NSW Law Reform Commission

REPORT 33 (1982) - THIRD REPORT ON THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

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Participants of the Commission

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

Attorney General for New South Wales.

THIRD REPORT ON THE LEGAL PROFESSION (ADVERTISING AND SPECIALISATION)

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)

Denis Gressier (Commissioner)

Julian Disney (Commissioner)

His Honour Judge Trevor Martin QC (Commissioner)

12th July, 1982.

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 Russell Scott

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 PE Nygh

The Hon Mr Justice Adrian Roden

The Hon Mr Justice Andrew Rogers

Mr HD Sperling, QC

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

The Commissions Director of Research is Ms Marcia Neave. Members of the research staff are: Mr Paul Garde, Ms Ruth Jones, Ms Gloria Lee (Librarian), Ms Philippa McDonald, ,4s. 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)).

This is the thirty-third Report of the Commission Its short citation is LRC 33.

REPORT 33 (1982) - THIRD REPORT ON THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

Preface

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

Advertising and other Attraction of Business,

Specialisation and Related Matters.

The Report contains our final recommendations on these topics.

Earlier in the Inquiry we published a Discussion Paper containing our tentative suggestions on these matters. That Paper and other Papers issued in the course of the inquiry are listed on page v below.

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 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 JH Wootten and the previous Deputy Chairman, Mr RD Conacher, were closely involved in earlier stages of the Legal Profession Inquiry. However, they ceased to be members of the prior to the commencement of work on this Report.

A large number of persons and organisations have made Submissions to us on matters relevant to the Legal Profession Inquiry. They are listed in Appendix II of our *First Report on the Legal Profession.* In addition a number of articles, papers and editorials have commented on tentative suggestions which we made in Discussion Pipers published in the course of the Inquiry. Some of these articles and papers are listed in Appendix III of the *First Report.* We list in Appendix IV of that Report some of the many persons and organisations, both in Australia and overseas, that have responded to our requests for information or advice. In addition to the academic consultants listed in that Appendix. Mr Stan Ross (University of New South Wales) gave assistance in relation to matters covered by the present Report. We are most grateful to all those who have assisted us in these ways.

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 on the Legal Profession.

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

Second Report on the Legal Profession.

(Complaints, Discipline and Professional Standards)

Third Report on the Legal Profession.

(Advertising and Specialisation)

Discussion Papers

1. *General Regulation.*

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

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

INTRODUCTION

The following is a summary of the principal recommendations made by the Commission in this Report. The recommendations relate to three general topics, namely

> *specialisation* and related matters;
>
> *individual advertising* by solicitors;
>
> *other attraction of business* (ie. *community discussion and solicitation by solicitors, attraction of business by barristers, and institutional advertising*).

The scope of these topics, and our usage of the words italicised above, is explained in chapters 2 and 8 of the Report.

SPECIALISATION AND RELATED MATTERS (Part II of the Report)

I. Solicitors (Chapter 6)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> three years in active practice as a lawyer;
>
> (i) for two years prior to commencing to advertise, attendance at specified continuing legal education (say, 20 hours each year); (ii) for each year after commencing to advertise, attendance at specified continuing legal education (say, 20 hours f or each of the first two years after commencing advertisements, and 10 hours for each subsequent year); and
>
> payment to the general regulatory body of a modest registration fee for each field advertised, the fee to be used to defray the cost of administering the scheme.

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

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

Special Interest Associations (paras. 6.43-6.51)

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

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

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

II. Barristers (Chapter 7)

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

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

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

Other Advertising about Fields of Practice (para.7.10)

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

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

Special Interest Associations (para.7.11)

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

In an Undivided Profession (para.7.12)

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

INDIVIDUAL ADVERTISING BY SOLICITORS (Part III of the Report)

I. A General Scheme (Chapter 12)

Basic Rules (para. 12.16)

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

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

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

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

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

Special Areas (paras.12.19-12.28)

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

fields of practice;

fees;

actual or potential clientele;

speed of service;

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

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

Fields of Practice:

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

(ii) unwillingness to accept work in particular fields;

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

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

Fees:

(i) acceptance of credit cards;

(ii) availability of information about a practices methods for determining fees;

(iii) willingness to give written estimates of fees;

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

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

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

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

Actual or Potential Clientele:

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

Speed of Service:

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

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

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

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

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

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

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

II. Particular Media (Chapter 13)

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

Radio and Television (para.13.5)

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

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

Signs and Brochures (paras.13.6-13.8)

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

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

Telephone Directory

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

Legal Services Directory

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

(i) willingness or unwillingness to accept work directly from clients, rather than only from instructing practitioners;

(ii) the names of principals and employed solicitors in each practice;

(iii) types of credit card accepted;

(iv) date of admission as a solicitor;

(v) after hours or emergency telephone numbers;

(vi) (provided it fits in a small space made available next to each practice's entry), any information such as opening hours, which solicitors would be permitted to advertise in other printed publications;

(vii) (in a part of the directory separate from the main listings), admission as a lawyer in other jurisdictions.

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

OTHER ATTRACTION OF BUSINESS (Part IV of the Report)

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

Community Discussion (paras.14.9-14.10)

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

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

Solicitation (paras. 14.28-14.31)

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

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

it does not involve coercion, duress or harassment;

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

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

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

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

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

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

(ii) languages spoken by the solicitor;

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

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

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

(i) commencement of practice as a barrister;

(ii) change of address or telephone number;

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

(iv) knowledge of foreign laws;

(v) date of admission;

(vi) fixed fees for clearly specified services.

Community Discussion (paras.15.25-15.26)

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

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

Solicitation (para.15.27)

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

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

In an Undivided Profession

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

III. Institutional Advertising (Chapter 16)

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

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

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

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

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

(6) The primary goals of institutional advertising should be helping members of the public to prevent legal problems from arising, to identify an appropriate source of assistance when they do arise, and to find their way to such a source. In many instances it will be feasible to achieve these goals, but not to communicate detailed information or advice about particular problems.

REPORT 33 (1982) - THIRD REPORT ON THE LEGAL PROFESSION: ADVERTISING AND SPECIALISATION

1. The Legal Profession Inquiry and this Report

A. INTRODUCTION

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. We have published two Reports prior to the present one. The *First Report* contains our final recommendations in relation to the general regulation of the legal profession; the division of the profession into barristers and solicitors; various aspects of the Queen's Counsel system; and the dress worn advocates in court. The *Second* Report contains our final recommendations in relation to the making, investigation and adjudication of complaints about lawyers, and certain other matters concerning discipline and standards within the legal profession.

B. THE SCOPE OF THIS REPORT

1.2 The present Report covers two general topics, namely,

> Specialisation and related matters (dealt with in Part II);
>
> Advertising and other Attraction of Business (Parts III and IV).

The following portions of our terms of reference are of particular relevance to these topics:

> "To enquire into and review the law and practice relating to the legal profession and to consider whether and, if so, that 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 -
>
> (h) the fixing and maintenance of ethical standards;

.....

> (n) advertising;

.....

> (p) the certification of legal practitioners as specialists in particular fields;
>
> (u) the necessity for participation by legal practitioners in courses of continuing legal education; "

C. OUR METHODS OF INQUIRY

1.3 At the commencement of the Legal Profession 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]

1.4 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. [2] 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.

1.5 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 meetings, 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 the New South Wales Bar Association had dealt with complaints against their members, and we obtained information about many hundreds of other complaints. [3]

1.6 We have carried out a considerable amount of empirical research. Much of this research has been the subject of reports published in our Background Papers. [4] In addition, we co-operated with the Law Foundation of New South Wales in an extensive questionnaire survey of the profession. [5] We also have undertaken 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. [6] We have been assisted in this work by a number of academic consultants from law and other disciplines. [7]

D. DISCUSSION PAPERS AND BACKGROUND PAPERS

1.7 With the benefit of the information and ideas obtained by the means referred to above, 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. [8]

1.8 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.

1.9 One of the Discussion Papers, Advertising and Specialisation, covered areas with which we deal in this Report Suggestions made in it, and responses which they evoked, are referred to in subsequent chapters. All responses made to us have been taken into account in determining our final recommendations.

FOOTNOTES

1. Submissions and certain other responses are listed in Appendices II and III of our First Report.

2. For further details, see *First* Report, para. 1.6, footnote 1.

3. 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.

4. See Background Papers II-V.

5. A report on the results of this survey has been published by the Law Foundation: see R. Tomasic and C.Bullard, *Lawyers and their Work in New South Wales* (1978).

6. Some results of this research which are relevant to the present Report are contained in *Background Paper* - IV (The Structure of the Profession).

7. Our principal academic consultants are listed in Appendix IV of our *First Report.*

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

2. Introduction

A. THE GENERAL QUESTION

2.1 The general question with which we are concerned in this Part of the Report is:

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

We use the term "specialisation" in a broad sense rather than as a precise term of art. In common parlance, specialisation is often used to mean a substantial degree of concentration o)f work in a particular field. But concentration in a field often leads to expertise in it and, accordingly, specialisation is commonly used to connote a substantial degree of both concentration and expertise. In this Report we use it to embrace both of its common meanings, that is, *concentration and concentration and expertise.* And we use it to cover a wide range of possible views about the degrees of concentration and of expertise necessary to constitute specialisation. We use cognate words, such as "specialise" and "specialist', in the same broad manner. More precise terminology is adopted where it is necessary to do so.

B. THE FOCUS OF DISCUSSION

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

2.3 We too concentrate principally in this Part on the issue of practitioners' rights to advertise claims about particular fields of practice. There are other types of action which could be taken to regulate specialisation. For example, practitioners who satisfy special criteria for designation as "specialists" in a particular field could be permitted to charge higher fees than non-designated practitioners, or could be given exclusive rights to undertake work in that field. But for reasons explained in chapter 5, we agree with the broad consensus amongst lawyers that discriminations of such a kind would not be desirable. Accordingly, we do not discuss these possibilities in detail.

2.4 We are concerned in this Part with one aspect of advertising by lawyers, namely advertising about fields of practice. We are not concerned here with the general question of advertising by lawyers, including questions such as the media in which advertisments appear and the full range of different types of information or assertion which may be advertised. Those issues are discussed in Parts III and IV and we incorporate into our recommendations in that Part the recommendations made in this Part in relation to advertising about fields of practice. As a background to the present Part, we indicate at this stage that in Parts III and IV we recommend a relaxation of the present restrictions on advertising in order to allow a wider range of material to be advertised in a wider range of publications and media.

C. "FIELDS OF PRACTICE SCHEMES"

2.5 We make frequent use in this Part of the expression "fields of practice scheme", by which we mean a body of rules in relation to advertising by practitioners about particular fields of

practice. The rules may relate to advertisements about specialisation expertise, willingness to accept work, or some other characteristic in relation to a field of practice.

2.6 For convenience of discussion we describe various fields of practice schemes along a spectrum from “low level” to “high level”, according to the level of qualifications, if any, which they require of practitioners wishing to advertise about fields of practice.

> An example of a *low level* scheme is one which permits practitioners to advertise that they specialise in a particular field of practice, provided that the advertisement is not false or misleading.

An example of a *high level* scheme is one which allows practitioners to advertise that they specialise in a particular field, provided that they spend 60% of their time working in the field and have passed a rigorous written examination in it.

3. The Present Position

A. INTRODUCTION

3.1 We begin this chapter by summarising briefly the present position in New South Wales concerning specialisation, and the regulation of specialisation in the legal profession. We then mention some relevant developments in other places, and in professions other than law, in relation to regulation of specialisation.

B. THE PRESENT POSITION IN NEW SOUTH WALES

3.2 The present position in New South Wales is described in some detail in our Discussion Paper.[1] We do not repeat all of that description here, but the following outline concentrates on the following aspects:

patterns of specialisation;

designation of specialists; and

advertising about fields of practice.

I. Patterns of Specialisation

Current Concentration

3.3 A simple way of defining and measuring specialisation is by reference to the proportion of a practitioner s time which he or she current]\, spends working in a particular field. Some information is available as to the patterns of concentration of this kind amongst the legal profession in New South Wales. For example, a survey of solicitors in 1977 found that almost three-fifths of respondents spent more than 40% of their time working in one of the 14 fields listed in the survey questionnaire. [2] By far the most Popular field was “real property sales, mortgages and leases”, in which almost two-fifths of respondents spent more than 40% of their time. No other field had more than 6% of respondents concentrating in it to such an extent The next most popular fields were “probate, wills and administration of estates”, "motor accident law”, “family law”, “taxation law and estate planning” and “other commercial and company law”.

3.4 The same survey [3] demonstrated the extent to which barristers concentrate in the field of advocacy, for example, about one-quarter of respondent barristers reported having spent more than 20 hours appearing in court during the week prior to the survey. In terms of subject areas of law, as contrasted with advocacy, slightly less than half of the barristers responding to the survey reported that they spent more than 40% of their time in any one area. Amongst the more popular areas were equity, criminal law, personal injury claims, commercial law, family law and workers’ compensation.

3.5 Patterns of current concentration vary somewhat between central Sydney and other parts of the State. [4] Many country and suburban solicitors, but a small proportion of central Sydney solicitors, spend the overwhelming majority of their time in real property and probate work. On the other hand, country and suburban solicitors are perhaps more likely than their city counterparts to be willing to handle a wide range of work, rather than confining themselves to a narrow field of practice. The latter type of concentrated practice is most commonly found in large city firms, especially in relation to sub- fields of commercial law.

Comparative Concentration within the Profession

3.6 The preceding comments relate to specialisation measured simply as a proportion of a particular practitioners total work. Another measure, which is a more accurate reflection of common usage by lawyers of the term specialisation is to compare that proportion with the proportion spent in the same field by other practitioners. [5] There are some fields, such as real property or probate work, in which a solicitor may spend a considerable amount of time yet not be regarded within the profession as being a specialist because many other practitioners concentrate in the field to a similar or greater degree. In other fields, such as admiralty or constitutional law, a solicitor or a barrister may spend little of his or her time in the field yet be regarded as a specialist in it because very few other practitioners do any work at all in the field. As we have said, levels of concentration in particular fields can vary substantially between central Sydney, the suburbs of Sydney, and other parts of the State. Accordingly, the level of concentration necessary to be commonly regarded as a specialist say, workers' compensation is likely to be much lower in many country areas than in Sydney.

Sustained Concentration

3.7 A third measure of specialisation is the extent to which a practitioner has concentrated in a particular field over a substantial period. In many fields, practitioners are unlikely to be regarded by the profession as being specialists unless, no matter how high their level of current concentration they have worked in the field for some years. Conversely, some practitioners may be regarded as specialists because they have worked in a field over many years, albeit not at a high level of concentration. But sustained concentration is not always necessary in order to be regarded as a specialist, particularly in new or relatively unusual fields such as communications law or anti-discrimination law. We know of no statistical data concerning the length of experience which New South Wales lawyers have in particular fields. But it is significant to note in this context that about one-third of solicitors, and a similar proportion of barristers, have been members of the legal profession for less than five years. [6]

Expertise

3.8 As we mentioned earlier, the term specialisation is often used to denote not merely concentration but also expertise. [7] For example, many lawyers in New South Wales do not describe another practitioner as a specialist in a particular field unless they consider that he or she is specially expert in it. Concentration in a particular field is likely to develop one's expertise in it. Some practitioners, however, may concentrate heavily, and for many years, on a particular field without developing special expertise. For example, as commonly occurs in relation to conveyancing, they may handle a great volume of repetitive and relatively simple work, referring more difficult problems in the field to other practitioners. For these and other reasons, concentration is not a highly reliable indicator of expertise. [8]

3.9 It is difficult to make specific statements about patterns of expertise amongst lawyers in New South Wales. It is perhaps reasonable to suggest however, that in many fields, especially of commercial law, the highest levels of expertise are more likely to be found amongst barristers, or in medium-sized and large firms of solicitors in central Sydney, than elsewhere in the profession. But some of the leading experts in fields such as criminal law, family law and conveyancing, may be solicitors in small practices, whether situated in central Sydney or otherwise. Some of the most highly skilled Queen's Counsel and junior barristers do not specialise in any particular subject area of law, but rather in dealing with difficult questions in a range of different fields.

II. Designation of Specialists

Official Designation

3.10 There is no official designation of specialists within the legal profession in New South Wales. Appointment as Queen's Counsel is a recognition of eminence as a barrister. [9] But it does not indicate the field or fields of practice in which a particular appointee has achieved this eminence. Some Queen's Counsel have narrow areas of concentration and expertise, while others are highly regarded for their ability to handle work in a wide range of fields.

3.11 The designations "barrister" and "solicitor" may give some clues as to a practitioners likely fields of practice. [10] For example, barristers are more likely than solicitors to undertake advocacy but unlike many solicitors, they do not carry out conveyancing transactions or the administration of estates. But the designations are not intended to indicate whether particular practitioners are specialists, nor their particular fields of practice, and they are not reliable indicators for those purposes. Many barristers concentrate heavily in particular fields but many do not. Many barristers are highly expert in particular fields but many are not. The same comments may be made about solicitors.

Designation by Special Interest Associations

3.12 Many practitioners in New South Wales belong to associations of people interested in a particular area of law, such as the Commercial Law Association and the Family Law Practitioners Association. [11] Neither the Law Society nor the Bar Association has organised associations of this kind under its own auspices, but since 1979 the Law Council of Australia, which is the national federation of law societies and bar associations, has established special interest groups ("Sections") in some fields. [12]

3.13 At present these associations and sections are open to any lawyer who is willing to pay a small subscription fee. Most of them also accept non-lawyers. With one exception (see below), they do not restrict or categorise membership on the grounds of training, concentration, experience or expertise in the field in question. Accordingly, the fact that a practitioner belongs to one of these associations is no more than an indication of interest in a particular field. It is not a designation by the association of the practitioner as being, for instance, specially experienced or skilled in the field.

3.14 The exception is the Family Law Practitioners Association, which introduced a new membership structure in 1979. [13] It now distinguishes between associate membership, which is open to all interested persons, and full membership, which is confined to those who

> (i) have passed an examination in family law prior to admission, or pass some other examination recognised by the Association; and
>
> (ii) satisfy the Qualifications Committee of the Association that they have a sound knowledge of family law and "current practical experience" in the field. [14]

We understand that the Qualifications Committee interviews all applicants for full membership and that a substantial proportion of applications have been unsuccessful. In addition, the Constitution of the Association provides for the appointment of Fellows. [15] These must be people who in the opinion of a general meeting of the Association have made "a significant contribution to the development or understanding of family law", have "achieved eminence in the practice of family Law", or whose other contributions to family law are "deserving of such recognition". [16] We understand that, to date, the only persons to be elected as Fellows have been judges.

Designation by Academic Institutions

3.15 Undergraduate law courses now include some optional subjects in particular fields of law. In addition, some postgraduate degrees and diplomas are available for work in particular fields. In the present context, however, these qualifications are of limited significance. Firstly, they are academic in nature; they do not require or connote practical experience and

expertise. Secondly, the required study in any particular field is limited, especially in undergraduate courses. Thirdly, titles such as LLB or LLM do not indicate the fields of law studied and therefore are of no use, in themselves, as designations in relation to particular fields.

3.16 The College of Law and various other bodies provide continuing legal education programmes in some fields but they rarely amount to more than a seminar or a few lectures and they do not lead to a diploma, certificate or other designation

III. Advertising about Fields of Practice

3.17 Generally speaking, neither barristers nor solicitors in New South Wales are permitted to advertise, or otherwise communicate publicly, any information or assertions about their fields of practice. This applies, for example, to communications about specialisation, concentration expertise, or willingness to accept work, in particular fields. It applies also to publicising one's membership of a special interest association. [17] The prohibition applies not only to advertisements in the mass media but also, for example, to entries in publications circulating mainly within the profession. The principal sources of the prohibition are, in the case of barristers, the rules of the New South Wales Bar Association and in the case of solicitors, statutory regulations made by the Law Society of New South Wales with the approval of the Governor. [18] These rules and regulations are summarised in greater detail in Parts III and IV, where we consider the general question of advertising, whether in relation to fields of practice or otherwise.

3.18 There is, however, a significant exception to the general prohibition in relation to solicitors. The relevant regulations give the Law Society power to approve types of advertisement which are not specifically authorised by the regulations. [19] It is presumably under this power that the Society has authorised inclusion of some information about fields of practice in its new Legal Services Directory. [20] This directory, first published in 1981, contains details of all solicitors' practices wishing to be included in it, and it is made available to the public and the profession The information in it relates to practices rather than to individual practitioners. The point of importance in the present context is that the directory indicates in which of fourteen particular fields each practice describes itself as "willing to provide assistance". It also enables each practice to indicate whether it claims to have "knowledge" of the laws of any other country.

3.19 A further qualification to the general prohibition is that it does not prevent lawyers from writing books or articles in legal periodicals and thereby conveying indirectly something of their experience and expertise in particular fields. In some circumstances, a similar effect can be achieved by accepting unsolicited invitations to address meetings. [21]

IV. A Proposed Development

3.20 In 1979 the Law Society announced that it intended to relax the present regulations against advertising by solicitors, so as to allow certain types of information to be advertised in newspapers and other printed publications. At the time of writing, these proposed changes are in an advanced stage of preparation. We describe them in detail in Part III when considering the general question of advertising by solicitors. [22]

3.21 The proposed new regulations would not allow solicitors to advertise in relation to fields of practice, otherwise than is presently permitted in the Legal Services Directory. But the Society also announced in 1979 that is had

> "decided to implement a scheme of specialisation under which a solicitor who wishes to be recognised as a specialist will be required to meet defined standards...." [23]

Solicitors recognised as specialists under this scheme would be permitted to advertise themselves as such in newspapers and other printed publications. The Society did not publish detailed proposals for such a scheme until after the publication of our Discussion Paper, *Advertising and Specialisation,* in 1981. It then embodied the proposals in its Submission responding to our Paper. We outline the proposals in chapter 4 when summarising responses to the Paper. [24]

C. DEVELOPMENTS IN OTHER PLACES AND OTHER PROFESSIONS

I. Introduction

3.22 In our Discussion Paper we described a number of recent developments in relation to specialisation in legal professions outside New South Wales, and in professions other than law. [25] The developments related to what we call "fields of practice schemes"; [26] that is, schemes concerning advertising by lawyers about their fields of practice. They comprised schemes which either have been introduced or have been proposed by an authoritative Source. We concentrated on developments which have not occurred as vet in New South Wales.

3.23 We do not repeat all of that description in this Report. But we mention several developments in order to illustrate a range of possible measures which could be adopted in relation to lawyers in New South Wales. As explained earlier, [27] we describe fields of practice schemes along a spectrum from "low lever, to "high level" according to the level of qualifications, if any, which they require of practitioners wishing to advertise about fields of practice.

II. Developments in Legal Professions outside New South Wales

Low Level: United Kingdom

3.24 Prior to 1976 the restrictions on advertising by lawyers in the United Kingdom were similar to those which presently apply in New South Wales. In 1976, the Monopolies and Mergers Commission in the United Kingdom recommended in relation to a number of professions, including solicitors but not barristers, that practitioners should be permitted to advertise any information or assertion, provided that it is not false or misleading, does not claim superiority over other practitioners, and is not Such as to be likely to bring the profession into disrepute. [28] Advertising about fields of practice fell within the ambit of the Commission's recommendations. The recommendations have not been implemented, [29] although they have stimulated some relaxations of the restrictions, Including those mentioned in the following paragraphs.

3.25 In England, solicitors are now allowed to advertise in office signs of a specified size and format that they "can help with" problems arising in one or more of fourteen specified fields. [30] Regional law societies can publish directories or newspaper advertisements listing the names of local solicitors and, amongst other things, the fields in which they undertake or do not undertake work. The national Law Society publishes regional Legal Aid lists of solicitors' practices which claim to be willing to accept work in particular fields and to be willing to accept legal aid work. In the Greater Manchester area, however, the List is of individual practitioners, rather than practices, and indicates in which of a number of specified fields they claim to "have experience". In the same area there is also a higher level scheme involving a director, of solicitors' practices which "have shown to the satisfaction of the Greater Manchester Legal Services Committee that they have some experience in advising and providing representation" before specified tribunals. Since 1977 the annual directory of English barristers, known as the Bar List, has indicated in which of 39 fields a barrister is willing to accept work in the ordinary of his practice".

3.26 In Scotland. practices which are In areas that the Law Society considers to have “an inadequate supply of legal services”, or to be ones where “the availability of that supply is insufficiently, known”, may advertise in the press on a specified number of occasions the nature of the legal services offered” by them. [31] The Society publishes a Legal Aid List similar to that in Greater Minchester. It also his a Directory of Specialist Services, comprising the names of individual solicitors who have responded to a general inquiries from the Society as to whether they have a “reasonable level of experience” in any one of 149 listed fields. This Directory is not directly available to the public. It is used by the Society’s officers when responding to inquiries from the public or the profession about the names of solicitors who claim to be well-versed in a particular field.

Low-Medium Level: Ontario

3.27 In Ontario, practitioners may not advertise about their fields of practice save under a scheme which permits them, subject to certain conditions, to advertise that they are in “General Practice” or that they have up to three “preferred areas of practice”. Each area must be drawn from a list of areas approved bv the Law Society. Prior to 1982, a practitioner wishing to advertise in this way was required to satisfy modest continuing legal education requirements, but this has been replaced by a requirement that every two years the practitioner must certify to the Law Society that during the preceding two years 20% of his or her practice has been spent in the particular area. [32]

3.28 Some Canadian provinces now allow practitioners to advertise “preferred areas of practice” without having to obtain any specified qualifications, [33] and in 1980 the Professional Organisations Committee in Ontario recommended the adoption of a similar approach. [34] By contrast higher level schemes, intended to enable highly-specialised practitioners to advertise themselves as specialists, have been considered in Ontario and several other provinces, [35] but they do not appear likely to be adopted in the foreseeable future.

Medium-High Level: American Bar Association

3.29 As a guide for States wishing to allow advertising about specialisation the American Bar Association adopted in 1979 a Model Plan of Specialisation. [36] It amounts to a suggested framework, leaving room for individual variations between States. The scheme would be run by a Board, and practitioners would be permitted to advertise themselves as “Board Recognised Specialists” in a particular field, provided that every five years they satisfy the Board that they have

(i) had “substantial involvement’ in the field for the previous three years;

(ii) participated satisfactorily in such continuing legal education as is prescribed by the Board (not to be less than 10 hours for each of the previous three years); and

(iii) provided five independent referees from whom the Board may obtain references concerning the practitioner’s competence and qualifications to be recognised as a specialist.

