

NSW Law Reform Commission

REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

Table of Contents

Table of Contents	1
Terms of Reference and Participants	2
1. Introduction	4
2. Practising as a Barrister and Solicitor in New South Wales	12
3. Conclusions and Recommendations	18
Appendix A	19
Appendix B	23
Appendix C	28

Terms of Reference and Participants

To the Honourable John P Hannaford, MLC
Attorney General for New South Wales

Barrister's Practising Certificates

Dear Attorney General

We make this Final Report pursuant to the reference to this Commission dated 2 December 1992.

Hon Gordon J Samuels AC QC

(Chairman)

Professor David Weisbrot

(Commissioner)

Hon Jerrold S Cripps QC

(Commissioner)

February 1994

Terms of Reference

The *Legal Profession (Practising Certificates) Act 1992* (NSW) came into operation on 2 December 1992. Sub-section 5(2) of the Act is in the following terms:

The Law Reform Commission is to inquire into and report to the Minister on the policy objectives of the provisions to which this section applies and the impact of the enactment of those provisions on the legal profession. The Commission must deliver its report within nine months after the date of assent to this Act and the Minister is to cause the Commission's report to be tables in Parliament.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon G J Samuels AC QC

Professor David Weisbrot

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

The Hon J Cripps QC

Officers of the Commission

Executive Director

Mr Peter Hennessy

Research and Writing

Mrs Sally Riordan

Librarian

Ms Beverley Caska

Desktop Publishing

Ms Julie Freeman

Administrative Assistance

Ms Zoya Howes

Suzanna Mishhawi

1. Introduction

ORIGIN OF THIS REFERENCE

1.1 Section 5(2) of the *Legal Profession (Practising Certificates) Amendment Act 1992* (NSW) required the New South Wales Law Reform Commission to review the operation and policy basis of several provisions of the *Legal Profession Act 1987* (NSW) relating to barristers' practising certificates.

BACKGROUND

The position under the *Legal Practitioners Act 1898* (NSW)

1.2 Under the *Legal Practitioners Act 1898* (NSW), there was no requirement that barristers hold a current practising certificate in order to work as a barrister. Once a barrister was admitted by the Supreme Court and signed the Roll of Barristers, he or she could commence unrestricted practice at the New South Wales Bar at any time. Although for a number of purposes - such as listing in the New South Wales Law Almanac - persons admitted to the Bar were labelled as either "practising barristers" or "non-practising barristers", this classification had no formal status. A "non-practising barrister" was perfectly entitled to accept a brief, offer advice and appear in court.

1.3 The New South Wales Bar Association, the voluntary professional association representing barristers in this State, published a set of Bar Rules based on English precedents, local rules promulgated by the Bar Council, ethical rulings, and judicial decisions. The Bar Rules applied directly to members of the Bar Association, but also, were generally accepted by the courts as amounting to a practical code of conduct for all barristers, based upon well recognised principles in New South Wales.¹

1.4 The Law Society of New South Wales² was given substantial statutory regulatory powers over solicitors under the *Legal Practitioners Act 1898* (NSW), including among other things the powers to issue, to refuse to issue, or to place conditions upon practising certificates; to promulgate rules of practice with statutory force; and to operate a disciplinary tribunal (the Solicitors' Statutory Committee).

1.5 By way of contrast, the New South Wales Bar Association had no real regulatory authority. While the Bar Association, in common with other private associations, had the power to expel a member for breach of its rules, this in itself did not affect the right of that person to continue to practise as a barrister before the courts.

1.6 The Supreme Court of New South Wales, with its inherent supervisory jurisdiction over all legal practitioners, acted as the sole disciplinary authority in respect of barristers (and the ultimate authority in respect of solicitors). Thus, complaints against barristers could be investigated by the Bar Association, but disciplinary action required initiating proceedings (following a decision of the Bar Council) in the Supreme Court. The Supreme Court could also initiate proceedings on its own motion, through the office of the Prothonotary (the senior administrative official in the Court).

1.7 In the divided profession in New South Wales, the paths of entry to practice were (and still are) different for barristers and solicitors. Solicitors traditionally were obliged to serve a term as an "articled clerk" under a "master solicitor", imitating the guild/apprenticeship origins of the English legal profession. Complementing the strong shift to university-based primary education for lawyers in the post-World War II period, articles were phased out and replaced by practical legal training (hereafter PLT) courses in the 1970s.³ In New South Wales, this practical training is now provided by the School of Legal Practice (commonly known as the College of Law) within the University of Technology, Sydney.

1.8 Admission as a solicitor, then, followed upon the attainment of a basic legal education (an LL B degree from a university law school or a Diploma in Law from the Solicitors' Admission Board) plus successful completion of a PLT course. Initial admission as a solicitor only entitled the admittee to a *restricted* practising certificate. This meant that the person had to work as an employed solicitor under a more senior lawyer for a

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

number of years⁴ until an unrestricted certificate could be obtained, allowing the solicitor to operate as a principal in a firm or as a sole practitioner.

1.9 Ironically, notwithstanding the Bar's traditional position as the "senior branch" of the profession, admission as a barrister was considerably less demanding. Any person who satisfied the basic educational requirement (an LL B or a Dip Law from the Admission Board) and was a fit and proper person (the character requirement) could be admitted as a barrister by the Supreme Court and acquire full rights to practise at the Bar.

The original position under the Legal Profession Act 1987 (NSW)

1.10 The *Legal Profession Act* 1987 (NSW) (*hereafter, the "LPA"*) replaced the 1898 Act as the principal piece of legislation governing the regulation and discipline of the legal profession in New South Wales. The *LPA* followed upon the detailed inquiry into the legal profession by this Commission in the late 1970s through the early 1980s, which resulted in seven discussion papers, five background papers, an options paper, and four Reports.⁵ While the *LPA* reflected the Law Reform Commission's concern to provide for a considerably greater degree of accountability and public involvement in the regulation of the legal profession, many of the Commission's specific recommendations did not find their way into the law.

1.11 The *LPA* established for the first time the requirement that barristers hold current practising certificates in order to practise at the New South Wales Bar,⁶ although this had been a condition of practice imposed on solicitors since 1935.⁷ This certificate is renewable annually, and requires payment of a fee (scaled according to experience and status). The *LPA* placed the responsibility for administering the new system⁸ with the Bar Council (the executive council of the Bar Association), finally giving the Bar Council statutory powers.

1.12 In the Parliamentary debates over the *Legal Profession Bill* 1987 (NSW), the then Attorney General, the Hon Terry Sheahan, noted that the Bar Association "was implacably opposed to common admission" of barristers and solicitors,⁹ and unwilling to discuss with the Government the detail of the Bill until the notion of common admission was dropped¹⁰ (which did eventuate). The Bill as a whole was commended by the Attorney on the basis that it would "ensure that public expectations of professional regulation, discipline and accountability are met, thus restoring public confidence in the profession."¹¹

1.13 The specific issue of barristers' practising certificates did not receive a great deal of attention in the Parliament. The then Attorney General, Mr Sheahan, stated that:

Clause 32 provides that all barristers who are practising at that date and are not pupils shall be entitled to an unrestricted practising certificate. Those barristers who are practising but serving a period of pupillage may be given a certificate subject to a condition requiring them to complete their period of pupillage. In relation to barristers admitted but not practising the Bar Council will have a discretion as to whether a condition of pupillage will be imposed on the barrister. Many barristers employed by the Crown have not practised and it is therefore provided that they may choose to hold a practising certificate subject to a restriction that they practise only as an employee of the Crown. The other significant reform in part 3 is the provision, in clause 3, whereby the Law Society can require solicitors to undergo each year various additional forms of legal training. The society is concerned to ensure solicitors remain up-to-date with changes to the law...¹²

1.14 The introduction of the practising certificate system for barristers under the *LPA* generally appeared to be something of an afterthought. The powers of the Bar Council over barristers' practising certificates were not developed in a parallel fashion to those of the Law Society Council in respect of solicitors. For example, while the Law Society Council was authorised to impose a much broader range of conditions upon a solicitor's practising certificate, the Bar Council had little flexibility in this regard. Similarly, the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal were given an array of disciplinary sanctions which could be imposed upon a solicitor, but the Board and Tribunal had less scope to fashion an appropriate sanction in relation to a barrister.¹³ Much of the subsequent amendment activity in this area has been in the direction of rationalising the powers of the Bar Council to bring them more into line with those of the Law Society Council.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

1.15 Section 32(1) of the *LPA* provided that an unrestricted certificate be given to an admitted barrister who was "practising as a barrister immediately before" the operative date of this part of the legislation (1 July 1988). However, the Bar Council was given discretion to grant only a conditional practising certificate¹⁴ for newcomers to the Bar *and* for persons already admitted to the Bar (such as legal academics, government lawyers, and in-house corporate lawyers) whom the Council regarded as "non-practising" barristers, even if such persons previously held an unrestricted right to practice consequent upon admission. This *conditional* practising certificate required compliance with conditions of practice which were already demanded by the Bar Association; for example, those required of a newly admitted barrister. Such conditions were therefore not unique, rather, the *LPA* (and similar subsequent legislation) provided a legislative imprimatur for existing practice.

