.60, p.175.

6. Burger, “The Special Skills of Advocacy” (1973) Fordham Law Review, Vol.42, p.227 at 230. See also

paragraph 3.77 below.

3. Some Basic Issues

A. INTRODUCTION

3.1 In this chapter we discuss some basic issues relating to general regulation and to the division of the profession. The discussion, and the conclusions which we draw from it, are of a somewhat general nature. Subsequent chapters contain further discussion, and specific recommendations, in relation to particular issues.

3.2 In considering these issues, we have sought to identify, and to be guided by, the public interest. Assessment of the public interest is a complex value judgment involving consideration of a diversity of interests, many of which may be in conflict. In the present context, it is obviously of fundamental importance to consider the interests of *legal practitioners,* since it is the regulation and structure of their profession which is under consideration. The manner in which they practise, the satisfaction and remuneration which they derive from their practice, and indeed their right to practise at all, are at issue. The interests of *clients* must also be of major significance. The type of service which they get from lawyers may have a substantial and even crucial effect on, for example, their livelihood, their domestic relationships, their financial position or their personal liberty. It is necessary also to consider the viewpoints of *would-be clients;* those who, for example, would like to avail themselves of lawyers' services but either cannot afford them, or cannot find an appropriate and accessible lawyer, or are daunted by the formality and the language of the law. Due consideration must be given to the interests of *judges and other people who work within the legal system ,* although they are not legal practitioners. Finally, there are the interests of the *general public* who, although they may never go to a lawyer, may be affected substantially if the legal profession and the legal system do not have the confidence of the community.

3.3 We have mentioned a number of broad interest groups. But there is, of course, considerable diversity of interests within these groups. For example, the division of the profession into barristers and solicitors may have consequences for a sole practitioner in a remote country town which differ substantially from those for a partnerin a large Sydneyfirm. The consequences for a large corporation wishing to litigate a taxation dispute may differ substantially from those for a person in straitened financial circumstances who is seeking compensation for injury suffered in a road accident.

3.4 Existing or proposed schemes in relation to the regulation and structure of the profession may have an effect on many different aspects of the legal system and on some matters outside that system. An assessment of the public interest must take into accountthis wide range of consequences and we mention many of them later in this Report. But the matter of central significance is the effect on the *delivery of legal services* and, in particular, on the

quality,

cost,

a*ccessibility*, and

speed

of those services. Each of these four aspects is important. For example, the structure of the profession cannot be regarded as satisfactory if it results in legal services being of very high quality but too expensive for all save a few, or being quick and readily accessible but of inadequate quality.

B. THE GENERAL REGULATION OF THE PROFESSION

3.5 We discuss in this section a number of basic issues concerning general regulation. We do so under the following heads:

(i) Regulation in the Public Interest;

(ii) The Independence and Responsiveness of the Profession;

(iii) The Value of Professional Participation;

(iv) The Value of Lay Participation;

(v) The Role of Professional Associations;

(vi) The Role of the Courts; and

(vii) The Role of Government.

We do not consider in this section whether or not there should continue to be different systems of general regulation for barristers and solicitors. That issue falls within the next section of this chapter, in which we look at the general question of the division of the profession into barristers and solicitors.

3.6 Manyof the matters which we consider in this section were discussed at greater length in our Discussion Paper, *General Regulation.* Some were dealt with at length in submissions made to our Inquiry, especially bythe Law Society and the BarAssociation. Our footnotesgive references to a number of these sources forthe benefitof those who wish to consideringreater detail than it is possible to give in this Report the arguments which we have considered in arriving at the views expressed here.

I. Regulation in the Public Interest

3.7 It is generally agreed that regulation of the profession should be carried out in a manner which is in the public interest. For example, the Law Society's response to our Discussion Paper on general regulation said that the Society

> "accepts and agrees with the Commission's premise that regulation of the profession should be for the benefit of the public." [1]

We have referred earlier in this chapter to the diversity of interests, both within and outside the profession, which must be taken into account in assessing the public interest. The task of regulation involves identification and appreciation of the se many interests, and fair-minded resolution of conflicts which may exist between them. We comment later in this section on ways in which the regulatory system can be designed to fulfil these responsibilities.

II. The Independence and Responsiveness of the Profession

3.8 In a just and democratic society, it is essential that there be an independent legal profession, in the sense of a body of lawyers who are willing and free to provide legal assistance fearlessly to all sections of the community. [1] Lawyers must be free to argue their clients' cases vigorously against the Government, against powerful institutions and against public opinion. This is an ideal which may never be fully achieved, but its value is demonstrated by many acts of courage and independence by lawyers on behalf of their clients. The importance of this ideal must be in the forefront of any consideration of the general regulation of the profession.

3.9 Another principle of fundamental importance is that the profession must be responsive to the community's needs for legal services. Lawyers have been granted by Parliament exclusive rights to undertake for reward certain types of work, such as the conduct of litigation, which are of great significance to the affairs of the community. Parliament and the Government have a responsibility to

ensure that the public is able to obtain satisfactory service from those to whom these exclusive rights have been given.

3.10 A system for general regulation of the profession must strike a balance between these two principles of independence and responsiveness. In the words of the Professional Organisations Committee's report to the Government of Ontario, there is

> "an inevitable, and in many ways healthy, tension between two equally fundamental constitutional values: the independence of the judiciary and the bar [ie. the legal profession], and the supremacy of the legislature. Obviously, neither value can be interpreted or applied in such absolutist terms as to negate the other". [1]

The preservation of due independence for the legal profession does not require or justify the profession being entirely free from outside involvement in its regulation.

3.11 The way in which the balance between the principles of independence and responsiveness should be struck is a fundamental theme of the comments in this chapter in relation to general regulation. it should not be overlooked, however, that the two principles are, in some ways, interdependent rather than conflicting. An independent legal profession is needed and valued withinthe community. But if the profession fails to meet the community's needs by, for example, providing services which are unduly slow, expensive or otherwise inadequate, Parliament and the Government will come under pressure from the community to intervene in the regulation of the profession.

III. The Value of Professional Participation

3.12 There can be no doubt that legal practitioners have a vital role to play in the regulation of their profession. [1] First, their knowledge and experience of the profession, and of the legal system generally, are invaluable if regulation is to be sufficiently informed, well-directed and fair. Secondly, decisions made by a regulatory authority are more likely to have the respect of the profession if it is known that practitioners played a substantial role in their formulation. A regulatory authority is unlikely to be effective if many of its decisions are widely regarded within the profession, whether fairly or not, as being ill-informed or unreasonable. Thirdly, lawyers' freedom to act for clients against the Government or other powerful interests in the community might be seriously eroded if they were controlled largely from outside the profession. Fourthly, it is important to preserve and develop the professions sense of responsibility for maintaining its standards, rather than to relegate it to a minor role in its own regulation.

3.13 Each of these reasons suggests that a substantial number of practitioners should be involved in regulation. For example, a decision is more likely to be well-informed, fair, and respected within the profession if it was made by a body which includes lawyers from a wide range of backgrounds in the profession. Each of the reasons, save the first may gain added strength if the practitioners involved in the regulatory system are chosen, whether directly or indirectly, by the profession itself.

3.14 On the other hand, legal practitioners can have limitations as members of regulatory authorities. They may lack sufficient awareness and understanding of the impact of particular regulatory measures upon clients, would-be clients and others outside the profession. They are at risk of giving excessive weight, whether consciously or not, to their own interests, or those of other lawyers, to the detriment of the broader public interest. They may be too lenient towards aberrant lawyers, thinking "there but for the grace of God go I", or they may be too harsh towards lawyers who do not conform to the prevailing political or social values within the profession. These limitations are not merely hypothetical. Their effect can be seen in the work of the Law Society Council and the Bar Council as general regulatory bodies. We have described in our Discussion Papers a number of aspects of regulation in which, in our view, these Councils have given insufficient weight to the public interest. They include, for example, their handling of complaints and discipline (some weaknesses in which have been remedied since our detailed investigation of that area), [1] their restrictions on advertising, [2] aspects of the Law Society Council's regulation of trust accounts, [3] and the Bar Council's rules against acting without an instructing practitioner. [4]

IV. The Value of Lay Participation

3.15 The manner in which the profession is regulated affects many people outside the profession, especially clients and would-be clients. [1] The involvement of some non-lawyers in the regulatory system can help to ensure that the interests of these people are understood and given due consideration. A further advantage of involvement of members of the community is that, by helping the profession to recognise and respond to the community's needs for legal services, it reduces the likelihood of government intervention of a kind which would gravely weaken the independence of the profession. Moreover, members of the public are more likely to have confidence in the profession if they know that non-lawyers playa significant role in its regulation. Non-lawyer participation is more likely to fulfil these purposes if the non-lawyers in question are not chosen by the profession itself.

3.16 We have referred in chapter 2 to a number of recent instances of non-lawyers being given a role in systems for regulation of the profession. [1] The contribution which non-lawyers can make to discussion of regulatory issues has been praised by many leaders of the profession who have personal experience of it. A typical comment comes from Washington, DC, where, as we have mentioned, the Bar Association has a Citizens Advisory Committee of non-lawyers which chooses its own members and also chooses three non-lawyers to act as non-voting members of the Association's Board of Governors. [2] The President of the Bar Association has said of the Committee's members:

> "They help us look at matters from another perspective, and make us aware of the needs and concerns of the public. They also help laymen understand the legal system and the profession .... The citizens make us aware of how laymen view our profession and what they expect from us. They call attention to our shortcomings, they make us engage in critical self-examination, and they step on some sensitive toes. By stepping on our toes and pressing lay views, they put us on our toes to improve the profession and our service to the community....." [3]

3.17 Lay membership of the general regulatory body of a profession is not a new concept, nor is its application confined to the legal profession. The General Medical Council in England, for example, has had lay members for more than one hundred years. [1] In Ontario, Chief Justice McRuer (sitting as a Royal Commission) recommended in 1968:

> "Lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations". [2]

This recommendation has been implemented in Ontario in relation to the legal profession and many other professions, and a similar approach has been adopted in places such as Quebec and California. [3]

3.18 Several arguments are put against non-lawyer participation in regulation. It is said, for example, that non-lawyers lack knowledge and experience of the inner workings of the profession and. accordingly, are likely to make ill-informed decisions or to rely so heavily on lawyers that their participation serves little purpose. But some non-lawyers have considerable familiarity with the legal system. In any event, non-lawyers' lack of knowledge of aspects of the work of a lawyer must be balanced against the knowledge and experience which they may have, but which lawyers may lack, in relation to other areas relevant to regulation of the profession. The criticism would be powerful in relation to a regulatory body consisting entirely of non-lawyers. But a body with an appropriate mixture of legal and non-legal membership can obtain the benefit of a broad and balanced range of expertise and perspectives.

3.19 Another criticism voiced about participation by non-lawyers is that if they are members of a regulatory body consisting predominantly of lawyers they are likely to play an excessively passive role. In our view this criticism, like the criticism of their lack of relevant knowledge, does not justify rejection of the concept of non-lawyer members of regulatory bodies. It indicates that if there are to be non-lawyer members they should comprise a significant proportion of the body, rather than say only 5-10%, and they should be people who are intelligent, confident and articulate. There might be a need to establish an advisory committee consisting entirely or substantially of non-lawyers, from which non-lawyers on the regulatory body could derive information, inspiration and support.

3.20 It is sometimes argued that non-lawyer membership of general regulatory bodies would threaten the independence of the profession. [1] This criticism might be valid if non-lawyers were to constitute a majority on those bodies, but we see it as having little the strength if non-lawyers are clearly in the minority, let alone if they have no vote or sit only on committees rather than on the governing body itself. Moreover, in some circumstances the involvement of non-lawyers can operate to preserve or enhance lawyers' independence. For example, it can help to protect individual practitioners from over-zealous regulation by their colleagues in matters such as advertising or participation in public affairs. In any event, as we have said earlier, the independence of the profession cannot be absolute. It must be balanced with the need for responsiveness to the communities needs.

3.21 Other criticisms of participation by non-lawyers relate to matters of detail concerning their number, the manner in which they are selected, and their precise role, rather than to the basic issue of whether non-lawyers should be involved at all. We refer to these matters when making specific recommendations in chapters 4 and 5.

V. The Role of Professional Associations

3.22 Several arguments may be advanced in favour of the Law Society Council and the Bar Council remaining as the general regulatory bodies of the profession. [1] Firstly, a professional association governed by a Council which is also a general regulatory body may be less inclined to pursue a narrow and selfish course on behalf of its members, and maybe more inclined to encourage the adoption of a public-spirited approach by the profession. Both in New South Wales and elsewhere, many professions other than law are regulated by bodies which were established especially for that purpose and are not also the governing bodies of professional associations. [2] Experience with this separation of functions indicates that it can result in the professional associations having greater power, in reality, than the regulatory bodies, yet being under no duty to exercise their power in the public interest. Secondly, the fact that a general regulatory body is also the governing body of a professional association may make some lawyers more willing to devote their time and energy to being members of it or its committees. Thirdly, lawyers may be more willing to accept regulation by a general regulatory body if, being also the governing body of their professional association, it takes action to advance their interests by, for example, arguing for increases in lawyers' fee scales or providing its members with an advisory service on office management. Fourthly, the creation of new general regulatory bodies might be complex and expensive, and they would start without the authority which has been developed by the Law Society Council and the Bar Council over the years.

3.23 There are, however, two powerful arguments against the governing bodies of professional associations being the general regulatory bodies of the profession. The first stems from the need for general regulatory bodies to act in the public interest, rather than merely in the interests of the profession or a dominant sector of the profession. If they also have a responsibility, as the governing body of a professional association, to advance the interests of that association's members, they are likely to be faced on many issues with a choice between a course which is in the public interest and a course which their members regard as being in their own interests. [1] The responsibilities of the Law Society Council and the Bar Council towards members of their respective associations appear from their memoranda of Association. In addition to objects such as promoting the administration of justice, law reform, and the study of law there are objects such as, in the case of the Law Society, "to represent generally the views of the profession" and "to acquire any rights or privileges which the Society may regard as necessary or convenient ... for promoting the interests of the profession", [2] and in the case of the Bar Association, "to uphold the honour and dignity and promote the interests of the Bar of New South Wales" and "generally to do all such things as may in the opinion of the Council be of benefit to the Bar of New South Wales or the members thereof". [3]

3.24 Both the Law Society and the Bar Association have submitted to us that this conflict does not exist or is not significant. [1] We do not accept those arguments. In our view, the conflict is sometimes acute. We do not accept those arguments. As the Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia has said:

> "the inevitable conflict between the [Law] Society's responsibility to its individual members and to the public and the profession as a whole, is likely to limit the capacity of the Society to fulfil either role". [2]

In the words of Chief Justice McRuer of Ontario:

> "There is a real risk that the [general regulatory] power may be exercised in the interests of the profession or occupation rather than in that of the public". [3]

The conflict is particularly obvious in relation to the handling of complaints against lawyers, but it arises in other areas of regulation concerning questions such as fee competition, advertising, borrowing from clients, acting for both clients in conveyancing transactions, barristers acting without an instructing solicitor, and many others. Although there have been many occasions on which the Law Society and Bar Association have put the public interest ahead of that of their own members, there have been a number of other occasions when, in our view, they have given undue weight, whether consciously or unconsciously, to their members' interests. [4] Moreover, even it, as the Law Society contends, the conflict is always resolved in favour of the public interest, there would remain the harm done to public confidence by the appearance of a conflict.

3.25 One way of reducing the disadvantages of this conflict would be to add some non-lawyers to the governing Councils of the professional associations. A balance would need to be struck between adding a sufficient number to ensure that the Councils give adequate consideration to the interests of non-lawyers, and yet not adding so many that the profession ceases to identify with the Councils. Whatever number of non-lawyers were added, the problem would arise of their role in relation to the non-regulatory functions of the Councils. The profession might reasonably object to non-lawyers being entitled to vote on questions such as whether the association should apply for an increase in fee scales, or should develop a library for use by its members. This difficulty would be avoided if the non-lawyers had no voting rights, or if they sat on committees rather than on the Councils themselves, but either of those approaches would reduce their ability to safeguard the public interest. Another possibility is for the Councils to delegate their non-regulatory functions to bodies on which non-lawyers do not sit, or at least do not have voting rights.

3.26 The second major argument against vesting general regulatory power in the governing body of a professional association arises if, as is usually the case, the right to elect the governing body is confined to members of the professional association. This means that practitioners are denied a vote for the principal body by which they are to be regulated, unless they join a particular professional association and thereby subject themselves to the internal rules of that association. A possible response to this argument is to allow all practitioners to vote for the general regulatory body, regardless of whether or not they are members of the association. All practitioners would be required to contribute to the cost of the regulatory functions of the body, but members of the association might pay an additional fee to meet the cost of such non-regulatory functions as they wish their association to perform. The members of the association might reasonably object to the non-regulatory functions, funded exclusively by them, being exercised by a body for which non-members have a right to vote. Moreover, difficulties might arise in seeking to distinguish between regulatory and non-regulatory functions, and in any event the regulatory body would continue to have the conflict between these functions to which we have referred earlier. These problems would be reduced if the governing body were to delegate many of its non-regulatory activities to other organs of the association.

VI. The Role of the Courts

3.27 At present the courts play an important role in the regulation of practitioners' conduct in the course of litigation, and the Supreme Court is the ultimate disciplinary body for the profession. [1] But, in practice, they do not act as the general regulatory body of either branch of the profession. Several considerations suggest that the present role played by the courts in relation to regulation of the profession should not be extended. First, courts traditionally eschew questions of general policy as far as possible, particularly if those questions are currently controversial. A general regulatory body, however, must be involved heavily in policy-making and, on occasion, in controversy. Secondly, courts are not equipped to

undertake the amount of investigation and administration required of a general regulatory body. Thirdly, judges are well-informed and experienced in relation to the conduct of litigation, but this is not necessarily so in relation to other aspects of legal practice. Fourthly, their appreciation of the interests of non-lawyers may be limited by their lengthy experience as legal practitioners and then as judges.

VII. The Role of Government

3.28 We have spoken earlier in this chapter of the fundamental importance of having a body of lawyers who are free to represent clients vigorously against Government and other powerful interests. [1] We have referred also to the importance of preserving a profession's sense of responsibility for its own standards. [2] For these reasons it would be undesirable, in our view, for Government nominees to constitute a large proportion of the membership of any general regulatory body of the profession.

3.29 There is a strong case, however, for some Government role in professional regulation. Despite the weaknesses in the democratic process, the Government has two major claims in this context. One is that it, alone of all the institutions in the community, is accountable at regular intervals to the whole community. The other is that the Government is responsible for the whole range of public policies throughout the community. These two factors mean that the Government may be more in touch than a professional body with changing public needs and attitudes, and with the impact on the profession of policy considerations arising in other areas. The Government has a continuing responsibility to oversee the functioning of the legal profession in the public interest, and to propose to Parliament changes in the law regulating the professions. Parliament may delegate to the governing body of a professional association the primary responsibility for regulation of the profession, or of a sector of the profession, but it and the Government have a responsibility to ensure that any such body remains accountable for the exercise of the power delegated to it. [1]

3.30 In reality, a danger of Government participation in regulation is that rather than being too dominant, it may be ineffectual. Ministers and senior public servants are likely to have too many competing demands on their time to enable close and continuous involvement in regulation of the profession. Moreover, public servants may have a limited acquaintance with many of the issues concerning delivery of legal services, whether from a practitioner's viewpoint or that of a client. If they are appointed to sit on regulatory bodies they may regard it as beyond their function and training to play a vigorous personal role, especially oil controversial issues. One way of reducing the demands on public servants would be to establish a committee to advise the Government in relation to its involvement in regulation of the profession. In this way the views of interested, well-informed and forthright people, especially non-lawyers, would be obtained on a regular basis. If chosen by appropriate means, the committee could also reduce the danger of Government intervention occurring tor reasons of party politics or personalities.

VIII. Some General Conclusions

3.31 The considerations to which we have referred in this section on the general regulation)f the profession lead us to the following general conclusions.

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

(ii) 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.

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

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.

(ix) 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.

3.32 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. 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.

C. THE DIVISION OF THE PROFESSION INTO BARRISTERS AND SOLICITORS

3.33 We discuss in this section some basic issues concerning the present divided structure of the profession and the desirability or otherwise of changing that structure. We do so under the following heads:

(i) Flexibility and Freedom of Choice.

(ii) Division of Labour between Practitioners.

(iii) Development and Identification of Specialisation.

(iv) Consequences of Specialisation.

(v) Independence and Objectivity.

(vi) Accessibility to Clients and Other Practitioners.

(vii) Support and Assistance from Other Practitioners.

(viii) The Operation of the Courts.

At the end of the section we draw some general conclusions from the preceding discussion.

3.34 It is important to emphasise at the outset that we do not give serious consideration to the introduction of a structure in which practising in the style in which barristers now practise would be prohibited or discriminated against. We know of no-one who proposes such a structure, and we regard it as clearly unjustifiable. The important question, in our view, is whether the present divided structure

gives practitioners sufficient freedom to practise in the style which best suits them and their clients, whether that be the style in which barristers now practise or some other style. We do not consider that the continued existence of a strong and vigorous Bar depends upon the maintenance of a divided structure. The experience of the legal professions in South Australia, Western Australia, New Zealand and elsewhere demonstrates the correctness of that view. We give other reasons for it in the course of this section.

3.35 The issues considered in this section were discussed in greater detail in the Commission's Discussion Paper, *The Structure of the Profession.* Tentative views expressed by us in Part I of that Paper were the subject of comment by our colleague, Mr Conacher, in Part II of the Paper, and by the Bar Association, the Law Society and others in submissions or other responses to the Paper. Many of the arguments raised by these commentators are referred to in the text of this section, with appropriate citations being included in the footnotes.

I. Flexibility and Freedom of Choice

The importance of Flexibility and Freedom of Choice

3.36 There is a wide diversity of needs for legal services amongst clients and would-be clients. [1] This arises not only from differing types of legal problem, but also from factors such as a clients financial situation, geographical location, and familiarity with the legal system. There is also a wide diversity of needs and preferences amongst lawyers in relation to the manner in which they practise. This arises from factors such as their aptitudes, experience, personality and geographical location. Moreover, the needs of particular lawyers and clients can be changed substantially by variations in the economic situation, changes in substantive or procedural law, or technological developments.

3.37 In the light of these diverse needs and changing circumstances, it is important, both for lawyers and for their clients or would-be clients, that the structure of the profession should give lawyers substantial freedom of choice concerning the manner in which they organise their practices. Freedom of choice encourages flexibility, diversity, competition and innovation. It enables lawyers to respond to the needs of their particular clients or potential clients, to their own capabilities and preferences, and to the circumstances of particular cases. If the structure of the profession unduly restricts this freedom, it may adversely affect the quality, accessibility, speed or cost of legal services. This does not mean that the structure should provide absolute freedom of choice, but rather that freedom should not be restricted to a greater degree than is clearly required in the public interest.

The Combined Effect of Distinctions and Restrictive Practices

3.38 The present divided structure substantially restricts practitioners' freedom of choice as to the style in which they practise and the manner in which they handle particular matters. This arises principally from the combined effect of, on the one hand, legal and official distinctions between barristers and solicitors, and on the other hand, restrictive practices amongst barristers. We mentioned some of these distinctions and restrictive practices in chapter 2, [1] and we describe many of them in detail in chapters 4, 6 and 7.

3.39 The combined effect of the restrictive practices and the distinctions may be summarised as follows. The restrictive practices require a barrister to practise in a particular style, the principal elements of which are being a sole practitioner and not acting without the intervention of an instructing solicitor. If a barrister wishes to practise in a slightly different style (for example, by going into partnership with another practitioner who does not act without the intervention of an instructing solicitor) he or she must become a solicitor. Upon doing so, the legal and official distinctions between barristers and solicitors mean that, for example, he or she has to obtain a practising certificate, pay for indemnity insurance, contribute to the Fidelity Fund, and cease to wear a wig and gown when appearing as an advocate. His or her professional fees will be subject to much tighter regulation than those of a barrister. These and many other consequences arise even though the practitioner is practising in the same style as a barrister save that he or she is now in partnership with another practitioner who practises in the same style, and may be doing exactly the same kind of work as a barrister. We do not see why, for example,

the wearing of a wig and gown, or the liability to obtain a practising certificate, should turn upon whether a practitioner is in sole practice or in partnership. Consequences similar to those described above will arise if, for example, a barrister wishes to continue as a sole practitioner and is generally willing to observe the Bar Association's rule against acting without the intervention of an instructing practitioner, but wishes to make an exception in relation to work from, say, a particular institutional client which has its own legal department that is willing and competent to do the work of an instructing solicitor. Indeed, the legal and official distinctions to which we have referred apply even where a solicitor practises in precisely the same style as a barrister they depend on whether one is admitted as a barrister, not on whether one practises in the style of a barrister.

Justifiable and Unjustifiable Distinctions

3.40 There are, of course, many circumstances in which legal or official distinctions between practitioners may be appropriate, and may be compatible with, or even enhance, freedom of choice and flexibility within the profession. But it is unfair, and inimical to freedom of choice and flexibility, for a distinction to be based on a criterion which differs from the justification f or the distinction. For example, if the justification for a distinction lies in the difference between the style of practice of a barrister and all other styles, the criterion used for the distinction should be whether or not a practitioner practises in that style, rather than whether or not he or she is admitted as a barrister. After all, solicitors may practise in the style of a barrister. If the justification for a distinction lies in one aspect of the style of a barrister, such as not acting without the intervention of an instructing solicitor, the criterion used should be whether a practitioner practises in that way, not whether he or she is a barrister or practises in all respects in the style of a barrister. If the justification lies in the type of work, say, advocacy, which a practitioner performs in a particular instance, the criterion should be whether the practitioner is undertaking that work. The fact that a large proportion of the advocacy in this State is performed by barristers does not justify the criterion being whether or not the practitioner is a barrister. A similar point may be made in relation to a distinction for which the justification lies in whether the practitioner was instructed by another practitioner in the particular case in question. The fact that in most instances instructed practitioners are barristers does not justify the distinction being drawn between barristers and solicitors.

3.41 Some people seek to justify many of the existing distinctions between barristers and solicitors on the ground that, in practice, all or most barristers have a certain characteristic (eg. acting only with an instructing practitioner, or specialising in advocacy) which is relevant to the distinction in question, but few, if any, solicitors have the same characteristic. [1] In our view, this approach has substantial failings. Considerable unfairness may be caused to those lawyers (and hence to their clients) who have a characteristic which is rare in their own branch yet common in the other branch. This unfairness can deter practitioners from practising in the style which best suits them and their clients. The result may be the complete, or virtually complete, disappearance of the characteristic from one branch thereby giving a retrospective and spurious "justification" to the original distinction. If that distinction and other unjustified distinctions were removed, the characteristic in question might cease to be confined solely, or largely, to one branch of the profession.

The Effect of Distinctions in the Present Divided Structure

3.42 Later in this Report we look at a number of existing legal and official distinctions which are based on whether a practitioner is a barrister or a solicitor. [1] In each instance we conclude that a distinction on that basis is not justified, although in some instances a distinction on another basis, such as whether a practitioner is being instructed by another practitioner in the matter in question, may be justifiable. The principal effect of the present unjustified distinctions, in conjunction with the restrictive practices at the Bar, has been to put undue pressure on practitioners who wish to specialise in advocacy (especially in the higher courts), and in advisory work, to practise in the style of a barrister irrespective of whether that style is best-suited to them or is in the best interests of their particular clients or potential clients. if they were to diverge, even slightly, from the barristers style, they would incur a substantial number of disadvantages, and only a few minor advantages, as a result of the distinctions between barristers and solicitors. The result of this pressure to conform to one particular style can be seen by comparing the style of practice of specialist advocates in the higher courts in New South Wales with those in places

where few, if any, legal or official distinctions are drawn between barristers and solicitors. In New South Wales all such advocates, with perhaps one or two exceptions, are barristers and practise in the style of barristers. By contrast, in those Australasian jurisdictions which have a flexible structure, some of these advocates practise at the Bar, but many others practise in partnerships, sometimes taking work directly from clients and sometimes having an instructing practitioner, whether from their own firm or from elsewhere. [2] In these places there is a wider range of choice for practitioners, unencumbered by unfair distinctions, and as a result there is a greater scope for diversity and competition, and a greater range of choice for clients in relation to the way in which they may have their matter handled.

Restrictive Practices at the Bar

3.43 We have mentioned the combined effect of restrictive practices and legal or official distinctions, but thus far we have concentrated on the distinctions. We have done so because it is more appropriate and feasible for Parliament and the Government to place primary emphasis on the removal of unjustified legal or official distinctions, rather than to seek modification or abolition of restrictive practices which arise from the action of private individuals and their association. If unjustified distinctions were removed, the restrictive practices at the Bar might have less impact on the profession as a whole and on the public interest. Practitioners would be able to avoid those practices by practising outside the Bar, without thereby incurring unjustified disadvantages.

3.44 Nevertheless, restrictive practices within the profession should be subjected to scrutiny, lest they constitute unreasonable restraints on competition and flexibility within the profession and thereby are contrary to the public interest. This applies whether or not the unjustified distinctions in law or official practice are abolished. It is generally accepted in Australia, as in many other countries, that restrictive practices in the realm of trade and commerce can affect adversely the quality and cost of goods and services. [1] These consequences can arise within the professions and, both in Australia and elsewhere, restrictive practices in the professions are, to some, extent becoming subject to outside regulation. [2]

II. Division of Labour

3.45 In the remaining sections of this chapter we look at a number of benefits which are said to arise from the present divided structure. In doing so, we consider the extent to which these benefits do, in fact, occur under that structure, whether they are obtainable only under such a structure, and whether they are accompanied by certain disadvantages which might be avoided or reduced by changing the structure. We reiterate that, in our view, the question is not whether the Bar should be abolished or discriminated against, but whether practitioners who wish to practise in styles other than that in which barristers now practise should be permitted to compete on fair terms with those who practise in that style. In particular, we consider whether the barristers style of practice is so clearly different from, and superior to, other styles as to justify the way in which it is singled out for special, usually favoured, treatment under the present divided structure.

Advantages of a Division of Labour

3.46 The New South Wales Bar Association has submitted to us that:

> “The separation of the profession provides a convenient division of labour, not a multiplication of labour. Law is, today, infinitely complex and no one person could possibly cope with all aspects of all branches of the law. in particular, there is an obvious practical difference between the process of interviewing clients and assessing what their cases are really about, on the one hand, and presenting those cases in Court, on the other hand. The distinction between barrister and solicitor reflects this difference. if the one person is placed in the position where he does both jobs, he will do each of them less thoroughly than if he is able to confine his attention to one of them.” [1]

3.47 There can be no doubt that in many circumstances the use of two lawyers on a matter has substantial advantages. [1] The sheer volume of work may require it. Even in a less onerous matter, the overall quality and efficiency of service provided may benefit from different lawyers concentrating on separate aspects of it, and from the ready availability of an informed second opinion. Division of labour

is, therefore, often desirable and sometimes essential. Its benefits may be enhanced if, as occurs in the present structure, barristers specialise on one side of the traditional division of labour and solicitors on the other. This specialisation can enable work to be more skilled and efficient. It is possible that any consequential saving of time may be reflected in lower fees for clients.

Disadvantages of a Division of Labour

3.48 There are circumstances, however, in which the advantages of division of labour are outweighed by its disadvantages. [1] For example, in many relatively simple cases it would be quicker, and equally adequate, for one lawyer to handle the whole matter. In these cases the involvement of two lawyers, one instructing the other, is a waste of time and money.

3.49 Moreover, a division of labour can lead to a confusion or abdication of responsibility on the part of some, or all, of the lawyers involved. The solicitor may rely on the barrister, the barrister may rely on the solicitor, and the client may find that the practical effect is that no-one is accepting a proper degree of responsibility. This should not happen, but in some cases it does happen. Additional cost and delay may arise from the need to transfer information between the lawyers involved, and from duplication of work, such as the reading of documents. The possibility of inefficiency arising out of the involvement of both a barrister and solicitor is increased by certain Bar rules and practices. For example, generally speaking, barristers are required to be accompanied by solicitors at conferences and in court, not to attend conferences at their instructing solicitors' offices, and to go through their instructing solicitor if they wish to obtain further information from their client or from potential witnesses. [1]

3.50 Another important consideration is whether a particular client can afford to pay for both a barrister and a solicitor. In some cases it may be essential to have two lawyers, and if the client cannot afford them then he or she must hope to obtain legal aid. In many other cases, however, while it may be preferable to have two lawyers, one would be sufficient and is all that the client can afford.

The Rigidity of the Present Structure

3.51 In short, division of labour on a case is sometimes desirable and sometimes undesirable. A principal weakness of the present structure is that it inhibits flexibility in this respect. The structure contributes to a situation in which, for cases in the higher courts, it is in practice almost inevitable that a barrister will have to be used. It also increases the likelihood of advisory work having to be sent to a barrister, rather than being dealt with by the original solicitor or by another solicitor on referral. it involves rules and practices which require that wherever a barrister is used a solicitor must also be used, and that there must be a division of labour between the barrister and the solicitor along specified lines. The overall effect, then is that the present structure of the profession tends to impose for a wide range of cases a standardised method of handling them. This method may often be suitable but in other circumstances, for the reasons mentioned above, it may cause undue cost or delay or may affect adversely the quality of service provided. Sometimes it may prevent a client from obtaining competent legal service at a price which he or she can afford.

III. Development and identification of Specialisation

Development of Specialisation

3.52 According to the New South Wales Bar Association:

> "The continuation of the existing division of the profession makes available, in fact, to members of the public the specialist services of the separate Bar, that body comprising those practitioners who are
>
> > (a) skilled and experienced in the specialty of advocacy, whether in general or in particular areas and who hold themselves out as, and are identified and accepted both within and outside the legal profession as, specialists in that sense; and

(b) skilled and experienced in areas of the law in relation to which they are available to advise and be consulted by any member of the public, through his solicitor, when independent specialist advice or consultation is required.

Thus ... the New South Wales Bar constitutes and provides the form of specialisation appropriate to the needs of the public and of the legal profession in New South Wales, a specialist service which it is essential in the public interest to maintain." [1]

3.53 There are undoubtedly many specialists at the Bar, especially in the field of advocacy. [1] The existence of the Bar nurtures to some extent the development of specialisation within the profession. [2] By becoming barristers, practitioners announce, in effect, that they are prepared to take court work and advisory work on referral from solicitors and that, since work will be taken on referral only, solicitors can refer matters to them without fear that the clients will be taken over. Such an announcement greatly increases barristers' prospects of obtaining sufficient work to develop a specialist practice.

3.54 There are, however, some aspects of life at the Bar which do not encourage specialisation. Barristers are required to practise on referral only and therefore cannot build up a specialist practice with the assistance of clients who come directly to them. Nor, generally speaking, can they take any other type of work directly from clients in order to keep themselves going while they build up their specialist work. Since they must practise as sole practitioners rather than as partners or employees, they cannot obtain the support of partners or employers to "carry" them during difficult times and to share the capital costs of acquiring expensive library and technological resources which may be necessary for advanced work in their chosen field. Solicitors, especially those who work in medium-sized or large firms, do not face these difficulties to the same extent.

Identification of Specialists

3.55 The Bar Association claims that the existence of the Bar not only facilitates specialisation but enables specialists to be identified more readily. [1] The Law Society, however, has described the structure as being

"open to criticism in that

(i) it regards all members of the bar as specialists in one or more fields of legal practice, irrespective of the actual degree of expertise of each barrister; and

(ii) it fails to recognise the extent of specialisation and expertise which has been obtained by many solicitors." [2]

The Society's criticisms may be some what over-stated, but in our view they point to significant failings in the present system. In relation to the Society's first criticism, it is clear that many barristers cannot claim specialist expertise in any particular field. [3] Moreover, the present system does not enable a barrister's particular field or fields of specialisation to be identified readily by all solicitors. City solicitors with big litigation practices may have little difficulty, but this is not the case for many suburban and country solicitors. The Law Society has submitted to us:

"Because of the absence of volume of work and close contact with counsel, it is difficult for country solicitors to know which counsel is the most competent one to engage in particular matters." [4]

In relation to the Society's second criticism, Mr Justice Jacobs (then of the Court of Appeal pointed out more than a decade ago that barristers

"are the specialists in litigation and a limited number are specialists in other fields, but the real specialists are becoming the firms of solicitors who can undertake the advising, preparing and carrying through of large commercial transactions". [5]

IV. Consequences of Specialisation

Advantages and Disadvantages

3.56 We have referred to the Bar Association's emphasis on the value of the Bar as a source of specialists. What are the advantages of specialisation, whether at the Bar or elsewhere? There is no doubt that specialisation in a particular field of practice can have many important advantages. [1] It can enable a practitioner to substantially improve the quality, speed and efficiency of his or her service. As society and the legal system become increasingly complex, there is a growing number of fields in which a measure of specialisation is essential for the provision of satisfactory service. It is simply not possible for a practitioner to achieve and maintain competence across the whole range of law.

3.57 The advantages of a measure of specialisation can be substantial and in some cases essential. But two qualifications need to be expressed. [1] First, specialists can tend to become unwilling or unable to handle work outside their specialist field. This applies, for example, to solicitors specialising in the preparation of a case and barristers specialising in its presentation, thus reducing the number of practitioners who are willing and competent to handle both preparation and presentation in appropriate cases. Secondly, intensive specialisation can lead to in-breeding and tunnel vision within those working in the field, raising the danger of problems being handled automatically in accordance with the prevailing views of specialists in the field, rather than being examined to see whether a particular problem might better be dealt with by a new method or by a specialist in another field.

3.58 Some particular advantages of specialisation are said to arise in relation to the Bar. [1] By specialising in advocacy and opinion work on referral from instructing solicitors, barristers can avoid the high overheads, [2] and the frequent interruptions, that may be involved in establishing and working in a solicitor's office which may be frequented by many clients and may require extensive staff, premises and other resources for the handling of clients' affairs.

3.59 There is strength in these points, but several qualifications must be taken into account. First, in relation to freedom of distraction at the Bar, the Bar Association has submitted to us that interruptions in chambers can be frequent, making sustained concentration very difficult. [1] Secondly, while there can be no doubt that, on average, barristers' overheads are substantially lower than those of solicitors, much of this difference arises from the mere fact that solicitors tend to handle those parts of a case which involve high overheads, such as the collection of evidence and the preparation of documents. To this extent, there is no overall saving for the client, nor for the profession as a whole. Thirdly, some of the difference in average overheads is misleading, because solicitors often include within their overheads the salaries of fee-earning solicitors on their staff. Fourthly, there is reason to expect that some solicitors can keep their overheads as low as barristers, or even lower. A likely possibility would be a solicitor specialising in advocacy who gets most of his work from an institutional client (such as an insurer) which has the resources and willingness to undertake most of the preparation of the case. And if a specialist advocate joins a medium or large firm of solicitors, the consequential addition to the firm's overheads may not be substantial and may be less than the overheads of the barristers whom the firm would otherwise have briefed.

The Effect on Non-Specialists

3.60 It is important to consider also the impact of specialisation on the provision of services by non-specialists. [1] Excessive encouragement of intensive specialisation within the profession can deplete unduly the supply of non-specialists to whom clients can resort for a preliminary diagnosis followed by a referral to an appropriate specialist, or for the handling of a problem which is simple or which, although difficult, arises in a country area remote from specialists. The development of a high degree of specialisation can result in various types of work coming to be regarded widely as requiring the services of a specialist, even though non-specialists with a modicum of experience in the relevant fields would be competent to handle them. In consequence, non-specialists can be deprived of the experience needed to develop or maintain their competence in performing these tasks, and thus the attitude that they are not competent to handle the work becomes self-fulfilling. As the more stimulating, prestigious and remunerative work is taken over by specialists, so there is a tendency for the status, morale and eventually the calibre of non-specialists to decline, not only in relation to their remaining work in specialist fields but also in non-specialist fields and in the general diagnostic and referral role.

3.61 The process described in the previous paragraph can be seen in the history of the medical profession, in which specialisation has developed to a greater degree than has yet occurred in the legal profession. It has led to great concern about the number and standards of general medical practitioners. For example, an Australian commentator has written:

> "it is a paradox of technical progress and specialisation that while the professional situation of the generalist is weakened, the need for his services as a guide and coordinator is not .... The experience of the United States is not an encouraging precedent. In many locations the general practitioner has disappeared and a large proportion of primary care is supplied either as a by-product of specialist practice, or by hospital out-patient and casualty departments and by the practitioners of fringe medicine. The remarkably high costs of services reflect misuse of resources rather than improvement in the availability or quality of care." [1]

3.62 The relevance of these considerations to the present divided structure of the legal profession is that, while that structure leads to experience in advocacy and opinion work being concentrated in the relatively small group of lawyers at the Bar, and thus tends to promote a special excellence in that group, the structure may so affect the calibre of services provided by the remainder of the profession that its overall effect is adverse. For example, if solicitors refer almost all advocacy or legal advice of any substance to the Bar, rather than undertaking it themselves, they reduce their competence to handle such work. It may appear on the surface that this does not matter because the work will be done by barristers. But it does matter. It reduces solicitors' ability to prevent legal problems arising for their clients, to diagnose promptly and accurately those problems which do arise, and, where the assistance of a barrister is necessary, to seek it at the right time and to gather evidence and present issues to the barrister in an effective and efficient manner. Moreover, it increases the likelihood of clients incurring additional expense and delay through having to resort to two lawyers rather than one. For a significant number of clients the financial or geographical difficulties of briefing a barrister may be prohibitive, forcing them to rely solely on their solicitor, whose lack of opportunity to develop experience in the field in question may lead to inadequate service.

