REGULATION OF THE
Legal Profession

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FOREWORD

The publication of this paper comes at an important time for the future of the legal profession in New Zealand. Regulation that is specific to the legal profession has been the subject of increasing debate in recent years. Such regulation relates to the use of the coercive powers of the government to control the terms on which people may supply legal services. It is distinguished from voluntary arrangements that are enforced by contract in accordance with the law that applies to all activities.

A government review of occupational regulation that affects the provision of legal and conveyancing services was started in New Zealand in 1999. A private member's bill introduced into parliament in 1997 sought to relax regulatory restrictions on conveyancing.

It is not clear exactly what form future changes will take. Four models might be said to be under consideration. Their main features may be characterised as follows:

- The current model. In this model the New Zealand Law Society and district law societies perform both representative and regulatory functions. Membership is compulsory and only members holding practising certificates can lawfully provide the public with legal services of the kind normally performed by lawyers (lawyer services). The provision of lawyer services is licensed.
- The Law Society model proposed by the president of the New Zealand Law Society in a letter to practitioners dated 15 September 1998. Although in this model membership of law societies is voluntary, the New Zealand Law Society, however structured, would continue as the monopoly regulator. The regulatory regime which it administers applies to all people who offer lawyer services to the public.
- The E-DEC model proposed in a 1997 report commissioned by the New Zealand Law Society. In this model, regulatory functions are the responsibility of a new agency, the New Zealand Law Council. Practitioners elect the Council's governing body. People who hold themselves out as lawyers or use the title lawyer would be required to be certified by the New Zealand Law Council. People, other than certified lawyers, are generally free to offer lawyer services to the public but are not permitted to use restricted titles. The New Zealand Law Society and district law societies would be stripped of their regulatory functions and membership would be voluntary.
- The McEwin model proposed in this paper in which anyone can offer lawyer services to the public except for a few services such as court appearances as counsel. The courts are responsible for regulating who may appear as counsel. The criteria focus on an applicant's capacity to fulfil his or her duty as an officer of the court. They do not aim to regulate the provision of legal services or the legal profession generally. Consideration would be given to whether certain lawyers should be certified as in the E-DEC model but any such certification would be the responsibility of an independent regulatory agency. Any such agency would not be responsible for regulating the right

of lawyers to appear in court as counsel. The statutory monopoly conferred on the New Zealand Law Society and district law societies is abolished. Membership of professional organisations is voluntary. They would set and enforce their own rules and standards. In the McEwin model professional organisations do not perform regulatory activities.

There is a good case for relaxing regulatory constraints on the practice of the law. The three reform proposals provide for voluntary membership of professional bodies that represent the interests of lawyers. They differ on the following two key questions:

- Whether the right to practise law should continue to be restricted to licensed lawyers (New Zealand Law Society model) or largely open to other people (E-DEC and McEwin models).
- Whether regulatory functions should be the responsibility of an agency that is independent of the legal profession (McEwin model) or a body controlled by the legal profession (E-DEC and New Zealand Law Society models).

In this paper, Ian McEwin makes the case for a substantial relaxation in regulation that is specific to the provision of legal services and the legal profession. His report is presented as a contribution to the debate on the future regulation of the legal profession.

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EXECUTIVE SUMMARY

The central role of the government in relation to the provision of legal services and other activities is to establish a regulatory framework that encourages individuals and firms to take decisions that will maximise the overall welfare of the community.

The legal profession is subject to the general law, including the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the criminal law and the law of passing-off. The question, therefore, is whether there should, in addition to these laws, be regulation specific to the legal profession (occupation-specific regulation) and, if so, what form it should take.

The main contemporary ground advanced in support of the current regime of licensing legal services that are normally performed by lawyers relates to information failures. It is claimed that consumers would not be able to evaluate legal services that would be available in the absence of occupation-specific regulation. In addition, the current regime serves to protect court and other systems, such as the land registration system, in which there is a significant public interest.

However, the information conveyed by licensing is limited. It merely separates potential providers into two groups – licensed and not licensed, or lawful and unlawful respectively. This does not help consumers to distinguish different levels of quality within the licensed group.

The regulation of the legal profession leads to costs. They arise from restricted entry into the practice of law, barriers to innovation such as inhibiting the development of multi-disciplinary professional firms and the formation of international law firms, restrictions on the use of organisational forms other than sole traders and partnerships, and administration and compliance costs.

The legal profession is controlled by the New Zealand Law Society (NZLS) and district law societies. They are statutory monopolies. Their functions involve a conflict between the interests of the public and members. The NZLS and district law societies face relatively weak incentives to act in the interests of members in performing their representative role because they are protected from competition.

Significant benefits are necessary to offset the costs to the community of occupation-specific regulation of the legal profession. The extent of these benefits is doubtful. Consumer protection grounds alone cannot justify restrictions on the supply of most classes of legal services. Such restrictions are neither necessary nor sufficient to protect the public from incompetent and dishonest practitioners.

A competitive market for legal services, reinforced by standard remedies for fraud, breach of contract and negligence, generally offers consumers the best combination of price and quality. Only a limited number of specific tasks explicitly required by law to be carried out by lawyers should be reserved for lawyers.

The courts should maintain either a single roll of lawyers or a roll of advocates entitled to appear in court and a roll of solicitors entitled to file documents. People with approved qualifications and experience should be able to enrol as either or both. The courts would be responsible for establishing the criteria for admission and removal of practitioners from the rolls. The criteria should focus on an applicant's capacity to fulfil their duty as an officer of the court and should not be aimed at regulating the provision of legal services or the legal profession in general.

The licensing of conveyancing should be abolished and any person or firm should be permitted to engage in conveyancing. If there is a concern that the normal protection available to consumers through competition and the general law is insufficient, conveyancing could be subject to a certification system. The public would be able to use a certified or uncertified conveyancer.

The statutory monopoly conferred on the NZLS and district law societies should be abolished. Membership of those bodies or other organisations representing lawyers and other providers of legal services should be voluntary.

Forms of business organisation and mechanisms for consumer protection, such as fidelity funds and professional indemnity insurance, should be matters for the voluntary associations and not for a monopoly body to determine.

If there are concerns that this approach would leave consumers with too little information to judge the quality of practitioners, consideration could be given to the introduction of a certification scheme. Any such scheme should be administered by a body independent of the legal profession, for instance a government department or statutory body. The use of titles such as lawyer, barrister and solicitor would be protected by statute. There would be no prohibition on people who are not certified from providing legal services (other than court appearances and any other restricted work) provided that they do not use protected titles.

The proposals outlined in this report would provide considerable benefits to consumers by reducing the costs of legal services and increasing the range of providers of some such services. The proposals would also benefit providers by reducing impediments to the efficient provision of legal services. The special role which lawyers play in the administration of justice is acknowledged in respect of those lawyers who elect to be admitted to the rolls of lawyers, advocates or solicitors by the court.

1

INTRODUCTION[1]

Lawyers provide important services which impact significantly on family, commercial and other social relationships. Society has an interest in ensuring that appropriate legal services are provided at least cost. Natural justice requires that people have access to competent counsel. Lawyers also provide the pool from which judges are chosen. Society therefore has an interest in the regulatory regime that governs the provision of legal services and its interest extends beyond consumer protection and the efficient supply of services to clients.

While the legal system as a whole provides benefits for the community, such as increased security, the main reason advanced for the regulation of the legal profession is the need to protect consumers. Regulation that is specific to the practice of law (occupation-specific regulation) and is additional to the rules that apply to all activities and occupations is the prime concern of this paper. Occupation-specific regulation relates to the use of the coercive powers of the government to control the terms on which people may supply and buy legal services. It is distinguished from voluntary arrangements that are enforced by contract in accordance with the law that applies to all activities. Occupation-specific regulation may provide benefits for consumers, but it also imposes costs on them. The key question to be examined is whether present arrangements advance overall community welfare.

In an assessment of the efficacy of the present regime, four main questions need to be addressed:

- What areas of legal activity, if any, should be reserved for licensed lawyers?
- Is a licensing scheme necessary? Or would a certification regime, where there are no restrictions on who can practise but only qualified practitioners can use certain titles such as lawyer or solicitor, be preferable?
- Who should regulate the provision of legal services? Should control of the legal profession continue to rest with a statutory self-regulating monopoly, or should the courts and/or government agencies undertake appropriate regulatory functions and voluntary professional bodies be allowed to be formed to represent the interests of lawyers and to create and enforce rules of professional conduct?

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[1] This paper relies extensively on my papers 'Access to Legal Services: The Role of Market Forces' prepared for the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs, February 1992, and 'A Critique of the Paper Prepared by the Tasman Institute Entitled 'Monopolistic Restrictions in the Provision of Advocacy Services'', August, 1992, prepared for the Victorian Bar Council.

- What rules should govern professional practice? How do we best ensure that rules developed to enforce standards of professional behaviour do not turn out to be anti-competitive? Should the Commerce Commission or specialist regulators assess professional rules? If we relax controls on the right to practise law and allow professional bodies that represent the interests of lawyers to be voluntary, do we even have to ask these questions?

In attempting to answer such questions, this paper will first summarise the current regulatory regime and present information on the size and significance of legal services. It then discusses the regulatory framework, and examines whether services provided by lawyers are productive, discusses efficiency and equity criteria, and analyses whether there are sound public policy grounds for licensing the providers of legal services.

The paper turns next to the question of which types of legal work should be reserved to lawyers and uses conveyancing and litigation as examples. The benefits of opening most legal services to competition are outlined.

The paper asks who should regulate lawyers before it examines the specific rules governing barristers and the post-admission rules that apply to both barristers and solicitors. The conclusions and recommendations are then presented.

2

THE REGULATION OF THE PRACTICE OF LAW

2.1 Initial regulation of the practice of law

The practice of law in New Zealand has been regulated since the 1840s.[2] From the beginning it has been closely related to the administration of justice through the courts. Section 13 of the Supreme Court Ordinance 1841 empowered that court:

> ... to enrol as barristers those persons only who had been admitted as barristers or advocates of Great Britain or Ireland, and as solicitors those only who had been admitted as solicitors, attorneys, or writers in one of the Courts at Westminster, Dublin or Edinburgh, or as proctors in any Ecclesiastical Court in England, or who had served a clerkship with a solicitor under a general rule of the Supreme Court.[3]

The queen, acting on the advice of the Colonial Office, disallowed the ordinance in 1843. Among other defects, it excluded barristers trained in New Zealand and other colonies from enrolment.