1.16 Perhaps the only real controversy, in policy terms, surrounding the grant of statutory powers to the Bar Council under the *LPA* was the treatment of admitted barristers deemed by the Bar Council to be "non-practising" barristers.¹⁵ Although new occupational licensing schemes usually include a "grandfather clause" to avoid disadvantaging existing practitioners, the application of the *LPA* provisions in respect of barristers' practising certificates served to remove retrospectively the rights to practise of a class of admitted lawyers who did not practise solely at the private Bar. As a result, whilst on 30 June 1988 such persons had been entitled to appear as counsel in a murder trial in the Supreme Court (assuming such a brief could be obtained), on 1 July 1988, with a restricted practising certificate, such barristers could not appear (without leave) as an advocate in a Local Court to make representations on a plea of guilty to a parking offence.

1.17 Following a subsequent amendment to s 32(3)(b) of the *LPA*,¹⁶ which had been sought by the Bar Council, the Council also gained the power to issue another category of *restricted* practising certificates, for academic lawyers and others in a similar position, which permits the holder to engage in opinion work but not to act as an advocate in a court or tribunal without the presence of a "leader".

The Bar Association's request for further powers

1.18 Although the Bar Association originally did not regard the practising certificate system as necessary or desirable, following the passage of the *LPA*, it embraced the opportunities for tightening control over rights to practise at the Bar.

1.19 However, after two years of experience with the administration of the new system, the Bar Association expressed concern that the provisions contained in the *LPA* were insufficient to ensure that persons beginning practice at the Bar had attained an appropriately high degree of knowledge of such areas as Evidence and Practice and Procedure. Without statutory backing, the Bar Council had no power to require the fulfilment of conditions endorsed on a practising certificate, or to impose any sanctions if these conditions were not satisfied. In a letter to the then Attorney General, the Hon John Dowd QC MP, dated 10 July 1992, the Bar Association expressed the following view:

Although the majority of pupils attend the (Reading) Programme, there have always been a minority who have not or who have only attended some portion thereof. Despite threats by the Reading Committee (none which were enforceable) indicating dire consequences in the event of a pupil failing, by a specified period, to complete their reading requirements, there have been numerous persons who have either ignored the requirements or who have been extremely dilatory in attending to their obligations with respect thereto The Council has no power to suspend or cancel a practising certificate where a pupil fails to comply with any condition ... It seems to the Reading Committee that pupils are well aware of the Council's lack of power in this regard: hence the frustration that the Committee has experienced in forwarding threatening letters to pupils which are ignored. The difficulty that the Council finds itself in is that the current provisions of the Act and, in particular, Sections 32 and 35, do not accommodate the above concerns. Thus the Council has no power to withhold a practising certificate until the satisfactory completion of the ... course. Further, and just as importantly, the Council has no power to suspend or cancel a practising certificate where a pupil fails to comply with any condition imposed thereon.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

1.20 The Bar Association's letter to the Attorney proposed certain amendments to the provisions of the *LPA*, suggesting that these changes would enhance the standards of competency of new barristers for the benefit of the public. These proposed changes to the *LPA* included:

Giving the Bar Council the discretion to issue a practising certificate subject to such conditions as it thought appropriate in the circumstances.¹⁷ As the legislation stood, upon completion of the period of pupillage, a barrister was entitled to an unconditional practising certificate. The amendment would have empowered the Bar Council to refuse to issue a certificate to a pupil until such time as that pupil had completed any full-time component of the Bar's Reading Program *to the Council's satisfaction*. In other words, the Bar Association wanted a requirement of *successful* completion of its program, rather than *mere* completion. This amendment would have made the powers of the Bar Council more congruent with those exercised by the Law Society Council.¹⁸

Giving the Bar Council the complementary power to revoke or vary the conditions on a practising certificate, or to impose new or additional conditions at any time during the currency of the certificate, rather than only once a year at the time of issue.

Amending section 35 to incorporate existing subparagraphs¹⁹ into one subsection. This would give the Bar Council greater flexibility with respect to barristers who breach conditions of their practising certificates, and give the Bar Council the same powers as are given in section 35(2) to the Law Society Council.

Giving a barrister the right to appeal to the Supreme Court against any adverse decision of the Bar Council in respect of his or her practising certificate.²⁰

The effect of the Legal Profession (Practising Certificates) Amendment Act 1992 (NSW)

1.21 Further discussion of these matters between the Attorney General and the Bar Association resulted in the *Legal Profession (Practising Certificates) Amendment Act 1992* (NSW). These amendments are reproduced in full at Appendix A of this Report.

1.22 In general terms, the amendments permit the Bar Council, after 1 January 1993, (subject to certain exceptions) to refuse to issue a practising certificate to a barrister, who, as a pupil, has not satisfactorily completed the full-time component of the reading program and who has not sat for and passed an examination as part of that program.²¹ The amendments also allow the Bar Council to issue conditional or unconditional practising certificates. Conditions that can be imposed include the requirement that the holder of the certificate complete the reading program, read with a specified barrister or with a barrister of a specified class or description, and undertake further legal education.²²

1.23 The amendments also give the Bar Council the power to refuse to issue, or to suspend or cancel a practising certificate in certain circumstances.²³ Such circumstances include where the barrister is in prison; where a barrister who is required by the Bar Council to explain conduct by the barrister, fails and continues to fail to give a satisfactory explanation to the Bar Council; and where in the opinion of the Bar Council the barrister has failed to comply with a condition attached to his or her practising certificate. The appeal provisions to the Supreme Court, contained in the previous section 37 were amended to encompass the above changes.

THE NATURE AND CONDUCT OF THE COMMISSION'S REFERENCE

1.24 When introducing the amendments into Parliament in 1992, the then Attorney General, the Hon P E J Collins QC MP, stated that the Government's intention was to ensure the maintenance of high standards of competence of members of the Bar, and to help provide for appropriate client protection against practitioners who did not meet the required standards.²⁴ The legislation would enable the Bar Council to do something about

barristers it regarded as insufficiently trained or unqualified to hold an unconditional licence to practise as a barrister in New South Wales. According to the Attorney:

It is all about giving consumers of legal services better value for their money. It is all about raising professional standards, self regulation by the profession, peer assessment, and the maintenance of standards by people who serve this State as officers of the Supreme Court of New South Wales.²⁵

1.25 However, some concern was expressed in the community and in the media that the changes sought by the Bar Association were not intended to be used to maintain standards or knowledge, ethics and practice, but rather, to limit competition by restricting entry into the profession. This could adversely affect the public interest. In its Issues Paper, the Trade Practices Commission (hereafter TPC) noted the view that the imposition of such increased "educational" requirements can operate in practice to limit the number and type of applicants who may enter the profession, and thus limit the degree of competition in the market. Similarly, both clients and practitioners are forced to forgo other benefits which might be obtained from more flexible or efficient business structures.²⁶ The Report by the Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Report) was also concerned that regulatory regimes that operate by reference to standards or qualifications may be more restrictive than necessary to protect the public interest objectives for which they were imposed. Even if the standards are objectively reasonable, there may be concerns over whether they are administered or enforced in a way that unduly favours incumbents.²⁷

1.26 In particular, the amendments were strongly opposed in the Parliament by Mr John Hatton MLA (South Coast). Mr Hatton referred to community concern that: (1) the public interest may be jeopardised by giving an already powerful body (the Bar Council) too much statutory regulatory authority; and (2) there was a possibility that the amendments could be manipulated to refuse or limit the rights of practice of persons who were otherwise qualified, but had somehow earned the enmity or suspicion of the Bar Council. Mr Hatton expressed concern that the amendments would result in further restrictive practices at the Bar.²⁸

1.27 Mr Hatton originally proposed a one year "sunset clause" for the amendment, after which the Law Reform Commission would be asked to report on whether the amendment had served the public interest. In particular, the Commission would be asked to consider whether: the increase in the Bar Council's powers had improved the standards of the profession; the changes had a restrictive effect on competition; the Bar had used these increased powers properly.²⁹ This proposal was not accepted by the Parliament. However, in deference to those who considered these amendments as providing the opportunity for hostile manipulation, the following "compromise" provision was inserted into the amending legislation:

Review and expiry of certain provisions

5. (1) This section applies to the following provisions of the Legal Profession Act 1987, as amended by this Act, namely: section 32(3) and (4) and section 35(1)(c).

