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PUBLIC ISSUES COMMITTEE

THE CHANGING LEGAL PROFESSION

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Public Issues Committee
Auckland District Law Society
Discussion Paper

THE CHANGING LEGAL PROFESSION - OVERVIEW

Introduction

The Lawyers and Conveyancers Act 2006 has introduced a number of significant changes to the legal profession. Some of these relate to strengthening the self-governance and also the accountability of the profession. But others affect the nature of the legal profession in more subtle ways. Both of these developments are of public interest.

Because the Lawyers and Conveyancers Act 2006 provides framework rather than detail – though it is a significantly longer Act than the Law Practitioners Act 1982 – much of the detail involved in the implementation of the Act remains to be developed.

Because the legal profession is involved as it is with the judicial system there is a strong public interest in statutory regulation of the admission and qualification of practitioners. Further there is a requirement that high professional standards be preserved. To maintain these standards there must be a disciplinary body empowered to achieve this. The use of legislation is the only way this may be done effectively. The Law Practitioners Act 1982 set up a framework which allowed maximum flexibility. It went further than merely providing for licensing, but did not involve the Government in the profession.

The current proposal will see the majority if not all district law societies – which currently have significant representational and disciplinary functions – subsumed in the "one society" model into a unified New Zealand Law Society. This will potentially lead to a more efficient management of the profession, but at the expense of local democracy and self-government, and the risk of capture by sectional interests.

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THE CHANGING LEGAL PROFESSION

Introduction

The Lawyers and Conveyancers Act 2006 has introduced a number of significant changes to the legal profession. Some of these relate to strengthening the self-governance and also the accountability of the profession. But others affect the nature of the legal profession in more subtle ways. Both of these developments are of public interest.

Because the Lawyers and Conveyancers Act 2006 provides framework rather than detail – though it is a significantly longer Act than the Law Practitioners Act 1982 – much of the detail involved in the implementation of the Act remains to be developed. The New Zealand Law Society (NZLS) and the district law societies were involved in a process of developing papers relating to the Rules of Professional Conduct and Client Care, Senior Counsel, Conditional Fee Agreements, Trust Account Rules, Complaints Service and Standards Committee and the Fidelity Fund.

The design in the NZLS Constitution design papers takes account of the statutory requirements, including the fundamental distinction between the NZLS regulatory and representative functions. It also keeps faith with the basis on which districts agreed to the legislative model in 1998, that is, that the current structure in the 1982 Act and the NZLS Rules should be rolled over. This would preserve the current membership of the NZLS Council (from districts and sections), the current voting strengths and the current method of electing officers of the NZLS Board.

This paper considers several of the structural changes to the profession which the Lawyers and Conveyancers Act 2006 is making, concentrating on those which are less obvious.

Self-regulation and co-regulation

The Law Practitioners Act 1982 was a consolidation of legislation that dates originally from 1841, when the first ordinance was passed governing the admission of barristers and solicitors in New Zealand. It authorises the considerable powers of the Law Society and its district societies, and contains much of the law relating to practitioners' relations with clients and with each other.[1] The 2006 Act is more than simply a continuation of that legislative history; it is also a change in direction. This is due, in part, to overseas trends in governance in the learned professions.

It might even be said that a crisis of confidence is shaking the legal profession internationally. There have been accusations of a decline in standards, of a lack of

[1] Vol 448 NZPD 4465-68 (3 November 1982) per J K McLay, Minister of Justice

commitment on the part of lawyers, of high fees, vested interests in prolonging litigation, and of a reluctance to extend pro bono service to public causes or to participate in legal aid schemes. The legal profession has for long laid claim to being an honourable profession, with the judiciary, the litigants, and the public expecting and demanding from its members a much higher standard than those applicable to other professions.[2]

There are those who might say that the New Zealand legal profession has sought to make changes before there was ever any real need to do so just to stay ahead of what was expected might be political pressure. In the final analysis Parliament must ensure public confidence is maintained in what is a major element of the legal system.