Proposals based on this Model Plan have been adopted in a few States but have been rejected, or held in abeyance, in a number of other States. In several States a lower level scheme has been introduced, [37] while in several other States a higher level scheme has been adopted. [38]

High Level: California

3.30 Since 1973, a specialist certification scheme for lawyers has been operated by a statutory Board of Legal Specialisation in California. [39] It covers criminal law, workers’

compensation, taxation law, and family law. Practitioners can obtain certification in a field if they have

(i) acquired five years' experience in legal practice;

(ii) acquired a specified degree of past experience in the field (for example, in workers' compensation an applicant must have made at least 300 appearances in workers' compensation proceedings during the past five years and have devoted at least one quarter of his or her practice to that field in each of three out of the past five years);

(iii) completed specified continuing legal education; and

(iv) in some fields, provided references from judges or other lawyers involved in the field.

Certified practitioners can advertise themselves as" Board certified specialists", and can use any other form of words provided it is not false or misleading. The scheme has aroused considerable opposition during its 9 year history, and its future continues to be uncertain. [40] Broadly similar schemes have been adopted in a few States, but proposals for high level schemes have been rejected or deferred in a number of other States. [41]

Two-Tier Systems

3.31 Schemes of differing levels are not necessarily incompatible. [42] In California, for example, there is a two-tier system. [43] Practitioners who wish to advertise themselves as certified specialists must meet the requirements which we described above. But any practitioner is free to advertise other claims about fields of practice, provided that they are not false or misleading. In other words, California has a combination of high level and low level schemes.

III. Developments in Professions other than Law

Medicine

3.32 For many years in Australia there have been a number of colleges and associations of medical practitioners who are interested in particular fields of practice. [44] Many of them require applicants for membership or fellowship to complete a rigorous course of examinations and substantial practical training in the particular field. The only permitted form of advertising by medical practitioners about their fields of practice is that membership or fellowship of most of these specialist bodies can be indicated on, for example, stationery and brass plates.

3.33 However, the significance of membership or fellowship of these specialist bodies goes beyond the area of advertising. First, it has become increasingly rare for public hospitals to be willing to appoint medical practitioners to senior positions in a particular field unless they are members or fellows of the relevant college or association Secondly, since 1970, higher Commonwealth medical benefits have been payable if the particular service was rendered by a recognised specialist on referral from another practitioner. [45] The usual requirement for recognition as a specialist under this scheme is membership or fellowship of a specified college or association in the particular field.

Accountancy

3.34 Since 1979, Australian accountants have been permitted to advertise one of eight specified descriptions about their fields of practice. [46] Examples include "registered company liquidator" and "management consultant". The advertisements "must in no way imply superior expertise or evaluate the services available". [47] They can appear in newspapers or other printed publications.

Engineering

3.35 Prior to 1981, Australian engineers were not permitted to advertise about their fields of practice, save to a limited extent in brochures and in advertisements in technical journals. [48] In 1981 the rules were successfully challenged before the Trade Practices Tribunal under the Commonwealth Trade Practices Act 1974. [49] The new rules allow advertising, including advertising about fields of practice, provided that it is "dignified, becoming to a professional engineer and characteristically free of any factor or circumstance that could bring disrepute to the profession Information given must be truthful factual dignified and free from ostentatious, complimentary or laudatory expressions or implications". [50]

FOOTNOTES

1. See *Advertising and Specialisation,* chapter 2.

2. The statistics referred to in this paragraph and in paragraph 3.4 were calculated by the Commission's research staff from data obtained in a survey conducted by Roman Tomasic and Cedric Bullard for the Law Foundation of New South Wales. Some relevant findings of that survey have been published in R Tomasic and C Bullard, *Lawyers and their Work in New South Wales* (Law Foundation of NSW, Sydney, 1978), pp.36-44, 159-166, 168, 215-228. For a valuable survey of the position in Victoria, see M. Hetherton, *Victoria's Lawyers* (Victoria Law Foundation, Melbourne, 1978).

3. See note 3.31, and Tomasic and Bullard, pp.168, 207.

4. For data on regional variations see Tomasic and Bullard (note 3.31 above).

5. For statistical comparisons of this kind, see, eg, H Arthurs, J Willms and L Taman, "The Toronto Legal Profession: An Exploratory Survey", University of Toronto Law Journal (1971), vol.21, p.498.

6. Calculated from the 1982 Law Almanac.

7. See para. 2.1.

8. For a fuller discussion of this point see our Discussion Paper, *Advertising and Specialisation,* pp. 12-13.

9. For a discussion of the rank of Queen's Counsel see our Discussion Paper, *The Structure of the Profession,* chapter 8, and our *First Report on the Legal Profession,* chapter 9.

10. For a fuller discussion of the matters considered in this paragraph see our Discussion Papers, *Advertising and Specialisation,* pp. 14-16, and the *Structure of the Profession pp.68,* 121-124, 133-146.

11. For a fuller list of these associations, see our Discussion Paper *Advertising and Specialisation,* p.16.

12. See Australian Law News, March 1980, p.29 and June 1980, p.32.

13. For a fuller treatment of the matters referred to in this paragraph see our Discussion Paper, *Advertising and Specialisation,* pp. 17-18.

14. Constitution of the Family Law Practitioners Association. rule IV(c).

15. Rule IV(d).

16. Rule IV(d).

17. Especially rules 72 and 73. For a fuller description of these rules see chapter 15 of this Report.

18. Solicitors (General Regulations, reg.29. For a fuller description of this regulation, and relevant rulings of the Law Society, see chapter 9 of this Report.

19. Solicitors' (General) Regulations, reg. 29(2).

20. For further discussion of the Directory, see paras.9.7 and 13.12-13.14 of this Report.

21. For further consideration of the matters referred to in this paragraph, see chapter 14 of this Report.

22. See paras. 9.6-9.19.

23. Law Society of New South Wales, *Special Bulletin* (No. 4 of 1979), p.8.

24. See para. 4.14.

25. See chapter 3.

26. See paras.2.5-2.6 of this Report.

27. See para. 2.6.

28. See *Solicitors' Services: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertsing* (HMSO, London. 1976), p.40, *Solicitors' Services: A Report on the Supply of Services of Solicitors in Scotland in Relation to Restrictions on Advertising* (HMSO, London, 1976); *Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising* (HMSO, London, 1976).

29. The Law Societies' failure to implement the recommendations has been criticised by the Government (Guardian Gazette, 1978, vol.75, p.521) and the Director-General of Fair Trading (Law Society Gazette, 1982, p.95).

30. For a summary of the present restrictions in England, see New Law Journal (1979), vol.129, p.1023. See also our Discussion Paper, *Advertising and Specialisation* pp.24-27 and 106-109-, Royal Commission on Legal Services, *Final Report* (HMSO, London, 1979, Cmnd.7648), pp.368-373: Royal Commission on Legal Services in Scotland, Report, (HMSO, Edinburgh 1980, Cmnd.7846), pp.61-65.

31. On the position in Scotland, see generally, Royal Commission on Legal Services in Scotland (note 30 above): K Macgregor, "Legal Services and the Public", International Bar Journal (1978), p.56: K Pritchard, "Rules of Professional Advertising in Scotland", International Legal Practitioner (1980), vol.5(l), p.28: Law Society of Scotland, *The Solicitors Compendium* (Edinburgh, 1980).

32. See Law Society of Upper Canada, *Communique*, 10th December, 1981.

33. See eg. A Esau, "Recent Developments in Specialisation Regulation of the Legal Profession", Manitoba Law Journal (1981). vol.11, p.133 at pp.170-176. Note that the previously liberal rules in Manitoba about advertising fields of practice were changed early in 1982; see *National* (1982), vol.19, no. 3.

34. Report (Ontario Government Bookstore. Toronto, 1980), pp.193-194.

35. See A Esau, “Specialisation and the Legal Profession”. Manitoba Law Journal (1979), vol.9, p.255.

36. For the Model Plan, an Explanation of it and Summary of Responses to it, see American Bar Association, Standing Committee on Specialisation, *Information Bulletins* Nos.6 and 7 (Chicago, 1980). For the position in the United States generally, see the annual Reports to the ABA’s House of Delegates by its Standing Committee on Specialisation: and Esau (note 33 above).

37. See eg. Esau (note 33 above). at pp.156-158.

38. See para.3.30 of this Report.

39. For the original scheme, see California State Bar Journal (1971), vol.46, p.182.

40. For a history of the scheme see Esau (note 3.28.1 above), at pp.139-149; “Forum: Legal Specialisation in California”. Los Angeles Lawyer (Feb 1980),p.10-California Lawyer (Dec 1981). p.15, and (May 1982). p.43.

41. See eg. Esau (note 33 above). at pp.149-156.

42. One existing and proposed two-tier systems in the US, see Esau (note 33 above), at pp.158-164.

43. See State Bar of California. *Rules of Professional Conduct*, rule 2-101.

44. For a fuller description of the position in the medical profession and for relevant sources, see our Discussion Paper, *Advertising and* Specialisation, pp.33-34 and 209.

45. For medical benefits legislation, see the Health Insurance Act 1973 (Commonwealth), and see the Annual Reports of the National Specialist Qualifications Advisory Committee.

46. For further details and relevant sources, see our Discussion Paper, *Advertising and Specialisation*. pp.34 and 209.

47. See *The Chartered Accountant in Australia* p.34.

48. For a fuller description of the matters mentioned in this paragraph, see our Discussion Paper, *Advertising and Specialisation,* pp. 34-35, 119-120, and para. 9.23 of this Report.

49. See *Association of Consulting Engineers, Australia,* Australian Trade Practices Reporter (1981), p.40-202.

50. Association of Consulting Engineers, Australia, *Code of Ethics,* rule 4(k).

4. Our Discussion Paper

4.1 In this chapter we summarise the proposals for change which we advanced tentatively in 1981 in our Discussion Paper, *Advertising and Specialisation*, [1] and we mention some of the responses which were made to that Paper.

A. OUR TENTATIVE SUGGESTIONS

4.2 In the Discussion Paper, we suggested that lawyers should continue to be prohibited from advertising themselves as specialists or experts in particular fields. We suggested, however, that there should be some relaxation of restrictions concerning other forms of advertisement about fields of practice. We summarise our principal suggestions below.

I. Solicitors

Willingness to Accept Work

4.3 We suggested that solicitors should be permitted to advertise in newspapers and other publications their willingness or unwillingness to accept work in particular fields of practice, and their willingness or unwillingness to accept such work directly from clients rather than only on referral from other practitioners. [2] No academic or practical qualifications would be required for advertising in this way but advertisements would be required not to be false or misleading and would be subject to certain conditions concerning terminology.

4.4 We canvassed the possibility of publishing a Referrals Directory, intended principally for use by lawyers. It would be in addition to the existing Legal Services Directory and would contain a much greater number of fields than that Directory. It would indicate in which of these fields individual solicitors are willing or unwilling to accept work, and whether or not they accept work directly from clients.

Preferred Fields of Practice

4.5 We said in the Paper that we were not necessarily opposed to the introduction of a scheme permitting solicitors to advertise themselves as, for example, “preferring”, or being “specially interested” in, particular fields. [3] We suggested that, if such a scheme were introduced, it should require practitioners to meet certain qualifications before advertising in such terms, but the qualifications should not be above medium level. They should not involve, for example, successful completion of written or oral examinations, attendance at lengthy courses of education maintenance of substantial levels of concentration in a particular field, or provision of references from fellow practitioners.

4.6 We did not positively suggest the introduction of such a scheme, but we suggested that if it were established it should be a low-medium scheme, with the following principal qualifications for lawyers wishing to advertise themselves as having a “preferred” field or a “special interest” in a field:

> three years in active practice as a lawyer;
>
> for two years prior to commencing the advertisements, attendance at a specified amount of approved continuing legal education (say, 20 hours each year); and

for each year after commencing advertisements, attendance at a specified amount of approved continuing legal education (say, 20 hours for each of the first two years and 10 hours for each subsequent year).

We suggested that advertising under this scheme should be restricted to certain broad fields, one of which should be General Practice. There should be no limit on the number of fields in which any one practitioner could advertise, subject to satisfying the qualifications in each field. We stressed that the scheme, including the fixing of qualifications, should be under the control of the general regulatory body for all solicitors, rather than, for example, one or more associations of practitioners interested in a particular field of practice ("special interest associations").

Special Interest Associations

4.7 We said in the Paper that special interest associations can be beneficial but should not be permitted to become, in reality, the regulatory bodies for solicitors working in particular fields. [4] The general regulatory body for solicitors should retain effective control over the professional activities of all solicitors. We suggested that the general regulatory body should give consideration to establishing, under its own auspices, various special interest associations to be known as "Sections".

4.8 We suggested that discrimination in law or official practice (such as the practice of the Government and the courts) should rarely, if ever, be based on whether or not a solicitor belongs to a special interest association. For example, if practitioners are to be allowed to advertise themselves as specialists, the right to do so should not be dependent upon being a member of a special interest association (save perhaps a Section under the control of the general regulatory body). We also referred to our suggestions in an earlier Discussion Paper, *The Structure of the Profession,* concerning the regulation of restrictive practices amongst lawyers, [5] and we pointed out that these suggestions would cover restrictive practices engaged in by special interest associations.

II. Barristers

4.9 Generally speaking, we made the same suggestions in relation to barristers as in relation to solicitors. [6] The principal exceptions were, firstly, we suggested that it might be appropriate to restrict barristers to advertising in publications circulating principally within the legal profession (such as the Law Society Journal or the Law Almanac) and, secondly, we said that the case for introduction of a "preferred areas of practice" scheme is weaker in relation to barristers than solicitors. Both of these exceptions were based on the fact that barristers do not accept work directly from clients.

4.10 In an earlier Discussion Paper, *The Structure of the Profession*, three of us suggested the abolition of the division between barristers and solicitors. [7] In our Paper, *Advertising and Specialisation,* we suggested that, if the division were abolished, the rules concerning advertising about fields of practice should be the same for all practitioners, save perhaps that those practitioners who do not accept work directly from clients should be restricted to advertising in publications which circulate principally within the profession.

4.11 One of us, Mr Conacher, differed to some extent from the suggestions made by the majority of us in relation to barristers. [8] He was inclined to prohibit barristers from advertising about their fields of practice, save for advertising their willingness to accept work in particular fields in a directory similar to the Bar List in England. [9]

B. RESPONSES TO OUR DISCUSSION PAPER

4.12 The principal responses to our Discussion Paper were from the Law Society of New South Wales and the New South Wales Bar Association. We give an introductory outline of those responses below, and we refer to particular aspects of them in subsequent chapters.

The Law Society

4.13 The Law Society's response [10] dealt only with our suggestions concerning solicitors. It agreed with our general view that solicitors should be given greater freedom to advertise about their fields of practice. But it disagreed with aspects of the changes which we suggested. Its two principal disagreements were as follows. First, it did not favour our suggestion that solicitors should have wider scope to advertise their willingness or unwillingness to accept work in particular fields. It said that such advertisements should continue to be confined to the Legal Services Directory. Secondly, the Society did not favour advertisements couched in terms of "preferred" fields of practice or "special interest" in particular fields. But it said that solicitors should be entitled to advertise themselves as "specialists", provided they have become designated as such by satisfying certain qualifications. Accordingly, it proposed what it described as a medium level scheme in place of the low- medium level scheme which we described in our Paper. It also said that "it is quite possible that a high level scheme may be superimposed at a later stage". [11]

4.14 The Society has sought responses from its members before finalising its proposed "medium level" scheme. In the form circulated for discussion, [12] the scheme would involve the following principal requirements for designation:

> substantial involvement in the field for the three years preceding designation (to be determined by" objective and verifiable standards", and, if measured by the time spent working in the particular field, to require at least 25% of ones time to be spent in the field)'
>
> at least ten hours of approved continuing legal education in each of the three years preceding designation; and
>
> affidavits from at least five practitioners in the field "attesting to the competence and qualification of the applicant as a specialist".

Designation would be valid for three years. Qualifications for re-designation would be broadly similar to those required for designation. Initially the scheme would be confined to four fields of practice: Family Law and Divorce; Criminal Law Magistrates Courts; Personal Injuries - Third Party, and Personal Injuries - Industrial Accidents.

4.15 The Law Society noted "with interest" our suggestion that it should compile and publish a Referrals Directory. The Society said that if it is satisfied that there is "a need for another Directory such as a Referrals Directory then the Society will meet that need". [13] Subsequently the Society's Community Assistance Department invited solicitors to notify it about the fields of practice in which they are willing to accept work. [14] Their names will then be passed on to people who ask the Department for assistance in seeking solicitors who handle work in a particular field. There is no restriction on the fields which solicitors may nominate, although the Department has listed 29 fields (in addition to the 14 fields in the Legal Services Directory) in relation to which it has been asked in the past to provide the names of solicitors willing to accept work.

The Bar Association

4.16 In its response, [15] the Bar Association did not express general approval of our suggestion that barristers should be entitled to advertise, at least in publications circulating amongst lawyers, their willingness to accept work in particular fields. But it expressed interest in the possibility of publishing a directory of barristers, along the lines of the Bar List in England, which would include information about the fields in which individual barristers are

willing to accept work. It said that it had referred this suggestion to the Joint Working Committee which was established in 1981 by the Bar Association and the Law Society for the principal purpose of considering suggestions made in our earlier Discussion Paper, *The Structure of the Profession* [16] The Association noted with approval that we did not suggest the introduction of what it called a "specialisation scheme" for barristers, whether at the low-medium level which we described in our Paper or at a higher level. The Association did not refer specifically to our suggestions concerning solicitors, but the general tenor of its response was opposed to the development of "specialisation schemes" within the legal profession.

FOOTNOTES

1. Chapters 5 and 6.

2. For the suggestions summarised in paras. 4.3 and 4.4, see our Discussion Paper, pp.62-67.

3. For the suggestions summarised in paras.4.5 and 4.6. see our Discussion Paper, pp.68-74.

4. For the suggestions summarised in paras.4.7 and 4.8, see our Discussion Paper, pp.75-77.

5. See chapter 6 of that Paper.

6. For the suggestions summarised in paras.4.9 and 4. 10. see our Discussion Paper, chapter 6.

7. See chapter 5 of that Paper.

8. See chapter 15 of our Discussion Paper, *Advertising and Specialisation.*

9. The English Bar List is referred to in para.3.25 of this Report.

10. "Advertising and Specialisation" (Submission No.412), esp. pp.6-13.

11. See source cited in note 10 above, at p.12.

12. See "Advertising and Specialisation" (Submission No.412), Annexures (b) and (c).

13. "Advertising and Specialisation" (Submission No.412), p.10.

14. See Law Society Journal (1982). vol.20, p.267.

15. "Advertising and Specialisation" (Submission No.406), pp.1-4.

16. The establishment and role of this committee was described in our *First Report on the Legal Profession,* para.2.26.

5. Some Consequences of Specialisation and of its Regulation

A. INTRODUCTION

5.1 We consider in this chapter the impact of specialisation and the consequences of different ways of regulating specialisation. In considering regulation of specialisation, we concentrate on different types of fields of practice schemes; that is, schemes for regulating advertisements about fields of practice. As we have mentioned earlier, [1] there are few proponents of other ways of regulating specialisation, such as prohibiting non-specialists from working in specialist fields.

5.2 We look at the impact of specialisation, and of fields of practice schemes, in relation to

- fragmentation of the profession;
- the quality of legal services;
- identification of appropriate practitioners for particular work;
- the speed and cost of legal services;
- particular sectors of the profession (namely, general practitioners, small or outlying practices, and young practitioners).

More detailed consideration of each of these matters is contained in our Discussion Paper, *Advertising and Specialisation*. [2]

B. FRAGMENTATION OF A PROFESSION

5.3 A substantial danger of intensive specialisation within the legal profession, and of fields of practice schemes which encourage such specialisation, is that the profession may become excessively fragmented. [3] Associations of practitioners specialising in particular fields may acquire dominant power over the number of practitioners who work in their field, over those practitioners' styles of practice, and over many of the rules of professional conduct which those practitioners must observe. This may occur without any vesting of statutory powers in these associations. The associations can become, in practice, largely autonomous sectors of the profession, the members of each of which work principally or exclusively in one field of practice in which they have acquired a dominant, or even monopoly, position.

5.4 The New South Wales Bar Association is an example of a body which has developed into being the de facto regulatory body for one sector of the profession without having been vested with any statutory powers of regulation. [4] Recent activities of the Family Law Practitioners Association referred to in the previous chapter, may constitute the early stages of a similar development of de facto power over part of the profession. [5] The process of fragmentation is clearly apparent in the history of the medical profession in New South Wales; the Royal Colleges and several other specialist associations have acquired extensive de facto control in their respective fields.

5.5 The extent to which fragmentation occurs can be affected substantially by the introduction of fields of practice scheme. For example, if a scheme adopts membership of a specialist association as the criterion for determining which practitioners may advertise themselves as specialists, it is likely thereby to reinforce or increase the associations power over

practitioners in the field in question. Of course, a scheme may strengthen greatly an association's position merely by permitting membership of the association to be advertised. Moreover, some schemes can cause fragmentation regardless of whether specialist associations develop. For example, a high level scheme is likely to have the effect of excluding from a field all practitioners save those who concentrate their practice solely or overwhelmingly in that field.

5.6 The dangers of fragmentation posed by a high level scheme were referred to in a submission to us by the Bar Association

> "such a scheme", the Association said, "encourages 'elitism' of specialists and the consequent combination of specialists in elitist groups, which could well restrict the attaining of specialisation, limit the areas or fields of specialization to those serving the interests of the wealthy, and increase the costs of specialist legal services which would otherwise be available without such a scheme." [7]

The Professional Organisations Committee, established by the Government of Ontario to report on the organisation of several professions, including law, said that

> "formal specialisation creates serious dangers of balkanizing the professional field by fragmenting it into a series of narrowly defined functions.... We would need to be confronted with much more substantial evidence than we have of massive information breakdowns in the legal services market for us to be persuaded that these dangers are worth running." [8]

5.7 We described the process of fragmentation and its dangers, in greater detail in our Discussion Paper. [9] In its response to that Paper, the Law Society said that under its proposed fields of practice scheme "central unified control of specialists would prevent any possibility estimates the extent to of fragmentation of the profession". [10] In our view, the Society under which de facto power can be acquired by a specialist group despite control remaining, in theory, in the Society. Moreover, it overlooks the practical difficulties which may arise in seeking to control a specialist association which is organised on a national basis or which includes barristers as well as solicitors amongst its members. The number and strength of such associations has increased in the last few years and can be expected to continue to do so. Recent experience in the United States demonstrates the difficulty which State regulatory bodies and professional associations can have in seeking to exercise effective control over high level fields of practice schemes established by national specialist associations. [11]

5.8 We regard the dangers of excessive fragmentation as being of fundamental importance in any consideration of possible fields of practice schemes or other means of regulating specialisation. Some of the adverse consequences of fragmentation are referred to in the course of the remaining sections of this chapter.

C. QUALITY OF SERVICE

5.9 We turn now to look at the impact of specialisation, and of various levels of fields of practice schemes, on the quality of legal services. [12]

I. Advantages

5.10 One of the most important advantages of specialisation was referred to in a submission to us by the Law Society:

> "A practitioner who is more highly qualified in an academic sense and who has greater depth of practical experience in a particular field of law should be better able to perform

> legal services in that field than a general practitioner who provides general services in all or most fields of law to his client." [13]

These benefits relate partly to the speed and cost of legal services, which we, consider later in this chapter. But they relate also to quality of service. A practitioner who is specially familiar with a field is less likely to be unaware of, or to misinterpret, the relevant law and practice. Moreover, detailed knowledge of official procedures and personalities in a particular field is often of great importance. These advantages of specialisation have increased in significance as the growing complexity and diversity of Australian society has been reflected in the laws and legal system by which we are governed. The emergence of new fields of practice, and the rapid changes in law and technique in many traditional fields, have made it increasingly difficult for a practitioner to provide skilled service across a wide range of areas. Furthermore, specialisation enables lawyers to restrict their work largely to those fields which interest them most or to which their talents are best suited. Increased job satisfaction can improve greatly the quality of a practitioner s work.

5.11 A fields of practice scheme can increase the likelihood of obtaining the advantages of specialisation to which we have referred. It may encourage practitioners to undertake special training and may assist them to develop and maintain an extensive practice in particular fields. However, these beneficial consequences should not be exaggerated. For example, training which consists solely of lectures and theoretical examinations, or practical experience which is concentrated but short-term, does not necessarily improve substantially the quality of a practitioners work and certainly does not guarantee competence. Some lawyers are adept at passing examinations but have no practical bent, while others are the reverse. Moreover, a lawyer may spend most of his or her time working in a particular field without doing that work as competently as some practitioners who rarely undertake it.

II. Disadvantages

5.12 In some circumstances, a high level of concentration in a particular field can adversely affect the quality of service provided by a practitioner. This may occur, for example, where a client's problems do not fit neatly into one field of practice. In its response to our Paper, the Bar Association emphasised that problems of this kind commonly arise. [14] Even if the assistance of other practitioners is sought the overall quality of service may nevertheless suffer from a lack of co-ordination and a diffusion of responsibility, and undue expense and delay may be caused. As we pointed out in our *First Report,* concerning the general regulation and structure of the profession, difficulties of this kind already arise from the division of the profession into barristers and solicitors. [15]

5.13 Even where work falls entirely within a specialist s field, it sometimes may suffer in quality as a result of intense specialisation Specialists can develop excessively rigid and preconceived responses to problems in their field, rather than seeking fresh or innovative solutions. [16] It is relevant to note in this context that many of the practitioners who are widely regarded as the leaders of the profession by fellow lawyers are Queen's Counsel who do not specialise intensively in any particular subject area of law. Their services are highly sought after because of the breadth of their knowledge and experience, and because of their ability to integrate, or to draw analogies between different fields of law. An analogous point has been made by the Law Society in another context, when putting the view that clients with conveyancing work will obtain better service from the all round legal skills of a solicitor rather than the narrower skills of specialist conveyancers of the kind found in South Australia (land brokers) and Western Australia (settlement agents). [17]

5.14 A former President of the American Bar Association, speaking of both the legal and medical professions, has said:

> "Both professions have undergone increased specialisation, and the result has been a decrease in the continuous physician- patient or attorney-client relationship. With

> increased impersonalisation, the warm human relationship between the professional and the patients and clients has disappeared." [18]

Another possible disadvantage was referred to in a submission to us by a suburban Law Society in Sydney:

> "Not all areas of the law are equally remunerative and specialisation could lead to some areas being neglected, with the possibility that such expertise as built up in those neglected areas is of an inferior standard to other areas." [19]

D. IDENTIFICATION OF APPROPRIATE PRACTITIONERS

I. Advantages

5.15 A major advantage of specialisation is that, provided it is accompanied by a scheme which permits some advertising about fields of practice, it can greatly assist clients to find their way to a lawyer whose skills are appropriate for their needs. There is, however, a wide variation in needs for assistance in identifying appropriate practitioners, and in the type of assistance which different fields of practice schemes can provide. We look first at identification by clients or their lay advisers, and then at identification by lawyers.