(2) The Law Reform Commission is to inquire into and report to the Minister on the policy objectives of the provisions to which this section applies and the impact of the enactment of those provisions on the legal profession. The Commission must deliver its report within 9 months after the date of assent to this Act and the Minister is to cause the Commission's report to be tabled in Parliament.

1.28 The Attorney General formally referred the matter to the Commission in a letter dated 16 March 1993, since the Commission normally operates on the basis of a reference from the Attorney General.³⁰ The particular sections of the *Legal Profession (Practising Certificates) Amendment Act 1992* (NSW) that the Commission is required to review are:

s 32(3) The Bar Council may attach a condition to a practising certificate when it is issued, or at any time after it is issued, and at anytime may vary or revoke any such condition.

s 32(4) Conditions of the following kind can be attached to the practising certificate of any barrister:

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

(a) a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a reading program as determined or approved by the Council;

(b) a condition requiring the holder to sit for and pass any examination set by the Council as part of the reading program;

(c) a condition requiring the holder to read with a specified barrister or with a barrister of a specified class or description for a specified period and to comply with such requirements as will enable the barrister, at the end of the specified period, to certify to the Bar Council that the holder is fit to practise as a barrister without restriction.

s 35(1) The Bar Council may refuse to issue, may cancel, or may by order suspend, a practising certificate applied for or held by a barrister (other than the Attorney General) who:

(d) being required by the Council to explain specified conduct by the barrister as a barrister fails, and continues to fail, to give an explanation satisfactory to the Council.

1.29 The Commission decided that, in light of the nature and origin of this reference and the widespread contemporary community debate about the regulation of the legal profession associated with the introduction of the *Legal Profession Reform Act 1993 (NSW)*, it was not necessary to proceed through the normal process of a consultation paper, followed by consideration of submissions, leading to a final Report. Instead, the Commission has proceeded directly to report to Parliament, through the Attorney General. For the purpose of this review, the Commission consulted with the New South Wales Bar Association, the Law Society of New South Wales, and a number of other professional and consumer associations in New South Wales and elsewhere.

THE LEGAL PROFESSION REFORM ACT 1993 (NSW)

1.30 During the course of this inquiry the Government introduced the *Legal Profession Reform Bill 1993 (NSW)*. After substantial amendment, the *Legal Profession Reform Act 1993 (NSW)* (hereafter the "*Reform Act*") was passed by Parliament on 20 November 1993.

1.31 The *Reform Act* changes the structure, regulation and operation of the legal profession in New South Wales. Among other important changes, the *Reform Act* will subject legal practitioners in New South Wales to the operation of the competition provisions of the *Trade Practices Act 1974 (Cth)*.³¹ This change is intended to take effect from 31 July 1994, or on a date which the Federal Court, the Trade Practices Commission and the Trade Practices Tribunal are, by a Commonwealth law, permitted to exercise the jurisdiction, powers and functions conferred on them under the restrictive trade practices laws.³²

1.32 The *Reform Act* also creates the office of the independent Legal Services Commissioner, who will manage the new system for handling complaints against lawyers.³³ The *Reform Act* represents the first statutory recognition of the Bar Council's right to make rules with respect to practice as a barrister.³⁴ (The powers of the Law Society Council to make rules with respect to practice as a solicitor were recognised in the earlier legislation, and continued in the *Reform Act*.)³⁵ The *Reform Act* specifies that such rules are binding on barristers, even where a barrister is not a member of the Bar Association.³⁶ Failure to comply with such rules does not of itself amount to a breach of the Act, but such failure is capable of amounting to professional misconduct or unsatisfactory professional conduct.³⁷

1.33 The provisions of the *LPA* under review in this Report, were largely replicated in the *Reform Act*.³⁸ The previous requirement under the *LPA* for the satisfactory completion of a reading program, is now the satisfactory completion of a full-time or part-time component of that program, whichever is applicable to the barrister in question. Secondly, the condition under the *LPA* requiring the holder of the certificate to read with a barrister of a specified class or description chosen by the holder, can now include a barrister chosen from a list of at least 10 barristers kept by the Bar Council for that purpose. This change was designed to assist those persons new to the Bar whose initial choice of Tutor may not be completely satisfactory, and who may need to choose another Tutor or Tutors.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

1.34 The Commission does not intend to comment further in this Report on the *Reform Act* as it is not relevant to this reference.

FOOTNOTES

1. See *NSW Bar Association v Livesey* [1982] 2 NSWLR 231.
2. In particular, the Council of the Law Society.
3. See D Weisbrot *Australian Lawyers* (Longman Cheshire Pty Ltd, Melbourne, 1990) at 148-151.
4. Initially a twelve month period of restricted practice was required in New South Wales. From 1 January 1994 this period increases to two years and there is a further requirement of the completion of a practice management course approved by the Law Society.
5. New South Wales Law Reform Commission *First Report on the Legal Profession: General Regulation and Structure* (LRC 31, 1982); *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards* (LRC 32, 1982); *Third Report on the Legal Profession: Advertising and Specialisation* (LRC 33, 1982); *Fourth Report on the Legal Profession: Solicitors' Trusts Accounts* (LRC 44, 1984).
6. Section 25.
7. The power to do so was conferred by Pt IX of the *Legal Practitioners Act 1898* (NSW), introduced by legislation amending that Act in 1935. Prior to that time the Law Society lacked any legislative power to govern solicitors.
8. Section 32.
9. New South Wales Parliamentary Debates (*Hansard*) 29 April 1987, Legislative Assembly at 10753.
10. New South Wales Parliamentary Debates (*Hansard*) 13 May 1987, Legislative Assembly, at 11883.
11. New South Wales Parliamentary Debates (*Hansard*) 29 April 1987, Legislative Assembly, at 10762.
12. New South Wales Parliamentary Debates (*Hansard*) 29 April 1987, Legislative Assembly at 10755.
13. See New South Wales Law Reform Commission *Complaints Against Lawyers* (Discussion Paper 26, 1992) paras 4.54-4.58.
14. Section 32(3).
15. Weisbrot at 61-62.
16. *Legal Profession (Amendment) Act 1987* (NSW), Sch 2(4).
17. By amending s 32.
18. Pursuant to s 33.
19. Subsections (1), (1A), (1B) and (1C).
20. By amending s 37(1), to provide an appeal right in respect of decisions made under the proposed amendments to s 32 and 35.
21. *LPA* s 29A.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

22. *LPA* s 32.
23. *LPA* s 35.
24. New South Wales Parliamentary Debates (*Hansard*) 26 March 1992, Legislative Assembly at 2155.
25. New South Wales Parliamentary Debates (*Hansard*) 16 September 1992, Legislative Assembly at 5887.
26. Trade Practices Commission *Study of the Professions - Legal Profession* (Issues Paper, July 1992) at 54.
27. Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Report). National Competition Policy. Canberra: AGPS 1993 at 197.
28. New South Wales Parliamentary Debates (*Hansard*) 16 September 1992, Legislative Assembly at 5880-5884.
29. New South Wales Parliamentary Debates (*Hansard*) 16 September 1992, Legislative Assembly at 5888.
30. See the *Law Reform Commission Act 1967* (NSW) s 10.
31. Although there are a number of exemptions and authorisations possible. For example, s 38FE (3) states that practice as a barrister under the Crown or as parliamentary counsel is not affected.
32. Section 38FA.
33. This follows the recommendations of this Commission in the report *Complaints Against Lawyers* (LRC 70, 1993).
34. Clause 57A.
35. Clause 57B.
36. Clause 57D(3).
37. Clause 57D(5).
38. Section 32(3) of the *LPA* will be replaced by s 32(2) of the *Legal Profession Reform Act 1993* (NSW) (the *Reform Act*) when that Act comes into force. Section 32(4) of the *LPA* will be replaced by s 34 of the *Reform Act*. Section 35(10)(c) of the *LPA* will be replaced by s 37(1)(a) of the *Reform Act*.

2. Practising as a Barrister and Solicitor in New South Wales

INTRODUCTION

2.1 In order to practise law in New South Wales, barristers and solicitors must be admitted to the Supreme Court of New South Wales and hold a current practising certificate. Until the introduction of the *Legal Profession Reform Act 1993* (NSW), the primary piece of legislation regulating the provision of legal services in this State was the *LPA*. Rules of practice and regulations made under the principal legislation are also promulgated by the Councils of the Bar Association and Law Society. A comparison of practice requirements in other Australian States and Territories and the United Kingdom is found at Appendix B.