The 1979 British Royal Commission on legal services thought that there were five main features of a profession:

> (1) A governing body (or bodies) [that] represents a profession and has powers of control and discipline over its members;
> (2) [Mastery of] a specialised field of knowledge. This requires not only the period of education and training ... but also practical experience and continuing study of developments in theory and practice;
> (3) Admission ... is dependent upon a period of theoretical and practical training in the course of which it is necessary to pass examinations and tests of competence;
> (4) [A] measure of self regulation so that it may require its members to observe higher standards than could be successfully imposed from without;
> (5) A professional person's first and particular responsibility is to their client. The client's case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means.[3]

Sociological studies of professions have traditionally focused on listing those activities which are accepted as professions in an attempt to differentiate profession from non-profession. An alternative approach holds that the ability to obtain and retain professional status is closely related to concrete occupational strategies and to wider social forces and arrangements of power. Such an approach leads to a consideration of the social meaning of occupational tasks (perhaps an easier task with the lawyer or doctor than the architect), the resources behind the emergence and the continuation of professionalism, and the social consequences of professionalism.[4]

Sociologists sought to demonstrate that governing bodies were unrepresentative and ineffective regulators; professions lacked the expertise they claimed; admission criteria had little relevance to the actual work of the professions; ethical rules were motivated by economic self-interest and failed to ensure competence; and

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[2] Venugopal, "The Legal Profession and Accountability" in "Selected extracts from papers given at the [LAWASIA 1993 Colombo] conference" [1993] NZLJ 414 at 415
[3] (1979) vol 1 at para 28,30
[4] Klegon, "The Sociology of the Professions: an emerging perspective" (1978) 5 Sociology of Work and Occupation 259

professionals repeatedly betrayed clients.[5] Producers of a service who succeed in constructing a marketable commodity only become an occupation. To become a profession they must seek social exclusivity. The consumer must acknowledge the value of the producers' services, and must be convinced that they cannot produce the services themselves.[6] Structural functionalists argue that this is not a conscious, self-interested strategy, but is simply the means by which society ensures that consumers receive quality services. Quality is maintained through controls on entry.[7] To promote competition the free-market advocates would reduce the controls on entry into professions, ignoring the fact that this is a means of maintaining standards in the public interest. If it were indeed true that professional status is for the benefit of the professional, then one would require strong evidence of some countervailing public benefit to justify any monopoly.[8]

The American Bar Association's Commission on Professionalism identified a profession with the placing of the interests of others ahead of one's own. In the case of the lawyer, the interests of the client must be placed ahead of those of the lawyer. The lawyer must also give precedence to the interests of the Courts and of the justice system, as well as to those of third parties and of society as a whole. The hallmarks of a profession are integrity and service.[9] Since service is a primary objective, the monetary reward must be relegated to second place. Rendering legal assistance to impecunious criminal defendants is a professional duty.[10]

A profession will tend to be concerned with personal confidence of the client in the technical competence of practitioners, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole.[11]

Because standards cover conduct and competence, both technically and ethically, control must be exercised over both entry into the profession and conduct within it. It follows that by membership practitioners may be subject to sanctions for acts or omissions which do not violate the criminal or civil law.[12] Only statutory regulation can ensure that the disciplinary sanctions are effective.

Controls over the conduct of members of the legal profession include personal remedies in tort, contract or equity; the criminal law; an educational standard for entry; procedural and substantive requirements for admission to the bar; restrictions as to the right of entry into private practice; procedural and substantive requirements for issuing a practising certificate; continuing requirement of physical and mental fitness; provision of taxation of bills of costs; provision for strict control over trust accounts;

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[5] Abel, *The Legal Profession in England and Wales* (1988) 7
[6] Ibid, 10
[7] Ibid, 12
[8] McKay, "Professions at risk" [1993] NZLJ 104
[9] Ibid
[10] *Darvell v Auckland Legal Services Subcommittee* [1993] 1 NZLR 111 at 120 per Williams J
[11] *Royal Commission of Inquiry into Civil Rights* (1968-71) (McRuer Report) Ontario No 1 Vol 3 at para 1161
[12] Flaus, "Discipline within the New Zealand Legal Profession" (1973) 6 VUWLR 337 at 338

requirements of membership of the NZLS (which has disciplinary procedures and sanctions).[13] A solicitor could not rely on their private involvement to opt out of any professional duty owed to the client.[14] Some of these controls belong to the wider law, but some are specific and reflect the fact that members of the profession voluntarily submit to higher standards of conduct than those required by ordinary citizens, and thereby render themselves liable for professional misconduct in addition to any penalty which the common or statute law may impose.[15]

The 2006 Act may be said to increase centralisation. Membership of the district law societies will cease to be compulsory, and indeed in the current "one society" model will cease to exist as separate entities. This could have significant implications for the independence of the legal profession.