Identification by Clients or Lay Advisers

5.16 We referred in our Discussion Paper to some of the evidence which convinces us that many members of the public experience considerable difficulty when trying to find a solicitor with the appropriate skills for their particular problem. [20] Some fail in their attempts and it seems that others may be so daunted that they do not resort to a lawyer at all.

5.17 The nature and degree of the need for assistance in identifying appropriate lawyers varies greatly between different types of client Clients such as large commercial organisations, government agencies, business people, and other repeated users of legal services are likely to have relatively good access to information which enables them to choose an appropriate lawyer. [21] If these sophisticated users of legal services do need information about lawyers, it will often be about high levels of skills in areas which the clients can specify with some precision. The cost of the specialist skills which they seek may be of relatively little importance to them.

5.18 But most people are in a very different situation from these sophisticated users. In most instances, these people need information which is readily available, easily comprehensible, and indicates lawyers who are likely to be competent in a broadly defined field of practice. [22] Information about specialists with high levels of skill in narrow fields will often be of little interest to those clients because they cannot identify correctly the appropriate field and are unlikely to be able to afford these specialists' services. Moreover, such specialists are unlikely to be geographically accessible to many clients in outer suburbs and in country areas.

5.19 These different needs mean that the consequences, in relation to accessibility of legal services, of a given kind of fields of practice scheme, will differ between sophisticated and less sophisticated users of legal services. Information about high level specialisation in narrow fields is of greater significance to sophisticated groups, but their need for assistance in identifying appropriate practitioners is less. For other clients, the major need is for assistance in identifying practitioners who are likely to be competent (but not necessarily highly expert) in broad fields of practice.

Identification by Lawyers

5.20 At present solicitors faced with a problem that falls outside their areas of expertise are limited in the ways in which they can identify appropriately skilled practitioners to whom they

can refer aspects of the matter or the whole matter. Particular difficulty in identification can be experienced by country or suburban solicitors who are isolated from the Bar and from the large city firms, in which the majority of leading experts are to be found. [23]

5.21 In some circumstances, a low level fields of practice scheme, using broadly defined fields, would be sufficient to meet these present difficulties in identification But in many other instances lawyers seek experts in narrow fields. Another factor to bear in mind is that self-assertions concerning fields of practice may create fewer dangers where they are directed towards other lawyers rather than to clients.

II. Disadvantages

5.22 The major disadvantage of fields of practice schemes in relation to identification of practitioners is that they may be misleading. For example, they may result in practitioners who are not expert in a particular field being identified as expert in it They also may give rise to practitioners who are expert or competent in a field not being identified as such.

5.23 Different types of fields of practice schemes may have markedly different effects on the incidence of inappropriate selection. The main danger of a high level scheme is that it may fail to identify all those practitioners who are expert or competent in a field and, thereby, may not only restrict access to those who do not qualify under it but eventually may reduce the overall supply of expertise and competence in the field. These omissions may occur because the scheme's qualifications are too high, or because they are misdirected in that, for example, they place excessive emphasis on lengthy training or experience as an indicator of skill. Misdirected criteria also create the danger of identifying as expert or competent some practitioners who do not have those qualities but who, for example, are merely good at passing theoretical examinations.

5.24 By comparison a lower level fields of practice scheme is much less likely to cause inaccurate adverse implications to be drawn about some practitioners. But a low level or medium level scheme may result in some practitioners being wrongly identified as competent or expert. For example, a scheme may aim to identify competence but. may choose inappropriate criteria for that purpose. And as the Law Society stressed in its response to our Discussion Paper, a scheme may aim to identify willingness to act, or competence, in a particular field, but be misunderstood as connoting a high level of expertise.

5.25 In assessing the disadvantages of identifying some solicitors as more skilled than they really are, it must be borne in mind that the provision of readily available information which is sometimes inaccurate, or sometimes misinterpreted by users, may be a great improvement on a situation in which information on the topic is, for many clients, very difficult to obtain and when obtained may carry an even higher risk of inaccuracy. Subject to the possible impact of the new Legal Services Directory, the latter situation presently exists in New South Wales.

5.26 We have referred earlier to the way in which some fields of practice schemes can encourage fragmentation of the profession. In turn, fragmentation increases substantially the danger that qualifications for specialist status in a field will be determined solely by specialists in that field and in such a way as to unreasonably stifle competition. As a result, many competent practitioners may be unable to meet the qualifications, and clients and other lawyers may be unable to identify and utilise their competence.

E. SPEED AND COST OF LEGAL SERVICES

I. Impact on Practitioners

Advantages

5.27 One of the most important advantages of specialisation is that it can save time and money for practitioners. [24] For example, practitioners who have dealt with a particular type of problem are likely to need less time to research and consider the relevant law and practice if a similar problem is subsequently brought to them. Moreover, the economies of scale may enable a practitioner with a high volume of work in a particular field to achieve greater efficiency by spending time and money on training, and on the development of libraries, equipment, staff and procedures of a kind specially suited to the field.

5.28 The development of specialisation, and of fields of practice schemes, within the profession can facilitate referrals to appropriately skilled practitioners. This may not only assist practitioners to attract specialist work which they can handle with great efficiency, but may also make it easier for them to avoid work which is likely to be slow and unremunerative for them because they lack expertise in the relevant field.

Disadvantages

5.29 High level specialisation may mean that practitioners have to complete lengthy, arduousorexpensivetrainingcoursesinordertoattainspecialiststatus.Itmayalsomeanthat they have to undergo relatively unremuneratiave periods of practice while building up their specialist qualifications. Their resultant expenditure of time, effort and money may be quite substantial. However, they may be compensated by the level of fees chargeable upon acquiring specialist status.

II. Impact on Clients

Advantages

5.30 If specialisation saves time and money for practitioners, some or all of this benefit may be passed on to clients in the form of lower fees. [25] Even if fees remain at the same level, or increase, clients may nevertheless benefit from faster work. Moreover, if specialisation improves the quality of service, an increase in fees borne by the client may be outweighed by the benefits of, for example, winning a case which cheaper but less expert service would have lost.

Disadvantages

5.31 If lawyers expend substantial time and money in acquiring specialist status, they are likely to seek compensation by increasing their fees upon attaining that status. And the prestige of being a recognised specialist is likely to enable such a practitioner to ask higher fees of a client than can a non-specialist who performs a similar task at a similar standard of quality. It is relevant in this context that under the present Australian medical benefits scheme a higher amount is payable if work is done by a specialist than if the same work is done by a general practitioner.

5.32 A major potential disadvantage of intensive specialisation within the profession, and of fields of practice schemes which encourage such specialisation, is that in various fields a cohesive and relatively small group of practitioners may attain a monopoly, or dominant, position in the supply of services, and, by concerted action, push up the level of fees being charged. This danger was referred to in a submission to us by the Bar Association:

> “Formal certification of specialisation can only tend to encourage elitism and monopolisation, with a consequent tendency of constantly increasing ‘specialist’ fees, with the restraints of the market place removed, under the guise of particular service to the public.” [26]

5.33 A further potential disadvantage is that the development of narrow specialty groups can lead to clients wasting time and money by having to resort to a number of different

practitioners over a problem which should have been resolvable by one practitioner. The resultant double-handling, delays and excessive cost are analogous to those which we described in our *First Report* as arising from the present division between barristers and solicitors. [27]

5.34 In assessing the impact of specialisation on speed and cost it is essential to bear in mind the wide diversity of clients and their problems. In some situations, speed and superlative quality may be important and the client may be willing and able to pay a premium for them. In other situations, they may not be important or, although they are important, the client cannot pay for them. A great danger of intensive specialisation within the profession is that by seeking perfection or by creating conditions in which specialists can force their fees up, it may price specialist services out of the reach of most individual clients and at the same time may reduce the supply of non-specialists who can provide the service with reasonable competence at a lower fee. It may also induce, or compel practitioners to concentrate exclusively in one field, rather than using their work in a remunerative field to subsidise their work in other fields where many clients cannot afford high fees.

F. EFFECTS ON PARTICULAR TYPES OF PRACTITIONERS

I. General Practitioners

Advantages

5.35 The development of specialisation within the profession, especially if allied with a fields of practice scheme, can make it easier for general practitioners to refer matters for which they are not suited to other, more appropriate, practitioners. The risks to both the practitioner and the client of inefficient or incompetent service are avoided. This advantage can be very substantial. It is, however, well-known and accordingly we do not dwell on it here. The potential disadvantages are less widely understood and accordingly we refer to them at somewhat greater length.

Disadvantages

5.36 One of the major disadvantages of a high degree of specialisation within the profession, and of high level fields of practice schemes, lies in the possible adverse consequences for general practitioners. As specialisation develops, so general practitioners are likely to lose work, especially work of the more stimulating or remunerative kind that is likely to attract specialists. They not only lose work in certain fields but, over time, their skills in those fields decline through lack of use. Their income and status declines, with a consequentially adverse effect on the number, calibre and morale of practitioners in general practice. These consequences are especially likely to occur if a medium or high level fields of practice scheme is introduced. Such a scheme is likely to lead many clients to under-estimate the competence of general practitioners and to take their work only to specialists certified under the scheme.

5.37 It may be argued that a decline in the number and quality of general practitioners does not matter because clients will be able to avail themselves of the services of specialists. But such an argument overlooks several major considerations. First, many problems benefit from being handled by a lawyer who has developed over some years a general familiarity with the client and with his or her affairs, rather than by a specialist previously unknown to the client Secondly, many clients may be constrained by financial or geographical considerations to resort to a general practitioner rather than to a specialist. Thirdly, many clients may not know in which field their problem lies and therefore may not know which type of specialist to approach. Fourthly, where a problem relates to more than one field it may sometimes be preferable for a general practitioner to handle it rather than for it to be dealt with solely by referral between specialists in the different fields.

5.38 The medical profession provides an instructive example of the importance of general practice, and of the way in which extensive development of specialization within a profession

can weaken general practice. We quoted commentators to this effect in our Discussion Paper and we do not reiterate their views here. [28]

II. Small or Outlying Practices

Advantages

5.39 Some fields of practice schemes may be of special value to practitioners in practices which are outside central Sydney or are small in size. [29] The present restrictions on advertising about fields of practice hamper those practices more than they hamper either the Bar or the large city firms, each of which has an established reputation as a source of specialists. Some relaxation of present restrictions might assist solicitors in small or outlying practices to develop specialties and might thereby improve the geographical accessibility of specialists within the profession.

Disadvantages

5.40 The introduction of a high or medium-high level fields of practice scheme might militate in some ways against practitioners in small or outlying practices. Requirements such as high level concentration or extensive continuing legal education are likely to be difficult, if not impossible, for many such practitioners to satisfy, no matter how able and hard- working they may be. [30]

III. Young Practitioners

Advantages

5.41 Fields of practice schemes of a relatively low level can be of assistance to young practitioners by making it easier for them to advertise about fields of practice and thereby develop specialties. Advertising is often more valuable to young practitioners than to practitioners who already have an established reputation and clientele.

Disadvantages

5.42 The development of a high level of specialisation within the profession can make it more difficult for young practitioners to attract work because they have not had time to develop specialisation to any substantial degree. Moreover, it puts increased pressure on young practitioners to devote themselves to one particular field from the outset of their career, rather than taking time to explore their aptitudes and interests in a number of fields. The Bar Association's response to our Discussion Paper emphasised the disadvantages of placing such pressure on young barristers. [31]

5.43 These potential disadvantages are more likely to occur if a fields of practice scheme is introduced and imposes qualifications requiring intensive concentration of work, or lengthy experience or training. Not only will attainment of these qualifications take time, but it may be difficult to attract sufficient work to satisfy the requirements concerning concentration or experience. Young practitioners may be put in the invidious position of not being able to attract work without the qualifications, yet not being able to get the qualifications without attracting work. They are especially vulnerable to the danger of specialist groups acquiring a dominant position in a particular field and imposing unreasonably high entry qualifications in order to inhibit competition in the field.

FOOTNOTES

1. Para. 2.3.

2. Chapter 4.

3. For a fuller discussion of the process of fragmentation and its consequences, see our Discussion Paper, *Advertising and Specialisation,* pp.37-40.

4. See our Discussion Papers, *General Regulation,* Chapter 2, and *The Structure of the Profession,* chapters 2, 6 and 7.

5. See para.3.14 of this Report.

6. See paras.3.32-3.33 of this Report and our Discussion Paper, *Advertising and Specialisation,* pp. 33-34.

7. “The Certification of Legal Practitioners as Specialists” (Submission No.84), p.9.

8. Report (Ontario Government Bookstore, Toronto, 1980), p.193.

9. See note 5.3.1 above. See also American Law Institute- American Bar Association, *Enhancing the Competence of Lawyers* (Report of the Houston Conference, 1981), pp.465, 467.

10. “Advertising and Specialisation” (Submission No.412), p.9.

11. See, e.g., Specialisation Committee, American Bar Association, *Report to the House of Delegates* (August 1979), p.9: Esau, (note 3.28.1 above), pp.165-168; *Enhancing the Competence of Lawyers* (note 5.7.1 above) pp.327, 348.

12. For a fuller discussion of the matters mentioned in paras. 5.9-5.14, see our Discussion Paper, *Advertising and Specialisation,* pp.40-45.

13. “The Necessity for Participation by Legal Practitioners in Courses of Continuing Legal Education” (Submission No.217), p.4.

14. “Advertising and Specialisation” (Submission No.406), pi).2-3.

15. See pp. 113-121.

16. For a fuller discussion of this point. see our Discussion Paper, *Advertising and Specialisation,* pp.44.

17. See, eg. Law Society of New South Wales, “Conveyancing of Land and Conflicts of Interests Relating to Conveyancing Transactions” (Submission No.258), pp.26, 37-38.

18. W. Spann Jr., American Bar Association Journal (1977), vol.63, p.314.

19. Eastern Suburbs Law Society, Submission No.73, p.2.

20. See pp.45-47, 210-211.

21. See eg. Law Society of New South Wales, “The Certification of Legal Practitioners as Specialists in Particular Fields” (Submission No.201), p.2.

22. For a similar view, see Professional Organisations Committee, Report (Ontario Government Bookstore, Toronto, 1980). pp.191-193.

23. See eg. Law Society of New South Wales, “Country Solicitors” (Submission No.270). p.1, and “Advertising” (Submission No.218). p.14.

24. For a fuller discussion of the matters referred to in paras.5.27-5.21-). See Our Discussion Paper, *Advertising and Specialisation,* pp.50-52.

25. For a fuller discussion of the matters referred to in paras.5.10-5.14, see our Discussion Paper, *Advertising and Specialisation,* pp.52-54.

26. “The Certification of Legal Practitioners as Specialists” (Submission No.84), p.4.

27. See paras.1.45-1.51.

28. See pp.55-50 of this Paper.

29. For a fuller discussion of matters referred to in paras.5.39-5.40, See Our Discussion Paper, *Advertising and Specialisation,* pp.56-57. And see also paras.11.7-11.8. and 11.17-11.20 of this Report.

30. See eg. New South Wales Bar Association, “The Certification of Legal Practitioners as Specialists” (Submission No.84). p.9.

31. See “Advertising and Specialisation” (Submission No.406), pp.2-4.

6. Our Recommendations: Solicitors

A. INTRODUCTION

6.1 In this chapter we make a number of recommendations in relation to the regulation of specialisation amongst solicitors. We do so under the following headings:

Our General Approach;

Advertising about Willingness to Accept Work in Particular Fields of Practice;

Other Advertising about Fields of Practice;

Associations of Practitioners in Particular Fields of Practice ("Special Interest Associations").

In Chapter 7 we make recommendations in relation to regulation of specialisation amongst barristers. We also consider in Chapter 7 the implications in this area of the recommendation in our *First Report* that the present division in the profession between barristers and solicitors should be abolished.

6.2 We mentioned in chapter 3 the Law Society's proposal to relax the present restrictions on advertising by solicitors so as to allow certain types of information to be advertised in Newspapers and periodicals. [1] We discuss the general question of advertising in Parts III and IV of this Report and we recommend there that a wide range of information should be able to be advertised by solicitors in newspapers, periodicals and printed publications generally, subject to certain restrictions such as that it must not be false, misleading or disreputable. [2] We also favour permitting advertisements on radio and television although we do not expect them to become common, at least in the short term. [3] It is against this background that we consider here whether special restrictions should apply to advertisements about fields of practice.

B. OUR GENERAL APPROACH

6.3 We described in our Discussion Paper, and in earlier chapters of this Report, a wide range of considerations relevant to the regulation of specialisation amongst solicitors. [4] In the light of those considerations we have arrived at the following general conclusions.

The Principal Issue

6.4 The principal question of present relevance in relation to the regulation of specialisation is whether solicitors should continue to be prohibited from advertising about their fields of practice, either in terms of "specialisation" or otherwise.

Advertisements about Willingness to Accept Work

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

work. However, if solicitors were permitted to advertise their willingness or unwillingness to accept work in particular fields, there would need to be some controls to reduce the dangers of misleading or ambiguous advertising.

Other Advertisements about Fields of Practice

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

6.7 We do not favour adoption of either of these possibilities. For reasons mentioned in the previous chapter, we consider that medium or high level schemes can have gravely adverse consequences on the cost and accessibility of legal services, and even on the quality and speed of service. They can have an unfair and undesirable impact on some sectors of the profession especially general practitioners and young practitioners. On the other hand, low level schemes can lead to a high incidence of advertising which is consciously or unconsciously misleading, and which it is difficult to police effectively. Moreover, the incidence of misleading advertising under such schemes is likely to lead to compelling demands for the introduction of a medium or high level scheme, with the consequential disadvantages to which we have referred.

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

Special Interest Associations

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

C. ADVERTISING ABOUT WILLINGNESS TO ACCEPT WORK IN PARTICULAR FIELDS

I. Introduction

6.10 We turn now to specific recommendations, beginning with a low level scheme in relation to advertisements about willingness to accept work in particular fields of practice.

II. The Basic Scheme

6.11 At present solicitors are permitted to advertise in the Legal Services Directory but not elsewhere, their willingness or unwillingness to accept work in particular fields. We see no sufficient reason why advertisements of such a kind should continue to be confined to that directory. We note that in the United States and several Canadian provinces lawyers are now permitted to insert such advertisements in a wide range of printed publications. [5] And recent changes in England and Scotland have enabled such advertisements to be displayed on office signs and, in some circumstances, in newspapers. [6]

6.12 It can be argued that willingness to accept work may be misinterpreted as connoting expertise. The Law Society has put this view in two submissions to us. [7] We recommend below certain controls on terminology which would reduce the likelihood of misleading claims being made. [8] A danger of occasional misinterpretation would remain, but in our view it is greatly outweighed by the advantages of providing the public with basic information about lawyers fields of practice. At present, many members of the public are severely hampered by lack of such information. In many circumstances, clients do not need lawyers with special expertise in the relevant field, or, although such lawyers would be preferable, their use is not feasible for particular clients because they are too costly, geographically remote, or taken up with other commitments.

6.13 Accordingly, we recommend that advertisements about solicitors willingness or unwillingness to accept work in particular fields should be permissible in newspapers, periodicals and any other media in which solicitors will become entitled to advertise information about themselves if our recommendations in Part III are implemented.

6.14 We make a similar recommendation in relation to advertisements about willingness or unwillingness to accept work directly from clients in particular fields. In our view, this would facilitate referrals between solicitors, because some solicitors may be more willing to refer a matter to another solicitor if they know that the client will not be lost as a result. This reassurance could be given in a number of ways, including advertising that one does not accept work directly from clients. A further consideration is that if some solicitors do not accept work directly from clients it is desirable, of course, for their would-be clients to be apprised of that fact.

III. Controls on Terminology

Willingness or Unwillingness to Accept Work

6.15 We do not recommend that solicitors should be required to use a standard form of words to indicate willingness to accept work. Satisfactory terminology would include, for example, “willing to handle family law work”, “accepting family law work”, “family law work welcome” or simply “family law work”. Any words should be regarded as acceptable provided that they indicate willingness or unwillingness to accept work; do not claim experience, expertise or specialisation, and do not contravene the general restrictions which we recommend in Part III concerning, for example, false, misleading or disreputable advertising, and claims of superiority over other practices. We make similar recommendations in relation to advertisements about willingness or unwillingness to accept work directly from clients.

6.16 These recommendations reflect our view that appropriate terminology may vary considerably according to circumstances, such as the likely readership of the advertisement, and that prescription of a standard form of words would be unnecessarily restrictive. We recommend, however, that

> the general regulatory body for solicitors should publish examples of terminology which it considers suitable, or unsuitable, for expressing willingness or unwillingness to accept work, and willingness or unwillingness to accept work directly from clients; and
>
> if solicitors wish to use terms which are not on the regulatory body’s suggested list, they should be required to notify the regulatory body a specified period in advance.

We do not recommend that the regulatory body’s prior approval should be required, nor that its interpretation of the relevant restrictions should be binding on solicitors. Binding interpretation would be the responsibility of disciplinary tribunals and the courts. However, most solicitors wishing to advertise certain terminology are likely to decide not to do so if it is explicitly disapproved by the regulatory body. If a solicitor were found by a disciplinary tribunal or court to have contravened the restrictions, his or her disregard of explicit disapproval by the

regulatory body might be taken into account in determining the appropriate disciplinary sanction. In cases of great importance, the regulatory body, having been given prior notice of an intended advertisement, could amend the restrictions, whether to permit the advertisement or to prohibit it.

6.17 The dangers of confusing or deceptive terminology are reduced when the advertisement is in a publication which circulates principally or solely amongst lawyers. We do not recommend that prior notification to the regulatory body should be required in such circumstances. But the regulatory body should be given power to specify with binding effect which publications fall within the requisite category. [9]

Fields of Practice

6.18 We recommend that the controls described above should apply also to terminology used to describe particular fields of practice. When drawing up a list of suggested descriptions of fields, tie regulatory body should obtain the advice of non- lawyers in order to ensure that the descriptions are useful, and readily comprehensible, to unsophisticated users of legal services. In some instances it may be desirable to use broad descriptions in order to assist the public and to provide the profession with detailed definitions of these descriptions in order to promote uniformity of usage. [10] If solicitors wish to use a description which the regulatory body has defined, they should be required to use it in accordance with that definition and to supply a copy of that definition to any client, or would-be client, who requests it.

6.19 Where a practitioner is willing to accept work in a wide range of fields, considerations of space or expense might preclude him or her from listing all of them, and an abbreviated list might be misinterpreted as exhaustive. Accordingly, we recommend that practitioners should be permitted to indicate General Practice as a field in which they are willing to accept work. The prohibition of such a description would increase the dangers of excessive specialisation and fragmentation within the profession, especially those relating to general practitioners and small or outlying practices, to which we referred in Chapter 5.

IV. Directories

Legal Services Directory

6.20 As we have mentioned, solicitors are presently permitted to advertise in the Legal Services Directory their willingness or unwillingness to accept work in the 14 fields listed in the Directory. [11] In our view, the Directory is potentially of great value, provided that it is made widely and readily available to the public. We make two recommendations in relation to its further development First, we recommend that solicitors should be permitted to indicate in it those fields, if any, in which they accept work only on referral from another solicitor. This information is important for both clients and lawyers, and it could be included without significantly changing the Director's present form or detracting from its clear presentation. Secondly, we recommend that the list of fields in the Directory should be kept under review with the assistance of lay people who are familiar with the needs and perspectives of users or would-be users of legal services. For example, a present description in the Directory which may not be comprehensible to many members of the public is "administrative law". [12]

Referrals Directory

6.21 Our inquiries indicate that many solicitors would benefit from readier access to the names of solicitors who are willing to handle work in particular fields, especially fields of a somewhat unusual nature. As we mentioned earlier, [13] the Law Society has decided to compile a list of solicitors who indicate their willingness to accept work in particular fields, in addition to the fields in the Legal Services Directory. The list will not be published but will be used to answer inquiries to the Society for the names of solicitors handling work in particular fields. This is a valuable scheme, provided that its existence is publicised widely. We

recommend, however, that the list should not be used solely to answer inquiries of the Society, but should be made available generally to members of the profession in the form of a Referrals Directory.

D. OTHER ADVERTISING ABOUT FIELDS OF PRACTICE

I. Introduction

6.22 For reasons explained earlier, [14] we do not favour the introduction of schemes enabling solicitors to advertise themselves in terms such as “specialists” or “experts” in particular fields, whether subject to meeting specified qualifications or otherwise.

6.23 We are not necessarily opposed, however, to a scheme which permits solicitors to advertise themselves as, for example, “preferring”, or being “specially interested in”, particular fields. If solicitors are to be permitted to advertise in such a way they should be required to meet certain qualifications. But in our view the qualifications should be modest and, for example, should not involve substantial levels of concentration in a particular field nor attendance at lengthy courses of continuing legal education.

6.24 We do not positively recommend the establishment of such a scheme. If it is introduced, however, we suggest that it should be a low-medium scheme along the general lines of the scheme which we describe below (paras.6.26-6.40). This scheme would be in addition to the low level scheme, recommended in the previous section of this chapter, concerning willingness to accept work in particular fields.

6.25 The principal purpose of a low-medium scheme of this kind would be to assist clients to identify practitioners who are likely to be competent in the field of practice relevant to their problem. It would seek to avoid the dangers of excessive specialisation and fragmentation within the profession which are the major weakness of medium or high level schemes. We turn now to an outline of the scheme.

II. “Preference” or “Special Interest”

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

6.27 The terminology to which we have referred is, in our view, pitched sufficiently low as not to claim, or be likely to be perceived as claiming, special competence or expertise. But it connotes, and is likely to be interpreted as connoting, more than the mere willingness to accept work which could be advertised under the low level scheme recommended earlier. It should be noted here that advertising of “preferred areas of practice” is now permitted in several Canadian provinces [15] and has been approved in the reports of the Professional Organisations Committee in Ontario [16] and the Royal Commission on Legal Services in Scotland. [17]

III. Qualifications

A Possible Package

6.28 The qualifications for advertising under the scheme could be:

three years in active practice as a lawyer;

(i) for two years prior to commencing to advertise, attendance at specified continuing legal education (say, 20 hours each year);

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

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

These qualifications are intended to be sufficiently substantial to require special interest and education in particular fields on a continuing basis, but not to require high levels of concentration or expertise. We look at each of the qualifications in turn.

6.29 *Three years in active practice.* We think three years is a reasonable qualifying period to enable a practitioner to acquire a basic familiarity with legal practice and to develop a special interest. Moreover, we do not favour practitioners being encouraged or pressured into specialising from the very outset of their career, before they have had some chance to assess their aptitudes and options. A longer minimum requirement, however, would be likely to discriminate unfairly against young practitioners.