Another ordinance passed in 1844 substantially repeated the qualifications contained in the first ordinance. In addition, barristers who qualified under any New Zealand prescription for admission and solicitors who had established themselves in the exercise of their profession before the first ordinance was adopted were eligible to be enrolled. Clerks could be admitted to the bar after completing five years' articles in New Zealand. Qualifications obtained in Australia were recognised by the Supreme Court Practitioners Act 1853.

The Law Practitioners Act 1861 required every registrar of the Supreme Court to keep separate rolls of barristers and solicitors admitted to the bar. That Act replaced all previous provisions relating to the admission of barristers and solicitors. The new qualifications for barristers and solicitors were "separately stated according to both local examination and ... overseas admission, together with separate conditions for admission in New Zealand".[4]

The discipline of lawyers was initially in the hands of the Supreme Court. In 1841 and 1844 provision was made for the removal of practitioners from the rolls upon reasonable cause. The conclusive step in striking a barrister or solicitor off the rolls was passed to the

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2 The historical information presented in this section is largely drawn from Cooke, Robin (ed) (1969), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, AH & AW Reed, Wellington, pp 138–165.

3 *ibid* p 138.

4 *ibid* pp 139–140.

Court of Appeal in 1862. The New Zealand Law Society (NZLS) did not establish a disciplinary committee until 1935. The first steps against an unqualified conveyancer were taken in the Conveyancing Ordinance 1842.[5]

In 1869 legislation was passed to establish the NZLS in order to enable barristers and solicitors to manage their own affairs. Statutory provision for the establishment of district law societies came later but it was not until 1913 that they became bodies corporate.

2.2 Regulation of the practice of law today

The practice of law in New Zealand is now governed by the Law Practitioners Act 1982 (the Act).[6] In order to practise, a person must:

- be admitted by the High Court of New Zealand as a barrister and solicitor;
- be on the roll of barristers and solicitors of the High Court of New Zealand; and
- be the holder of a current practising certificate issued annually by one of the 14 district law societies.

To be admitted to the bar as a barrister and solicitor a person must:

- be aged 20 years or over;
- have passed the prescribed examinations in general knowledge and in law, namely completion of a bachelor of law (or equivalent) degree along with a 13 week full-time course of study administered by the Institute of Professional Legal Studies (or an equivalent course);
- be of good character and a fit and proper person to be admitted;
- take an oath to truly and honestly conduct themself in the practice of a barrister and solicitor according to the best of their knowledge and ability; and
- pay the prescribed admission fee.[7]

Once admitted to the bar, all barristers and solicitors are enrolled by the registrar of the High Court on the roll of barristers and solicitors.[8] Rules of court relating to the admission of barristers and solicitors may be made in terms of the Judicature Act 1908 provided that they are not inconsistent with the Act.

Although both professions, barristers and solicitors, exist in law in New Zealand, all practitioners are admitted as barristers and solicitors. It is not possible to be admitted only as a barrister or only as a solicitor, or to be admitted on a limited basis, for example

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5 *ibid* p 142.

6 The discussion in this section draws on the Act and information contained on the New Zealand Law Society's web site, http://www.nz-lawsoc.org.nz.

7 Law Practitioners Act 1982, s 44, s 45, s 46 and s 50.

8 Law Practitioners Act 1982, s 50.

on the condition that the applicant will practise in only certain areas of the law. A practitioner may, however, elect to practise as a barrister sole and not as a solicitor.

The body responsible for prescribing academic and practical legal qualifications is the New Zealand Council of Legal Education, a statutory body established by the Act.[9] Its membership comprises the following:

- two judges of the High Court and a district court judge;
- five members of the NZLS;
- the five deans of university law faculties;
- two law student representatives;
- a person (other than a practitioner or a law student) nominated by the minister of justice; and
- not more than one co-opted member.[10]

A barrister and solicitor may be struck off the roll on publication in the *New Zealand Gazette* of an order of the Court of Appeal, the New Zealand Law Practitioners Disciplinary Tribunal, or the High Court on appeal from the New Zealand Law Practitioners Disciplinary Tribunal.[11] There is also provision for voluntary removal from the roll.[12] In both cases a person may be able to be re-enrolled.

In order to practise law a person must hold a practising certificate as a solicitor or a barrister, or both.[13] This allows for an independent bar comprising barristers sole. Most practitioners, including those who practise only as solicitors, hold practising certificates as barristers and solicitors.

There are three main groups of barristers and solicitors:

- those in private practice on their own account (either alone or in partnership with others as partners or principals);
- those employed by solicitors in private practice on their own account; and
- those employed by a government department or corporate body.

Additional requirements must be met, including legal experience in New Zealand of at least three years during the preceding eight years, before a solicitor can enter private practice on their own account. This requirement can be waived by the High Court. A

9 Law Practitioners Act 1982, s 31 and s 38.

10 Law Practitioners Act 1982, s 31.

11 Law Practitioners Act 1982, s 51.

12 Law Practitioners Act 1982, s 52.

13 Law Practitioners Act 1982, s 56.

practitioner is also required to take a course and pass a test in trust accounting.[14] These requirements do not apply to a person who proposes to practise as a barrister sole.

There are no continuing education requirements or general tests of competency that barristers or solicitors are required to satisfy to renew their practising certificates or to remain on the roll of barristers and solicitors. However, the NZLS was recently authorised to make rules requiring the holders of practising certificates to undertake ongoing education relating to the law or the practice of the law.[15]

The right to appear in the New Zealand courts is not available to foreign lawyers who have not been admitted by the High Court of New Zealand. However, the Trans-Tasman Mutual Recognition Act 1997 enables a person who is registered to practise in Australia to apply to the New Zealand High Court for admission and then to the relevant New Zealand district law society for a practising certificate. The NZLS takes the view that Australian lawyers who wish to practise on their own account in New Zealand must satisfy the criteria that apply to New Zealand lawyers.

The issue of a practising certificate by a district law society carries membership of that society and the NZLS, the governing body of the profession. The general functions of the NZLS are to:

- promote the interests of the legal profession and the interests of the public in relation to legal matters;
- promote and encourage proper conduct among the members of the legal profession;
- suppress illegal, dishonourable, or improper practices by members of the legal profession;
- preserve and maintain the integrity and status of the legal profession;
- promote opportunities for the acquisition and diffusion of legal knowledge and skills relating to the practice of law;
- assist in and promote the reform of the law; and
- provide means for the amicable settlement of professional differences between members of the legal profession.[16]

Each district law society has within its district the same functions and powers as the NZLS.[17] Every district law society also has the function of providing and maintaining law libraries.

The statutory functions of the NZLS and district law societies overlap. The NZLS generally makes the rules under which lawyers practise whereas their enforcement is a prime

[14] Law Practitioners Act 1982, s 55.

[15] Law Practitioners Amendment Act 1999, s 2.

[16] Law Practitioners Act 1982, s 4.

[17] Law Practitioners Act 1982, s 26. District law societies do not have power to levy fees under s 9 of the Act but have power to do so under s 25.

responsibility of district law societies. However, if a complaint is made the law firms involved may be required to satisfy both the NZLS and the appropriate district law society that they have complied with the rules. Penalties may be imposed on practitioners found guilty of improper conduct. In serious cases a lawyer's right to practise is affected and they may be struck off the roll of barristers and solicitors.

The NZLS has extensive powers to make rules under section 17 of the Act. These rules are mostly for the good governance of the NZLS and its members and for the effective exercise of its functions and powers.[18] The following provisions contained in the *Rules of Professional Conduct for Barristers and Solicitors* (the Rules) are of particular interest from a regulatory perspective:[19]

- A practitioner must not, without good cause, refuse to accept instructions for service within the practitioner's fields of practice from any particular client or prospective client (rule 1.02).
- A practitioner has a duty, subject to availability, to administer oaths or take declarations (rule 7.02).
- The overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client (rule 8.01).
- No person holding a practising certificate as a barrister and solicitor shall hold himself or herself out as a barrister sole (rule 11.02).
- A barrister sole must generally accept instructions only from a solicitor and may not accept instructions direct from a lay client (rule 11.03). A barrister sole may act without instructions from a solicitor where he or she is instructed to act in a judicial or quasi-judicial capacity, or is instructed by a person or body acting in such a capacity. Similarly, a barrister may so act where he or she is instructed by the NZLS or a district law society, by a registered patent attorney, a lawyer practising overseas, an official assignee or official liquidator, or is acting as a revising barrister pursuant to any enactment. A barrister sole may also act without instructions from a solicitor where he or she is assigned to a person receiving legal aid, acts as a duty solicitor, provides assistance to a legal advice service operating on a non-profit basis, advises a legal aid committee, acts under a detention legal assistance scheme, or is advised in any other case by the ethics committee of the NZLS that he or she may act (rule 11.04).
- A practitioner shall charge a client no more than a fee that is fair and reasonable for the work done, having regard to the interests of both the client and the practitioner (rule 3.01).

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18 Law Practitioners Act 1982, s 17(1).

19 New Zealand Law Society (1999), *Rules of Professional Conduct for Barristers and Solicitors*, http://www.nz-lawsoc.org.nz. A summary of selected rules is presented.

- A client has an unequivocal right to change from one practitioner to another (rule 6.05). The commentary on the rule indicates that it is not permissible to exert persuasion, influence or pressure on a former client to return to a practitioner.
- Advertisements to, or any other communications with, any person relating to the services of a practitioner must be consistent with the maintenance of proper professional standards (rule 4.01). The commentary on the rule notes that advertisements may indicate a field or fields of practice in which the practitioner is prepared to take instructions but must not be comparative in relation to other practitioners so as to denigrate them, either individually or as a group. An advertisement by a barrister sole must make it clear that members of the public may instruct a barrister sole only through a solicitor.
- A practitioner must not, in any advertisement, claim to be a specialist or to have special expertise in any field or fields of practice unless such a claim is capable of verification on inquiry (rule 4.02).
- In offering services direct to members of the public other than by normal advertising channels, a practitioner must ensure that approaches to persons who are not existing clients are made in accordance with proper professional standards and not in a way that is intrusive, offensive or inappropriate (rule 4.03).
- A practitioner must accept legal responsibility for his or her actions and must generally be prepared to meet any liability arising out of any act, error or omission in the course of the practitioner's professional duties or business. A practitioner is not permitted to exclude by contract his or her liability to a client unless the practitioner buys professional indemnity insurance that at least satisfies the minimum level specified and advises the client of all aspects of the contract of limitation (rule 1.12).
- The name of a practitioner's firm must be one which is not likely to be misleading as to the nature or structure of the firm, bring the profession into disrepute, or be unfair to other practitioners or the public (rule 2.01).
- A practitioner must ensure that each separate place of business is at all times under effective and competent management by a practitioner who is qualified to practise on his or her own account as a solicitor, whether in partnership or otherwise (rule 2.04).
- A practitioner shall not, while the holder of a practising certificate, engage in a business or professional activity other than the practice of law. An exception is made where the business or professional activity will not detract from the standards of independence and professionalism expected from a practitioner. Similarly, the activity must not have a harmful effect on the privilege or confidentiality attaching to communications between a practitioner and a client, and must not have the potential to create a conflict of interest on the part of a practitioner. A practitioner shall not become a partner of a firm or a shareholder in a company that practises a profession other than law except as a registered patent attorney or as a principal of a firm practising as patent attorneys (rule 2.03).