3.63 Consequences of this kind have been adverted to in many submissions to us. For example, the Chief Solicitor of the Commonwealth Bank submitted to us:

> "The present form of the division seems to produce two undesirable tendencies:
>
> (a) Many solicitors seem to be reluctant to express an opinion or follow a course of action in a contentious matter without obtaining an opinion or advice from a barrister.
>
> (b) Although some solicitors competently carry out advocacy, there appears to be a predominant practice of briefing a barrister for the sole purpose of advocacy in even the most elementary of matters." [1]

V. Independence and Objectivity

Freedom from Conflicting Interests

3.64 Barristers may be less prone than many solicitors to certain conflicts of interests. [1] The division of labour means that barristers often do not have close or continuing contact with clients, and thus may be able to give more objective advice, unclouded by a long association with the client and with the conduct of his or her legal affairs. The fact that barristers practise as sole practitioners, rather than as partners or employees of other practitioners, leaves them free of possible conflicts between, on the one hand, their clients' interests, and on the other hand, interests of their partners or employers, or of clients of their partners or employers. Solicitors, on the other hand, may have ties with partners or employers, and with a wider range of business interests than most barristers. Chief Justice Burt, of Western Australia, has put the matter in the following way:

> "A large firm has many permanent clients and through them it develops a permanent connection with various interests in the community. This compromises the independence of counsel. He becomes identified and this restricts his availability." [2]

3.65 On the other hand, the extent and significance of these differences between barristers and solicitors should not be exaggerated. The practice of many barristers rests heavily on a flow of work from a particular client, type of client (such as trade unions), or firm of solicitors. Some have general retainers binding them to accept such work as may be offered by a particular client. These ties can reduce availability and independence. Also, barristers' independence and distance from clients can sometimes lead them to have an inadequate understanding of their clients' needs and an insufficient commitment to provide the best possible service.

The "Cab-rank" Rule

3.66 Another aspect of independence at the Bar is the Bar Association's rule (colloquially known as the "cab-rank" rule), which in certain circumstances requires barristers to accept work which is offered to them. [1] The Association has submitted to us that the rule

> "is of great importance in practice because it ensures that barristers are not identified with their clients. It also enables parties with unpopular causes or defences to obtain proper representations." [2]

The Association has re-iterated the importance of this rule in its reply to our Discussion Paper on the structure of the profession. [3] But there are fourteen paragraphs of exceptions to the rule and in relation to a previous version of the rule, in which the exceptions were fewer and no more subjective than those in the present rule, the Law Society said that

> "the interpretation of the duty and its exceptions has become highly subjective and there is, in reality, ample opportunity for any barrister to refuse any brief offered to him". [4]

3.67 We share the Society's view quoted above. But we think that the cab-rank rule does have a valuable effect in reducing criticism of barristers who accept unpopular clients. Some barristers who might otherwise be willing to take unpopular cases could be deterred if such appearances were generally construed by professional colleagues and the public as expressions of sympathy for the client's cause. But the cab-rank rule, or something like it, need not be unique to the Bar. It could be extended to any practitioner offered work by an instructing practitioner, at least in relation to litigious work. In the view of the Law Society, it is already the case that "most solicitors feel they have a subjective moral obligation to accept most work and most clients" and that this obligation is "subject only to the same exceptions applying to the [Bar Association's cab-rank rule]". [1] We consider the cab-rank rule, and the application to solicitors of a somewhat similar principle, in greater detail in a later chapter. [2]

VI. Accessibility to Clients and Other Practitioners

3.68 We have mentioned already some matters which affect the accessibility of legal services, such as the incidence and identification of specialist practitioners, and the effects of specialisation on non-specialists. In this section we refer to several other issues which substantially affect accessibility. [1]

Client Poaching

3.69 An important advantage said to be inherent in the divided structure is that, because a barrister may not deal with clients except through a solicitor, any solicitor may obtain the assistance of a barrister without running the risk of permanently losing the client to that barrister. [1] This, it is said, improves clients' access to lawyers of appropriate skills. The protection against client-poaching is said to be of special importance in relation to sole practitioners and small firms, which are more likely to lack specialist skill in a particular field and therefore to need to refer a client to another lawyer. They may also be more vulnerable than large firms to having unfavourable comparisons made by a client between

their resources and those of the firm to which the client is referred. The Bar Association has submitted to us:

> "Without the Bar, individual or small group practice amongst solicitors may well become impossible or dangerous." [2]

3.70 In our view, the risk of client-poaching is not great. First, our inquiries indicate that referrals between solicitors, including referrals from small outlying practices to large Sydney firms, are by no means uncommon and are increasing in frequency. Secondly, a practitioner who gained a reputation as a client poacher would be unlikely to continue to get work on referral, and his or her practice would thereby suffer. Thirdly, experience in professions with flexible structures shows that practitioners, including country practitioners, frequently brief amalgam practitioners (ie. those who are not at the separate Bar) despite the alleged risk of client-poaching. Our survey of the profession in South Australia found that small and country practices were at least as willing to brief amalgams as to brief practitioners at the Bar. [1] Fourthly, if there is a widespread fear, whether justified or otherwise, that client-poaching will occur, practitioners who are willing to undertake not to poach clients referred to them, or at least not to do so within a specified period of the referral, could be permitted to advertise that fact Indeed the choice has to be made between, on the one hand, the Bar's present restrictive practice against accepting work directly from clients, and on the other hand, a rule prohibiting client-poaching in certain circumstances, the latter alternative may well be preferable in the public interest.

Access to Practitioners in Firms

3.71 Another matter concerning accessibility arises from the fact that barristers have to be in sole practice. If they were in a firm, it is said, they might be largely occupied with work for clients of that firm and they might be more likely to have to decline a brief due to a conflict between the interests of the potential client and those of an existing client of the firm. This is a valuable attribute of barristers, but its significance by comparison with solicitors should not be exaggerated. First, solicitors can be, and many are, sole practitioners. Secondly, by contrast with a barrister, a partner in a firm is more likely to be able to transfer to other partners, or to employees, work which does not require his or her skills. In this way, the partner can make time to handle a greater number of clients. These arrangements are especially likely to be made if the partner is so busy that he or she is having to decline work referred to him or her by other practitioners, whether inside or outside the firm. Thirdly, most firms, and especially those members of them who receive work from outside practitioners, are unlikely to want to turn down this outside work any more than inside work. Experience in New South Wales shows that some leading advisers working in firms, including medium-sized and large firms, receive and accept much outside work. Our survey in South Australia showed that when leading amalgams received instructions from other practitioners, about half were from practitioners in their own practice and about half from outside practitioners. Those instructions which were declined were as likely to come from inside the practice as from outside it. In relation to instructions which were accepted, those sent to amalgams were more likely to come from small practices than were those sent to members of the Bar. [1]

Country and Suburban Areas

3.72 Both the Law Society and the Bar Association have stressed in their submissions to us the special value of the Bar for country and suburban solicitors, and for their clients. [1] There is strength in this view as an argument for retention of a strong Bar. But for reasons which we have given above, we consider that there is considerable, and growing, scope for country and suburban solicitors to refer matters to other solicitors as an alternative to using the Bar. As we have mentioned, in South Australia country and suburban solicitors are as likely to instruct amalgams as to instruct members of the Bar. [2] This use of other solicitors would be aided considerably by relaxing the present restrictions on advertising by solicitors. [3]

3.73 It is important, too, to bear in mind the problems which arise from the present centralisation of the Bar. Apart from a small number of barristers in the cities of Newcastle, Wollongong and Parramatta, the Bar is clustered together within a couple of hundred metres of the Supreme Court building in central Sydney. The Law Society has pointed out some of the problems which this causes for country solicitors:

> "There is difficulty in briefing counsel as a matter of urgency and, even in non-urgent matters, once counsel is briefed it is more difficult for a country solicitor not having the close personal contact with counsel or the volume of work to extract favours from counsel or even to have counsel deal with his matters in turn." [1]

The problems can be especially marked in relation to advocacy. Country solicitors have frequently told us of the difficulties and expense of obtaining barristers to take briefs at country sittings. Country solicitors often have very little choice as to whom they brief and may find themselves left without a barrister, or with a strange barrister, at the last minute. Even when barristers are available, bringing them from Sydney is expensive.

VII. Support and Assistance from Other Practitioners

3.74 A feature of the Bar is its corporate life. [1] It embraces the communities of barristers sharing floors of buildings, and the Bar Association itself. Through close proximity, and the traditions of the Bar, many barristers have ready access to the advice and assistance of other barristers. They can benefit from an overflow of work amongst other barristers on their floor and elsewhere. These characteristics can be of special value to newly-fledged barristers. However, many of the virtues of corporate life seen in the Bar by its older or former members have become less substantial in recent years as the Bar has grown rapidly in size.

3.75 It must not be forgotten that practice outside the Bar often provides support and assistance of at least equal value to that which is available at the Bar. A firm may provide an environment which is both intellectually and socially rewarding, and may provide ready access to the experience and expertise of colleagues. Many solicitors hold a view similar to that expressed by a prominent Canadian advocate (now an appellate judge) while practising in a firm in Ontario:

> "My partners are my friends. I see them socially... I discuss problems with them, whether they are engaged principally in litigation or principally in corporation law. To me, practising in chambers in the same building with some of my present partners would be a poor substitute for the advantages of true partnership, practised in an aura of friendship and affinity of taste." [1]

Solicitors often maintain extensive contacts with solicitors outside their own firm. By comparison with barristers, they have greater opportunities for extensive contact with clients, which can give them a wide range of knowledge and experience outside a purely professional milieu.

VIII. The Operation of the Courts

A Flood of Inexperienced Advocates?

3.76 An argument commonly advanced in favour of the present structure is that because it, in effect, confines advocacy in the higher courts to the Bar, it thereby prevents the courts from being flooded with inexperienced or incompetent advocates who are unfamiliar to the judges and to other advocates. [1] It is argued that the advent of these advocates would greatly prolong the hearing of many cases and would erode the mutual understanding and trust between advocates and judges which, at present, substantially improves the speed and fairness with which cases are resolved. [2]

3.77 The strength of this argument in modern times must be assessed in the light of the substantial increase in the size of the Bar and the Bench, and the high proportion of inexperienced barristers. The Bar now comprises some 700 or so practising barristers, about one-third of whom have been at the Bar for less than five years. [1] Moreover, even if higher court advocacy were no longer confined, in practice, to the Bar, the overwhelming majority of it would continue to be undertaken by skilled specialists in advocacy, whether at the Bar or otherwise, rather than by neophytes. Even if a sense of responsibility or pride did not deter the incompetent advocate, the fear of judicial criticism or disciplinary action would be highly likely to do so. Perhaps more importantly, many inexperienced advocates would prefer to spend their time working on matters in which they are experienced, rather than working less efficiently and less remuneratively on the unfamiliar task of advocacy. The experience in flexibly-structured professions in

Australasia and Canada supports these views. Concern has been expressed at the standard of advocacy in the United States. [2] But that country differs from Australasian and Canadian jurisdictions in many relevant respects, including methods of legal education, the widespread use of contingent fee arrangements, emphasis on written procedure, the appellate system, and methods of judicial selection. Chief Justice Burger has been a prominent critic of standards of advocacy in his country and has proposed that advocates should be required to undergo special training. But he has said that "we cannot have, and most emphatically do not want, a small elite, barrister-like class of lawyers." [3]

Selection of Judges

3.78 Another argument advanced in favour of the present structure is that the bar provides a pool of specialist advocates from which judges can be chosen. [1] Because the pool is relatively small and its senior members are well-known to each other and to the judiciary, identification of the professional skills and personal qualities desirable in judges is facilitated.

3.79 Several reservations must be expressed about this view. As we have mentioned, both the Bar and the Bench are now large. Moreover, both the Bar and the Bench in England are very much larger than in New South Wales, yet the process of judicial selection from the ranks of some 4,000 barristers appears to work at least as well as in this State. We have expressed earlier the view that, whether or not the present divided structure is retained, higher court advocacy would remain, in practice, largely the preserve of a group of specialist advocates which would not be much greater in size than is the case at present. The skills and personalities of these advocates would be well-known amongst themselves, the judges, and others whose opinion would be likely to play a direct or indirect role in judicial selection.

IX. Some General Conclusions

The Need for Reform

3.80 As we see it, the present divided structure has the following disadvantages, amongst others.

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

(ii) 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.

(iii) 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.

(iv) 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.

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

(vi) 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.

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

(viii) 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.

A Basis for Action

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

(i) 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.

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.

(ix) 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.

FOOTNOTES

Para.

3.7 1. Submission No.269 ("Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the General Regulation of the Legal Profession"), para.2.1.

3.8 1. For a fuller discussion of the issues referred to in paragraphs 3.8-3.1 1, see our Discussion Papers, General Regulation, pp.124-127, and The Structure of the Profession, Part II, ch.6 and para.11.5. See also eg. Law Society of New South Wales, Submission No.244 (The Role of Lawyers in Society and Special

Needs for Legal Services"), pp.5-12 and Submission No.269 (Reply to the Law Reform Commission's Discussion Paper No. 1 in relation to the General Regulation of the Legal Profession), paras.4.1-4.15; New South Wales Bar Association, Submission No.266 (Reply to the Law Reform Commission's Discussion Paper No.1 - General Regulation"),pp.26-27: Needham J, Submission No.271.

3.10 1. Professional Organisations Committee, Report (Ontario, 1980), p.26.

3.12 1. Fora fuller discussion of the issues referred to in paragraphs 3.12-3.14, see our Discussion Paper, *General Regulation* , pp.119-127. See also Law Society of New South Wales, Submission No.225 ("Control of the Profession"), p.2; and Submission No.269 ("Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the General Regulation of the Legal Profession"), para.4.14.

3.14 1. See our Discussion Paper, Complaints, *Discipline and Professional Standards -Part I* , and our *Background Paper -I* .

2. See our Discussion Paper, *Advertising and Specialisation .*

3. See our Discussion Paper, *Solicitors' Trust Accounts and the Solicitors' Fidelity Fund* .

4. See our Discussion Paper, *The Structure of the Profession*, *Part I*.

3.15 1. For a fuller discussion of the issues referred to in paragraphs 3.15-3.21, see our Discussion Papers, *General Regulation ,* pp. 1 34-149, and *The Structure of the Profession, Part* 11, paras.6.6-6.13. See also Law Society of New South Wales, Submission No.269 ("Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the General Regulation of the Legal Profession"), pp.4, 37; Needham J, Submission No.27 1, pp.4, 9.

3.16 1. See paragraphs 2.31-2.32.

2. For a brief description of the Committee, see paragraph 2.31.

3. Pickering, "The Bar and the Community" (1980) *District Lawyer,* vol.4, p.6.

3.17 1. For a fuller description of the Council's membership, see our Discussion Paper, *General Regulation*, pp.79-80.

2. Royal Commission of Inquiry into Civil Rights Report *No.1* , (Ontario, 1968), vol.3, p.1166.

3. For a description of these developments, see our Discussion Paper, *General Regulation*, pp.80-87, 90, 97.

3.20 1. See NSW Bar Association, Submission No.266 ("Reply to the Law Reform Commission Discussion Paper No.1 - General Regulation"), pp.11-13; Law Society of New South Wales, Submission No.269 ("Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the General Regulation of the Legal Profession"), pp.14-23.

3.22 1. Fora fuller discussion of the issues referred to in paragraphs 3.22-3.26, see our Discussion Papers, *General Regulation ,* pp.119-127, and *The Structure of the Profession,* Part II, ch.16. See also, eg. Law Society of New South Wales, Submission No.269 ("Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the General Regulation of the Legal Profession"); NSW Bar

Association, Submission No.266 ("Reply to the Law Reform Commission Discussion Paper No.1 - General Regulation").

2. See eg. *General Regulation* , ch.4.

3.23 1. On this conflict, see, e.g., our Discussion Paper, *General Regulation,* pp.29-31 and 136139; Keay, Submission No. 145, p.3-4; British Legal Association, Submission to the Royal Commission on Legal Services

(England and Wales), p.9; and the sources cited in notes 3.24. 2 and 3 below.

2. Clause 3(2), (5).

3. Clause 4(b), (q).

3.24 1. NSW Bar Association, Submission No.266 (“Reply to the Law Reform Commission's Paper No.1 - General Regulation”), pp.16-18; Law Society of New South Wales, Submission No.269 (“Reply to the Law Reform Commission's Discussion Paper No.1 in relation to the general Regulation of the Legal Profession”), pp.23-29 and Appendix.

2. *Working Paper No.1* , (July 1981), para.2.26.

3. Royal Commission of Inquiry into Civil Rights *Report No.1* , (Ontario, 1968), vol.3, p.1166.

4. See, for example, the matters mentioned in paragraph 3.14.

3.27 1. For a fuller discussion of the issues referred to in paragraphs 3,27, see our Discussion Paper, *General Regulation* , pp.129-134.

3.28 1. See paragraphs 3.8-3.11. Fora fuller discussion of the issues referred to in paragraphs 3.283.30, see our Discussion Paper, *General Regulation* , pp.127-129.

2. Paragraph 3.12.

3.29 1. For an expansion of this argument, see Professional Organisations Committee, Report, (Ontario, 1980), p.28.

3.36 1. For a fuller discussion of the matters referred to in paragraphs 3.36-3.37, see our Discussion Paper, *The Structure of the Profession ,* Part I, pp.106-108.

3.38 1. Para.2.14.

3.41 1. See eg. *The Structure of the Profession* , Part II, esp. ch. 14.

3.42 1. See chapters 6, 9 and 10.

2. See our Discussion Paper, *The Structure of the Profession*, Part I, chapter 3, and our Background *Paper* - IV, Parts I and II.

3.44 1. See in particular, the Commonwealth Trade Practices Act 1974.

2. See chapter 7. See also eg. Pengilley, *Trade Associations, Fairness and Competition*, (Law Book Co., 1981), pp.122-130, 143-148; *Goldfarb v. Virginia State Bar*, (1975) US Reports, vol.421, p.773; Combines Investigation Act (Canada), and *Law Society of* British Columbia v. AG. for *Canada ,* (1981) Western Weekly Reports, vol.2, p.159.

3.46 1. NSW Bar Association, Submission No.180, (“Division of the Legal Profession into Two Branches”), p.8.

3.47 1. For a fuller discussion of the issues referred to in paragraphs 3.46-3.51, see our Discussion Paper, *The Structure of the Profession,* Part I, pp.113-124. See also eg. Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”),Appendix II; NSW Bar Association, Submission No.80 (“Division of the Legal Profession into Two Branches”), pp.8-10.

3.48 1. See eg. Mr Justice Samuels, Submission No.113, pp.10-11.

3.49 1. See Rules of New South Wales Bar Association, rr.32-34; the Association’s Submission No.80 (“Division of the Legal Profession into Two Branches”), p.5; and our Discussion Paper, *The Structure of the Profession,*

Part I, pp.60-64.

3.52 1. NSW Bar Association, Submission No.184 (“Certification of Legal Practitioners as Specialists”), p.2.

3.53 1. For a fuller discussion of the issues referred to in paragraphs 3.52-3.55. see our Discussion Paper, *The Structure of the Profession* , Part I, pp.133-143, Part II, paras.12.41-12.43. See also our Discussion Paper, *Advertising and Specialisation ,* pp. 14-22 and 45-9. See also, eg. NSW Bar Association, Submission No.80 (“Division of the Legal Profession into Two Branches”), pp.9-13; Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”), pp.14-15; Mr Justice Deane, Submission No.55, p.8.

2. On the incidence of specialisation at the Bar, see our Discussion Papers, The Structure *of the Profession ,* Part I, pp.68 and 134-137, and *Advertising and Specialisation ,* pp.9-13.

3.55 1. See paragraph 3.52.

2. Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”), p.14.

3. See the sources referred to in note 3.55.1 above.

4. Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”), p.3.

5. Mr Justice Jacobs, “The Future of the Legal Profession in Australia”, an address to the Australian National University Law Society, 2nd May, 1968, p.10. (For this and some other portions of the address, see Disney *et al., Lawyers ,* (Law Book Co., 1977), p.70).

3.56 1. For a fuller discussion of the issues referred to in paragraphs 3.56-3.63, see our Discussion Papers, *The Structure of the Profession,* Part I, pp.121-124 and 143-146, and *Advertising and Specialisation,* pp.37-58. See also the sources cited in note 3.53.1.

3.57 1. See further our Discussion Paper, *Advertising and Specialisation* , pp.43-44.

3.58 1. See eg. Mr Justice Hutley, Submission No.90, p.6.

2. See eg. Tomasic and Bullard, *Lawyers and their Work*, (Law Foundation of NSW, 1978), Table 174; Law Society of New South Wales, Submission No.257, pp.13-16; Meredith, “Structure and Financial Performance of Legal Practices in NSW”, in Tomasic (ed), *Understanding Lawyers* (Law Foundation of NSW, 1978), pp.347362; our Discussion Paper, *The Structure of the Profession ,* Part II, para.12.14: New South Wales Bar Association Submission No.194 (“The Fixing and Recovery of Charges for Work Done by Legal Practitioners”), pp.4-10.

3.59 1. NSW Bar Association, Submission No.194 (“The Fixing and Recovery of Charges for work Done by Legal Practitioners”), p.19.

3.60 1. For a fuller discussion of issues referred to in paragraphs 3.60-3.63, see our Discussion Paper, *Advertising and Specialisation* , pp.54-56.

3.61 1. R Scotton, *Medical Care in Australia: An Economic Diagnosis* (1974), p.97.

3.63 1. L Hollis, Submission No.22, p.9.

3.64 1. For a fuller discussion of the issues referred to in paragraphs 3.64-3.67, see our Discussion Paper, *The Structure of the Profession ,* Part I, pp.146-150, Part II, paras.12.6-12.8, 12.15. See also, eg. NSW Bar Association, Submission No.80 (“Division of the Legal Profession into Two Branches”), pp.16-17; Liberal Party of Australia (NSW Branch), Submission No.404, p.1.

2. Chief Justice Burt, Letter to the President of the New South Wales Bar Association, reproduced in the Association's Submission No.80 ("Division of the Legal Profession into Two Branches"), p.55.

3.66 1. Rules of the New South Wales Bar Association, rule 2. On the cab-rank rule generally see our Discussion Paper, *The Structure of the Profession,* Part II, para.12.12; and the sources in notes2, 3, and 4 below.

2. New South Wales Bar Association, Submission No.80 ("Division of the Legal Profession into Two Branches"), p.5.

3. New South Wales Bar Association, Submission No. 401 ("Reply to the Law Reform Commission's Papers on The Structure of the Profession"), p.4.

4. Law Society of New South Wales, Submission No.264 ("Duty to Accept Work"), p.2. See also Lord Diplock in *Saif Ali v. Sydney Mitchell,* (1978) Weekly Law Reports, vol.3, p.849.

3.67 1. Law Society of New South Wales, Submission No. 264 ("Duty to Accept Work"), pp.3, 4.

2. See paragraphs 6.76-6.81.

3.68 1. For a fuller discussion of the issues referred to in paragraphs 3.68-3.73, see our Discussion Paper, *The Structure of the Profession ,* Part I, pp.150-159.

3.69 1. See eg. *The Structure of the Profession,* Part II, para. 12.13; NSW Bar Association, Submission No.80 ("Division of the Legal Profession into Two Branches"), pp.15-16; Law Society of New South Wales, Submission No.200 ("Division of the Legal Profession into Two Branches"),Appendix 1.2.

2. NSW Bar Association, Submission No.80 ("Division of the Legal Profession into Two Branches"), p.15.

3.70 1. For the report of the South Australian survey, see our *Background Paper* -IV, Part II.

3.71 1. For these and other results of the survey, see our Background *Paper* -IV, Part II.

3.72 1. Law Society of New South Wales, Submission No.200 ("Division of the Legal Profession into Two Branches"), pp.10-11, Appendix 4; NSW Bar Association, Submission No.80 ("Division of the Legal Profession into Two Branches"), pp.14-16, and Submission No.401 ("Reply to Law Reform Commission's Paper on The Structure of the Profession"), p.9.

2. See our *Background Paper* -IV, Part II.

3. See our Discussion Paper, *Advertising and Specialisation*.

3.73 1. Law Society of New South Wales, Submission No.200 ("Division of the Legal Profession into Two Branches"), p.3.

3.74 1. Fora fuller discussion of the issues referred to in paragraphs 3.74-3.75, see our Discussion Paper, *The Structure of the Profession,* Part I, pp.159-162. See also *The Structure of the Profession,* Part II, paras.12-17-12.32; NSW Bar Association, Submission No.80 ("Division of the Legal Profession into Two Branches").

3.75 1. J. Arnup, "Fusion of the Professions", (1971) *Law Society of Upper Canada Gazette,* vol.5, p.38 at 47.

3.76 1. See eg. Judges of the High Court of England, Submission to the Royal Commission on Legal Services, pp.7-15 (reprinted in NSW Bar Association Submission No.80 ("Division of the Profession into Two Branches"), p.69 at 72-79).

2. For a fuller discussion of the issues referred to in paragraphs 3.76-3.79, see our Discussion Paper, *The Structure of the Profession* , Part I, pp.162-166.

3.77 1. NSW Law Almanac 1981.

2. See the sources cited in chapter 2, footnote 2.35.5.

3. See Burger, “Special Skills of Advocacy” (1973) Fordham Law Review, vol.42, p.227 at 230.

3.78 1. See, for example, the NSW Bar Association's Submission No.80 (“Division of the Legal Profession into Two Branches”), p.17.

4. Admission, General Regulatory Bodies and the Right to Practise

A. INTRODUCTION

4.1 In this chapter and in the remaining four chapters of this Part, we consider a number of specific issues concerning the general regulation and structure of the profession. In doing so, we proceed from the general views which we expressed in chapter 3. The principal recommendations which we make in these chapters are listed as recommendations 1-14 in the Summary of Principal Recommendations at the beginning of this Report.

4.2 The main issues considered in the present chapter are as follows.

Admission to the Profession

Should all persons admitted to the profession be admitted under a common title? If so, what should be the common title?

General Regulatory Bodies

Which should be the general regulatory body or bodies of the profession? What should be the general nature of the powers of the body or bodies, especially in relation to the making of statutory regulations?

The Right to Practise

Should all lawyers be required to hold practising certificates if they wish to practise? Who should receive the fees paid for practising certificate fees and for what purposes should the money be used?

A number of related issues are considered in later chapters. They include, for example, the precise composition of the general regulatory body or bodies, whether there should be different types of practising certificate, and the requirements for obtaining a practising certificate.

B. ADMISSION TO THE PROFESSION

I. Common or Separate Admission?

4.3 It is convenient to express at this early stage our conclusions on the question of common or separate admission. [1] But those conclusions have been arrived at in the light of the views we have formed on a number of the issues dealt with later in this Report. For example, for reasons which we give later, we do not favour the retention of different pre-admission training requirements for barristers and solicitors. [2] And although we suggest that different practitioners could be subject to different general regulatory bodies, and that post-admission training requirements might differ somewhat between different practitioners, we do not favour any such differences being based on whether a practitioner is admitted as a barrister or as a solicitor. [3] Indeed, later in this Report, [4] we consider a number of existing distinctions based on whether a practitioner is admitted as a barrister or as a solicitor, and in each instance we conclude that a distinction on that basis is inappropriate and should not be retained. In some of the areas which we cover in later Reports, such as complaints and discipline, and professional indemnity insurance, there are certain distinctions between barristers and solicitors. For reasons which will appear in those Reports, we do not consider that those distinctions are justified. if the existing distinctions based on admission as a barrister or as a solicitor are inappropriate and, accordingly, are

abolished, then much of the possible justification for separate admission disappears. Moreover, the abolition of separate admission would remove the danger of further distinctions of an inappropriate nature being introduced between barristers and solicitors.

4.4 It may be argued that separate admission under different titles helps lawyers and members of the public to identify practitioners who practise in the traditional style of barristers. Such identification can be helpful where, for example, a practitioner wishes to refer a matter to another practitioner without fear of losing his or her client, or a member of the public wishes to avoid approaching practitioners who do not accept work directly from clients. But the present system of separate admission in New South Wales is not necessarily an accurate indication of those who practise in the traditional style of a barrister. First, solicitors may practise in the traditional style of barristers. Secondly, many barristers and solicitors practise in the same style, namely as employees in the legal departments of governments and corporations. Thirdly, it is not clear whether even barristers in private practice are required to practise in the traditional style of a barrister, unless they bind themselves to do so by joining the Bar Association. [1]

4.5 In our view, separate admission contributes to exaggerated notions of the extent and significance of the differences between those who practise in the style of barristers and the remainder of the profession. For example, it contributes to the tendency, referred to in a submission to us by the Law Society, [1] for the degree of specialisation amongst barristers to be over-estimated, and for that amongst solicitors to be under-estimated, by some lawyers and members of the public. It contributes to the tendency in some quarters to think of barristers as necessarily more experienced and more expert than solicitors in advocacy and advisory work, and as constituting the “senior branch” of the profession. The procedural requirements and delays involved in transferring from being admitted as a barrister to being admitted as a solicitor are obstacles in the way of a practitioner who wishes to change from the traditional style of a barrister to that of a solicitor. [2] The same is true of transfers in the other direction. In these and other ways separate admission hinders flexibility within the profession. Yet, as is demonstrated by the experience in the southern States of Australia, [3] it is not necessary to have separate admission in order to have a strong and vigorous Bar.

4.6 These considerations lead us to the conclusion that separate admission as a barrister or a solicitor should be abolished in favour of common admission under a common title. The question then arises: What should be the common title?

II. A Common Title for Admission

4.7 We see three principal possibilities for use as a common title. They are “barrister and solicitor”, “lawyer” and “legal practitioner”. [1] The composite title, “barrister and solicitor”, is already in use as a common title in all parts of Australia save New South Wales and Queensland. [2] Being a combination of the two present titles, it could help to convey the abolition of separate admission, while at the same time retaining words which have emotional significance for many lawyers. The appearance of the word “barrister” in the title would have a special attraction for practitioners wishing to specialise in advocacy or advisory work. On the other hand, a substantial disadvantage of “barrister and solicitor” is that some practitioners who do not wish to undertake advocacy might not want to use a title which includes the word “barrister”, and some practitioners who do not wish to accept work directly from clients might not want a title which includes the word “solicitor”. The terms “lawyer” and “legal practitioner” lack the advantages of “barrister and solicitor” to which we have referred, but they also lack the substantial disadvantage which we have mentioned. They are less likely to cause confusion in the minds of members of the public, especially those who do not have an English-speaking background.

4.8 An important consideration affecting our choice of a common title for admission to the profession is that, in our view, admission to the profession should not confer, of itself, a right to practise. It should be necessary also to hold a practising certificate, as is presently the case in relation to solicitors. Our reasons for this view are given later in the chapter. [1] Its relevance in the present context is that it makes it desirable for the title acquired upon admission to be of a kind which does not convey the impression of an entitlement to practise. None of the three titles to which we have referred is ideal from this point of view, but “legal practitioner” is perhaps the least satisfactory. It is better suited for use as a generic description of those who are entitled to practise. Both “barrister and solicitor’ and, perhaps to a lesser

extent, “lawyer” might be interpreted by many people as connoting an entitlement to practise. But it is not easy to devise a simple title which avoids this problem. Moreover, the extent of the problem would be reduced by a general prohibition on holding oneself out as entitled to practise unless one is the holder of a practising certificate. Such a prohibition presently exists, in effect, in relation to practising as a solicitor. [2] If the common title for admission were “barrister and solicitor” or “lawyer”, the effect of a prohibition along these lines would be that a person who is admitted, but does not hold a practising certificate, could use the common title in some circumstances but not, for example, in a situation where it is reasonably likely that a potential client will interpret it as connoting an entitlement to practise.

4.9 For the reasons outlined, we favour either “barrister and solicitor” or “lawyer” as the common title for admission. We have no firm preference between these two alternatives, but in this Report we shall use the term “barrister and solicitor”. We shall use the term “legal practitioner” to denote a person who not only has been admitted to the profession but also is entitled to practise.

C. GENERAL REGULATORY BODIES

4.10 We have described earlier’ the positions of the Law Society Council and the Bar Council as the general regulatory bodies of solicitors and barristers respectively. The Law Society Council has extensive statutory powers in relation to solicitors, including the power to make statutory regulations, but the Bar Council has no such powers in relation to barristers. In addition, the Governor has extensive powers to make regulations in relation to solicitors and to veto regulations made by the Law Society.

4.11 In considering whether the present position is satisfactory, three inter-related issues arise, namely:

> Is it appropriate for a professional association to be also a general regulatory body?
>
> Should there continue to be different general regulatory bodies for different sectors of the profession?
>
> What, in general terms, should be the powers of a governing body, especially in relation to the making of statutory regulations?

I. Professional Associations as General Regulatory Bodies

4.12 For reasons which we explain in the next section, we are of the view that, at least for the time being, there should continue to be two general regulatory bodies of the profession, each with responsibility for a different sector of the profession. The question here is whether those bodies should continue to be the Law Society Council and the Bar Council, each of which is also the governing body of a professional association. The advantages and disadvantages of the present position have been described in chapter 3. [1] The advantages relate principally to the danger that separation of the general regulatory roles and the professional association roles might lead to a situation in which the general regulatory bodies are less than effective, and the professional associations are unduly self-interested and, in many respects, are more powerful than the regulatory bodies. In addition, there is the consideration of the substantial cost likely to be involved in creating new general regulatory bodies. On the other hand, as we described, there are two powerful disadvantages. The first is the serious conflict, both actual and apparent, between the responsibility of a general regulatory body to act in the public interest and the responsibility of a professional association to advance the interests of its own members. The second arises from the fact that, in our view, practitioners ought not to be required to join a professional association in order to have a vote for membership of the general regulatory body to which they are subject.

4.13 The advantages to which we have referred are substantial, and measures can be taken to reduce considerably the first of the two disadvantages and to avoid the second disadvantage. Accordingly, we consider that it is acceptable for the Law Society Council and the Bar Council to be the general regulatory bodies of the profession, provided that the following conditions are satisfied.

(i) There should be substantial and effective community participation in the system of general regulation, including community representation on the Law Society Council and the Bar Council. We make detailed recommendations to this effect in chapter 5.

(ii) The Governor should have certain powers to make statutory regulations in relation to the profession, and any regulation made by a general regulatory body should be subject to the approval of the Governor. As we have mentioned, the Governor presently has extensive powers to make regulations in relation to solicitors. We return to the question of regulation-making power in paragraph 4.29-4.31, and we explain there our differing views about the range of regulation-making power which should be vested in the Governor.

(iii) All practitioners should be entitled to vote in elections for membership of the Council which is their general regulatory body, irrespective of whether or not they are members of the professional association in question (ie. the Law Society or the Bar Association).

(iv) In the exercise of such statutory powers, including powers to make regulations, as may be vested in them, the Councils should not be subject to direction or restraint by a general meeting, or any other organ, of their professional association. This condition is presently satisfied in relation to the Law Society Council.

(v) The question whether the Law Society Council and the Bar Council should continue as the general regulatory bodies should be subject to a periodic review initiated by the Attorney General. We make recommendations in chapter 8 in relation to periodic review of this and other aspects of regulation and structure.

4.14 The Law Society and the Bar Association might be reluctant to have non-members voting in elections for their governing bodies, which in addition to their general regulatory role would be responsible for advancing the interests of members. The associations may consider that their non-regulatory functions, such as the provision of advisory or library services for members, should be controlled by a body chosen solely by members. We recommend later that any such functions should be funded solely from membership fees, rather than, as is presently the case in relation to the Law Society, from practising certificate fees. On the other hand, the associations might well consider that the practical disadvantages of this situation are slight, and from their point of view are outweighed by the advantages of remaining as the general regulatory body. This is especially likely to be the case if the great majority of practitioners subject to a particular Council are members of the professional association in question. Moreover, if either association wished to do so, it could provide for the control of some or all non-regulatory functions to be vested in some organ of the association other than the Council, or could give a general meeting or some other organ of the association power to override the Council in relation to non-regulatory functions.

4.15 If the system which we have recommended proves to be unworkable because of opposition from the Law Society or the Bar Association, it will be necessary to effect a complete separation of general regulatory roles and professional association roles. This was the approach suggested by our colleague, Mr Conacher, in Part II of the Discussion Paper, *The Structure of the Profession.* He suggested the creation of a new general regulatory body for barristers, to be known as the Bar Governors, and of an analogous body for solicitors. We do not oppose complete separation of the two roles; indeed, we favoured it at the time of writing our Discussion Paper, *General Regulation.* But we think that before introducing such a major reform an attempt should be made to improve the existing system along the lines we have recommended.

4.16 If it does become desirable to create new general regulatory bodies, rather than continuing to use the Law Society Council and the Bar Council for that purpose, the composition of the new bodies should be similar to that which we recommend in this Report for the existing Councils. In other words, between 15 and 20 members of each body should be chosen by the practitioners who are to be subject to that body, and 5 “public members” should be chosen along the lines recommended in chapter 5. We recommend in chapter 5 that the public members should not have voting rights. Some of the justification for this recommendation does not apply to a general regulatory body which does not also have the responsibilities of a professional association.

II. Two General Regulatory Bodies or One?

4.17 If different sectors of the profession are subject to different governing bodies, there is a greater likelihood of inappropriate distinctions being drawn between practitioners who are subject to different bodies, and of the emergence of undue barriers to flexibility and freedom of choice within the profession. [1] Issues which are of a similar nature may arise in relation to practitioners who are subject to differing bodies. For example, questions concerning designation of specialists in particular fields of practice, or the control of lawyers employed by governments or corporations, directly affect both barristers and solicitors. The separation of regulatory power can lead to inconsistency and unfairness, or to an undesirable lacuna in regulation because the general regulatory bodies cannot agree on a common policy. There is a danger, too, that each body, especially if it is also the governing body of a professional association, may tend to act in the interests of its own sector of the profession rather than giving sufficient weight to the interests of the profession as a whole, let alone to the public interest if there is more than one general regulatory body, there may be an inefficient duplication of effort and expenditure. Moreover, if one of the bodies is responsible for only a small sector of the profession it may not be able to devote adequate resources to important functions such as the investigation of complaints and the provision of advisory and educative services for its members.

4.18 It is necessary, however, to take into account in New South Wales the established positions of the two general regulatory bodies, the Law Society Council and the Bar Council. If either body were to be made the sole general regulatory body for all practitioners, there would be a powerful case for saying that it should be the Law Society Council, since the Law Society has far more members and much greater resources than the Bar Association. But this would mean that barristers, who now govern themselves, would become subject to a body elected largely by solicitors. As a result, barristers might not co-operate or identify with the general regulatory body, and effective regulation might be made difficult. Expense and dislocation would be involved in transferring responsibility for all barristers to the Law Society Council. Moreover, it is likely that the Bar Council would continue to exist and to exercise considerable control over members of the Bar Association through its internal rules.

4.19 We have no doubt that, in principle, it is preferable for all practitioners to be subject to the same general regulatory body. But, bearing in mind the practical difficulties involved in introducing one regulatory body for the whole profession under the present circumstances, we consider that for the present it is acceptable to continue with two general regulatory bodies for different sectors of the profession, provided that the following conditions are satisfied.

(i) The Law Society Council should be the general regulatory body for all practitioners, whether practising in the style of a barrister or in some other style, save those practitioners who elect to be governed by the Bar Council and undertake to comply with its rules in relation to professional practice.

(ii) As we have said earlier, the Governor should have some powers to make statutory regulations in relation to all practitioners, and any regulations made by a general regulatory body should be subject to the approval of the Governor. Subject to our differing views about the powers which the Governor should have to make regulations, [2] one consequence of giving the Governor power to make or veto regula-tions would be to reduce the danger of inconsistency, unfairness or undesirable inaction due to the two general regulatory bodies having different policies on similar or related issues.

(iii) As we have said earlier, [3] there should be effective community participation in both general regulatory bodies. One consequence of value in the present context is that community participation might reduce the tendency for either body to be excessively concerned for the interests of its own sector of the profession, rather than taking a broader approach. We make detailed recommendations concerning community participation in chapter 5.

(iv) 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 general regulatory body for the whole profession. This question should be kept under review, including the periodic review recommended in chapter 8.

4.20 Mr Disney joins in the views expressed in the previous paragraph, and in the recommendations in this Report which flow from them, on the ground that implementation of them would constitute a substantial improvement of the present system for general regulation. But he considers that, for the reasons given in paragraph 4.17, greater improvement would result from proceeding with the introduction of one general regulatory body for the whole profession, rather than awaiting a further review. In his view that body could be the Law Society Council, provided that all practitioners are given the right to vote for practitioner members of the Council and that public membership of the Council is introduced along the lines recommended in chapter 5.

A Question of Terminology

4.21 Under a regulatory system of the kind described in the previous paragraph, a practice might develop of describing practitioners who are subject to the Bar Council as "barristers" and those who are subject to the Law Society Council as "solicitors". In our view, such a practice would be most undesirable. The objections to it are similar to some of those which we mentioned earlier as reasons for abolishing separate admission. [1] For example, it would tend to perpetuate the present exaggerated notions of the extent and significance of the differences between those who practise in the style of barristers and the remainder of the profession, including the notion that barristers constitute the senior branch of the profession. It would be unfair and inaccurate in relation to practitioners under the governance of the Law Society Council, especially those who wish to practise in the style of a barrister. it would unduly inhibit the development of specialist advocates and advisers who practise in some style other than that of a barrister.

4.22 We suggested in our Discussion Paper, *Advertising and Specialisation,* that practitioners should be given considerable freedom to advertise, amongst other information, whether or not they are in sole practice, the fields of practice in which they accept work or have a special interest, and whether or not they accept work directly from clients. [1] In our view, these suggestions would provide lawyers and clients with clearer, more comprehensive, and more accurate information than would be conveyed by using the terms "barrister" and "solicitor" according to whether a practitioner is subject to the Bar Council or the Law Society Council.