The Lawyers and Conveyancers Act 2006 (NZ) will introduce a new regulatory and disciplinary system, and in this also centralisation may be seen. Part 7 of the Act (ss 120-272) comprises a significant proportion of the new, very lengthy and complex, statutory provisions for the legal profession.

The New Zealand Law Society will now not have compulsory membership, but all lawyers are required to have practicing certificates from it, and will be subject to its disciplinary processes. It is required to establish a complaints service.

There will be one or more Lawyers Standards Committees, as part of the New Zealand Law Society complaints service. Members of the Committees will be appointed by the law society, and there are to be at least three members, one at least of whom must be a lay member. The role of the Committee is to investigate complaints against lawyers or their employees (and to make its own inquiries where necessary), to promote the resolution of disputes through negotiation, conciliation and mediation, and to prosecute in the Disciplinary Tribunal. The law society or a Standards Committee may (and it is expected that they will) appoint investigators.

Centralisation, and the reduction of the independence of the districts, may be seen as potentially weakening the independence of the legal profession, and are therefore a matter of public interest. Centralisation is a threat to the independence of the legal profession because it removes an element of localised democracy. The districts provide a counterweight to the national society, which is necessary to adequately represent lawyers interests.

There had been an expectation that in the new system the district societies would continue to provide an element of representation. In the "one society" model the representation of the district societies is significantly reduced, with the inclusion of interest sectors, including the large firms (who already have the ability to influence decisions by block voting). The result is that, for the Auckland District Law Society, representation falls in relative terms from 44% to 28% in the New Zealand Law Society.

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[13] Ibid, 339

[14] *Sims v Craig Bell and Bond* [1991] 3 NZLR 535 (CA)

[15] Abeysuriya, "The Legal Profession" in "Selected extracts from papers given at the [LAWASIA 1993 Colombo] conference" [1993] NZLJ 414

The New Zealand Law Society will also acquire the assets (and liabilities) of those district law societies which decide, within the six months after 1st July 2008, to not incorporate. In the case of the Auckland District Law Society this amounts to some $14m, with a higher valuation as a going concern. In effect those societies which do not decide to remain independent will be nationalised. Significantly, the members of the Auckland District Law Society approved the "one society" model on the basis that the Auckland District Law Society would provide the majority of New Zealand Law Society member services. It remains unknown whether this will occur. Unfortunately for the district law societies, although they have to decide whether to subscribe to the "one society" model, or incorporate themselves as separate societies, within six months after 1st July, information on exactly what the model will mean in practise is likely to only be available in August or September. Hence the prospect remains that this is a takeover rather than a merger.

The management of the profession could become a mess if all the societies decide to remain fully separate unless the proposed constitution is amended to provide for that, but neither is centralisation good for the profession. What is good for the profession is good for the public, and vice versa.

A divided profession

A further development, and one which is less overt, is in the structure of the profession itself. There has recently been some discussion as to whether the continued division of the New Zealand legal profession into barristers and solicitors ought to be maintained. It has further been suggested that legal practitioners should all be styled lawyers, the distinction between barristers and solicitors being now largely – or so it is argued – irrelevant.[16] The Lawyers and Conveyancers Act 2006, in its name and in the use of the term "lawyer" in preference to barrister and solicitor, suggests that this perception is being acted upon.

The assumption that the New Zealand legal profession is currently a fused one is not, however, quite correct. The bar remains distinct, both legally and functionally, from what might be termed the office, as distinct from the court, side of the profession. Legislative provisions which break down this distinction, without consideration of their implications, ought to be treated with caution.

Legal professions may be categorised as divided between functions. In the classic English form this was between barristers and solicitors. However, this pure distinction, between the counsel who represent clients in court, and those lawyers who act directly for clients, is far from universal. Dual practice, where lawyers may act as barrister or solicitors at their choice, is rather more common.[17] In this situation a lawyer who chooses to undertake court or opinion work, and minimise his or her

[16] Ted Faleauto, Northern Law News 19 April 1996 p 4; Law Talk 453, 15 April 1996, p 3; Colin Amery, Law Talk 455, 13 May 1996 p 2; Robert McKee, Northern Law News 14 June 1996 p 6; Law Talk 459, 8 July 1996 p 2; C.M. Ruane, Law Talk 455, 13 May 1996 p 2.