6.30 *Modest continuing legal education requirements.* These requirements should involve attendance at lectures or seminars but should not involve passing any examinations. They should not involve practitioners in substantial commitments of time or money, nor should they pose substantial difficulties of accessibility for country practitioners. Save in the initial stages, they should amount to only one day, or several evenings, per year in each field. Failure to attend the required courses in occasional years should be permissible. In order to reduce the danger of practitioners concentrating excessively on particular fields, the annual course in each field should include a brief outline of major developments in other fields. The courses could be supplemented by educational material distributed from time to time under the auspices of the general regulatory body.

6.31 *Registration fee*. This fee should be fixed at a level sufficient to meet all or most of the cost of the required continuing legal education But it is essential that the fee should not be so high as to constitute a significant barrier to registration including registration in a number of different fields.

6.32 We have explained earlier our reasons for not proposing more onerous qualifications. It may be noted here that of the three Canadian provinces in which advertising of “preferred areas of practice” is permitted, only the Ontario scheme requires practitioners to satisfy specified qualifications. [18]

Other Possibilities

6.33 The package of qualifications which we have described above might be varied somewhat without becoming what we would regard as either too high level or too low level. But there are some possible qualifications which we do not favour and upon which we comment briefly below.

6.34 *Examinations*.Written or oral examinations are likely to be expensive to administer and are not necessarily a reliable guide to practical competence or expertise. Similar criticisms may be made in relation to requiring attendance at lengthy, non-examination courses.

6.35 *Specified levels of concentration.* We have referred earlier to some of the complexities and difficulties involved in the use of such levels. [19] It would be arbitrary and unfair to require the same level in each field and in each part of the State. And requirements concerning levels of concentration can operate unfairly and undesirably in relation to practitioners who are young, or are in small or outlying firms. Moreover, concentration is not an accurate indicator of those practitioners who are competent and those who are not. [20] These arguments apply

particularly to arithmetical definitions of concentration but they apply also to criteria such as substantial involvement. [21]

6.36 *References.* We do not consider that requiring references from fellow practitioners is a desirable element in a fields of practice scheme. Practitioners may be thoroughly competent in a field, yet their work will not be well-known to many practitioners outside their own firm. Moreover, many practitioners may well have reasons for being unjustifiably compliant, or unreasonably uncooperative, in response to a request for a reference. A reference requirement provides great scope for abuse and is unlikely to be a reliable indicator of competence or experience.

IV. Description of Fields

6.37 Advertising under the scheme would need to be restricted to certain broadly-defined fields of practice. An excessive number of fields would foster over-specialisation in narrow fields and would cause fragmentation of the profession. Moreover, the time and money involved in providing continuing legal education would be unreasonable. The Legal Services Directory currently includes 14 fields of a broad nature. They are examples of the sort of field which might be suitable for adoption in a low-medium scheme.

6.38 We do not suggest any limit on the number of fields in which a practitioner should be permitted to register. The qualifications which we have suggested for the scheme are likely to deter most practitioners from registering in a large number of fields. But, in our view, the requirements should not be set at such a level as to deter an enthusiastic practitioner from registering in, say, three or four different fields.

6.39 We referred earlier to the importance of general practitioners within the legal profession and to the threat to the number and calibre of general practitioners which can arise from excessive encouragement of specialisation. [22] This process has caused great concern in the medical profession, and in recent years steps have been taken to establish General Practice as, in a sense, a specialty in its own right. [23] In order to encourage an adequate supply of general practitioners within the legal profession we are firmly of the view that if a low-medium scheme is established, one of the fields covered by it should be General Practice.

V. Control of the Scheme

6.40 We described earlier the dangers of fragmentation of the profession into autonomous specialty groups with quasi-monopolies in their respective fields.[24] In our view, it is of paramount importance that the scheme, and especially the level of qualifications required in each field, should remain under the effective control of the general regulatory body for all solicitors. This would reduce the likelihood of, for example, excessively high qualifications being set in order to deter practitioners from entering a particular field and competing with those already in it. We stress *effective* control because it would not be sufficient if the general regulatory body were to act as no more than a rubber stamp for proposals made by specialty groups.

VI. The Law Society's Proposals

6.41 We mentioned earlier the fields of practice scheme which the Law Society described in its response to our Discussion Paper and which it has circulated for discussion amongst its members.[25] That scheme differs from the low-medium scheme which we have described in four principal respects, namely

> it would permit practitioners to advertise themselves as "specialists", rather than as "preferring" or being "specially interested in" particular fields;

it would require “substantial involvement’ in the field (such as spending 25% of one’s time in it);

it would require the provision of references from five practitioners in the field;

it would be limited, at least in its initial stages, to four fields of practice (Family Law and Divorce; Criminal Law - Magistrates Courts; Personal Injuries - Third Party; Personal Injuries - Industrial Accidents).

6.42 In our view, for reasons given earlier,[26] the Law Society’s proposed scheme is pitched at too high a level. Moreover, as we said in paragraphs 6.35 and 6.36, we do not favour specified levels of concentration or references from fellow practitioners, as qualifications. These weaknesses in the Society’s proposals are of particular importance in relation to fields of practice where many users of legal services are relatively unsophisticated and are unable to afford substantial legal fees. Yet it is in fields of this kind that the Law Society suggests its scheme should first be tried. We do not disagree with its choice of those fields as ones in which the need for wider dissemination of information about practitioners is especially great. But we consider that the case for a lower level scheme than that proposed by the Society is particularly strong in relation to those fields. As we mentioned earlier, the Society disagrees with our criticisms of its scheme and apparently prefers that scheme to the low-medium one which we have described above.[27]

E. ASSOCIATIONS OF PRACTITIONERS IN PARTICULAR FIELDS

I. Introduction

6.43 We explained earlier our reasons for recommending that, although associations of practitioners interested in particular fields (“special interest associations”) can be beneficial they should not be permitted to become, in reality, the regulatory bodies for solicitors working in their respective fields. [28] The general regulatory body should retain effective control over the professional activities of all solicitors. The Law Society has expressed its agreement with these principles. [29] The following recommendations are directed towards their realisation.

II. Distinctions in Law or Official Practice

6.44 If membership of a special interest association is used as a basis for distinguishing by law or official practice (such as the practice of the courts, the Government or the Law Society) between practitioners, undue advantages may be conferred on members and unfair prejudice maybe caused to non-members. For example, suppose a court in a certain field of law (such as the Family Court) were to use membership of a particular association in that field as the criterion for compiling a list to be given to people who ask the court s staff for the name of a suitable lawyer in the field. In this way, members of the association could get an unfair advantage over non-members who have at least as much experience and expertise in the field.

6.45 The major danger of basing legal or official distinctions on membership of a special interest association is that it may significantly assist the association’s members to obtain a collectively dominant position in a particular field, and thus result in the association being able to unfairly restrict competition or in other ways adversely affect the public interest. If there is an effective system for regulation of restrictive practices within the profession, this danger may be reduced. But it will usually be preferable to avoid distinctions which contribute to the acquisition of quasi- monopoly power by an association rather than to try to control the manner in which that power, once acquired, is exercised.

6.46 Accordingly,werecommendthatdistinctionsinlaworofficialpracticeshouldrarelyif ever, be based on whether or not a solicitor belongs to a special interest association There may be some circumstances in which distinctions based on membership of such an association can

be justified. We see no such circumstances at present but our recommendation does not exclude the possibility of them arising. We note that in its response to our Discussion Paper the Law Society said that it is opposed to any distinctions based on membership of special interest associations, but that it "has little control over such discrimination" [30]

III. Regulation of Restrictive Practices

6.47 In our First Report, we recommended the vesting in the Council of the Law Society of a statutory power to regulate restrictive practices amongst practitioners who are subject to its governance. [31] That recommendation would cover restrictive practices engaged in by practitioners as members of special interest associations. For example, it would regulate the extent to which associations could require their members to observe fee scales or refuse to accept work directly from clients. It would reduce the dangers of fragmentation of the profession to which we referred earlier in this Report.

6.48 We recommended in the *First Report* that the Council of the Bar Association should have a corresponding power to regulate restrictive practices amongst practitioners who are subject to its governance. [32] Many existing special interest associations include amongst their members lawyers who, under our recommendations in the *First Report*, would be subject to governance by the Bar Council as well as lawyers who would be subject to governance by the Law Society Council. Accordingly, it will be desirable for the two Councils to confer, and seek to co-ordinate, with each other in the exercise of their powers to regulate restrictive practices engaged in by special interest associations.

IV. Sections

6.49 We described in our Discussion Paper the growth of Sections under the auspices of some law societies in other parts of Australia. [33] Many of these Sections consist of practitioners who are interested in a particular field of practice. In New South Wales, however, the only Section is the Young Lawyers Section.

6.50 Membership of each of these Sections is open to any member of the parent body on payment of a small fee. Their activities consist principally of lectures, seminars, distribution of educational material to members, and preparation of law reform proposals. The establishment of Sections requires the approval of the parent body, as do their rules.

6.51 In our view, Sections of this kind can do much to promote competence within the profession as well as having other benefits such as generating proposals for improvement of the law in particular fields. An important aspect of them in the present context is that they are subject to ultimate control by the general regulatory body, rather than being totally autonomous. This reduces the danger of excessively self interested policies being adopted to the detriment of the remainder of the profession and of the general public. The Law Society's response to our Discussion Paper expressed agreement with these views. [34]

FOOTNOTES

1. Para. 3.21.

2. Chapter 12.

3. Chapter 13.

4. See our Discussion Paper, *Advertising and Specialisation,* chapter 2 and 4; and this Report, chapters 3 and 5.

5. See eg. Esau (note 1.28.1 above).

6. See paras.3.25-3.26 of this Report.

7. “The Certification of Legal Practitioners as Specialists in Particular Fields” Submission No.201), pp.8-9; and “Advertising and Specialisation” (Submission No.412) p.10.

8. See para.6.15-6.19.

9. Examples would include the Law Society Journal, the Australian Law News, and the Australian Legal Directory.

10. See American Bar Association, Standing Committee on Specialisation, *Information Bulletin* No.7 (1980), pp.18-22.

11. See para.3.18 of this Report.

12. A preferable description, used in the corresponding directory in South Australia, is “appeals against government decisions”.

13. See para.4.15.

14. Chapter 5 and paras.6.6-6.8 of this Report.

15. See paras.3.27 and 3.28 of this Report.

16. *Report* (Ontario Government Bookstore, Toronto, 1980) p.296.

17. *Report* (HMSO, Edinburgh, 1980, Cmnd. 7846), p.63.

18. See paras.3.27 and 3.28 of this Report.

19. See paras.3.3-3.7 of this Report; and our Discussion Paper, *Advertising and Specialisation*, pp.9-12.

20. See paras.5.35-5.43 of this Report.

21. See the sources cited in note. 6.35.1 above.

22. See paras.5.35-5.38 of this Report.

23. For discussion and relevant sources, see our Discussion Paper, *Advertising and Specialisation,* pp.54-56 and 209.

24. See chapter 5. esp. Paras.5.3-5.8 of this Report.

25. See paras.3.20-3.21 and 4.14 of this Report.

26. See chapter 5. and paras.6.6-6.8. of this Report.

27. See “Advertising and Specialisation” (Submission No.412).

28. See eg. paras.5.3-5.8 and 6.9 of this Report.

29. “Advertising and Specialisation” (Submission No.412), p.13.

30. See Source cited in note 6.41.2 above.

31. Paras.7.7-7.11.

32. Paras.7.7-7.11.

33. P.77

34. See source cited in note 6.43.2 above.

7. Our Recommendations: Barristers

A. INTRODUCTION

7.1 In this chapter we make recommendations in relation to regulation of specialisation amongst barristers. We look first at the position under the present division of the profession into barristers and solicitors. We then consider the implications in this area of abolishing that division in the manner recommended in our *First Report.*

B. UNDER THE PRESENT DIVIDED STRUCTURE

I. Some General Considerations

7.2 Several grounds can be given for arguing that the comments and recommendations which we made in the previous chapter in relation to solicitors are not applicable to barristers.

7.3 First barristers do not deal directly with the public and therefore, it can be argued, there is no need for the public to be able to identify those who are willing to handle work, or those who are competent or expert, in particular fields. There is some strength in this argument. But, on the other hand, members of the public are entitled to choose their barrister. Moreover, the fact that few of them may wish to be informed about particular barristers' fields of practice does not justify prohibiting public dissemination of such information.

7.4 Secondly, it can be argued that in practice, solicitors usually choose the barrister for their client and have sufficient access to information about barristers' fields of practice to be able to make an appropriate choice. As we said earlier, however, it is our view, based on submissions and comments made to us by many solicitors, that a number of solicitors experience considerable difficulty in identifying barristers who work in particular fields, especially fields of a somewhat esoteric nature. [1]

7.5 Thirdly since there are relatively few barristers, it can be argued that the establishment of fields of practice schemes and special interest associations is less viable for barristers than for solicitors. This argument has considerable strength although there is scope for co-operation between barristers and solicitors, and their respective associations, in this respect.

7.6 With these considerations in mind, we turn now to the three areas in which we made recommendations in relation to solicitors, namely

> Advertising about Willingness to Accept Work in Particular Fields of Practice;
>
> Other Advertising about Fields of Practice;
>
> Associations of Practitioners in Particular Fields of Practice.

We do so against the background of our recommendations in Part IV on the general question of advertising by barristers. We recommend there that barristers should be entitled to advertise certain types of information about themselves in publications circulating principally within the legal profession. [2] We include within that category of publications the Law Society journal and a Referrals Directory of the type which we have proposed in Chapter 6 of this Report. [3]

II. Advertising about Willingness to Accept Work in Particular Fields of Practice

Referrals Directory

7.7 In our Discussion Paper we suggested that barristers should be entitled to advertise in the Referrals Directory their willingness or unwillingness to accept work in particular fields. [4] In its response to our Paper, the Bar Association said that the suggestion was being examined by a joint working committee of the Association and the Law Society. [5] It said that the suggestion " on the surf ace, would have some merit; but there are very real difficulties about implementing it." [6] Some of the Association's concerns arise from its opposition, which we share to a considerable extent to schemes for the formal designation of specialists. In our view, however, the Association over-emphasises the extent to which the publication of a directory containing advertisements about willingness to accept work is likely to affect the degree of specialisation amongst barristers. Moreover, while there may be circumstances in which some such advertisements, especially if they relate to broad fields of practice, may be too vague, or be prone to misinterpretation the directory would be a valuable addition to the present methods by which solicitors can seek to identify appropriate barristers. It can hardly be regarded as less useful than one of the two "accepted methods" referred to by the Association, which is to "flip through the law reports of similar cases to see who has appeared in the past in similar cases." [7]

7.8 We recommend that the Bar Association should arrange for the publication of a directory in which barristers may indicate their willingness or unwillingness to accept work in particular fields. The directory could be combined with the Referrals Directory of solicitors. [8] It should be intended principally for use by practitioners, rather than the public, and accordingly, unlike the existing Legal Services Directory, it would not need to be confined to a few broadly-defined fields. The English Bar List provides a valuable precedent for the type of directory which we have in mind. [9]

Other Publications

7.9 We see no compelling reason why barristers should not be permitted to advertise in other publications their willingness or unwillingness to accept work in particular fields, subject to the same controls on terminology as we recommended in relation to advertisements of this kind by solicitors. [10] The fact that few barristers may wish to advertise in this way is not a good reason for prohibiting it. We recommend that, at the least, barristers should be permitted to place such advertisements in publications which circulate principally amongst lawyers. Advertising of this kind would be of particular value to barristers who are commencing, or returning to, practice at the Bar. We note that the Royal Commission on Legal Services in England recommended that these barristers should be allowed to use advertisements or circulars to advise solicitors of the types of work which they are willing to undertake. [11]

III. Other Advertising about Fields of Practice

7.10 We described in Chapter 6 a scheme which would allow solicitors, subject to meeting certain low-medium level qualifications, to advertise themselves as "preferring", or being "specially interested in", particular fields of practice. [12] But we did not positively recommend that such a scheme be established. For the reasons mentioned earlier in this chapter, [13] the case for establishing such a scheme for barristers is less powerful than in relation to solicitors, and accordingly we do not recommend it We do recommend, however, that if a scheme is established for barristers it should be similar to the low-medium one described in Chapter 6.

IV. Associations of Practitioners in Particular Fields of Practice

7.11 As we mentioned earlier, the membership of many of the existing special interest associations includes both barristers and solicitors. [14] We know of no special interest associations which are confined to barristers. We make the same recommendations in relation to special interest associations which include barristers (whether or not they are

confined to barristers) as we made in Chapter 6 in relation to special interest associations which include solicitors.[15]

C. UNDER OUR RECOMMENDED STRUCTURE

7.12 The principal reason for making different recommendations in relation to barristers, by contrast with those which we made in relation to solicitors, is that barristers do not accept work directly from clients. In our *First Report* we recommended the abolition of the present division of the profession into barristers and solicitors. [16] If our recommendations in that Report are adopted, the recommendations which we have made earlier in this chapter in relation to barristers should be applied to all practitioners who do not accept work directly from clients, whether or not they are in sole practice (as barristers presently are) and whether they are subject to the governance of the Bar Council or to that of the Law Society Council. [17]

FOOTNOTES

1. See paras.5.20 and 5.21 of this Report: our Discussion Paper *Advertising and Specialisation,* pp.48-40: and Law Society of New South Wales, “Advertising” (Submission No.218). p.14.

2. See para.15.23.

3. See para.6.21.

4. See p.81.

5. “Advertising and Specialisation” (Submission No.406), p.2.

6. See source cited in note 7.7.2.

7. “Advertising and Specialisation” (Submission No.406). p.4.

8. The introduction of which we recommended in para.6.21 of this Report.

9. See para.3.25 of this Report.

10. See paras.6.15-6.19 of this Report.

11. *Final Report* (HMSO, London, 1979, Cmnd.7648), para.27.49.

12. See paras.6.22-6.42.

13. Paras.7.3-7.5.

14. See paras.3.12-3.14 and 6.48.

15. See paras.6.43-6.51.

16. Chapters 4, 6.

17. For our recommendations on the question of practitioners being subject to the respective governance of these Councils, see our *First Report,* paras.4.12-4.35.

8. Introduction

A. INDIVIDUAL ADVERTISING AND OTHER ATTRACTION OF BUSINESS

8.1 We consider in this Part and in Part IV, the extent to which conduct by lawyers which is intended, or is likely, to attract business to their practice should be subject to regulation We refer to this whole field of conduct as attraction of business.

8.2 Many different expressions are used in statutory regulations and elsewhere to describe different types of attraction of business. Examples include “advertising”, “touting”, “solicitation”, “unfair attraction of business” and “seeking instructions”. [1] The meaning and inter-relationship of these expressions is rarely defined with clarity and often the same expression is used differently by different people.

8.3 In this Report we are concerned with four broad categories of attraction of business by lawyers. These categories are not mutually exclusive but they reflect distinctions which are ,commonly drawn in discussions of this general topic. They may be summarised as follows.

Individual Advertising

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

Community Discussion

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

Solicitation

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

Institutional Advertising

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

B. THE PRESENT POSITION

8.4 At present, there are tight restrictions on the means by which lawyers in New South Wales may attract business. We mention here the principal restrictions; more detailed descriptions of the present position are given in subsequent chapters.

Solicitors

8.5 The principal restriction on attraction of business by solicitors is regulation 29 of the Solicitors (General) Regulations, made by the Law Society of New South Wales under the Legal Practitioners Act, 1898. [2] At the time of writing, regulation 29(1) provides that:

> "A solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or as calculated to attract business unfairly."

Regulation 29(2) provides that, with certain limited exceptions:

> "A solicitor shall not, except with the consent in writing of the Council of the Law Society, publish any advertisement...."

The exceptions concern the insertion of certain types of information in recognised legal directories, and limited advertising by country practitioners in their local newspapers in relation to matters such as opening hours and changes of address.

8.6 In addition to regulation 29, there are rulings of the Law Society Council in this area. [3] We refer to many of them in subsequent chapters. It is often unclear, however, whether a particular ruling is an interpretation of a statutory prohibition in regulation 29 (and, if so, of which prohibition), or a decision about whether to exercise the Council's discretion to approve advertisements which would otherwise be prohibited by the regulation, or an opinion as to whether certain conduct is unethical although not prohibited by regulation. The Council's rulings are not legally binding, but they would be likely to have great influence on the way in which the Solicitors Statutorv Committee and the Supreme Court would exercise their disciplinary powers in this area.

8.7 In 1979, the Law Society Council announced its intention to amend regulation 29 in order to allow greater scope for individual advertising by solicitors. [4] The proposed new regulations are at an advanced stage of preparation. [5] Their principal significance is that they would allow solicitors to advertise certain specified types of information about themselves in newspapers and periodicals. They also would extend somewhat the types of information which can be advertised in certain legal directories. The proposed relaxation would be significant, but the restrictions on individual advertising and other attraction of business would continue to be very tight. Pending the making of these new regulations, the Law Society Council has exercised its powers under regulation 29(2) by approving applications by lawyers to advertise in newspapers along lines which would be permissible under the proposed new regulations. [6]

Barristers

8.8 There are no statutory provisions concerning the attraction of business by barristers. However, the New South Wales Bar Association, to which the great majority of practising barristers belong, has made rules on this subject The rules are generally regarded by barristers as being definitive and would be likely to be given great weight by the Supreme Court when exercising its disciplinary jurisdiction over barristers, whether they be members of the Bar Association or otherwise.

8.9 The two principal rules of the Association in this field are as follows:

> "72. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of soliciting employment as a barrister or which is likely to lead to the reasonable inference that it is done for that purpose.
>
> 73. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of or with the primary motive of personal advertisement of himself as barrister or which is likely to lead to the reasonable inference that it is done for that purpose." [7]

C. A NEED FOR CHANGE?

8.10 In recent years, restrictions on certain forms of attraction of business by lawyers have come under criticism from official bodies and other commentators in many parts of the common law world. [8] Most of the criticism has centred on tight restrictions in relation to individual advertising. Critics say that such restrictions impede public access to legal services, and that by inhibiting competition, innovation and efficiency within the profession they impede the development of better and more economical legal services. Critics say also that such restrictions unfairly hamper new practitioners and small practices in their efforts to attract sufficient business to become, or remain, viable.

8.11 On the other hand, supporters of a general prohibition against individual advertising argue that such advertising can lead to undue competition between practitioners, and thus may cause a decline in the quality of service and in practitioners' devotion to their clients' interests ahead of their own. [9] They argue that advertising would encourage a more commercial approach within the profession thus reducing clients' trust in their lawyers and also increasing the likelihood of lawyers neglecting their ethical duties to the courts. The cost of advertising, it is said, would outweigh any savings which might result from competition, and it would be borne ultimately by clients. Small or new practices, it is argued, would be unlikely to have the financial resources to match the advertising of larger or more established practices.

8.12 Additional arguments apply to individual advertising, and other attraction of business, by barristers. [10] It is said by supporters of the present prohibitions that barristers do not need to advertise because they receive work only from solicitors, who are readily able to identify barristers well- suited to their clients' needs. Opponents of the present prohibitions, however, argue that some solicitors are not readily able to identify suitable barristers for particular cases, and that in any event clients are entitled to choose their barrister themselves. Moreover, they say, the fact that individual advertising by barristers may not often be necessary does not mean that it should be prohibited.

D. THE SCOPE OF THIS PART

8.13 We have given in this chapter an introductory outline of the principal restrictions on attraction of business by lawyers in New South Wales, and of the arguments for and against relaxing those restrictions. In the remainder of this Part we consider in detail one aspect of attraction of business by lawyers, namely *individual advertising by solicitors.* In Part IV we consider other types of attraction of business by solicitors, the general question of attraction of business by barristers, and institutional advertising by groups of lawyers.

FOOTNOTES

1. See, e.g., Solicitors (General) Regulations, reg.29 (NSW): Solicitors (Professional Conduct and Practice) Rules 1979 (Victoria).

2. Section 86.

3. Many of them are collected in R Atkins, *New South Wales Solicitor's Manual* (3rd ed., Law Society of NSW, Sydney, 1975).

4. See Law Society Journal (NSW) (1980). Vol.18, p.309.

5. The description of the proposed regulations in this Report is based on the drift published in the Law Society Journal, April 1982, at pp.222-224.

6. See Law Society of New South Wales, “Advertising and Specialisation” (Submission No.412), p.15.

7. New South Wales Bar Association, *Rules*.

8. The criticisms referred to in this paragraph are described in greater detail in our Discussion Paper, *Advertising and Specialisation* (especially chapter 9), and later in this Report (especially chapter 11).

9. The arguments referred to in this paragraph are described in greater detail in the sources referred to in note 8 above.

10. The arguments referred to in this paragraph are described in greater detail in the Sources referred to in note 8 above.

9. The Present Position

A. INTRODUCTION

9.1 In this chapter we look at

- the present position in relation to individual advertising by solicitors in New South Wales;
- some developments in legal professions outside New South Wales, and in professions other than law, in relation to individual advertising.

B. THE PRESENT POSITION IN NEW SOUTH WALES

I. Introduction

9.2 We have referred earlier to regulation 29 of the Solicitors (General) Regulations which prohibits "applying for or seeking instructions", "touting", "attracting business unfairly" and "publishing an advertisement". [1] Of these four prohibitions, the third and fourth are the most likely to be relevant to individual advertising; the first two, it would appear, are directed principally at solicitation. [2]

9.3 The terminology of these prohibitions is somewhat general, but there are two other sources which help to define the line between permitted and forbidden advertising by solicitors. They are, firstly, the exceptions to the prohibition against advertising which are listed in regulation 29 itself, and secondly, rulings made by the Law Society Council. We have referred earlier to the question of the legal status of the Council's rulings. [3]

9.4 We summarise below various important aspects of the existing regulations and Council rulings on individual advertising by solicitors. We do so under four heads, namely

- advertising in newspapers, periodicals and directories;
- advertising on radio and television;
- advertising on office signs, brochures and business cards;
- incidental advertising.

Under each head we also describe the changes, if any, which would be effected by the Law Society's proposed new regulations in relation to advertising which, as we mentioned earlier, are in an advanced stage of preparation. [4]

9.5 We conclude our summary of the present position by referring to certain legislation concerning consumer protection and restrictive practices which may be relevant to advertising by solicitors in New South Wales.

II. Newspapers, Periodicals and Directories

The Present Regulations

9.6 At present, advertising in these types of publication is prohibited by regulation 29, subject to exceptions specified in the regulation itself. Those exceptions relate to

advertising of basic information (such as name, name of practice, address and telephone number) in “recognised” legal directories;

advertising of certain information by country solicitors in limited circumstances;

advertising undertaken with the consent of the Law Society Council.