4.23 We recommend that, with the introduction of common admission, the terms "barrister" and "solicitor" should cease to be used, other than in the composite term "barrister And solicitor" if that is adopted as the common title for admission. In particular, we recommend that the terms should not be used in legislation, or by the courts, the Government, or the general regulatory bodies, in order to distinguish between practitioners who are subject to the Bar Council and those who are subject to the Law Society Council. [1]

III. Powers of General Regulation

The Law Society Council

4.24 As we have mentioned earlier, the Law Society Council has a wide range of statutory powers, including powers to make regulations subject to the approval of the Governor. [1] It has specific powers to make regulations on particular matters, especially in the areas of complaints and discipline, practising certificates, indemnity insurance, trust accounts and the Fidelity Fund. In addition, it has a general power to make regulations concerning "the professional practice, conduct and discipline of solicitors". [2] We are of the view that if the Council is to continue as a general regulatory body it should continue, generally speaking, to have its present statutory powers. We say "generally speaking" because later in this Report and in other Reports, when looking at particular areas of regulation, we shall consider whether the Council's present powers in those areas should be altered. The Council's statutory powers should be exercisable in relation to all practitioners for whom it is the general regulatory body. As we have said earlier, the Council should not be subject to direction, whether by a general meeting of the Law Society or otherwise, in the exercise of its statutory powers.

4.25 The Council has extensive non-statutory powers, arising from the Memorandum and Articles of Association of the Society, in relation to members of the Society. We make no recommendations for change in that respect. One way in which the Council exercises these powers is to make rules and rulings on aspects of professional practice. Some of these rules and rulings are binding on members of the Society as a matter of contract. Others are of an advisory nature. Breach of a rule or ruling, even of one which is contractually binding on the practitioner in question is not, in itself, professional misconduct. But the Statutory committee and the Supreme Court, which are the disciplinary tribunals for solicitors, have regard to the Council's rules and rulings on the basis that they indicate what the main professional association of solicitors considers to be principles with which solicitors should comply. In our view, it is appropriate for disciplinary bodies to continue to do so, provided that they have regard to whether the relevant rules or rulings are contractually binding or merely advisory, to whether or not the practitioner is a member of the Law Society, and to relevant rules or rulings of other professional associations, especially those of an association of which the practitioner is a member.

The Bar Council

4.26 The Bar Council has no statutory powers to regulate barristers, whether members of the Bar Association or otherwise. In our view, the Council should have some statutory powers and these powers should be exercisable in relation to all practitioners for whom the Council is the general regulatory body. It should have powers, including the power to make regulations, in relation to certain specified matters. For example, implementation of the recommendations in our Second Report, on Complaints, Discipline and Professional Standards, would require that the Bar Council be given statutory powers in relation to the investigation of complaints. Should the Council be given a general power, analogous to a present power of the Law Society Council, to make regulations in relation to "professional practice, conduct and discipline"? Mr Gressier considers that the Council, as a general regulatory body, should be given such a power. Mr. Disney and Judge Martin, however, consider that it is more appropriate to recommend, as we have, that all practitioners who elect to be governed by the Bar Council should be required to undertake to comply with its rules.

4.27 Under the Bar Association's Memorandum and Articles of Association, the Bar Council has extensive non-statutory powers in relation to members of the Association. In the exercise of these powers it makes rules and rulings in relation to professional practice. We have recommended earlier that all practitioners who elect to have the Council as their general regulatory body should have to undertake to comply with the Council's rules concerning professional practice. Thus the Council's rules, although non-statutory, would apply to all practitioners subject to its governance, irrespective of whether they are members of the Association. If a practitioner does not wish to be subject to those rules, he or she may decide to be governed by the Law Society Council. On the matter of disciplinary bodies having regard to rules and rulings of the Bar Council, we make the same recommendations as we made above in relation to rules and rulings of the Law Society Council.

4.28 As recommended earlier, when the Council makes regulations, or non-statutory rules which are to be binding on non-members of the Association, it should not be subject to direction or restraint by a general meeting, or any other organ, of the Association.

Powers of the Governor

4.29 As we have indicated earlier, [1] we are of the view that in order to protect the public interest and to ensure consistency and fairness as between practitioners who are subject to different general regulatory bodies, the Governor should have certain powers in relation to the making of statutory regulations. We consider that any regulations made by the general regulatory bodies should be subject to the approval of the Governor. This presently applies in relation to solicitors. We also consider that the Governor should have certain powers to make regulations concerning the legal profession. We summarise our views on that matter in the following two paragraphs.

4.30 Should the Governor have a broad power to make regulations concerning the legal profession? As has been mentioned, since 1980 the Governor has had a general power to make regulations under the Legal Practitioners Act, including the power to make regulations concerning "professional practice,

conduct and discipline", in relation to solicitors. [1] The Governor has extensive powers to make regulations in relation to several other professions in New South Wales, although they are not expressed in such broad terms as those under the Legal Practitioners Act. [2] Subject to the same qualification, the position is similar in places such as South Australia and Queensland in relation to the Governor's powers to make regulations concerning solicitors or (in South Australia, for example) legal practitioners generally. [3] The vesting of a broad power in the Governor, similar to that which presently exists in relation to solicitors, would be of particular value to prevent unfairness or confusion arising between practitioners due to a conflict between regulations or rules made by the Law Society Council and the Bar Council. Mr Gressier is of the view that a broad power of this kind should be exercisable only on the recommendation of the Bar Council or the Law Society Council. Mr. Disney and Judge Martin do not favour the exercise of the power being confined by law in such a way. But they envisage that, as a matter of practice, the power would not usually be exercised otherwise than in pursuance of recommendations made to the Attorney General by the Bar Council, the Law Society Council or the Public Council on Legal Services, the creation of which we recommend in chapter 5. They consider that the vesting of this power in the Governor is a necessary consequence of our earlier recommendations, first, that there should continue to be two general regulatory bodies (with the consequent possibility of unfair or inappropriate distinctions being drawn between practitioners who are subject to different bodies) and, secondly, that those bodies should be the governing Councils of professional associations rather than being independent statutory bodies.

4.31 All three of us consider that in relation to specified matters the Governor should have power to make regulations without being subject to any requirement of prior recommendation by the Law Society, the Bar Council or the Public Council on Legal Services. We illustrate such matters by reference to powers which the Governor already has, by virtue of s.87(1)(a)-(d) of the Legal Practitioners Act, to make regulations concerning solicitors. These include, for example, the power to prescribe the proportion of a solicitors lowest annual trust account balance which must be deposited with the Law Society.

Regulation-Making Procedures

4.32 Regulations made by the Law Society Council may have considerable effect on practitioners who are subject to the Bar Council, and vice versa. Two practitioners who practise in precisely the same style may be subject to different councils. In order to assist the making of regulations which have due regard to the interests of all practitioners, and which do not give rise to inappropriate distinctions between practitioners, we consider that, in general, the Councils should consult with each other before sending regulations to the Attorney General for the approval of the Governor. We do not recommend that such consultation should be required by statute, but we do recommend that when a Council sends regulations to the Attorney General for the approval of the Governor it should be required to send them at the same time to the other Council. Mr Disney and Judge Martin consider that the Attorney General should then be under a statutory obligation, subject to an exception for emergencies, to give the other council an opportunity to express its views to him or her about the proposed regulations. Mr Gressier, however, considers that although this procedure would usually be desirable it should not be mandatory.

4.33 We have recommended that the Governor should have some powers to make regulations in relation to the legal profession. In our view, it will usually be desirable for the general regulatory bodies to be given an opportunity to consider and comment on regulations which the Attorney General intends to propose to the Governor. Indeed, Mr Disney and Judge Martin are of the view that this procedure should be required by statute, subject to an exception for emergencies.

4.34 In chapter 5 we recommend the creation of a Public Council on Legal Services, and we make recommendations about its role in the making of regulations.

Annual Reports

4.35 Under the regulatory system recommended in this Report, Parliament would delegate to the Law Society Council and the Bar Council the principal responsibility for regulation of the profession in the public interest. It would give them extensive powers for that purpose. In our view, it is appropriate for the

two Councils to have both the right and the duty to report annually to Parliament on the manner in which they have carried out the role given to them by Parliament. The Governor should be given power to prescribe particular matters relevant to a Council's work which must be dealt with in its Annual Reports. We note that a somewhat similar requirement to report was recommended by the Professional Organisations Committee in Ontario. [1]

D. THE RIGHT TO PRACTISE

I. Practising Certificates

4.36 As we have mentioned earlier, solicitors must obtain a practising certificate if they wish to practise as such. [1] There is, however, no analogous requirement in relation to barristers. A requirement that practitioners must hold practising certificates serves valuable purposes. For example, there are many obligations which it may be appropriate to place upon a lawyer who wishes to have the right to practise, but which are inappropriate for one who does not wish to practise. These include obligations to serve a period as an employee or pupil of another practitioner before practising as a principal, to contribute to the cost of regulation of the practising profession, to take out indemnity insurance, and to serve a further period as an employee or pupil if returning to practise after some years out of active practice. These and other obligations presently apply to solicitors who wish to have the right to practise. [2] For reasons which we shall give later in this Report [3] and in subsequent Reports, we consider that analogous obligations should apply to barristers who wish to have the right to practise. This requires some means, Such as a practising certificate system, for distinguishing between practitioners who have a right to practise and those who do not.

4.37 Another advantage of a practising certificate system is that it can be used as the means by which practitioners indicate the general regulatory body to which they wish to be subject, and it can enable that body to obtain certain details of practitioners and their practices which are important for administration and as a statistical basis for policy formulation. A practising certificate system is also a convenient way of implementing disciplinary orders to the effect that a practitioner is to be suspended from practice or is to be restricted in the way in which he or she may practise. In our *Second Report on the Legal Profession,* we recommend that disciplinary authorities should have wide powers to make such orders, and that, as is presently the case in relation to solicitors, they should be implemented through a practising certificate system. [1]

4.38 The Law Society has submitted to us that practising barristers should be required to have practising certificates and should have to join the Bar Association. This would mean that they would become subject, for example, to the Association's requirements concerning membership fees and pupillage. [1] The Bar Association has submitted that admission as a barrister should be confined to those who undertake to practise as a barrister and to join the Association. [2] We have said earlier, however, that we do not favour compelling practitioners to join the Law Society or the Bar Association. Moreover, we do not favour the Association's suggestion that admission as a barrister should depend upon an undertaking to practise. By comparison with a practising certificate system, such a requirement would bring excessive formality to a transfer from inactive to active status, and would place an undue and inappropriate burden on the Court. It also raises major difficulties in relation to barristers outside private practice.

4.39 These various considerations lead us to recommend that all lawyers should be required to hold practising certificates if they wish to practise. As to the issuing of certificates, it is appropriate that the administrative responsibility should lie with the general regulatory bodies. But for the reasons given in paragraphs 4.21-4.23, we would be opposed to the practising certificates issued by the Bar Council being described as "barristers" certificates, and those issued by the Law Society Council being described as "solicitors" certificates. The requirements for obtaining a practising certificate are of such importance that they should be laid down by Parliament or in regulations. In chapter 6 we make recommendations concerning the requirements for obtaining a practising certificate, and certain rights and obligations of certificate holders. We consider here, however, some issues relating to the fees charged for practising certificates.

II. Practising Certificate Fees

4.40 At present, the fees to be paid by solicitors for their practising certificates are fixed by the Law Society, subject to the approval of the Attorney General. [1] The fees are paid into the general funds of the Society for expenditure on such matters as it deems appropriate. Payment of the fee entitles the practitioner to membership of the Society. [2]

4.41 In our view, practising certificate fees should be devoted solely to regulatory functions, not to non-regulatory functions such as those of a trade union nature. Financial support of the latter activities should not be a condition of being entitled to practise law. Accordingly, we do not consider it appropriate that payment of the practising certificate fee should entitle a practitioner to membership of the Society or association and thus to enjoyment of its services for members, There should be a separate membership fee for those practitioners who do wish to avail themselves of these services.

4.42 Who should fix practising certificate fees? We are inclined to favour vesting this power in the respective general regulatory bodies, provided that the Attorney General's approval of the proposed fees is required. As we have mentioned, this is the present position in relation to solicitors. The involvement of the Attorney General is appropriate in order to ensure that the fees are not higher than is reasonably necessary to meet the cost of regulatory, as opposed to non-regulatory, functions. This principle may not be capable of precise application, but it is important that, within reasonable bounds, it should be observed. In order to fulfil his or her responsibilities in this respect, the Attorney General will need to have access to detailed information about the income and expenditure of the general regulatory bodies, and he or she should take into account any money which those bodies receive from other sources, such as the Fidelity Fund, in order to defray the expenses of regulation.

4.43 We have said that practising certificate fees should be expended on regulatory functions. Most of these functions are performed by the general regulatory bodies. Accordingly, the bulk of the money received in fees should be allocated to them. But some regulatory functions are performed by other bodies, such as disciplinary tribunals, and it may be appropriate for portion of the revenue from fees to be allocated to them. It is beyond the scope of this Report to make specific recommendations in this respect, save that practising certificate fees should be paid by practitioners to their general regulatory body, and any disbursements by that body to other bodies exercising regulatory functions should be at the direction, or subject to the approval of, the Attorney General.

4.44 Should practising certificate fees vary between practitioners? At present solicitors' practising certificate fees vary according to certain criteria, the most important of which is whether the solicitor holds a certificate entitling him or her to practise as a principal, rather than one which confines him or her to practising as an employee. There are reductions for solicitors who have been admitted for less than three years, or whose practice is primarily outside New South Wales. There is no reduced fee allowed to part-time practitioners, but the compulsory indemnity insurance premium, which must be paid at the same time as the practising certificate fee, is lower for part-time practitioners. The membership fees of the Bar Association vary quite considerably, being higher for those who are of longer standing at the Bar. Country members, Public Defenders, Crown Prosecutors, and some associate members (some of whom are part-time practitioners or non-practising barristers pay 50% of the fee which would otherwise be payable.

4.45 We confine ourselves to two comments about variations in practising certificate fees. First, we see no justification for requiring that practising certificate fees should be fixed at the same level by both general regulatory bodies. The per capita cost of an appropriate regulatory system may differ considerably between the two bodies. Secondly, there are a number of factors which may justify variations in the fees payable by practitioners who are subject to the same general regulatory body. They include, for example, the demands which certain categories of practitioner (for example, those who hold trust accounts) are likely to place on the resources of their general regulatory bodies. Another factor is the desirability of easing the financial burden on young practitioners. Also, we are inclined to favour some reduction in practising certificate fees for part-time practitioners, especially those, such as some academic lawyers, whose work is done solely or largely for legal aid organisations. These suggestions are illustrative rather than exhaustive.

FOOTNOTES

Para.

4.3 1. For the present system of separate admission, see our Discussion Paper, *The Structure of the Profession,* Part I, pp.49-50.

2. See paragraphs 6.7-6.19.

3. See paragraphs 4.19 and 6.20-6.42.

4. See, in particular, chapter 6.

4.4 1. See paragraph 7.41.

4.5 1. See Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”), p.14.

2. See Barristers Admission Rules; Solicitors Admission Rules; Solicitors Practices Rules, rule 11; Law Society of New South Wales, Submission No.200 (“Division of the Legal Profession into Two Branches”), pp.20-23.

3. See our *Background Paper* -IV, Part I.

4.7 1. For discussion of the issues referred to in paragraphs 4.7-4.9, see our Discussion Paper, *The Structure of the Profession,* Part I, pp.172-174.

2. See our *Background Paper* -IV, Part I.

4.8 1. See paragraphs 4.36-4.39.

2. See Legal Practitioners Act, 1898, ss.40, 40B.

4.10 1. See paragraphs 2.2-2.5 of this Report, and also our Discussion Paper, *General Regulation,* especially pp.36-43.

4.12 1. See paragraphs i.22-3.26. For a fuller discussion, see our Discussion Papers, *General Regulation,* pp.119-127, and *The Structure of the Profession,* Part I, pp.241-242.

4.17 1. For a fuller discussion of issues referred to in paragraphs 4.17-4.20, see our Discussion Papers, *General Regulation,* pp.162-163, and *The Structure of the Profession,* Part I, pp.242-247.

4.19 1. See paragraph 4.13.

2. See paragraph 4.30.

3. See paragraph 4.13.

4.21 1. See Paragraph 4.5.

4.22 1. See chapters 5, 6, 10 and 13.

4.23 1. For our views concerning usage of the words “barrister and solicitor”, “lawyer” and “legal practitioner”, see paragraphs 4.7-4.9.

4.24 1. See paragraph 2.2.

2. Legal Practitioners Act, 1898, s.86(1)(a)(iv).

4.29 1. See paragraphs 4.13, 4.19.

4.30 1. See paragraph 2.2

2. See our Discussion Paper, *General Regulation*, ch.4.

3. See paragraph 2.30.

4.35 1. *Report* (Ontario, 1980) pp.62-64.

4.36 1. For a description of the present position concerning practising certificates, see our Discussion Paper, *The Structure of the Profession*, Part I, pp.53-54. For a fuller discussion of issues referred to in paragraphs 4.36-4.39, see *The Structure of the Profession*, Part I, pp.186-187.

2. See chapter 6, and our Discussion Paper, *Professional Indemnity Insurance*.

3. See chapter 6.

4.37 1. See chapters 7 and 8 of that Paper.

4.38 1. See Law Society of New South Wales, Submission No.262 (“Admission and Right to Practice”), pp.14,15.

2. See New South Wales Bar Association, Submission No.131 (“The Admission and Right to Practice of the Legal Practitioner”), pp.6, 7.

4.40 1. Legal Practitioners Act 1898, s.69.

2. *Id*.

5. Community Participation in the Regulatory System

A. INTRODUCTION

5.1 In the previous chapter we recommended the continuance of the Law Society Council and the Bar Council as general regulatory bodies, subject to, amongst other things, the introduction of substantial and effective community participation in the regulatory system. [1] In this chapter we make specific recommendations for achieving community participation of such a kind. We look first at participation in the general regulatory bodies themselves, and then at a body, the Public Council on Legal Services, which we recommend should be established to keep under review the manner in which the profession is being regulated and other matters affecting the provision of legal services. The principal recommendations made in this chapter are listed as recommendations 15-28 in the Summary of Principal Recommendations at the beginning of this Report.

B. THE LAW SOCIETY COUNCIL AND THE BAR COUNCIL

I. Community Participation

5.2 We described in chapter 3 the principal benefits which can arise from the involvement of non-lawyers in the system for regulating the legal profession. [1] In particular, we suggested that participation by appropriately selected non-lawyers would increase the prospects of regulation being carried out in accordance with the public interest. The needs and perspectives of clients and would-be clients would be more likely to get adequate consideration, and there might be less danger of non-conformist lawyers being unduly restricted by traditionalist views within the profession.

5.3 But some lawyers, especially if they have the independence which arises from not being elected representatives of the profession may provide a knowledge and understanding of the communities needs which is somewhat akin to that found amongst non-lawyers. And their legal knowledge may be of special value to lay people who seek to play an informed role in the regulatory system but who find that they cannot develop effective communication with lawyers who have little experience and understanding of their needs and perspectives. Accordingly, while we have stressed the need for non-lawyers to participate in the regulatory system. some types of lawyer can provide a similar” community”, as opposed to “professional”, perspective. Thus, when we refer to “community”, or “public”, participation we have non-lawyers principally, but not exclusively, in mind.

II. Public Members on Councils

5.4 If community participation in regulation of the profession is to be of real rather than token, significance, it is essential that it include, as one form of participation membership of the Law Society Council and the Bar Council. [1] Without such membership, it would be exceedingly difficulty if not impossible, for participation to be sufficiently well-informed, well-placed and timely to have substantial effect on important regulatory issues. The voice of the community should be heard in the governing Councils rather than being confined to consultative committees which are at one or more removes from those who have the responsibilities for making the decisions.

III. How Many Public Members?

5.5 We gave Our reasons in chapter 3 for considering that a majority of the members of the Law Society Council and the Bar Council should be elected by and from the profession itself. [1] How many other members, whom we shall refer to as “public members”, should there be? In our view, it is essential that there should be a substantial number of public members on each Council, rather than merely one or two. This is necessary in order to obtain a reasonably wide range of experience, interests and

perspectives amongst the public members. It is also desirable in order to prevent the public members from feeling unduly isolated and ineffectual. Moreover, if there were only one or two public members it would be impossible for them to give proper consideration to all issues coming before the Council.

5.6 At present, both the Law Society Council and the Bar Council have in the order of 20 members. [1] The considerations to which we have referred lead us to the conclusion that there should be at least five public members on each Council, whether in addition to the existing members or in substitution for some of them. [2] However, the appropriate number of practitioner members and public members could be affected by whether or not they have the right to vote, a question to which we now turn.

IV. Voting or Non-Voting Members?

5.7 There can be no doubt that the public members should have the same rights as other members to obtain information and to participate fully in discussion at Council meetings. If they did not have these rights their participation would be of little value, indeed it would be so cosmetic as to be positively undesirable. But a difficult question arises as to whether they should have the right to vote. In favour of them having that right it may be argued that without a vote they would have no real power to affect decisions and their contributions to Council discussion would be paid little heed. Moreover, it may be argued, denial of a vote to the public members would be demeaning and could be interpreted as implying that they have no substantial role to play. In such circumstances it might be difficult to find able people who are willing to accept appointment as public members.

5.8 The considerations referred to in the previous paragraph are powerful. On the other hand, if public members had no right to vote but had rights and duties to report publicly to Parliament and to the Attorney General on the activities of the Council to which they belong, they might be in a stronger and more independent position than as a voting minority on the Council. If strongly opposed to a Council decision, they could bring the matter to the attention of Parliament Government and the public. Parliament and, in some cases, the Government, could override the Council if it saw fit. By contrast if public members had a right to vote and exercised it, but were out-voted, it might be urged upon them that they had been added to the Council in such number as Parliament considered sufficient to protect the public interest and, having been out-voted, they should be loyal to the majority decision. A similar case might be put against intervention by Parliament or Government to over-ride the Council. Another possibility is that if the public members had a right to vote, there might be a greater tendency for the practitioner members to vote as a block rather than according to their individual views.

5.9 Two other advantages of public members not having voting rights should be mentioned. First, some matters which arise for decision by the Law Society Council and the Bar Council are of a purely “trade union” or “members’ services” nature. Examples include decisions whether to apply to a statutory fee-fixing authority for an increase in fee scales, and whether to provide a library for the use of members. It is difficult to justify public members having a vote on such issues, yet it is also difficult to define with precision those issues which are of a regulatory nature and therefore ones upon which public members should have a vote. Secondly, if public members do not have a vote they may be less likely to identify too closely with decisions made by their Council, and thus more likely to recognise and acknowledge failings in the Councils performance. They will be well-informed as to the reasons for Council’s policies and may be convincing defenders of many such policies, without tending to be excessively defensive because they see themselves as under attack.

5.10 On balance, we are of the view that the public members should not have the right to vote. [1] This is conditional however, upon them being given effective rights and powers to make reports to Parliament and the Attorney General. We return to that question in paragraphs 5.17-5.19 below. We recognise that there is a risk that public members will be ineffective without voting rights, but we think that the powers which we recommend they should have will, in all the circumstances, be more effective than a right to vote. It is on that assumption that 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.

5.11 If the public members are not to have voting rights, it becomes less important for us to recommend exactly how many representatives of the profession, and how many public members, should be on each Council. If the number of representatives of the profession on each Council remains in the order of twenty, we consider that five public members would be sufficient. We do not favour any increase in the number of representatives of the profession. A substantial increase would mean that there should be more than five public members, and as a result the Councils would become too large and unwieldy. Although we do not specifically recommend any reduction in the number of representatives of the profession. we are of the view that with the advent of five public members the councils may need to consider reducing that number slightly in order to keep the total number of members at a manageable size.

V. Selection of Public Members

5.12 It is important, but difficult, to devise a satisfactory method for choosing the public members. There is a wide range of different needs and viewpoints within the community in relation to the activities of the legal profession it would be impossible to choose public members who reflect all of this range. There is a Law Consumers Association in New South Wales but it cannot claim to represent a wide spectrum of consumers. If it were decided that public members should reflect specified sectors of the community, the task of choosing those sectors might be subjective and invidious, and in many cases there would be no satisfactory method for choosing a person who demonstrably reflects or represents a particular sector.

5.13 Several other considerations need to be borne in mind when deciding how the public members should be selected. First, the reasons for having public members would be largely defeated if those members were chosen by the profession itself, whether directly or through its professional associations. Secondly, it is important to find public members who are articulate, confident, and interested in playing an active role in the work of the general regulatory bodies. They should be people of an independent mind, willing to express their views, yet not irresponsible or untrustworthy. Thirdly, it is not necessary that, upon appointment, public members should have an extensive or detailed knowledge of the issues with which they will be concerned. But they should be people with a capacity to learn and they should have a basic understanding of the legal system and the legal profession.

5.14 One possibility is to vest the Government with the responsibility for choosing the public members. This is the approach adopted in those parts of North America where the general regulatory body of the legal profession has some non-lawyer members, [1] and it is the method used in many places, including New South Wales and Victoria, for choosing non-lawyer members of disciplinary tribunals. [2] In our view, the Government has a role to play in selecting public members, but it should not bear principal responsibility. One danger of excessive Government involvement is that it may be unduly partisan This might be reduced by giving the Opposition some role in the selection of public members. Another danger is that Governments may not always be able to give sufficient attention to choosing as public members people with appropriate knowledge, experience and enthusiasm.

5.15 As we have mentioned, we recommend later in this chapter the creation of a body to be known as the Public Council on Legal Services. [1] It would consist principally of non-lawyers. If such a Council were established, it would provide three principal benefits in relation to the selection of public members for the general regulatory bodies. First, non-lawyer members of the Public Council on Legal Services would develop their knowledge of the legal profession and thereby become better-suited for possible appointment as public members of the Law Society Council or the Bar Council. Secondly, whoever is to choose public members would have the benefit of a pool of possible appointees, whose ability, responsibility, enthusiasm and other important qualities could be assessed by looking at their work on the Public Council on Legal Services. Thirdly, the Public Council on Legal Services itself would be an appropriate body to play a substantial role in selecting the public members. The composition which we propose for the Council is such that, collectively, its members can be expected to be independent of the profession yet knowledgeable about it and about the legal system aware of the needs of a substantial range of consumers of legal services, strong-minded yet responsible, and acquainted with a wide range of people from whom appropriate public members could be chosen.

5.16 These various considerations lead us to recommend that if there are to be five public members on each governing body, three should be chosen by the Public Council on Legal Services, [1] one by the Attorney General and one by the Leader of the opposition in the Legislative Assembly. [2] Generally speaking, any person should be eligible for appointment as a public member. It would be desirable if all or most of the appointees were not legal practitioners. [3] But, for reasons given at the beginning of this chapter, [4] we do not suggest that legal practitioners should be ineligible. Members of the Public Council on Legal Services should themselves be eligible for appointment. The appointment of members of Parliament might carry party politics into the governing Councils. We do not suggest that they should be ineligible but, in general we think that they should not be appointed. We suggest that the public members should be appointed for terms of two years, but that appointments should be readily renewable. As a rule, it would be desirable for at least some of the public members serving at any particular time to have been members for more than two years.

VI. Reports by Public Members

5.17 Generally speaking, the public members should have the same rights and duties as other members. But we have suggested earlier [1] that they should not have voting rights, provided that they are vested with special rights and duties to report to Parliament and to the Attorney General. The purpose of these reports would be to express the public members' views on issues concerning the regulation of the legal profession including in particular the work of the Council of which they are members, and on other issues relating to the delivery of legal services.

5.18 In our view, there should be a duty to submit an Annual Report to the Attorney General for presentation to Parliament. [1] In addition, there should be a right to report at any other time to the Attorney General whether for presentation to Parliament or otherwise. [2] The Annual Report should be submitted together with the Annual Report of the Council to which the members in question belong. The reports for presentation to Parliament would have the benefit of the privileges which attach to such reports generally. [3] The public members should be entitled to recommend in a report that it should be made public before presentation to Parliament. [4] If it is made public before presentation it should have the same privileges as if it had been presented. The Attorney General should be entitled to request or require a report from the public members at such time and on such issues as he or she sees fit. [5] It is important that reports by public members should be frank and independent, and that their preparation should not be hampered by lack of resources. It would be appropriate for the Attorney General, rather than the general regulatory bodies, to bear the responsibility for providing the public members with access to sufficient resources for this purpose.

5.19 These rights and duties to make reports should apply to each public member individually. We envisage, however, that, in the ordinary course, reports would be submitted jointly by all the public members of a particular governing body, incorporating such dissents or other individual views as particular members may wish to express.

VII. Committees of the Council

5.20 Both the Law Society Council and the Bar Council have a number of committees, some standing and some *ad hoc.* These committees usually have at least one Councillor amongst their members, but most of them also have as members practitioners who are not Councillors. As we have mentioned, there are now a few committees of the Law Society Council which have one non-lawyer member, and one committee has two non-lawyer members. [2] These non-lawyers are chosen by the President of the Law Society. The Society has declared its intention to add non-lawyers to more of its committees in future. [3]

5.21 Many committees of the Law Society Council and some committees of the Bar Council, play a major role in the formulation and application of regulatory policy. It is essential in our view, that there should be community participation in committees of this kind. [1] We suggest that, generally speaking, every committee of the Law Society Council or Bar Council should be required to have at least one public member, and in the case of large committees (more than, say, six members) approximately one-third of the members should be public members. Some committees, however, may be concerned solely

with trade union, social or other activities which are the concern only of members of the professional association in question. In order to allow for this, for possible difficulties in finding appropriate public members for particular committees, and for other special considerations applying to particular committees, the requirement to have public members should be able to be waived in relation to particular committees by the public members of the Council in question or by the Attorney General.

5.22 Unlike the Councils, the committees do not have actual power to determine policy. Also, it would clearly be inappropriate to give committee members the right to report to Parliament Accordingly, the arguments for denying voting rights to public members on governing Councils have less strength in relation to committees. We consider that public members on committees should be entitled to vote, as are the present non-lawyer members of the committees of the Law Society Council. They should also have the same rights and duties in other respects as other committee members, including rights to obtain information to participate in discussion, and to report to the Council.

5.23 Some questions arise in relation to the selection of public members for committees. Clearly they should not have to be drawn exclusively from the public members of the governing Council. As we have mentioned, many present committee members are not Councillors. The workload on Councillors, especially those who are public members, would be intolerable if they had to fill all committees from amongst their number. But who should choose the public members for the committees Selection by the Public Council on Legal Services or the Attorney General would be too remote and unwieldy, given the fact that committees often need to be established promptly and with very specific purposes in mind. Mr Disney and Judge Martin consider that the concept of public membership which we have described is incompatible with those members being chosen by the governing Council in question or, as presently applies in relation to the Law Society, by the President of the Society. They favour selection by the public members of the particular Council. Mr Gressier differs to some extent in that he favours appointment by the President of the governing Council after consultation with the public members of the governing Council.

VIII. Payment of Public Members

5.24 Public members of the Councils would have to devote a substantial amount of time to their duties. It might be difficult to persuade appropriate people to accept appointment as public members unless remuneration, albeit modest, were made available to them. The position is different in relation to members who are legal practitioners; membership of the governing Council is a mark of standing in their own profession and many of the issues considered by the Council are ones which closely affect their working lives. Accordingly, we recommend that an annual honorarium should be paid to each member of the Council who is not a legal practitioner. In some circumstances the workload of a particular committee maybe so onerous as to justify honoraria for those of its members who are not practitioners.

5.25 Since the role of the public members is to safeguard the public interest especially the interests of lawyers' clients, it would be appropriate for the cost of their honoraria to be met out of the Statutory Interest Account, practising certificate fees, government funds or a combination of these sources. The Statutory Interest Account holds interest earned on trust moneys deposited with solicitors by their clients. [1] In recent years its annual income has been between $5 million and $7 million. The Account is presently used to reimburse victims of defaulting solicitors, to pay for legal aid, and to meet the cost of the Law Foundation We envisage that the sum total of honoraria paid to public members each year would be in the vicinity of $20,000. This figure represents substantially less than one-half of one per cent of the annual income of the Account.

C. THE PUBLIC COUNCIL ON LEGAL SERVICES

I. A New Reviewing and Advisory Body

5.26 In the previous section we recommended public membership on the general regulatory bodies. In our view, however, those recommendations would not provide, in themselves, sufficient community participation in the regulatory system. We recommend that, in addition, a new statutory body should be established, consisting principally of people who are not legal practitioners, to act as a reviewing and

advisory body in relation to the regulation of the profession and the delivery of legal services. [1] This body, which we call the Public Council on Legal Services, should have a number of important functions and its influence should be considerable. We make specific recommendations along these lines later in this chapter. But we do not suggest that it should have any regulatory power; that is, any power to regulate the conduct of the profession. [2] Its principal functions would be investigation consultation and the expression of views, and, as recommended earlier, the selection of three members of the Law Society Council and the Bar Council respectively.

5.27 A number of advantages would arise from the establishment of the Public Council on Legal Services.

(i) it would provide Parliament, the Government and the public with a source of well-informed opinion from a body which is independent of the legal profession and does not have the "trade union" responsibilities of a professional association.

(ii) it would enable a wider range of community viewpoints to be involved in the regulatory system, albeit only in a reviewing and advisory role, than it is possible to achieve merely by adding public members to the governing bodies.

(iii) It would provide a forum in which because legal practitioners do not predominate, non-lawyers would be likely to be less reluctant to express their views, and to indicate their uncertainty or lack of knowledge, than in the general regulatory bodies, which would consist overwhelmingly of practitioners. The Public Council on Legal Services would include some lawyers, however, to whom its non-lawyer members could turn for information and advice when necessary. [1]

(iv) Non-lawyers who might be suitable for appointment as public members of the general regulatory bodies could be given an opportunity to gain knowledge, experience and confidence by being appointed to the Public Council on Legal Services in the first instance. Their performance on the Council would be a valuable guide to their fitness, or otherwise, for appointment to a general regulatory body.

(v) As we mentioned earlier, the Council would be an appropriate body for choosing some of the public members for the general regulatory bodies. [2]

(vi) The Council would be a valuable source of support, information and views for the public members, especially those chosen by the Council itself. In this sense the Council would act to some extent as a constituency in the same way as legal practitioners are the constituency for their elected representatives on the general regulatory bodies. [3]

II. The Size of the Council

5.28 In our Discussion Paper, *General Regulation,* we suggested the creation of a Community Committee on Legal Services, the functions of which were to be similar to those which we recommend in this Report for the Public Council on Legal Services. We suggested that the Committee should have between 24 and 29 members, many of whom were to be chosen by specified community organisations. [1] In making this suggestion, we were influenced by the Citizens' Advisory Committee established by the Bar Association of the District of Columbia in the United States. [2] It has 33 members, each chosen by the existing members from nominations by community organisations. Some people who favoured the establishment in this State of a body with the functions which we suggested for the Community Committee nevertheless criticised our proposed Committee for being too large. [3] Others criticised it for not including all relevant interest groups. [4] Those who thought it was too large did not appear to appreciate that as we said in the Paper, we envisaged the Committee would operate largely through relatively small sub-committees, as does the Citizens' Advisory Committee in the District of Columbia.

5.29 In our view, it may eventually be desirable for the Public Council on Legal Services to have the wide-ranging and large membership which we suggested in our Discussion Paper. We think it preferable, however, for it to be set up as a smaller body, with its members being chosen by more

conventional means than we proposed in the Paper. Once it has become established it may prove desirable to broaden its membership. Accordingly, we suggest that at the outset the Council should have nine members. However, it should have the power to co-opt non-members to sit on any committees which it may establish.

III. Selection of Council Members

5.30 An important aspect of the Council's role would be to act as an advisory committee to the Attorney General. This, together with the Government's mandate and responsibility to protect the public interest, suggests that the Attorney General should have a substantial role in determining the composition of the Council and, in particular, should choose its chairperson. On the other hand, it is important that the Council should not engage in party politics and should be free to form its own views. A major role in the selection of the Council should be played by people who are independent of the profession; who are likely to have a basic understanding of the legal system, the legal profession and the role of statutory agencies and advisory bodies in the process of Government; who understand the need for the regulatory system to give due weight to the needs of consumers, or would-be consumers, of legal services; and whose experience and background is such that they are likely to know people who would be suitable appointees to the Council.

5.31 For reasons mentioned earlier in this chapter, [1] we do not suggest that legal practitioners [2] should be excluded entirely from the Council. Indeed, we think it would be desirable to have at least one practitioner on the Council. But there should not be more than two practitioners, and the Council should not be chaired by a practitioner. In view of the intended functions of the Council we do not consider that it would be appropriate for judges to be members of it. With these exceptions, we think that qualifications of the members should be at the discretion of the selectors, but that special consideration should be given to the appointment of non-lawyers, ie. people who not only are not legal practitioners but are not legally qualified. The selectors should seek to maintain a clear majority of non-lawyers on the Council.

5.32 There are many different ways in which the Council could be chosen, each with its own special advantages and disadvantages. We recommend the following composition.

(1) Three members of the Council should be chosen by the Attorney General. One of these members should be a practitioner, and another should be a person who is admitted to the profession but is not necessarily a practitioner.

(2) Three members of the Council should be chosen by those members of the Legal Services Commission and the Board of the Law Foundation who are not legal practitioners. This group of selectors, which should be convened for the purpose by the Attorney General, would have approximately twelve members, according to the manner in which certain discretions to appoint to the Foundation and the Commission are exercised. The Law Foundation's principal activities - include community legal education, conducting research into the legal system and the legal profession and supporting projects aimed at facilitating access to legal information and legal services. [1] The Board of the Law Foundation has 11 members. One is the Attorney General (or his or her nominee), one is the Director of the Foundation (who may or may not be a lawyer), two are solicitors nominated by the Law Society, and one is a barrister nominated by the Bar Association. Of the remaining six members

"5, of whom not more than 1 may be a barrister or solicitor, shall be persons who in the opinion of the Attorney General have special knowledge, experience or interest in relation to any of the objects of the Foundation; ...

"1, who shall be a member of the Legislative Council or the Legislative Assembly, shall be nominated by the Leader of the Opposition in the Legislative Assembly...." [2]

The principal functions of the Legal Services Commission are to provide legal advice and assistance to legally-aided persons and to fund other organisations to do likewise. [3] It has a full-time Deputy Chairman, who must be a barrister or solicitor, and the following seven part-time Commissioners:

> (a) a person appointed by the Minister as Chairman of the Commission;
>
> (b) a person appointed to represent the Minister;
>
> (c) a person nominated by the Bar Association;
>
> (d) a person nominated by the Law Society;
>
> (e) a person nominated by the Labor Council of New South Wales;
>
> (f) a person who, in the opinion of the Minister, is a representative of consumer and community welfare interests; and
>
> (g) a person who, in the opinion of the Minister, is a representative of such bodies, whether incorporated or unincorporated, as provide legal services and are staffed by persons wholly or predominantly on a voluntary basis." [4]

(3) Two members of the Council should be chosen by those members of the Consumer Affairs Council who are not legal practitioners. The Consumer Affairs Council is a statutory body established to advise the Minister for Consumer Affairs in relation to the operation of consumer protection legislation, and to investigate matters relating to the interests of consumers. [5] The Minister has extensive powers to act in the interests of consumers of goods and services, including legal services. The Consumer Affairs Council has between 6 and 10 members, appointed by the Governor. Of these members

> (a) one shall be an officer of the Department [of Consumer Affairs];
>
> (b) at least five shall be appointed to represent the interests of consumers; and
>
> (c) the remaining members shall be appointed from persons experienced in any of the fields of manufacture, retailing, distribution, advertising or other aspects of trade or commerce." [6]

If for some reason it is not possible for the election to be made by the non-practitioner members of the Council, it should be made by the Commissioner for Consumer Affairs.

(4) The remaining member of the Council should be chosen by the Leader of the Opposition in the Legislative Assembly.

IV. Powers and Responsibilities of the Public Council on Legal Services

5.33 We have said that the areas of interest of the Public Council on Legal Services should be the regulation of the legal profession and the delivery of legal services. It is essential that, within these areas, the Council should have extensive and timely access to information, and should be entitled to express its views both publicly and privately. It should not be merely an advisory committee, looking only it such questions as the Minister refers to it and reporting only to the Minister. The Council should take the initiative in considering issues which it considers to be of importance within its designated areas of interest. It should keep these areas generally under review, playing what might be described as a watchdog role. It should not be afraid to express its views publicly, when appropriate, whether in formal reports or in statements by its members or officers. The experience of some advisory committees demonstrates the danger of them being largely ineffective ciphers, especially if the Minister, or senior departmental officers, lick enthusiasm for the concept of an advisory committee. The Public Council on Legal Services could suffer a similar fate at some future time unless its dual role of reviewing and advising is specified by statute, and unless it is given sufficient statutory power, and the necessary resources, to exercise both roles. In the remaining paragraphs of this chapter we indicate the powers

and resources which we consider necessary for the Council to be an effective safeguard for the public interest.

5.34 What should be the Councils powers to investigate, and to obtain information? We suggest that the Council should be entitled, of its own initiative, to investigate and consider any issue within its designated areas of interest, namely the regulation of the profession and the delivery of legal services. [1] The Attorney General should have power to require it to do so in relation to any particular issue. [2] The Council should be entitled to request information relating to its areas of interest from, in particular, the Law Society, the Bar Association and the Attorney General. Where the Council considers that information has been unreasonably withheld, it should consider making a public report or statement to that effect. In addition, we suggest that the Council should be entitled to obtain reports from the public members selected by it for the Law Society Council and the Bar Council, subject to such legal duties of confidentiality as apply to all members of the particular Councils in their capacity as members.

5.35 We turn now to the Councils powers to express its views. It should have a right and duty to report annually to the Attorney General for presentation to Parliament; and a right to report to the Attorney General, whether for presentation to Parliament or otherwise, at such other times as it sees fit. [1] We make similar recommendations concerning privilege, and publication of reports before presentation to Parliament, to those which we made earlier in relation to reports by public members of the Law Society Council and the Bar Council. [2] It is essential, in our view, that the Council should not be confined to formal reports. It should be entitled to make public statements, using a member or officer as spokesperson, on matters within its area of interest. [3] Any such statements would be subject of course, to such restraints as may arise from the law of defamation. In addition, it would be mutually beneficial, we suggest for the Attorney General, the Bar Council and the Law Society Council to foster meetings and other communication between themselves and the Public Council on Legal Services.