- A barrister sole may not practise in partnership (rule 11.01).

Solicitors are required to deposit all client money into a trust account at a bank in New Zealand.[20] They have a duty to ensure that, whenever practicable, such money earns interest for the benefit of the client unless they are instructed otherwise.[21] Solicitors are also required to nominate at least one trust account for the purposes of Part VIA of the Act. Where any money held on behalf of any person is required to be paid into a trust account and it is not reasonable or practicable to invest the money at interest for the benefit of the client, the money is to be paid into the nominated trust account.[22]

Every bank at which a nominated trust account is held is required to pay interest at the rate determined in accordance with the provisions contained in the Act.[23] The interest is paid into the NZLS special fund.[24] This fund finances community law centres, and research and education programmes through the Legal Services Board and the New Zealand Law Foundation. The Board received $5.2 million from the NZLS special fund in 1997/98. Any surplus in the New Zealand Law Society special fund is divided equally between the Legal Services Board and the New Zealand Law Foundation. The Foundation may fund activities such as law libraries, legal research, practical training for law students and practitioners, and the Council of Legal Education.

A solicitor engaged in public practice is required to contribute to the solicitors' fidelity guarantee fund. This fund is applied to meet claims, legal expenses and costs arising from loss due to theft by practitioners. The fund does not cover losses relating to money invested with a solicitor after April 1993.[25] There is a similar scheme which may cover a partner in a law practice for loss arising from theft by a fellow partner.[26]

2.3 Classification of the present regulatory regime

It is useful to distinguish between the two main forms of professional regulation, licensing and certification. A form not considered is registration. These terms are defined as follows:

- A licensing scheme is one in which an activity cannot be undertaken lawfully unless the practitioner holds a licence issued by a regulatory authority. In addition to the legal profession, many health professions such as medical practitioners, dentists, dental technicians, optometrists and pharmacists are subject to licensing. Licensing requirements also apply to (amongst others) plumbers and gas fitters.

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20 Law Practitioners Act 1982, s 89.

21 Law Practitioners Act 1982, s 89A.

22 Law Practitioners Act 1982, s 91K.

23 Law Practitioners Act 1982, s 91L.

24 Law Practitioners Act 1982, s 91M.

25 Law Practitioners Act 1982, Part 1X.

26 Law Practitioners Act 1982, Part X.

- A certification scheme is one in which a regulatory authority may certify that an applicant has particular skills or expertise, but a person can practise without such a certificate. Anyone may practise as an accountant, for example, but there is a certification scheme that allows certain accountants to describe themselves as chartered accountants. (A few activities are reserved by law to chartered accountants, such as the audit of public companies, so those activities are licensed.)
- The term 'registration' is sometimes used to mean a licensing scheme, sometimes a certification scheme and sometimes to describe a scheme whereby a register is maintained and a fee may be charged for registration but there is no right to refuse registration. Examples are the registration of businesses for goods and services tax (GST) and the registration of motor vehicles.[27]

The provision of most legal services in New Zealand is licensed. It is the most restrictive form of occupational regulation.

The exclusive right of lawyers to provide certain legal services (lawyer services) arises from the following provisions of the Act:

- Section 54 provides that no person shall act as a barrister or as a solicitor in any court who is not duly enrolled as a barrister and solicitor under the Act. Appearance in court must be in person or by counsel, except with leave of the court. A court file must be signed by the party to the proceedings or by a solicitor.
- Section 64 makes it an offence for a person not enrolled under the Act to act as a solicitor or to hold themself out as being qualified to act as a solicitor. It is also an offence to take or use any name, title, addition, or description implying, or likely to lead any person to believe, that a person not enrolled under the Act is qualified to act as a solicitor. Similarly, it is an offence for a person who is not a solicitor to carry on business as a solicitor's agent or to advertise or hold themself out as a solicitor's agent.
- Section 65 restricts conveyancing to holders of a current practising certificate and to persons acting under their supervision.

The restriction on an unlicensed person from acting as a solicitor can be interpreted as preventing such a person from providing legal advice in any area. For example, it would be an offence for an unlicensed person to advertise as a legal adviser, even though a person other than a chartered accountant can advertise that they provide accounting advice – which may have a legal content. Similarly, an unlicensed professional is prohibited from acting as a barrister sole.[28]

Blanchard J in *Dempster v Auckland District Law Society*[29] held that the statutory prohibition on acting as a solicitor applied to "doing work of a kind ordinarily done by a solicitor" rather than merely to the tasks reserved by law to solicitors or barristers.

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27 For a detailed analysis of licensing and certification see Trebilcock, Michael J and Reiter, Barry J (1982), 'Licensure in Law' in Evans, Robert G and Trebilcock, Michael J (eds), *Lawyers and the Consumer Interest*, Butterworths, Toronto.

28 Law Practitioners Act 1982, s 56(1).

29 [1995] 1 NZLR 210.

2.4 The significance of legal services

Legal services play an important role in the New Zealand economy. In 1980/81, income from legal services provided by practitioners in private practice amounted to nearly $208 million. By 1986/87 this total had increased to $589 million, compared with $1,192 million for general insurance and $137 million for architectural services.[30]

Sales of goods and services by the legal services industry (Australian New Zealand Standard Industrial Classification (ANZSIC) 78410 comprising the services of advocates, barristers and solicitors in private practice) amounted to $1,258 million in 1995/96, rising to $1,328 million in 1997/98.[31] Since this figure does not include the services of the Ministry of Justice, the Crown Law Office, the Department of Courts, the Parliamentary Counsel Office, judges and the Patent Office, and solicitors employed by businesses (other than law firms), it severely underestimates the total value of legal services.

On the employment side 13,371 full-time equivalent people were employed in the legal services industry in 1995.[32] By 1998 such employment had increased to 14,010.[33] Since this figure does not include lawyers employed by businesses other than law firms and in the public sector, the size of the entire legal services industry is larger than the figure indicates.

Total membership of the New Zealand Law Society has risen from 6,996 in 1995 to 7,544 in 1998. Of these, 2,851 were principals, 3,123 practised in Auckland and 1,814 in Wellington. The Westland District Law Society had 23 members in 1998.[34]

Figures indicating the structure of the profession are also of interest. There were 742 barristers sole in 1998. Of these, 407 were in Auckland meaning that over 10 percent of the Auckland profession were barristers sole.[35] Roughly speaking, the larger the centre, the higher the proportion of barristers.

In 1998 seven firms had over 100 lawyers each and the largest eight firms comprised or employed 1,200 lawyers between them, or 16 percent of the profession. By contrast, 1,417 lawyers were principals or employees of firms that had three or fewer lawyers.[36]

The ratio of lawyers to New Zealand's population as a whole is roughly similar to that of other common law countries and well above the proportion in civil law countries. A 1992 survey by *The Economist* reported that there were 144.6 lawyers in New Zealand for every 100,000 people, compared with 145.7 in Australia, 134.0 in England and Wales, 51.4 in Switzerland and 49.1 in France.[37] This result is somewhat surprising because legal work

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30 Department of Statistics (1987), 'Finance Insurance and Business Services', *Economy Wide Census*, Department of Statistics, Wellington.

31 Statistics New Zealand (1999), *Annual Enterprise Survey*, Statistics New Zealand, Wellington. The survey includes enterprises that are deemed to be economically significant, eg they employ more than two persons or report annual GST sales or expenses of $30,000 and over.

32 Statistics New Zealand (1996), *Business Activity 96*, Statistics New Zealand, Wellington, Table 1.7, p 58.

33 Statistics New Zealand (1999), *op cit*.

34 Communication from the New Zealand Law Society, May 1999.

35 *ibid*.

36 *ibid*.

37 *The Economist* (1992), 'On Trial: A Survey of the Legal Profession', 18 July p 4.

arising from personal injury, which accounts for a significant proportion of legal services performed in other common law countries, is not generally open to lawyers in New Zealand.

The structure of the legal profession in New Zealand is unusual in that a high proportion of lawyers is concentrated in the large firms. In *Russell McVeagh v Tower Corporation*,[38] Thomas J pointed out that Russell McVeagh McKenzie Bartleet & Co with 64 partners (not New Zealand's largest firm) was not huge by international standards. However, it had one partner to every 56,250 of population while the largest firms in Australia and the United Kingdom, although nearly three times as large, had only one partner per 98,895 and 339,776 people respectively.

It is clear that the majority of members of the Court of Appeal in *Tower Corporation* were concerned with the position of the current large law firms. The House of Lords decision in *Prince Jefri Bolkiah v KPMG*[39] must raise doubts about whether such large firms can continue to dominate the legal profession. In both cases a professional firm (lawyers in the *Tower Corporation* case and accountants in the *KPMG* case) accepted instructions from both parties to a transaction without the party which had first engaged the firm giving its informed consent. The New Zealand Court of Appeal held that a number of factors, including the measures taken to prevent information being passed from one part of the firm to another (so-called 'Chinese walls'), had to be balanced against each other before the Court could decide whether the firm's conduct was justified in the particular case. The House of Lords, on the other hand, in a decision not formally binding in New Zealand, held that such conduct could not be justified. The effect of this decision is that a firm whose tax department is acting for company X cannot accept instructions in its commercial department to run company Y's hostile bid for X. This may turn out to be a factor which causes large firms to break up into smaller and more specialist entities.