[17] See the Annual Reports of the New Zealand Law Society.

contact with clients, may be called a barrister sole, to distinguish them from barristers and solicitors.[18] Some professions have been amalgamated,[19] but perhaps the only truly fused professions are those where lawyers use only one style, and there is no functional or legal division of the profession between court and office work.

Whilst the great majority of New Zealand legal practitioners are both barristers and solicitors,[20] if they are acting as a barrister they are only entitled to the (remaining) privileges of that calling if they are not also purporting to act also as a solicitor,[21] whether or not they may have a practising certificate as a solicitor also.[22] No person holding a practising certificate as a barrister and solicitor shall hold himself or herself out as practising as a barrister sole.[23]

A recent High Court case has highlighted the dangers for barristers who also conduct themselves as solicitors. In *McDonald v FAI (NZ) General Insurance Co Ltd v NZ Law Society*,[24] the immunity of barristers from actions relating to their conduct of a trial was shown to be qualified by the provision that they are not acting as both barrister and solicitor, by using reverse-briefs. This is where a barrister arranges for a solicitor to brief them, to comply with the rule that barristers do not work directly for clients. Circumstantial evidence suggests that this practice is wide-spread, and that the requirement that counsel act only on instructions from solicitors is honoured more in the breach than in the observance.

The House of Lords have since decided in *Arthur J S Hall & Co v Simons A P Barratt v Ansell & others (Trading as Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill*,[25] reversing *Rondel v Worsley*,[26] that advocates do not now have immunity. The

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[18] FORBES, J.R. (1979) The Divided Legal Profession in Australia: history, rationalisation and rationale (Sydney, Law Book Co).

[19] For New Zealand as a fused profession see *Barrott v Barrott* [1964] NZLR 988.

[20] "Barrister" includes a barrister and solicitor practicing as a barrister, whether or not he or she is also a solicitor; Law Practitioners Act 1982, s 2. For the role of a barrister see *Ziems v Prothonotary of Supreme Court of New South Wales* (1957) 97 CLR 279, 298; 64 ALR 620 (HCA).

[21] Privileges include immunity from civil arrest, whilst going to, remaining at, and returning from court; *Meekins v Smith* (1791) 1 Hy Bl 636; *Childerston v Barrett* (1809) 11 East 439; *Pitt v Coombs* (1834) 3 Nev & MKB 212; *Newton v Harland* (1839) 8 Scott 70; *Anon* (1839) 9 LJCP 176. There is also privilege in judicial proceedings for defamatory statement: *Rawlinson v Oliver* [1995] 3 NZLR 62 (CA); *Munster v Lamb* (1883) 11 QBD 588 (CA); *Brook v Montague* (1605) Cro Jac 90; Defamation Act 1992, s 14(1).

[22] Rights of audience are accorded all barristers and solicitors, and barristers (s 43 (4)), though those practitioners who are admitted as solicitors only have rights of audience in the lower courts; *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA); *Mihaka v Police* [1981] 1 NZLR 54.

[23] Rule 11.02 of the Rules of Professional Conduct for Barristers and Solicitors (1998) (5th ed, Wellington, New Zealand Law Society).

[24] Unreported, Giles J, Auckland, CP 507/95, 24 September 1998, note by Hanne Janes, Barrister, (1998) Northern Law News issue 40 p 5.

[25] [2000] UKHL 38, 20 July 2000.

New Zealand courts are not however bound to follow precedents set by the House of Lords,[27] but it will doubtless prove very persuasive. This development also raises questions about the proper role and organisation of the legal profession.

There is manifestly a distinction between their two types of work. Indeed, in recent decades the greatest increase in legal personnel has been among the specialist counsel. But not every jurisdiction retains this distinction.

Today, to obtain entry into the legal profession in New Zealand candidates must pass the degree of bachelor of laws in one of the university law schools, pass a professional legal studies course run by the Institute of Professional Legal Studies and the College of Law, and apply to the High Court for admission as a barrister and solicitor of the High Court.[28]

Since 1982 admission has been both as barrister and solicitor, admission as one or the other having ended. Most of those admitted to the profession in New Zealand practice as both barrister and solicitor. The continued division of the profession derives from the practice in Britain, but is nonetheless a functional one.