5.36 A matter of special importance is the role of the Public Council on Legal Services in relation to the making of statutory regulations concerning the legal profession We made recommendations earlier in relation to the Bar Council and the Law Society Council being notified of regulations proposed by each other or by the Attorney General and being given an opportunity to express their respective views. [1] Those two Councils are professional associations, and even under the changes which we have suggested their only voting members would be practitioners. In our view, the protection of the public interest requires that the recommendations concerning notification and expression of views which we made in relation to the Law Society Council and the Bar Council should apply also to the Public Council on Legal Services. We recommend also that the Public Council on Legal Services should be entitled to propose in its reports certain legislative or executive action, whether for the making of regulations or otherwise. [2]

V. Staff and Finance

5.37 If the Public Council on Legal Services is to be effective and independent, it will need its own staff and office. The members of the Council would all be part-time and they would need the support of an Executive Officer who is capable of playing a key role in such tasks as investigation and the drafting of reports. If funds permitted, it might be appropriate to have a junior Research Officer also. Secretarial and clerical support would, of course, be necessary.

5.38 In our view, the members of the Council should be paid an annual honorarium. We envisage that their work on the Council would include attendance at one Council meeting, and perhaps on average, one sub-committee meeting, per month. We understand that members of a number of statutory agencies or advisory committees established by the Government in recent years are now paid an annual fee for their services, rather than sitting fees. In the case of several such bodies, which meet monthly and have subcommittees meeting on other occasions, the annual fee paid to each member is in the order of $900. [1] We envisage that an honorarium of that order would be appropriate for members of the Public Council on Legal Services.

5.39 Since the role of the Council would be to safeguard the public interest especially the interests of lawyers' clients, it would be appropriate for it to be funded from the Statutory Interest Account or from

government funds. We have referred to the Account in paragraph 5.25 above. After taking independent advice, it is our view that the recurring cost of a Council of the kind we have recommended would be less than $100,000 per annum. As we see it, the benefits likely to result from the work of the Council would more than justify this relatively minor expenditure. It should be borne in mind that even an expenditure of $100,000 on the Council would constitute less than 2% of the present annual income of the Statutory Interest Account, and less than 4% of the combined annual expenditure of the Law Society Council and the Bar Council at present. [1]

5.40 The Council could achieve significant economies if it rented an office near to the Law Foundation's premises and was given access, through the generosity of the Foundation, to certain resources such as the Foundation's library and conference room. Such assistance by the Foundation seems to fall squarely within its statutory functions [1] and, in our view, the ready opportunity for contact between the Foundation and the Council would be to the advantage of both bodies. We suggested earlier that some Board members of the Law Foundation should play a role in selection of three of the Council,s members.

FOOTNOTES

Para.

5.1 1. See paragraphs 4.13 and 4.19.

5.2 1. See paragraphs 3.15-3.21.

5.4 1. For examples of public membership on governing bodies of legal professions and other professions in various parts of the world, see paragraphs 2.31, and our Discussion Paper, *General Regulation*, chapter 4.

5.5 1. See paragraphs 3.8-3.14.

5.6 1. See New South Wales Bar Association, Articles of Association, article 46; Law Society of New South Wales, *Articles of Association,* article 51.

2. For numbers of public members on some governing bodies of legal professions and other professions, see note 5.4.1 above.

5.10 1. As noted in paragraph 2.31, the three non-lawyer members of the Board of Governors of the Bar Association in the District of Columbia (USA) do not have the right to vote.

5.14 1. See paragraph 2.31 above and our Discussion Paper, *General Regulation,* chapter 4.

2. See paragraph 2.32 above, our Discussion Paper, *General Regulation,* chapter 4, and our *Second Report on the Legal Profession.*

5.15 1. See paragraph 5.26.

2. See paragraph 5.32.

5.16 1. The non-lawyer members of the Board of Governors of the Bar Association of the District of Columbia are chosen by the Board with the assistance of a body similar to the Public Council on Legal Services. See paragraph 2.31 above and our Discussion Paper, General Regulation, pp.90-92.

2. For precedents for vesting such a power in the Leader of the Opposition, see Privacy Committee Act 1975, s.5(4), and the Law Foundation Act 1979, sch.1, cl.2.

3. For our use of the term “legal practitioner” in this Report see paragraph 4.9.

4. See paragraphs 5.2-5.3.

5.17 1. See paragraph 5.10.

5.18 1. For examples of a duty to report annually see Ombudsman Act, 1974, s.30; Privacy Committee Act 1975, s.17.

2. See eg. Privacy Committee Act 1975, ss.15(1)(b), 18(1).

3. See the Defamation Act, 1974, s.17.

4. See eg. Privacy Committee Act, 1975, s.18(2), (3).

5. See eg. Privacy Committee Act, 1975, s.15(1)(b).

5.20 1. For a list of committees, see the Annual Report of the Law Society of New South Wales, (1981) Law Society Journal, vol. 19 1)p.670.9 at 670.62-67; the Annual Report of the New South Wales Bar Association, 1981, pp.5-6.

2. See paragraph 2.24.

3. See Law Society of New South Wales Special Bulletin, No.4 (1979), and Law Society of New South Wales, Submission No.269 (“Reply to the Law Reform Commission’s Discussion Paper No.1 in relation to the General Regulation of the Legal Profession”), pp.23,37.

5.21 1. We referred in paragraph 2.32 to the fact that the Benson and Hughes Commissions in the United Kingdom favoured the addition of non-lawyers to committees of the general regulatory bodies.

5.25 1. For a detailed description of the Account, see our Discussion Paper, *Solicitors' Trust Accounts and the Solicitors' Fidelity Fund*, pp.162-167.

5.26 1. Both the Benson and Hughes Commission proposed the establishment of an advisory committee on legal services. These proposals bear some similarity to ours but differ in significant respects. The New Zealand Law Society has formulated plans for an advisory committee of non-lawyers. For these three proposals see the footnotes to paragraph 2.3 1 above.

2. By contrast, the Benson Commission envisaged that its proposed “advisory” committee could be given “executive” power. But it did not define what executive power should be vested in the committee. See Royal Commission on Legal Services in England, Report, (Cmnd.7648, 1979), para.6.20.

5.27 1. See paragraphs 5.30-5.32.

2. See paragraphs 5.15-5.16.

3. For further discussion of these and other advantages of a body such as the Public Council on Legal Services, see our Discussion Paper, *General Regulation,* pp.175-176, 193-194.

5.28 1. See our Discussion Paper, *General Regulation,* pp. 189-192,

2. See paragraph 2.31 above and our Discussion Paper, *General Regulation,* pp.90-92. See paragraphs 2.1 1 and 2.1 3.

4. See eg. Women's Electoral Lobby, submission No.183.

5.31 1. See paragraphs 5.2-5.3.

2. For our use of the term “legal practitioner” in this Report, see paragraph 4.9.

5.32 1. For the functions and composition of the Law Foundation, see the Law Foundation Act, 1979.

2. Law Foundation Act 1979, sch.1, cl.2.

3. For the functions and composition of the Legal Services Commission, see the Legal Services Commission Act, 1979.

4. Legal Services Commission Act 1979, s.8.

5. For the functions and composition of the Consumer Affairs Council, see the Consumer Protection Act, 1969.

6. Consumer Protection Act, 1969, s.7(2).

5.33 1. See eg. Royal Commission on Australian Government Administration, Report. (Aust Govt Publishing Service, 1976), Appendix, vol.1, p.375 at 382-6.

5.34 1. For a similar power, see the Privacy Committee Act, 1975, s.15(1)(a).

2. For a similar power, see Privacy Committee Act, 1975, s.15(1)(1)).

5.35 1. For some relevant precedents, see the notes to paragraph 5.18.

2. See paragraph 5.18.

3. See eg. Privacy Committee Act, 1975, s.15(1)(f).

5.36 1. See paragraphs 4.32 and 4.33.

2. See eg. the power of the Noise Advisory Committee under the Noise Control Act, 1975, s.16.

5.38 1. Eg. the Legal Services Commission and the Women's Advisory Council.

5.39 1. Seethe Annual Report of the Law Society of New South Wales, Law Society Journal (1981) Vol.19, p.670.9 at 670.71, 72 and 95; Annual Report of the New South Wales Bar Association, 1981, p.36.

5.40 1. See Law Foundation Act, 1979, s.5.

6. Legal and Official Distinctions Between Barristers and Solicitors

A. INTRODUCTION

6.1 In chapter 4 we recommended the abolition of separate admission of barristers and solicitors. A principal reason for that recommendation was that, in our view, the existing legal and official distinctions between barristers and solicitors are inappropriate and should be abolished, in which case much of the justification for separate admission would disappear. In this chapter we look at a number of the existing distinctions between barristers and solicitors, and we explain why we consider that each of them should be abolished. in each case our reasons apply not only to the present distinction, based on whether a practitioner is admitted as a barrister or as a solicitor, but also to its replacement by a distinction based on whether a practitioner practises in the style in which barristers now practise. Accordingly, our criticisms of the former should be read as applying also to the latter.

6.2 It is necessary for the discussion in this chapter to proceed on the assumption that separate admission is retained. If it is not retained, the existing distinctions based on admission will necessarily disappear. However, the recommendations in this chapter apply whether separate admission is retained or abolished. As we have said, our recommendations for the abolition of distinctions between barristers and solicitors should be read as including opposition to the introduction of similar distinctions based on whether or not a practitioner practises in the style of a barrister.

6.3 In some of the areas considered in this chapter, we recommend that, although distinctions between barristers and solicitors should be abolished, certain other distinctions between practitioners should be retained or introduced. There are, at present, many legal and official distinctions between practitioners which have nothing to do with the difference between barristers and solicitors. The fact that we do not mention them in this chapter does not mean that we consider them to be undesirable; it means only that they are not relevant to the issues with which we are concerned in this Part of this Report.

6.4 The distinctions discussed in this chapter arise in the following areas:

(i) Requirements for Admission

(ii) Requirements concerning Training and Experience after Admission

(iii) Rights of Audience and Other Rights to do Legal Work

(iv) Civil Rights, Liabilities and Immunities concerning Professional Work

(v) Regulation of Fees

(vi) Duties to Accept Work

(vii) Appointment as judges

(viii) judicial and Official Attitudes

(ix) Distinctions in the Federal Sphere.

The principal recommendations which we make in this chapter are listed as recommendations 29-43 in the Summary of Principal Recommendations at the beginning of this Report.

6.5 Certain important distinctions between barristers and solicitors are not dealt with in this chapter. We discussed in chapter 4 existing distinctions in the areas of admission, general regulation, and, to some extent, the right to practise. Some other distinctions are not dealt with here because they relate to an area, such as professional indemnity insurance, which we shall examine comprehensively elsewhere in our Reports on the Legal Profession Inquiry. In relation to these areas, it is convenient to defer our discussion of distinctions between barristers and solicitors until we deal with the area generally. The areas in question, and the Reports in which we shall discuss them, are as follows: First Report -Queen's Counsel (chapter 9), Court Dress (chapter 10); Second Report -Complaints, Discipline and Professional Standards; subsequent Reports -Advertising, Specialisation, Professional Indemnity Insurance, Trust Accounts and the Fidelity Fund.

6.6 Before looking at particular distinctions, we reiterate briefly a basic principle which we discussed in chapter 3. [1] That principle is that if a distinction is to be drawn between practitioners in relation to a particular matter, it should be based on a criterion which corresponds to the justification for making the distinction. For example, if the justification for a distinction is based on whether or not a practitioner specialises in advocacy, the distinction should not be drawn on the basis of whether a practitioner is a barrister or a solicitor. It is not sufficient to argue that the proportion of specialist advocates is higher amongst barristers than amongst solicitors great unfairness may be caused to those solicitors who do specialise in advocacy. Moreover, the fact that fewer solicitors specialise in advocacy may be due, to some extent to distinctions between barristers and solicitors which place solicitor advocates at an unfair disadvantage. In our view, much of the difference of opinion between Mr Conacher and ourselves in relation to whether existing distinctions between barristers and solicitors should be retained arises from our adherence to the basic principle which we have described. [2] In saying this we do not overlook the fact that there is much common ground between Mr Conacher and ourselves in relation to these distinctions. In particular, as Mr Conacher has said, all four of us

> "....
>
> (d) recognise that in some fields, of which an important one is advocacy in the higher courts, barristers are dominant;
>
> (e) think that in these fields solicitors are under unfair handicaps;
>
> (f) think that that dominance is partly the result of those handicaps;
>
> (g) think that to the extent to which that dominance is the result of those handicaps, the freedom in law of the solicitor is not matched by freedom in fact;
>
> (h) think that those handicaps ought to be taken away;
>
> "

B. REQUIREMENTS FOR ADMISSION

Introduction

6.7 In 1974, the then Attorney-General, at the request of the then Chief Justice of New South Wales, established a Committee of Inquiry into Legal Education in New South Wales (to become known later as the Bowen Committee) to inquire into "all aspects of the system and the control of legal education and of qualifications for admission as a barrister or solicitor," [1] Subsequently, the present Attorney-General referred for inquiry by our Commission a wide range of issues concerning the legal profession. With the Bowen Committee Inquiry already under way, "legal education prior to admission", [2] was excluded specifically from our terms of reference. The Bowen Committee reported in 1979 [3] and its recommendations are presently under consideration by the Government. In these circumstances, we do not consider in detail, or make firm recommendations about, the existing distinctions between barristers and solicitors in relation to educational requirements for admission. We do make some observations on those distinctions, however, and we also refer to some other distinctions concerning admission.

6.8 We refer in the following paragraphs to various recommendations of the Bowen Committee. The Committee was not asked to consider the general question of the division between barristers and solicitors, nor the question of introducing common admission. Indeed, the extract quoted above from its terms of reference might be taken as precluding consideration of common admission. The Committee appears to have assumed the retention of separate admission; certainly its Report did not discuss the issue. However, as we indicate below, a number of the recommendations which the Committee made about admission requirements, and about the authorities concerned with prescribing those requirements, would remove or reduce certain of the present distinctions between barristers and solicitors in these areas.

Academic Training

6.9 At present, there is no distinction between barristers and solicitors in relation to the academic training requirements for admission. [1] The Bowen Committee recommended that this situation should continue. [2] We see no reason to differ from this view, but the matter clearly falls outside our terms of reference.

Practical Training

6.10 At present, attendance at a practical training course run by the College of Law is a prerequisite for admission as a solicitor. The course may be taken on a full-time basis for six months, or as a "sandwich course" with periods of full-time attendance at the College interspersed with periods of working in a legal office. By contrast, barristers do not have to undertake any practical training prior to admission. The Bar Association presently requires its new members, after admission, to attend a course of evening lectures on aspects of law and of practice at the Bar. [1] But barristers who do not belong to the Association have the right to practise without satisfying any such requirements.

6.11 The Law Society has submitted to us that barristers, as well as solicitors, should be required to undertake a practical training course prior to admission. The Society suggested that the course should be at the College of Law and could be "either the existing course or a course specially designed for prospective barristers." [1] The Bar Association has submitted to us that barristers should be required to undergo a course at a "College of Law for the Bar or... a new department within the existing College of Law devoted to education of the Bar." [2] It did not express a firm view as to whether the course should be taken before or after admission.

6.12 The Bowen Committee's proposals on practical training before admission would reduce, but not eliminate, the present distinctions between barristers and solicitors in this area. The Committee recommended that barristers should be required to undergo training "adjusted to their needs within the College of Law or some other approved institution for practical training." [1] It said that "differences in the functions" of barristers and solicitors should be reflected in their practical training." [2] Nevertheless, it recommended that, just as solicitors "should be taught the basic principles of advocacy", so prospective barristers "should be given the opportunity to obtain office training". [3] The Committee's proposals proceeded on the assumption that the present divided structure of the profession would continue. A different view might or might not have been taken if that division had been reduced in degree or abolished.

6.13 Our terms of reference preclude us from making recommendations in relation to training requirements for admission. But training requirements after admission fall within those terms, and it is not possible to explain our recommendations in that area (see paragraphs 6.20-6.42) without indicating our views concerning the closely-related question of training prior to admission. In our view, all candidates for admission to the profession should be required to undertake a course at the College of Law, the length and content of which should not vary according to whether they wish to be admitted as barristers or as solicitors. We give our reasons briefly in the next paragraph.

6.14 First, practitioners' capacity to change their style of practice, and the fields in which they work, is enhanced by having had a preliminary practical training which covered a wide range of the skills necessary for different styles and fields of practice. This flexibility is valuable both for the public interest

in the efficiency of the profession and for the personal interests of practitioners, especially as the opportunities and demands involved in legal practice are changing with increasing rapidity. [1] Secondly, it has long been acknowledged by many barristers and judges that the degree of inter-action between barristers and solicitors is so great that an understanding of the work of a solicitor is an important attribute in a barrister. Likewise, a solicitor is likely to benefit from some training in the work of a barrister. Thirdly, the differences in the types of skills necessary for barristers and solicitors are not as substantial as is sometimes asserted, and they are decreasing. For example, many solicitors now undertake a considerable amount of advocacy, [2] and some solicitors frequently give specialist advice on referral from other solicitors.

Other Requirements

6.15 There are, at present, certain distinctions of relatively minor significance between barristers and solicitors in relation to requirements of moral fitness for admission, and requirements to enrol as student clerks or students-at-law a specified period prior to seeking admission. [1] We agree with the Bowen Committee that these distinctions should be removed.

6.16 At present, a period of practice subject to some form of guidance, such as service of articles under a solicitor, is not required as a qualification for admission to either branch of the profession. The Bowen Committee, however, recommended that all would-be solicitors should be required to practise as an employee of a solicitor for 12 months prior to admission and that all barristers should be required to serve as a pupil of a barrister for 12 months after their admission. [1] We consider the general question of practice under guidance in the course of discussing training requirements after admission (see paragraphs 6.20-6.42 below).

Determination and Administration of Requirements

6.17 The Supreme Court has the ultimate responsibility for admitting both barristers and solicitors, but important roles in the determination and administration of admission requirements are played by the Barristers Admission Board in relation to barristers and by the Solicitors Admission Board in relation to solicitors. [1]

6.18 The Bowen Committee's recommendations would reduce the extent of this distinction between barristers and solicitors. It recommended that the power to determine academic practical training requirements for admission to the profession, whether as a barrister or a solicitor, should be vested in one body, the Council of Legal Education, to be established by statute. [1] It proposed the retention of the two separate Admission Boards to perform certain administrative functions and to assist the Court to determine whether candidates satisfy the requirements of moral fitness for admission. [2] But it said that the question whether there should continue to be two Boards rather than one should be kept under review. [3]

6.19 For reasons explained earlier,' it is not appropriate for us to make recommendations in relation to the authorities by which the requirements for admission should be determined and administered. In any event, we are concerned in the present context only with distinctions between barristers and solicitors. Accordingly, we confine ourselves to two observations, both of which are based on the desirability of avoiding inappropriate distinctions between practitioners in relation to the specified requirements for admission and the way in which those requirements are administered. First, we share the Bowen Committee's view that requirements for admission should be fixed by a common body for the whole profession. Secondly, if there continues to be a need for an Admission Board, we consider that it would be appropriate to have only one such Board for the whole profession.

C. REQUIREMENTS CONCERNING TRAINING AND EXPERIENCE AFTER ADMISSION

I. Introduction

6.20 In chapter 4 we made the general recommendation that for both barristers and solicitors the right to practise should be dependent upon holding a practising certificate. In this section we look at the existing

distinctions between barristers and solicitors in relation to the training and experience, if any, which is required of them before they may

(i) practise as a principal (ie. as a sole practitioner or partner);

(ii) accept work directly from clients;

(iii) practise in the style in which barristers now practise;

(iv) return to practice after a period out of active practice.

II. Practising as a Principal

The Present Position

6.21 The Law Society has broad statutory power to impose “conditions” on solicitors” practising certificates. [1] It uses this power to require that before solicitors are issued with an unconditional practising certificate entitling them to practise as either a principal or an employee, they must first practise for 12 months on a conditional practising certificate which restricts them to practising as an employee. [2] There are no special requirements of supervision or training during this period. All that is required is the production at the end of the period of a certificate from the employer to the effect that 12 months employment has been served.

6.22 Barristers do not require practising certificates and may practise as principals immediately upon admission. The Bar Association, however, requires its new members to undertake 12 months as a “pupil” of a “tutor”. A tutor must be a member of the Association who has practised at the Bar for at least seven years but is not a Queen’s Counsel. [1] A pupil is entitled to practise as a principal, although like other members of the Association he or she cannot accept work without the intervention of a solicitor. During pupillage, the pupil and the tutor are required to “use their best endeavours... to ensure that the newly admitted member is fully cognisant of [the Association’s rules] and of the standards of conduct etiquette and competence expected by the court, fellow barristers, solicitors and the public, of members of the Bar of New South Wales.” [2] In practice, some pupils obtain considerable advice and experience through their tutors but others have scarcely any contact with them. All pupils are required to attend a course of evening lectures about various aspects of law and of practice at the Bar.

The Issues

6.23 Should these distinctions between barristers and solicitors continue? In our view, it is desirable for all practitioners to have some form of guidance during their first 12 months in practice. We note that both the Law Society and the Bar Association share this view, in that they favour the introduction of compulsory pupillage for all new barristers rather than, as at present, only for those who join the Bar Association. [1] The Law Society adds that “the present requirements of pupillage and attendance at lectures... should be formalised and rigidly enforced”. [2]

6.24 The question then arises whether the period of practice while subject to guidance should have to be served as an employee, or whether some, or all, types of practitioners should be permitted to serve it as a pupil. In one sense, pupillage provides the public and the practitioner with less protection from the dangers of inexperience than does employment. This is because a pupil can practise as a principal and when doing so does not present the tutor with the risk of incurring vicarious liability. As a result, there is less incentive for a tutor to supervise the pupil’s work and to remedy any mistakes which may occur. On the other hand, some safeguard is provided by the fact that, under present arrangements, pupils are not entitled to accept work without the intervention of an instructing practitioner. This reduces the danger of pupils being given work which is beyond their capabilities, and having to handle matters without the assistance of another practitioner. A further consideration to be taken into account is that, at present barristers in New South Wales are sole practitioners and do not employ other practitioners. We recommend in chapter 7 that the Bar Association should consider allowing its members to form small partnerships and to employ a limited number of other members. But it is unlikely, at least in the near

future, that these changes would lead to positions as employees of members of the Association becoming widely available.

Our Views

6.25 On balance, we are inclined to favour pupillage being available, subject to certain conditions, as an alternative to employment for the purposes of satisfying our proposed requirement of 12 months practice while subject to guidance. Those conditions are:

(i) pupils should be prohibited from acting without the intervention of an instructing practitioner, save in prescribed circumstances;

(ii) tutors should be required to be practising on the basis that, generally speaking, they do not act without the intervention of an instructing practitioner;

(iii) pupils and tutors should be subject to rules which require a significant degree of informal training and supervision by tutors, and these rules should be enforced.

6.26 In relation to the first condition it should be noted that it does not require that pupils must be admitted as barristers rather than solicitors. Moreover, the circumstances in which work can be accepted without the intervention of another practitioner should be the same for all pupils, whether admitted as barristers or as solicitors. In relation to the second condition, the general regulatory body of an intending tutor should be the arbiter of whether he or she satisfies the requirements which we have proposed for tutors. The third condition would require rules which are more stringent and detailed, and more strictly enforced, than the present pupillage rules of the Bar Association. At the Victorian Bar, the relationship between tutor and pupil tends to be much closer than in New South Wales; their Reading Rules would be a useful model. [1] The rules should be the same for all pupils.

6.27 We recommend that, in order to implement these proposals, all practitioners who wish to practise as a principal, otherwise than under pupillage, should be required to hold what we shall refer to as a full practising certificate. Practitioners should not be eligible for a full practising certificate unless they have practised for 12 months on what we shall refer to as *a qualifying* practising certificate. The holder of a qualifying certificate should be restricted to practising as an employee or, subject to the conditions we have listed in paragraph 6.25, as a pupil. Some of the 12-month qualifying period could be served as a pupil and some as an employee. At the end of the period, each holder of a qualifying certificate should be required to produce a certificate from his or her employer or tutor indicating that the requisite period has been served. The employer or tutor should have to be subject to the same general regulatory body as the employee or pupil. The employer or tutor should, of course, hold a full practising certificate and should have done so for at least a prescribed number of years. We make no recommendation as to what number should be prescribed. At present, the Law Society often permits the equivalent of our 12-month qualifying period to be served under the guidance of a practitioner who is a fellow employee (usually the person in charge) in the legal department of a government or corporation or in a legal aid centre. Our recommendations are not intended to prohibit or deter this practice.

6.28 We mentioned earlier the Bowen Committee's recommendation that solicitors should have to serve 12 months as an employee prior to admission rather than as at present, after admission. Our recommendations in the previous paragraph are intended to be an alternative to those of the Bowen Committee; we do not propose that any practitioner should be required to serve a period in employment both before and after admission.

III. Accepting Work Directly from Clients

The Present Position

6.29 The basic question with which we are concerned here is whether a practitioner who wishes to accept work directly from clients should have to satisfy any special requirements of training or experience. The present position, broadly speaking, is as follows.

(i) Barristers who belong to the Bar Association are prohibited by its rules from acting without the intervention of an instructing practitioner, save few specified circumstances. [1] Although the strict legal position is somewhat uncertain, it seems to be generally assumed that a barrister, whether or not a member of the Association, may not act without the intervention of another practitioner. [2]

(ii) Solicitors are entitled to accept work directly from clients. As we have mentioned earlier, however, solicitors, unlike barristers, have to undertake a College of Law course in order to obtain admission, and before being entitled to practise as a principal must practise for 12 months as an employee of another solicitor.

(iii) Barristers who wish to act in matters without the intervention of an instructing practitioner may decide to cease being a barrister and to obtain admission as a solicitor. If they have not been barristers for five years or more, they are usually required to satisfy the normal requirements for admission as a solicitor, including the College of Law course. [3] Whether or not they have been barristers for five years or more, they are usually required, upon admission as a solicitor, to practise for 12 months as an employee before becoming entitled to practise as a principal. [4]

Some Relevant Considerations

6.30 In effect, the present system aims to ensure that practitioners who deal directly with the public as principals have had some training (at the College of Law), and some experience (as an employee of a solicitor), which is specially relevant to that style of practice. One justification for this approach is that the need to ensure that a practitioner is competent is greater when he or she can be retained directly by members of the public, rather than being chosen by an instructing practitioner who then has the opportunity and responsibility to ensure that satisfactory service is provided. Another justification is that practitioners who accept work directly from clients are commonly involved, unlike other practitioners, in the handling of trust accounts and the management of substantial office systems and resources. These skills are not easily acquired without practical training and experience.

6.31 A number of other considerations need to be taken into account in deciding whether the present system should be retained. First, many barristers who have practised for some time, but have not dealt directly with clients, may nevertheless have acquired knowledge and experience which would enable them to deal directly with clients at least as competently as a solicitor whose experience is confined to serving a year as an employee of another solicitor. Secondly, the present system imposes the training and experience requirements on all solicitors, yet a significant number of solicitors (including many who are employed by government or corporations) do not deal directly with the public or handle trust moneys. Indeed, the requirements would apply to a solicitor who decided to practise in the style of a barrister. Thirdly, the period of employment is not required to be served in a practice which deals directly with the public or handles trust moneys. Accordingly, it may fail to serve some of the major aims of the system. Fourthly, we have expressed earlier the view that completion of the College of Law course should be required of everyone seeking admission to the profession, rather than only of would-be solicitors. Fifthly, we suggest in chapter 7 that the Bar Association should consider relaxing its present rule against acting without an instructing practitioner. If such a relaxation were to occur, some members of the Association might acquire significant experience of dealing directly with clients.

Our Views

6.32 In the light of these various considerations, we are of the view that no special requirement concerning training or experience should be based on whether or not a practitioner wishes to accept work directly from clients. However, we recommend that practitioners who wish to operate a trust account should be required to have practised for at least six months as an employee of ,i practitioner who operates a trust account. This six-month period could be served as part of the twelve-month qualifying period recommended in paragraph 6.25, or at a later stage in a practitioner’s career. The requirement concerning operation of a trust account should be the same for all practitioners, save that it should not apply to practitioners who have been in active practice for five years or more.

6.33 The recommendations in the previous paragraph should not be read as prohibiting the Bar Council from continuing to require practitioners who are subject to its governance not to act without the intervention of an instructing practitioner. But as we have mentioned, we consider that question in chapter 7 when discussing restrictive practices at the Bar and we recommend that the Council should be asked to consider some voluntary relaxation of the present rule.

IV. Practising in the Style of a Barrister

The Present Position

6.34 The question with which we are concerned here is whether practitioners should be required to undertake special training or experience if they wish to practise in the style in which barristers now practise. The present position may be summarised as follows.

(i) As mentioned earlier, barristers who join the Bar Association are required by the Association to serve 12 months as a pupil of another member and to attend evening lectures which deal, amongst other things, with practice at the Bar. Other barristers have the right to practise without satisfying any such requirements.

(ii) For solicitors, the requirements concerning training and experience do not differ according to whether or not they wish to practise in the style in which barristers now practise. By contrast with barristers, therefore, solicitors wishing to practise in that style must complete the College of Law course and must serve 12 months as an employee of another solicitor. The period in employment need not be served under a solicitor who practises in the style in which barristers practise.

(iii) As we have mentioned, solicitors need not become barristers in order to practise in the style of a barrister. But the practice is for them to do so. Generally speaking, they may transfer without any further re-quirements of training or experience, but if they wish to become members of the Bar Association they will usually be required to undertake pupillage. [1]

Some Related Changes

6.3 5 We have expressed the view that all candidates for admission should be required to attend the college of Law. Training at the College involves a significant amount of supervised training in advocacy, including mock trials. No supervised training of this kind is presently provided for barristers, even those who arc members of the Bar Association. Moreover, we envisage that if attendance at the College of Law became mandatory for would-be barristers as well as for would-be solicitors it would give greater attention than at present to matters relevant to practice in the style of a barrister. It might, for example, cover much of the ground presently covered in the Bar Association's evening lectures.

6.36 In addition, we recommended earlier in this chapter that all practitioners who wish to practise as a principal should be required to practise for 12 months as an employee or pupil. This would avoid the present situation in which barristers who do not belong to the Bar Association do not have to undergo any period of practice under guidance.

Our Views

6.37 Against this background, we do not recommend that any special requirement concerning training or experience should be based on whether or not a practitioner wishes to practise in the style in which barristers now practise. As we mentioned earlier, the need for public protection is less here than in relation to practitioners who act without the intervention of an instructing practitioner. Moreover, the charges referred to in the previous two paragraphs would provide all practitioners with formal training in advocacy and in practice at the Bar, and would require all practitioners, including those practising in the present style of a barrister, to under go a period of practice under guidance, either as a pupil or as an employee.

6.38 The Bar Council may wish to require special training or experience of any practitioner who elects to become subject to its governance. We do not suggest that the Council should be prohibited from doing

so, but any such requirements should not be so onerous as to constitute an unreasonable barrier to practitioners who wish to transfer to the governance of the Law Council after some years in practice. For example, if a practitioner has been in active practice under the governance of the Law Society Council for a period of, say, three years or more, he or she should not be required to undertake a lengthy period of pupillage upon electing to be governed by the Bar Council, In our view, the required period, if any, in such circumstances should not exceed six months, and credit should be given for any period of pupillage served during the 12 month qualifying period which we have said should be required of all practitioners.

V. Returning to Practice

The Present Position

6.39 At present, solicitors who cease or resume practice must notify the Prothonotary of the Supreme Court accordingly. [1] If they remain out of practice for two years or more, they must seek leave of the Court to resume practice and may be required to serve 12 months as an employee before becoming entitled to practise as a principal. [2] In reality, no significant check is kept on whether a solicitor who holds a practising certificate is actually practising. But the cost of the certificate, and the related cost of compulsory insurance premiums and contributions to the Fidelity Fund, is likely to be a substantial deterrent against solicitors applying for a certificate when they do not intend to practise.

6.40 Barristers can leave and return to active practice without any notification and without satisfying any special requirements. There is a list of practising and non practising barristers in the Law Almanac, but there is no requirement in law that those on the practising list must actually practise nor that those on the non-practising list must not practise.

Our Views

6.41 In our view, all practitioners who have been out of active practice for a substantial period should be subject to controls designed to protect the public from engaging practitioners who have lost touch with current law and practice. The variety of circumstances which may arise is so great that it would not be appropriate to impose a rigidly uniform requirement of, say, 12 months practice as an employee for any practitioner who has been out of active practice for two years or more. A number of factors need to be taken into account when considering what, if any, period as an employee should be required. They include the length of time spent previously in active practice, the nature of the work undertaken while not in active practice, and whether or not the practitioner wishes to accept work directly from the public. If a discretion is to be exercised in this respect it is more appropriate for it to be vested in the general regulatory body of the practitioner in question rather than in the Supreme Court.

6.42 We recommended in chapter 4 that all practitioners should be required to have practising certificates. We recommend here that where an applicant for a practising certificate has not held a practising 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 in practice as an employee or pupil, on a qualifying practising certificate, before becoming entitled to a full practising certificate. We envisage that where a practitioner has been without a certificate for only two or three years it would rarely be appropriate to require him or her to serve more than 6 months, if any period at all, as an employee or pupil.

D. RIGHTS OF AUDIENCE AND OTHER RIGHTS TO DO LEGAL WORK

Rights of Audience

6.43 Generally speaking, there is no difference between the rights of audience of barristers and solicitors in New South Wales courts. [1] There may, however, be some differences. First, it may be argued that a barrister's rights of audience are dependent upon the barrister being instructed by a solicitor. No such limitation applies to the rights of audience of solicitors. [2] Secondly, in relation to the rights of audience of practitioners who are employed by other practitioners, there may be differences in

some courts according to whether the employee is a barrister or a solicitor. [3] At present, barristers rarely practise as employees of other practitioners, but in chapter 7 we recommend that the Bar Council should consider action to enable barristers to be employed by other barristers to some extent.

6.44 In our view, the rights of audience of all practitioners should be defined by statute and should be the same for barristers as for solicitors. This is largely, but not entirely, the situation at present. As to the first possible difference noted in the previous paragraph, we do not favour the right of audience of any category of practitioner being dependent, as a matter of law or official practice, upon whether the practitioner is instructed by another practitioner. There is no such distinction at present in relation to solicitors and we see no reason why it should apply in relation to barristers. As to the second possible difference, this arises principally from matters of drafting in particular statutes. We suggest that rights of audience of all practitioners, whether barristers or solicitors, who are employed by other practitioners should be expressed in similar terms. The main arguments which may be adduced for restricting the rights of audience of employed practitioners relate to the possibility of conflicts of interest between employer and employee, and the possibility of doubt arising about the scope of an employee's authority. Whatever strength these arguments have does not depend upon whether the employee is a barrister or a solicitor.

Other Rights to do Legal Work

6.45 Many exclusive rights to do legal work for reward apply equally to barristers and solicitors. This is the case, for example, in relation to conveyancing and probate work. [1] Generally speaking, however, statutory rights to issue court process and to lodge documents on behalf of clients are vested in solicitors but not in barristers. In our view, these rights should be vested in all practitioners, subject to conditions designed to ensure that the particular practitioner has the authority to act on behalf of the client. If a practitioner does not act without the intervention of an instructing practitioner, then he or she might rarely exercise these rights. But it could be convenient to do so on occasions where the instructing practitioner is not readily available. Moreover, members of the Bar Association can accept some work directly from clients, and in chapter 7 we suggest that they should be permitted to do so in a wider range of circumstances. This would increase their need to have the right to issue process, and related rights.

6.46 Generally speaking, the most appropriate way of implementing these recommendations would be to vest in all legal practitioners the statutory rights which are presently vested in solicitors. This would involve retention of any conditions which are presently placed on those rights, such as that the practitioner in question must be practising as a principal or must be the practitioner on the court record. The rights presently vested in barristers would then be abolished. These proposals would not preclude practitioners from agreeing amongst themselves not to undertake certain types of work. Agreements of such a kind fall within the ambit of chapter 7 on restrictive practices.

E. CIVIL RIGHTS, LIABILITIES AND IMMUNITIES CONCERNING PROFESSIONAL WORK

6.47 In this section we consider distinctions between barristers and solicitors in relation to:

(i) their capacity to enter into contractual relationships concerning professional work;

(ii) their rights to sue for professional fees;

(iii) their immunity from civil liability for professional work.

The Present Position

6.48 Solicitors have legal capacity to enter into contractual relationships concerning their professional work. Barristers do not. [1]

6.49 Solicitors are entitled to sue for their professional fees, provided that they deliver a bill in a specified form (known as a "taxable" form) at least one month before suing. [1] Barristers have no legal right to sue for their fees. [2] Nevertheless, solicitors are, generally speaking, "honour bound" to pay the

fees of a barrister retained by them [3] and if they do not do so their names may be put on a list kept by the Bar Association for the information of its members. Rules of the Bar Association prohibit members from accepting a brief from a solicitor named on the list unless their fees accompany the brief, and from acting in a matter on which another barrister has worked unless they are satisfied that the fees have been paid or that arrangements have been made to the satisfaction of the other barrister. [4] The latter prohibition does not apply where there is a bona fide dispute over fees. In addition, the Bar Association and the Law Society have established a joint scheme for arbitrating fee disputes between barristers and solicitors. [5] Submission to arbitration requires the consent of both parties, but the decision of the arbitrator is binding.

6.50 Barristers were long regarded as having common law immunity from civil liability arising out of their professional work. [1] Recent decisions in courts outside New South Wales (most notably the House of Lords) have confined this immunity to the actual conduct of a case in court and work intimately connected therewith. [2] The question has not arisen for decision in New South Wales, but it is likely that at least the general tenor of these recent decisions would be followed. Before these decisions it was generally thought that solicitors had no immunity. But some judges involved in those cases suggested, without having to decide the point that solicitors have the same immunity as barristers. [3]

Possible Justifications for the Present Distinctions

6.51 One argument for these distinctions stems from a traditional view of barristers as being gentlemen and, therefore, remunerated only by way of honorarium. [1] This argument is unrealistic and inappropriate in modern times. Other arguments relate to characteristics of advocacy which are said to set it apart from other fields of professional work. Foremost among the characteristics referred to are the importance of advocates being sufficiently independent of their clients to observe properly their duties to the court, the importance of unpopular clients being able to obtain representation in court the difficulty of conducting a case in court where quick decisions (often between conflicting duties) have to be made, and the undesirability of, in effect, rehearing a case in order to determine whether an advocate has been negligent and, if so, what the outcome of the case would have been in the absence of negligence.

6.52 These arguments may or may not be sufficient reason for distinguishing between advocacy and other professional work, but they do not justify distinctions between barristers and solicitors. They relate to advocacy, and a substantial amount of advocacy is undertaken by solicitors, as well as by barristers. Moreover, most of the arguments relating to advocacy apply also to the preparation of cases by instructing solicitors. This is true, for example, of the arguments based on the need to provide unpopular clients with representations these clients need someone to prepare the case as well as someone to argue it in court. It is also true of arguments based on the importance of lawyers observing their duties not to mislead the court; these duties apply to those who instruct advocates as well as to the advocates themselves, and breaches by the former can result in the Courts being misled as seriously is breaches by the latter.

6.53 As we have mentioned, judges in courts outside New South Wales have decided recently that immunity from liability is confined to advocacy and work intimately connected therewith, and some have suggested that it may apply to solicitors as well as to barristers. These views are ill accord with the comments which we made in the previous paragraph.

Our Views

6.54 We consider that all practitioners should have legal capacity to enter into contractual relationships in relation to their professional work, and should have the right to sue for their professional fees. This is subject of course, to the general laws of the land concerning contractual capacity and suing for fees. In our view, there is value in prohibiting all practitioners, as solicitors presently are, from suing until a reasonable period after delivery of a bill. We question, however, whether the bill should have to contain all the detail of a taxable bill, which is often expensive to provide and confusing to read. But whatever detail should be required, we can see no justification for a distinction in that respect between barristers and solicitors. There may or may not be justification for distinctions based on other criteria, such as the

type of work to which the bill relates or whether the person to be sued for the fees is the instructing practitioner rather than the lay client.

6.55 In relation to immunity from civil liability, we see no good reason for distinguishing between barristers and solicitors. Recent decisions provide considerable support for that view. It is beyond the scope of this Report to consider whether the immunity should continue to exist and, if so, what types of work it should cover. We say only that the scope of any immunity should be the same for barristers as for solicitors.

F. REGULATION OF FEES

I. Fee Scales

The Present Position

6.56 There are some statutory fee scales, known as "solicitor-and-client" scales, which specify the amount that solicitors may charge their clients for certain types of work. [1] There are no such scales in relation to barristers.

6.57 There is a second type of fee scales, known as "party-and-party" scales. [1] Unlike solicitor-and-client scales, these do not fix the amount which practitioners can charge their clients for particular items of work. They fix the amount which clients can recover as reimbursement of legal expenses incurred by them in a case where they obtain an "order for costs" against someone else, usually the unsuccessful party. But they have a considerable indirect effect on the amount which practitioners charge their clients for work covered by the scales. If the clients seek an independent review of the amount charged by their solicitor or barrister, using the procedure known as "solicitor-and-client taxation" (see para.6.65), the fees allowed on the review in relation to many of the items in the practitioner's bill may be determined by reference to the fees fixed for those items in a party-and-party scale. In relation to barristers' fees, however, such a review fixes the amount which the client must pay for the barristers services but does not affect the amount which the barrister can seek from the solicitor by whom he or she was engaged.