Apart from anecdotal evidence there is not a lot of information available about the current market for legal services and how it has developed and is evolving. This comment applies to the relative importance of different areas of practice, the client base, the importance of international work, the efficiency of legal services provision relative to other countries, the importance of publicly provided legal services and so on. This lack of information is a deficiency common to other countries as well.

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38 *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 659.

39 [1999] 1 All ER 517 (HL).

3

REGULATORY FRAMEWORK

3.1 Is legal work productive?

The legal system is part of the general institutional framework within which society operates. Laws exist primarily to facilitate social and economic interaction and to control individual and group behaviour in the interest of society through the use of sanctions. Properly designed laws help to prevent people from committing crimes, and promote social interaction by minimising the potential for disputes. The benefits conferred by a legal system include increased peace and security, greater confidence in commercial transactions, reduced scope for the abuse of public and private power, protection of private property, and the assurance of fair and transparent legal processes.

Lawyers play a key role in the legal system. Informed opinions on the value to society of the services they provide differ markedly. Some perceive legal work as merely redistributive and therefore unproductive because transfers among residents do not increase total output. A report prepared for the Singaporean government noted that such activities might nonetheless advance welfare but that too many lawyers could lead to problems:

> Viewed as an economic function, legal services are in the nature of 'transfer-seeking activities', that is, they perform the function of redistributing wealth and carry certain transactional costs. The proper and efficient functioning of this activity contributes positively to the economic welfare of the nation. But too many lawyers, leading to an excessive supply of legal services, might bring about a distortion of this function. The Committee is of the view that unnecessary legal work, both as an economic and as a social function, might be generated to meet the available supply of legal services. The result: an over-litigious society, lowering of standards of professional conduct and quality of legal services.[40]

This view equates 'legal work' with litigation. Litigation is a backward-looking and redistributive activity, but a system of litigation provides a public good, namely confidence that bargains will be enforced and wrongs corrected. It also provides precedents that help to reduce the risk of disagreements in the future and assists in resolving disputes that arise.

Others believe lawyers have 'captured' the law-making process both through the courts and through parliaments. It is argued that, historically, large numbers of lawyers in parliament enabled the profession to maintain a privileged position, and to fight off any attempts to reduce or eliminate restrictions on legal practice.

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[40] *Straits Times*, 24 April 1993, p 13, quoted in Ramsay, Ian M (1993), 'What Do Lawyers Do? Reflections on the Market for Lawyers', *International Journal of the Sociology of Law*, vol 21(4), December, pp 355–389.

Some commentators go so far as to suggest:

> Lawyers are also able to influence general demand for their services in more subtle ways. Social, political, and economic institutions are influenced by a rhetoric of legalism that raises public acceptance of 'legal' solutions to social or economic problems. This perspective is expressed whenever opinion leaders say 'there ought to be a law', and most authoritatively when translated into judicial decisions mandating the use of lawyers, or requiring recourse to legal forms and institutions, rather than bureaucratic, informal, or private alternatives.[41]

On the other hand, Ronald Coase has stated:

> Lawyers do a lot of harm, but they also do an immense amount of good. And the good is that they are expert negotiators, and they know what is necessary in the law to enable deals to be made. Their activities are designed, in fact, to lower transaction costs. Some of them, we know, raise transaction costs. But by and large, they are engaged in lowering transaction costs. People talk about the information age and how large numbers of people are engaged in information activities. Well, gathering information is one of the difficulties when you're in a market. What is being produced, what are the prices of what is being offered? You've got to learn all these things. You can learn them now a good deal more easily than you could have done before; you don't have to search. If you've ever tried to buy anything, you know how much time goes into finding out what's available and all the alternatives.[42]

Ronald Gilson sees business lawyers as *transaction cost engineers* who create value. Lawyers dominate this role:

> Because the lawyer must play an important role in designing the structure of the transaction in order to assure the desired regulatory treatment ... Knowledge of alternative transactional forms and skill at translating the desired form into appropriate documents are as central to engineering transactions for the purpose of transaction costs as for the purpose of reducing regulatory costs.[43]

More generally, lawyers apply legal skills and legal drafting which add precision to consensual relations *ex ante*. The allocation of rights, responsibilities and risks between the parties is better understood, and this adds value through fewer disputes and a greater reluctance by judges to interfere than if parties are uninformed or are perceived to be in an unequal bargaining relationship.

Lawyers also create value through their indirect impact on the substantive law. By contributing to the creation of high value legal precedents, lawyers create external benefits for society. As William Bishop puts it:

> The parties to a dispute, naturally enough, think only of the way the court's decision will affect them. They do not see that some decisions have a much wider impact. Mr Hadley and Mr Baxendale thought only of their dispute over a mill shaft: the litigation they funded

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41 Stager, David AA and Arthurs, Harry W (1990), *Lawyers in Canada*, University of Toronto Press, Toronto, pp 66–67.

42 Interview with Ronald Coase (1997), 'Looking for Results', *Reason Magazine*, January, see http://www.reasonmag.com.

43 Gilson, Ronald J (1984), 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing', *The Yale Law Journal*, vol 94(2), December, p 298.

> created a legal standard by which over the last 130 years countless thousands of cases have been decided or settled. Every year many hundreds of decisions are thought sufficiently important to be reported in published volumes. This is an extensive and never-ending process of informal updating of the law by the judiciary.[44]

Richard Epstein's assessment of the social value of services provided by lawyers reflects the tensions between the overall good and the harm that lawyers may contribute:

> ... a society with no lawyers is a society in which it is impossible to keep social order or to organize any but the simplest business deals. Up to a certain point an increase in the number of lawyers is necessary to define property rights, to enforce contracts, and to run a decent system of criminal law and public administration. The initial increase in the number of lawyers thus facilitates the performance of these useful social functions. But as their ... number increases further, lawyers assume very different roles. They occupy *Bleak House* as the incarnation of the old expression that "justice delayed is justice denied." In addition, they stimulate a torrent of litigation which far from encouraging production, perpetuates an endless cycle of wasteful and expensive transfer payments through litigation and regulation.[45]

3.2 Efficiency and equity criteria

The central role of the government in relation to the provision of legal services and other activities is to establish a regulatory framework that encourages individuals and firms to take decisions that will maximise the overall welfare of the community. Economists use the concept of efficiency to measure the extent to which resources are used to maximise community welfare. More specifically, an allocation of resources is said to be Pareto optimal if the resources cannot be transferred to other uses to make someone better off without making anyone else worse off. A less restrictive definition of efficiency than Pareto optimality is usually applied to resource allocation, as it is often impossible to make policy changes without making someone worse off. The abolition of a statutory monopoly may, for instance, make the monopolist worse off but may also provide far larger benefits to consumers. An allocation of resources is said to be efficient if resources cannot be reallocated in a way that would make those who gain better off after compensating any losers to ensure that they are no worse off. Such compensation is not normally provided, because, for example, the losers and gainers cannot be identified. Even if winners and losers could be compensated, objective valuations of costs and benefits are impossible, partly due to incentives to exaggerate losses and underestimate benefits.

Resources encompass the following:

- labour, including the education, training and experience embodied in the labour force;

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[44] Bishop, W (1989), 'Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise', *The Modern Law Review*, vol 52, May, p 333.

[45] Epstein, Richard A (1995), *Simple Rules for a Complex World*, Harvard University Press, Cambridge, pp 13–14.

- knowledge such as scientific understanding, and knowledge of production processes, management techniques and so on;
- inherited institutions and cultural values;
- natural resources such as land, water and air; and
- capital including plant, equipment and buildings.

The appeal of efficiency as a social goal is that an inefficient allocation of resources represents waste. If someone can be made better off without making anyone else worse off, why not make the change?[46]

In an efficient market, legal services would be supplied up to the point where the expected benefit to the community from spending an extra dollar on such services equals one dollar. People who could produce services of the required quality at least cost (sometimes lawyers, sometimes non-lawyers) would supply legal services to people and firms who value them most highly. The effective demand for legal services depends on the willingness and the ability of consumers to pay.

The decisions of individuals and firms would, in the absence of valid grounds for occupation-specific regulation such as those discussed below, be expected to lead to an efficient provision of legal services. Society accepts that individuals generally make rational choices – not in the sense that they do not make mistakes but that they do not systematically repeat them and act against their interests.[47] Epstein notes that classical political philosophers such as Hobbes, Locke and Hume began their examination of a just society with an account of human nature. He reports that:

> Their accounts did not assume the crude position of Homo Economicus, that all individuals maximize their individual self-interest all the time. Rather, they took a less rigorous but more defensible view that most individuals, most of the time, act out of a form of self-interest whereby they place themselves (and their families) ahead of the general population ...[48]

In his Nobel lecture, Gary Becker outlined the approach that he adopted in subjecting social issues to economic analysis. He said:

> The analysis assumes that individuals maximise welfare *as they conceive it*, whether they be selfish, altruistic, loyal, spiteful, or masochistic. Their behaviour is forward looking, and it is assumed to be consistent over time. In particular, they can try as best they can to anticipate the uncertain consequences of their actions. Forward-looking behaviour will, however, be rooted in the past, for the past can exert a long shadow on attitudes and values. Actions are constrained by income, time, imperfect memory and calculating capacities, and other

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[46] Hartley, Peter (1997), *Conservation Strategies for New Zealand*, New Zealand Business Roundtable, Wellington, p 31.

[47] Society acknowledges the capacity of individuals to take sound decisions by, for instance, selecting citizens to serve on juries.

[48] Epstein, Richard A (1998), *Principles for a Free Society: Reconciling Individual Liberty with the Common Good*, Perseus Books, Reading, p 5.

> limited resources, and also by opportunities available in the economy and elsewhere.[49] [Emphasis in the original.]

Becker noted that no approach of comparable generality has yet been developed that offers serious competition to rational choice theory.[50] Not only do models that assume self-interest better explain outcomes, they also focus on the individual as the basis for analysis. This accords with notions of justice.

The premise of rationality is similar to the presumption in criminal law that everybody knows the law. The alternative presumption in both cases would be unhelpful. Irrational voters, for example, would be presumed to elect representatives that are capable of acting rationally even though they operate through irrational agents. If it were necessary to prove that a person knew the law before they could be convicted of a crime, ignorance would be encouraged and social disorder would result.

Some people might claim that reliance on efficiency as a normative goal fails to consider factors that cannot be valued in monetary terms. This view is mistaken. In judging whether an allocation of resources is efficient an individual makes choices that are usually accepted as rational expressions of what makes them better off. A person may decline to sell land that has particular cultural or historical significance even at a price well above its perceived market value. The decision indicates that the landowner believes that they are better off by retaining the property. The resource is efficiently allocated, other things being equal, because the land's value in the next best use is lower than its value to the present owner.