9.7 The power of the Law Society Council to approve advertising which otherwise would be prohibited by regulation 29 has led to two significant developments in the last few years. First, as we mentioned in Part II, [5] the Law Society published in 1981 a Legal Services Directory, containing basic information about individual practices, such as their name and location, languages spoken by their principals or staff, fields of practice in which they are “willing to provide assistance”, and whether they are willing to provide a 30 minute initial interview for $20. Several thousand copies of the Directory have been distributed for use at government offices, court houses, police stations, libraries, solicitors’ offices and legal aid centres. Secondly, having announced in 1979 its intention to amend regulation 29 to allow greater scope for advertising, [6] the Law Society Council has approved some advertisements on the basis that they are in compliance with the proposed new regulations. Early in 1982 the Society informed us that 188 such advertisements had been approved. [7] For example, solicitors have advertised in newspapers their name, the name of their practice, their address and telephone number, their opening hours, and such phrases as “full range of legal services” and “legal aid applications attended to”.

The Proposed Regulations

9.8 The main differences between the proposed regulations and the existing regulations are that under the proposed regulations

a few additional types of information could be advertised (notably in relation to languages spoken and fees for an initial consultation); and

instead of being confined principally to legal directories, advertisements could be published in newspapers and periodicals.

We summarise the proposed regulations in the following four paragraphs.

9.9 *Types of Publication*. The proposed regulations would permit solicitors to advertise on an unlimited number of occasions in newspapers and periodicals (except those declared by the Law Society Council to be “unsuitable” for the purpose), the Law Almanac, other “legal directories” or “law lists” approved by the Council, and the telephone directory.

9.10 *Size and Format*. There would be restrictions, aimed at avoiding “undue prominence”, on the size and format of advertisements in newspapers, periodicals and the telephone directory. The controls on format relate to matters such as the use of colour, symbols and borders. In practice, the Law Society Council could apply similar controls over legal directories.

9.11 *Content*. The permissible content would vary according to the type of publication. The broadest range would be in relation to newspapers and periodicals. It may be summarised under the following heads.

Basic Information

name; occupation (ie. “solicitor”); name of practice; personal and business addresses and telephone numbers (including cable, telegraphic, telex addresses etc); opening hours; agents and associated firms.

Qualifications and Appointments

date of admission; right to practise in other jurisdictions; right to practise on own account academic awards; honours or awards conferred by the Crown; appointment as a notary public or Commissioner for affidavits; subject to approval by the Law Society Council membership of a “non-legal professional body”.

Changes in Practice

commencement, change in constitution or termination of a practice; establishment or closure of an office.

Languages Spoken

languages spoken by solicitors or staff in the practice.

Fees

fees charged for an initial consultation of a stated maximum duration (provided the fees are not below those specified under any relevant scale).

Most of this information could also be advertised in approved legal directories, although only some of it could be included in the Law Almanac. Advertisements in the telephone directory would be confined, generally speaking, to names, addresses, telephone numbers, status as a “solicitor”, and languages spoken. The proposed regulations would not explicitly permit advertisements concerning fields of practice; the position concerning such advertisements is described in Part II of this Report.[8]

9.12 *Other Matters.* In their present form, the proposed regulations would not permit employed solicitors to advertise. The proposed regulations would give the Law Society Council a general power to approve in writing an advertisement which would otherwise be prohibited by the regulations.

III. Radio and Television

9.13 Advertising on radio and television is totally prohibited under the present regulation 29. It would also be prohibited under the proposed regulations.

IV. Office Signs, Brochures and Business Cards

The Present Regulations

9.14 The existing regulations do not deal explicitly with attraction of business by use of office signs, brochures or business cards. However, rulings by the Law Society Council closely restrict the use of office signs, prohibit dissemination of anything in the nature of a brochure, and allow only limited use of business cards.

9.15 The Councils ruling on office signs says that they

> “shall be no more than reasonably necessary to assist a member of the public seeking legal services to obtain such services and shall not
>
> (a) be in bad taste;
>
> (b) be unnecessarily large, conspicuous or numerous; ....”[9]

Save with the Councils approval office signs must not be on premises other than those in which the practice is located.[10] The ruling on business cards requires them to be of “normal size”, and to contain only the solicitor s name, name of practice, degrees, address, telephone

number, and the description “solicitor”. [11] Use of business cards by a practitioner must be “discreet and is confined to occasions on which it is proper that he should establish his professional identity.”[12]

9.16 Some aspects of the use of brochures and business cards relate to solicitation and, accordingly, they are considered in chapter 14 of this Report.

The Proposed Regulations

9.17 The proposed regulations do not deal explicitly with the use of office signs, brochures or business cards. The Law Society Council presumably takes the view that business cards and office signs which are permissible at present would continue to be permissible under its proposed regulations. But if those regulations were introduced, the question would arise whether solicitors could advertise in office signs, brochures and business cards the same range of information as the regulations would entitle them to advertise in newspapers. For example, could office signs include details concerning fees for initial consultations? Such expanded use of these means of advertising might be regarded as contravening the new regulations, subject to the Councils power to approve exceptions.

V. Incidental Advertising

9.18 By “incidental” advertising we mean advertising which is undertaken primarily for a purpose other than the attraction of legal work, but which also is intended, or is likely, to attract such work. Despite some differences in wording, the intent of the present regulations and the proposed regulations does not seem to differ significantly in relation to incidental advertising. The proposed regulations are expressed a little more clearly on this point and it is them which we quote here. They would prohibit the seeking of instructions for “professional business”, the unfair attraction of “business”, and the publication of advertisements “which can reasonably be regarded as calculated to attract business to a solicitor’s practice”. Thus, for example, a solicitors advertisements for new staff would be prohibited if the advertisements could reasonably be regarded as calculated to attract business to the practice.

9.19 The Law Society Council has made a number of rulings in relation to incidental advertising. It does not seem likely that they would be affected by the proposed amendments to the regulations. An example of a Council ruling in this area concerns solicitors advertisements seeking information about the whereabouts of missing persons. The Council has ruled that such an advertisement must be confined to the classified advertising sections of newspapers if the name of the solicitor s practice is to be mentioned in it. [13] Another ruling concerns display advertisements by solicitors seeking legal or non-legal staff, and it states, amongst other things, that such advertisements must not include “any reference to or comment about the advertiser s field of practice. [14]

VI. Consumer Protection and Restrictive Practices Legislation

9.20 We have summarised above the principal restrictions on advertising by solicitors in New South Wales, namely, regulations made under the Legal Practitioners Act and rulings made by the Law Society Council. But brief mention should be made of two other forms of control which may become relevant in this area, namely, consumer protection legislation and restrictive practices legislation.

Consumer Protection

9.21 The New South Wales Consumer Protection Act, 1969, makes it an offence for providers of services, including solicitors, to engage in advertising which to their knowledge is “false or misleading in any material particular”. [15] Other provisions which may be relevant to advertising by solicitors are the consumer protection provisions of the Commonwealth Trade Practices Act 1974. These provisions relate to activities in the course of trade or commerce

and, amongst other things, they make it an offence to "engage in conduct that is misleading or deceptive or is likely to mislead or deceive", to "falsely represent that services are of a particular standard, quality or grade", or to "make a false or misleading statement concerning the need for any good or service". [16] However, the scope of the Act is limited by the Commonwealth Parliament's constitutional power and its applicability to the activities of New South Wales solicitors is substantially restricted. [17]

Restrictive Practices

9.22 The Commonwealth Trade Practices Act also contains provisions for regulating restrictive practices in the public interest. [18] As we have mentioned, the applicability of the Act to New South Wales solicitors is substantially restricted. Moreover, all statutory regulations, including those concerning advertising by solicitors, are exempt from the Act. [19] But rulings made by the Law Society Council in relation to advertising by solicitors may not be exempt if they impose restrictions going beyond those in the regulations themselves.

9.23 No attempt has been made to apply the Trade Practices Act to New South Wales solicitors. But it has been applied to non-statutory rules about advertising made by professional associations of engineers in Australia. [20] Prior to 1981, these rules prohibited advertising by engineers, save to a limited extent in technical journals, on signs at the sites of projects, and in brochures handed out in response to inquiries. The restrictions were not as tight however, as those which presently apply to solicitors in New South Wales. In 1981, the Trade Practices Tribunal held that the engineers' rules were contrary to the restrictive practices provisions of the Trade Practices Act. [21] The rules were changed to allow any form of advertising by engineers provided that it meets such requirements as being "truthful" "dignified" and "free from any matter that could bring disrepute to the profession". [22] The Tribunal authorised the new rules, having rejected a proposal that advertising about fees should continue to be prohibited.

C. SOME DEVELOPMENTS ELSEWHERE

I. An Outline

9.24 In our Discussion Paper, *Advertising and Specialisation,* we described in detail a number of significant developments in legal professions outside New South Wales, and in some professions other than law, in relation to restrictions on advertising. [23] We do not repeat all of that description here, but we do give a brief outline of the position in relation to lawyers in Australia, the United Kingdom, Canada and the United States, and in relation to the medical engineering and accounting professions in Australia.

9.25 In Australia, the restrictions on advertising by lawyers outside New South Wales are broadly similar to those which presently apply in New South Wales (that is, prior to the introduction of the Law Society's proposed new regulations). [24] However, some newspaper advertising is permissible in Western Australia, [25] and the Law Institute of Victoria has decided to relax its present restrictions. [26] At the time of writing, the new restrictions in Victoria are in the course of formulation.

9.26 In the United Kingdom, the Monopolies and Mergers Commission recommended in 1976 a very substantial relaxation of the restrictions on advertising by solicitors, which at that time were similar to those which presently apply in New South Wales. [27] Since them the Royal Commission on Legal Services in Scotland has endorsed the Monopolies and Mergers Commission' s recommendations, [28] and less extensive, but nevertheless major, relaxation has been recommended by the Royal Commission on Legal Services in England and Wales. [29] Some relaxation has occurred since these three Commissions reported, [30] but the British Government has expressed "regret" that the changes "do not meet in full the recommendation of the Monopolies and Mergers Commission". [31]

9.27 In Canada, the restrictions in each province were, until 1976, generally similar to the present ones in New South Wales. Since then, however, a considerable range of advertising has become permissible in a number of provinces, including the most populous ones. [32] Further relaxation was recommended in Ontario in 1980 by the Professional Organisations Committee. [33] But in Manitoba a substantial relaxation introduced in 1978 was largely reversed early in 1982. [34]

9.28 In the United States, restrictions on advertising were somewhat similar to those which presently apply in New South Wales, until the Supreme Court of the United States held in 1977 that the freedom of speech provisions of the Constitution of that country guarantee lawyers certain rights to advertise. [35] The American Bar Association responded by drafting two Proposals (A and B) for consideration by individual States. [36] Each Proposal allowed a considerable range of advertising, but Proposal B was the more liberal of the two. Approximately half the States have adopted rules broadly similar to Proposal A, and most of the remainder have rules broadly similar to Proposal B. [37] The American Bar Association is presently considering draft Model Rules of Professional Responsibility, part of which would relax the restrictions still further than was suggested in Proposal B. [38]

9.29 Until recent years, the restrictions on advertising by the medical engineering and accountancy professions in Australia were similar to those which apply to lawyers in New South Wales. In 1979, however, the principal professional associations of accountants relaxed their rules to a significant extent. [39] In 1981, as mentioned earlier in this chapter, legal action under the Trade Practices Act led to a substantial relaxation of the restrictions on advertising by engineers. [40] The Health Commission of New South Wales favours greater scope for advertising by doctors [41] and in mid-1982 the State Government announced that certain types of doctor will be allowed to advertise in newspapers and other printed publications such information as opening hours, languages spoken, surgery fees, and information about bulk-billing. [42]

II. The Range of Restrictions

9.30 The existing or proposed restrictions on advertising to which we have referred above may be classified into the following five broad categories.

9.31 *General* Prohibition. In this category, very little advertising is permitted other than in legal directories. Examples include the present restrictions on solicitors throughout Australia and the United Kingdom. [43]

9.32 *Small Approved List.* In this category, it is permissible to advertise in a range of publications, including newspapers, but only such types of information as are specified in a small list may be advertised. In particular, little, if any, information about fees or fields of practice can be advertised. The proposed new regulations for solicitors in New South Wales provide an example of this category. The present rules for lawyers in Ontario and Quebec, and for accountants in Australia, provide other examples. [44]

9.33 *Extensive Approved List.* In this category, the list of information which may be advertised is broader, especially in relation to fees and fields of practice. Examples include Proposal A of the American Bar Association (and the rules based on that proposal which are in force in many parts of the United States) and the existing rules in British Columbia. [45]

9.34 *General Approval with Broad Restrictions*. An example of this category is a rule in which the basic test is whether the advertisement is false or misleading, but which also has a number of prohibitions relating, for example, to particular types of claims about fees or fields of practice. Examples include Proposal B of the American Bar Association (and the rules based on that Proposal which are in force in many parts of the United States) and the present rules in Alberta. [46]

9.35 *General Approval with Few Restrictions.* An example of this category is a rule which prohibits false or misleading advertisements and includes some other prohibitions relating, for example, to claims of superiority over other practitioners and to undignified presentation. The current draft Model Code of the American Bar Association, the rules of the professional associations of engineers in Australia, and the proposals of the Monopolies and Mergers Commission in the United Kingdom, fall within this category. [47]

FOOTNOTES

1. See para.8.5.

2. We consider solicitation in chapter 14.

3. See para.8.6.

4. See para.8.7.

5. See para.3.19.

6. See Law Society Journal (1980), vol.18, p.309.

7. Law Society of New South Wales, “Advertising and Specialisation” (Submission No.412), p.15.

8. See paras.3.17-3.20 and 4.12-4.13.

9. See Law Society of New South Wales, “Advertising and Specialisation” (Submission No.412), p.20.

10. See source cited in note 9 above.

11. See R Atkins, *New South Wales Solicitor’s Manual* (3 rd ed., Law Society of NSW, Sydney, 1975), p.228.

12. See source cited in note 11 above.

13. See Atkins (note 11 above), p.227.

14. See Atkins at p.229.

15. Section 32(1).

16. Sections 52(1), 53(aa) and 53(f).

17. See our Discussion Paper, *Advertising and Specialisation,* pp.104 and 216.

18. See, in particular, sections 45 and 90. For a summary, see our *First Report on the Legal Profession Inquiry*, paras.7.1-7.11: and our Discussion Papers, *The Structure of the Profession,* pp.212-214, and *Advertising and Specialisation,* pp.103-104. See generally, W Pengilley, *Trade Associations, Fairness and Competition* (Law Book Co, Sydney, 1981).

19. See section 51(1).

20. For a fuller description of its application to these rules, see our Discussion Paper, *Advertising and Specialisation,* pp.119-120, and ACEA *in Trade Practice Land* (Association of Consulting Australia, Sydney, 1981).

21. *See Association of Consulting Engineers, Australia,* Trade Practices Tribunal Decision, 27th February, 1981 (Australian Trade Practices Reporter, p.40-202).

22. Association of Consulting Engineers, Australia, Rules, rule 4(k).

23. See pp.104-120.

24. For some further details, see our Discussion Paper, *Advertising and Specialisation,* p.105.

25. See Law Society of Western Australia, Professional Conduct Rulings, ruling 3(m)-(o).

26. See Law Institute Journal (1982), vol.56, p.264.

27. See *Solicitors' Services: A Report on the Supply of Services of Solicitors in England and Wales in relation to Restrictions on Advertising* (HMSO, London, 1976). esp. p.40. See also our Discussion Paper, *Advertising and Specialisation,* pp.107-108.

28. See the Commission's Report (HMSO, Edinburgh 1980, Cmnd.7846), chap.6, esp. para.6.36.

29. See the Commission's Final Report (HMSO, London, 1979. Cmnd.7648). chap.27.

30. See our Discussion Paper, *Advertising and Specialisation,* pp.106-107.

31. Guardian Gazette (1979). vol.76, p.521. See also the comments of the Director-General of Fair Trading, reported in Law Society Gazette (1982). p.95; and the editorial in the New Law Journal (1981), p.1018.

32. See our Discussion Paper, *Advertising and Specialisation,* pp.109-113.

33. See the Committees Report (Ontario Government Bookstore, Toronto, 1980), pp.191-202, esp. 201-202.

34. See National (1982), Vol.19, no.3.

35. *See Bates and O'Steen v. State of Arizona* US Reports (1977), vol.433, p.350. For a description of developments in the United States, see L Andrews, Birth of a Salesman (American Bar Association, Chicago, 1980), and our Discussion Paper, *Advertising and Specialisation,* pp.113-118.

36. See American Bar Association Journal (1977), Vol.63, p.1234. For a summary of the proposals, see our Discussion Paper, *Advertising and Specialisation,* pp.114-116.

37. See Andrews (note 35 above).

38. Proposed Final Draft (1981), rules 7.1-7.5; Alternative Draft (1981), disciplinary rules 2-101 to 2-106.

39. For a summary of these changes, see our Discussion Paper, *Advertising and Specialisation,* p. 120.

40. See para.9.23.

41. For a fuller description, See Our Discussion Paper, *Advertising and Specialisation,* p.118.

42. See *The Australian,* 5th June 1982, p.3.

43. For a summary of these restrictions. *see Advertising and Specialisation,* pp.106-109.

44. For a summary of these restrictions. see *Advertising and Specialisation,* pp.112, 120.

45. For a summary of these restrictions, see *Advertising and Specialisation,* pp.109-111, 114-115.

46. For a summary of these restrictions, see *Advertising and Specialisation,* pp.111-112, 115-116.

47. For a summary of these restrictions, *see Advertising and Specialisation,* pp.107-108, 117-118, 119-120.

10. Our Discussion Paper

A. INTRODUCTION

10.1 In our Discussion Paper, *Advertising and Specialisation,* published in 1981, we tentatively suggested a number of changes in the restrictions on individual advertising by solicitors. We outline those suggestions below, and we mention some of the responses which were made to them. A number of suggestions and responses on points of detail are referred to in subsequent chapters.

B. OUR SUGGESTIONS

10.2 We discussed in the Paper a number of advantages and disadvantages of the present restrictions on advertising. [1] In the light of that discussion we [2] formed the tentative view that the present restrictions should be relaxed substantially. We described three general approaches which in our view, merited particular consideration. [3] We referred to them as the Narrow, Medium and Broad approaches, according to the range of advertising which they would permit These three approaches correspond to the third, fourth and fifth of the categories which we described at the end of the previous chapter of this Report; it was our view that the first and second of those five categories were excessively restrictive and did not merit further consideration.

Three Possible Approaches

10.3 Under the *Broad Approach,* [4] advertising was to be required to comply with four basic rules, namely that

> it must not be false or misleading in any material particular;
>
> it must not claim superiority for the advertising solicitor over any or all other solicitors;
>
> while it may make clear the intention of the solicitor to seek custom, it must not be vulgar, sensational or otherwise of such a character as to be likely to bring the profession into disrepute; and
>
> it must not contain testimonials or endorsements concerning the advertising solicitor.

10.4 Under the Medium Approach, [5] the four basic rules mentioned above were to be supplemented by restrictions applying to advertisements about four special areas, namely

> fields of practice;
>
> fees;
>
> clientele; and
>
> speed of service.

In these special areas, only specified types of information could be advertised and certain requirements about terminology would have to be observed.

10.5 Under the *Narrow Approach,* [6] the four basic rules would have to be observed, but in addition advertisements in all areas (rather than only in the four special areas mentioned above) would be confined to certain specified types of information In the four special areas these types of information would be the same as under the Medium Approach.

Our Tentative Preferences

10.6 We suggested in our Paper that the Medium Approach is preferable to the Narrow Approach and, at least in the short term, to the Broad Approach. [7] We said, however, that we were not opposed to the adoption of the Narrow Approach on an interim basis, accustoming the profession to change. But we considered that if such an approach was adopted, it should not become entrenched without a proper review after a fixed period of, say, two years. We emphasised that the Narrow Approach would allow certain types of advertisement in the four special areas - fields of practice, fees, clientele and speed of service. It was our view that if these areas were omitted the Narrow Approach would not constitute a sufficient relaxation of the restrictions, even on an interim basis.

Particular Media

10.7 In addition to these suggestions about a general approach, we made a number of suggestions about advertising in particular media. [8] We mention some of them below.

10.8 *Radio and Television.* The majority of us said that we were presently of the view that advertising should be permitted on radio and television to the same extent as in print, although we did not expect that such advertising would become extensive. [9] Mr Conacher, however, did not favour advertising on radio and television being permitted. [10]

10.9 *Signs and Brochures.* We suggested that, generally speaking, restrictions on the content of office signs and brochures should be the same as for other forms of advertising, such as newspaper advertisements. [11]

10.10 *Directories*.We made a number of detailed suggestions for the inclusion of additional information about solicitors in the Telephone Directory (both Yellow and White Pages), the Legal Services Directory, and the Law Almanac. [12] We also suggested that the existence of the Legal Services Directory should be advertised more widely than at present and on a regular or recurrent basis. [13]

C. SOME RESPONSES

10.11 A number of responses, both formal and informal, were elicited by our Discussion Paper. Each of them has been taken into account in the formulation of this Report. We mention below two of the formal responses which we received in relation to individual advertising by solicitors.

10.12 In its response, [14] the Law Society of New South Wales reiterated its wish to relax the present restrictions by introducing new regulations along the lines which it had proposed earlier. [15] These proposed new regulations reflect an approach which is narrower than the Narrow Approach described in our Paper in particular, they would allow very little advertising in relation to the four special areas. The Society did not indicate approval of any further relaxation beyond its proposed new regulations, and it specifically rejected our Medium Approach. [16] It did not agree with our suggestion that solicitors should be permitted to ,advertise on radio and television, [17] but it went some way towards our suggestions concerning signs, brochures and directories by indicating that restrictions on advertising in these media “should be the same, so far as is possible, as for other printed publications”. [18]

10.13 Another response was from Edward H O'Brien Pty Ltd, the advertising contractor for the Yellow Pages of the telephone directory. [19] The company's submission referred to the Law proposed new regulations and pointed out that they are more restrictive in relation to advertisements in the Yellow Pages than advertisements in newspapers and periodicals. The company said, as we had in our Discussion Paper, that the restrictions for the Yellow Pages should be the same as for printed publications generally.

10.14 The New South Wales Bar Association's response to our Paper confined itself to our suggestions in relation to barristers. [20] We refer to it in chapter 15.

FOOTNOTES

1. See chapter 9.

2. Mr RD Conacher expressed reservations in relation to some of the views expressed by us in the Paper. Due to his subsequent retirement from the Commission he has not been involved in the preparation of this Report.

3. See pp.137-145.

4. For a full description of this approach, see *Advertising and Specialisation,* pp.137-137.

5. For a full description of this approach, see *Advertising and Specialisation*, pp.138-140.

6. For a full description of this approach. see *Advertising and Specialisation,* pp.142-143.

7. For our reasons, *see Advertising and Specialisation,* pp.145-148.

8. For the suggestions in detail, see *Advertising and Specialisation,* chapter 11.

9. See pp.153-154.

10. See p.154 and chapter 15.

11. See pp.154-155.

12. See pp.155-160.

13. See p.159.

14. "Advertising and Specialisation" (Submission No.412).

15. P.15.

16. P.19.

17. Pp.21-22.

18. P.22.

19. Submission No.415.

20. "Advertising and Specialisation" (Submission No.406).

11. A Need for Change

A. INTRODUCTION

11.1 It is apparent from the recent developments described in chapter 9 that there is a widespread trend towards relaxation of restrictions on advertising by lawyers. In some places, such as Australia and the United Kingdom the movement is slow and tentative, but in North America there have been substantial changes in the last few years. Moreover, four official commissions or committees in the United Kingdom and Canada have recommended major relaxation in the restrictions. [1] In this chapter we consider various advantages and disadvantages which may arise from relaxation of the present restrictions in New South Wales. The issues were canvassed at greater length in our Discussion Paper. [2]

B. ADVANTAGES OF RELAXING THE RESTRICTIONS

I. Improved Access to Legal Services

11.2 Submissions made to us in the course of our Inquiry convince us that many clients or would-be clients face substantial difficulties at present in identifying appropriate lawyers for their work. [3] Sometimes the difficulties may be, or may appear to be, so great that, in the result, no lawyer is engaged. It seems that the types of information for which there is the greatest unmet need relate to fields of practice and fees. Other matters of interest to potential clients include speed of service, length of experience in practice, office hours, languages spoken and size of practice. Similar conclusions to ours have been drawn by professional associations and official inquiries in various parts of the world. [4]

11.3 The need for more readily available information about lawyers is greater in metropolitan areas, where it is less easy than in country towns to tap community knowledge about local lawyers. It is also particularly likely to be felt by people who read little, do not speak English well, have legal problems which few lawyers handle (for example, social security problems), or whose financial position makes it essential that they find the cheapest service of an adequate standard.

11.4 Some of these needs may be met to some extent by the Law Society's new Legal Services Directory, and by newspaper advertising of the kind which would be permissible under the Society's proposed new regulations. But severe limitations on the range and style of will remain. For example, many of the people most in need of assistance in choosing lawyers read very little; radio and television are the most effective media for engaging their attention. Many people are unlikely to hear of the Legal Services Directory, let alone locate a copy and utilise it effectively. Moreover, the types of information which can be advertised in the newspapers or the Directory, even under the proposed new regulations. are very limited. One example is that nothing can be said about fees, save in relation to a standard fee for initial consultations.

II. Innovation, Efficiency and Lower Prices

11.5 Advertising by individual practitioners can stimulate innovation and improve efficiency within the profession. [5] Practitioners are more likely to be willing to provide a new service, and to be able to make it economically viable, if they can publicise it effectively. This applies, for example, to services such as remaining open in the evening, employing a solicitor who speaks a foreign language, or specialising in the legal problems of, say, mentally ill people. It applies also, of course, to the provision of services at lower prices. By helping to attract

business, advertising of particular services or of lower fees helps practitioners to achieve economies of scale. Lawyers and non-legal staff become more knowledgeable and efficient, routine officer, procedures can be streamlined, capital investment in more efficient technology becomes economically Justifiable, and so on. In many areas, economies of scale can enable cheaper service to be provided without any reduction in lawyers standards or net incomes; indeed, standards and incomes may become higher. Moreover, advertisements about fees may attract business even though they do not offer reduced fees; for example, many clients may be attracted by the offer of a fee which although not especially low, is fixed in advance.