6.58 In some areas of litigation, there is a party-and-party scale which covers a certain type of work if it is performed by a solicitor, but there is no scale covering the same work if it is performed by a barrister. In other areas, barristers and solicitors are covered by separate scales specifying different fees for the same type of work. The difference in fees may arise through different fees being specified for the same item, or an item being allowed in one scale but not the other, or different methods of calculating fees for the same item (for example, a daily rate by contrast with an hourly rate in relation to fees for appearances in court), or in other ways. We mentioned a number of these differences in our Discussion Paper, The Structure of the Profession, and we do not repeat them here. The differences can lead in many circumstances to the fee allowable under the scale varying substantially according to whether the work in question was performed by a barrister or by a solicitor. In some circumstances the fee allowed is higher where the work was done by a barrister, but in other circumstances it is lower.

The Issues

6.59 The first question is whether there should be situations in which a scale applies to certain types of work when they are performed by a barrister but no scale applies when they are performed by a solicitor, or vice versa. It might be argued that there is less need to control the fees of those who practise in the style of a barrister because the instructing practitioner can ensure that the fee is reasonable. Experience has demonstrated, however, that many solicitors often do not know what is a reasonable fee for the barrister or do not take sufficient care to ensure that the fee charged is reasonable. What often happens is that the solicitor neither marks the barrister's brief nor makes an arrangement with the barrister about the latter's fee. The barrister then marks a fee and, whether it is reasonable or excessive, the solicitor asks the client to pay it. In most cases, the client pays, whether or not he or she regards the fee as reasonable. The client has left the matter of the barrister's fee to the solicitor, the solicitor has left it to the barrister, and the barrister is left with a wide discretion as to what he or she will charge. In these circumstances the client has had little protection from the solicitor.

6.60 The second question is whether, if both barristers' and solicitors' fees are covered by a scale, or by two separate scales, there are circumstances in which the fee for the same item of work should differ according to whether it is performed by a barrister or solicitor. It may well be reasonable for fees to differ according to the complexity of the work, the amount of money at stake, the exceptional skill of the particular practitioner, or many other factors. But we can see no good reason why they should differ merely because the work is undertaken by a barrister rather than by a solicitor.

6.61 In some circumstances it may be appropriate for a scale to specify a lump sum for a whole matter, such as an undefended divorce, rather than separate fees for individual items of work, such as writing a letter or making a telephone call. In some circumstances it may be appropriate to specify a fee for the conduct of a case which may be charged irrespective of whether the case is settled before trial. But if either of these methods is adopted for a particular type of work we see no reason why it should be adopted for barristers but not for solicitors, or vice versa.

6.62 It might be argued that solicitors' overheads are higher than those of barristers, and therefore solicitors should be allowed higher fees for the same work. But adoption of that argument would substantially reduce the incentive for practitioners to conduct their practices efficiently. in any event, there is a wide variation in levels of overheads amongst solicitors; some may have overheads much lower than most other solicitors and even than some barristers.

Our Views

6.63 We do not suggest that fee scales are always or frequently desirable. But we recommend that whether or not a particular type of work is covered by a fee scale should not depend upon whether the work is performed by a solicitor or a barrister. We also recommend that the fees specified in a scale should not vary according to whether the work is performed by a barrister or a solicitor. This means that not only should the actual fees, or range of fees, be the same but, for example, if fees are prescribed by reference to time units, the units should be the same. It also means that, for example, the fees allowed for an instructing practitioner should be the same whether the advocate is a barrister or a solicitor, and if the fees specified for barristers in relation to court appearances include preparatory work and waiting time, the fees for solicitors doing the same type of appearance should also include these items.

6.64 These recommendations apply both to scales concerning the fees charged to a client ("solicitor-and-client" scales) and to scales concerning fees recoverable from a person other than the client, such as the opposing party ("party-and-party" scales). They do not apply, however, to unofficial fee scales which bind only such practitioners as agree to be subject to them. These scales fall within the ambit of our discussion of restrictive practices in chapter 7.

II. Review of Bills

The Present Position

6.65 Clients who are dissatisfied with a bill rendered by their solicitor may have two principal methods of seeking an order that the bill be reduced. First, they can have the bill referred for review, known as "solicitor-and-client taxation", by a court officer. [1] Generally speaking, this "taxing officer" can order the amount of the bill to be reduced if it is unreasonable. If the fee was agreed previously with the client, however, the power to order a reduction is much restricted. Secondly, many clients who wish to dispute a bill not exceeding $1500 can seek an order from a Consumer Claims Tribunal reducing the amount of the bill. The order can be made if the Tribunal considers that it is "fair and equitable" to do so.

6.66 By contrast, there is, generally speaking, no procedure by which a barrister can be required to submit his or her fees to a reviewing authority which has power to order the barrister to reduce them. There is no form of "barrister-and-client" taxation, and as the Consumer Claims Tribunals are confined to reviewing contractual relationships they have no direct power in relation to barristers.

6.67 Both solicitors' and barristers' fees may be subjected to another form of review, known as "party-and-party" taxation. [1] But such a review does not directly affect the fees which barristers or solicitors

can charge their clients. Rather it determines how much of those fees can be recovered by the client from the opposing party or from some other person. The principal distinction between barristers and solicitors in relation to this type of review concerns the different fee scales which are applicable. We have referred to them earlier. Another distinction is that, while the bill submitted for review must include considerable detail about the solicitor's work and the fee charged for each item of it, it need not include as much detail in relation to the barrister's work or the method used to calculate his or her fees.

Some Relevant Considerations

6.68 We have mentioned earlier the weaknesses in the argument that there is little or no need to provide a system of review of barristers' fees because the instructing solicitors provide a check on whether they are reasonable. In our view, this argument is not in accord with the realities of many relationships between barristers and their instructing solicitors. The scope for achieving a greater degree of control by solicitors is limited. The Law Society, like its counterparts in some other jurisdictions, has had little success in its efforts to have solicitors agree barristers' fees in advance wherever possible. Such agreements continue to be the exception, and indeed in very many cases it would be exceedingly difficult, if not impossible, for either the barrister or the solicitor to predict with accuracy the amount of work which will be required of the barrister.

6.69 The present forms of indirect review by a solicitor-and-client taxation or by proceedings before a Consumer Claims Tribunal have substantial limitations. They cannot be invoked by solicitors, yet, as we explained earlier, solicitors are under certain professional obligations to pay the fees of barristers retained by them and may incur sanctions if they do not do so. Moreover, if a client invokes a review and obtains an order reducing his or her barristers fees, this does not. generally speaking, have the effect of reducing the amount which the solicitor is obliged in honour to pay the barrister. And if the barristers fees are reduced by a solicitor-and-client taxation, either the client or the solicitor, but not the barrister, will have to pay the cost of the taxation.

6.70 We have recommended earlier that barristers should have contractual capacity. If this recommendation were adopted, one consequence would be that anyone having a contractual obligation to the barrister to pay his or her fees would have the right to a direct review of them by a Consumer Claims Tribunal. But there would continue to be no right to seek a direct review of them by taxation. Moreover, if the contractual obligation is on the solicitor, the client, by whom in almost all cases the barrister's fees are ultimately borne, will continue to be without any form of direct review, whether by a Consumer Claims Tribunal or by taxation. And the degree of control exercised by most solicitors over their barrister's fees is not likely to increase substantially as a result of their present professional obligation to pay those fees being replaced by a contractual obligation. This is one of the reasons advanced by those who argue that the contractual obligation to pay a barrister, or a solicitor instructed by another solicitor, should rest on the client rather than on the instructing solicitor. That issue, however, is beyond the scope of this Report.

Our Views

6.71 In the light of these considerations, we recommend that the rights of a client or other person to obtain a taxation or other review of a practitioner's bill should not vary according to whether the practitioner is a barrister or a solicitor. For example, any person who is under a contractual obligation to the practitioner to pay the bill should be entitled to a review of it by taxation or, subject to the financial and other limitations on its jurisdiction, by a Consumer Claims Tribunal. Where there has been a prior agreement about fees these rights to a review should be subject to restrictions of the kind which presently apply in relation to solicitors. The recommendation which we have made would be ineffectual, of course, if our earlier recommendation that barristers should have contractual capacity were not adopted. It will be of limited effect if, as a general rule, barristers' contractual relationships are with instructing solicitors rather than with clients. In either of these eventualities, measures will need to be taken to provide clients with a better avenue for review of their barrister's fees than is presently available to them. It is beyond the scope of this Report to recommend particular measures for that purpose, but there would be a strong argument forgiving clients the right to a direct taxation of their barrister's fees, despite the fact that their obligation to pay those fees may be to the instructing solicitor rather than to the barrister.

6.72 For the same reasons as we gave in relation to fee scales, we recommend that the amount allowed on taxation for a particular item of work, such as an appearance as an advocate, should not vary according to whether it was performed by a barrister or a solicitor. But it might vary according to other factors such as the special difficulty of the task in the circumstances of the particular case. In relation to all forms of taxation of barristers' fees, including "party-and-party" taxation, we recommend that those fees should be required to be specified in a reasonably detailed form. Requirements in this respect should be prescribed by rule of court.

6.73 The present system of taxation has been much criticised for undue complexity, expense and delay. It is beyond the scope of this Report to consider whether these criticisms justify substantial reform of the taxation procedure. In our view, the present procedures are sufficiently useful for us to recommend, as we have, that they should be available more widely. But this does not mean that we think they are not capable of' significant improvement. If a better system of review is developed, we envisage that it should apply to all practitioners in the same way as we have recommended above in relation to the present system of taxation.

III. A Particular Issue

6.74 It is important that if practitioners handle the whole of a matter themselves, rather than working in conjunction with a barrister or an instructing solicitor as the case may be, the additional work and responsibility involved should be recognised in any relevant fee scales and in taxations and other reviews of fees. In particular, the work of presentation in court should be sufficiently remunerated. Failure to observe this principle would constitute an unfair and undesirable deterrent to solicitors who otherwise would be willing to handle a case entirely on their own when they are competent to do so. This does not mean, for example, that a practitioner who handles a case alone should be allowed to charge twice over for reading the papers. But sufficient recognition should be given to the extra preparation for trial which will usually be required if a solicitor is acting also as the advocate rather than as an instructing solicitor only.

6.75 In our view, considerable effort and care will be necessary to implement the recommendation made in the previous paragraph. But we regard it as being of major importance, and worthy of such work as may be necessary for its implementation. The importance of the task is manifest in the history of the largely unsuccessful attempts, dating from 1891, to abolish the rigid division of the profession in Victoria. 1

G. DUTIES TO ACCEPT WORK

The Present Position

6.76 We discussed some aspects of this topic in chapter 3. We repeat some of that discussion in the course of considering the topic in greater detail here. Members of the Bar Association are subject to an association rule, known colloquially as the cab-rank rule, which provides that a member "shall not refuse to accept a brief in a field in which he professes to practise, except in the following circumstances..... These circumstances are described in fourteen paragraphs. They include cases where the complexity of the matter is such that the barrister considers it beyond his or her capacity, where the fee offered is not a proper fee, having regard to all relevant factors including the complexity of the matter and the seniority and experience of the barrister; where the length of time in which the barrister will be involved full-time in the matter is such as would seriously affect his or her practice; and where the barrister considers that having regard to other commitments, professional or otherwise, he or she will have insufficient time to give proper attention to the brief. The cab-rank rule does not bind barristers who are not members of the Bar Association and it is not clear whether, independently of the rule, courts regard barristers as under a legal duty to accept work.

6.77 There is no formal rule requiring solicitors to accept work in certain circumstances. The Law Society has submitted to us, however, that "most solicitors feel they have a subjective moral obligation to accept most work and most clients", and it suggests that a solicitor may be ethically bound to accept a client "in cases of dire emergency or unavailability of alternative practitioners". 1 It says that the

"subjective moral obligation felt by most solicitors is subject only to the same exceptions applying to the present ethical duty on barristers to accept all briefs offered to them". [2]

Some Relevant Considerations

6.78 We quoted in chapter 3' the conflicting views of the Bar Association and the Law Society concerning the practical significance of the Association's cab-rank rule. In our view, the main practical effect of the rule in New South Wales is not that it forces reluctant barristers into accepting unpopular cases, but rather that it reduces criticism of barristers who do take such cases. Some barristers who might otherwise be willing to take unpopular cases could be deterred if Such appearances were generally construed by professional colleagues and the public as expressions of sympathy for the client's cause. The cab-rank rule can play a valuable role in providing some protection for a barrister against such allegations.

6.79 It is important to bear in mind that the cab-rank rule has no application unless a client has found a solicitor who is willing to instruct a barrister on his or her behalf. This provides barristers with some protection against having to accept vexatious clients. Application of the rule to practitioners who accept work directly from clients would impose a far greater obligation on them than it presently imposes on members of the Bar Association. The same is not true, however, of its application to practitioners who, although not members of the Bar Association, do not act without the intervention of an instructing practitioner.

6.80 It may be argued that if, as we have recommended earlier, barristers are to have contractual obligations in relation to their professional work, they should not be obliged to accept work which they do not want. This may be an argument against imposing a statutory or common law duty on barristers, but it is of less weight in relation to an ethical rule which has generous exceptions of the type to be found in the Bar Association's present rule. In addition to those mentioned already, those exceptions cover circumstances "where [the barrister's] past experience of the particular client or an essential witness is such as to give him good reason to believe and he does in fact believe that his performance in the conduct of the proceedings would be adversely affected" or where "his advice as to the preparation or conduct of the proceedings has been ignored by his instructing solicitor or the client". [1] Moreover, as we have mentioned, barristers (and probably solicitors also) have an immunity from civil liability which extends it least to the conduct of a case in court and work intimately connected therewith.

Our Views

6.81 As we see it, neither barristers nor solicitors are subject, at present, to a general legal duty to accept work offered to them. We do not suggest that Such a duty should be imposed. We recommend, however, that the Bar Council should continue to have an ethical rule along the lines of its present cab-rank rule. In addition, we recommend that 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.

H. APPOINTMENT AS JUDGES

The Present Position

6.82 At present, both barristers and solicitors are eligible for appointment as judges. In the case of New South Wales Courts, a statutory requirement of five years' standing as a barrister or seven years' standing as a solicitor is common, [1] but in federal courts the usual requirement is five years' standing as a legal practitioner. [2]

6.83 Almost all judicial appointments from the New South Wales profession have been made from the rinks of barristers. In recent years, however, several New South Wales solicitors have been appointed to the Family Court of Australia, two to the Industrial Commission, and one to the Workers' Compensation Commission. The present Chief Judge of the Land and Environment Court was a solicitor prior to his first judicial appointment, to the Industrial Commission. Early in 1982 a solicitor was appointed to the

District Court bench for the first times since 1859. But no solicitor in this State has ever been appointed to the High Court, the Federal Court, or the Supreme Court.

Some Considerations

6.84 The general question of eligibility for appointment to judicial office is not within out terms of reference. But distinctions in that area between barristers and solicitors are clearly relevant to the structure of the profession. For example, if judges of the higher courts arc chosen solely from the ranks of barristers, then practitioners with judicial aspirations may feel obliged to become barristers, whether or not the barrister's style of practice accords with their preference or is best-suited to their clients' needs. Moreover, judges of the higher courts playa substantial role in the regulation of the profession in relation to matters such as admission, costs and discipline. There are obvious limitations in having such roles played by bodies consisting entirely of people whose practising life was spent solely or largely in the same small sector of the profession.

6.85 There are strong grounds for believing that it is not necessary to have practised as *a* barrister in order to be of judicial calibre. This is demonstrated by experience with appointments of amalgam practitioners in the flexible professions in Australasia to senior judicial positions at State and national level. Moreover, solicitors appointed from divided professions to various judicial bodies in Australia, [1] and to the Crown Court in the United Kingdom, [2] have come to be regarded as, generally speaking, the equal of those of their colleagues who were appointed from the ranks of barristers. Many solicitors in New South Wales have Substantial experience in advocacy, [3] and many have acquired close familiarity with the conduct of litigation through working with counsel on numerous cases. It must be remembered also that it is not uncommon for a barrister to be appointed as a judge largely on the grounds of a reputation acquired in, say, equity, and then to have to sit on cases, such as criminal trials, with which he or she has little or no prior acquaintance. Moreover, many solicitors have expertise and personal qualities which can be of great value on the Bench. We refer, for example, to an understanding of the commercial world, or of a wide cross-section of the Community, and to qualities such as commonsense and fair-mindedness which are not found solely amongst barristers.

6.86 It is relevant in this context to refer to some comments by the Commonwealth Attorney-General, Senator Durack. In 1980 he pointed out that his recent appointments to the federal judiciary

> "included 12 solicitors, four women lawyers, two Government lawyers and one academic lawyer. These selections represent a substantial departure from the limited areas of traditional appointments. I hope the boundaries of eligibility will continue to widen, and I do not exclude the High Court from that .... It would be regrettable if we developed a judicial class remote from the concerns and feelings of the community." [1]

The Attorney-General's reference to widening the boundaries of eligibility reflects the power of custom in this area. The appointments to which he refers were a departure fro in customary perceptions of eligibility, but did not involve any broadening of eligibility as a matter of law.

Our Views

6.87 In the light of these considerations, we favour the abolition of the existing distinctions between barristers and solicitors in relation to their legal eligibility for appointment to a judicial office. Moreover, we are of the view that, as a matter of practice, appointments to judicial office should not be regarded, even in relation to the higher Courts, as having to be made solely from the ranks of barristers rather than also from amongst solicitors.

I. JUDICIAL AND OFFICIAL ATTITUDES

Attitudes towards Advocates

6.88 It has been suggested to us that some judges are more favourably disposed towards barrister advocates than towards solicitor advocates. A survey in 1977 found that about half of the solicitors

surveyed considered that judicial antipathy towards solicitor advocates was “frequently” or “occasionally” an “important” reason for them deciding to refer an latter to be handled by a barrister. [1] Similar views have been expressed to us by a number of individual solicitors and by some senior court officials. We think that there may be justification for these views in relation to some members of the judiciary, but whether the views are right or wrong the fact that they are widely held is of considerable significance.

6.89 It is neither surprising nor undesirable that ill-prepared or incompetent advocates will, on occasion, incur expressions of judicial disapproval. if, however, even one judge, without good cause, favours a barrister at the expense of a solicitor, the administration of justice suffers to some extent. A similar result follows if the same degree of judicial tolerance is not extended to both the inexperienced solicitor and the inexperienced barrister. Judicial attitudes should demonstrate beyond doubt that there is no reasonable basis for any solicitor to believe that he or she is discriminated against in any court on the ground that he or she is a solicitor.

Precedence at Court and at Official Functions

6.90 In earlier times, there were practices in the courts and elsewhere by which barristers were given precedence over solicitors. In the courts, this often included the right of pre-audience; that is the right for barristers to have their cases heard before those in which the advocates are solicitors. Some of these old practices remain. On ceremonial occasions, such as when a judge is sworn in or retires, the representative of the Bar is heard before the representative of solicitors. In the church services at the beginning of the legal year, the barristers move in procession ahead of the solicitors-indeed, in some instances the solicitors are not included in the procession. On these and other occasions, a barrister who is newly admitted to the profession may have precedence over the most senior and highly respected solicitor. In addition, there remains a tendency in some courts to regard instructing solicitors as not entitled, without the express leave of the court, to sit at the Bar table, alongside their advocate, even when there is sufficient room for them to do so.

6.91 In our view, distinctions should not be drawn between barristers and solicitors in these ways. If at some official functions it is necessary to give precedence to barristers over solicitors, there should be no systematic preference for one branch over the other. Where each branch has a representative, precedence might be determined, where necessary, by their respective number of years standing in the profession. The order in which a court hears cases should reflect the exigencies of Court business and the fair treatment of litigants and practitioners, rather than whether the advocate involved is a barrister or a solicitor. Practitioners’ access to the Bar table, or any other Court facility, should depend on the function they are performing at the time, rather than involve distinctions between barristers and solicitors.

J. DISTINCTIONS IN THE FEDERAL SPHERE

6.92 We are a State body, conducting an inquiry at the request of our State Attorney-General. It is not our role, therefore, to make recommendations about federal laws or practices which distinguish between barristers and solicitors. But in many instances the abolition of a distinction at State level between barristers and solicitors can be expected to lead to abolition, at least in relation to New South Wales practitioners, of any similar distinction at federal level. In many such instances there is at present no Federal distinction in relation to practitioners from some other parts of Australia, notably, of course, those in which all practitioners are admitted as barristers and solicitors. For example, in most states all practitioners appearing as advocates in the higher courts of their state wear wigs and gowns, and they do likewise in the higher federal courts. The fact that New South Wales barristers wear wigs and gowns in federal courts, but solicitor advocates do not, is due to a distinction drawn at the State level. The abolition of the State distinction can be expected to lead to the disappearance of the distinction at federal level also.

K. TRANSITIONAL ARRANGEMENTS

6.93 Implementation of a number of the recommendations in this chapter would require transitional arrangements in order to avoid unfairness to practitioners, clients or other people. This applies especially to our recommendations concerning training and experience requirements after admission. In

many instances the precise nature of these transitional arrangements would depend on whether a number of the other recommendations in this Report were to be implemented. The range of possible situations in which transitional arrangements might need to be devised is so great that it would be highly complex and confusing to make specific recommendations in this Report.

FOOTNOTES

Para.

6.6 1. See paragraphs 3.38-3.42.

2. See eg. Parts I and II of our Discussion Paper*, The Structure of the Profession,* and chapter II of this Report.

3. *The Structure of the Profession,* Part II, part.10.6.

6.7 1. Committee of Inquiry, *Legal Educations in New South Wales*, (NSW Govt Printer, 1979), para.1.3.

2. For full terms of reference, see Appendix I.

3. See note 6.7.1 above.

6.9 1. *See Legal Education in New South Wales,* chs.5-7.

2. *Legal Education in New South Wales,* para.6.12.6.

6.10 1. See Bar Association Rules, rule 99; and the Bar Association's Submission No.131 ("Admission and Right to Practise of Legal Practitioners"), pp.1-13.

6.11 1. Submission No.262 ("Admission and Right to Practise"), p.17.

2. Submission No.131 ("Admission and Right to Practise of Legal Practitioners"), p.12.

6.12 1. *Legal Education in New South Wales,* p.199.

2. *Ibid*., p.198.

3. *Id.*

6.14 1. On this point, see *Legal Education in New South Wales,* para.3.4.9.

2. See our Discussion Paper, *The Structure of the Profession* Part I, pp.60-67.

6.15 1. See *Legal Education in New South Wales,* paras.5.8.1-5.9.2.

2. *Ibid*., paras.5.8.4, 5.9.2.

6.16 1. *Ibid*., paras.8.7.4, 8.8.11.

6.17 1. For the powers and functions of the Supreme Court and the two Admission Boards, see *Legal Education in New South Wales,* ch.5.

6.18 1. *Ibid*., ch.11.

2. *Ibid*., paras.5.1.1, 5.5.4, 5.9.2.

3. *Ibid.*, paras.5.3.1.

6.19 1. See para.6.7.

6.21 1. Legal Practitioners Act, 1898, ss.66, 67.

2. See Law Society of New South Wales, Submission No. 262 (“Admission and Right to Practise”), p.15.

6.22 1. See Bar Association Rules, rule 97. For a general description of the pupillage requirements, see NSW Bar Association, Submission No.131 (“Admission and Right to Practise of Legal Practitioners”). p.15.

2. Bar Association Rules, rule 98.

6.23 1. See the Law Society's, Submission No.262 (“Admission and Right to Practise”), p.17, and the Bar Association’s Submission No.131 (“Admission and Right to Practise of Legal Practitioners”), pp.7-11.

2. Submission No.262, p.17.

6.26 1. See Gowans, *The Victorian Bar* (1979), pp.34-41.

6.29 1. See rule 26.

2. On this point, see paragraph 7.41.

3. See Law Society of New South Wales, Submission No. 262 (“Admission and Right to Practise”), p.21.

4. *Ibid*., p.20.

6.34 1. See Legal practitioners Act, 1898, s.11; and NSW Bar Association Submission No.131 (“Admission and Right to Practise of Legal Practitioners”), p.9. See also Barristers Admission Rules, rule 14, and Law Society of New South Wales, Submission No.80 (“Division of the Legal Profession into Two Branches”), p.22.

6.39 1. Solicitors' practices Rules, rule 3.

2. *Ibid.,* rule 11.

6.41 1. See our Discussion paper, *The Structure of the Profession,* Part I, p.65.

2. See eg. Legal Practitioners Act, 1898, s.15; District Court Act, 1973, s.43; Courts of Petty Sessions (Civil Claims) Act, 1970, s.11.

3. See eg. the sections cited in note 2 above.

6.45 1. Legal Practitioners Act, 1898. ss.40C, 40D.

2. See eg. Supreme Court Rules, Part 65, rule 8 and Part 66, rule 1(1) District Court Rules, Part 45, rule 5 and Part 48. rule 1(1).

6.48 1. See eg. *Saif Ali* v. *Sydney Mitchell,* [1978] All England Reports, Vol.1, p.1033, and Sources cited therein.

6.49 1. Legal Practitioners Act, 1898, s.21; *Morgan v. Meissner*, [1975] NSW Law Reports, p.614.

2. See *Saif Ali v. Sydney Mitchell* (note 6.48.1 above) and sources cited therein.

3. Joint Statement of the Law Society of New South Wales and the New South Wales Bar Association (1977), p.l (printed in NSW Bar Association, Submission No.194 (The Fixing and Recovery of Changes for

Work done by Legal Practitioners"), Appendix A.)

4. Bar Association Rule, rr.64, 85.

5. See Joint Statement cited in note 3 above.

6.50 1. See cases cited in *Rondel v Worsley* [1967] Weekly Law Reports, vol.2, p.1666 and in *Saif Ali v. Sydney Mitchell* (note 6.48.1 above).

2. *See Saif Ali v. Sydney Mitchell*; *Rees v. Sinclair,* [1974] New Zealand Law Reports, vol.1, p.180: *Feldman v. A Practitioner,* (1978) South Australia State Reports, vol.18, p.238.

3. See eg. *Rondel v. Worsley,* [1969] Appeal cases, vol.1, p.169, the speeches of Lord Reid (p.232), Lord Morris of Borth-y-Gest (pp.243-4) and Lord Pearce (p.267). In *Saif Ali v. Sydney Mitchell*, see the speeches of Lord Wilberforce (p.1039), Lord Diplock (p.1046) and Lord Salmon (p.1048).

6.51 1. See Baker, "Counsellors and Barristers" (1969) Cambridge Law Journal, vol.27, p.205 at 227-9.

2. For argument along these lines see eg. *Rondel v Worsley* [1967] Weekly Law Reports, vol.2, p.1666; *Saif Ali v Sydney Mitchell* (note 6.48.1 above).

6.56 1. See our Discussion Paper, *The Structure of the Profession,* Part I, pp.76, 299.

6.57 1. See our Discussion Paper, *The Structure of the Profession,* Part I, pp,76, 79-83, 299-300.

6.58 1. Part I, pp.81-82.

6.65 1. See generally Saddington, Costs (Law Book Co., 1947) ch.1; Ahern & Seibel, *Legal Costs* (NSW) (Butterworths), pp.xiii-xv, xix-xx. See also eg. Legal Practitioners Act 1898, s.22, and Supreme Court Rules Part 52; District Court Act 1973, s.122 and Rules, Part 39.

2. Consumer Claims Tribunal act 1974, s.26(1); Consumer Claims Regulations, ch.9. See also *Silver v Consumer Claims Tribunal* [1978] New South Wales Law Report, vol.2, p.313; *Thomson v Consumer Claims Tribunal* [1981] NSW Law Reports, vol.1, p.68.

6.67 1. See the Sources cited in note 6.65.1 above.

6.75 1. See our *Background Paper* -IV, pp.11-14 and 17, and the sources cited therein at pp.50-54.

6.76 1. Bar Association Rules, rule 2.

6.77 1. Submission No.264 ("Duty to Accept Work"), p.3.

2. *Ibid*., p.4.

6.78 1. See para.3.66.

6.80 1. Rule 2.k.l.

6.82 1. See, for example, Supreme Court Act 1979, s.26(2); District Court Act, 1973, s.6(2).

2. See, for example, Judiciary Act, 1903, s.51 Federal Court Act, 1976, s.6(2).

6.85 1. Principally the Family Court of Australia.

2. See eg. Hodgson, "Solicitor-Puisne Judges" (1981) New Law Journal, vol.131, p.273; and Aequalitas, "Two Classes of Judge", (1981) *Law Society Gazette* (England) vol.178, p.257.

3. See our Discussion Paper, *The Structure of the Profession*, Part I, pp.66-67.

6.86 1. See Australian Law News (Sept 1980), p.8 at 11.

688 1. See Tomasic and Bullard, Lawyers and their Work in New South Wales (law foundation of NSW 1978), Table 163. See also Law Society of New South Wales, Submission No.200 ("The Division of the Legal Profession into Two Branches"), p.11 and Appendix 6.1.

7. Restrictive Practices

A. INTRODUCTION

7.1 We begin this chapter by considering the general question of regulation of restrictive practices within the profession. We then took individually at a number of the existing restrictive practices at the Bar. We emphasise that we use the term “restrictive practice” in its correct, non-pejorative sense. The fact that a practice is a restrictive practice does not necessarily mean that it is contrary to the public interest or in any other way undesirable. The principal recommendations made in this chapter are listed as recommendations 44-48 in the Summary of Principal Recommendations at the beginning of this Report.

B. REGULATION OF RESTRICTIVE PRACTICES

7.2 There is a New South Wales Act, and common law, relating to restrictive practices, whether concerning legal services or otherwise. [1] These laws, however, are of limited scope and have little significant effect. The body of law of current importance in this context is the Commonwealth Trade Practices Act 1974, which regulates restrictive practices in many areas of trade and commerce in Australia. The Act covers restrictive practices concerning professional services, but its application to the work of lawyers in New South Wales is substantially restricted by the constitutional limitations on Commonwealth legislative power. [2]

7.3 In so far as the Trade Practices Act does apply to lawyers in this State, the provision of greatest significance in the present context is section 45 (2) (a) (ii), the general effect of which (in conjunction with ancillary provisions in the Act [1]) is to prohibit “contracts, arrangements or understandings” which have “the purpose, or would have or be likely to have the effect, of substantially lessening competition” in any market in which a party to them operates or, but for their existence, would be likely to operate. This prohibition is subject to a power in the Trade Practices Commission (with an appeal lying to the Trade Practices Tribunal) to authorise particular contracts, arrangements or understandings if it is satisfied that they have resulted, or are likely to result, “in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition” [2] that they have caused or are likely to cause.

Some Possible Changes

7.4 In our view, the basic philosophy behind section 45(2)(a)(ii) of the Trade Practices Act is appropriate for general application to the legal profession in New South Wales. Restrictive practices amongst lawyers, as elsewhere, tend to inhibit efficiency, innovation and resourcefulness. We agree with the Royal Commission on Legal Services in England that

> “a monopoly or restrictive practice should be regarded as against the public interest unless shown to serve it”. [1]

The Trade Practices Act already applies to lawyers in the Commonwealth territories, and to members of a number of other professions throughout Australia. Its application to all professions was recommended in 1976 by a Committee established by the Commonwealth Government to inquire into the Act (the Swanson Committee).

7.5 The question then arises, however, as to how the philosophy behind section 45(2) (a)(ii) can be applied in a comprehensive fashion to the legal profession in this State. The Commonwealth Parliament does not have the constitutional power to do so. A joint Commonwealth-State system would be highly complex and politically difficult especially as it is unlikely that it could reasonably be confined to regulation of legal services, rather than covering a range of other services, such as medical services,

which cannot be dealt with comprehensively under the Commonwealth's powers. The State Parliament has the constitutional power to pass a Trade Practices Act which would cover New South Wales lawyers but if it followed the Commonwealth model it would have to establish a Trade Practices Commission. The establishment of such a Commission might be justified if the Act covered a wide range of professions or other occupations, rather than only the legal profession, but difficult issues of demarcation and co-ordination with the existing Commonwealth system would then arise. In any event, consideration of such a wide-ranging proposal is beyond our terms of reference.

7.6 These difficulties are formidable. Moreover, there is the danger that if a Trade Practices Commission has responsibility for a wide range of goods and services it may lack the resources and expertise to maintain adequate regulation in the area of legal services. This applies particularly to a Commission which has to cover the whole of Australia.

A Limited Recommendation

7.7 In time, it may prove feasible to apply the Trade Practices Act approach to the legal profession, whether by State action or joint Commonwealth-State action. For the present, however, we suggest an approach which is limited in scope but nevertheless is likely to be of considerable value and is capable of early implementation. It involves the addition to the Legal Practitioners Act in New South Wales of a provision prohibiting legal practitioners from entering into, or remaining party to, an agreement or understanding which their general regulatory body (ie. the Law Society Council or the Bar Council) has declared by regulation to be one which substantially affects competition in a legal services market and which is not in the public interest.

7.8 An obvious and serious limitation of this approach is that it would not have any effect on restrictive practices which are embodied in rules made by either of the general regulatory bodies, such as the Bar Council's rules against partnerships and against accepting work without the intervention of a solicitor, upon which we comment later in this chapter. A partial reply is that changes which we have recommended in earlier chapters concerning the regulatory system, especially in relation to community participation, should reduce the likelihood of the general regulatory bodies embodying in their rules restrictive practices which are contrary to the public interest. Nevertheless, it must be conceded that undesirable restrictions may continue and Would not be caught by the approach which we are suggesting.

7.9 The main utility of the suggested approach is in relation to the growing number of associations of practitioners who are interested in particular fields of law. We described this growth in our Discussion Paper, *Advertising and Specialisation,* and we mentioned the disadvantages to the profession as a whole, and the public, which can arise from fragmentation of the profession into a number of groups of specialist associations, each adopting restrictive practices in order to deter competition from both inside and outside the group. [2] Our proposal would give the Law Society Council and the Bar (council considerable power to regulate those restrictive practices and thus to reduce the dangers of excessive fragmentation. In its response to *Advertising and Specialisation,* the Law Society has expressed strong agreement with our view that specialist associations of solicitors should remain subject to close control by the Society. [3]

7.10 The proposed addition to the Legal Practitioners Act could follow much of the wording of section 45(2) (a)(ii) of the Commonwealth Act and of the ancillary provisions in that Act concerning the public interest. [1] But our proposal differs significantly from that particular section in that, rather than prohibiting certain practices unless they obtain authorisation, it specifies grounds on which the general regulatory bodies may prohibit certain practices. This relieves practitioners from having to obtain prior authorisation in order to avoid illegal conduct a restrictive practice will only become illegal if it has been prohibited by the practitioner's general regulatory body. No doubt, the Councils would be approached on occasion for an indication of whether a proposed agreement would be likely to be prohibited. We suggest that they should be given power to give such an indication in a binding form. It maybe desirable on occasion for the two councils to confer in relation to particular restrictive practices, especially those which involve practitioners subject to different Councils.

7.11 The Commonwealth Trade Practices Act exempts practices which are specifically authorised or approved by acts or regulations. [1] We suggest a similar exemption in relation to our proposal.

C. SOME EXISTING RESTRICTIVE PRACTICES AT THE BAR

I. Introduction

7.12 We look in this section at a number of restrictive practices which presently exist amongst barristers. They prohibit or substantially restrict the following types of conduct by barristers:

Style of Practice

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

(ii) practising in partnership with other barristers;

(iii) employing, or being employed by other barristers;

Work Arrangements between Barristers and Solicitors

(iv) appearing with a solicitor as fellow advocate for the same party;

(v) attending conferences or hearings without being accompanied by the instructing solicitor or his or her representatives;

(vi) attending conferences in the office of the instructing solicitor.

At present, the first two and the last two of these practices are embodied in rules of the Bar Association, which are binding only on members of the Association. But so far as we are aware they, like the other two practices, have been adopted by all practising barristers, whether or not members of the Association. It may be argued that some of these practices would be regarded by the courts as common law obligations binding on all barristers. We consider this argument in the final section of this chapter. In this section we discuss the practices on the basis that they have no force at common law, save as a matter of contract between Bar Association members.

7.13 In our view, each of these restrictive practices is undesirable under present circumstances and in its present form. Each of them impedes the overall efficiency of the profession, with adverse consequences for both the profession as a whole and the public. We give reasons for this view when looking at the practices in turn later in this section. But three general considerations need to be taken into account in deciding what action, if any, should be taken to relax or abolish the practices. We refer to these considerations in the following paragraphs.

7.14 First, it may be argued that, despite their disadvantages, some or all of the practices are necessary to preserve the Bar. We described in chapter 3 the benefits which the Bar can provide for its members, the profession as a whole, and the public. The essence of the Bar and of its benefits is the distinctive blend of cohesion and independence which can arise in a relatively small and close-knit community of small practices. The value of preserving this essence must be borne in mind when considering possible changes to particular restrictive practices at the Bar. But this does not mean that all aspects of the Bar's present practices are desirable, nor that any change whatsoever in these practices would destroy the Bar. The nature of the Bar has changed significantly over the years, especially as a result of its recent substantial increase in size. its practices differ considerably in some respects from those of other Bars, including the English Bar from which it traces its origins. [1] Moreover, the Bar is under increasing competition from solicitors, and the adoption of our recommendations elsewhere in this Report would be likely to increase the competition. If the Bar is to remain strong, it will need to ensure that its restrictive practices, with their inhibiting effect on efficiency and innovation, go no further than is necessary.

7.15 Secondly, we have recommended in earlier chapters the abolition of a substantial number of legal and official distinctions between barristers and solicitors. If these recommendations are implemented, the adverse effects of the restrictive practices to which we have referred above might be reduced. practitioners who do not wish to practise in accordance with the restrictive practices might be able to compete on fairer terms with those who do. For example, a specialist in higher Court advocacy might be more readily able to practise in partnership, or in some other way to eschew a barrister's style of practice, than is presently the case. On the other hand, the residual effect of past legal and official distinctions would be considerable, and the under competitive advantage which they have given the Bar would be unlikely to disappear for many years, if at all. Accordingly, the restrictive practices would continue to restrict, albeit to a lesser degree, the overall efficiency of the profession.

7.16 Thirdly, there can be advantages in restrictive practices being relaxed or abolished by those people who are engaging in them, rather than by legislative action. Where it is reasonable to expect that an association will respond positively and promptly to a request for consideration of voluntary reform, it may be preferable to give the association an opportunity to do so. This applies particularly if there are many possible relaxations of approximately equal merit which could be adopted. On the other hand, if a restrictive practice is contrary to the public interest, and voluntary reform is unlikely to be introduced with reasonable speed, the legislature and the government should use such powers as they may have in order to protect the public interest.

7.17 We turn now to consider each of the practices and to canvass possible changes. We then conclude the chapter with our recommendations.

II. Acting Without the Intervention of an Instructing Practitioner

7.18 At present, a Bar Association rule prohibits its members from acting "without the intervention of an instructing solicitor". [1] There are exceptions to the rule in relation to accepting patent, trade marks and designs work on the instructions of a patent attorney, conducting a dock defence, appearing in courts martial proceedings, and providing voluntary and unpaid assistance to legal aid centres and welfare organisations. There are more extensive exceptions to the equivalent rule in England and Victoria. In England, they extend, for example, to various types of non-contentious work for local government authorities, church authorities and the chief land registrar, some types of advice work concerning defamation, and some types of work for overseas clients. [2] In Victoria, there is no rule against accepting non-contentious work directly from clients, although the practice is "not encouraged". [3]

Some Relevant Considerations

7.19 The principal purpose of the rule appears to be to develop and maintain a community of lawyers who, because they do not have to undertake preparatory work, are less likely to need extensive office staff and other resources, less likely to have extensive ties with clients and partners, and more likely to be able to concentrate on particular types of work, especially advocacy. [1] But it is clear from the exceptions referred to in the previous paragraph that the rule need not be absolute or immutable in order to create or maintain a community of this kind. In Our view, the present rule in New South Wales is unnecessarily strict, and causes substantial, even crucial, detriment to some clients. For example, clients with limited financial means may find it quite impossible to pay both an instructing solicitor and a barrister, yet their case may be simple enough to be handled competently and efficiently by the barrister alone. Some clients, such as insurance companies, may have sufficient in-house expertise and resources, including perhaps a legal department, to handle the preparatory work usually undertaken by a solicitor. Yet they cannot retain a barrister without also using a solicitor.

7.20 In our view, the benefits of the Bar community could be retained while removing some of the inefficiencies caused by the breadth of the present rule. The rule could be relaxed significantly without leading to a situation in which a substantial proportion of members of the Bar undertake large amounts of work directly from clients. We canvass some possible changes below.

Some Possible Changes

7.21 The existing exceptions in New South Wales, Victoria and England appear to stem from one or more of the following considerations:

(i) the client, or client's representative, is likely to be able to provide adequate assistance in the preparation and office work involved in the matter (eg. local government authorities (England), patent attorneys (NSW));

(ii) the client is likely to be in poor financial circumstances (eg. dock briefs (England and NSW));

(iii) the matter is of a type which is likely to be capable of being conducted efficiently without the assistance of a solicitor (eg. perusal of manuscripts for possible defamation (England) non-contentious work (Victoria)).

7.22 In our view, each of these three considerations would justify some further exceptions to the rule. But we suggest that the exceptions with the strongest claim are those which combine the second and third considerations, that is, where the client is likely to be in poor financial circumstances (or to be relying on legal aid) and the work is of a type which is commonly capable of being conducted competently and efficiently without the assistance of an instructing practitioner. Examples include matters in courts of petty sessions and certain tribunal proceedings such as social security appeals. It is important for both the Bar and the public that the Bar should not, by a rigid insistence on having instructing solicitors, price itself out of areas of work which may not be highly remunerative or glamorous but which are of great importance to many ordinary citizens. Many other possible changes could be made without threatening the existence of the Bar, particularly in relation to circumstances where the client has the resources to handle the preparatory work. One of many possible examples is acting for employer and employee organisations in industrial matters.