If efficiency is accepted as an important goal, then economic analysis can be used to explain the way the legal system works and to examine the consequences of alternative legal rules and institutions. By encouraging efficiency, more 'justice' can be squeezed out of limited resources.

Few people argue that access to legal advice should depend solely on a person's ability to pay. Some legal services should be available to all irrespective of wealth – most notably access to a competent criminal defence lawyer – because equality before the law is more important to overall community welfare than the pursuit of efficiency.[51] This is the perceived ground for the provision of legal aid which now costs about $94 million a year. There is, however, room for debate on the extent to which individuals should have 'rights' or 'entitlements' to legal services.

'Justice' includes more affordable access to the legal services people desire and value, which in turn improves commercial and social relationships. However, the subsidisation of legal services and unduly litigious behaviour can create adverse impacts on third parties through more frivolous or mischievous claims and appeals that have little chance

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49 Becker, Gary S (1996), *Accounting for Tastes*, Harvard University Press, Cambridge, p 139.

50 *ibid* p 155.

51 Okun, Arthur M (1975), *Equality and Efficiency: The Big Tradeoff*, The Brookings Institution, Washington, p 23.

of success. While some parts of the legal system can deal with this problem (through cost rules for example)[52] some external effects are likely to remain.

The social value of legal services depends both on the laws themselves and the role of lawyers. An efficient market for legal services cannot correct for inappropriate legal rules or laws, or inefficiencies in court processes. These issues are beyond the scope of this study. Nevertheless, the goal of reducing inefficient legal rules should not be forgotten. Fewer and less complex laws, a simpler land registration system, or arbitration outside of the formal legal system may reduce the need for legal advice. On the other hand, legislation changing 'rights' or increasing regulatory requirements, or poorly drafted statutes, may increase the demand for legal services. Similarly, court processes that lead to excessive ligation costs, undue delays in resolving disputes and too much uncertainty reduce community welfare.

3.3 Possible grounds for occupational regulation

The main contemporary ground advanced for regulating the provision of legal services relates to information failures.[53] It is claimed that consumers would not be able to evaluate legal services that would be available. Minimum standards of entry into the profession are intended to keep charlatans out. Advertising is restricted because it is argued that consumers may be misled. Ethical standards are promoted and policed by the profession because it is said that consumers cannot properly monitor the behaviour of lawyers. Regulation is said to be justified, in other words, by the argument that lawyers are better able to judge client need, and to monitor the quality of service, than their clients.

Another important ground for examining whether legal services should be regulated relates to the external costs imposed on parties other than those involved in the transaction by incompetent and inexperienced practitioners. Inadequate advice can raise costs to other parties in litigation and lead to judgments based on inadequate argument. Incompetence can, for example, lead to beneficiaries of wills losing assets or to children suffering unnecessarily in divorce proceedings.

3.3.1 Information failures

In an ideal world where clients have perfect information there would be no role for lawyers because there would be no uncertainty or ambiguity about the law or transactions. It is an inequality in knowledge of the law and legal processes that gives rise to a demand for legal services. Such inequalities are pervasive and lead to many welfare-enhancing transactions. The inequality in knowledge between teachers and students, and medical practitioners and patients, for example, leads to a demand for education and health services respectively.

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[52] As in *MacDonald v FAI* [1999] 1 NZLR 583 where counsel was ordered personally to pay a substantial proportion of the client's costs. The decision was upheld in the Court of Appeal in *Harley v MacDonald* [1999] 3 NZLR 545 (CA).

[53] See, for example, Haynes, Ian (1999b), 'Law Practitioners Act 1982', letter to practitioners, NZLS, 20 October.

Consumers are not perfectly informed because information is costly to produce, disseminate and assimilate. Members of the public typically seek the advice of their families and friends before engaging a new professional adviser. They may ask their accountant, banker or real estate agent to recommend a lawyer and, in the case of barristers, they may rely on the advice of their solicitor. Consumers may also seek a second opinion to test the quality of advice tendered if the issue is of sufficient importance or if they are in doubt.[54]

The most important protection that the consumer has against poor performance is the right to take their business elsewhere. It is competition which encourages suppliers to provide goods and services of an appropriate quality and at a reasonable cost. When competition is not permitted or is restricted, shoddy products and services are likely to be supplied and consumers have limited opportunities to seek redress if problems arise. The former statutory monopolies that provided rail, domestic airline and telephone services in New Zealand demonstrated the pervasiveness of these problems.

The prospect of making a profit encourages suppliers to provide information to consumers where it is economic to do so. In the absence of occupation-specific regulation, law firms may signal that their services are superior in quality to those of their rivals. Firms may emphasise their past record and may disclose the perceived shortcomings of competitors. Law firms would have stronger incentives and greater scope than at present to protect and promote their reputations, for instance through the use of brands. Several large accountancy firms that trade in New Zealand are part of international franchise operations. The New Zealand Institute of Accountants views the promotion of the chartered accountants brand as an important activity following the relaxation of the regulation of accountancy. To this end it advertises on television and in other media.

In the absence of occupation-specific regulation, competition may encourage legal professionals to form one or more voluntary groups that promote professional and ethical standards. Each group could attempt to increase the demand for its services by signalling both that its members abided by certain rules (for example, acting in the best interests of their clients and avoiding potential conflicts of interest) and that the rules would be enforced. Competition would ensure consumers received the protection they value – failure to do so would result in a firm's loss of reputation and of demand for their services. Alternatively, lawyers could place voluntary restrictions on the way their services were provided, that is, limit the contractual freedom between lawyers and clients. In a competitive market, lawyers with restrictions would win more business if such restrictions benefited consumers.

Information 'dealers' may find a profitable market providing information to consumers about the price and quality of legal services that are available. Not-for-profit

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[54] The NZLS recommends that consumers who wish to engage a lawyer ask friends, look in the Telecom *Yellow Pages*, inquire at a citizens' advice bureau or contact their district law society. See New Zealand Law Society (1999), *How Your Lawyer Can Help You*, http://www.nz-lawsoc.org.nz.

organisations like citizens' advice bureaux and student associations may provide advice to the public and their members respectively.

Members of the public can, however, be expected to face some uncertainty in assessing the quality of legal services. There must inevitably be an element of trust that their lawyer will provide appropriate advice at a reasonable cost. This is true for all services, from those provided by the home handy person to medical specialists. The trust of the consumer will be abused on occasions, whether the profession is regulated or not.

Milton Friedman and Rose Friedman correctly observed in their discussion of consumer protection that "Perfection is not of this world".[55] It is uneconomic to seek to eliminate all risks to consumers because risk reduction comes at a cost. Restrictions aimed at reducing risks faced by consumers must take account of the costs and benefits involved.

The consumer may be able to seek redress for wrongdoing through the courts. The Crown may prosecute lawyers who defraud clients or commit other crimes. Civil remedies may apply where lawyers are negligent or breach their contracts. The Fair Trading Act 1986 provides certain remedies where information supplied, including in an advertisement, is false or misleading. The Fair Trading Act 1986 also prohibits certain unfair trading practices. Under the Consumer Guarantees Act 1993 any trader (including a lawyer) supplying services automatically guarantees that the service will be performed with reasonable care and skill and, where the price is not agreed in advance, the consumer will pay no more than a reasonable price. The remedies available in the event of a breach of the Consumer Guarantees Act 1993 may include the cancellation of the service and a refund, or compensation.

Specific information problems differ among consumers and among different types of legal problems. Large corporations (for example insurers), government departments and legal aid bodies, for instance, are likely to be well informed about the services offered by different lawyers, and able to evaluate the quality of services. Because they employ lawyers more regularly, these bodies can afford to make a greater investment in lawyer evaluation than would be justified by the average person. Accordingly, the argument for intervention must focus on the specific information problems involved and assess the extent to which markets overcome them.

This raises the utility and wisdom of applying uniform regulation to the entire profession. Commercial lawyers in the largest law firms are frequently involved in arranging major international transactions. Not only are the clients sophisticated and well informed, but also the law firms are effectively competing with overseas law firms for this business. Onerous regulatory requirements, designed with small consumers in mind, may therefore harm their competitiveness. In fact debate on subjects such as incorporation and multi-disciplinary practices in New South Wales is driven by a perceived need to compete with Hong Kong and other centres for international legal business.[56]

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[55] Friedman, Milton and Friedman, Rose (1990), *Free to Choose: A Personal Statement*, Harcourt Brace Jovanovich, San Diego, p 222.

[56] See, for example, the *Australian Financial Review*, 19 March 1999, pp 26–27.

Any market restrictions aimed at increasing the minimum or average quality of services will only improve efficiency so long as the benefits outweigh related costs. There should be no presumption that this would be the case with occupational regulation. Licensing may be justified where personal or public safety is at risk. Where it is not, such as in accounting, there has been a tendency to reduce occupational regulation because the costs have been judged to be excessive.

The information conveyed by present licensing arrangements is limited. Consumers want to be able to identify services of the appropriate quality and price to match their needs, but licensing merely separates potential providers into two groups – licensed and not licensed, or lawful and unlawful respectively. This does nothing to help consumers distinguish different levels of quality within the licensed group. On the contrary, the present regime has the effect of suppressing information on the specialist skills of lawyers, thereby making the evaluation of practitioners within the licensed group more difficult for the consumer than would otherwise be the case. Aside from such constraints, the consumer has to rely on the same kinds of information and services as would be relied upon in the absence of licensing.

Admission to the roll of barristers and solicitors establishes the practitioner's minimum level of competency only at the time. There are no periodic assessments of each practitioner's knowledge in the areas in which they practice. Moreover, a political process determines the standard of competency on entry into the legal profession. This contrasts with a competitive market where the test is one of performance. The market imposes the real standard that those who enter it must be able to meet the competition; they must earn enough, in the face of free choice among consumers, to remain in business.[57] The claim that the relaxation or removal of occupational regulation would abolish standards is mistaken.

Assume for the moment that licensing leads to higher quality services than otherwise available. It also results in a more expensive and restricted supply of such services and a larger supply of substitute services. An important economic question is whether, at the margin, a lower minimum standard of legal services, a larger and less expensive supply of such services and fewer substitute services might contribute more to overall community welfare.