2.2 Two major considerations arise from this position. The first is the vexed question of the appropriateness of self regulation by professional bodies. This issue has attracted much debate and criticism, raising questions over the ability of such associations to act in the public interest while at the same time advancing their members' interests. The second and related consideration is whether entry and practising requirements stipulated by these professional associations amount to restrictive practices which operate contrary to the public interest.

2.3 The Commission has previously noted the arguments about the inherent conflict of interest - in appearance, certainly, if not always in fact - present in a single body having simultaneous responsibility for advancing the interests of its membership (the "sectional" or "trade union" function) as well as regulating and disciplining that membership in the public interest.¹ To avoid the appearance of conflict, it requires at least, a clear separation of the administration of those two functions.

2.4 The issue of restrictive practices has recently been addressed by the TPC. In its draft Report on the Legal Profession,² the TPC made a number of comments and recommendations on the regulation of solicitors' and barristers' practices, which the Commission will refer to in this chapter.

ENTRY INTO PRACTICE AS A BARRISTER

The Pupillage and Reading Program

2.5 The New South Wales Bar Association has long regarded the use of the pupillage system and attendance at a Reading Program as essential to gaining a sufficient degree of basic knowledge to enable barristers to commence practice. The *LPA* converted this position from a voluntary program for persons wishing to become members of the Bar Association, to a compulsory program for all admitted barristers who wish to hold a current practising certificate. This is now a requirement for practice in New South Wales.

2.6 Newly admitted barristers (and others deemed to be "non-practising" barristers) are required to attend a Reading Program and serve a period of time during which they are called "pupils".³ The Reading Program, conducted by the Bar Council, is designed to be a comprehensive introduction to the Bar. It is offered twice a year in February/March and August/September, and is a one month, full-time course. Intending applicants to the Reading Program are advised that all newly admitted barristers are required to sit for and attain at least a 75% pass mark in an examination on Ethics. An additional examination in Aspects of Evidence will also be held from August 1994. Examinations are scheduled to take place approximately six weeks prior to the commencement of the reading program. Applicants are advised not to give notice of termination to employers until examination results confirm entry to the Reading Program.

2.7 Once the Reading Program is completed, and passed, the barrister is required to submit to the professional supervision of a Tutor appointed by the Council.⁴ Whilst the Bar Rules detail the duties and responsibilities of a pupil and Tutor,⁵ and guidelines exist, the relationship is essentially an unregulated and personal one. Until the satisfactory completion of service as a pupil, a new barrister is issued with a restricted practising certificate which specifies he or she is a pupil, and that:

This certificate is subject to the condition that the holder comply with the conditions and restrictions imposed on pupils by the Rules of the NSW Bar Association.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

During the first three months from the date of issue of the practising certificate, the pupil is not allowed to appear as an advocate in a court or tribunal without the approval of, or on behalf of, the Tutor.⁶ Satisfactory completion of the program includes attendance at all sessions (save for excused absences); the completion of various drafting exercises; demonstrating advocacy skills; conducting conferences with clients; preparing and presenting a (simulated) trial; and passing a written examination on legal ethics.

2.8 After completion of the full-time component of the program, the reader must then attend each of the Continuing Legal Education lectures arranged during the year by the Reading Program, attend a further advocacy workshop, undertake further criminal and civil reading, and generally fulfil the obligations of a Reader pursuant to the Bar Rules.

Attendance or satisfactory completion?

2.9 Under the original provisions of the *LPA*, the Bar Council could impose a condition that a barrister attend a Reading Program. However, there was nothing in the *LPA* which authorised the Bar Council to insist upon *satisfactory completion* of that course before an unrestricted practising certificate would be granted.⁷ The 1992 amendments to the *LPA* remedied this anomaly, allowing the Bar Council, after 1 January 1993, to:

refuse to issue a practising certificate to a barrister who, as a pupil, has not completed to the satisfaction of the Council a full-time component of a reading program applicable to the pupil and determined or approved by the Council or who has not sat for and passed an examination set by the Council as part of that program.⁸

2.10 This provision does not apply to barristers who are holders of statutory positions under the Crown in right of New South Wales, or of any other State or Territory, or of the Commonwealth; a barrister who acts as parliamentary counsel; or a barrister who is a member of a class or of a description of barristers, specified by the Bar Council or prescribed by the Regulations for the purposes of the section.⁹ Barristers practising in such positions as parliamentary counsel or the Office of the Department of Public Prosecutions hold restricted practising certificates.

The applicable conditions

2.11 The *LPA* also gives the Bar Council the discretion to attach conditions to a practising certificate when it is issued, or at any time after it is issued, or at any time to vary or revoke any such condition.¹⁰ Such conditions are limited to the following:

- (a) a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a reading program as determined or approved by the Council;
- (b) a condition requiring the holder to sit for and pass any examination set by the Council as part of a reading program;
- (c) a condition requiring the holder to read with a specified barrister or with a barrister of a specified class or description for a specified period and to comply with such requirements as will enable the barrister, at the end of the specified period, to certify to the Bar Council that the holder is fit to practise as a barrister without restriction.¹¹

2.12 At a practical level these sections reinforce the Bar Association's own practice pursuant to the Bar Rules.

The choice of tutor issue

2.13 A pupil has complete freedom of choice of Tutor, provided that the nominated choice is a member of the Bar Association and has practised at the Bar for no less than seven years.¹² Those who are unable to find

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

Tutors are assisted in this by the Bar Association. The Commission believes that the requirement that the Tutor be a member of the Bar Association is essentially restrictive. Non-membership of the association would seem to be an arbitrary reason to deny junior barristers of good standing at the Bar the opportunity of tutoring.

2.14 According to the Bar Association, the condition requiring the pupil "to read with a specified barrister or with a barrister of a specified class or description"¹³ is not intended to operate to restrict a pupil's choice of Tutor.¹⁴ The purposes behind s 32(4)(c) of the LPA are to firstly ensure that both the criminal and civil areas of legal practice are sufficiently well observed and discussed with experienced counsel so that new barristers do not commence practice without reasonable grounding; and secondly, to ensure that an experienced barrister is able to certify to the Bar Council at the end of pupillage, that the pupil has attained a level of advocacy, skill and knowledge commensurable with professional practice.

The Bar Council's exercise of power to date

2.15 Since the 1992 amendments came into effect the Bar Council can vary or revoke a practising certificate during its currency.¹⁵ A pupil can be asked to show cause why his or her practising certificate should not be cancelled for either failure to pass an examination in legal ethics, refusal (without reasonable excuse) to submit to a re-examination, substantial failure to attend upon a Tutor, or failure to complete a period of pupillage to the satisfaction of the Tutor. The Bar Council has advised the Commission that there has been only one instance since the introduction of this amendment, where a pupil's practising certificate has been cancelled pursuant to this power.

ENTRY INTO PRACTICE AS A SOLICITOR

The effect of s 33 of the LPA

2.16 The Council of the Law Society has imposed restrictions on solicitors' practising certificates since 1967. Since 1978, all newly admitted solicitors have been required to complete a period of restricted practice before being entitled to engage in private practice. Prior to the *Reform Act*, practising certificates were regulated by the LPA, in particular section 33, which stated:

33. (1) The practising certificate issued to a solicitor (other than a solicitor corporation):
- (a) may entitle the holder to practise as a solicitor on his or her own account or may impose a condition limiting the practising rights of the holder as provided by subsection (2); and
 - (b) if the Council so determines, may impose a condition requiring the solicitor to undertake and complete a specified course of legal education.
- (2) The practising certificate issued to a solicitor (other than a solicitor corporation) may limit the practising rights of the holder in any manner determined by the Law Society Council.
- (3) For the purposes of subsection (1)(b), the Law Society Council shall arrange for the establishment and administration of courses of further legal education.
- (4) The practising certificate issued to a solicitor corporation is not to be subject to any condition.

This section is comparable to s 32 of the LPA which deals with the issue of barristers' practising certificates and identifies the types of conditions that can be attached to them by the Bar Council.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

2.17 Those solicitors admitted before 1 January 1986, are required by the Law Society to undertake a 12 month period of practice as an employed solicitor in private practice before being eligible to engage in private practice on his/her own account, or in partnership. Solicitors admitted after 1 January 1986 are not entitled to practise other than as employees until certification of satisfactory completion of 12 months approved practice has been received and approved by the Law Society. Solicitors are precluded from practising as a sole practitioner until they have had three years experience as a solicitor and satisfactorily completed a prescribed course in office management. When a practising certificate is issued by the Law Society, a summary of conditions and restrictions appear on the reverse side of it.¹⁶

2.18 Following a comprehensive review of practising certificates and the conditions and restrictions assigned to them, the Council of the Law Society resolved in June 1993 to implement a new practising certificates policy to come into operation from 1 January 1994. From that date, any solicitor admitted after 1 January 1986 or who was admitted before 1 January 1986 but did not take out a practising certificate before 1 January 1994, and who seeks the issue of an unrestricted practising certificate, will be required to complete a two year period of restricted practice and a practice management course approved by the Law Society.