III. Practising in Partnership

The Practice and Its Effect

7.23 A rule of the Bar Association prohibits its members from practising in partnership "or in a practice resembling a partnership" with another barrister. [1] But the rule adds that it "does not prohibit the establishment of companies, co-operatives or other arrangements between barristers for the purpose of employing staff or otherwise organisms a floor of barristers". [2] Within the New South Wales Bar, as in Victoria and England, considerable support has been expressed from time to time for allowing barristers to enter into partnerships, but in each place the rule remains in force. [3]

Some Relevant Considerations

7.24 The principal arguments against allowing partnerships at the Bar are that conflicts of interests between partners, or between clients of different partners, call reduce a partners independence and availability by comparison with a sole practitioner. [1] These arguments are stronger in relation to large partnerships than to small ones. However, it should not be overlooked that there are usually significant financial, professional and personal links between barristers having chambers on the same floor. On the other hand, partnerships can provide substantial benefits for their members and for the public. A practitioners ability and willingness to handle particular cases, including unremunerative ones, can be enhanced by the extra resources and support available in a partnership. A partnership can provide its members with more satisfactory distribution of work and earnings over a working life, greater ease of dealing with periods of sickness and vacation, and the possibility of making better financial arrangements for retirement and for dependents.

7.25 One argument against partnerships, which is sometimes raised also in relation to the notion of employed barristers, is that, if a particular barrister has a partner or an employee, then clients or instructing practitioners cannot be sure that their work will be done by the particular barrister of their choice. [1] Several points need to be made about this argument. First, the client or instructing practitioner can obtain formal or informal undertakings about who will do the work, especially the crucial parts such as advocacy or the final approval and signing of an opinion. This sort of thing presently happens in

relation to work to be done by particular solicitors in firms. Secondly, it is commonly accepted at the present time that some research and other ancillary work may be undertaken for the barrister who received the brief by some other barrister. This practice is known as “devilling”. There is ordinarily no obligation on the barrister to notify the client or instructing practitioner whether devilling has occurred. Thirdly, it may be preferable for all concerned that the barrister relieves himself or herself of work which can be done competently by a partner or employee whose time is less expensive. This may avoid, for example, a brief being given inadequate attention by an overworked barrister, or being returned at a late stage. Barristers who delegated in inappropriate circumstances, or to incompetent partners or employees, would be likely to lose business as a result.

Some Possible Changes

7.26 The Bar would be changed fundamentally by the emergence of a number of medium sized or large partnerships. The distinctive blend of independence and cohesion would be lost. But the position would be different if the present rule against partnerships was relaxed by the Bar Council to allow the formation of partnerships of no more than, stay, three members. Many of the benefits of partnership could be obtained without sacrificing independence and ready availability. indeed these latter qualities might he enhanced. We do not anticipate that many practitioners would wish to form a partnership of a kind which would experience such conflicts of interest as to reduce substantially the amount of work which they Could accept. However, if this risk were considered to be substantial, the rule could provide that the Bar Council may disallow the formation of a particular partnership if it considers that in all the circumstances the partnership would gravely prejudice the availability of expert legal assistance in a particular field. [1] An example could arise if two Queen’s Counsel specialising in copyright matters went into partnership with each other.

IV. Employment at the Bar

The Practice

7.27 Although the position is not clear, it is arguable that barristers in New South Wales are free to employ other barristers on a part-time basis, or for a particular task, or for some types of work. [1] This is in addition to the traditional use of devils, which does not create an employment relationship. There is a practice, however, amongst barristers that they do not employ barristers on a full-time and permanent basis to handle the broad range of barristers’ work including advocacy. It is the restriction on this type of employment with which we are concerned here.

Some Relevant Considerations

7.28 The principal arguments against employment of barristers are similar to those which we have mentioned in relation to partnerships, namely loss of independence and availability. [1] In some respects, these arguments are stronger here than in relation to partnerships, because the obligation on an employed practitioner to conform to the wishes of an employer may be greater than the mutual obligations between partners. In addition to the impact on individual practitioners, the effect on the Bar would be substantial if barristers began to employ large numbers of other barristers, forming large practice units. Again, the objections to such a development are similar to that which we mentioned in relation to large partnerships. A further argument, which we discussed above in relation to partnerships, is that if a barrister has an employed barrister, clients and instructing practitioners cannot be sure that the work will be done by the barrister of their choice. All of these arguments are stronger where a barrister, or partnership of barristers, employs a large number of employees, than where only one or two are employed.

7.29 There are, however, several arguments which must be weighed against those mentioned in the previous paragraph. First employment amongst solicitors, and in other professions, is not found to be necessarily incompatible with the exercise of individual professional responsibility. Employed solicitors presently undertake many tasks, including advocacy, of the same type as those undertaken by barristers. Secondly, by employing other barristers, barristers could share their workload and thus increase their efficiency and their availability for work of a kind which calls for their particular skills.

Thirdly, employment of barristers would also make it easier for some people who have the ability, but not the financial resources, to get established at the Bar. At present, the financial obstacles to entry to the Bar are very substantial.

Some Possible Changes

7.30 The introduction of an unrestricted right to employ other practitioners might put the essence of the Bar at risk. A more attractive possibility is for the Bar Council to allow each practitioner who is subject to its governance to employ one other such practitioner at any one time. in the case of partnerships, this would mean a maximum of one employee per principal. An alternative, or additional, restriction is to confine each such employee to a maximum of, say, three years' employment. This restriction would have the aim of increasing opportunities for practitioners to gain experience as employees before trying to establish themselves as principals.

V. Appearing with Solicitors

The Practice

7.31 Despite solicitors' statutory rights of audience, the Bar Association is apparently of the view that barristers should not appear with a solicitor advocate for the same party. [1] In Victoria and Queensland the bar associations have specific rules to that effect. [2]

Some Relevant Considerations

7.32 Experience both in this State and elsewhere demonstrates that practitioners outside the Bar can perform competently as advocates. if they are competent and the client wishes to have them appear in addition to a barrister, we see no good reason why, as a general practice, barristers should refuse to do so. Two major reasons may be advanced for the abolition of the existing practice. First, its abolition Would assist advocates outside the Bar to gain experience and expertise in the same way as do many junior barristers, namely by acting as a junior to leading advocates. Secondly, in many cases it would be appropriate and economical for the instructing practitioner to act also as the junior advocate. Often it is valuable for a Queen's Counsel or other leading advocate to have the assistance of a junior advocate to keep notes of evidence, to act as a sounding board in determining the conduct of the case, and perhaps to examine or cross examine some of the less important or less difficult witnesses. In many instances this role could be filled competently by the instructing practitioner, especially if that practitioner has a modicum of experience of advocacy. [1] In this way, the additional expense of involving a third practitioner to act as the junior advocate can be avoided.

A Possible Change

7.33 In our view, the Bar Council should adopt a clear policy to the effect that practitioners subject to its governance are free to appear as fellow advocates (whether as seniors or juniors) with practitioners who are subject to the governance of the Law Society Council.

VI. Attendances with Solicitors

The Practices

7.34 We consider here the remaining two of the six practices mentioned at the outset of this discussion of existing restrictive practices at the Bar. The practices are embodied in the following rules of the Bar Association:

> "33. A barrister, except in compelling circumstances, or with the permission of Council
>
> a. shall require the attendance of his instructing solicitor or the solicitors clerk at any conference with a lay client and with any witness and shall also require the attendance of such solicitor or clerk at the hearing of any proceedings in which he is briefed;

b. shall not interview persons in gaol in the absence of his instructing solicitor or his clerk.

34. A barrister shall not hold a conference (including a compulsory conference in a Family Law matter) in a solicitor's office or the premises of a client or witness except in the following circumstances:

a. Where the conference is held more than 40 kilometres from his Chambers; or

b. Where it is essential for the proper instructing of counsel that access should be had to articles or documents that cannot practicably be removed to the barrister's chambers; or

c. Where the age, infirmity of disability of the solicitor, lay client or witness would cause hardship to the aged, infirm or disabled person attending chambers."

Some Relevant Considerations

7.35 The arrangements required by rule 33 may be appropriate in many situations. For example, considerations of good sense would often lead a barrister to require the attendance of a solicitor at a conference if there were reason to fear that the client's instructions might later be repudiated, or if it were important for the solicitor to be aware of what was said at the conference so that he or she could take necessary follow-up action or give continuing or consequential advice to the client. But this hardly supplies a reason why the barrister and solicitor cannot be trusted to decide between them whether the solicitor s attendance can be dispensed with in a particular case, with a consequent saving to the client. The same applies to the attendance of a solicitor at court. In many circumstances such attendance may be essential or advantageous; it may even be required by the court. In other circumstances, it may only be a pointless inconvenience to the solicitor and an additional cost to the client. It may be argued that unless there is a general and strong rule it may be difficult for the barrister to secure the solicitor's attendance when necessary. But, in our view, this possibility does not outweigh the disadvantages of requiring all solicitors to attend even when it is not necessary to do so. The exceptions for "compelling circumstances", and for particular cases in which the Bar Council approves departure from the rule, do little to reduce the excessive breadth of the restrictions in rule 33.

7.36 Similar comments can be made about rule 34, concerning attendance at solicitors' offices or certain other premises. The exceptions are more generous than in rule 33, but they remain excessively narrow. Even where there is no question of infirmity, impracticability of removing documents, or travelling distances in excess of 40 kilometres, the balance of convenience amongst those involved in a conference may point very clearly to the conference being held in the solicitor's office or at the premises of a client or witness. To hold the conference it another location may cause great and unnecessary inconvenience to solicitors, clients or witnesses, and may waste considerable time and money. In our view, these disadvantages of the rule in its present strict form outweigh such weight, if any, as should be given to fears that barristers may engage in touting at solicitors' offices. And whatever the motivation for rule 34 may be, one effect of it is to increase the unfortunate and undesirable tendency for barristers to be regarded by some lawyers and members of the public as the "senior" branch of the profession.

Some Possible Changes

7.37 A possible response to the adverse effects of these two rules is to abolish them entirely, leaving work arrangements in these respects to the discretion of the practitioners involved and the wishes of the client. It might be considered desirable to indicate some guidelines for the exercise of this discretion, stressing that they are advisory only and framing them in accordance with the basic principle that instructing practitioners and those being instructed should attend together only when it is necessary or when the client so wishes. In relation to the location of conferences, the balance of convenience amongst those involved in the conference is obviously an appropriate method for determining the location. If that method does not point clearly to any particular location, the conference could be held at the office of the more senior practitioner (measured by years since admission to the profession).

VII. Conclusion

7.38 In preceding paragraphs we have pointed out disadvantages which arise from a number of existing restrictive practices at the Bar, some of which are embodied in Bar Association rules. We have canvassed possible changes aimed at relaxing or abolishing them. We do not recommend that specific legislative action should be taken at this stage in relation to any of these restrictive practices. We have two principal reasons for not doing so, both of which we mentioned earlier in this chapter. [1] First, if other recommendations in this Report are implemented, notably those concerning abolition of legal and official distinctions between barristers and solicitors, the adverse effects of these restrictive practices are likely to be reduced and might not be so serious as to justify legislative or governmental action. Secondly, we think it preferable in all the circumstances to give the Bar Council an opportunity to reconsider these practices with a view to voluntary relaxation or abolition. We have been informed that the Bar Council and the Law Society (council have established a joint Working Committee to consider the views which we expressed in relation to these practices in our Discussion Paper, *The Structure of the Profession.*

7.39 Accordingly, we recommend that the Bar Council should be requested to reconsider the practices which we have discussed in this section, with a view to their voluntary relaxation or abolition. The reconsideration should have regard to, amongst other possible changes, those which we have mentioned in paragraphs 7.21, 22, 26, 30, 33 and 37 above.

7.40 If our recommendations concerning abolition of legal and official distinctions are not adopted, or do not substantially reduce the adverse effects of the restrictive practices tinder consideration, or if the Bar Council does not respond positively and promptly in reconsidering those practices, it may prove desirable to take specific legislative action.

D. COMMON LAW RESTRICTIONS ON BARRISTERS

7.41 As we said earlier, it may be argued that the courts would regard all barristers in private practice as obliged by common law not to act without the intervention of an instructing solicitor, and not to practise in partnership or as an employee. We know, however, of no court decision to such effect. [1] Moreover, both in New South Wales and elsewhere, exceptions to the Bar rule against acting without an instructing solicitor have been introduced by the relevant bar association without obtaining the approval of any court. This applies, for example, to the substantial exception in the English rule, concerning the acceptance of work directly from overseas clients. And committees considering whether to relax or abolish the rule against partnership have not referred in their reports to any need to obtain court approval if such a change were to be made. [2] We have recommended that there should cease to be a separate category of practitioner admitted as a barrister. If this recommendation is implemented it will be even more difficult to argue that any category of practitioners is prohibited by common law from acting without an instructing solicitor, or from practising as a partner or employee.

7.42 Whether or not there are presently any legal obligations of the type to which we have referred, we consider that there should not be in the future. This applies not only to restrictions which might go to legal practice in general, but also, for example, to those which might relate to appearing before the Supreme Court. At present, solicitors can appear in the Supreme Court without an instructing practitioner, and can do so when practising as a partner or employee. We see no justification for the courts applying stricter rules to other practitioners.

7.43 If doubts arise as to the power of the Bar Council to relax or abolish these restrictive practices without obtaining the approval of the Supreme Court, the relaxation or abolition should be effected by regulation. We have explained earlier our differing views about regulation-making powers in relation to practitioners who are subject to the Bar Council. [1] If Mr Gressier's view were adopted, the Bar Council would have power to make regulations, subject to the approval of the Governor, in relation to the restrictive practices under discussion here. If the views of Mr Disney and Judge Martin were adopted, that power would lie in the Governor.

FOOTNOTES

Para.

7.2 1. For the present position in NSW, see, eg. Monopolies Act, 1923, s.6(1); *Attorney-General v. Brickworks Ltd,* (1941) State Reports (NSW), vol.41, p.72: Stalley, "The Control of Monopoly-New South Wales", (1956) University of Queensland Law Journal, vol.1, p.377. For the position in Australia generally, see, eg. Donald and Heydon, *Trade Practices Law* (Law Book Co., 1978): Pengilley. *Trade Associations, Fairness and Competition* (Law Book Co., 1981).

2. See eg. Donald and Heydon, *Trade Practices Law,* ch.2; Heydon, "Lawyers' Fees and The Trade Practices Act, s.45", [1976] Australian Current Law Digest, p.27.

7.3 1. See esp., ss.4, 6, 45.

2. See s.90(6) and (7).

7.4 1. Report, (Cmnd.7648, 1979), para.21.30.

2. See eg. *Association of Consulting Engineers of Australia,* [1979] Australian Trade Practices Reporter, p.15606.

3. Trade Practices Act Review Committee, Report (Aust. Govt. Publishing Service, 1976), para.10.31.

7.9 1. pp.16-18.

2. p.37-58.

3. See Submission No.412 ("Reply to the Law Reform Commission of New South Wales Discussion Paper No.5 on Advertising and Specialisation").

7.10 1. Ie. s.90(6) and (7).

7.11 1. S.51(1).

7.14 1. See eg. the difference between the Bar rules in England and New South Wales in relation to acting without the intervention of an instructing practitioner, and in relation to interviewing witnesses.

7.18 1. Rule 26.

2. *See Code of Conduct for the Bar of England and Wales,* rule 50, Annexes 3,14,17; Boulton, *Conduct and Etiquette at the Bar* (Butterworths, 6th ed., 1975), pp.8-17.

3. Gowans, *The Victorian Bar* (Law Book Co., 1979) pp. 17, 49.

7.19 1. See eg. NSW Bar Association, Submission No. 80 ("Division of the Legal Profession into Two Branches"), p.8; Hutley J, Submission No.90, p.8.

7.21 1. See notes to paragraph 7.18.

7.23 rule 16.1.

2. Rule 16.2.

3. See NSW Bar Association, Submission No.197 ("Partnerships and the Incorporation of Legal Practices"): Victorian Bar News (1975), No.11, p.5; Report of the Templeton Committee to the Bar Council (1969) reprinted in the Royal Commission on Legal Services, Report, (1979, Cmnd.7648), vol.11, p.75; and see also the Report of the Royal Commission on Legal Services, vol.1, pp.462 465.

7.24 1. See eg. NSW Bar Association, Submission No.197 (“Partnerships and the Incorporation of Legal Practices”), pp.5-7; contrast Glass J., Submission No.72, p.3. See also the Report of the Templeton Committee (note 7.23.;).

7.25 1. See, eg. NSW Bar Association, Submission No.197 (“Partnerships and the Incorporation of Legal Practices”), p.7.

7.26 1. For a somewhat similar suggestion, see the submission by Justice to the Royal Commission on Legal Services, p.24.

7.27 1. On barristers obtaining the assistance of other barrister, whether by employment or otherwise, see NSW Bar Association rule 11; Boulton, *Conduct and Etiquette at the Bar*, (6th ed, 1975), pp.30-31; Halsbury’s Laws of England (4th ed, 1973), vol.3, para.1204.

7.28 1. See eg. Law Society of New South Wales, Submission No.219 (The Solicitors and Barristers Branches of the Profession”), p.18.

7.31 1. In relation to Queen's (counsel appearing with solicitors as juniors, see Bar rule 62.

2. See Gowans, The Victorian Bar (1979), ruling 10. Queensland Bar Association, *Collection of Ethical Rulings* (1977), ruling 30.

7.32 1 Our survey of the South Australian profession found that in 95% of instances where two counsel appeared for a party in the Supreme Court the junior counsel was the instructing practitioner or was from the same practice as the instructing practitioner *(Background Paper -IV*, p.116).

7.38 1. See paragraphs 7.14, 7.15.

7.41 1. In *Doe d Bennett v. Hale* (1850) 15 QB 171 it was held that barristers are not under a common law obligation to act only upon the instructions of a solicitor. There is no subsequent decision of a court to the contrary. *Re T* (1981) All England Reports, vol.2, p.952, and *Re T.* (1981) All England Reports, vol.2, pp.1105, are relevant in this context, but it should be noted that they are decisions of visitors of the Inns of Court, not of a Court of law.

2. See 7.23.3.

7.43 1. See paragraphs 4.26 and 4.30.

8. The Way Ahead

8.1 The recommendations which we have made in this Report constitute a substantial step, but only a first step, towards the reform which we consider necessary in the regulatory system and structure of the legal profession. We have sought to recommend changes which will encourage other changes to come about through the actions of the profession itself and of the people involved in the modified regulatory system which we have proposed. It is essential that the momentum for reform which has developed within the Law Society during the course of our inquiry should be maintained. We note that the current President of the Law Society shares this view. [1] It is important that a similar momentum should develop within the Bar Association.

8.2 Implementation of the recommendations in this Report should not be seen as an end of a period of reform, but rather as a first phase. There are, in particular, a number of areas of central importance in which events may prove it desirable, indeed essential, to go further than we have recommended in this Report. They include such issues as

(i) whether the public members of the Law Society Council and the Bar Council should be given voting rights;

(ii) whether the Law Society Council and the Bar Council should continue to be general regulatory bodies as well as being the governing bodies of professional associations; and

(iii) whether there should be one general regulatory body for the whole profession.

We mention other issues of this kind in our recommendations at the end of this chapter. On some of these major issues we may have erred on the side of caution; we are confident that we have not gone too far.

8.3 In the light of these considerations, it is essential that the regulation and structure of the profession be kept under active and continuing review, not only by the profession itself but also by people outside the profession. A major contribution to this continuing review should be made by the Law Society Council and the Bar Council (including, in particular, their public members), and by the Public Council on Legal Services. In addition, we think it desirable that the Government should adopt a general principle of regular, periodic reviews of the regulation and structure of the profession. We note here the recommendation of the Professional Organisations Committee in Ontario to the effect that the Government should conduct a review every ten years of each of the professions (including law) which fell within the Committee's terms of reference. [1] In recommending periodic reviews the committee said, amongst other things:

"We have recommended a number of changes in the legislation governing these professions: whatever recommendations may be implemented, the effects will have to be assessed at some future time. Furthermore, changing conditions will undoubtedly give rise to issues which have not confronted us". [2]

8.4 In our view, the requirement to hold a periodic review, and the frequency with which it should be held, should be specified by statute, even if the statute is somewhat vague about the exact nature of the review and of the body or bodies by whom it is to be conducted. We suggest that the review should be held every five years, subject to a proviso that a review need not be held if the Attorney General reports to Parliament that, in his or her opinion, special circumstances make it undesirable to do so. The public members on the governing bodies, and the Public Council on Legal Services, should play a prominent role in the review, but there should be a special review committee set up for the purpose by the Attorney General. The committee should have only a few members, and should be composed in such a way as to be, collectively, independent of both the profession and the Government. The review need not be

lengthy or exhaustive, but in recommendation 51 we list a number of issues which, in our view, should be given particular attention in the first review and perhaps also in subsequent reviews. That recommendation, and other recommendations arising out of the views expressed in this chapter, are listed as recommendations 49-5 1 in the Summary of Principal Recommendations at the beginning of this Report.

FOOTNOTES

Para.	
8.1	1. See Law Society Journal (1981), p.782.
8.3	1. Report (Ontario, 1980), pp.64-65.
	2. *Ibid*., p.64.

9. Queen's Counsel

A. THE DISCUSSION PAPER

I. Introduction

9.1 In the Discussion Paper, *The Structure of the Profession,* we discussed in some detail the Queen's Counsel system in this State and we made suggestions for change. For the most part, we do not repeat the discussion here, but we summarise the suggestions in later paragraphs. Before doing so, we do, however, make some preliminary comments.

9.2 In this State, with very few exceptions, the people appointed as Queen's Counsel have been practising barristers. In general, people who have served the law with distinction in the academic field or in the paid service of government have not been appointed. Some barristers who are also politicians have been appointed but, in general, their appointments appear to have been on the basis of their service to the law rather than other forms of public service. No solicitor has been appointed in this State.

9.3 Two main reasons prompt junior barristers to apply for appointment as Queen's Counsel. First, there is a desire for advancement. In general, Queen's Counsel enjoy higher incomes and status than junior counsel, and many judicial appointments are made from their ranks. Secondly, there is a desire to change the nature of their work. In general, Queen's Counsel conduct the heavier types of litigation and the more responsible advisory work; they devote their time to the preparation and conduct of relatively few cases and are thereby enabled to concentrate more intensively on each case. Part of this second reason calls for some explanation. A barristers work is divided between advocacy, advice in conference, and paper work. The last mentioned includes the drawing and settling of documents required for the purpose of litigation, the writing of legal opinions and the drafting of legal documents. For many junior barristers, this paperwork is laborious, demanding, and less remunerative than the work of advocacy. A Queen's Counsel is required by rule of the Bar Association to refuse much of it, and hence some successful junior barristers apply for silk for the purpose of lessening the burden of their paperwork.

9.4 From the viewpoint of lay clients, a most important consequence of a barrister being appointed a Queen's Counsel is that thereafter, for a large range of work, they cannot retain that barrister unless they retain a junior barrister as well. This "two-counsel" rule, as it is commonly called, is the subject of a combination of rules of the New South Wales Bar Association.

9.5 Until 1966, another rule of the Association (the "two-thirds" rule) had the effect that where two counsel were briefed, it was a breach of the rule for the junior counsel to charge less than two-thirds of the senior counsel's fees. That rule was rescinded in 1966. Since then, the rule has been that in general the junior must not mark a fee more than two-thirds of his or her leader.

II. Outline of Suggestions

Appointment to the Rank of Queen's Counsel

9.6 We suggested in the Discussion Paper:

(i) that the Queen's Counsel system should continue for the time being, but not necessarily in its present form;

(ii) that 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 in the academic field, or in the field of government, commerce, industry or the like;

(iii) that a practising barrister and solicitor should be eligible for appointment as Queen's Counsel, whether or not he or she practises in the stvle of a barrister, or as a sole practitioner, or in a firm;

(iv) that the qualities required for appointment as Queen's Counsel should be outstanding integrity, competence, and deep learning in the law;

(v) that, in making appointments, preference might be given to people who practise as advocates but provision should also be made for people who are of outstanding eminence in other fields of practice.

The Two-Counsel Rule

9.7 As to the two-counsel rule, we suggested that the rule should be replaced by a rule to the effect of the following:

(i) as to non-contentious work, a Queen's Counsel should have an unfettered choice of undertaking the work with or without a junior;

(ii) as to appearance as an advocate, a Queen's Counsel should be entitled to 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:

refrain from making it a condition of his or her acceptance of the instructions that a junior also be instructed; or

decline to accept the instructions;

(iii) as to contentious written work (pleadings, and other documents necessary for the conduct of litigation) the rule should be the same as for advocacy, save 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 entitled to do the associated written work without a junior, but if the Queen's Counsel is to appear in the matter with a junior, then he or she ought not do the associated written work without the involvement of a junior.

(iv) 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 delivery of his or her instructions. If a Queen's Counsel agrees to appear without a junior and subsequently decides that the use of a junior would be justified, it should be open to the Queen's Counsel and the instructing solicitor to agree that a junior should be instructed.

We also suggested that, for the purposes of the rule, "junior" should include a person who practises in the style in which barristers now practise or a person who practises in any other style, whether as a partner in a firm, as a sole practitioner, or as an employed practitioner. Nothing in our suggestions with respect to the two-counsel rule was intended to have the effect that the "cab-rank" rule should oblige a Queen's Counsel to appear without a junior counsel.

The Two-Thirds Rule

9.8 In addition, we outlined possible approaches to the matter of the fees which should be charged by junior counsel in cases where they appear with senior counsel.

A Different View

9.9 In Part 11 of the Discussion Paper, *The Structure of the Profession,* one of us, Mr Conacher, expressed reservations about some of the suggestions made in Part I of the Paper. In short, he said:

(i) that only practising barristers should be eligible for appointment as Queen's Counsel; and

(ii) that, though he did not join in the suggestions with respect to the two-counsel rule, an attempt should be made to see whether further exceptions to the rule could be formulated so as to escape the occasional wastefulness of the present arrangements. [1]

III. Responses to the Discussion Paper

The Bar Association

9.10 In its reply to our Discussion Paper, the Bar Association said:

> "The Bar is ... disappointed with the way the majority's Report deals with Queen's Counsel. To date, this title is synonymous in the public's mind with eminence as a barrister. To use the title to honour solicitors or academics would take away the significance that it now has. This is not acknowledged as an objective. The Bar has no objection to senior solicitors or academics being given some special title, indeed, the title 'Professor' already fits the bill for the latter. If solicitors and academics want honorific titles, they should develop their own. Moreover, care must be taken to see that the position of silk is not eroded by unthinking tinkering with the two counsel rule. There may, perhaps, be some room for redefining the exceptions to the rule -this can be safely left to the joint working committee of the Bar and Law Society -but beyond this one is in danger of jeopardizing the Queen's Counsel system which, as even the majority report suggests, works well." [1]

The Law Society

9.11 The submission of the Law Society with respect to our Discussion Paper was to the effect of the following-.

(i) that, at the present time, the Society has no objection to the system of appointment of some barristers as Queen's Counsel out of the ranks of eminent practising advocates;

(ii) that eligibility for appointment as Queen's Counsel should be confined to practising barristers;

(iii) that it should be left to the instructing solicitor, his or her client, and the Queen's Counsel concerned to determine in the particular circumstances of each case whether two or more counsel are in fact required; and

(iv) that a decision to retain junior counsel with a Queen's Counsel should not be made for a client by an internal rule of the profession. [1]

Other Responses

9.12 The suggestions with respect to Queen's Counsel evoked very few other responses from individuals or organisations. Newspaper comments, however, generally supported the suggestions made in Part I concerning the "two-counsel rule".

Professional Attitudes Generally

9.13 Although the Bar Association, the Law Society, and some individual practitioners and judges, are opposed to many of the suggestions about Queen's Counsel made in Part I of our Discussion Paper, it is, we think, necessary to note that the profession does not speak with one voice on these matters. As we said in that Part, Mr Justice Hutley of the Court of Appeal has spoken critically of the practice of confining the rank of Queen's Counsel to persons in active practice. [1] In England, the report of the Royal Commission on Legal Services ("the Benson Commission") said that it could see no serious objection to the continuation of the practice in that Country of appointing some non-practising barristers as "QC honoris causa" for distinguished service to the law. [2]

9.14 In the context of the two-counsel rule, the profession is clearly divided. As noted already, the Bar Association concedes that "there may, perhaps, be some room for redefining the exceptions to the rule".

This view is shared by at least Mr Conacher and Mr justice Needham of our Supreme Court. [1] On the other hand, the Law Society wants the rule to be abolished. Two judges of the Court of Appeal, Mr Justice Glass and Mr Justice Samuels, have also spoken in favour of abolition. [2] In England, the Monopolies and Mergers Commission recommended in 1976 that the two-counsel rule in that country be abolished and this was done in 1977. In 1979, the Benson Commission recommended that steps be taken to ensure that the abolition of the rule is observed. [3]

B. THE ISSUES

1. Introduction

9.15 The main issues with respect to the Queen's Counsel system in this State can be grouped under three heads, namely:

(i) the class of eligible appointees;

(ii) the two-counsel rule; and

(iii) the fees payable to junior counsel in two-counsel cases.

We consider these issues in the three following sections of this chapter. We do not consider the question whether the Queen's Counsel system should be abolished. in this context, we recommend that the question should not be examined until other recommendations made in this Report are considered and, if implemented, their effects are evaluated.

II. Class of Eligible Appointees

9.16 For the purposes of this discussion we assume the implementation of the recommendation made earlier in this Report that separate admission should be abolished. Accordingly, we are speaking of people who have been admitted as barristers and solicitors, not as barristers or as solicitors.

9.17 The Bar Association says that, to date, the title of Queen's Counsel is "synonymous in the public's mind with eminence as a barrister". [1] In saying this the Association is clearly referring only to eminence as a *practising* barrister and it is equally clear that the Association would confine the class of eligible appointees to the people who comprise the small group of eminent practising barristers. The Law Society speaks in somewhat similar terms when it says that "the eminence that now attaches to the rank of Queen's Counsel has been generated by those who have practised as advocates and therefore eligibility for the rank should be confined to practising barristers". On this view, it seems that if the most eminent advocate in the State were a person practising in the style in which solicitors now practise, the Society would deny him or her eligibility for appointment as Queen's Counsel.

9.18 Neither the Bar Association nor the Law Society has given detailed reasons for confining eligibility to practising barristers. On the other hand, Mr Conacher did so in Part II of *The Structure of the Profession.* His reasons are these:

(a) The rank gives to those within it a high standing both in the profession and in the community as a whole.

(b) The high standing has been earned by the barristers bearing that rank and those that have gone before them, and they have earned it by eminence in practice as barristers.

(c) The rank is not a mere rank of honour. It carries important practical consequences in the shape of risk of failure, limitation of work and higher fees. In this I believe it stands alone amongst ranks and dignities in the gift of the Crown.

(d) If a solicitor is appointed a Queen's Counsel, what will be the practical consequences? I do not find any in chapter 8 [of Part I of *The Structure of the Profession*]. It would be an empty title, but drawing on the high reputation gained by those for whom it had substantial practical consequences.

(e) The position is the same for lawyers, whether barristers or solicitors, who have gained eminence in government service, in the academic world or elsewhere outside ordinary legal practice. An empty title drawing on the reputation gained by others.

For these reasons, the rank would not cast the same reputation on its bearers as it does today. The reputation would be spread more thinly to cover others who had taken no risk and for whom there were no practical consequences. In that sense the rank would be degraded. That would be so however eminent in their own fields the new class of appointees might be." [1]

9.19 We do not consider that enlarging the class of eligible appointees is likely to degrade the rank of Queen's Counsel. Whether this happened or did not happen, would depend on the number, and the quality, of the people appointed to the rank. If great numbers of less than eminent people were appointed, the rank would certainly be degraded. On the other hand, we think it unrealistic to suggest that the Executive Council would make so many, or so many unsuitable, appointments, that this would happen.

9.20 Likewise, we do not consider that the appointment of a person practising in the style of a solicitor would be without practical consequences. This is not the case in South Australia where some Queen's Counsel are partners in firms of barristers and solicitors. These Queen's Counsel do not, for example, accept instructions from a lay client without the intervention of another practitioner, except where the lay client is already a client of the firm and the work is work which a Queen's Counsel might properly undertake. We do not say that a rule of this kind should be adopted here for Queen's Counsel who are subject to governance by the Law Society Council. Rules, or conventions, appropriate to this State can be expected to develop in due course. We would expect moreover, that these Queen's Counsel would not undertake work inappropriate to their new status. Also, we would expect that some fee scales would be amended to provide for higher fees for work done by them. These matters are, of course, now hypothetical. But we believe that it is highly unlikely that the appointment as Queen's Counsel of a person practising in the style of a solicitor would be without practical consequences.

9.21 We are influenced by the fact that appointment as Queen's Counsel in this State is not now confined to practising barristers who are eminent advocates. Appointment as Queen's Counsel is sometimes made of practising barristers who are less than eminent advocates but who have nonetheless attained eminence for their deep learning in particular fields of law. We see no compelling reasons why a person with eminence of this kind should not be eligible for appointment as Queen's Counsel, whether he or she practises in the style in which barristers now practise, or in any other style. This is particularly so if, as we have assumed in this chapter, in future all practitioners will be admitted as barristers and solicitors.

9.22 To this point, we have spoken of eligibility in the context of practitioners. We turn now to non-practitioners and to the notion of appointment as Queen's Counsel *honoris causa.* We refer, in particular, to academic lawyers and to lawyers who use their legal knowledge and skills not in the practice of the law but in the course of their work for government, industry, commerce, and the like. If these people give distinguished service to the law, we think it right that they should not be denied public recognition of their service. The English concept of "QC honoris catisa" seems to us to be an appropriate form of recognition, and we adopt, in the context of New South Wales, the following words of the Benson Commission:

"In every year one or two people are appointed QC honoris causa. They are not practitioners, but have served the law with distinction, either in the public service or academic field, and are honoured accordingly by appointment to the rank of QC Because such appointments serve no practical purpose, practitioners sometimes call the QC honoris causa an 'artificial silk'. But this does not indicate any serious objections to their appointment and we can see none. Organisations representing barristers in commerce, finance and industry suggested to us that more such appointments should be made from amongst their number. It is best that a professional

appointment of this kind should be confined, as a general rule, to the purposes of practice, but we can see no reason why appointments honoris causa should be confined to one class or another. We observe only that, if such appointments are to be made, it should be for distinguished service to the law and not to any other field of endeavour. It may well be that barristers employed in commerce, finance and industry perform distinguished service for those purposes rather than for the purposes of the law. If this be so, their merit should be recognised in some other way. But if in the course of his work a salaried barrister performs distinguished service to the law, we see no reason why it should not be recognised by appointment to the rank of QC." [1]

Recommendation

9.23 In short, we recommend as follows:

(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.

III. The Two-Counsel Rule

9.24 Arguments for and against abolition of the existing two-counsel rule were given in Part I of *The Structure of the Profession* and it was suggested there that a new rule should be substituted for the existing rule. In considering the arguments for abolition of the existing,, rule, we commented on, amongst other things:

(i) its anti-competitive effect: it prevents competition between Queen's Counsel and junior counsel in certain areas of work, for example, the drafting and settling of pleadings, and it prevents competition between Queen's Counsel in the sense that, if it were not for the rule, some Queen's counsel might well be prepared to appear without a junior and thereby gain a competitive advantage over other Queen's Counsel who are not prepared to do the same;

(ii) its inappropriateness in many cases: there are many types of cases where it may be appropriate to instruct a Queen's Counsel but inappropriate or unnecessary also to instruct a junior counsel, for example, quantum appeals in the Court of Appeal and appeals involving a pure question of law on which there is little authority which requires analysis.

In considering the arguments against abolition of the rule, we rejected, amongst other things, arguments based on:

(i) the threat that abolition would pose to the continued existence of the two-tier system of counsel;

(ii) the adverse effects on the training of junior barristers which would flow from abolition of the rule; and

(iii) the additional costs to litigants which might also flow from abolition of the rule.

9.25 The substance of our suggested new rule is stated in paragraph 9.6 above. It does not conform with the view of either the Bar Association or the Law Society. Contrary to the wishes of the Law Society, the question whether two counsel should be retained in a particular case would not be left entirely to agreement between the client, the solicitor, and the senior counsel; the question would still be governed by a professional rule. And, contrary to the wishes of the Bar Association, the rule would not say, in effect, that Queen's Counsel may not appear without a junior counsel except in specified circumstances. The most significant change would be in the application of the new rule to a Queen's Counsel's appearance as an advocate. In short, if, in the opinion of the Queen's Counsel, the use of two counsel was not justified, he or she should appear without a junior or decline to appear at all. In addition, the Queen's Counsel would not be entitled to assume that a junior counsel would also be instructed.

9.26 We have reconsidered our suggested new rule in the light of the submissions we have received. It is, however, still our view that the advantage of the existing rule to the personal interests of the junior and senior Bar are far greater than the advantages to the public, and that its overall disadvantages outweigh its advantages. We still believe that a new rule should be substituted for the existing rule.

9.27 In saying this, we are not overlooking the suggestions made by Mr Conacher, the Bar Association, and others, that an attempt should be made to see whether further exceptions to the rule can be formulated. The Bar Association, for example, sees this task as being one for a joint working committee of the Bar and Law Society. As we have mentioned earlier, such a committee was established after the publication of our Discussion Paper, *The Structure of the Profession.* But, in our view, the rule has more disadvantages than advantages, and grafting some more exceptions on to it will not remedy its failings.

Recommendation

9.28 We recommend as follows:

(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.

“Junior Counsel”

9.29 As sub-paragraph (6) of the preceding paragraph indicates, where, in this context, we use the expression “junior counsel” we do not intend it to apply only to a person who practises in the manner in which barristers now practise. We mean that a junior may be a person who practises in the style in which barristers now practise or a person who practises in some other style, whether in a firm or elsewhere. In our view, the identity and style of practice of the junior should be a matter for the client and the instructing practitioner subject, of course, to the junior being appropriately qualified to appear in the forum in question. The junior could also be the instructing practitioner.

9.30 This view of “junior counsel” is not novel. In a submission to us, the Western Australian Bar Association said:

> “In this State the junior is, as often as not, Counsel provided by the instructing Solicitor’s firm, and as often as not is the instructing Solicitor.
>
> If one accepts the proposition that, generally speaking, a case sufficiently important to warrant the engagement of Queen’s Counsel warrants the use of two Counsel, and that in any event, the presence of a representative of the instructing Solicitor is necessary, one can see that the lay client’s interests are often best served by the instructing Solicitor acting as junior, a clerk being available as “runner” should one be required. The advantages are that the instructing solicitor acting as junior has a good knowledge of the case, has been involved in getting it up for trial, and generally speaking, in this State, is or should be a competent advocate. The complaint that a junior is often an expensive and non-productive luxury is thereby avoided, the Solicitor’s presence being necessary in any event. When a junior from the independent Bar is in fact engaged to assist Senior Counsel it is the decision of the Solicitor, acting in the best interests of his client, that he be so engaged, and the obvious conclusion is that the complexity and characteristics of the particular action require an independent junior. In practice, a junior from the Independent Bar is only engaged where it is considered by the Solicitor to be necessary...” [1]

The position in South Australia seems to be much the same as in Western Australia. Our survey in 1978 of the South Australian profession showed that in 95% of the occasions when two counsel appeared in the Supreme Court in 1977, the instructing practitioner, or a person from the same practice, acted as junior counsel.

IV. The Fees of junior Counsel when Appearing with Senior Counsel

9.31 As noted in paragraph 9.5, until 1966, the effect of the then relevant rule of the Bar Association was that it was a breach of the rule for a junior to charge less than two-thirds of the fee charged by his or her senior; since 1966, the effect of the present rule in the case of an unmarked brief, is that the junior must not, in general, charge more than two-thirds. In practice, according to taxing officers to whom we have spoken, the effect of the present rule seems to be little different from that of its predecessor.

9.32 There is, we believe, little need to demonstrate the undesirability of a practice with respect to unmarked briefs that one person receives a fixed proportion of another person’s fee, whatever the eminence of the other person, whatever the size of the fee, whether the first person assumes much or little responsibility, and whether the first person does a great deal of work, little work, or, perhaps, no work.

9.33 The convenience and ease of the proportional approach are clearly recognisable, but these considerations do not justify its general undesirability. The question is how best to formulate an appropriate rule. Possible approaches include the following:

(a) to amend the rule for the purpose of making it more specific: it might provide, for example, that where two counsel are instructed and the junior receives an unmarked brief, the junior shall 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 at the Bar; and

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

(b) to provide by rule of court that a tee marked by junior counsel in the circumstances outlined in (a) above may, on the application of the instructing practitioner, be taxed in the same manner as a solicitor and client bill may now be taxed; [1] or

(c) to encourage the Law Society and Bar Association to embark upon a campaign of encouraging instructing practitioners to mark or agree junior's fees in two-counsel cases and to encourage the Society to provide instructing practitioners, with advice and assistance in relation to such fees.

Approaches of this kind are not, of course, mutually exclusive.

9.34 The particular question of fees for junior counsel when appearing with senior counsel is part of the general question of legal costs and fees. It would, tor example, be difficult to justify adopting the second or third approaches outlined above, solely in relation to junior's fees in two-counsel cases. Nonetheless the second approach has been considered in more detail earlier in this Report, [1] and, if so minded, the Law Society and the Bar Association could pursue the third approach at any time.

Recommendation

9.35 We favour adoption of the first approach and we recommend as follows:

(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 junior's fees in two-counsel cases and to provide them with advice and assistance for that purpose.