Even if licensing raises quality standards, this fact alone does not guarantee that consumers receive higher quality services. A practitioner of doubtful competence may, for example, attract clients because consumers mistakenly assume that all licensed practitioners are competent. In its report for the NZLS, E-DEC Limited (E-DEC) wrote:

> It is our conclusion ... that the present curriculum of pre-admission legal education and training does not equip lawyers to provide legal service of a reasonable quality. Admission standards are seriously flawed relative to the very purpose of regulation.[58]

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[57] Leef, George C (1998), *The Case for a Free Market in Legal Services*, Policy Analysis No 322, Cato Institute, Washington, p 22.

[58] E-DEC Limited (1997), *Purposes, Functions and Structure of Law Societies in New Zealand: Final Report to the New Zealand Law Society*, http://www.nz-lawsoc.org.nz/general/report.htm.

In a more competitive environment a practitioner may need to raise their performance to remain in business.

If regulation is required on information grounds, certification is likely to be preferable to licensing, since it allows greater competition and gives clients more choices. As Friedman put it:

> If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business.[59]

The rules and restrictions imposed on the legal profession may also inhibit competition between lawyers. The former chairman of the Commerce Commission, Dr Alan Bollard, and a Commission colleague noted that there are:

> ... a number of practices in the legal profession that are unusual by the standards of other professions. Too often these result in inefficiencies for clients. The arguments that the practices provide protection for clients have some validity, but there is little evidence that they represent the best way of doing this.[60]

3.3.2 Negative externalities

Another justification for regulation is that low quality legal services can constitute a negative 'externality' by imposing costs on a third party. For example, an incompetent advocate may waste the time of a judge, jury or other parties involved in a trial. The potential for negative externalities may vary depending on the specific area of legal practice. Externalities are pervasive and most do not justify government action. Any negative impacts on third parties need to be clearly identified and the appropriate solution, including the possibility of taking no action, found.

Licensing is unlikely to be an appropriate response to external costs. The aim of any intervention on externality grounds should be to impose the costs on the party involved rather than other parties. Licensing imposes the costs on potential users of legal services. Alternative ways of addressing the problem should also be considered. For example, courts should be vigilant to ensure that practitioners appearing before them do not waste time or behave in an incompetent fashion. The courts may be better placed to control negative third-party effects. There may be grounds for examining whether court procedures adequately address the problem.

3.4 The costs of regulation

The regulation of the legal profession leads to costs that arise from the following:

- restricted entry into the practice of law, including credentialism.[61] A reduction in

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[59] Friedman, Milton (1962), *Capitalism and Freedom*, University of Chicago Press, Chicago, p 149.

[60] Bollard, Alan and Scott, Paul (1996), 'Competition and the Legal Profession', *New Zealand Law Journal*, July, p 280.

[61] Friedman and Kuznets report that the pressure in the United States for limiting the number of lawyers has been directed mainly toward more severe educational requirements and greater stringency in bar examinations. See Friedman, Milton and Kuznets, Simon (1945), *Income from Independent Professional Practice*, National Bureau for Economic Research, New York, pp 35–36.

practitioners leads to higher fees and incomes for lawyers, and the provision of fewer services than otherwise;

- barriers to innovation, such as inhibiting the development of multi-disciplinary professional firms and the formation of international law firms, restrictions on the adoption of forms of business other than sole traders and partnerships, and constraints on educational practices that may arise from the need to allow graduates to satisfy entry requirements;[62] and
- the administration of, and compliance with, the regulatory regime. These costs are not trivial. They include the costs involved in establishing what the rules require in particular circumstances, changing preferred practices to comply with the rules and responding to allegations that rules may have been breached.

A major part of the costs of occupational regulation arises from the protection afforded to producers. The pressure for government regulation tends to come from producer rather than consumer interests.[63] Consumer lobbying for occupational regulation is rare. Similarly, competing providers rather than members of the public usually generate most complaints to regulatory agencies. Moreover, producer groups tend to be more concentrated and better organised politically than consumer interests. They therefore have greater influence on the design of regulatory regimes than consumers.

The facilitation of competition is a key policy prescription for raising quality standards and generally advancing consumer interests. A study by Clifford Winston of the deregulation of several industries in the United States provides compelling evidence for this view.[64] Occupational regulation tends to impede competition, for instance by discouraging innovation.

Producers that stand to gain the most from regulation are well placed to allege incompetence by so called fly-by-night, unorthodox or inexperienced practitioners. They are able to cite examples of mistakes, poor service or gross incompetence. They tend to dismiss similar problems among members as rare. But as George Stigler argued:

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62 It is interesting to note that the NZLS submission to the 1925 Royal Commission on University Education "viewed with apprehension" a possible recommendation of the Commission that four separate universities be established because it would lead to four different standards for the bachelor of law degree, see Cooke (1969), *op cit* p 158. As noted above, the deans of New Zealand university law faculties are members of the New Zealand Council of Legal Education. The Council will not credit someone with a business law major from Massey University even with the first year legal system paper. Established educational providers may be sheltered from potential competition as a consequence of controls on the practice of law.

63 There is no indication in Cooke's survey that consumer interests played a significant role in the initial regulation of the legal profession in New Zealand. See Cooke (1969), *op cit* pp 138–165.

64 Winston evaluated regulatory reforms in the United States that affected transport (air, rail and trucking), telecommunications, cable television and natural gas industries. The effect on prices, services, industry profits, wages and employment of the reforms was examined. Winston estimated that society had gained at least US$36–46 billion (in 1990 dollars) annually from deregulation. This amounted to a substantial 7–9 percent improvement in the contribution of affected industries to gross national product (GNP). Most of the benefits were reaped by consumers but employees and producers were also found to be better off. See Winston, Clifford (1993), 'Economic Deregulation: Days of Reckoning for Microeconomists', *Journal of Economic Literature*, vol 31(3), pp 1263–1289.

> ... we must base public policy not upon signal triumphs or scandalous failures but upon the regular, average performance of policy.[65]

Protected occupational groups appear to have frustrated consumers who wish to pursue complaints against members of such a group. The legal and medical professions, in particular, have been subject to much criticism on this point in the recent past. Protected groups can be expected to put their collective interests, such as the minimisation of adverse publicity, ahead of the interests of consumers. The emphasis on entry criteria as opposed to regular assessment of the competence of practitioners is an example.

The need to define activities that may be performed by licensed practitioners alone may lead to questionable restrictions on the activities that other people can undertake. In the absence of occupation-specific regulation, it would be open to anyone to provide legal services. Consumers would choose among lawyers and other providers of legal services (non-lawyers) on the basis of personal recommendations, advertising and other information. Over time, competition would lead to the supply of services that meet the needs of consumers where it is economic to do so. As in other areas, diverse services, market practices and organisational forms (such as sole traders, partnerships and companies) could be expected to evolve.

Moreover, there is pressure, over time, to extend the range of activities that are protected.[66] As Friedman observed "featherbedding is not something that is restricted to the railroads".[67] Even relatively straightforward legal services, such as much residential conveyancing which is often undertaken within law firms by para-legals, is licensed.

The licensing of lawyers can be expected to have encouraged the growth of substitute services. This may have occurred in several ways. First, the cost of regulated legal services is increased thereby making alternative services more attractive than otherwise. The high cost of ligation relating to injury from accidents was, for example, advanced as a reason for the establishment of a no-fault accident compensation scheme. Similar arguments were advanced in support of the establishment of dispute tribunals. The parties are not permitted to be represented by a lawyer at tribunal hearings. Secondly, providers of competing services can be expected to find ways around licensing requirements. They are encouraged to differentiate their practices sufficiently to be beyond the regulatory boundary. Taxation consultants, for instance, may provide advice that involves the interpretation of tax laws that might otherwise be provided by lawyers. Thirdly, licensing discourages innovation by practitioners thereby encouraging other producers to take advantage of technological advances. The costs of obtaining information have been lowered dramatically by the internet. Some information that

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65 Stigler, George J (1975), *The Citizen and the State: Essays on Regulation*, University of Chicago Press, Chicago, p 185.

66 In 1998 the State Bar of Texas instituted suits against two firms that published self-help computer books and programmes. It alleged that the firms violated a statute prohibiting the unauthorised practice of law by helping individuals navigate the shoals of the law. One case is yet to be decided but in the second a federal district judge granted the Bar's motion for summary judgment. The decision may be appealed. See Leef, George C (1999), 'Banned in Austin', *The Freeman*, August, pp 43–45.

67 Friedman (1962), *op cit* p 156.

might traditionally be obtained from practitioners may be available on the internet from non-lawyers. The internet could have a large impact on the provision of at least some legal services over the longer term.

Complex business transactions, sometimes involving more than one jurisdiction, often require insights from a range of professional disciplines to be applied. Some people believe that such services can be provided best by a single organisation.[68] If there were economies of scope, multi-disciplinary firms might emerge that contain skilled professionals providing, for instance, more than one of accounting, legal, financial and valuation services. Arthur Andersen, for example, would not have established Andersen Legal as an independent business but for regulations constraining the ability of lawyers and accountants to practise within a single firm. The largest accountancy firms have associated legal practices in several countries. Regulatory constraints largely explain why such businesses are not merged into single firms offering accounting and legal services.

Firms with international ownership or linkages could be expected to emerge to provide services to clients with interests in more than one jurisdiction. Overseas ownership of legal firms is effectively prohibited. Moreover, some legal firms might be established as private or public companies rather than as partnerships. The company structure may offer advantages especially for large practices by separating ownership and control, and facilitate the raising of capital. With a company structure it would not be necessary, for instance, for practitioners to contribute capital to buy out the partners of a firm that is taken over. The rule that requires practitioners to be liable for transactions prevents the use of a company structure.

Occupational regulation can be particularly harmful to those members of minority groups who wish to attain professional legal status. They are more likely to attain para-professional status than to become fully qualified professionals. The poor are also likely to suffer disproportionately from the restricted supply and higher cost of legal services because their choices are particularly constrained. Legal aid goes some way toward mitigating these costs but it is unlikely to offset them entirely.[69]

Lawyers might also form voluntary associations to provide services to members that can be best provided on a joint basis. Such associations would have stronger incentives to focus on the provision of services that are valued by members than organisations where membership is mandatory and recourse for wrongdoing is limited. Where compulsory membership of professional and occupational organisations has been abolished or relaxed, for instance in respect of accountancy and farming, the affected organisations have sought to refocus their activities to better serve members on a cost-effective basis.