2.19 The restricted practitioner will be supervised by a practitioner who holds an unrestricted practising certificate, and in his or her application for an unrestricted practising certificate has to demonstrate that work constituting restricted practice has been undertaken. Restricted practice is defined as legal practice that is performed as an employed solicitor involving the application of legal knowledge and skills, the delivery of legal services, and work that is undertaken in the context of a solicitor/client relationship. These requirements are identified in greater detail in the "Guidelines for Applicants" document produced by the Law Society.

2.20 A further condition that is imposed on any solicitor's practising certificate, is the condition that the holder will undertake and complete a specified course of further education.¹⁷ A solicitor must complete a minimum of 10 Mandatory Continuing Legal Education (MCLE) units during the period 1 April of each year and 31 March of the following year. If in the opinion of the Law Society Council a practitioner has failed to comply with this condition, it may, pursuant to section 35(2) of the *LPA*, refuse to issue, cancel or suspend, a practising certificate.

The operation of s 35(2)(c) of the LPA

2.21 Section 35(2)(c) of the *LPA* allows the Law Society Council to refuse to issue, cancel or suspend a practising certificate applied for or held by a solicitor who has been required to explain specified conduct and has failed and continues to fail to give a satisfactory explanation of that conduct. The Law Society has only cancelled five practising certificates pursuant to this section, as most solicitors respond to the notification of the Council's resolution.¹⁸

2.22 Both this section, and section 35(1)(c), which gives an identical power to the Bar Council, were criticised in this Commission's recent Report, *Scrutiny of the Legal Profession: Complaints Against Lawyers*.¹⁹ The Commission suggested that given that the sanction of suspending or cancelling a practising certificate is so serious that it is reluctantly and rarely invoked, delinquent practitioners count on this reticence.²⁰ Whilst the Commission does not resile from comments made in that Report, it would seem that such a power provides both the Bar Association and the Law Society with greater flexibility to deal with delinquent practitioners.

THE ISSUE OF RESTRICTIVE PRACTICES AND CONCLUSIONS OF THE TPC

2.23 In any professional area there may exist what purport to be standards or requirements of skill or experience whose real intention is to limit the number of entrants to that profession and thereby reduce competition.²¹ However, in its Draft Report on the Legal Profession, the TPC states that from a restrictive trade practices point of view, there is nothing inherently wrong in setting higher educational or other requirements, such as a pupillage or reading program, where these are calculated to set or raise standards of competency, in the public interest.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

2.24 From time to time, there have been suggestions that making rights of practice conditional upon satisfying *further* requirements after a barrister has been admitted by the Supreme Court, may amount to an impermissible restrictive (anti-competitive) practice, reducing the flow of persons into that branch of the legal profession. The TPC's conclusions were that the reading and pupillage requirements of the independent Bars in Australia do not add unreasonably to the cost or difficulty of gaining admission. The TPC considered that those requirements appear to be directed only to providing new entrants with exposure to the skills of advocacy, case preparation, court practices and procedures, and the traditions and ethics of the Bar, under the guidance of an experienced Tutor. Consequently the TPC generally did not regard the training and experience requirements for entry into practice at the Bar as creating barriers to entry which would impede competition or more efficient forms of advocacy practice.²² The TPC made no recommendation for review or reform of this area.²³

2.25 The Commission agrees with these views and believes that such programs are in the public interest. Imposing licence requirements on practitioners gives clients greater confidence in those providing the legal service. Further safeguards such as professional codes of ethics, indemnity and fidelity insurance, and discipline, work against incompetence or misconduct.

FOOTNOTES

1. See New South Wales Law Reform Commission *The Legal Profession: General Regulation* (Discussion Paper 1, 1979) at 29-31, 52, 86, 122-127, 136, 138, 149-152, 159, 166 and 185-187; New South Wales Law Reform Commission *Scrutiny of the Legal Profession* (Discussion Paper 26, 1992) at para 5.4 and 5.17-5.20; and New South Wales Law Reform Commission *Scrutiny of the Legal Profession* (Report 70, 1993) at para 3.19.
2. Australia. Trade Practices Commission *Study of the Professions-Legal Profession* (Issues Paper, July 1992); and Australia. Trade Practices Commission *Study of the Professions-Legal* (Draft Report, October 1993).
3. The New South Wales Bar Association Rules, R 97.
4. The New South Wales Bar Association Rules, R 98(a).
5. The New South Wales Bar Association Rules, R 98 and 99.
6. The New South Wales Bar Association Rules, R 98(b).
7. Nor was there any statutory provision which permitted the imposition of study requirements as part of the disciplinary process.
8. Section 29A.
9. Section 29A(2).
10. Section 32(3).
11. Section 32(4).
12. The New South Wales Bar Association Rules, R 100(b). In practice, Queen's Counsel are not Tutors.
13. Section 32(4)(c).
14. There was some confusion when the amendments were introduced to Parliament that this was the intention of the section. See New South Wales Parliamentary Debates (*Hansard*) Legislative Assembly, 1 September 1992 at 5326, and New South Wales Parliamentary Debates (*Hansard*) Legislative Assembly, 16 September 1992 at 5882.
15. Section 35, as amended.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

16. A copy of a certificate is found at Appendix C.
17. *LPA*, s 33(1)(b).
18. Letter from the Law Society of New South Wales, dated 10 September 1993.
19. LRC 70.
20. LRC 70 at 165.
21. The Independent Committee of Inquiry into Competition Policy in Australia (the Hilmer Report). National competition policy. Canberra: AGPS, 1993, at 191, stated that regulatory barriers to market entry have the most direct influence over competitive conditions within an industry. The Report recommended that regulations that restrict competition should not be adopted unless the restriction is justified in the public interest. See generally Chapter 9, 190-198.
22. The TPC did have some concern over other practices, such as those which make it unnecessarily difficult for lawyers to move flexibly from practice as a solicitor to practice as a barrister and back again. See Chapter 13 of the TPC Draft Report.
23. See TPC Draft Report at para 16.4.1 and 16.5.1.

3. Conclusions and Recommendations

3.1 The Commission's reference is to inquire into the policy objectives and impact of provisions in the *Legal Profession Act 1987 (NSW)* that deal with the Bar Council's ability to impose conditions on a barrister's practising certificate, in particular the requirement of a barrister to undertake and satisfactorily complete, a reading program. The Commission has found no evidence that the powers given to the Bar Association have been used in an inappropriate or improper manner. The Commission accepts the policy objectives behind the legislation, and recommends that no change be made to the provisions at this time.

3.2 In reaching this conclusion the Commission points out that the introduction of the provisions was likely to have a minimal impact on the legal profession as it reflected practices and procedures adopted by the Bar for several years. Furthermore, the Commission acknowledges that the provisions have been in force for a very short period of time: too short to permit a statistical sample to be taken of their operation.¹

Matters for further consideration

3.3 Two matters arise from the Bar Association's Reading and Pupillage Program that the Commission believes require consideration on the ground that they are potentially or actually restrictive. The first is that the control of the Program lies exclusively with the Bar Association, in contrast to the practical legal training program for solicitors provided by the College of Law (as it is commonly known). The College is the School of Legal Practice within the University of Technology, Sydney, and is therefore subject to review by the Academic Board of the University and the instructors are members of the academic staff of the University.

3.4 The equivalent program for barristers lacks these features. Where the issue of a practising certificate depends upon satisfactory completion of a course of instruction directly controlled by the Bar Association, that structure might possibly be perceived as a restrictive practice and as exhibiting elements of control which might be exerted in the interests of existing members of the Bar Association at the expense of free professional competition. Further, the absence of professional input into the teaching skills aspect of the program may adversely affect its educational quality. To address these issues, the Commission suggests that the Bar should consider a biennial review of its Reading and Pupillage Program to be conducted by a committee which should include at least one academic, one member of an independent Bar from another state and one lay person, together, of course, with a representative or representatives of the New South Wales Bar Association.

3.5 The second matter is that the current rules of the Bar limit those who are available to act as tutors, to members of the Bar Association.² The Commission is of the view that Tutors should be drawn from any practising members of the Bar (other than Queen's Counsel or Senior Counsel).