FOOTNOTES

Para.	
9.9	1 See, generally, *The Structure of the Profession,* Part II, para. 12.5.
9.10	submission No.401 ("Reply to the Law Reform Commission's paper on the Structure of the Profession"), pp.8-9.
9.11	1. Submission No.402 ("The Structure of the Profession"), pp.41-45.
9.13	1. *The Structure of the Profession,* Part I, p.258: and Submission No.90, p.18.

9.14 1. Mr Justice Needham, Submission No.33, p.3.

2. Mr Justice Glass, Submission No.72, p.2; Mr Justice Samuels, Submission No.113, p.12.

3. (1979, Cmnd.7648), para.33.86.

9.17 1. See para.9.10.

2. Submission No.402, ("The Structure of the Profession"), pp.41-42.

9.18 1. *The Structure of the Profession*, Part II, para.12.5.

9.22 1. (1979, Cmnd.7648), para.33.92.

9.30 1. Submission No.146, p.6.

9.33 1. See paras.6.65-6.73.

9.34 1. *Id.*

10. Court Dress

A. INTRODUCTION

The Present Position

10.1 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 different type of wig (on ceremonial occasions), gown, and bar jacket from that which is worn by other barristers. Solicitors, however, do not wear special court dress when they are appearing as advocates in the higher courts or on any other occasion.

10.2 The Bar Association is of the view that barristers should continue to wear their present court dress. [1] It appears, however, that there may be a considerable difference of opinion within the Bar on this question. A referendum conducted by the Bar Council in 1975 produced the following result: [2]

	Barristers favouring Abolition	Barristers favouring Retention
Wig	136	212
Gown	75	273
Bar Jacket	126	222
Wing Collar	170	178
Bands (bibs)	133	215

In 1977 Sir Garfield Barwick, then Chief justice of the High Court of Australia, referred to this referendum and said:

> "I think the day will come when the wigs will go. That is a matter of time. I doubt whether the day will come when the robes will go.... I think there is value in at least the robe." [3]

10.3 The Law Society is of the view that, whether barristers or solicitors, "advocates appearing in all the Courts of this State should not be permitted to wear wigs and gowns, other than on ceremonial occasions." [1] It says, however, that "this question has produced a great deal of division of opinion amongst members of the solicitors' branch". [2] The Public Service Board of New South Wales, an employer of some hundreds of solicitors and non-practising barristers, submitted to us that "wigs, gowns and/or distinctive dress should not be worn by barristers or other advocates". [3] We refer later in this chapter to a number of other views concerning court dress.

10.4 The present position concerning court dress in Queensland is similar to that in New South Wales. In all other parts of Australia, and in New Zealand, the special court dress is similar to that which is worn in New South Wales but all practitioners are admitted as "barristers and solicitors" and wear the same

court dress when appearing as advocates. in those Federal courts and tribunals where special court dress is worn, it is worn by barristers (but not solicitors) from New South Wales and Queensland, and by all practitioners from other States or Territories who are appearing as advocates. In England, the position concerning barristers' court dress is similar to that in New South Wales, but, unlike their New South Wales counter-parts, solicitors wear gowns and bands when appearing in some of the courts where they have a right to be heard. The solicitors do not wear wigs, and their gowns and bands are different from those of barristers. [1]

10.5 The question of court dress was considered recently in New Zealand by the Royal Commission on the Courts. [1] The Department of justice in New Zealand submitted to that Commission that wigs and gowns should no longer be worn. The Law Society, however, said that opinion in the Profession was divided and it expressed no firm view on the matter. The majority of the Royal Commission recommended that the present court dress in the higher courts should be retained, but the minority considered that only gowns should be retained. All members of the Commission were of the view that special court dress should not be introduced into the proposed District Courts, and this recommendation has been adopted. Neither of the recent Royal Commissions on Legal Services in the United Kingdom made any recommendations in relation to court dress. [2]

Our Discussion Paper

10.6 In Part I of the Discussion Paper, *The Structure of the Profession,* we suggested that wigs, bar jackets, wing collars and neck bands should cease to be part of the special court dress worn by barristers. [1] One of us also favoured abolition of the gown. We suggested that solicitors appearing as advocates should wear the same court dress as barristers. But we said that we saw no objection to a Queen's Counsel continuing to wear a gown of different material and design from that worn by other practitioners.

10.7 In Part II of that Paper, our colleague, Mr Conacher, suggested that for barristers the gown, but not the wig, should be retained and the bar jacket, collar and bands should not be required. [1] He suggested that the Law Society should be asked to consider, in consultation with the judiciary, whether solicitors should wear a special dress in the superior courts. If the Society favoured a gown, consideration should be given to a gown of common pattern for barristers and solicitors, but with some distinction to show that the wearer is either a barrister or a solicitor. Mr Conacher favoured the retention of a distinctive gown for Queen's Counsel.

10.8 In response to the Discussion Paper, the Law Society referred to the views which it expressed to us in its earlier submission (see paragraph 10.3 above). The Society said that whilst it "does not regard court dress as an important practical issue [it] is of the view that in relation to court dress there should be no distinction between barristers and solicitors." [1] The Bar Association's response to our Paper did not express any views on the question of court dress. Other responses to our Paper vaned from favouring abolition of all special court dress, including gowns, to a preference for retaining status quo. Some agreed that gowns should be retained; others considered that, although barristers' dress should remain the same, solicitors might wear gowns when appearing in some courts. We mention in the following paragraph some examples of the spectrum of opinion.

10.9 An editorial in the Daily Mirror said: "let's scrap these preposterous wigs and gowns;" [1] while an editorial in *The Australian* "commended" our "suggestion to phase out wigs and butterfly collars". [2] The Australian Legal Workers Group supported abolition of the wig. [3] Mr Justice Needham submitted that, generally speaking, the present position should be retained, although he approved of barristers changing the present collar and bands for "other similar garb" and of solicitors wearing gowns, different from those worn by barristers, in the higher courts. [4] The Liberal Party (NSW Division) submitted that "the role played by barrister's wigs and robes as an expression of the ideals of professional independence and respect for the law [should] be recognised and, accordingly, [should] be retained". [5]

B. SOME RELEVANT CONSIDERATIONS

10.10 There are a number of considerations to take into account when deciding whether wigs, gowns or the other accoutrements of present court dress should be retained. We refer to them under the following headings:

(i) formality, solemnity and tradition;

(ii) neatness, uniformity and fairness;

(iii) expense, inconvenience and discomfort;

(iv) the position of solicitor advocates.

Formality, Solemnity and Tradition

10.11 Various points of view on these issues have been summarised in a submission to us by the Law Society. The Society says that

> "there is a considerable body of opinion [amongst solicitors] that supports the traditional view that the wearing of wigs and gowns in Court is part of the historical tradition and ceremony of the Courts and has contributed to the dignity of the profession and the respect for both judges and members of the profession." [1]

The Society refers also to the argument that

> "in criminal cases the mystique generated by wigs and gowns adds that extra 'something' which helps to maintain and continue respect of the Court, particularly by criminals." [2]

10.12 On the other hand, the Society says that

> "there is a considerable body of opinion [amongst solicitors] that feels that the wearing of wigs and gowns or other distinctive dress is archaic and outmoded and cannot be supported in present day society." [1]

When commending the suggestion in our Discussion Paper that wigs and wing collars should be abolished, an Editorial in *The Australian* said:

> "There was a time when they served a purpose, when the law needed a mystique and to be seen as a higher, greater-than-thou authority.... In the 1980's the greater need is for law to be seen as contemporary and understanding." [2]

Another argument against the degree of formality and solemnity induced by the present dress of barristers was referred to in the Public Service Board's submission to us. in the Board's view:

> "The wearing of distinctive dress by barristers results in an unnecessary and (at least, at times) undesirable ceremonial and formal atmosphere in the courts. Such an atmosphere may operate to the disadvantage of witnesses." [3]

10.13 It is relevant to note here the views of Lord Justice McKinnon:

> "Wigs are not really part of the legal uniform, as robes are. Wigs are simply a fashion in head dress that was once universal for gentlemen, and was given up by all of them except bishops, judges and barristers, towards the end of the eighteenth century. Bishops, with the permission of William IV, gave them up in 1832, judges and barristers retain them still.... It is because I have thought that a wig is only a masculine fashion, and not a part of the forensic uniform, that I have never felt any scruple upon a very hot day, in removing my wig and inviting counsel to do the like." [1]

It should also be mentioned that two justices of the High Court of Australia have made a general practice of sitting without a wig, [2] although we know of no instances of barristers being invited to remove their wigs in the High Court. In the judicial Committee of the Privy Council, which remains for some Australian cases the highest court of appeal, the judges wear suits without any wig, gown or other special accoutrements.

Neatness, Uniformity and Fairness

10.14 The Bar Association says that barristers

> "should be required to wear the same dress so as to avoid distraction as a means of reducing the personal quality which one counsel may have to the prejudice of his opponent. A good looking advocate should not have, thereby, an unconscious advantage. A wig serves to conceal what may be otherwise regarded as an unattractive or conversely an overly attractive feature. Gowns do the same to multi-fareous clothing choice, covering the garish, the vulgar, the ill-taste and the superb raiment of a person of wealth and taste." [1]

10.15 If the present requirements concerning special court dress were abolished, it might become necessary to have detailed rules about the style and colour of clothes which advocates are permitted to wear. This might lead to invidious and somewhat risible distinctions being drawn between different colours, styles and fashions.

Expense, Inconvenience and Discomfort

10.16 The cost of the present court dress of barristers is substantial. For example, for Queen's Counsel the cost of a new wig, bar jacket and gown is in the vicinity of $950, $250 and $375 respectively. For other barristers the cost is in the vicinity of $400, $180 and $150 respectively. Shirts with detachable collars are no longer commonly worn as part of every day business dress, even by barristers, and therefore most barristers must buy special shirts which they wear only when in court. On many occasions the superior court in which a barrister is appearing is close to his or her chambers, and the barrister is permitted to wear court dress while walking between court and chambers. But there are many other occasions, especially in relation to the District Court appearances, where barristers must carry their bulky dress to court and change into it in the court precincts.

10.17 The disadvantages to which we have referred in the previous paragraph would be exacerbated if the present court dress for barristers was required also of solicitors. First, the expense would be a special barrier to those solicitors who might be competent and willing to appear as advocates in the higher courts on an occasional basis, but who do not wish to appear in those courts on a regular basis. Secondly, the District Court is more likely than the Supreme Court to be an appropriate venue for solicitor advocates, yet, as we have mentioned, the inconvenience of transporting bulky court dress applies especially to appearances in the District Court, which sits in many places throughout the State.

10.18 The present court dress can be uncomfortable, especially in hot weather. Some judges remove their wigs on extremely hot days, and they may invite those appearing before them to do likewise. But we understand that this practice remains rare, and depends entirely on the particular judge involved. It is relevant to note here that, according to Sir Bernard Sugerman:

> "Israel is a country in which the British tradition has been carried on but with the qualification that those ingredients which are uncomfortable in a hot Country -the wig and the starched collar and bands have been dropped; so that the uniform common to both judges and counsel is a black gown worn over a dark suit with a black tie, but without head covering of any kind." [1]

The Position of Solicitor Advocates

10.19 The Law Society submitted to us:

> "Many solicitors... feel that the wearing of wigs and gowns by barristers and judges may operate to discriminate against solicitors who appear in Court in opposition to barristers. Whilst this question is one which has generated a lot of discussion and division of opinion, it is, in the Law Society's view, a matter of little real importance in relation to the community at large." [1]

Despite the latter comment, the fact that barristers' special dress "could operate to the possible disadvantage of the client of a solicitor advocate" [2] was one of the principal reasons which the Society gave for submitting that wigs and gowns should be abolished.

10.20 The Public Service Board, having referred in its submission to the distinction in dress between barristers and solicitor advocates, said:

> "It may be that the wearing of [the present distinctive dress] by barristers results in some reluctance on the part of some solicitors to appear in the role of an advocate." [1]

The distinction may also contribute to the view held amongst lawyers and clients that barristers constitute a "senior branch" of the profession, and are necessarily more learned and skilful, at least in relation to the conduct of cases in court, than any solicitor. We referred to these perceptions, and their undesirable consequences, earlier in this Report. [2] We also referred earlier to the view expressed to us by a number of solicitors, and by some court officials, that some judges are less favourably disposed towards solicitor advocates than towards barristers. [3] The likelihood of such unfair discrimination occurring is increased by the present distinctions in court dress, indeed, if those distinctions were removed it might become common for judges to be unaware whether an advocate appearing before them is a barrister or a solicitor.

10.21 We recommended in Part II of this Report that all practitioners should be admitted under a common title, such as "barrister and solicitor". [1] Implementation of this recommendation would remove the basis for the present distinction in court dress between barristers and solicitors. We also looked at a number of existing distinctions between barristers and solicitors, and we recommended that, even if separate admission is retained, each of these distinctions should be abolished. Implementation of these recommendations would substantially weaken the arguments for retaining a distinction in relation to court dress.

C. OUR VIEWS

Barristers and Solicitors

10.22 In our view, the present distinction between barristers and solicitors in relation to court dress is inappropriate and unfair. It is an undue deterrent to solicitors who are competent and willing to act as advocates in appropriate cases, and it increases the possibility of some judges, jurors and others being less favourably disposed towards solicitor advocates than towards barristers. These consequences can have adverse effects for clients as well as for their solicitors. And whether or not unfairness actually results, many people whose advocates are solicitors, not clad in special dress, cannot but feel that they are disadvantaged if their opponents are represented by barristers who are clad in special dress, particularly when the judge is in similar attire.

10.23 We recommend that the court dress which is required, or permitted, to be worn by advocates appearing before a particular court should not vary according to whether the advocate is a barrister or a solicitor. Nor should it vary according to whether the advocate is subject to the governance of the Bar Council or of the Law Society Council. This recommendation applies not only to whether or not a practitioner wears a particular item of dress, such as a gown, but also to distinctions in relation to the design or colour of a particular item.

The Gown

10.24 In our view, significant advantages can be obtained by requiring advocates to wear a gown. It hides inappropriate dress and thus reduces the need to prescribe what must not be worn. It reduces the

likelihood of unfair distinctions being drawn 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 and thus can be of assistance to other participants in the proceedings. At least in some courts, however, these advantages may be outweighed by the need to avoid excessive formality. At present, for example, gowns are not worn by advocates in courts of petty sessions, the Family Court of Australia, the Land and Environment Court, or in most tribunals.

10.25 We recommend that all practitioners should be required to wear gowns when appearing in the courts of this State 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. This recommendation should be read in the light of the views expressed by one of us, Judge Martin, in paragraph 10.32 below.

The Wig

10.26 In the course of our Legal Profession Inquiry we have seen much evidence of people questioning the relevance and value of many aspects of the legal system. in our view, the wearing of wigs in court contributes towards this tendency to regard the law, and lawyers, as out of touch with the thinking and needs of the community. Moreover, the wearing of wigs can increase the likelihood of some witnesses being so overwhelmed by the formality and strangeness of court proceedings that the accuracy and comprehensibility of their testimony is impaired. Furthermore, wigs are expensive, especially from the point of view of practitioners who are starting their career or who do not appear regularly in the superior courts, and they are uncomfortable for many people, whether in hot or cold weather.

10.27 We have recommended that gowns should continue to be worn. We consider that they provide sufficient formality and solemnity, and a sufficient degree of neatness and uniformity, in the court dress of advocates. Accordingly, we recommend that the wearing of wigs by advocates appearing in the higher courts of this State should be discontinued.

Other Items of Dress

10.28 For many people wing collars are uncomfortable and their use involves a change of shirt before and after appearing in court. Neither they nor neck bands serve any useful purpose. As with wigs, they can contribute to a view that the judicial system, and the legal profession, is to some extent irrelevant to contemporary society. We recommend that wing collars and neck bands should cease to be worn by advocates in court.

10.29 Bar jackets are neat, but they are not cheap and their use requires practitioners to change from their ordinary work-day dress, no matter how neat and formal that dress may be. If bar jackets, but no wing collar or neck bands, were required, the ordinary work-day dress of most male practitioners would enable them to change into court dress without significant inconveniences but the same is less likely to be true for female practitioners. We do not regard it as necessary to require the wearing of the bar jacket in order to ensure that advocates dress in a manner appropriate to the seriousness of court proceedings. Accordingly, in view of their disadvantages, we recommend that bar jackets should no longer be worn by advocates in the courts of this State.

Queen’s Counsel

10.30 The recommendations which we have made apply to Queen’s Counsel as much as to other advocates. But we see no objection to Queen’s Counsel continuing to wear a gown of different material and design from that which is worn by other advocates.

Federal Courts and Tribunals

10.31 As a State body, it is beyond our function to make recommendations in relation to the court dress to be worn by advocates appearing in Federal courts or tribunals.

A Further Step?

10.32 Judge Martin joins in the above recommendations on the ground that their implementation would constitute a substantial improvement on the present position. But he considers that a greater improvement would result from abolishing the gown as well as the wig and other items of the present court dress. He considers it important that lawyers should cease to wear headdress and outer wear fashionable in a past century and carrying the suggestion that justice can only be done by the initiates of an ancient mystery. On the contrary they should dress in the ordinary fashion of the day, as litigants, witnesses and jurors do, in order to show that the doing of justice, though an arduous task in which training may help greatly, is nevertheless a down-to-earth one free from mystique and not incapable of being understood by ordinary people. He agrees with that committee of the Auckland District Law Society [1] which wrote that courts do not exist to provide archaic pageants but to resolve disputes and every effort should be made to show that they are modern, business-like places rather than ones removed from the mainstream of society.

FOOTNOTES

Para.

10.2 1 Submission No.80 (“Division of the Legal Profession into Two Branches”), p.136.

2. New South Wales Bar Notes, (May, 1977), p.5.

3. Oral Evidence to the Royal Commission on Legal Services, (London, 1977), p.7.

10.3 1. Submission No.219 (“The Solicitors and Barristers Branches of the Legal profession”), p.18.

2. *Id.*

3. Submission No.88, p.1.

10.4 1. See Royal Commission on Legal Services, Report (1979, Cmnd.7648), paras.33.95-33.96.

10.5 1. See Royal Commission on the Courts, Report (Government Printer, Wellington, 1978), pp.272- 275.

2. But see the discussion in the Report of the Royal Commission on Legal Services in England and Wales (Cmnd.7648), paras.33.94-33.100.

10.6 1. Part I, chapter 9.

10.7 1. Part II, pp.371-372, 448-449.

10.8 1. Submission No.402 (“The Structure of the Profession”), p.44.

10.9 1. 16th June, 1981, p.11.

2. 16th June, 1981, p.7.

3. Press Release, 15th June, 1981.

4. Submission No.405, pp.19-23 and Appendix.

5. Submission No.404, p.5.

10.11 1. Submission No.219 (“‘The Solicitors and Barristers Branches of the Legal profession”), p.18.

2. *Id.*

10.12 1. *Id.*

2. 16th June, 1981, p.7.

3. Submission No.88, p.1.

10.13 1. “Wig or Biretta: Miss Buzfuz - or Portia” (1945) Law Quarterly Review, vol.61, p.12 at 12.

2. Mr Justice Murphy and Mr Justice Starke.

10.14 1. Submission No.80 (“Division of the Legal Profession into Two Braches”), p.130.

10.18 1. “The Wearing of the Wig”, (1973) Australian Law Journal, vol.47, p.39.

10.19 1. Submission No.219 (“The Solicitors and Barristers Branches of the Legal Profession”), p.18.

2. *Id.*

10.20 1. Submission No.88, p.1.

2. Paragraphs 3.55, 6.90-6.91.

3. Paragraphs 6-88-6.89.

10.21 1. paragraphs 4.7-4.9.

2. Chapters 4 and 6.

10.32 1. Committee on public Issues, “Lawyers, Wigs and Gowns” (1979).

11. A Separate View

A. INTRODUCTION

11.1 This chapter is written by R D Conacher, Deputy Chairman of the Commission. I have particular views, sometimes amounting to dissent, on many of the recommendations made elsewhere in this Report. In sections B to F of this chapter I discuss some matters at length:

B. -Common admission

C. -Government regulation

D. -The Public Council on Legal Services

E. -Professional councils: powers on sufferance

F. -Public members; conflict of interest

G. -Queen's Counsel

H. -Court Dress

In the last section, section 1, comments are given on the recommendations of the majority one by one.

11.2 In this chapter, in relation to a structure in which a lawyer is admitted as a barrister and solicitor, I use "barrister" to mean a lawyer holding a practising certificate from the Bar Council and "solicitor" to mean a lawyer holding a practising certificate from the Council of the Law Society. I use "member services" to cover what I think the majority mean by "trade union activities" and also to cover social activities.

11.3 I have put views on many matters on which I differ from my colleagues in Part 2 of this Commission's Discussion Paper (No.4) on the Structure of the Profession. in general I shall not go over the same ground in this chapter.

11.4 The majority find an explanation for much of the difference of opinion between them and me in relation to existing distinctions between barristers and solicitors. They find the explanation in their adherence to a basic principle. I take the inference to be that I do not adhere to the principle. The principle is that if a distinction is to be drawn between practitioners in relation to a particular matter, it should be based on a criterion which corresponds to the justification for making the distinction. I am not aware that I have put forward anything inconsistent with the proposition. I think that our differences depend on other things. As regards the Bar, I gave emphasis in the Discussion Paper on Structure of the Profession to its character as a professional group of lawyers having a common commitment by law to limited functions in legal practice and bound by canons of conduct evolved over a long period and still evolving as appropriate to that commitment. I then saw, and I still see, much to the public advantage in that character of the Bar. I then saw in the proposals of the majority in the Discussion Paper much that was destructive of that character. Now that we have the recommendations of the majority in this Report, I see much in them destructive of both barristers and solicitors as professional groups, and injurious to the public interest. I have in mind especially the intervention of government in the regulation of lawyers in the extreme form put forward by Judge Martin and Mr. Disney, and the precarious nature of such self-regulation as would be permitted to the professions. I see these things in the way that I have described but, so far as I can gather from the Report, the majority or some of them do not, or regard them as outweighed by other considerations where I do not. It is there that the major reason for our differences is to be found.

B. COMMON ADMISSION

11.5 The recommendations are that a lawyer should be admitted under a common title, for example, as a barrister and solicitor, not as a barrister alone nor as a solicitor alone. [1] But admission as barrister and solicitor would not confer a right to practise in either character. In order to gain a right to practise, the lawyer would have to get a practising certificate. [2] Prima facie he would be under the governance of the Council of the Law Society and he would go to that Council for a practising certificate. [3] But he would be at liberty to elect to be governed by the Bar Council and to undertake to comply with its rules: if he did so, he would get a practising certificate from the Bar Council and would be under its governance. [4]

11.6 Two consequences of the adoption of the recommendations would be, I think, that lawyers who elected for governance by the Bar Council would be called barristers and collectively would be called the Bar, and that lawyers who did not, or at least lawyers who got practising certificates from the Council of the Law Society, would be called solicitors. Some confusion would no doubt arise by lawyers describing themselves on letter paper and so on as “barristers and solicitors” but, if I am right about the consequences I have suggested, the description would become misleading and would sooner or later be regulated or prohibited.

11.7 The consequences in paragraph 11.6 are, I think, likely, notwithstanding paragraph 4.23 and recommendation 5. There the majority recommend that neither “barrister” nor “solicitor” should be used alone. It is a strong thing to attempt to control language, and a stronger thing to suppose that such an attempt would prevail over general ideas of fitness of language in the future, It is a strange thing to recommend the denial prospectively to Parliament, the courts, the Government and regulatory bodies such language as they respectively may from time to time think appropriate. The majority do not offer alternatives. “Barrister and solicitor holding a practising certificate issued by the Council of the Law Society” might, I suppose, be used instead of “solicitor”.

11.8 The recommendations have something in their favour. They would reduce to insignificant size the problem of the non-practising barrister. A lawyer might get the name “barrister” in common language by getting a practising certificate from the Bar Council, but he would have to pay for the practising certificate, and the Bar rules or regulations might require an undertaking to practise. If he did not get a practising certificate from either professional council, he might with truth be known as a “non-practising barrister and solicitor”: he would be in some degree under the governance of the Council of the Law Society, but he and his kind would hardly be more numerous or more troublesome than the solicitors today who do not hold practising certificates.

11.9 The recommendations are in some ways open to objection. Common admission is opposed both by the Council of the Law Society and by the Bar Council. On this question, the views of the professional councils, elected as they are by the overwhelming majority of barristers and solicitors, are entitled to great weight. But a scheme like that now recommended has not been put to either professional council: we, do not know what they would say.

11.10 Apart from the views of the professional councils, there is much in the traditions of solicitors, and of barristers, traditions of high professional standards of honesty, ability and service, which may not automatically be carried over to the new description. But the experience in Victoria suggests that the risk is not great.

11.11 In our Discussion Paper on the Structure of the Profession I stressed the public utility of the Bar as a body of lawyers sharing a commitment by law to the limited functions of advocacy and advice, acting in general only on the instructions of solicitors. Under the recommendations that commitment would go, but a like commitment would presumably arise under rules or regulations of the Bar Council. The changed nature of the commitment would not, I think, be important.

11.12 Also in our Discussion Paper on the Structure of the Profession, I considered the case there made by the majority for common admission. I thought that that case was not made out, but I had one reservation. The reservation was that the change to common admission would tend to take away one basis for distinguishing between barristers and solicitors as higher and lower branches of the profession. Any change with that tendency was, I said, in that respect a change for the better. On that question I thought that the views of the Law Society should carry great weight. [1] We now have the Law Society’s reply to the

Discussion Paper. The Society takes the view that the present divided structure of the profession should be retained. [2]

11.13 The recommendations may indeed give a new and firmer basis for the idea of higher and lower branches. At present such an idea cannot find a foothold in the laws relating to the legal profession. But under the recommendations of the majority it would be a prescription of law that there would be taken out of the general mass of lawyers under the governance of the Council of the Law Society those, and those alone, who elected for governance by the Bar Council. The recommendations in this respect would set up barristers as a group having by statute a distinction unique to the group.

11.14 I was for a time attracted by a recommendation for common admission, coupled with other possible recommendations. The other possible recommendations would have been for:

(a) recognition by Parliament of the Bar Council as the governing body of barristers in a manner comparable to that already accorded to the Council of the Law Society;

(b) grant to the Bar Council of statutory power to make regulations generally with respect to the professional practice, conduct and discipline of barristers, subject to approval by the Governor;

(c) recognition by Parliament of the part played by rules and rulings of a professional council, not made formally as regulations;

(d) matters relating to complaints, discipline and professional standards generally in accordance with the recommendations in our Report No.2 (I say generally" because I do not discuss here the points in the recommendations in that Report on which I am in a minority).

11.15 But the recommendations and proposals in this Report on the subjects mentioned in paragraph 11.10(a), (b) fall short of what I had thought possible and are accompanied by other recommendations and proposals that, in my view, are wrong in principle. In the end, I think that the problem of the non-practising barrister can be dealt with by a scheme for practising certificates, whether or not common admission is adopted. I think that there is a risk that the problem of barristers and solicitors being regarded as higher and lower branches may be given a little new life by the recommendations. The change to common admission would make it easier to saddle both branches with such things as a common scheme for compulsory insurance, and to saddle barristers with a liability to contribute to the Solicitors' Fidelity Fund. Otherwise, as I see it, the change to common admission would be only change for the sake of change, or change for the sake of a theory unrelated to realities. For these reasons I dissent from the recommendation for common admission.

C. GOVERNMENT REGULATION

11.16 On the question of power in the Governor to make regulations, Judge Martin and Mr Disney take one view, Mr Gressier another.

11.17 Judge Martin and Mr Disney propose that the Governor should have unqualified power to regulate in respect of any matter the professional practice, conductand discipline of all barristers and solicitors holding practising certificates. [1] Judge Martin and Mr. Disney anticipate that the Governor would exercise the powers which they propose only:

(a) usually, in pursuance of recommendations made by any one of the Bar Council, the Council of the Law Society, or the Public Council on Legal Services; and

(b) unusually, without any such recommendation.

But they do not propose that the powers of the Governor should be limited in these respects by statute.

11.18 The proposal is that the executive government should have direct statutory power to regulate the day to day practice and conduct of all practising barristers and solicitors. The proposal strikes at the root of

professional independence and goes against the overwhelming weight of informed opinion in the common law world. For example in 1977 “Justice”, the British section of the international Commission of jurists, said that “... a legal profession that is, and is seen and believed to be, independent of State control and influence is a cornerstone of the Rule of Law and the preservation of human rights, as the experience of many countries - including this one - has amply demonstrated”. [1] The proposal is, I believe, without precedent in any place in the common law world outside New South Wales. [2] The legislation in South Australia and Queensland referred to by the majority in paragraph 4.30 does not give to the Governor powers of regulation even remotely resembling those in sections 86(1)(a)(iv) and 87(1) of the Legal Practitioners Act, 1898.

11.19 The proposal is in contradiction of opinions expressed in this Commission’s Discussion Paper on the General Regulation of the Legal Profession published in 1979, opinions then having, as I understand it, the concurrence of Judge Martin and Mr Disney. It is worth recalling part of what was there said:

> “A form of professional Organisation which exposed the regulation of a profession to ill-considered or ill-motivated interferences by the Government of the day would inevitably prejudice its independence in those areas where that independence is important. This is particularly true of the legal profession. It is of the essence of freedom under law that the Government of the day is itself subject to the law, not merely in theory, but in practical accountability, enforceable before the courts if necessary. It is essential that citizens should have access to lawyers who can invoke the law on their behalf in this way, and that such lawyers should not be exposed to vindictive reaction by the Government, either directly, or through a facade of Government controlled regulation. This applies no less whether the Government is motivated by its own interests, or by pressure from vocal expressions of public opinion.” [1]

As the Chairman at that time of this Commission said in a letter to the Sydney Morning Herald, “the discussion papers do not propose handing control of the Bar, or the legal profession, to the Government. They explicitly reject this course”. [2] Even in the present Report Judge Martin and Mr Disney join in saying that it would be undesirable for Government nominees to constitute a substantial proportion of the membership of any general regulatory body of the profession. [3] Yet they propose, not merely that government nominees should be on the professional councils, but that the executive government itself should have statutory power to regulate every aspect of professional practice, conduct and discipline. They do not give reasons for departing from the views expressed in the Discussion Paper except, as I understand it, such reasons as may be found in paragraphs 3.22-26, 28-30, 4.12, 13, 29, 30.

11.20 The proposal that the Governor should be given unqualified general power to regulate the practice, conduct and discipline of barristers and solicitors should be rejected.

11.21 Mr Gressier thinks that the Governor should have power to make regulations:

> (a) to regulate in respect of any matter the professional practice, conduct and discipline of barristers, but only on recommendation by the Bar Council; and
>
> (b) to regulate in respect of any matter the professional practice, conduct and discipline of solicitors, but only on recommendation by the Council of the Law Society. [1]

11.22 On Mr Gressier’s view, the powers of the Governor referred to in paragraph 11.19(a) and (b) would have the same subject matters as should the powers of the Bar Council and the Council of the Law Society respectively. [1] It seems to me that the powers of the Governor would be redundant: whatever the Governor could do on the recommendation of a professional council the professional council could itself do with the approval of the Governor. Further, the grant to the Governor of direct powers of regulation is bad in principle and a step along that path should not be taken, even with the requirement of a recommendation by a professional council.

11.23 The majority recommend that the Governor should have power to make regulations in relation to specific matters, such as those mentioned in the Legal Practitioners Act, 1898, s.87(1)(a)-(d). [1] The

question is, I think, nota question of general regulation and is beyond the scope of this Report. it should be dealt with in relation to particular matters as occasion arises.

D. THE PUBLIC COUNCIL ON LEGAL SERVICES

11.24 The Public Council would, in the eyes of the majority, be a supplement to the public members of the professional councils (see section F below) in providing community participation in the regulatory system, so as to provide adequate protection for the public interest, and would enable a wide range of community viewpoints to be involved in the regulatory system. [1] It would have functions like those proposed for the Community Committee on Legal Services proposed in this Commission's Discussion Paper on General Regulation. [2]

11.25 The Public Council would, at the outset, [1] have 9 members. Of these, 3 would be chosen by the Attorney General. Five of the remaining 6 would be chosen by bodies the majority of whose members are themselves chosen by the Attorney General or by "the Minister". [2] It seems that the Public Council would be dependent on the government for its funds. [3] Given this government dominance, it is within the power of the government to contrive that the Public Council is responsive to the wishes of the government. Chapter 5 must therefore be read as using "community participation" in a special sense.

11.26 The Public Council on Legal Services would have functions of 3 kinds:

(a) to review and investigate the regulation of the legal profession and, in the language of the recommendation, the delivery of legal services; [1]

(b) to advise on the regulation of the legal profession and the delivery of legal services; [2] and

(c) to nominate 3 members of each professional council. [3]

11.27 In its functions of review, investigation and advice the Public Council would in the view of Judge Martin and Mr Disney, rank equally with the Bar Council and the Council of the Law Society as a body on whose advice the governor right act in making regulations regulating in respect of any matter the professional practice, conduct and discipline of practising barristers and solicitors. [1]

11.28 In the same functions, it would be a specific concern of the Public Council to keep under continual review as matters of central importance questions of whether the professional councils or either of them should be deprived of their regulatory functions, and whether a single governing body for all lawyers should be set up. [1]

11.29 I think it possible that some sort of advisory committee, created by one or both of the professional councils or otherwise created, and having demonstrated its responsibility and capacity, could well be an aid to the professional councils. That is the lesson of the experience of the Citizens Advisory Committee in the District of Columbia. [1] But the Public Council recommended by the majority is a very different matter. It is potentially a body merely responsive to the wishes of the executive government and has a major function in keeping always under review the question whether the professional councils should be deprived of their functions as governing bodies. The recommendations seem to me to have a tendency to surround the professional councils in an atmosphere of hostility and uncertainty and to handicap them in the discharge of their functions.

E. PROFESSIONAL COUNCILS: POWERS ON SUFFERANCE

11.30 As a temporary expedient by reason of practical difficulties, and subject to conditions, the majority think it acceptable, as a first phase of reform, to continue with the Bar Council and the Council of the Law Society as general regulatory bodies. [1] Amongst the conditions is one that the question whether the present professional councils should continue as the general regulatory bodies should be subject to periodic review. [2] This question, and the question whether the time has come for the introduction of a single regulatory body for the whole profession are, the majority say, questions of central importance. [3]

These questions should also be kept under continual review by, amongst others, the Public Council on Legal Services and the public members of the professional councils. [4]

11.31 The professional councils would therefore, in consequence of the recommendations of the majority, be treated as not meriting the enduring trust of Parliament, but would be permitted to have their functions as governing bodies merely precariously. The public members intruded upon the professional councils would have as a continuing concern of central importance the question whether the time has come when the permission thus given on sufferance ought to be withdrawn. Adoption of these recommendations would promote discord and suspicion between each professional council and its public members, and would impede the professional councils and the public members in the discharge of their proper functions in the regulation of the professions.

11.32 I have mentioned the recommendations for periodical review. These would be required prospectively by statute. The first review would be after an initial period of 5 years, subsequent reviews would be at 5 year intervals. The statute might, however, be vague about the nature of the review and the body or bodies to conduct it. The reviews should be instituted by the Attorney General, but if when the time came he thought that there were special circumstances making it undesirable to hold a review he could so certify to Parliament and then he need not institute the review. [1]

11.33 If Parliament legislated for these periodic reviews, it would emphasise the precarious nature of the powers given to the professional councils, and would adopt the view (as it appears to me) of the majority that the professional councils are unworthy of enduring trust Perhaps it is possible to imagine a worse legislative context for the introduction of reforms in the structure and regulation of the legal profession, or one with a greater tendency to make the reforms a failure. But none occurs to me.

11.34 I do not object to further reviews of the structure and regulation of the legal profession. What I do object to is a recommendation that Parliament should legislate prospectively on the subject. I have dealt with the tendency of such legislation to impede the professional councils in their work. But there is another objection. I do not see how we can assume that we are wiser on that question than will be the Attorney General holding office from time to time in the future. And we cannot know the facts as they will be in the future and as they will be known to Attorneys-General in the future. We are not equipped to make a recommendation worthy of weight on the question whether there should be reviews in the future. The recommendation does not lose these objections by reason of the vagueness of the proposed legislation or the power of the Attorney General in what he regards as special circumstances.

F. PUBLIC MEMBERS; CONFLICT OF INTERESTS

11.35 As I have said in our Discussion Paper on Structure, I think that a case can be made for a small number of outside members on the professional councils, but not with voting rights. In this I have a measure of agreement with the majority. But I think that the particular recommendations are bad in several respects.

11.36 The majority see as part of the utility of having public members on the professional councils a tendency to reduce the dangers of a conflict between interest and duty affecting the professional councils. They give instances where the professional councils allowed their public duties to yield to the interests of themselves or of their constituents. [1]

11.37 One instance is found in the handling by the Council of the Law Society in the regulation of the question of solicitors acting for more than one party to a conveyancing transaction. [1] To me, the charge is fully and satisfactorily answered by the submission to us in 1979 of the Law Society oil conveyancing of land and conflicts of interest relating to conveyancing transactions. [2] A reading of the relevant pages of that submission, [3] and in particular the Society's circular of 16th May 1975, shows that the Council has for a long time considered and dealt with the question by reference to proper principles, and has not taken the unworthy course of yielding to the private pecuniary interests of solicitors. One may or may not agree with the Council on its conclusions, but it is altogether without warrant to suggest that the private interests of themselves or their constituents have influenced the conclusions. I shall not lengthen this chapter by discussion of other instances given by the majority, but I think that they move too easily from a disapproval

of some rule of practice to an assertion that the rule rests on a preference of the interests of lawyers to a conflicting public interest.

11.38 In general, it seems to me that the majority press too far their case on conflicts between interest and duty in the professional councils. The theoretical existence of such conflicts is general and inescapable amongst bodies exercising authority in public affairs. The relevant question is how far such a body is likely to prefer a sectional interest to a public duty. The record of the professional councils, properly understood, is, I believe, one which other public bodies might well envy, and does not give ground for uneasiness for the future. A case that such conflicts were a significant problem was attempted in our Discussion Paper on the General Regulation of the Profession. The case was answered by the submissions of the professional councils in response to that paper. [1] There are useful practical insights into the question in the letter of Mr W H Hurlburt, QC, of Alberta to the Chairman of this Commission dated 7th September 1979. [2]

11.39 The leading difficulty about intruding outsiders into an elected professional council lies in the means of choosing them. The majority recommend that of the initial 5 public members, one should be chosen by the Attorney General and one by the leader of the opposition in the Legislative Assembly. [1] So far I am not concerned to differ: no better way occurs to me. But the remaining 3 would be chosen by the Public Council on Legal Services. [2] That Council would be, at least potentially, an instrument responsive to the wishes of government. [3] In the result 4 out of 5 of the public members may be chosen by the government or by a body under government control. That is too heavy an interference by government in professional self-regulation.

11.40 The majority recommend that the public members should not have voting rights with that I concur. But, as I understand it, that would only be the arrangement at the outset as a first phase, and the question should be kept under review. [1] The question is, say the majority, one of central importance and should be kept under continuing review not only by the public members themselves but also by the Public Council on Legal Services. The same people should play a prominent role in the periodic reviews covering (amongst other things) the same question. [2] Similar arrangements for review are recommended on another question of prominence, the number of public members. [3] Thus choice of 80% of the public members would be in the control of the government, and the majority put amongst prominent questions for future review the questions whether the numbers of public members should be changed and whether they should be given voting rights. The recommendations are innocent enough as regards their operation at the outset, but they have within them the seeds of a large or even dominant voice of the government in the decisions of the professional councils. In my view, if there are public or outside members of the professional councils, they should not have voting rights and there should be no suggestion that they might afterwards be given voting rights.

11.41 One problem about having public members on a professional council concerns confidential matters under discussion in the council. An occasion for secrecy may arise by reason of the discussion of the private affairs of a client or of a lawyer, or such an occasion may arise on more general grounds, that premature disclosure of some matter under discussion in the council may impede the discharge by the council of its functions. In their recommendations the majority recognise the problem, and provide for it in relation to the duty which they would impose on public members to pass on information to the Public Council on Legal Services. The duty would be subject to such legal duties of confidentiality is apply to all members of the professional Council in their capacity as members. [1]

11.42 I do not see how the restriction could be applied. Suppose that a member of a professional council intended to disclose to a particular person not a member of the council (whom I shall call Jones) some matter arising in discussions of the council which the council properly regarded as confidential. it seems to me that the disclosure could not be justified unless it appeared that the disclosure to *Jones* was a proper incident of the discharge by the member of his fiduciary duties as member. [1] The point is that the propriety of a disclosure would, I think, depend in part on the identity of the person to whom the disclosure is made or intended. On this basis, there may conceivably be cases where disclosure by any member to the Public Council on Legal Services would be justified, and that would involve that such a disclosure by a public member would be justified. But, so regarded, the power of disclosure allowed to a public member would be very limited, and would be haphazard as far as concerns the Public Council. I think that the question of

confidentiality as regards public members is important, that the answer of the majority is not sufficient, and that the question needs further study.

G. QUEEN'S COUNSEL

11.43 This and the fees of junior counsel in two-counsel cases are the subject of chapter 9. In our Discussion Paper on the Structure of the Profession I gave my reasons for thinking that eligibility for appointment as Queen's Counsel should be confined to practising barristers: the relevant passage is set out in chapter 9 (9.18) of this Report. I adhere to those views. I went on:

> (c) What I have said applies to the present structure of the profession and to a structure according to the proposals of the writers [the majority in this Report] if, as they foresee, there still is a strong and vigorous Bar.
>
> (d) If, however, the structure of the profession is so changed that there is not a body of lawyers which can be recognised as a Bar, then, in my view, all that remains is to give)the rank of Queen's Counsel a decent burial. I do not regard the arrangements in Ontario, existing or recommended, as appropriate to the circumstances of New South Wales."

I adhere also to those views.