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[68] The NZLS and some kindred bodies in other countries are examining whether non-lawyers might be permitted to become partners in law firms. See New Zealand Law Society (1999), *Multi-disciplinary Practices and other Related Matters: Discussion Paper*, http://www.nz-lawsoc.org.nz/general/mdp.htm.

[69] Fees contingent on success may also have a role to play in financing civil litigation, including for people with little wealth. There is, however, some debate as to whether contingency fees are lawful in New Zealand. See http://www.nz-lawsoc.org.nz/lawtalk/contingency.htm.

Moreover, the potential conflict between the public interest and the interest of members, which is inherent in the statutory functions of the NZLS, could be reduced, if not eliminated.

The costs of regulatory failure are also relevant. Regulatory agencies may impose costs through delays in granting approvals or through mistakenly declining applications or proposals. Agencies may be subject to political interference such as lobbying by people who may be adversely affected by the introduction of regulations. Regulatory agencies often face relatively weak incentives to carry out their functions efficiently, for example because they are protected from competition.

The performance of regulatory agencies is rarely subject to a thorough evaluation and individuals and small groups often have limited recourse if agencies perform badly. Moreover, agencies do not usually bear the full costs of the damage done to the reputations of providers that are wrongly charged with breaches of disciplinary rules. The NZLS and the district law societies, and their committees (including council and committee members, employees and any other person appointed under the Act), have unusually broad protection from any criminal or civil liability in respect of anything done in pursuance of the Act.[70] This protection from liability is extraordinary; it even protects people who act other than in good faith. One would have to look hard to find a more obvious example of legislative capture by a regulatory agency at the expense of consumers and individual members.

The costs of the present occupation-specific regulation of the legal profession are likely to be high. The significant benefits that are necessary to justify such costs are doubtful.

3.5 Overseas reviews of the legal profession

Broadly similar regulatory arrangements to those of New Zealand have applied in comparable countries such as Britain and Australia, at least until recently. Restrictions on competition and other regulatory practices are sometimes perceived to advance the interests of lawyers rather than those of society. As a result a number of inquiries into the legal profession have been undertaken in the common-law world over the last 20 years. They have generally become increasingly critical of regulatory restrictions on the practice of law.

In 1976, the British government appointed the Royal Commission on Legal Services to investigate the legal profession.[71] In the late 1970s and early 1980s the New South Wales Law Reform Commission completed extensive studies into the legal profession.[72] In Ontario, Canada, the Professional Organizations Committee also undertook

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[70] Law Practitioners Act 1982, s 189.

[71] Royal Commission on Legal Services (1979), *Final Report*, Cmnd 7648, HMSO, London.

[72] The studies were under the direction of Julian Disney who co-authored Disney, Julian; Redmond, Paul; Basten, John and Ross, Stan (1977), *Lawyers*, Law Book Co, Sydney.

comprehensive studies of the legal profession.[73] In 1988, the English Law Society and Bar established a committee to study the future of the legal profession.[74]

In 1989, the Lord Chancellor's Department systematically reviewed the rules of the legal profession, and published a green paper. Stephen Parker summarised its thrust in the following terms:

> The basic premise of the Green Paper was that the public should have the best possible access to legal services and that those services should be of the right quality for the particular needs of the client. The objective should best be achieved by ensuring that the legal services market should operate freely and effectively so that clients had the widest possible choice of cost effective services and that the public could be certain that service-providers have the necessary expertise in the relevant area.[75]

Later, the Lord Chancellor's Department published a white paper that provided the foundation of the Courts and Legal Services Act 1990.[76] Among other things, this Act allowed non-lawyers to compete with lawyers in areas such as conveyancing and probate services.

A further white paper, *Modernising Justice*, was released in December 1998. It was somewhat extravagantly claimed to:

> ... set out the biggest programme of reform in the British legal services for at least 50 years. Major changes in the way the legal system serves the public are intended to open access to justice, revolutionise legal aid and sweep away restrictive practices in the legal professions.[77]

The paper stated that "in many instances, the assumptions and working practices of the legal profession, taken as a whole, are outdated and inefficient" and it sought to "encourage greater competition".[78] The government proposed to:

- remove practices that unreasonably restrict solicitors and employed lawyers from appearing in the higher courts;
- simplify existing procedures to allow new bodies (representing para-legals) to authorise their members to appear in prescribed proceedings;
- examine whether to extend the right to conduct litigation to members of the Institute of Legal Executives; and

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73 Professional Organizations Committee (1977), *Regulation of the Practice of the Law*, Ministry of the Attorney General, Toronto.

74 Committee on the Future of the Legal Profession (1988), *A Time for Change: Report of the Committee*, General Council of the Bar and Law Society's Hall, London.

75 Parker, Stephen (1991), 'A Survey of Reforms to the English Legal Profession', background paper prepared for the Senate Standing Committee on Legal and Constitutional Affairs, Canberra.

76 Lord Chancellor's Department (1989a), *Legal Services: A Framework for the Future*, HMSO, London.

77 Lord Chancellor's Department (1998a), *Modernising Justice*, press statement, 2 December, http://www.open.gov.uk/lcd/consult/access/press.htm.

78 Lord Chancellor's Department (1998b), *Modernising Justice*, http://www.open.gov.uk/lcd/consult/access/mjch1.htm.

- improve the range of options available to resolve disputes without a formal court adjudication process.[79]

In Australia the Senate Standing Committee on Legal and Constitutional Affairs began an inquiry in 1989 into the Cost of Legal Services and Litigation. In May 1992, the Law Reform Commission of Victoria published its report *Access to the Law: Restrictions on Legal Practice*.[80] At the same time, the Trade Practices Commission released a study of the legal profession and expressed its suspicion that some rules relating to legal professionals "may unnecessarily restrict competition, inhibit innovation and deny consumers lower prices and improved choice".[81] The Trade Practices Commission's final report concluded that:

> The Australian legal profession is heavily over-regulated and in urgent need of comprehensive reform. It is highly regulated compared with other sectors of the economy and those regulations combine to impose substantial restrictions on the commercial conduct of lawyers and on the extent to which lawyers are free to compete with each other for business. As a result, the current regulatory regime has adverse effects on the cost and efficiency of legal services and their prices to business and final consumers.[82]

The Trade Practices Commission recommended that:

- all levels of government should adopt measures to open up the supply of legal services to appropriately qualified non-lawyers to the maximum extent that is consistent with the public interest;
- licensing arrangements which require separate practising certificates for barristers and for solicitors should be eliminated;
- rules such as those that prevent direct access to barristers by clients be removed;
- specialist accreditation schemes that provide consumers with relevant information about the specialist skills and competency of lawyers be supported;
- rules which impose restrictions on the ownership and organisation of legal practices be removed or reformed; and
- lawyers should have the freedom to inform their clients and to attract business by means of advertising and promotion and related forms of information disclosure.[83]

The Trade Practices Act 1974 now applies to the legal profession in Australia in accordance with the competition principles agreement that was endorsed by the Council

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79 *ibid*.

80 Law Reform Commission of Victoria (1992), *Access to the Law: Restrictions on Legal Practice*, Law Reform Commission of Victoria, Melbourne.

81 Trade Practices Commission (1992a), *Legal Profession: A Study of the Professions: Issues Paper*, Trade Practices Commission, Canberra and Trade Practices Commission (1992b); News Release, 8 May 1992.

82 Trade Practices Commission (1994), *Legal: Studies of the Professions*, Trade Practices Commission, Canberra, p 3.

83 *ibid* pp 6–12.

of Australian Governments in 1995. Each state and territory undertook to review the regulation of its legal profession. New South Wales and Victoria have completed their review and Queensland has produced a green paper for discussion.[84] The Australian Competition and Consumer Commission has responsibility for the application of competition laws to the legal profession in Australia following changes to the Trade Practices Act 1974. In 1997 its chairman, Professor Allan Fels, observed that under both the regulation review process and the requirements of the Trade Practices Act 1974 a number of the rules and practices of professional associations, including those relating to the legal profession, are likely to come under scrutiny. In the chairman's view many of the rules and regulations which apply to the professions inhibit competition. He noted that contraventions of the Trade Practices Act 1974 may arise where self-regulatory professional associations impose such rules.[85]

In 1994 the Law Council of Australia released a blueprint for the structure of the legal profession in Australia that contained a plan to establish a national market for legal services.[86] Subsequently, the Standing Committee of Attorneys-General endorsed a 'travelling practising certificate' regime. The scheme allows a lawyer admitted in any state or territory to practise law throughout Australia. Legislation to introduce the scheme has been passed in New South Wales, Victoria, South Australia and the Australian Capital Territory. While the professional bodies that represent lawyers in Australia prefer regulation by the relevant professional bodies in each state or territory, some canvas the establishment of a professional body that would regulate lawyers throughout Australia.

The Law Council of Australia has also proposed a set of *Model Rules of Professional Conduct and Practice* that were developed by the Law Society of New South Wales for adoption in each Australian state and territory. The rules were intended to be adopted by each constituent body of the Law Council with a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia. They focused almost exclusively on the ethical and professional responsibilities of lawyers in their dealings with clients and other lawyers and in giving effect to the requirements of the legal and judicial systems. The Australian Competition and Consumer Commission confirmed that the model rules did not cause it any concern in terms of the requirements of the Trade Practices Act 1974. At the same time, the Commission advised the Law Council of Australia that other rules and regulations that deal with issues such as entry requirements, pricing and advertising conduct and the organisation of legal practices may raise issues of concern under the Trade Practices Act 1974.[87] To date the professional

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84 The reports and discussion paper are available on the following web sites: http://www.lawlink.nsw.gov.au/crd/nsf/pages/ncp_index2, http://www.liv.asn.au and http://www.justice.qld.gov.au/public_consult.html.

85 Fels, Allan (1997), 'Can the Professions Survive under a National Competition Policy? – The ACCC's view', http://www.accc.gov.au/docs/speeches/intro.htm.

86 Law Council of Australia (1994), *Blueprint for the Structure of the Profession: A National Market for Legal Services*, Law Council of Australia, Canberra.

87 Fels (1997), *op cit.*

conduct and practice rules of the law societies of New South Wales and the Australian Capital Territory are compatible with the model rules.[88]

There seems to be a good possibility that the monopoly of lawyers over legal services work will be abolished in Australia. It is surprising then that the regulation of the legal profession in New Zealand has not attracted the same level of scrutiny by official bodies.