FOOTNOTES

1. In a letter to the Commission dated 23 September 1993, the New South Wales Bar Association stated that it was too early to make any worthwhile assessment of these provisions.
2. The New South Wales Bar Association Rules, R100 (b)(iii).

Appendix A

LEGAL PROFESSION (PRACTISING CERTIFICATES) AMENDMENT ACT 1992 No. 93 NEW SOUTH WALES

Table of Provisions

1. Short Title
2. Commencement
3. Amendment of Legal profession Act 1987 No. 109
4. Transitional
5. Review and expiry of certain provisions

LEGAL PROFESSION (PRACTISING CERTIFICATES) AMENDMENT ACT 1992 No. 93

NEW SOUTH WALES

Act No. 93, 1992

An Act to amend the Legal Profession Act 1987 in relation to practising certificates for barristers. [Assented to 2 December 1992]

The Legislature of New South Wales

Short title

1. This Act may be cited as the Legal Profession (Practising Certificates) Amendment act 1992.

Commencement

2. This Act commences on the date of assent.

Amendment of Legal Profession Act 1987 No. 109

3. The Legal Profession Act 1987 is amended as set out in Schedule 1.

Transitional

4. The amendments made by Schedule 1 (2)-(4) extend to practising certificates issues before the date of assent of this Act.

Review and expiry of certain provisions

5. (1) This section applies to the following provisions of the Legal Profession Act 1987, as amended by this Act, namely: section 32 (3) and (4) and section 35 (1) (c).

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

(2) The Law Reform Commission is to inquire into and report to the Minister on the policy objectives of the provisions to which this section applies and the impact of the enactment of those provisions on the legal profession. The Commission must deliver its report within 9 months after date of assent to this Act and the Minister is to cause the Commission's report to be tabled in Parliament.

Schedule 1 - Amendments

(1) Section 29A:

After section 29, insert:

Refusal of application by barrister for practising certificate

29A(1). The Bar Council may, on or after 1 January 1993, refuse to issue a practising certificate to a barrister who, as a pupil, has not completed to the satisfaction of the Council a full-time component of a reading program applicable to the pupil and determined or approved by the Council or who has not sat for and passed an examination set by the Council as part of that program.

(2). Subsection (1) does not apply to:

- (a) a barrister who is the holder of a statutory position under the Crown in right of New South Wales, and other State or Territory or the Commonwealth; or
- (b) a barrister who acts as parliamentary counsel under a contract of service, or contract of services, with the Crown (whether in right of New South Wales or in another right); or
- (c) a barrister who is, or is a member of a class or of a description of barristers, specified by the Bar Council for the purpose of this subsection; or
- (d) a barrister who is, or is a member of a class or of a description of barristers, prescribed by the regulations for the purpose of this subsection.

(3). Subsection (2) applies only while a barrister is a barrister to whom paragraph (a), (b), (c) or (d) of that subsection applies.

(4). In this section, "**pupil**" means a person who is a pupil in accordance with the rules of the Bar Association as in force from time to time.

(2) Section 32:

Omit the section, insert instead:

Issue of practising certificate to barrister

32 (1). A barrister is, subject to this Act, entitled to a practising certificate.

(2). A practising certificate may be unconditional or subject to conditions.

(3). The Bar Council may attach a condition to a practising certificate when it is issued or at any time after it is issued, and may at any time vary or revoke any such condition.

(4). Conditions of the following kinds can be attached to the practising certificate of any barrister:

- (a) a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a reading program as determined or approved by the Council;

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

(b) a condition requiring the holder to sit for and pass any examination set by the Council as part of a reading program;

(c) a condition requiring the holder to read with a specified barrister or with a barrister of a special class or description for a specified period and to comply with such requirements as will enable the barrister, at the end of the specified period, to certify the the Bar Council the at the holder is fit to practise as a barrister without restriction.

(5). The only other conditions that can be attached to a practising certificate are conditions of the following kinds:

(a) a condition requiring the holder to undertake and complete to the satisfaction of the Bar Council a course of further legal education;

(b) a condition limiting the holder to practising as abarrister as the holder of a statutory office under the Crown (whether in right of New South Wales or in another right);

(c) a condition limiting the holder to practising as parliamentary counsel under a contract of service, or contract for services, with the Crown (whether in right of New South Wales or in another right);

(6). Conditions of a kind referred to in subsection (4) cannot be attached to a practising certificate of a barrister referred to in section 29A (2) (a) or (b).

(7). The Attorney General, of admitted as a barrister, is entitled to an unconditional practising certificate.

(3) Section 35 (Refusal, suspension or cancellation of practising certificate):

Omit section 35 (1)-(1C), insert instead:

(1). The Bar Council may refuse to issue, may cancel, or may by order suspend, a practising certificate applied for or held by a barrister (other than the Attorney General) who:

(a) is unable to satisfy the Council that the barrister intends to practise as a barrister during the currency of the certificate; or

(b) is not, in the opinion of the Council, practising as a barrister; or

(c) being required by the Council to explain specified conduct by the barrister as a barrister fails, and continues to fail, to give an explanation satisfactory to the Council; or

(d) has, in the opinion of the Council, failed to comply with a condition attached to the certificate; or

(e) has contravened an order made in respect of the barrister by the Legal Profession Standards Board or the Tribunal; or

(f) has contravened a provision of this Act; or

(g) is in prison.

(4) Section 37 (Appeals relating to practising certificates):

(a) At the end of section 37 (1) (b), omit "or"

(b) After sections 37 (1) (b), insert:

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

(b1) attaches a condition to a practising certificate or varies a condition attached to a practising certificate; r

(c) In section 37 (2), after "suspension", insert ", or the attaching or variation of a condition,".

[Minister's second reading speech made in Legislative Assembly on 26 March 1992, Legislative Council on 19 November 1992]

Appendix B

PRACTICE REQUIREMENTS IN OTHER AUSTRALIAN STATES AND TERRITORIES AND THE UNITED KINGDOM

New South Wales and Queensland are the only Australian States that have a formally divided legal profession with no common admission as a barrister and solicitor.¹ Whilst the other states and territories allow a successful applicant admission as both a barrister and solicitor, over the years a practical division has emerged, as after admission an applicant often chooses to practise only as a barrister or solicitor. Separate Bars have consequently come into existence, and individual State and Territory Bar Associations with their own rules of conduct, pupillage requirements, and disciplinary procedures have become established. Whilst such rules are not legally enforceable, peer pressure has, to an extent ensured that such rules are generally complied with, if a barrister wishes to continue to practise successfully within that jurisdiction.

Some Bar Associations have not developed their own rules of conduct, possibly due to membership size and lack of resources, and barristers practising in that jurisdiction are governed by the Act that regulates the legal profession in the particular State or Territory.

Victoria

The enactment of the *Legal Profession Practice Act 1891 (Vic)* legally fused the barristers' and solicitors' branches of the legal profession in Victoria, and this distinction is maintained in the current Act, the *Legal Profession Practice Act 1958 (Vic)*.² In practice, however, the branches remain quite separate, for a person admitted as a "barrister and solicitor" of the Supreme Court of Victoria must make an election whether they wish to be inscribed on the Roll of Counsel or on the Roll of Solicitors.

If a person elects to practise as a barrister in Victoria, he or she must make application to sign the Roll of Counsel. The Roll of Counsel constituting the Victorian Bar is kept by the Victorian Bar Council, who upon being satisfied as to the applicant's qualifications, intention to practise as counsel in Victoria, and obtaining further undertakings as required, may, subject to its discretion, consent to the applicant's signing of the roll. The undertakings required of applicants include that they will abide by all rulings of the Victorian Bar Council and conform to all principles of practice, including ethical principles, and the rules known as application rules, reading rules and clerking rules. The Constitution of the Victorian Bar provides for these rules.

Traditionally the Victorian Bar has required that upon commencing practice as a member of the Bar, a reading period is to be spent in the chambers of a practising barrister. The reading period is designed to ensure that the proposed member of the Bar has some training in the rules of practice and an understanding of the ethical obligations of the profession. The period is currently nine consecutive calendar months, and a practical training course run by the Bar Council is generally required to be undertaken.

Certain exceptions exist to the reading requirement, including an applicant who has been a former member of the Bar and who practised for a period of not less than 12 months and whose name was removed from the Bar Roll voluntarily, an applicant who practised for a period of not less than 12 months, solely as a barrister in another jurisdiction where the common law of England is practised and who was not a member of any association of solicitors during that time; an applicant who is and who intends to continue to be employed as a Parliamentary Counsel for the Commonwealth or the State of Victoria, or as a Prosecutor for the Commonwealth or the State of Victoria, or an applicant to whom the Bar Council has granted an exemption.