11.6 Some of the beneficial effects of relaxing the rules against advertising can be seen in recent United States experience. We have referred earlier to the substantial relaxation effected by a decision of the Supreme Court of the United States in 1977. [6] Two years later, the Chairman of the American Bar Association's Commission on Advertising said that there was clear evidence that prices for routine legal services drop when some lawyers in a market advertise. [7] He added that it appears that the quality of services in those areas has improved. Other evidence and opinion to a similar effect was referred to in our Discussion Paper. [8]

III. New Practices and Small Practices

11.7 Tight restrictions on advertising strike particularly at practitioners who are newly-admitted or are setting up in new localities. These practitioners would be assisted in seeking to build up a practice and a reputation if they could widely publicise their existence, location, some biographical material, and the types of services which they provide. Established practitioners may have less use for advertising because this sort of information about them may already be known to a considerable degree within the local community. In our view, the present restrictions adversely affect the geographical spread of legal practices, especially in socially disadvantaged areas where a high volume of work is essential in order to offset the necessity of charging low fees.

11.8 Restrictions can place small practices at an unfair disadvantage by comparison with large practices. The high overall volume of work in a large practice may include sufficient work in a particular field to enable a member of the firm to specialise in it. This is less likely to be possible in a small practice, unless it can advertise its interest in particular fields. Moreover, large practices may benefit because clients who lack information about which practices handle their particular types of work may choose a large firm in the belief that its size makes it likely to have someone skilled in the relevant field.

IV. Other Methods of Attracting Business

11.9 The present restrictions on advertising increase the importance of other methods of attracting business, such as involvement in social and sporting clubs, speaking engagements, and friendships with, for example, estate agents and bank managers. These avenues may be more open to some well-connected lawyers than to other lawyers who are at least as competent They may help members of golf or service clubs, for example, to find out about individual lawyers, but may leave socio-economically disadvantaged sectors of the community without comparable sources of information. [9]

11.10 The realisation that these indirect methods of attracting business can be used to evade the prohibition on individual advertising has led to restrictions on public comment and other participation in community activities, by lawyers. [10] But in the words of a Deputy Executive Director of the Law Institute of Victoria, these restrictions are "very difficult to police" and a "strict interpretation ... would often be contrary to common sense and unduly restrictive of lawyers' ordinary activities". [11]

V. Greater Utilisation of the Profession's Services

11.11 Individual advertising can contribute to a higher level of utilisation of the profession's services generally. The profession may become less likely to be seen as austere and unapproachable. Advertising about fees may help to allay exaggerated fears amongst the public about legal fees being excessively high or unpredictable.

11.12 A further consideration is that in some fields, such as conveyancing or taxation advice, the legal profession is under increasing competition from non-lawyers who are entitled to advertise. Lawyers may feel unreasonably disadvantaged if they are denied a similar freedom to inform the public about their services in those fields.

11.13 Institutional advertising can play a valuable role in these respects. We discuss it in chapter 16. But individual advertising may penetrate some sectors of the community more effectively and more economically than centralised advertising campaigns by the profession as a whole.

C. DISADVANTAGES OF RELAXING THE RESTRICTIONS

I. Commercialism and Shoddy Work

11.14 It is argued by many lawyers that individual advertising by solicitors would lead to excessive commercialism in the profession, with undue emphasis on attracting extra business and making more money, rather than on providing the best possible service to each client. [12] In some instances, the pressures of increased competition may lead some lawyers to set too much store on achieving success for their clients, ignoring their ethical duties to the courts. Moreover, lawyers may have to devote substantial time and resources to advertising and systems management, diverting them from developing their legal skills and using those skills for the benefit of their clients. Another possibility is that if lawyers resort to advertising, clients may have less confidence in them as being willing to put service above profit, and may be less inclined to trust their advice or even to resort to them. The dangers to which we have referred would be particularly acute, it is said, if lawyers were to advertise about their fees. In those circumstances, lawyers and clients might be more likely to emphasise cost rather than quality, and in order to provide cheap service lawyers would be tempted to cut corners and lower their standards.

11.15 Many of these arguments were advanced by the Law Society in its original submission to us about advertising, and were re-iterated in its response to our Discussion Paper. [13] In our view, they are substantial and they justify some control over advertising. But we do not consider that they justify the present degree of restriction, nor that which is proposed by the Society. For example, many of the suggested dangers would be avoided is as was recommended by the Monopolies and Mergers Commission in the United Kingdom, [14] advertising was required to be dignified and not to claim superiority over other practices. Fee advertising could be controlled more rigorously than other advertising; this is presently the case in many parts of North America. [15]

11.16 In our view, however the dangers of harm to the quality of service and to the reputation of the profession are over- estimated by many opponents of advertising. We have pointed out earlier that the ability to advertise can encourage competition, innovation and efficiency, and we consider that the consequential improvements in quality and speed of service are likely to be substantially greater than any increased incidence of shoddy service or corner-cutting which might occur. This view is supported by evidence, some of which we mentioned in our Discussion Paper, about the experience in the United States since the recent relaxation of advertising restrictions. [16] As to the effect of advertising on the public image of the profession and on the degree of trust between lawyers and clients, the advent of advertising may reduce the extent to which lawyers are perceived as aloof, unapproachable, and concerned only with well-to-do sectors of the community. If, as we anticipate, greater competition between lawyers were to reduce delay and expense in the delivery of legal services, it would also ameliorate two of the major causes of public dissatisfaction with the legal profession.

II. Excessive Cost

11.17 It is often argued that the advent of advertising by lawyers would substantially increase their overheads and that this cost would have to be passed on to the client. [17] In addition, it is said that small practices and new practices would not have the financial resources to match the level of advertising by wealthier firms. These arguments are put especially in relation to advertising in the mass media, where rates are likely to be high In both its initial submission and its response to our Discussion Paper, the Law Society has placed considerable emphasis on these dangers of excessive cost. [18]

11.18 In our view, these arguments are of little strength. Broadly speaking, the forces of the market place would inhibit expenditure on unproductive advertising. And in any event, why should lawyers be prohibited from expending money on advertising but be free to spend large sums of money on other means of attracting and retaining business, such as lavish office premises? Moreover, as we pointed out earlier in this chapter, [19] the competition induced by advertising can increase efficiency and reduce excessive profit margins. We referred in our Discussion Paper to North American studies which suggest that relaxation of restrictions on advertising can significantly decrease the cost of goods or services to the consumer. [20]

11.19 It is true that large well-established firms are likely to be able to afford extensive advertising campaigns more readily than most other practices. In the United States, however, large firms have tended not to be very interested in advertising. [21] This is not surprising, since the clients or potential clients of large firms tend not to need, or to be much affected by, advertising about lawyers. Even if these firms did advertise, they would not be competing for the sectors of the community in which many small or new practices would be interested. Moreover, for reasons explained earlier in this chapter, the prohibition of advertising can operate to the disadvantage of small and new practices by comparison with those which are larger and well-established. [22]

11.20 Nevertheless, if there were to be a substantial relaxation of restrictions on advertising, there might be a case, at least initially, for some restrictions aimed at preventing excessive expenditure on advertising. They might apply, for example, to the size and frequency of advertisements, to the media in which advertisements could appear, or directly to the level of expenditure.

III. False or Misleading Claims

11.21 An important set of arguments raised against relaxing restrictions on advertising relates to the possibility that false or misleading claims will be advertised. [23] Even if the making of such claims is prohibited, it may be difficult in many instances for their false or misleading nature to be detected and proved by the responsible authorities, let alone by clients. Policing of the rules may be expensive and intrusive, and it may not be sufficiently rapid to prevent considerable damage being caused before the advertisements are stopped. These arguments are put especially in relation to advertising of fees, fields of practice, and speed of service. [24]

11.22 There can be no doubt that false or misleading advertising should be prohibited. In assessing the justification for additional restrictions, however, it is important not to overestimate public gullibility, especially in relation to “ mere puff’. Moreover, the possibility that relaxation of the restrictions may lead to some false or misleading claims being advertised must be weighed against the substantial damage which arises from the present restrictions on public access to information about lawyers. The present rules in New South Wales, and the Law Society’s proposed new regulations, exclude a wide range of information which raises little if any danger of being false or misleading, yet which may reasonably be regarded as helpful by clients. An example is where a practitioner is willing to commit himself or herself to charging a standard specified fee for a particular service which is clearly defined in the advertisement.

11.23 Nevertheless, the arguments referred to in paragraph 11.21 have some strength, and it may well be desirable to impose restrictions going beyond a mere rule against false or misleading advertisements. Possible approaches include specifying some types of advertisement which would be regarded as false or misleading, such as advertising a minimum fee ("from $50") rather than a fixed or maximum fee.

IV. Unnecessary or Ineffective Advertising

11.24 Some lawyers argue that individual advertising is unnecessary and ineffective. [25] Most clients, they say, will rely on personal references rather than on advertisements. Moreover, most members of the public use lawyers very rarely, and it is said that when the time comes, uncoordinated and sporadic advertising by individual practitioners will not provide these people with a convenient basis for selection. Legal services directories and institutional advertising, it is argued, are more likely to be useful to the public because they are more widely disseminated, more comprehensive, and more reliable than individual advertising. In its response to our Discussion Paper, the Law Society referred to the fact that only a small percentage of lawyers have taken advantage of the greater scope for advertising which has developed in the United States in the last few years. [26]

11.25 But the likelihood that many practitioners will not wish to advertise does not justify prohibiting them or other practitioners from doing so. And for many practitioners, especially those seeking to meet needs which are presently unmet or to develop practices more suited to their capabilities and preferences, the right to advertise may be of crucial significance. As we indicated in our Discussion Paper, there are ways in which individual advertising can be economical without being sporadic or ephemeral. [27] There can be no doubt that since the recent relaxation of restrictions in the United States some lawyers have already obtained substantial benefits from individual advertising of their services. [28]

11.26 Legal services directories, institutional advertising, and personal evaluations by friends can be of value to many people seeking an appropriate lawyer. But many people do not have ready access to informed personal evaluations of lawyers, and individual advertising can be more effective than directories or institutional advertising in reaching particular sectors of the community and in publicising innovative services offered by individual lawyers.

V. Stirring up Litigation

11.27 Some opponents of advertising fear that it would stir up unmeritorious or unnecessary litigation thus harming members of the public and the judicial system. We do not consider that any significant increase in the incidence of such litigation is likely to occur. In any event, a possibility of a slight increase cannot justify preservation of restrictions which in our view, substantially impede access to appropriate lawyers, and to justice, for many people who have problems calling for judicial resolution This is especially so since the restrictions particularly affect the information available to people who are socio-economically disadvantaged.

FOOTNOTES

1. In the UK the two Royal Commissions on Legal Services and the Monopolies and Mergers Commission (see para.9.26): in Canada. the Professional Organisations Committee (see para.9.27).

2. See chapter 9 of that Paper.

3. For a fuller discussion of the issues raised in paras.11.2-11.4, and for relevant Sources, see our Discussion Paper, *Advertising and Specialisation,* pp.122-124 and 220.

4. See eg. the sources cited in *Advertising and Specialisation*, pp.123, 220.

5. For a fuller discussion of the issues raised in paras.11.5-11.6, and for relevant Sources, see *Advertising and Specialisation,* pp.124-126 and 220.

6. See para.9.28.

7. See comments by R Brosnahan quoted in American Bar Association Journal (1979), vol.65, p.232.

8. See pp.125-126.

9. On this point see A Nicoll, “Advertising our Wares” Australian Law Journal (1979). vol.53. p.438.

10. On these restrictions, see chapter 14.

11. See Nicoll (note 9 above), at p.443.

12. For a fuller discussion of the issues raised in paras.11.14-11.16. and for relevant sources, see our Discussion Paper, *Advertising and Specialisation,* pp.128-130 and 221.

13. See “Advertising” (Submission No.218). p.1-3, 10; and “Advertising and Specialisation” (Submission No.412). pp.2-3 and 17-18.

14. See the Commission’s report (note 9.26.2. above), at p.40.

15. See L Andrews, *Birth of a Salesman* (American Bar Association, Chicago, 1980), and our Discussion Paper, *Advertising and Specialisation*, pp.111-118.

16. See p.129.

17. For further discussion of the issues raised in paras.11.17-11.20, and for relevant sources, see *Advertising* and *Specialisation*, pp.130-131 and 221.

18. See “Advertising” (Submission No.218), p.2, and “Advertising and Specialisation” (Submission No.412). pp2-3 and 18-19.

19. Paras.11.5-11.6.

20. See p.131.

21. See eg. American Bar Association Journal (1981), Vol.67, p.1618, Table 1.

22. See paras.11.7-11.8.

23. For a fuller discussion of the issues raised in paras.11.21-11.23, and for relevant sources, see our Discussion Paper, *Advertising and Specialisation*, pp.132-133 and 221.

24. See eg. Law Society of New South Wales, “Advertising and Specialisation” (Submission No.412), p.20.

25. For a fuller discussion of the issues raised in paras.11.24-11.26, see our Discussion Paper, *Advertising and Specialisation*, pp133-134.

26. See “Advertising and Specialisation” (Submission No.412), p.18.

27. See p.134.

28. See eg. The survey reported in the American Bar Association Journal (1980), vol.66, p.705.

12. Our Recommendations: A General Scheme

A. INTRODUCTION

12.1 In the light of the discussion in previous chapters we turn now to state our conclusions and recommendations in relation to individual advertising by solicitors. In this chapter we make recommendations about a general scheme for regulating such advertising. We do so under the following headings:

our general approach;

a recommended scheme;

some ancillary matters.

In chapter 13 we consider special issues in relation to advertising in particular media, such as radio and television.

B. OUR GENERAL APPROACH

I. The Need for Change

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

II. A Range of Options

12.3 As mentioned earlier we described in our Discussion Paper, *Advertising and Specialisation*, three general approaches (Broad, Medium and Narrow) to relaxation of the existing restrictions. [1] Each of these approaches would require advertising to comply with four basic rules, including, for example, a rule against false or misleading advertising. [2] Under the *Broad Approach*, there would be no further restrictions. Under the Medium Approach, additional restrictions would apply to four special areas, namely fees, fields of practice, clientele and speed of service. In these special areas, advertising would be confined to such types of information as are on an approved list. [3] Under the *Narrow Approach* these restrictions in relation to special areas would apply but, in addition advertising in all other areas would be confined to specified types of information on an approved list. [4]

Narrow Approach

12.4 The Narrow Approach has the virtue of specificity. [5] It would leave little room for doubt as to whether a particular type of advertisement falls within the rules. Specificity would facilitate policing of the rules, thus reducing the danger of contraventions which might harm

the public or cause unfairness between practitioners. Much would depend, of course, on the range of items on the approved list, especially in relation to the special areas.

12.5 A major weakness of the Narrow Approach is its reliance on predicting types of information which lawyers might wish to advertise, and on predicting the extent to which particular types are likely to be advertised in a false, misleading or otherwise undesirable manner. Individual practices might wish to advertise particular information which is quite unexceptionable, but which was not thought of when the approved list was compiled. Moreover, whereas particular wording (such as “close to the railway station” or “friendly professional services”) might be generally regarded as unobjectionable, it might be difficult to draft an item for the approved list which would permit such wording but would not permit other wording that might be regarded as objectionable. Much time and effort might be expended in debating and formulating additions to the approved lists, and the lists might become complex and unwieldy.

Broad Approach

12.6 The Broad Approach avoids the disadvantages of reliance on approved lists, to which we have referred in relation to the Narrow Approach. [6] Its restrictions are expressed in terms of what we see as the basic justifications f or prohibiting advertising. It is important to note that it does not settle merely for a “false or misleading” standard; it includes prohibitions on advertising which claims superiority, is disreputable, or contains testimonials. These prohibitions would preclude many of the hypothetical examples of flamboyant advertising which are often referred to by people who oppose relaxation of the present restrictions. The Broad Approach is similar to the new rules for engineers which were approved in 1981 by the Trade Practices Tribunal as being consistent with the Commonwealth Trade Practices Act. [7]

12.7 The main weakness of the Broad Approach is its lack of specificity. This could make it difficult to police, thus increasing the possibility of abuse, uncertainty and inconsistency. Practitioners who are in doubt about the precise application of the rules might unwittingly infringe them or, for fear of doing so, might be excessively conservative in their advertising. The breadth of the rules might put pressure on the regulatory body to issue a large number of advisory opinions on their meaning. Any of the three approaches would be likely to need supplementation by opinions of this kind, but under the Broad Approach they might become very numerous and, in effect, might reduce substantially the intended breadth of the rules.

Medium Approach

12.8 Save in the four special areas, this approach is the same as the Broad Approach. [8] But it avoids many of the disadvantages of that approach by applying tighter and more specific restrictions in the special areas (such as fees and fields of practice) where lack of specificity might be likely to give rise to abuse or uncertainty. In these special areas of difficulty, the Medium Approach is as rigorous as the Narrow Approach, but in the other areas it eschews the list technique of the Narrow Approach, thereby fostering initiative and beneficial competition and avoiding the need to develop a lengthy and complex list which would require much time and effort to compile and administer.

III. Our Recommended Approach

12.9 We recommend adoption of the Medium Approach. In our view, that Approach is preferable to the Narrow Approach because it gives greater encouragement to initiative and efficiency within the profession and is likely to be simpler to administer. It is preferable to the Broad Approach because it applies stricter controls to areas such as fees and fields of practice, in which there might otherwise be a serious risk of undesirable types of advertising. In addition, its specificity in those areas may encourage practitioners to venture into advertising in them, rather than being deterred by a fear of contravening the less precise restrictions of the Broad Approach.

12.10 In the next section of this chapter we make detailed recommendations for a scheme which adopts the Medium Approach. It may be considered, however, that the Medium Approach would constitute too great a relaxation of the present restrictions, at least in the immediate future. We do not take that view but we describe in Appendix II of this Report another scheme, adopting the Narrow Approach which might be suitable for implementation pending introduction of our recommended scheme. We emphasise that this interim scheme would allow advertising in the four special areas to the same extent as would be permissible under the Medium Approach. If the scheme prohibited such advertising it would, in our view, not constitute an adequate relaxation, even on an interim basis.

C. A RECOMMENDED SCHEME

12.11 In this section we describe the principal elements of our recommended scheme. We recommend first a number of *basic prohibitions* applying to all advertising, then we recommend additional restrictions in relation to advertising about the four *special areas,* namely fees, fields of practice, clientele and speed of service.

I. Basic Prohibitions

12.12 *False or Misleading Claims.* There can be no doubt that false or misleading advertisements should be prohibited. A prohibition of this kind applies to advertising generally, whether by solicitors or otherwise, under consumer protection legislation. [9] It may be desirable to define the word “misleading” in any such prohibition. An appropriate definition might be whether there is a reasonable possibility of the advertisement being misunderstood by an ordinary, reasonable person who is likely to become aware of it.

12.13 *Claims of Superiority.* Difficulties can arise in interpreting and enforcing a prohibition on false or misleading advertisements. Many of these difficulties would be reduced by adding to it a prohibition against claiming to be superior to other solicitors. Such a prohibition would also help to strike the necessary balance between enabling greater competition and diversity within the profession yet not causing an unprincipled free-for-all.

12.14 *Sensationalism*. In our view, solicitors should be free to advertise in a manner which openly encourages and invites people to utilise their services. Such advertising should not be prohibited as demeaning or undignified to the profession But solicitors should be deterred from adopting sensationalism of a kind which is likely, for example, to confuse, rather than to assist, the public in making informed and objective choices, or to create public expectations of unscrupulous conduct within the profession. These distinctions are difficult to draw and if subjective and somewhat vague terms are used in any regulation on-the matter there is a danger that bodies responsible for interpreting them may take an excessively conservative approach Nevertheless, we think that at least in the initial stages, there should be a prohibition aimed at the type of abuse which we have described.

12.15 *Testimonials and Endorsements.* A difficult question arises over advertising laudatory statements by clients or other people about particular lawyers. Evaluations by clients may be of considerable value as an indicator of a lawyer’s qualities, but may be misleading if stated in an abbreviated form and out of context. Moreover, some solicitors might resort to improper inducements in order to obtain favourable evaluations. On balance, we think that these types of advertisements raise so many dangers that they should be prohibited.

Summary

12.16 We recommend that advertising bv solicitors should be sub’ect to four basic rules, namely

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

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

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

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

12.17 The first three of these rules are broadly similar to the three basic prohibitions which were suggested by the Monopolies and Mergers Commission in the United Kingdom in 1976. [10] The Draft Model Code of the American Bar Association has counterparts to the first two rules, but is much more liberal in relation to the third. [11] A rule similar to our fourth rule is in force, together with other rules, in many parts of the United States. [12]

II. Special Areas: An Approved List

12.18 As mentioned earlier, we consider that there is a substantial public need for readier access to information about individual lawyers' fees, fields of practice, actual or potential clientele, and speed of service. But these are also areas in which there is a considerable likelihood of advertisements being false or misleading, or in some other way being in breach of the four basic prohibitions, and in which these prohibitions are difficult to interpret and enforce.

12.19 Accordingly, we recommend that advertisements in relation to those areas should be prohibited unless they relate to particular types of information on an approved Special Areas List We indicate below (paras.12.21-12.24) a number of types of information which we consider should be on that list. In compiling the list we have been influenced principally by whether or not particular types of information are of such a nature that advertisements about them are likely

to be of interest and utility to members of the public;

not to be false or misleading;

if false or misleading, to be demonstrable as such (for example, because they relate to objective and specific facts rather than being vague or subjective assertions).

12.20 In its response to our Discussion Paper, the Law Society opposed advertising in relation to most of the items which we recommend below. [13] In our view, the Society over-estimates the likelihood of false or misleading advertisements about these matters and under-estimates the benefits which members of the public and the profession could obtain from relaxing the present restrictions in these respects. In relation to some of the items, we anticipate that, at least in the early stages of the new scheme, there might be few solicitors who are interested in advertising about some items on our recommended list. For example, they may not be willing to commit themselves to maximum fees, or to maximum times for completion in relation to specified types of work. But we do not regard that as a justification for prohibiting advertisements by those who are willing to commit themselves in such a way.

Fields of Practice

12.21 We recommend that the following items in relation to fields of practice should be on the Special Area List:

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

(ii) unwillingness to accept work in particular fields;

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

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

These items accord with the recommendations made in Part 11 of this Report. [14] We mentioned in that Part a number of jurisdictions in which a broadly similar approach has been adopted. [15]

Fees

12.22 We recommend that the following items in relation to fees should be on the Special Areas List:

(i) acceptance of credit cards;

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

(iii) willingness to give written estimates of fees;

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

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

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

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

The items on this list are drawn largely from Proposal B of the American Bar Association. [16] There is now considerable freedom to advertise about fees in many parts of the United States, and in British Columbia. [17] The UK Monopolies and Mergers Commission, the Royal Commission on Legal Services in Scotland, and the Professional Organisations Committee in Ontario all recommended that a considerable range of advertising about fees should be permitted, while the Royal Commission on Legal Services in England and Wales recommended a limited form of fee advertising. [18]

Actual or Potential Clientele

12.23 We recommend that the items on the Special Areas List should include

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

An example of such an advertisement would be "pensioners welcome". We do not recommend that it should be permissible to advertise the identity of past or present clients, or to advertise about types of clientele (for example, "accident victims a specialty") as a way of avoiding the restrictions which we have recommended above in relation to advertising about fields of practice.

Speed of Service

12.24 We recommend that the Special Areas List should include the following items in relation to speed of service:

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

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

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

III. Special Areas: Controls on Terminology

12.25 We do not recommend that the terminology to be used in advertisements about items on the Special Areas List (for example, to express a willingness to accept work from particular types of client) should have to be approved in advance. Such a requirement would be likely to be excessively restrictive and bureaucratically burdensome. However, some steps should be taken to avoid the use of terminology which is misleading or ambiguous, whether intended to be so or otherwise, and to promote the use of standard, defined terms.

12.26 Accordingly, wt recommend that the general regulatory body for solicitors should publish lists of terminology which it regards as acceptable or unacceptable. For example, it could suggest short descriptions (such as “standard family company incorporation”) for particular types of work in relation to which solicitors might wish to advertise their fees or their speed of service. It might also give detailed definitions of some of these suggested descriptions. [19] If solicitors wished to use these descriptions, they should be required to use them in accordance with the regulatory body s definition (if any) and to supply a copy of that definition to any client who requests it. In addition, solicitors wishing to use terminology which had not been suggested by the regulatory body should be required to send the proposed advertisement to the body within a specified period in advance; save if the advertisement is to be confined to a publication circulating principally within the profession (such as the Law Society journal or the Australian Legal Directory).

12.27 Although prior approval by the regulatory body would not be necessary, most solicitors wishing to advertise certain terminology are likely to decide not to do so if it has been disapproved explicitly by that body. If a solicitor were found by a disciplinary tribunal or court to have broken the statutory restrictions, his or her disregard of explicit disapproval by the regulatory body might be taken into account in determining the appropriate disciplinary sanction.

12.28 These recommended controls on terminology are not closely similar to any existing scheme, so far as we are aware. However, the notion of approving certain terminology provided it is used in accordance with official definitions has been adopted in a number of North American jurisdictions in relation to advertisements about fields of practice, [20] and in British Columbia in relation to types of service (such as “simple wills”, “conveyances”, “uncontested divorces”) for which a practitioner advertises that specified fees will be charged. [21] We give examples of these British Columbian definitions in Appendix III of this Report.

D. SOME ANCILLARY MATTERS

Introduction

12.29 In this section we consider some ancillary matters relating to the general scheme recommended above. These matters were considered at greater length in our Discussion Paper, *Advertising and Specialisation*. [22]

Incidental Advertising

12.30 We explained in chapter 9 the present restrictions concerning incidental advertising, such as advertising for new staff. [23] The Law Society’s proposed new regulations apply only to advertising which “can reasonably be regarded as calculated to attract business to a solicitors practice”. In our view, this wording is appropriate. Questions of interpretation will arise from time to time, but many of the present difficulties in this area would cease to be of practical significance if either the Narrow, Medium or Broad approaches were adopted. [24]

Where problems remain, we think it will usually be sufficient for the general regulatory body to issue an advisory ruling.

Size and Format

12.31 The Law Society's proposed new regulations include a number of restrictions on size and format of advertisements. For example, they include restrictions on overall size, size of type used, colours, and the use of graphics. We do not favour these restrictions. They are aimed partly at excessive expenditure, which we discuss later in this section, and partly at misleading or undignified presentation. In relation to controls over presentation, we consider that our recommended scheme's basic prohibitions on advertising that is false, misleading or disreputable to the profession are likely to be sufficient for this purpose. Large advertisements, large type and the use of colour or pictorial material do not necessarily make an advertisement misleading or disreputable. They can add substantially to the effectiveness of an advertisement, especially in communicating with those most in need of assistance in finding a lawyer.