An increasing number of lawyers practice as barristers sole. In 1989 the figures were 3.2%, 1993- 6.2%, 1996- 9% barristers sole. This was even more noticeable in commercial centres. In Auckland on 30th November 1998 there were 410 barristers sole and 28 Queen's Counsel, out of a total of 3,162 practitioners – 13.8% counsel.[29]

There is not an effectively fused legal profession in New Zealand. This is because the rights and duties of barristers and of solicitors are still distinct. Thus solicitors must maintain trust accounts, but not barristers sole. Solicitors must have three years experience before they are permitted to practice on their own account or as partners. Barristers, who are expected to have little or no direct contact with their clients, may commence professional practice without having had any experience.

Within the common law jurisdictions, the only truly fused professions are those where lawyers use only one style, and there is no functional or legal division of the profession between court and office work. This is found, for example, in Zimbabwe, where legal practitioners, formerly advocates and attorneys, form a single profession. Legal practitioners, a single profession, have replaced barristers and solicitors in Ghana. Advocates form a single profession in the Isle of Man, and lawyers in Papua New Guinea. The introduction of the style "practitioner" for the admission of new lawyers in some Australian states, and now "lawyer" in New Zealand, would appear to be an attempt to promote fusion.

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[26] [1969] 1 AC 191, followed in New Zealand in *Rees v Sinclair* [1974] NZLR 180 (CA).

[27] *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741.

[28] Law Practitioners Act 1982; Law Practitioners Admission Rules 1987 (SR 1987/223).

[29] *Law Directory 1989, Law Directory 1998.*

The abolition of the appointment of Queen's Counsel, and its replacement with that of Senior Counsel – now open to partners in law firms – also serves to further blur the distinction between barrister and solicitor.

The inclusion of provision for the comparatively small profession of conveyancers might also be criticised, on the basis that it is too small and undeveloped to be included in the same measure as covers the regulation of barristers and solicitors. Given that the number of barristers, and barristers and solicitors exceed that of conveyancers by something of the order of one hundred to one, it would be preferable to make alternative provision for the profession of conveyancers, if it need be regulated at all. Even in England and Wales, with a much more established profession of conveyancers, they are comparatively uncommon, and not regulated by the same laws as barristers and solicitors.[30] If the number of conveyancers dramatically increases then alternative regulatory arrangements are even more justified.

The question of whether the legal profession remains separated into two divisions is not one which can be easily answered.[31] Both common law and civil law jurisdictions follow functional divides, and increased specialisation in legal practice is unlikely to lessen the need for such a division. Indeed, the proportion of New Zealand lawyers in practice as barristers sole has steadily risen in the course of the last several decades. The division of barrister and solicitor may be a legacy of our common law heritage, but it is a sensible and widely followed practice. Whether it will continue or not will ultimately depend upon a combination of market forces and governmental decision-making, just as the legal professions have always evolved. But amalgamation should not occur as a result of legislative provisions which were ostensibly introduced for other reasons.

Conclusion

Because the legal profession is involved as it is with the judicial system there is a strong public interest in statutory regulation of the qualification and admission of practitioners. Further there is a requirement that high professional standards be preserved. To maintain these standards there must be a disciplinary body empowered to achieve this. The use of legislation is the only way this may be done effectively. The Law Practitioners Act 1982 set up a framework which allowed maximum flexibility. It went further than merely providing for licensing, but did not involve the Government in the profession.

The policy behind the Law Practitioners Act was largely unstated. Its social objective was to maintain a balance between the public and domestic interests of the profession. The Act generally achieved this objective in what was a good example of general empowering legislation.

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[30] In 2004 there were 96,757 solicitors, 14,364 barristers, 850 licensed conveyancers. In addition there were 1,500 registered patent attorneys, 900 notaries public and 857 registered Trade Mark attorneys. There were also 22,000 legal executives.

[31] Or three if one includes the notaries public – for that profession, see READY, N. (1992) Brookes' Notary 11th ed (London, Sweet & Maxwell).

A lesson which might be taken from an examination of the Law Practitioners Act from 1861 to 1982 is that the legislation regulating professions should be as general as possible, with the professional body free to determine what conduct infringes professional conduct. However, the Lawyers and Conveyancers Act 2006 may have gone too far towards generalities, and while, in effect, at the same time compelling the district law societies to submit to the NZLS. A return to the less complex model typified by the Law Practitioners Act 1955, or even that of 1982, would be desirable.