An applicant required to read shall not engage in any legal work otherwise than as reader to the master for the practical training period.

Queensland

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

The admission of barristers in Queensland is regulated by the Barristers Admission Rules which are prescribed by the Judges of the Supreme Court of Queensland, but which are not the subject of any legislation. The Barristers Board of Queensland administers these rules. Neither the Bar Association of Queensland nor the Barristers Board play a role in issuing practising certificates.

The Barristers Admission Rules prescribe what qualifications are required for admission in Queensland and once these qualifications have been met, the applicant is issued with an unconditional practising certificate, there being no provision for conditional admission. Provision for conditional admission does however, exist for solicitors.³ Once admitted, the Barristers Board does not require any further pupillage or reading program to be undertaken.

Before admission, an applicant has to have obtained certain tertiary qualifications and undertaken and passed several practical tests and exercises.⁴ A person is eligible for admission if he or she has practised interstate or in the United Kingdom,⁵ although the Board may require in such cases that the applicant undertake a course of practical training.⁶

South Australia

The practice of the law in South Australia is regulated by the *Legal Practitioners Act 1981 (SA)*. Under the Act, every practitioner is admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia. The legal profession in South Australia has recently been the subject of a review by the South Australian Government, with the release of a Green Paper in 1990 and a White Paper in 1992. One of the issues that these papers addressed is the structure of the profession.

Until 1993, section 6 of the *Legal Practitioners Act 1981 (SA)* allowed the Supreme Court, upon the application of the Law Society, to divide legal practitioners into two classes, one class consisting of barristers and the other class consisting of solicitors.⁷ There was concern amongst a number of groups that this was giving rise to a divided profession, and that was not considered desirable, given the government's support for the continuation of a fused legal profession. On 6 May 1993 section 6 was repealed and a new section inserted which affirms that the legal profession in South Australia is fused, but at the same time does not prohibit the development of a separate bar on a voluntary basis.

The South Australian Bar Association Incorporated is an Association whose members have chosen to practise solely as barristers, and although virtually all barristers in South Australia are members of the association, membership is voluntary. There are currently 110 members.⁸ Whilst the bar has its own rules, these rules are not legally enforceable. As a consequence, if a member breaches the Bar Rules, that member may be expelled from the Bar Association, but the Association cannot prevent that person from continuing to practise. Disciplinary complaints against members are dealt with by a Committee established under the *Legal Practitioners Act*, and in appropriate cases, the Supreme Court.

The *Legal Practitioners Act 1981 (SA)* is responsible for the issue of practising certificates, and section 17a allows conditions to be imposed on the issue of new practising certificates in respect of training and experience, and such conditions can be enforced by the non-renewal or cancellation of the certificate if those conditions are not complied with. The Bar Association imposes no additional pupillage or reading requirements.

Tasmania

In Tasmania, a person is admitted to the Supreme Court as both a barrister and solicitor. Admission is governed by the *Legal Profession Act 1993 (Tas)*.⁹ There has been a small, separate Bar in Tasmania for many years. There is no statutory recognition of this association, however it does have independent rules and regulations, for example a person practising solely as a barrister cannot accept briefs from the general public, but only through a solicitor.

Australian Capital Territory

A person is entitled to be admitted as both a barrister and solicitor in the Australian Capital Territory (ACT). Once a person has been entered on and signed the Roll of Barristers and Solicitors, they are then entitled to practise in the Territory as a barrister and solicitor, as a barrister, or as a solicitor.¹⁰ The *Legal Practitioners Act 1970* (ACT) governs the issue of all practising certificates, for both barristers and solicitors. Unrestricted practising certificates are issued, but limitations can apply, including that an applicant must have served a two year clerkship in a State or Territory.¹¹

A small, separate bar has developed in the ACT, comprising of approximately 25-30 barristers, excluding those employed by the Director of Public Prosecutions Cth or ACT. The Bar Association has no control over the issue of practising certificates, nor does it have any formal pupillage or reading requirements. An informal arrangement exists whereby inexperienced barristers are given some instruction in the basic elements of practice. The Association and its members are governed by the *Legal Practitioners Act 1970* (ACT).

Northern Territory

Once an applicant has been admitted to practice in the Northern Territory he or she is entitled to practise as a barrister and solicitor, a solicitor or a barrister.¹² Section 22 of the *Legal Practitioners Act 1974* (NT) requires however, that in order to practise, the person must hold an unrestricted practising certificate or in the case of those wishing to practise as a barrister, a restricted practising certificate class 2, which allows the holder to practise as a barrister only and whilst under pupillage, to practise for a period, of no less than 12 months and no more than 2 years, with a local counsel who holds an unrestricted practising certificate.¹³

The Law Society of the Northern Territory is responsible for issuing practising certificates in relation to all legal practitioners, including those practising as counsel. The Bar Association has no jurisdiction in that regard. Those practising solely as barristers in the Northern Territory are governed by the *Legal Practitioners Act 1974* (NT). This Act is comprehensive and regulates the issue of practising certificates and the limitations that can be imposed on those certificates. As well as the limitations (discussed in the preceding paragraph) that can be attached to a practising certificate, the Law Society can refuse to issue a certificate if it is not satisfied that the applicant has passed the requisite exams, and has an adequate knowledge of accounts and legal ethics. Section 27 of the *Legal Practitioners Act 1974* (NT) provides further general grounds for the refusal, cancellation or suspension of practising certificates.

A review of the Act is being conducted, and it is envisaged that amendments will be introduced in 1994.

Western Australia

Western Australia has a fused legal profession, although a separate, independent Bar has emerged. In 1993 there were approximately 85 practitioners practising at the Independent Bar. The *Legal Practitioners Act 1893* (WA) vests statutory authority over the admission and discipline of all legal practitioners in the Legal Practice Board.

The Legal Practice Board has the power to regulate the issue, review and renewal or refusal of practice certificates, the conditions to which such certificates may be made subject, and the fees to be charged. A practitioner who wishes to practise in Western Australia must hold a practice certificate. Practice certificates are issued for a 12 month period commencing on 1 July each year.

There is no special practice certificate issued to practitioners who practise as barristers at the Independent Bar. There is freedom of movement to and from the independent Bar. Practitioners seeking to move to the Bar present themselves to the Full Court of the Supreme Court to announce their intention of moving. There is a separate Bar Association in Western Australia and most barristers are members. Membership is not a pre-requisite for practising at the Bar.

United Kingdom

The professions of barrister and solicitor in the United Kingdom are entirely separate and one cannot be a member of both professions at the same time. Whilst a solicitor has to obtain an annual practising certificate from the Law Society in order to practise, once a barrister has obtained his or her "final certificate", which permits that person to practise in his or her own right, no further certificates are required.

Since 1987,¹⁴ the Bar Council has been the central governing body of the Bar in England and Wales. Regulations which govern entry to the profession are called the Consolidated Regulations of the Four Inns of Court. The most recent version of these regulations was issued in 1992. There is also a Code of Conduct for the Bar of England and Wales which is published by the Bar Council and which sets out the rules of conduct which a barrister is under a professional duty to observe. The rules of conduct are not binding or legally enforceable and have no effect outside the profession. This is the same status as the New South Wales Bar Rules.

Before being called to the Bar, a person must have obtained certain academic qualifications and passed the Bar exam, the course of tuition leading to it, a series of practical exercises and certain other courses provided by the Council of Legal Education.¹⁵ This body is responsible for the examination and training of student members of the Inns of Court. It administers the Inns of Court School of Law and provides lectures, tutorials, and other courses, subject to directions given by the Bar Council on matters of general policy.