Expenditure and Frequency

12.32 The main arguments for controlling frequency and expenditure in relation to advertising are, first, that the cost of extensive advertising may outweigh any consequential economies, and secondly, that large and wealthy firms may get substantial advantages by advertising on a scale which is beyond the resources of other firms. [25] We have expressed earlier the view, supported by the recent American experience, that these consequences are unlikely to occur. [26] Even if they were to occur, there would need to be a strong case to justify interference with market forces in this respect. We recommend that there should not be any restrictions on frequency or expenditure, at least in the initial stages of the new scheme.

Duration of Representations

12.33 We recommend that where solicitors advertise representations about fees, they should be bound by them for a prescribed period. Such a requirement presently applies in some parts of the United States and Canada. [27] A similar requirement should apply to other representations concerning, for example, speed of service, or willingness to accept a particular type of work. The prescribed period could vary according to the frequency of publication of the journal in which the advertisement appears, and would be subject to express variation in the advertisement itself. Another possibility is simply to require that the duration of representations must be indicated in the advertisements themselves.

Records of Advertisements

12.34 We recommend that in order to facilitate enforcement of the restrictions on advertising, practitioners should be required to make a copy or recording of each advertisement published by them, excluding repetitions, and to retain it for a period of one year after the advertisement was last published. This requirement would be especially important if radio and television advertisements were permitted, an issue which we consider in the next chapter.

FOOTNOTES

1. Pp. 1 37-145.

2. For these rules, see para. 10.3 of this Report.

3. For the suggested list, see our Discussion Paper, *Advertising and Specialisation,* pp.139-140.

4. For the suggested list, see *Advertising and Specialisation,* pp.142-143.

5. For a fuller discussion of the matters mentioned in paras.12.4-12.5, see *Advertising and Specialisation*, pp.145-146.

6. For a fuller discussion of the matters mentioned in paras.12.6-12.7, see *Advertising and Specialisation*, pp.146-147.

7. See paras.3.35 and 9.23 of this Report.

8. For a fuller discussion of the matters mentioned in para.12.8, see *Advertising and Specialisation,* pp.147-148.

9. See para.9.21 of this Report.

10. See note 9.26.2 of this Report.

11. See American Bar Association, *Model Rules of Professional Conduct* (Proposed Final Draft and Proposed Alternative Draft) (Chicago, 1981), rules 7.1 and 2-101 respectively. The rules are summarised in our Discussion Paper, *Advertising and Specialisation*, pp.117-118.

12. For examples, see L Andrews. *Birth of a Salesman* (American Bar Association, Chicago, 1980).

13. “Advertising and Specialisation” (Submission No.412). p.20.

14. Chapter 6.

15. Chapter 3.C: see also our Discussion Paper, *Advertising and Specialisation,* chapter 3.

16. American Bar Association Journal (1977). vol.63, p.1236: and our Discussion Paper, *Advertising and Specialisation,* pp.115-116.

17. See *Advertising and Specialisation,* pp.109-112, 114-117, and the Sources cited thereto.

18. For the reports of these bodies, see notes 9.26.1, 9.26.2, 9.26.1 and 9,27.2 of this Report: for further details see *Advertising and Specialisation,* pp.107-109, 112.

19. For some examples, see Appendix III.

20. See Andrews (footnote 12 above).

21. See Law Society of British Columbia, *Professional Conduct Handbook,* Part C., ruling 2.

22. Pp.148-151.

23. Para.9.18-9.19.

24. For a fuller discussion of this point- see Our Discussion Paper, *Advertising and Specialisation*, p.149.

25. These arguments were put by, for example, the Law Society of New South Wales (“Advertising and Specialisation”, Submission No.412, p.21).

26. See paras.11.17-11.19.

27. See eg. Andrews (footnote 12 above): and Law Society of British Columbia, *Professional Conduct Handbook.*

13. Our Recommendations: Some Particular Media

I. Introduction

13.1 The previous chapter we recommended a substantial relaxation of restrictions on individual advertising by solicitors. Generally speaking, our recommendations applied to advertising in any medium. However, in this chapter we look at particular media in relation to which special considerations may require some divergence from the general approach. We look at

- radio and television;
- signs and brochures;
- the telephone directory;
- the Legal Services Directory;
- the Law Almanac.

We do not consider in this chapter advertising by mail or on business cards. Such advertising is received on a private and individual basis; accordingly, we consider it in chapter 14 under the heading of solicitation.

II. Radio and Television

13.2 It is sometimes argued that individual advertising by solicitors should be restricted to printed publications, because advertising on radio and television is more likely to be misleading, disreputable to the profession or excessively, expensive. [1] The Law Society opposes radio and television advertising on the grounds that it is "intrinsically, promotional rather than informative" and must rely on "the immediacy of its impact" whereas written advertising "allows the reader to reflect and reconsider". [2]

13.3 On the other hand, radio and television advertising by lawyers is permitted in many parts of the United States. [3] In recommending that television advertising should be permitted, the American Bar Association's Commission on Advertising reported in 1978:

> "Because a substantial percentage of the public receives most of its general information through the television medium, television is the most universal and effective means for conveying information about any service, including legal services.... Because of widespread 'functional illiteracy, radio and television are the only methods of informing many members of the public." [4]

13.4 In our view, many of the people most in need of encouragement and assistance to identify and approach a lawyer who is well- suited to their needs are more likely to notice an advertisement on radio or television than in newspapers. Moreover, whereas some types of information are best communicated in print, others can only be communicated, or are more effectively communicated, by sound, pictures or a mixture of both. We do not accept that radio or television advertisements are inherently more likely to be misleading or disreputable to the profession, than printed advertisements. As to the question of expense, we expect that it will contribute to a lack of interest on the part of many solicitors in this kind of advertising, especially on television but we do not see that as a reason for prohibiting such advertising.

And as we mentioned earlier, recent American experience does not indicate that radio and television advertising is likely to be dominated by large and wealthy firms to the detriment of smaller practices. [5]

13.5 Accordingly, we recommend that individual advertising by solicitors should be permitted on radio and television to the same extent as in print. We do not anticipate that advertising of this kind would become widespread, at least in the near future. I f problems of over-use occur eventually, consideration could be given to introducing restrictions on frequency and expenditure.

III. Signs and Brochures

13.6 We described earlier the present restrictions concerning the display of signs and brochures by solicitors. [6] These forms of advertising can be very effective ways of communicating information, although, in relation to office signs, considerations of space and expense may deter lengthy advertisements.

13.7 We do not favour the content of signs and brochures being limited more closely than the content of, say, newspaper advertisements. Particular signs or brochures may be misleading, or disreputable to the profession, but, in our view, they can be dealt with adequately by the rules suggested in the general scheme recommended in the previous chapter. However, we do not necessarily object to specific restrictions on the size and appearance of office signs, provided they are necessary to avoid advertisements which, by reason of their size or appearance, are disreputable to the profession. But the restrictions should not be aimed at prohibiting content which could be advertised in other media.

13.8 We recommend removal of the present requirement that generally speaking, signs must be attached to the office premises of the solicitor.[7] Such a restriction is a remnant of the view, recently abandoned by the Law Society,[8] that the proper role of the signs is to help people find their solicitor's office, rather than to attract business. Similarly, we see no Justification for confining brochures to office waiting rooms; subject to the rules relating to solicitation, they should be able to be made available generally.

IV. Telephone Directory

13.9 The telephone directory is an important source of information about solicitors. It is our view that, generally speaking, the restrictions on advertising in the directory should be no tighter than in relation to other printed publications. However, considerations of space make it reasonable to place extra restrictions on information in the alphabetical section (the White Pages). In relation to the classified section (the Yellow Pages), it is reasonable for the Law Society to arrange coordinated alphabetical, regional and perhaps other listings of solicitors, and to restrict information in them so as to preserve conciseness and comprehensibility. But, outside these coordinated listings, we see no reason for special restrictions on advertisements (including display advertisements) by solicitors in the Yellow Pages. Of course, all advertisements in the directory would be subject to the general restrictions imposed by Telecom as the publisher of the directory. [9]

13.10 In our Discussion Paper, we described the types of information which solicitors are presently permitted to insert in the telephone directory, and which they would be permitted to insert under the Law Society’s proposed new regulations. [10] We also made some detailed suggestions for change. [11] We do not repeat all of that discussion here, but we do make three specific recommendations for relaxation of the restrictions, beyond those currently proposed by the Law Society.

13.11 First consideration should be given to a co-ordinated listing of solicitors in the Yellow Pages, containing, amongst other things, the types of information about fields of practice, languages spoken and initial consultation fees that are in the present Legal Services

Directory. A listing of this kind, proposed by Telecom, was endorsed by the Law Institute of Victoria early in 1982. [12] At the head of the listing, there could be a note explaining the significance of the advertisements. In Ontario there is a note of this kind which also includes information for clients or potential clients about obtaining estimates of fees and independent reviews of bills; similar information could usefully be added to the directory in New South Wales. Secondly, if the first recommendation is not adopted, the nature and availability of the Legal Services Directory should be advertised prominently in the Yellow Pages. Thirdly, solicitors should be permitted to insert display advertisements in the Yellow Pages, outside the coordinated listings, containing any information which they would be entitled to advertise in other printed publications.

V. Legal Services Directory

13.12 The Legal Services Directory should remain concise, comprehensible, and uniform in presentation It should be convenient for use by people who are not at ease reading complex material or legal language. If too much information is included in the Directory it may fail to meet these requirements. But, in our view, the Directory presently omits some important types of information which could be included without significantly reducing its comprehensibility or convenience.

13.13 We recommend that the Directory should include the following types of information, [13] in addition to those which it presently contains:

(i) willingness or unwillingness to accept work directly from clients, rather than only from instructing practitioners;

(ii) the names of principals and employed solicitors in each practice;

(iii) types of credit card accepted;

(iv) date of admission as a solicitor;

(v) after hours or emergency telephone numbers;

(vi) (provided it fits in a small space made available next to each practice's entry), any information, such as opening hours, which solicitors would be permitted to advertise in other printed publications;

(vii) (in a part of the directory separate from the main listings), admission as a lawyer in other jurisdictions.

If a low-medium fields of practice scheme of the kind described in Part II of this Report [14] were introduced, the Directory could include advertisements of "preferred areas of practice" in accordance with that scheme.

13.14 If the Legal Services Directory is to be of substantial use, especially to those most in need of it, its existence must be widely advertised. We understand that, having achieved considerable publicity when the Directory was launched. In 1981, the Law Society has no plans to advertise it on a regular or recurrent basis. In our view, the Directory should be advertised widely and repeatedly in accordance with a continuing plan Posters, brochures, and radio and television commercials could be considered for use in such a campaign, in addition to more conventional methods such as newspaper advertisements. It would be desirable for a thorough and independent survey of the level and pattern of use of the Directory to be conducted. Without "follow-up" along these lines, the potential advantages of the Directory for both the profession and the public may be substantially lost.

VI. Law Almanac

13.15 We recommend that consideration should be given to including a wider range of information in the Almanac than it presently contains. In particular, it could include information about willingness or unwillingness to accept work in certain fields of practice, and willingness or unwillingness to accept work directly from clients rather than only from instructing practitioners. In this way it could meet the need for a Referrals Directory to which we referred in Part II of this Report. [15] If the low-medium "preferred fields of practice" scheme described in that Part [16] were introduced, the Almanac could include advertisements complying with that scheme.

FOOTNOTES

1. For a fuller discussion of the issues raised in paras.13.2-13.5, see our Discussion Paper, *Advertising and Specialisation,* pp. 153-154.

2. "Advertising and Specialisation", (Submission No.412), pp.21-22.

3. See L Andrews, *Birth of a Salesman* (American Bar Association, Chicago, 1980).

4. *Report to the House of Delegates* (1978), p.4.

5. Part 11.19; and see Andrews (footnote 1 above).

6. Paras.9.14-9.15.

7. See para.9.15.

8. Contrast the present ruling, made in 1981. with the previous ruling, made in 1980.

9. See para.10.13 of this Report in relation to the views of the advertising contractor for the Yellow Pages.

10. P.156.

11. P. 157.

12. See Law Institute Journal (February, 1982), p.7.

13**.** Some of these types of information arc included in legal services directories outside New South Wales (see our Discussion Paper, *Advertising and Specialisation,* ch.8, and pp.158-159).

14. See chapter 6.

15. Paras.6.21 and 7.8.

16. Paras.6.22-6.40.

14. Community Discussion and Solicitation by Solicitors

A. INTRODUCTION

14.1 We consider in this chapter two forms of attraction of business by solicitors, namely

community discussion;

solicitation.

B. COMMUNITY DISCUSSION

I. Introduction

14.2 We use the term “community discussion” by solicitors to cover statements made by them

in public (for example, in the press or on television): or

at meetings of social clubs or other private organisations.

The statements may be on legal or non-legal matters. [1]

14.3 Some forms of community discussion may also constitution advertising or solicitation, in which case they would be subject to the restrictions which we describe in Part III (in relation to advertising) or later in this chapter (in relation to solicitation). In the present section, we consider only those restrictions concerning community discussion as such.

II. The Present Position

14.4 Neither the present regulations in relation to attraction of business, nor the Law Society’s proposed new regulations, deal explicitly, with community discussion by solicitors. But the Law Society has issued many advisory rulings in this area, [2] the tenor of which is that generally speaking,

discussion in public is not permissible unless it is anonymous or does not indicate that the speaker or writer is a solicitor;

addresses to club meetings are permissible provided that the invitation to deliver them has not been solicited and that they are arranged in good faith for the benefit of club members.

Approval may be sought from the Law Society to depart from these restrictions.

III. Our Discussion Paper

14.5 In our Discussion Paper, Advertising and Specialisation, we described the liberal policy towards community discussion by solicitors which has been adopted by the Law Society in England and the Law Institute in Victoria. [3] The English policy is stated as applying “where a solicitor takes part in radio or television broadcasts, gives a talk or lecture or an interview to the press or contributes an article or writes a letter to the press or writer or edits a book, whether on a legal or non-legal subject.” [4] It consists of the following basic principles:

"[S]ubject to the general principle that a solicitor Must have regard at all times to the need to uphold the good name of the profession:

(a) A solicitor may be identified by name, profession and town and when writing to the press or writing a legal text book may give his business address;

(b) the solicitor may give particulars of any special qualifications or specialised knowledge directly relevant to the subject matter of his appearance, broadcast, talk, interview or publication;

(c) a solicitor should not permit to be published anything identifying or likely to identify clients for whom he or his firm acts or has acted except where the subject matter of the broadcast, talk, interview, article or book relates specifically, to the affairs of a client or former client and the publication and reference to the client is with that clients consent and is not designed to advertise the solicitor;

(d) a solicitor should not seek or inspire an interview with the press except on the instructions of his client and on that clients business, he may however, allow himself to be interviewed by the press for the purpose of supplying them with biographical details about himself where the press wish to write up a personality, piece or pen picture about him, provided that he takes care to exclude from the information Supplied to the press any reference to his clients, his type of practice or the name of his firm. He may also supply or permit the press to publish a photograph of himself;

(e) a solicitor must not, with a view to attracting or inviting instructions, enter into correspondence with listeners, viewers or readers who are not already his clients.

Subject to the above mentioned principles, there is no objection to a solicitor permitting prior announcements or subsequent reports to appear in the press relating to his appearances on television or a radio broadcast, a talk, article, letter or book."[5]

14.6 In our Discussion Paper we suggested that, subject to a few variations, the English policy should be introduced in New South Wales. In its response to our Paper, the Law Society of New South Wales agreed generally with our suggestion although it disagreed with some of our suggested variations.[6]

14.7 Since the completion of our paper the English policy quoted above has been supplemented in four principal respects: [7]

(i) item (d) has been extended to apply to interviews with all media rather than only with the press;

(ii) solicitors must discontinue interviews of the kind described in item (d), unless the interviewer agrees not to publish a reference to their types of practice or the name of their firm;

(iii) solicitors may give interviews about their work or type of practice, provided they do not supply any information which could identify any of their clients and that they discontinue the interview if the interviewer does not agree to refrain from identifying them or their firm;

(iv) in particular circumstances, solicitors can approach their law society for an exemption from the restrictions in (ii) and (iii) above.

IV. The Need for Change

14.8 In our view, it is in the interests of both the public and the legal profession that solicitors should be allowed to participate in community discussion of issues, and to give some information about themselves which is relevant to those issues and to the perspectives from which they view them. This applies especially to legal issues, upon which lawyers have special qualifications to comment But it is also important that they, like their fellow citizens, should be free to make public comment on non-legal issues and, in doing so, to provide general information about themselves, including their occupation and other biographical details. Moreover, the line between legal and non-legal issues is not easy to draw; a lawyers comment on the main causes of domestic violence, for example, may stem from lengthy experience in family law work.

V. Our Recommendations

14.9 We recommend that, generally speaking, the policy enunciated by the Law Society in England in relation to community discussion by solicitors should be adopted in New, South Wales. We have described that policy in paragraphs 14.5 and 14.7 above. It would probably be sufficient for this policy to be embodied in a statement by the Law Society of New South Wales, rather than in statutory regulations.

14.10 We recommend, however, that the policy in New South Wales should vary in two respects from the English one. First, under the English policy, solicitors are permitted to make public statements in letters or articles written on their initiative, but are prohibited from seeking interviews with media representatives in order to make the same public statements by another means. In our view, both types of conduct should be permissible, and item (d) in the English statement should be varied accordingly. Secondly, items (b) and (d) restrict the types of information which solicitors can disclose about themselves and their practices. If our recommendations in Part III of this Report are accepted, solicitors will be able to advertise other types of information about themselves, we see no reason why they should not be allowed to communicate similar information in the course of making public statements, provided that the information is relevant to the subject matter of the comments. The Law Society of New South Wales agrees with the first of these recommended variations, but it considers that the second variation offers too much scope for abuse by solicitors. [8]

C. SOLICITATION

I. Introduction

14.11 We use the term “solicitation” to include public or private communications which

> are intended, or are likely, to attract business; and
>
> are directed towards a particular person or organisation, or to a relatively small number of people.

Advertising is public and is more generally directed than solicitation but the boundary between it and solicitation is one of degree rather than clear-cut. [9]

14.12 We concentrate in this chapter on three types of solicitation namely solicitation

> by public media (such as newspapers, television and so on; but not including face-to-face communication such as at public meetings);
>
> by mail (but not including mail addressed by solicitors to present or former clients);
>
> by the use of business cards.

II. The Present Position

14.13 The present regulations, and the Law Society's proposed regulations, do not deal specifically with solicitation. The most relevant of the general prohibitions in the regulations are "touting" and "applying for or seeking instructions', but the prohibition on "unfair attraction of business" may sometimes be of relevance in this context. [10] In practice, the restrictions on solicitation are to be found primarily in the considerable number of rulings made by the Law Society on various aspects of this topic, [11] rather than in the regulations. We summarise below the effect of those rulings in relation to the three types of solicitation under consideration, and we mention certain respects in which the position in New South Wales differs from that in some other places.

14.14 *Public Media.* Generally speaking, solicitors in New South Wales are prohibited from engaging in solicitation by public media. By contrast, in some parts of the United States solicitation is subject only to the same restrictions as apply to advertising. [12]

14.15 *Mail to Non-Clients*. Generally speaking, solicitors in New South Wales are prohibited from soliciting by mail addressed to persons other than their present or former clients. There are limited exceptions to this general prohibition. For example, a ruling of the Law Society states that, under some circumstances and subject to certain conditions, a solicitor acting for a building society may write to a borrower from that society, offering his or her legal services. [13] In many other parts of the world, solicitation of non-clients by mail is generally prohibited. However, it is permissible in some parts of the United States, subject to certain restrictions. [14]

14.16 *Business Cards.* The present ruling by the Law Society of New South Wales about business cards is as follows:

> "There is no objection to the use by a solicitor of a visiting card not larger than normal size, upon which is stated his name, degrees if desired, address and telephone number, with the addition of the description 'solicitor' and his firm-name, provided that such use is discreet and is confined to occasions on which it is proper that he should establish his professional identity." [15]

Similar rulings apply in many other jurisdictions.

III. Some Relevant Considerations

General

14.17 Some types of solicitation can play a valuable role in communicating information about legal services. They can be better directed, and can provide fuller information of greater relevance to the recipient, than may be possible through advertising. They can be substantially more economical than advertising. Indeed, in some circumstances, the achievement of a similar effect by advertising may be exceedingly difficult or even impossible.

14.18 The principal dangers of solicitation arise from the possibility of duress or coercion being brought to bear on particular individuals and, if the solicitation occurs in private, from the reduced possibility of abuses coming to light and being provable. The dangers of duress and of invasion of privacy are particularly acute when the solicitation is face-to-face.

14.19 In the light of these general comments, we turn now to the three types of solicitation under consideration in this chapter.

Public Media

14.20 Public soliciting of instructions from individuals with a common problem can fulfill an important social role in the public interest. Individual would-be litigants can benefit from locating others with a similar cause of action who may be willing to share the expenses of research, negotiation the conduct of a test case or, if feasible, a class action. The judicial

system may benefit from a resultant reduction in the number of separate lawyers involved in complex or inter-related actions.

14.21 The desirability of facilitating contact between clients with a similar problem, and of facilitating their use of shared legal resources, can be seen in the recent cases concerning Agent Orange, Thalidomide, and the Mt Erebus aircraft crash. Injustices may presently go unremedied because those suffering them are not aware of the harm caused to them (for example, asbestosis) or believe that nothing can be done at a price which they can afford. Lawyers who offer assistance in these causes should not be unreasonably impeded in contacting prospective clients.

14.22 Our earlier definition of public media excluded face-to-face communications, such as at public meetings. This exclusion greatly reduces the danger of duress or coercion arising from solicitation in addition, it might be desirable to require that any solicitation must be done by, and in the name of, one or more of the potential litigants, rather than by a practitioner. But such a procedure may not always be possible and, in any event, it may be little more than cosmetic.

14.23 In its response to our Discussion Paper the Law Society did not argue that solicitation in public media should be prohibited absolutely, but it said that the approval of the Society should be required on each occasion. [16]

Mail to Non-Clients

14.24 Use of the mail can be a valuable means of communicating information about legal services to particular sectors of the community. It can be directed more precisely than many forms of advertising, and it can provide a convenient document to be kept by recipients until they need a lawyer. I n some instances, it may be less cost effective than the use of, for example, local newspapers or radio. But that possibility raises a matter of judgment for the individual practitioner in the particular circumstances; it does not justify a general prohibition on use of the mail.

14.25 The principal arguments against permitting solicitation by mail are: being private, there is a greater risk that breaches of the restrictions may go undetected, the receipt of unsolicited mail is a nuisance and an invasion of privacy; some recipients may feel undue pressure to utilise the practitioners services, and, recipients may be concerned about the nature and source of the information which led the practitioner to write to them. In our view, each of these arguments has strength but the dangers can be reduced greatly by the introduction of certain controls. For example, there could be a requirement that the form of material to be mailed, and the manner of selection of addresses, must be notified to the general regulatory body a prescribed period before being posted. We describe other possible controls later in this chapter. [17]

Business Cards

14.26 Business cards provide a convenient method of establishing a solicitors identity as suck and of conveying certain basic information about how he or she may be contacted. They could also be used to convey other basic information about a solicitor s practice, and it may be argued that any type of information which could be advertised publicly by a solicitor should be able to be included on a business card. On the other hand, the use of business cards constitutes a form of face-to-face solicitation with the attendant dangers to which we have referred earlier. It may be appropriate to expand somewhat the range of information which can be put on a card, without extending the range as far as we have recommended earlier in relation to advertising generally.

IV. Our Recommendations

14.27 Some relaxation of the present general prohibition on solicitation by solicitors could provide substantial advantages for both the public and the profession However, some types of solicitation would have undesirable consequences. Accordingly, this is an area in which cautious experimentation with limited changes may be necessary before considering substantial reforms. We recommend such changes in the following paragraphs.

Public Media

14.28 We recommend that solicitation in public media should be permitted, provided that

> it complies with the same restrictions as we recommended earlier in relation to advertising (including, for example, a prohibition on solicitation which is false, misleading or disreputable to the profession), save that an indication of willingness to accept work from a particular class of clients could be more specific than would be permissible under those restrictions; [18]
>
> it does not involve concern duress or harassment;
>
> details of the intended solicitation are notified to the general regulatory body a prescribed period in advance.

We recommend that these restrictions should be embodied in regulations.

14.29 Several points should be made in relation to these recommendations. First, we emphasis that our definition of solicitation by public media excludes face-to-face solicitation. [19] Secondly, although we recognise that solicitation by public media is unlikely to involve coercion, duress or harassment, we consider that a specific prohibition of such conduct is desirable. Thirdly, although we have not recommended that the prior approval of the regulatory body should be required, the requirement of prior notification to that body gives it considerable power to prevent solicitations which it considers to be undesirable. In most cases an indication of disapproval by the regulatory body would be sufficient to deter a solicitor from proceeding with a proposed solicitation. [20] Such disapproval would, no doubt be taken into account by disciplinary tribunals in the event of disciplinary charges being brought for breach of the regulations. In cases of substantial importance, the regulatory body could initiate an urgent change in the regulations in order to prohibit a proposed solicitation.

Mail to Non-Clients

14.30 We recommend that solicitation of non-clients by mail should be permitted, subject to the same restrictions as we have recommended above for solicitation in the public media, and to the following additional restrictions:

> a copy of any material to be mailed, and a description of the manner of selection of addressees, should be supplied to the general regulatory body a prescribed period before mailing;
>
> if more than one mailing is to be made to an address, a reply-paid card should be included in the first mailing so that the addressee may indicate that he or she does not wish to receive further material, and it would be prohibited for a solicitor to send further material after receiving such an indication.

Business Cards

14.31 We recommend addition of the following items to those which the Law Society's present ruling permits to appear on solicitors' business cards:

such information about the solicitors fields of practice as would be able to be advertised in accordance with our recommendations in Part III of this Report;

languages spoken by the solicitor;

jurisdictions outside New South Wales in which the solicitor is entitled to practise.

FOOTNOTES

1. On our usage of the term “community discussion” and other terms concerning attraction of business, see para.8.3 of this Report.

2. See R Atkins, *New South Wales Solicitor’s Manual* (3rd ed., Law Society of NSW, Sydney, 1975), pp.226-237.

3. See pp.163-165 of our Discussion Paper. See also *A Guide to the Professional Conduct of Solicitors* (Law Society, London. 1974), pp.99-100; K Gifford, *Legal Profession Law and Practice in Victoria* (Law Book Co., Sydney, 1980), pp.233-234.

4. See A *Guide to the Professional Conduct of Solicitors* (note 3 above), p.99.

5. See A *Guide to the Professional Conduct of Solicitors* (note 3 above), pp.99-100.

6. “Advertising and Specialisation” (Submission No.412), pp.22-23.

7. See Guardian Gazette (1981), vol.

8. “Advertising and Specialisation” (Submission No.412), pp.22-23.