11.44 On the two-counsel rule, I think that its exceptions are too narrow and lack knowledge the constructive thought which has led to the recommendation of the majority. However, I believe that, within proper limits, the rule has a public utility in the shape of putting leading barristers in a position to give a service of high quality. In my opinion the solution does not lie in allowing wider discretions, or wider value judgments, to Queen's Counsel, To do so would, I think, tend to erode the rule to an extent which would endanger its public utility. The question is difficult and is under discussion between the professional councils. There I think it should be left. The councils will, I have no doubt, give weight to the constructive discussion in chapter 9.

11.45 On the question of the fee of junior counsel on an unmarked brief, I agree that a practice should not continue or develop merely to mark two-thirds of the leader's fee. I think that there is merit in the statement of principle in paragraph 9.32(a). In particular I think that the standing of the senior counsel should not be a material consideration.

11.46 I do not join in the suggestion that taxing the fee of junior counsel should be considered as a possible means of dealing with the problem of the unmarked brief in two counsel cases. I refer to the general grounds I have given elsewhere for thinking that taxation of barrister's fees should not be introduced.

11.47 I concur with the majority in their recommendation for encouragement of marked briefs or prior agreement about fees and for advice and assistance to solicitors in relation to fees.

H. COURT DRESS

11.48 This is the subject of chapter 10. In brief, the recommendations are that, subject to arrangements for particular courts, both barristers and solicitors appearing in court would be required to wear a gown. The gown would be of a prescribed material, colour and design, and would be the same for both barristers and solicitors. The wearing of a wig, bar jacket, wing collar or neck-bands would not be allowed.

11.49 The substantial considerations, as I see them, are these:

> (a) The robes of the barrister are valuable in several ways, amongst them are contributing to an appropriate atmosphere in court, marking the place of the barrister as one discharging a public function in the administration of justice, marking the professional bonds which contribute to the service offered to the public by the Bar, and reminding the wearer of his duties as one of that profession.
>
> (b) The tendency of the barrister's robes to intimidate witnesses is not of significant magnitude.

(c) The Bar Association and most barristers favour the retention of the barrister's robes, subject to change in response to circumstances, for example, the possible abandonment of the wing collar.

(d) The Law Society does not wish that solicitors be compelled to wear gowns or any other robes.

11.50 It would, I think, be wrong to impose on solicitors a compulsion to wear a gown, against the views of the Law Society. The matter is not important enough to justify overriding that expression of opinion. Yet all of us here except judge Martin see value in a gown being worn by a lawyer in court. We should not therefore be justified in proposing that the barrister be compelled to give up the gown. To do so would be an and imposition of uniformity. So we should be left with a distinction of dress between barristers and solicitors. If a distinction remains, I see no utility, and some harm, in our recommending that the wig and so on of the barrister be abolished. The dress of lawyers in a court is a matter of the practice and procedure of the court. The judges of the court would take matters of public interest into account and would, I expect, consult the professional councils on any proposals for change. There I think it should be left.

11.51 In our Discussion Paper on the Structure of the Profession, I put views on court dress different from those in paragraph 11.50. I have changed my mind because it now appears to me that the Law Society takes the view that solicitors ought not to be compelled to robe.

I. COMMENT ON PARTICULAR RECOMMENDATIONS

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

Comment: I dissent. See paragraphs 11.5-15.

R.1 (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.

Comment: For me the question does not arise.

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.

Comment: I concur in principle, save that I would sav "as a barrister or as a solicitor". But practising certificate" is an ugly name. For solicitors, the name is established by long usage and should not be changed without the concurrence of the Council of the Law Society. For barristers, a scheme with similar consequences might be adopted, but perhaps using different language. For example, the Bar Council might establish a roll of barristers, on which entry might be gained for a fee and might be renewed periodically for a fee. Discussion of practising certificates elsewhere in this chapter should be read subject to the foregoing comment.

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

Comment: "Legal practitioner" may be a convenient name in legislation applying to both barristers and solicitors. Otherwise, language should be allowed to take its own course.

R.3 (1) The Law Society 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).

Comment: In my opinion the council of the Law Society and the Bar Council should continue to be the governing bodies of solicitors and of the bar respectively. The other recommendations should be considered on their merits.

R.3 (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, RR.50, 51).

R.3 (3) Experience may demonstrate that, despite adoption of the measures 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, RR.50, 51).

Comment: In my opinion, putting aside future events not now foreseeable, the present professional councils should remain as governing bodies. I dissent from recommendations for future review. See paragraphs 11.30-34.

R.4 (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.

Comment: I comment on this as if there were common admission. In my opinion the Bar Council should be the governing body for lawyers who have a practising certificate from the Bar Council. Subject to other provisions relating to practising certificates, a lawyer (not holding a practising certificate of the Council of the Law Society) should be entitled to a practising certificate from the Bar Council on giving an undertaking to comply with its rules. A lawyer having a practising certificate from the Bar Council should have a vote in elections for the Bar Council, but should not be required to join the Bar Association.

R.4 (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.

Comment: I comment on this as if there were common admission. In my opinion the Council of the Law Society should be the governing body for all other lawyers. Subject to other provisions relating to practising certificates, a lawyer (not holding a Practising certificate from the Bar Council) should be entitled to a practising certificate from the Council of the Law Society on giving an undertaking to comply with its rules. A lawyer having a practising certificate from the Council of the Law Society should have a vote in elections for that Council, but should not be required to join 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.

Comment: In my opinion the terms are appropriate. Their use should be open as occasion arises. See paragraphs 11.6, 7.

R.6 (1) Generally speaking, the Law Society Council should retain its present statutory powers. These powers include broad powers to make regulation, 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.

Comment: (a) I concur in the matter in the first two sentences.

(b) If there is common admission, the Council of the Law Society should have such powers of governance as may be necessary in respect of a lawyer who does not hold a practising certificate.

R.6 (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.

Comment: The Council of the Law Society should continue to have its present function of making rules and rulings, without statutory force, in relation to solicitors.

R.6 (3) In exercising its statutory powers, the Council should not be subject to direction or restraint by a general meeting, or any other organ, of the Law Society.

Comment: I do not dissent, but the recommendation is unnecessary.

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”.

Comment: The recommendation accurately states my views.

R.7 (2) The Bar. 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 Bar Council must also undertake to comply with its rules in relation to professional practice.

Comment: In my opinion the Bar Council should continue to have its present function of making rules and rulings, without statutory force, in relation to barristers. The function should extend to a barrister who is not a member of the Bar Association.

R.7 In exercising its statutory powers, and in making non-statutory rules in relation to professional practice, the Bar Council should not be subject to direction or restraint by a general meeting, or any other organ, of the Bar Association.

Comment: I do not dissent, but the recommendation is unnecessary. Recommendations 6(3) and 7(3) should not differ in their Substance.

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.

Comment: In my opinion, where the conduct of a lawyer is impugned before a disciplinary authority, the authority should have regard to any relevant rule or ruling of a professional council under whose governance he was at the time of the conduct, and to ally obligation of his to observe the rule or ruling.

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

R.9 (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(1)(d) of the Legal Practitioners Act. t898, the Governor already has power to make regulations concerning solicitors.

Comment: Within the subject matter of this Report, namely the Structure and General Regulation of the Legal Profession, there is no occasion for the grant to the Governor of any power to make regulations in relation to the legal profession. On matters outside the scope of this Report, there may be occasion for such a grant. See, for example, the Legal Practitioners Act, 1898, s.87(1)(a)-(d).

R.9 (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.

Comment: The last sentence accurately states my views. See paragraphs 11.16-22.

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, an opportunity to express its views on them before a final draft is sent to the Attorney General for the approval of the Governor.

Comment: This should be left to the decision of the professional council making the regulation. There should not be a presumption, statutory or otherwise, that there should be consultation.

R.10 (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.

Comment: As in the case of recommendation 10(1), this should be left to the decision of the professional council making the regulation.

R.10 (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.

Comment: This should be left to the decision of the Attorney General.

R.11 In general, if the Attorney General proposes regulations to be made by the Governor, 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.

Comment: See my continent on recommendations 10(1), (2). For me, so far as this Report is concerned, the question does not arise.

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.

Comment: I concur. in addition, if there are public members of a professional council, the professional council should be at liberty to deal in its annual report with the functions, powers and conduct of the public members and with any report of a public member. And, if there is a Public Council on Legal Services, a professional council should be at liberty to deal in its annual report with the functions, powers and conduct of the Public Council and with any report or public statement of the Public Council.

R.12 (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.

Comment: I concur.

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.

Comment: (a) I concur in the recommendation in the first sentence.

(b) In my opinion, “barrister’s practising certificate” and “solicitor’s practising certificate” are apt names.

R.14 This is concerned with fees for practising certificates.

Comment: I concur in substance,

RR.15-19 These recommendations are concerned with Public members on the professional councils.

Comment: I adhere generally to what I said in chapter 16 of Paper No.4 on the Structure of the Profession. With that reservation, I dissent from recommendations 15 to 19.

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.

Comment: (a) I dissent. But outside members (if appointed) and other persons, whether or not members of the professional council concerned, and whether or not practitioners, should be eligible for appointment to committees at the discretion of the professional council, or at the discretion of a person (for example, its president) acting with the authority of the professional council. Outside members if appointed should be entitled to observe the work of committees concerned with matters of regulation, and to inspect their papers.

(b) The question whether a committee is concerned with matters of regulation should be for decision by the professional council, or by another person, for example, its president, acting with the authority of the professional council.

(c) If outside members are appointed, the merits of such a decision would be amongst the matters which might be dealt with in a report, annual or special, by outside members to the Attorney General.

(d) Disputes on the question might be avoided by the Bar Association acting so as to confine the Bar Council to matters of regulation and set up another body to handle member services and social activities. Likewise in the case of the Law Society. If the associations did so, a result might be reached not unlike that which I suggested in chapter 16 of our Discussion Paper on the Structure of the Profession.

(e) There may be a case for having outsiders on committees for particular purposes outside the scope of this Report. See, for example, our Report No.2 on Complaints, Discipline and Professional Standards.

R.20 (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, however, 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 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.

Comment: The closing words accurately state my views.

RR.20 (3), 21, 22 These are further recommendations about public members on committees.

Comment: For me the questions do not arise. See my comment on recommendation 20(1).

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.

Comment: I dissent. See paragraphs 11.24-29.

RR.24-28 These have to do with the recommended Public Council on Legal Services. Comment: For me the questions do not arise.

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

Comment: I concur.

R.29 (2) Practitioners should not be eligible for a full practising certificate unless they have practised for 12 months on a qualifying practising certificate.

Comment: I concur, save that the period of practice under a qualifying practising certificate should be fixed by the professional council concerned, or by its authority. it should be possible to reduce the period, or to

dispense with the need for practice under a qualifying practising certificate. For example, where a lawyer with experience in another State gains admission here and seeks to practise here, a professional council might see fit to grant a reduction or dispensation.

R.29 (3) Practitioners who wish to practise as a principal under pupillage should be required to hold a qualifying practising certificate.

Comment: I take the sense of this recommendation to be that practice as a principal under pupillage should be permitted by a qualifying practising certificate and that practice in that manner for the required period should entitle a lawyer to a full practising certificate. If that is the sense, I think that it is an arrangement that a professional council might well adopt. But where a lawyer has practised in that manner under a qualifying practising certificate for the required period, I do not see why he should not be entitled to a full practising certificate, whether or not he wishes to continue, or to resume, practice under pupillage.

R.29 (4) The holder of a qualifying practising certificate should be restricted to practising as an employee or under pupillage.

Comment: (a) In my opinion the restrictions under a qualifying practising certificate should be determined by the professional council concerned. I think that this recommendation and recommendations 29(5), (6) and 30 rest too much on a wish to impose uniformity for its own sake, and pay too little regard to the practical needs of lawyers entering practice and to practical safeguards against inexperience. The professional councils are in a better position than ourselves to devise appropriate arrangements, are not burdened with the pursuit of a theory about uniformity and are in a position to meet changing circumstances. Similar considerations apply to other recommendations based on chapter 6 of this Report.

(b) The restrictions under a qualifying practising certificate should be determined by the professional council concerned. For example, the Bar Council might restrict practice to practice while a pupil, and the Council of the Law Society might restrict practice to practice as an employee. The qualifications of a master or tutor should be a matter for the professional council concerned.

(c) Pupillage is an arrangement appropriate to the circumstances of barristers. Whether pupillage or something like it should be made an alternative to practice as an employee for new solicitors is a question for the Council of the Law Society.

R.29 (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.

Comment: See comment on recommendation 29(4).

R.29 (6) It should be permissible to serve some of the 12-month qualifying period as a pupil and some as an employee.

Comment: This should be a matter for the professional council concerned.

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.

Comment: As regards pupil solicitors, it should be left to the Council of the Law Society to make appropriate arrangements, if the Council sees fit to introduce pupillage as an alternative to employment. A pupil barrister should be under the restraints applying to barristers generally, subject to such other provision as the Bar Council might make.

R.30 (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.

Comment: This too should be left to the professional councils. I do not see why, as a general rule, a barrister should need the approval. If Bar rule 26 continues, the need for approval would arise only where the bulk of the intending tutor s work comes to him without the intervention of a solicitor by virtue of the exceptions to the rule. If it became a question whether such a barrister was, for that reason, unfit to be a tutor, the Bar Council should deal with the question.

R.30 (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 are subject to their respective governance.

Comment: Whether there should be pupillage for solicitors should be a matter for the Council of the Law Society. Whether the requirements should be by regulation or by some other means, for example rules, should be a matter for the professional council concerned. Otherwise I concur.

R.30 (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.

Comment: I dissent. The Bar Council should, as in other matters, consider what is right for barristers and for any relevant classes of barristers. if the Council of the Law Society adopts pupillage for solicitors, it should do likewise in respect of solicitors.

RR.31-33 These recommendations concern training and experience for lawyers taking work directly from clients or operating a trust account and for lawyers practising in the manner of barristers, and concern restrictions after an absence from practice.

Comment: These are matters for determination by the professional councils.

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.

Comment: The present rights of audience, and other rights to do legal work, of barristers and solicitors are generally appropriate and there is no occasion for change. However, Acts relating to particular courts and tribunals may require amendment in some details.

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.

Comment: I dissent from recommendations 35 and 36. There is no occasion for change of the present law, under which the acceptance by a barrister of the instructions of a solicitor does not give rise to a contract. The recommendations would lay the ground for litigation between barristers and solicitors and is bad in policy.

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

R.37 (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.

Comment: There is no occasion to change the present law.

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.

Comment: I dissent. The obligation to pay a barristers fee rests on the instructing solicitor, not on the client. There is a means for settling disputes about fees between barristers and solicitors, agreed between the Bar Council and the Council of the Law Society. If that agreed means is unsatisfactory to solicitors, or to barristers, it is open to the professional councils to agree on different means. It is not a question on which Parliament should intervene. I draw attention to a suggestion I made in our Discussion Paper on Structure (paragraph 13.17) for the case where a claim by a solicitor for reimbursement of a barrister's fee is not allowed in full on a taxation between solicitor and client.

R.39 The amount specified in a fee scale, or allowed on a taxation, in relation to a particular 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.

Comment: I dissent. The recommendation does not have regard to the customary terms on which barristers are given, and accept, their instructions. In general, the fees of a barrister are based on what he is instructed to do, not on the particular steps he takes, or the time he spends, in carrying out his instructions. In consequence, fee scales for barristers are, in general, lists of fees for accepting instructions of one kind or another. Different considerations apply in relation to solicitors, and accordingly fee scales are framed on different principles. The recommendation is concerned with a consequence of well-understood ways of conducting legal business, but neither recommendation 39 nor any other recommendation is for any change in those well-understood ways.

R.40 Adequate recognition should be given in a 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.

Comment: I concur. But the matter is self-evident.

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

Comment: I expect and hope that the Bar Council would do so, but it is a matter for the Council. If common admission is introduced, the Bar rule may be more important than it is now. That is because admission and, on a possible view, practice as a "barrister and solicitor" may be held not to attract a canon of conduct like the canon of conduct (distinct from Bar rule 2) now observed by barristers.

R.41 (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.

Comment: This is a matter for determination by the Council of the Law Society. I express no opinion on what the Council should do.

R.42 The recommendations are concerned with judicial attitudes to advocates.

Comment: The subject is in my opinion outside our terms of reference.

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

Comment: I am not concerned to dissent. Yet any rule may be better than mere disorder. I would leave these things to the courts and to those who conduct the functions. They should not act on a principle that precedence should be given to barristers merely because they are barristers.

R.44 The recommendation is for a special statutory scheme to regulate restrictive practices.

Comment: I dissent. The recommendation is unnecessary and its adoption may be a nuisance. If the professional councils have appropriate general powers to make regulations and rules, they can deal with problems in the light of the facts as they may emerge in the future.

RR.45-47 The recommendations are that the Bar Council should consider relaxing or abolishing some matters which the majority characterise as restrictive practices. The matters are:

(a) acting without the intervention of a solicitor (Bar rule 26);

(b) practising in partnership (Bar rule 16);

(c) barrister as servant of another barrister;

(d) joint appearance of barrister and solicitor;

(e) conference, interview or hearing without instructing solicitor or his clerk (Bar rule 33); and

(f) conference at solicitor s office (Bar rule 34).

The majority add that in doing so the Bar Council should be asked to have regard to some possible changes discussed in the Report.

Comment: The matters specified, like all other matters of practice at the Bar, should be considered by the Bar Council if occasion arises, with appropriate consultation with the Council of the Law Society.

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 does not substantially reduce the adverse effects of the restrictive practices under consideration; or

(iii) the restrictive practices in question are not reconsidered with reasonable speed by the Bar Council.

Comment: I do not join in the recommendation. We should not attempt to influence the way in which those in authority in the future will discharge their responsibilities.

RR.49-51 The recommendations are for future reviews of the regulation and structure of the legal profession.

Comment: (a) I do not join in the recommendations. I have no objection to future reviews. But I am not persuaded that I can speak with greater wisdom than those who will be in positions of authority in years to come. I am persuaded that I cannot know the facts, now in the future, as those can who in years to come will be in positions of authority.

(b) Further, as the recommendations stand, they treat the powers of the professional councils as precarious and as being given merely on sufferance. To do so is to provoke discord and friction, and to distract the professional councils from getting on with their jobs. See paragraphs 11.30-34.

(c) On the point in (a), the mischief is relieved, but not removed, by a power in the Attorney General to dispense with a periodical review if he thinks that there are special circumstances making it undesirable.

RR.52, 53 These recommendations concern the appointment of Queen’s Counsel.

Comment: In my opinion:

(a) The Queen's Counsel system should continue.

(b) The qualification, and the only qualification, for appointment as Queen's Counsel, should be outstanding eminence in practice at the Bar, save that it is proper that the Attorney General, if a barrister, should be appointed Queen's Counsel.

(c) If common admission is introduced and there remains a body of lawyers identifiable as a Bar, appointment should be restricted to members of that body.

(d) If common admission is introduced and there does not remain a body of lawyers identifiable as a Bar, further appointments should not be made. See paragraph 11.43.

R.54 This recommendation concerns a two-counsel rule.

Comment: In my opinion the Bar Council should consider enlarging the exceptions to the two-counsel rule. I think that the enlargement should, as far as possible, not be by way of earning matters at the discretion of senior counsel or for determination by a value judgment made by senior counsel. The Bar Council should give weight to recommendation 54 and should continue consultation with the Council of the Law Society. See paragraph 11.44.

R.55 This recommendation concerns the fees of junior counsel where a leader is briefed.

Comment: I concur. See paragraphs 11.45-47.

R.56 This recommendation concerns court dress.

Comment: In my opinion the present arrangements are generally appropriate. The matter is one of the practice and procedure of the several courts and should be considered by them from time to time as occasion may require. See paragraphs 11.48-51.

FOOTNOTES

Para.	
11.5	1. Recommendation 1.
	2. Recommendation 2(1).
	3. Recommendation 4(2), 1
	4. Recommendation 4(1), 13.
11.12	1. Discussion Paper on the Structure of the Profession, pp.554-557.
	2. Reply by the Law Society to Discussion Paper on the Structure of the Profession, especially at p.3. The Law Society qualifies its view by reference to another structure such as one suggested in an earlier submission. But I do not understand the Society's qualification to go anywhere near embracing the recommendations for common admission in this Report.
11.17	1. Recommendation 9(3).
	2. para.4.30.

11.18 1. Lawyers and the Legal System: a critique of legal services in England and Wales, para.23.

2. But in New South Wales a like power over solicitors was granted by Parliament to the Governor in 1980. See the opening words of section 87(1) of the Legal Practitioners Act, 1898.

11.19 1. Pp.127, 128.

2. *Sydney Morning Herald,* 16th May 1979.

3. para.3.28. See also paras.3.31 (eighth general conclusion), 5.14, 16, 30.

11.21 1. Recommendation 9.

11.22 1. Recommendations 6(1), 7(1).

11.23 1. Recommendation 9(1), (2).

11.24 1. paras.5.26, 211(ii).

2. para.5.28.

11.25 1. Para.5.29. but later it might have a membership like that proposed for the Community Committee on Legal Services proposed in our Discussion paper on General Regulation (pp.189-192): para.5.29. That would be one of the matters for continuous and periodic view recommendations 49-51, especially 51(ii).

2. See recommendation 24(1) and paras.5.30-32. For the Board of Governors of the Law Foundation, see the Law Foundation Act, 1979, ss.7, 8, sch.2 cl.2. I-or the Legal Services Commission, see the Legal Services Commission Act, 1979, ss-7,8, 14. That the Commission is, for the purposes of any act, a statutor body representing the Crown (s.6(3)) and is, in the eyes of the majority, an “official source” (para.2.9). For the Consumer Affairs Council, see the Consumer Protection Act, 1969, s.7: that Council's functions under the Act are to be performed only with the consent or at the direction of the Minister: s.12(1), (2).

3. Recommendation 28(1), paras.5.;7-40.

4. Discussion Paper on General Regulation pp.90-92.

11.26 1. Recommendations 23, 25(1).

2. Recommendation 23.

3. Recommendation 16(1)(iii).

11.27 1. para.4.30.

11.28 1. Recommendations 49-51, especially 51(iii), (iv), paras.8.2, 3.

11.29 1. On the Citizens Advisory Committee, see paras-2.31(b), 3.16.

11.30 1. Paras.4.13, 19,8.2. In the summary of principal recommendations, recommendation 3(1) does not put th matter as conditional.

2. para. 4.13 (v).

3. Para.8.2, 3.

4. Paras.4.13(v), 19(iv), 8.3.

11.32 1. para.8.4.

11.36 1. paras.3.14, 3.24. See also paras.3.23, 4.12, 17, 19(iii).

2. Bar rule 33(a); para.314.

11.37 1. para. 3.24.

2. Submission No.258.

3. Pp.59-72.

11.38 1. law Society (Submission No.269) pp.23-29 and Appendix; Bar Association (Submission No.266) pp.16-18. And see the letter of the president of the Law Society to the Chairman of this Commission dated 11th October 1981.

2. A copy is appended to the reply of the Law Society to our Discussion Paper No.4 on the Structure of the Profession, October 1981, pp.47-54.

11.39 1. Recommendations 15, 16(1)(i), (ii), para.5.16.

2. Recommendation 16(1)(iii); para.5.16.

3. Para.11.24.

11.40 1. Recommendations 18(1), 51(1), para.8.2.

2. Recommendations 49-51; paras.8.2-4, 11.28-32.

3. Recommendation 51(i).

11.41 1. Recommendation 25(3): para.5.34.

Appendix I - Terms of Reference

"To enquire into and review the law and practice relating to the legal profession and to consider whether any and, if so, what changes are desirable in

(a) the structure, Organisation and regulation of that profession;

(b) the functions, rights, privileges and obligations of all legal practitioners; and

(c) the provisions of the Legal Practitioners' Act, 1898, and the Rules and Regulations made thereunder and other relevant legislation and instruments,

with particular reference to but not confined to the following matters

(d) the division of the legal profession into two branches;

(e) the rights of audience of legal practitioners;

the existence or otherwise of monopolies or restrictive practices within the profession;

(g) the right of senior counsel to appear without junior counsel;

(h) the fixing and maintenance of ethical standards;

(i) the making, investigation and adjudication of complaints concerning the professional competence or conduct of legal practitioners and the effectiveness of the investigation and adjudication of such complaints by professional organisations;

(j) the making, investigation and adjudication of complaints concerning charges made for work done by legal practitioners;

(k) the fixing and recovery of charges for work done by legal practitioners, including the charging by junior counsel of two-thirds of his senior's fee and the fixing of barristers' fees in advance for work to be done;

(l) the liability of legal practitioners for professional negligence and compulsory insurance in respect thereof;

(m) partnerships and the incorporation of legal practices;

(n) advertising;

(o) confidentiality;

(p) the certification of legal practitioners as specialists in particular fields;

(q) performance of conveyancing and other legal work other than by legal practitioners;

(r) fidelity guarantees and rules relating to the administration of guarantee funds;

(s) the Statutory interest Account;

(t) the supervision by independent third parties of trust accounts of legal practitioners;

(u) the necessity for participation by legal practitioners in courses of continuing legal education;

but not including an examination of the provisions of the Legal Assistance Act, 1943, the Public Defenders Act, 1969, the Legal Practitioners (Legal Aid) Act, 1970; the role of the Law Foundation; or legal education prior to admission."

Appendix II - List of Submissions to the Legal Profession Inquiry

(as at February 1982)
The following is a list of submissions made to the Commission in relation to its Legal Profession Inquiry. The submissions are available for inspection in the Commission's public reading room.

Y. Abdurahman	170
Aboriginal Medical Service	147
LF. Abrahams	50
Adrian & Fellows	409
Adult Deaf Society of New South Wales	1
Aitken & Pluck	2
J. Akister, M.P.	115
Major General J. Allen	367
Amalgamated Metal Workers and Shipwrights Union	92
J. Anderson & Co.	319
Armidale Law Institute	4
A.W. Ashe	102
C. Ashton	117
Australian Association of Social Workers (New South Wales Branch)	109
Australian Bar Association	403
Australian Chamber of Shipping	108
Australian Consumers Association	230
Australian Council for Rehabilitation of Disabled	148
Australian Country Party (Quambone Branch)	186
Australian Federation of Travel Agents	78

Real Estate Institute of New South Wales	254
Redfern Legal Centre	318
Riverina Law Society	336
A.D. Robertson	297, 396
M. Rosenblum & Co.	299
ROW (Residents of Woolloomooloo)	52
P. Ruddock, M.P.	36
Russell McVeagh McKenzie Bartleet & Co.	410
L.J. Ryan	306
The Salvation Army	193
The Hon. Mr. Justice Samuels	113
D.M. Scarlett	111
J. Schipp, M.P.	40
H. Scrimshaw	310
H. Selby	307
Serbian National Defence Council in Australia	38
Shaw McDonald & Partners 41	
The Hon. T. Sheahan, M.P.	39, 381
The Hon. I. Sinclair, M.P.	96
H.A. Sisak	366
S. Skofic	334
Society of Real Estate Agents & Valuers Limited	91
South British United Insurance Group (Newcastle)	206
D. Spain	42
SPELD - Specific Learning Difficulties Association of New South Wales	43
T. Sri Ramanathan	75
St George Permanent Building Society	37
D.M. Stack	210

W.H.A. Womack	112
Women Lawyers' Association of New South Wales	95
Women's Electoral Lobby	47, 330, 383
The Hon. Mr. Justice Woodward	48
The Hon. Mr. Justice Yeldham	49
B.Young	324
M.M. Young	362

The contents of the following submissions are public but the names of the persons making the submissions have been withheld on request: 30, 45, 164, 165, 166, 167, 168, 169, 208, 220, 224, 228, 234, 237, 245, 273, 276, 279, 281, 282, 283, 284, 302, 305, 365 394.

Appendix III - Some Comments on Our Discussion Paper

We list below a selection of articles, papers and editorials which have included comments on our Discussion Papers, *General Regulation and The Structure of the Profession*.

Articles and Papers

The Hon. N.K. Wran, Q.C., M.P., Occasional address to the University of NSW Graduation Ceremony, Sydney, 27th April, 1979.

R.P. Meagher, Q.C., "Legal Profession: Case for Defence", Sydney *Morning Herald,* 8th May 1979, p.6.

S. Robertson, "Will Law Reform Make Real Headway with Lawyers?", *Rydge's,* July, 1979, p.4.

Professor M. Zander, "The Report of the Royal Commission on Legal Services", Address delivered at University College, London, 17th January, 1980.

"Law Reform Commission Proposals", *Law Society Journal* (NSW), February, 1980, p.75.

G. Robertson, "A Comparison of the Methodology of the Commissions for Legal Services in Britain and NSW", Address to the Conference on the Royal Commission on Legal Services, Cardiff, Wales, 21st-23rd March, 1980.

H. Arthurs, "Public Accountability of the Legal Profession", Address to the Conference on the Royal Commission on Legal Services, Cardiff, Wales, 21st-23rd March, 1980.

R. Abel, "The Politics of the Market for Legal Services", Address to the Conference on the Royal Commission on Legal Services, Cardiff, Wales, 21st-23rd March, 1980.

R.P. Meagher, Q.C., "A Step towards Anarchy", *Australian Law News,* June 1980, pp.11-12.

The Officious Bystander, "Long legal labour brings forth a mouse", *The Bulletin,* 23rd June 1981, pp.55-56: "A minority report that's full of merit', *The* Bulletin, 30th June, 1981, p.39.

J. Farmer, "Barristers and solicitors: Should they be one?", *Sydney Morning Herald,* 25th June, 1981, p.9.

D.K. Malcolm, Q,C., "The Role of the Profession", a paper presented at the Twenty-first Australian Legal Convention, (1981) *Australian Law Journal*, vol.55, p.401.

K. Bell and J. Dixon, "Lawyers: Making the Industry More Flexible", *Legal Service Bulletin,* October, 1981, p.241.

"Regulation of the Legal Profession in NSW". Transcript of Seminar at the University of NSW, 28th July, 1979.

D.J. Bleby, "Lawyers and the Public". Commentary on paper presented by J. Disney at the Annual Seminar of the Law Society of South Australia, Tanunda, 8th November, 1980.

"Australian position papers on the Organisation of the legal profession". (1981) *Australian Law Journal*, vol.55, p.771.

Editorials

The Mirror (Sydney), 26th April, 1979; *The Sun* (Sydney), 26th April, 1979; *The Sydney Morning Herald*, 27th April, 1979; *The Australian*, 26th April, 1979; *The Newcastle Morning Herald & Miners' Advocate,* 27th April, 1979; *The Law Society Journal* (Sydney), 1st June, 1979; *Brief* (Perth), Vol.6, No.3, June, 1979; *The Courier* Mail (Brisbane), 16th June, 1981; *The Sydney Morning Herald,* 16th June, 1981; *The Australian,* 16th June, 1981.

Appendix IV - Acknowledgements of Assistance

In the course of the Legal Profession Inquiry we have sought information or advice from a large number of people and organisations. The number of individuals to whom we owe thanks is, unfortunately, too great for us to list them here. We wish to acknowledge, however, our particular indebtedness to the following people who have been of special assistance in relation to matters dealt with in this Report and in our Second Report on the Legal Profession.

Consultants

Professor Gerard Nash (then of Monash University), Mr. John Basten (University of New South Wales), Mr. John Forbes (University of Queensland), Mr. John Ahern, Professor Charles Kerr (University of Sydney), Mr. Kevin O'Connor (Melbourne University).

Officers of Professional Associations

Ms. Michele Day, Mr. Andrew Dix, Ms, Clarissa McCarthy, Ms. Carmel McAuliffe, Ms. Yvonne Purcell and Mr. John Purdy (Law Society of New South Wales), Captain Bill Cook (New South Wales Bar Association), Mr. Gordon Lewis (Law Institute of Victoria), Mr. BoE Nicholson (Law Council of Australia), Mr. Mervyn Rodgers (New Zealand Law Society), Mr. Bert Early (American BarA ssociation), Mr. Kenneth Pritchard (Law Society of Scotland), Mr John Bowron and Mr. Paul Leach (The Law Society, England and Wales), Sir Arthur Power (Senate of the Inns of Court and the Bar, England), Mr. Ken Jarvis (Law Society of Upper Canada).

We list below a number of organisations which have responded to our requests for information. We are most grateful for their assistance.

Australia

Administrative Appeals Tribunal (The Registry)

Attorney-General's Department (Commonwealth)

Attorney-General's Department (South Australia)

Attorney-General's Department (Victoria)

Australian Conciliation and Arbitration Commission (The Registry)

Australian Dental Association (New South Wales Branch)

Australian Law Reform Commission

Australian Medical Association (New South Wales Branch)

Australian Society of Accountants (New South Wales Division)

Bar Association of Queensland

Barristers Board of Western Australia

Builders Licensing Board (New South Wales)

Central Coast Law Society (New South Wales)

Clarence River and Coffs Harbour Law Society (New South Wales)

College of Law (New South Wales)

Commissioner for Consumer Affairs (Western Australia)

Corporate Lawyers Association of New South Wales

Council of Auctioneers and Agents (New South Wales)

Eastern Suburbs Law Society (New South Wales)

Ethnic Affairs Commission (New South Wales)

Department of Aboriginal Affairs (Commonwealth)

Department of the Attorney General and of justice (New South Wales)

Family Court of Australia (Principal Registry)

Family Court of Australia (Parramatta Registry)

Family Law Practitioners Association (New South Wales)

Far North Coast Law Society (New South Wales)

Federal Bankruptcy Court (The Registry)

Federal Court of Australia (Principal Registry)

Goulburn Valley Law Association (New South Wales)

Health Commission of New South Wales

High Court of Australia (The Registry)

Hunter Valley Law Society (New South Wales)

Industrial Registrar (Victoria)

Institute of Chartered Accountants in Australia (New South Wales Branch)

Institute of Patent Attorneys of Australia

Law Institute of Victoria

Law Council of Australia

Law Reform Commission of Western Australia

Law Society of the Australian Capital Territory

Law Society of New South Wales

Law Society of South Australia

Law Society of Tasmania

Law Society of the Northern Territory

Law Society of Western Australia

New South Wales Bar Association

North and North West Law Society (New South Wales)

Ombudsman's Office (New South Wales)

Pharmaceutical Society of New South Wales

Privacy Committee of New South Wales

Queensland Law Society

Sole Practitioners Association

South Australian Bar Association

Supreme Court of New South Wales (The Prothonotary)

Tasmanian Bar Association

Trade Practices Commission (Commonwealth)

Victorian Bar

Western Australian Bar Association

Canada

Barreau du Quebec

Barristers Society of New Brunswick

Canadian Bar Association

Chambre des Notaires du Quebec

Commissioner for Yukon Territory

Commission of the Northwest Territories

Law Reform Commission of British Columbia

Law Society of Alberta

Law Society of British Columbia

Law Society of Manitoba

Law Society of Newfoundland

Law Society of Prince Edward Island

Law Society of Saskatchewan

Law Society of the Northwest Territories

Law Society of Upper Canada

Office of the Professions (Quebec)

Ministry of Consumer and Corporate Affairs (Quebec)

Nova Scotia Barristers Society

New Zealand

New Zealand Law Society

United Kingdom

Association of Community Health Councils for England and Wales

Faculty of Advocates (Scotland)

General Medical Council

Incorporated Law Society of Northern Ireland

Institute of Chartered Accountants in England and Wales

Law Society of Scotland

Royal Commission on Legal Services (England and Wales)

Royal Commission on Legal Services in Scotland

Senate of the Inns of Court and the Bar (England and Wales)

The Law Society (England and Wales)

United States

American Bar Association

American Bar Foundation

Association of the Bar of the City of New York California Board of Legal Specialization

Citizens Advisory Committee, Washington D.C. Florida State Bar Association joint Specialisation Committees of the Nassau and Suffolk County Bar Associations

Massachusetts Bar Association

Nassau & Suffolk County State Bar Association New York State Bar Association

Minnesota State Bar Association

North Carolina State Bar

Oregon State Bar Association

State Bar of California

The District of Columbia Bar

Washington State Bar Association

Other Countries and International Organisations

Association of Law Societies of the Republic of South Africa

Consultative Committee of Bars and Law Societies of the European Community

International Bar Association

Norwegian Consulate (Sydney)

Trinidad and Tobago Law Society

Appendix V - Select Bibliography

The Commission has collected and considered a very extensive range of published material in the course of preparing this Report. Almost all of this material is held in indexed files at the Commission's offices. We list below some publications which may be of particular interest to anyone considering the general regulation and structure of the profession. Reference should also be made to the submissions listed in Appendix II, the articles and papers listed in Appendix III, and to the Notes on Sources in our Discussion Papers, *General Regulation and Structure of the Profession*.

Monographs

B. Abel-Smith and R. Stevens, In *Search of Justice* (Penguin, London, 1968).

B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, London, 1967).

P. Aucoin, Public Accountability in the Governing of Professions, (A Working Paper prepared for the Professional Organisations Committee, Ontario, 1978).

Z. Bankowski and G. Mungham, *Images of Law* (Routledge & Kegan Paul, London, 1976).

Committee of Inquiry into Legal Education in New South Wales (the Bowen Committee), *Report*, (NSW Govt Printer, Sydney, 1979).

Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia, *Working Paper* No.1, (Perth, 1981).

Committee on Modes of Practice, *Report* (New Zealand Law Society, 1979).

Committee on the Healing Arts, *Report* (Govt. of Ontario, 1970).

J. Disney, J. Basten, P. Redmond, S. Ross, *Lawyers* (Law Book Co., Sydney, 1977).

J. Forbes, *The Divided Legal Profession in Australia* (Law Book Co., Sydney, 1979).

R. Hazell (ed.), *The Bar on Trial* (Quartet Books, London, 1978).

Q.Johnstone and D. Hopson, *Lawyers and Their Work* (Bobbs-Merrill, Indianapolis, 1967).

Monopolies Commission, *Report on Professional Services,* (HMSO, London, 1970, Cmnd.4463).

New South Wales Law Reform Commission, *General Regulation* (Discussion Paper No.1, 1979).

New South Wales Law Reform Commission, *Structure of the Profession* (Discussion Paper No.4, 1981).

W. Pengilley, *Trade Associations, Fairness and Competition* (Law Book Co., Sydney, 1981).

Professional Organisations Committee, *Report* (Min. of the Attorney General, Ontario, 1980).

Royal Commission of Inquiry into Civil Rights, *Report No.1* (Govt. of Ontario, 1968).

Royal Commission on Legal Services (the Benson Commission), *Report* (HMSO, 1979, Cmnd.7648).

Royal Commission on Legal Services in Scotland (the Hughes Commission), *Report* (HMSO, Edinburgh 1980, Cmnd. 7846).

P. Slayton and M. Trebilcock (ed.), *The Professions and Public Policy* (Univ. of Toronto Press, 1978).

R. Tomasic (ed.), *Understanding Lauyers* (Law Foundation of New South Wales and George Allen & Unwin, Sydney, 1978).

R. Tomasic and C. Bullard, *Lawyers and their Work* (Law Foundation of New South Wales, 1978).

M. Trebilcock, C. Tuohy, A. Wolfson, *Professional Regulation* (a Staff Study for the Professional Organisations Committee), (Min. of the Attorney General, Ontario, 1979).

Up Against The Law (Australian Broadcasting Commission, Sydney, 1977).

M. Zander, *Lawyers and the Public Interest* (Weidenfeld and Nicolson, London, 1968).

M.Zander, *Legal Services for the Community* (Temple Smith, London, 1978).

Articles

H. Arthurs, “Authority, Accountability and Democracy in the Government of the Ontario Legal Profession”, (1971) Canadian Bar Review, vol.49, p.l.

H. Arthurs, “Counsel, Clients and Community”, (1973) Osgoode Hall Law journal, vol.11, p.437.

Sir Henry Benson, “The Profession of the Future”, (1979) Australian Law Journal, vol.53, p.497.

J. Farmer, “The Conduct of Litigation within New Zealand: Fusion of Barristers and Solicitors”, (1979) Law Institute journal (Victoria), vol.53, Nos.1 and 2.

Lord Gardiner, “Two Lawyers or One”, (1970) Current Legal Problems, vol.23, p.l.

Mr Justice M. Kirby, “Futurology” (chapter in R. Tomasic (ed.), *Understanding Laywers,* see above).

D. Malcolm, “The Role of the Profession”, (1981) Australian Law Journal, vol.55, p.401.

Papers and Speeches by Commissioners

The following are amongst the papers and speeches delivered by members of the Commission in relation to issues dealt with in this Report.

J. Disney, “Lawyers and the Community: Outreach or Outrage?” (Proceedings of the Triennial Conference of the New Zealand Law Society, Dunedin, April, 1981).

J. Disney, “New Areas and Styles of Practice”, (Paper presented at the 20th Australian Legal Convention, Adelaide, 3rd July, 1979). Published in (1979) Australian Law journal, vol.53, p.348.

J. Disney, “Reform of the Legal Profession”, (Paper presented at the 2nd National Conference of Labor Lawyers, Sydney, 6th July, 1980). Published in (1980) Law Institute Journal (Victoria), vol.54, p.797.

D. Gressier, “The Law Reform Commission's Discussion Papers on General Regulation and Structure of the Legal Profession in New South Wales”, (Speech delivered to the Sir Thomas More Society, Sydney, 5th August 1981).

J. Wootten, “The Legal Profession Inquiry”, (Speech delivered to the 19th Australian Legal Convention, 4th July, 1977).

Index

This Index indicates the recommendation numbers (eg. R.3) and paragraph numbers (e.g., 6.24) in the Report which refer to particular topics. Where recommendation numbers are indicated they refer to the numbered list of recommendations which appears at pages 9-23 of the Report, under the title Summary of Principal Recommendations. But they should be read also as references to Mr Conacher's comments on particular recommendations, Those comments, which deal with the recommendations in numerical order, appear at pages 9-23 of the Report.
The Index refers only to the text of the Report. It does not refer to the material in footnotes.