Once that stage is completed, persons wishing to practise as a barrister in England are then obliged to undertake pupillage with an approved barrister (a "Pupil Master") possessing at least five years experience in practise as a barrister.¹⁶ Pupillage may only be undertaken after the pupil has completed the "Vocational Course" conducted by the Council at the Inns of Court School of Law, and after sitting the "Final Assessment."¹⁷ The pupillage period is a compulsory twelve month period, and is divided into a non-practising period of six months, and a practising period of six months.¹⁸ Upon completion of the initial non-practising period of pupillage, the pupil obtains a certificate from his / her pupil master for submission to the Masters of the Bench and the Bar Council, certifying the satisfactory completion. A provisional Practising Certificate is then issued to the pupil.¹⁹

Guidelines for the conduct of pupillage are prescribed in Part II Annex C of the Code of Conduct. The guidelines state the general obligations and functions of a pupil and pupil master. Included in those duties is the requirement that the pupil draft pleadings and opinions, accompany the master to court on sufficient occasions so that he or she has the opportunity to do work and gain experience as is appropriate for a person commencing practice in the type of work done by the pupil master. For example, guideline 6 provides that:

In the second six months he should take a direct interest in and monitor all work his [the master's] pupil does on his own. In particular he should in relation to court appearances by his pupil give assistance before he goes into court and the opportunity for discussion afterwards. He should however take all reasonable steps to ensure that his pupil does not do so much on his own that his pupillage is impaired.²⁰

Upon completion of the second (practising) six month period, the pupil is provided with a certificate from the pupil master which certifies that the pupil has satisfactorily completed this period, which entitles the pupil to be registered as a practising barrister upon receipt by the Bar Council.²¹

Should the pupil master, or any other person able to sign a certificate (specified in reg. 49(f)) refuse to do so, the pupil may request the Masters of the Bench to grant a certificate, on the grounds that the certificate was wrongly withheld.²² Where the Masters of the Bench refuse to issue a certificate, an appeal lies to the Joint Regulations Committee (JRC), which may dismiss the appeal or allow it unconditionally or subject to conditions.²³

FOOTNOTES

1. The *Legal Profession Reform Act* (NSW) requires common admission of legal practitioners in New South Wales, but separate practising certificates will still be issued to barristers and solicitors.

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

2. *Legal Profession Practice Act 1958* Section 5. Prior to the *Legal Profession Practice Act 1891*, there were approximately seven fusion bills introduced into the Victorian Parliament
3. Section 40A, *Queensland Law Society Act 1952-85*.
4. Rule of Court, *Rules Relating To The Admission Of Barristers Of The Supreme Court Of Queensland*, 19-25. (Hereafter *Queensland Admission Rules*)
5. *Queensland Admission Rules*, 15(d)(3)-(5).
6. *Barristers Admission Rules Amendment Order (No 1) 1992*, s 5.
7. *Legal Practitioners Act, 1981(SA)*, s 6.
8. The development of a separate bar has taken place since the 1960's.
9. Prior to this Act the legal profession in Tasmania was governed by the *Legal Practitioners Act 1959*.
10. *Legal Practitioners Act 1970 (ACT)*, s 15A.
11. *Legal Practitioners Act 1970 (ACT)*, s15E.
12. *Legal Practitioners Act 1974 (NT)*, s19.
13. *Legal Practitioners Act 1974 (NT)*, s 6.
14. Prior to that time a body called the Senate of the Inns of Court and the Bar.
15. *Consolidate Regulations of the Four Inns of Court 1992*, Reg 18(a)(i), (b), Schs 12 and 13.
16. *Consolidated Regulations of the Four Inns*, Reg 42 and 43(a). Certain exceptions and dispensations from Pupillage apply (reg 45). There are also alternative modes of serving part of the Pupillage requirements (reg 46).
17. Regulation 44.
18. Regulation 43(b).
19. Regulation 49(d).
20. The complete provisions of Annex C are included in a letter sent by the Bar Council, 9 September 1993.
21. Regulation 49(e).
22. Regulation 49(g).
23. Regulation 49(h).

Appendix C

SUMMARY OF THE CONDITIONS AND RESTRICTIONS THAT MAYBE IMPOSED ON A SOLICITOR'S PRACTISING CERTIFICATES CONDITIONS

0	Sole practitioner/ Partner	Entitles the holder to practise as a sole practitioner or partner.
1	Employee - Private practice	Entitles the holder to practise only as an employe, not on his/her own account or in partnership.
2	Employee - Crown - Head Solicitor	Entitles the holder to practise as an employee of the Crown or a corporation prescribed for the purpose of Section 76(5) of the Legal Profession Act, 1987.
3	Employee - Crown - Head Solicitor	Entitle the holder to practise only as an employee of the Crown or of a corporation prescribed for the purpose of Section 76(5) of the Legal Profession Act,1987. It does not entitle his/her to practise on his/her own account or in partnership.
4	Employee - Corporation	Entitles the holder to practise only as an employee of a corporation or a person other than a solicitor.
5	Employee - Corporation	Entitles the holder to practise only as an employee, not on his/her to practise on his/her own account or in partnership.
6	Partner	Entitles the holder to practise only as a partner or employee of a solicitor who holds and has held an unrestricted New South Wales practising certificate for a period of three years. It does not entitle him/her to practise as a sole practitioner.
7	MCLE	Unless otherwise exempted the holder of this certificate is required to complete within a period of 12 months ending 31 March next year a course of Mandatory Continuing Legal Education as specified by the Council of the Law Society for that period.

[\[Link to text only version of table 1\]](#)

RESTRICTIONS

Restriction 1: - The holder of this certificate is not entitled to engage in private practice as a **sole practitioner** or in **partnership** until he/she has completed an aggregate period of **twelve months** practice as an **employee** of one or more solicitors engaged in private practice on his/her or their own account, one of whom holds an unconditional New South Wales practising certificate, or as an employee in a legal office recognised by the Law Society of New South Wales for this purpose and he/she has submitted satisfactory evidence thereof to the Law Society of New South Wales.

Restriction 2: -The holder of this certificate is not entitled to engage in private practice as a **sole practitioner** until he/she has completed an aggregate period of twelve months practice as an **employee** or **partner** of one or more solicitors engaged in private practice on his/her or their own account, one of whom holds an unconditional New South Wales practising certificate, or as an employee in a legal office recognised by the Law Society of

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

New South Wales for this purpose and he/she has submitted satisfactory evidence thereof to the Law Society of New South Wales.

Restriction 3: - The holder of this certificate is not entitled to engage in private practice as a **sole practitioner** or in **partnership*** until he/she has completed an aggregate period of months' practice as an **employee** (or **partner**) of one or more solicitors engaged in private practice on his/her or their own account, one of whom holds an unconditional New South Wales practising certificate or as an employee in a legal office recognised by the Law Society of New South Wales for this purpose and he/she has submitted satisfactory evidence thereof to the Law Society of New South Wales.

*As determined by Council.

Solicitors subject to Restriction 3 are required to satisfy a period of restricted practice either as an employee or partner as determined by Council and noted on the front of this certificate.

Restriction 4: - The holder of this certificate is not entitled to engage in private practice on his/her own account as a sole practitioner until the Law Society is satisfied, on the basis of evidence submitted by the holder, that he/she has completed:-

- (a) a period of twelve months, in aggregate, of approved practice as an employed solicitor.
- (b) an additional period of 2 years as the employee or partner of a solicitor who, at the commencement of that period held an unrestricted practising certificate in New South Wales for not less than 3 years and continued to hold such a certificate thereafter; and
- (c) The prescribed office management course.

OR Practice in Partnership

The holder of this certificate is not entitled to engage in private practice on his/her own account as the partner of another solicitor unless the Law Society is satisfied, on the basis of evidence submitted by the holder that -

- (a) the holder has completed a period of twelve months, in aggregate, of approved practice as an employed solicitor; and
- (b) that at least one of the solicitors with whom the holder intends to enter into partnership has held an unrestricted practising certificate in New South Wales for not less than 3 years.

Restriction 5: - Sole Practitioner - The holder of this certificate is not entitled to engage in private practice on his/her own account as a sole practitioner until the Law Society is satisfied, on the basis of evidence submitted by the holder, that he/she has completed:-

- (a) a period of, in aggregate, of approved practice as an employed solicitor;
- (b) an additional period of as the employee or partner of a solicitor who, at the commencement of that period held an unrestricted practising certificate in New South Wales for not less than 3 years and continued to hold such a certificate thereafter; and
- (c) the prescribed office management course.

OR Practice in Partnership

The holder of this certificate is not entitled to engage in private practice on his/her own account as the partner of another solicitor unless the Law Society is satisfied, on the basis of evidence submitted by the holder that: -

- (a) the holder has completed a period of, in aggregate, of approved practice as an employed solicitor, and

NSW Law Reform Commission: REPORT 72 (1994) - BARRISTERS' PRACTISING CERTIFICATES

- (b) that at least one of the solicitors with whom the holder intends to enter into partnership has held an unrestricted practising certificate in New South Wales for not less than 3 years.

Restriction 6: - The holder of this certificate:-

- (a) has had substantial experience in a particular field;
- (b) has given an undertaking to practise only in that particular field and to do that only as an employee or partner EXCEPT the holder may practice also in some other field or fields under the supervision of a solicitor holding an unrestricted certificate;
- (c) noting and allowing for the exception in (b) hereof, the employer or partners of the holder have given an undertaking to the Society that they will ensure that the holder will practise only in that particular field.

NB: Further restrictions are currently being drafted to incorporate the new guidelines which are effective from 1 January 1994.