9. On our usage of the terms “advertising”, “solicitation”’ and other terms concerning attraction of business, see pira.8.3 of this Report.

10. The relevant regulation is quoted in para.8.5 of this Report.

11. See Atkins (note 14.4.1 above), and Law Society of New South Wales, “Advertising” (Submission No.218).

12. See L Andrews, *Birth of a Salesman* (American Bar Association, Chicago, 1980).

13. See Atkins (note 2 above), pp.231-233.

14. See, for example, Andrews (note 12 above); *Ohralik v. Ohio State Bar Association,* US Reports (1978), vol.436, p.477; In re Primus, US Reports (1978), vol.436, p.412.

15. See Atkins (note 2 above), p.228.

16. “Advertising and Specialisation” (Submission No.412), p.23.

17. Paras.14.30-14.31.

18. See para.12.23.

19. See para.14.12.

20. On this point, see para.6.16.

15. Attraction of Business by Barristers

A. INTRODUCTION

15.1 In this chapter we consider restrictions concerning attraction of business by barristers. In particular, we look at

> individual advertising;
>
> community discussion;
>
> solicitation.

We begin by describing the present position in New South Wales in relation to each of these forms of attraction of business. We discuss whether there is a need for change, and then we make some recommendations. We conclude the chapter with some comments about the implications in this context of the recommendation in our *First Report on the Legal Profession* that the present division in the profession between barristers and solicitors should be abolished.

B. THE PRESENT POSITION

I. Individual Advertising

15.2 The principal restriction on advertising by barristers in New South Wales is contained in the rules of the New South Wales Bar Association:

> "73. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of or with the primary motive of personal advertisement of himself as a barrister or which is likely to lead to the reasonable inference that it is done for that purpose."

15.3 Other relevant rules provide that unless with the prior permission of the Bar Council, a barrister must not

> disclose to the public that he or she is a barrister "when such qualification is not a relevant consideration" (rule 74.a.);
>
> give interviews to the media" in connection with any legal proceedings" (rule 74.b.);
>
> take any steps to procure, or to encourage any person to procure:
>
> > a. the attendance of the press at any proceedings in which he is appearing as a barrister;
> >
> > b. the publication or broadcasting of any matter concerning any proceeding or dispute in relation to which he is acting as a barrister" (rule 75).

There are some exceptions to these rules. The main ones are, first that barristers may give certain basic information about a case in response to inquiries from the press, provided the information is not to be attributed to them (rule 76), and, secondly, that in some circumstances barristers may advise clients to seek to correct reports about them (the clients) in the media (rule 77).

II. Community Discussion

15.4 The main restrictions on community discussion by barristers arise from the rules referred to above in relation to individual advertising. [1] They prohibit barristers from according interviews to the media in relation to any legal proceedings, save with the prior permission of the Bar Council or, to a limited extent, in relation to proceedings in which the barrister is acting. [2] Generally speaking, other forms of community discussion by barristers are permitted, provided that a barrister does not breach rule 73 (see para.15.2 above) and does not disclose himself or herself as being a barrister when that status is not a relevant consideration". [3]

III. Solicitation

15.5 The principal restriction in relation to solicitation is the following rule of the Bar Association:

> "72. A barrister shall not directly or indirectly do or cause or allow to be done anything for the purpose of soliciting employment as a barrister or which is likely to lead to the reasonable inference that it is done for that purpose."

15.6 In addition, there are several rules aimed at prohibiting barristers from soliciting work from solicitors. For example, generally speaking, a barrister is prohibited from visiting solicitors' offices [4] and from sending solicitors "a memorandum containing his name and address, the fact that he is a barrister, or his curriculum vitae". [5]

15.7 Although there is no explicit rule in relation to the use of business cards by barristers, the Bar Council decided in 1975 that, although they may be used, they must not indicate that the person in question is a barrister. [6] There is a rule to that effect in relation to barristers' stationery. [7] Queen's Counsel, however, may indicate that rank on business cards and stationery. [8]

C. OUR DISCUSSION PAPER

Our Suggestions

15.8 In our Discussion Paper, *Advertising and Specialisation,* the majority of us suggested some relaxation of the present restrictions on *individual advertising* by barristers. [9] Generally speaking, our suggestions were similar to those which we made in relation to solicitors, save that advertising by barristers would be confined to designated publications, such as the Law Society journal, circulating principally within the legal profession.

15.9 The majority of us also suggested clarification and relaxation of the restrictions on *community discussion* by barristers. [10] We suggested that this could be achieved by adopting the rules of the English or Victorian Bars in this area.

15.10 In relation to *solicitation* by barristers, the majority of us did not favour a substantial relaxation of the present restrictions, at least in the near future, but we suggested certain changes in relation to restrictions on visiting solicitors' offices. [11] We also suggested that barristers should be permitted to describe themselves as such on business cards and stationery. [12]

15.11 One of us, Mr Conacher did not "see utility in advertising by barristers", save for the publication of a directory along the lines of the English Bar List, and the periodical publication by the Bar Council of practice changes such as the commencement of practice or a change in address. [13]

A. Response

15.12 In its response to our Discussion Paper the New South Wales Bar Association said that the rules in relation to attraction of business, like other rules of professional conduct, "are properly determined by the profession itself in the light of tradition and experience, changing and developing over the years as circumstances changed". [14]

15.13 In relation to community discussion the Association said that since 1972

> "there would be very few occasions when a member of the Bar has been refused permission under the rules to make a statement to the media or to a meeting on a matter of public interest though permission is, of course, refused to those who wish to address on matters that have occurred in a piece of litigation in which they have been recently involved." [15]

But it informed us that it had referred to its Rules Committee our suggestion that the English rules in relation to community discussion by barristers should be adopted. [16]

15.14 The Association said that "there has always to date been a majority" of the Bar Council which does not favour relaxation of the restrictions in relation to business cards and stationery, and that there

> "does not seem to be any compelling reason why the firmly held view should not continue so long as they are held by a majority of the Bar in this particular matter." [17]

D. THE NEED FOR CHANGE

Introduction

15.15 We discussed earlier in this Report a number of considerations which are relevant to restrictions on attraction of business by solicitors, and we recommended changes in those restrictions. [18] We mention here various differences, or alleged differences, between barristers and solicitors, which may indicate that the restrictions upon barristers should differ from those upon solicitors. [19] These issues were considered in greater detail in our Discussion Paper.

Solicitors Choose Barristers

15.16 Barristers do not accept work directly from clients. Accordingly, it is argued, there is little or no need for the public to be able, without the help of a solicitor, to locate a barrister or to identify one who is well-suited to his or her needs. [20] This task, it is said, is seen by solicitors as their responsibility and they are able to perform it satisfactorily. There is, therefore, no need for advertising or solicitation.

15.17 This argument has strength but in our view, it should not be accepted without important reservations. First, a number of solicitors, especially in outlying areas, have considerable difficulty in finding a barrister who is suited to a particular case. [21] Secondly, clients are entitled to choose their own barrister. [22] Thirdly, lack of public awareness of all but the few leading barristers who receive substantial media coverage can lead clients to insist that these leaders should be briefed for them, yet other barristers known to the instructing solicitor but not to the client may be at least as competent more readily available, and less expensive.

Competition at the Bar

15.18 AnotherargumentisthattheBarishighlycompetitiveanddoesnotneedthestimulus of advertising. [23] We question, however, whether the Bar is more competitive, especially in terms of fees, than at least some sectors of the solicitors' branch. In some ways the smallness

and cohesiveness of the Bar militates against competition; we described in our *First Report on the Legal Profession* the extensive range of restrictive practices at the Bar. [24]

15.19 It is argued that barristers are under special pressure to provide good service, because they are under the eyes of instructing solicitors. [25] This argument has strength. However, our inquiries lead us to the view that a number of solicitors are not well-informed users of barristers' services and do not constitute a significant stimulus to competition between barristers in terms of the quality or speed of service provided or the fees charged. [26]

Ethical Duties and Mutual Trust

15.20 Another argument is that the danger that advertising may lead to an excessively commercial cut- throat atmosphere in the legal profession is especially serious in relation to barristers. [27] Barristers must not fight too zealously for their clients at the expense of observing their ethical duties to the courts. Moreover, mutual trust between barristers helps to avoid delay, expense and needless dispute in the conduct of litigation.

15.21 Again, these points have merit But the difference between barristers and solicitors in this context should not be exaggerated. For example, solicitors also are subject to ethical duties which may conflict with the interests of their clients. This conflict may arise not only when acting as advocates but also when acting as an instructing solicitor or in non-litigious matters.

E. OUR RECOMMENDATIONS

I. Individual Advertising

15.22 In our view, the need for barristers to be permitted to advertise to *the public* is substantially less than the need for solicitors to do so. On the other hand, we do not consider that the potential disadvantages of enabling barristers to advertise are substantially greater than those in relation to solicitors. In the result although we see no compelling reason for restricting barristers to any greater extent than solicitors in this area, we do not consider that, at least at the present time, there is a pressing need to ensure that extensive advertising by barristers to the public is permitted.

15.23 Weconsider,howeverthatbarristersshouldbepermittedtoadvertisetootherlawyers by inserting advertisements in publications which circulate principally within the legal profession. Many solicitors would benefit from this additional source of information, and consequential benefits would flow to clients and barristers. The restriction to lawyers' publications would avoid many of the dangers of false, misleading or disreputable advertising.

15.24 Accordingly, we recommend that the restrictions on advertising by barristers should be the same as those recommended earlier in this Report in relation to solicitors, [28] save that advertisements by barristers could be confined to publications circulating principally within the legal profession. These publications would include, for example, the Law Society Journal, the Australian Legal Directory, and the Referrals Directory which we recommended in Part II of this Report. [29]

15.25 As indicated, we do not consider that the permissible content of advertisements by barristers should be more restricted than in relation to advertisements by solicitors. But if that view is not accepted, we recommend that at least the following types of information should be allowed to be advertised in addition to basic information such as name, address and telephone number:

(i) the fact that a barrister is commencing practice;

(ii) change of address or telephone number;

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

(iv) Knowledge of foreign laws;

(v) date of admission;

(vi) fixed fees for clearly specified services.

At present, New South Wales barristers can advertise some of these items to some extent. They can arrange for the first of them to be indicated in the Law Society Journal can circularise information about the second item to solicitors who have instructed them, and can indicate the fifth item in the Law Almanac.

II. Community Discussion

15.26 In relation to community discussion by barristers about cases in which they are, or were, involved, we consider that the existing Bar Association rules (principally rules 75 and 76) are broadly satisfactory. However, we recommend that consideration should be given to replacing those rules with a somewhat more liberal rule along the lines of the following English Bar rule:

> "102. A barrister may not write for publication, broadcast by radio or television, publish in a film or otherwise cause or permit to be published any particulars of any matters on which he has been or is currently engaged as Counsel unless he can do so without disclosing confidential information and without giving publicity to his own part in the matter."

The Victorian Bar has rules to similar effect. [30] We consider, however, that if the English rule is adopted, the word "undue" should be added before the word "publicity" towards the end of the rule. It is unrealistic, and indeed undesirable, to require that barristers' comments on cases in which they are, or were, involved must not disclose the fact of their involvement.

15.27 We turn now to community discussion by barristers which does not relate to proceedings in which they are, or have beer involved. Our principal criticism of the current Bar Association rules in New South Wales is that they prohibit comment in relation to "any legal proceeding". [31] In our view such a restriction is clearly unjustifiable. It is alleviated somewhat by the Bar Council's power to grant exemptions in specific instances. But this arrangement involves the Council in an area where some decisions may raise highly subjective considerations of politics or personalities. We recommend adoption of the English Bar rules in this area, which enable barristers to comment on legal or non-legal issues, whether involving legal proceedings or not, and in doing so to describe themselves as barristers if the topic is a legal one or if being a barrister is relevant. [32]

III. Solicitation

15.28 Generally speaking, we see no substantial need, at least at the present time, to change the present restrictions on solicitation by barristers. However, we do recommend two changes which are relevant to solicitation. First, we recommended in our *First Report on the Legal Profession* that the present prohibition on barristers visiting solicitors' offices should be abolished or relaxed substantially. [33] Secondly, in relation to business cards, we recommend adoption of a rule along the lines of the following rule of the English Bar:

> "106. A barrister may use a visiting card which bears the following details:
>
> (a) The word 'barrister' or initials 'QC' as appropriate.
>
> (b) Other professional and academic qualifications.

(c) Professional address, telex and telephone numbers.

A barrister may not make his visiting card available to any person other than for social purposes, unless that person has asked for it or for the information on it."

F. UNDER OUR RECOMMENDED STRUCTURE

15.29 We have recommended above that the restrictions on attraction of business should be tighter in relation to barristers than in relation to solicitors. The reason for this difference is that barristers, unlike solicitors, do not accept work directly from clients. If the recommendations in our *First Report on the Legal Profession* are adopted, the profession will cease to be divided into barristers and solicitors. [34] In that event, the restrictions recommended above in relation to barristers should apply to all practitioners who do not accept work directly from clients, all other practitioners should be subject to the restrictions which we have recommended in earlier chapters in relation to solicitors.

FOOTNOTES

1. For a fuller description of the present rules. see our Discussion *Paper, Advertising and Specialisation*, pp.177-178.

2. See NSW Bar Association rules 74-76.

3. NSW Bar Association rule 74a.

4. NSW Bar Association rules 34 and 35.

5. NSW Bar Association rule 74f.

6. Correspondence to this Commission from the Registrar of the Bar Association September 1981.

7. NSW Bar Association rule 74e.

8. In relation to stationery, see the rule cited in note 15.7.2 above.

9. Pp.184-185.

10. Pp.185-186.

11. P.186.

12. P.186.

13. See pp.201-202 of our Discussion Paper. Mr Conacher retired from the Commission prior to the preparation of the present Report.

14. "Advertising and Specialisation" (Submission No.406), p.5.

15. See source cited in note 13.

16. See source cited in note 13.

17. See source cited in note 13.

18. See chapters 11-14.

19. Pp.180-184. See also the sources cited at p.225 of the Paper.

20. See eg. New South Wales Bar Association, “Advertising” (Submission No.196). para.5.2.

21. See para.5.20 of this Report. and our *First Report on the Legal Profession,* paras.3.55, 3.73.

22. At least in the sense that if their solicitor will not brief the barrister of their choice they may go to another solicitor.

23. See eg. New South Wales Bar Association (note 18 above), paras.3.2, 5.2.

24. See chapter 7.

25. See eg. New South Wales Bar Association (note 18 above), para.5.2.

26. See eg. our *First Report on the Legal Profession,* para.6.59.

27. See eg. NSW Bar Association (note 18 above), paras.3.1-3.4.

28. See chapters 12 and 13.

29. See paras.6.21 and 7.7-7.8.

30. See Sir G Gowans, *The Victorian Bar* (Law Book Co., Sydney, 1979), pp.84-87.

31. Rule 74b.

32. Rules 102 and 104.

33. See paras.7.34-7.40.

34. See chapters 4 and 6.

16. Institutional Advertising

A. INTRODUCTION

16.1 In previous chapters we have been concerned with the conduct of individual practitioners and firms. In this chapter we consider action by professional associations, such as the Law Society and Bar Association and by other groups of lawyers outside any one firm. We look at a number of ways of informing the public about aspects of the legal system ("informational" communication) and of encouraging them to use lawyers ("promotional" communication). Some of these methods can be described as advertising, in the usual sense of that word, while others have similar informational or promotional goals but are better described as community legal education.

16.2 We begin the chapter with an outline of the present position We then make some recommendations about further initiatives in this area.

B. THE PRESENT POSITION

Solicitors

16.3 In recent years, the Law Society of New South Wales has established a number of projects aimed at informing the public about the law and at encouraging the use of lawyers. [1] The projects include:

(i) preparation and distribution of brochures which contain simple information about a particular type of legal problem (for example, "buying a home", "motor accident third party claims", "your will") and which advise that a solicitor or legal referral centre should be consulted;

(ii) a six-month newspaper and radio advertising campaign in 1980 "designed to inform the public of dangers involved in the employment of unqualified conveyancers"; [2]

(iii) preparation of a package of four lectures on legal topics for delivery by local lawyers to senior secondary school students;

(iv) provision of a lawyer to answer legal queries on a weekly radio talk-back programme;

(v) preparation of a cartoon-type series in a daily newspaper, depicting common legal situations and indicating the advantages of seeing a solicitor;

(vi) preparation by some regional law societies of weekly feature columns in local newspapers, discussing legal topics;

(vii) preparation and distribution of the Legal Services Directory, which we have described earlier in this Report. [3]

Each of these projects was financed out of the general funds of the Society, although in the case of the Legal Services Directory the Law Foundation of New South Wales also provided financial assistance.

Barristers

16.4 Neither the Bar Association nor any other group of barristers undertakes projects analogous to those mentioned above. In 1977, the Association submitted to us that

> "collective advertising which informs or educates the public as to the general nature of legal services available and provided by the legal profession, but which does not advertise or promote any one individual or organisation is desirable and in the public interest." [4]

However, no steps have been taken by the Association in this regard.

Law Foundation

16.5 The Law Foundation has conducted or funded a number of initiatives in this area. [5] For example, it has played a major role in the development of legal studies in secondary schools, and has financed publications designed to inform members of the public about various aspects of law. The Foundation has representatives of the Law Society and the Bar Association amongst its Governors, but its funds come from the interest on clients' funds held in trust by solicitors, rather than from the profession itself.

Outside New South Wales

16.6 In our Discussion Paper, we described the extensive advertising compaigns undertaken in recent years by law societies in Queensland, Victoria, New Zealand, and the United Kingdom. [6] We referred also to several other developments in relation to institutional advertising and community legal education. [7] We do not repeat those descriptions in this Report.

C. OUR RECOMMENDATIONS

16.7 In our view, institutional advertising and community legal education can serve very valuable purposes, to the benefit of both the public and the profession provided that they are prepared, presented and financed in an appropriate manner. In the following paragraphs we list certain principles by which, in our view, further developments in this area should be guided. [8]

16.8 *Promotional Advertising*. Institutional advertising of a predominantly promotional nature is acceptable provided that it is accurate, fair and temperate, and that it is financed solely or principally by the profession itself rather than from public funds. The need for fairness applies particularly to advertising which seeks to attract business from the profession's competitors.

16.9 *Informational Advertising*. The profession should not concentrate its institutional advertising on promotional goals. Informational advertising, whether in conjunction with promotional material or otherwise, is an important means by which the profession can demonstrate its high ideals of public service. It would be unsatisfactory if the profession restricted its institutional advertising to reactive campaigns against competitors, rather than initiating positive campaigns in areas of unmet need.

16.10 *The Bar*. We do not consider that institutional advertising and community legal education should be regarded as the exclusive preserve, or responsibility, of solicitors. Like solicitors, the Bar espouses high ideals of public service. Moreover, extra business or enhanced public standing which arises from institutional advertising by the Law Society may often flow on to the benefit of the Bar. In our view, the Bar should take initiatives in this area or, perhaps preferably, contribute human and financial resources to joint projects with bodies such as the Law Society and the Law Foundation.

16.11 *Local and Specific Groups.* In some instances, institutional advertising and community legal education may be easier to organise, and more effective, if done by a group of lawyers

who work in a particular locality or who have some special interest in common. The Law Society and the Bar Association could facilitate advertising of this kind by preparing a manual of suggestions and practical details, [9] and by subsidising projects from their general funds.

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

16.13 *Types of Information.* The primary goals of institutional advertising should be helping members of the public to prevent legal problems from arising, to identify an appropriate source of assistance when they do arise, and to find their way to such a source. In many instances it will be feasible to achieve these goals, but not to communicate detailed information or advice about particular problems.

FOOTNOTES

1. See Law Society of New South Wales, “Advertising” (Submission No.218), pp.8-9.

2. See Law Society of New South Wales, *Annual Report* (1980). in Law Society Journal (1980) Vol.19, p.548.

3. Paras.3.18 and 9.7.

4. “Advertising” (Submission No.196), para.2.7.

5. For details of the Foundation’s work see its Annual Reports.

6. Pp.191-193.

7. Pp.193-194.

8. These principles are considered in greater detail in our Discussion Paper, *Advertising and Specialisation*, pp.194-197.

9. See eg. the American Bar Association’s manual, “Bar Association Advertising - A How-to Manual”.

Appendix I - Terms of Reference

"To inquire 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 - Individual Advertising by Solicitors

I. Introduction

1. In chapter 12 we recommended the adoption of a scheme for substantial relaxation of the present restrictions on individual advertising by solicitors. We said, however, that if that scheme is regarded as too liberal, a more limited scheme should be introduced, pending further relaxation. We describe such a scheme below, under three headings, namely

basic prohibitions;

additional restrictions in special areas;

additional restrictions in other areas.

II. Basic Prohibitions

2. All advertising would be subject to the four basic prohibitions in the scheme which we recommended in chapter 12 (see para.12.16).

III. Additional Restrictions in Special Areas

3. Advertising in relation to fees, fields of practice, clientele and speed of service would be prohibited unless it related to an approved type of information. The approved list would be the same as in the scheme which we recommended in chapter 12 (see paras.12.21-12.24).

IV. Additional Restrictions in Other Areas

4. Advertising in areas other than the special areas would be prohibited unless it related to an approved type of information. The following types of information would be on the approved list.

(i) name of practice or employer;

(ii) names of principals, employed lawyers and other staff;

(iii) business and personal addresses and telephone numbers (including cable, telex and other details);

(iv) office hours and after-hours availability;

(v) legal qualifications, or non-legal qualifications relevant to the advertises s practice, conferred by a university, college of advanced education, the Solicitors' Admission Board or the Barristers' Admission Board;

(vi) current teaching or research appointments at a university or college of advanced education;

(vii) honours or awards conferred by the Crown;

(viii) admission as "solicitor' and date of admission;

(ix) right to practise on one's own account or only as an employee;

(x) admission in other jurisdictions;

(xi) subject to approval by the regulatory body, rights to practise in other professions or occupations;

(xii) subject to approval by the regulatory body, membership of associations of legal practitioners or of members of another profession or occupation;

(xiii) age;

(xiv) sex;

(xv) commencement or termination of practice;

(xvi) languages spoken (indicating whether by a lawyer or a non-legal member of staff;

(xvii) associated legal practices (including agents);

(xviii) appointment as a notary public or commissioner for affidavits;

(xix) willingness to undertake legal aid work;

(xx) availability of brochures, provided their contents comply with the rules on advertising;

(xxi) changes in any of the above particulars;

(xxii) statements which do not relate to an individual practice or practitioner.

The regulatory body would have power to extend this list to include other types of information which it considers may be of assistance to potential clients. Practitioners would be entitled to apply to the regulatory body for the addition of items to the list.

5. This list includes all the items listed in the present regulations, and the Law Society's proposed new regulations, in New South Wales. But it includes a few additional items, two of which merit brief comment here. First, item (xx) on the list refers to advertisements about the availability of brochures. Adoption of our recommendations in this Report would mean that solicitors could publish brochures about their practices and, for example, make them available in their offices or upon request. Secondly, item (xxii) concerns statements which do not relate to an individual practice or practitioner. Such statements include, for example, educational material about citizens' legal rights, and eye-catching introductory words such as "Do you need a lawyer?" or "Have you made a will?"

Appendix III - Advertising Rules in British Columbia

We referred in paragraph 12.28 of this Report to descriptions of legal services contained in the advertising rules in British Columbia. We reproduce in this appendix the relevant extract from the Professional Conduct Handbook of the Law Society of British Columbia.

PART C: ADVERTISING

Ruling 2

It is permissible to include in any... advertisement a statement of fees for specific services provided that:

> (a) such fees and services are in the opinion of the Law Society sufficiently described to enable the public to understand the nature and extent of the services and their cost, including disbursements; and
>
> (b) a member who publishes any such advertisement shall during the currency of the advertisement, perform the service at the advertised fee for any person unless excused by circumstances such as conflict with the interests of another client or other reasonable and proper ground.

The following descriptions of specific services, or any reasonable equivalent, shall be deemed to be sufficient for the purposes of the last preceding paragraph provided that:

> (a) the advertisement indicates the nature and approximate amount of disbursements involved and not included in the fee; and
>
> (b) a member who publishes any such description in an advertisement of fees shall during the currency of the advertisement, perform for the advertised fee all of the items of service required in the circumstances of any case which is set out below to be included in the service as described, except for any item which is specifically excluded in the advertisement;

"Simple Wills"

Advising, taking instructions, preparation review with the client and execution of a will appointing an executor and providing for payment of debts and specific and residual bequests.

“Estates”

All necessary services to obtain a grant of letters of probate or of administration of any kind including arranging for valuation of assets and or preparation and filing of income tax returns for the deceased and in attending to the transmission of the assets of the estate into the names of the personal representatives and, where applicable, into the names of the beneficiaries, advising upon Canada Pension Plan benefits as well as any services, process or proceedings relating to the passing or settling of the first accounts of the executor or administrator.

“Conveyances”

Advising on interim agreement, if required, determining and advising upon status of property taxes, attending to review title, preparation, completion and filing of all necessary documents to carry out the transfer in accordance with the interim agreement and registration thereof, including assumption of mortgage when applicable, settlement of statement of adjustments, post registration search and advising in writing on registration of title and of any charges assumed by the purchaser but not including cost of clearing title.

“Mortgages”

Attending to take instructions and to review title, obtain and review mortgage survey if required, and confirm conformity with zoning requirements if any, and payment of current taxes, preparation, completion and registration of mortgage, preparation and completion of direction to pay, preparation of postponement agreement and certificate of independent advice where applicable, advising in writing on registration validity and priority of mortgage.

“Simple Incorporation”

Advising and taking instructions, obtaining approval of corporate name, preparation, completion and filing of incorporation documents for the incorporation of a British Columbia company having one class of shares, preparation and completion of the minutes of subscribers adopting a seal and form of share certificate. determining the addresses of records and registered offices and the time for inspection of records, fixing the number of directors and appointing the first directors, allotting subscribers shares, appointing or waiving the appointment of auditors, approving a banking resolution and in the case of federally-incorporated companies adopting general and borrowing by laws, directory resolutions appointing officers and transferring subscribers' shares, preparation completion and filing of notices of records and registered offices and directors, setting up corporate records, reporting in writing on incorporation and organisation of the company and advising in writing of the annual report and the annual meeting requirements.

Appendix IV - 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 which are available to the public at the Commission's offices.
We list below some publications which may be of particular interest to anyone considering the topics of advertising and specialisation in the legal profession. Reference should also be made to the Notes on Sources in our Discussion Paper, *Advertising and Specialisation.*

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Index

This Index indicates the recommendation numbers (eg. R.3) and paragraph numbers (eg. 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 the beginning of the Report under the title Summary of Principal Recommendations. The Index refers only to the text of the Report It does not refer to the material in footnotes.