3.6 The E-DEC report

The NZLS commissioned E-DEC Limited, a consultancy firm, to prepare a report on the purposes, functions and structure of the law societies in New Zealand.[89] E-DEC did not present a detailed analysis of the regulation of legal services. It noted, however, that occupation-specific regulation "is the exception, not the rule and is done only if there is a clear need arising from market failures".[90] E-DEC reported that the following types of market failure were involved in the provision of legal services:

- information failure: the inability of many clients to assess, monitor or control the quality of legal services that they purchase;
- public good: market forces would not compel lawyers to protect the rule of law and the rights of the individual;
- externalities and transactions costs: market forces do not secure the efficient use of the justice system and do not enforce efficiency in legal transactions.[91]

It continued:

> These characteristics of legal services are such that a pure market outcome would neither produce the outcomes desired by society nor be efficient in providing legal services. In addition, legal services frequently involve matters of such importance to the individual that Governments are unwilling to tolerate the consequences of these market failures. Accordingly, regulatory intervention in the supply of legal services is justified provided this intervention deals with these identified market failures (i.e. is effective) and provided the benefits of intervention exceed the costs caused by it (i.e. is efficient).[92]

E-DEC concluded that occupational regulation can address the perceived market failures and it proposed the following general guidelines for the regulation of the legal profession:

1. The title 'lawyer' merits protection. Only those who meet defined standards may hold themselves out as lawyers.

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88 See Australian Law Reform Commission (1999), *Discussion Paper 62: Review of the Federal Civil Justice System*, http://www.alrc.gov.au/news/index.html#updates.

89 E-DEC Limited (1997), *op cit* section 1.1.

90 *ibid* section 3.2.

91 *ibid* section 3.2.

92 *ibid* section 3.2.

2. Lawyers' behaviour must comply with standards related to maintaining the rule of law and the rights of the individual.

3. Lawyers must comply with standards that ensure that legal service provided is of at least a reasonable quality. The main approach is to require that every lawyer is competent. This is accompanied by measures to deal with legal service that is found not to meet reasonable standards.

4. These standards and behavioural requirements must apply to all lawyers.

5. This intervention is in the form of self-regulation, not Government regulation.

6. These regulatory activities are motivated and justified by the objectives of client and public protection. Lawyers' own interests are not part of the equation.[93]

E-DEC has confirmed that people other than lawyers would be permitted to supply legal services to the public (ie in terms of the classifications used in this report E-DEC proposes the certification, and not the licensing, of lawyers).[94]

E-DEC reported that:

> One law society cannot simultaneously and effectively advance both regulatory objectives and lawyers' direct interests. The pursuit of two conflicting objectives needs two separate organisations.[95]

It proposed the establishment of a new body, the New Zealand Law Council, to assume responsibility for the regulation of lawyers. The Council's governing body would be elected directly by practitioners. The New Zealand Law Council would regulate lawyers "to ensure that legal services are of at least a reasonable standard" and "that lawyers' behaviour is consistent with maintaining the rule of law and the rights of the individual".[96] Law societies would be stripped of their regulatory and public good functions and focus solely on the furtherance of the interests of lawyers. Membership would be voluntary.

3.7 The New Zealand Law Society model

The NZLS published the E-DEC report indicating that it welcomed debate on the important issues raised in it.[97] However, the president of the NZLS wrote that by September 1998 the debate:

> ... was shaping as an unhelpful, adversarial and divisive process of consultation involving not only the E-DEC report but other options with their respective proponents, viz a regional model and the status quo. I was sure that the result would be a waste of time and money. I

93 *ibid* section 3.3.

94 Personal communication between E-DEC Limited and G Dwyer, 15 September 1999.

95 E-DEC Limited (1997), *op cit* section 3.4.

96 *ibid* section 4.1.

97 Haynes, Ian (1997), 'E-DEC Report Released', press statement, 23 September, http://www.nz-lawsoc.org.nz/edec.htm.

> was equally sure that if we as a profession did not map out our own future organisation and regulation, we would have it done for us ... I was not prepared to stand by while indecision caused the profession to lose control of its own destiny.[98]

In response to these developments, the NZLS approved in principle a separate model that was outlined to members in a letter dated 15 September 1998. The essence of the model is presented below:

- membership of the law society would be voluntary;
- the law society would provide representative services;
- all people practising law, whether members of the law society or not, would be subject to a regulatory regime administered by the law society and provided on a district-by-district basis; and
- the cost of the regulation would be met by an annual fee charged and accounted for quite separately from the voluntary law society membership fee.[99]

This model falls well short of that recommended in the E-DEC report. The only change of any significance is the proposal that membership of the NZLS should be voluntary. However, even this change is limited because the regulation of lawyers would remain in the hands of the NZLS and practitioners who elect not to join would be regulated by their competitors. The practice of law would continue to be licensed and the NZLS would continue to perform regulatory and representative functions.

3.8 The government's proposals

The government was close to finalising a bill in 1999 to amend the Law Practitioners Act 1982 when parliament rose for the general election. The precise model proposed by the outgoing government and the rationale for it are not known. On 30 November 1999 the minister of justice declined to release the cabinet and departmental papers relating to the reform of regulation of lawyers and conveyancers.[100] The minister stated, however, that the NZLS had been advised that the key decisions taken by the government included the following:

- The new regulatory regime will be based on the principle of self-regulation.
- Membership of the NZLS will be voluntary but coverage by the regulatory regime will be compulsory.
- Rules made by the NZLS will be subject to the approval of the minister of justice.

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98 Haynes, Ian (1999a), 'NZLS Annual Report 1998', *LawTalk*, April, p 2.

99 *ibid* p 2.

100 Communication between the minister of justice and the New Zealand Business Roundtable, 30 November 1999.

- The new regime will require rules for the administration of trust accounts, a disclosure regime, indemnity insurance, a code of ethics, a complaints system and entry criteria.
- Compulsory membership of the fidelity fund will be abolished. Provision for cost revisions and the referral rule would not be mandatory.
- Lawyers and conveyancers will be permitted to sell real estate.
- In the first instance conveyancers will be regulated by the NZLS. The legislation will provide for the recognition of a regulatory body for conveyancers by order in council at an appropriate time.

These proposals indicate that relatively modest changes in the regulation of the legal profession, essentially reflecting the NZLS model, were envisaged by the outgoing government. The government's proposals were welcomed by the president of the NZLS.[101] The incoming government will need to decide whether to proceed with the changes proposed by its predecessor or to re-examine the regime afresh.

[101] Haynes (1999b), *op cit*.

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WHAT WORK SHOULD BE RESERVED TO LAWYERS?

Legal services are wider in scope than just 'lawyer services'. They have been defined as:

> ... concerned with the advice, assistance and representation required by a person in connection with his rights, duties and liabilities. These may of course change over the years with the prevailing values of society, the legislative will of Parliament and the decisions of the courts. Most services which are 'legal', in the sense that a lawyer often performs them in the ordinary course of his practice, may also be performed by non-lawyers.[102]

Legal services cover the full range of advice on matters such as the interpretation of legislation, consumer rights, and ascertaining entitlements to welfare services. Many non-lawyers provide legal services, including accountants, welfare advisers, public officials and company secretaries. Members of the public may also provide legal advice to their family and friends.

On the other hand, lawyer services are a subset of the market for legal services that are provided *solely* by lawyers.[103] One way of increasing competition in the legal services market is to reduce the extent of the exclusive area given over to lawyer services. From a public policy viewpoint what classes of legal services should be reserved for lawyers?

Legal services and lawyers are not homogeneous and clients have varying degrees of knowledge about the services that are available and their quality. Because information problems differ considerably across legal service sub-markets, the argument for regulation on information grounds needs to be demonstrated on a market-by-market basis. Clients seeking advice on securities law are likely to be more sophisticated than those seeking advice on family law. Moreover, the minimum skill required to practise in different areas of law varies considerably.

In determining the need for minimum standards of competence, it is relevant to consider a number of factors. Higher standards may be important where the stakes for the client are great, for example in relation to wealth or personal liberty. Licensing or other occupation-specific regulation is unnecessary on consumer protection grounds where clients are sophisticated. A system of certification might be appropriate where consumers are likely to be poorly informed. Certification then serves as a signal to consumers that minimum educational and training standards have been met but still leaves consumers to decide whether they want to engage a certified or uncertified practitioner.

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[102] Lord Chancellor's Department (1989b), *The Work and Organisation of the Legal Profession*, HMSO, London.

[103] For a more complete discussion of this distinction, see Chapter 3 of Stager and Arthurs (1990), *op cit*.

There may be a case for permitting lower entry qualifications in areas where the service is reasonably homogeneous and consumers can directly monitor service quality. This may be feasible for activities that are largely routine or can be standardised.[104] Residential conveyancing, family separations and dissolutions, adoptions, basic company incorporation, and straightforward compensation claims can all be standardised and, in many cases, be provided by people with less training than lawyers currently receive. Much routine legal work is at present carried out within law firms by para-legals under (perhaps unnecessary) supervision. It seems likely that allowing para-legals to set up shop themselves would increase competition and drive down prices, and at the same time make the way legal services are provided more transparent to consumers. Accordingly, there seems little *prima facie* justification for reserving most legal services to generalist lawyers.

Some may still have concerns for consumers resulting from poor advice from unlicensed practitioners. Provided consumers are aware of the risks and have sufficient redress under the general law, this possibility should not pose a problem.

Which specific areas, then, should be reserved for lawyers? In answering this question it is useful to divide legal services into areas by expertise – a classification that could be based on the type of service or, perhaps more appropriately, on the type of consumer. One possible breakdown comprises legal services relating to the following:[105]

- the family, including marriage, divorce, wills and adoption;
- the home, including conveyancing,[106] home insurance and disputes with neighbours;
- employment, including employment contracts, discrimination, entitlements and dismissal;
- relations with government, including immigration and welfare benefits;
- financial services, including trust and estate management;
- consumer protection, including product liability, sale of goods and debts;
- protection of clients' property rights and other pecuniary interests;
- accident insurance;
- criminal law;
- small business commercial transactions, including the setting up of a business, taxation, insolvency, intellectual property rights and commercial insurance;
- large firm commercial advice in all areas;

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[104] For an examination of the type of legal services that are amenable to specialisation (ie service repetitiveness) see Engel, DM (1977), 'The Standardisation of Lawyers' Services', *American Bar Foundation Research Journal,* pp 817–44.

[105] Adapted from the Lord Chancellor's Department (1989b), *op cit* p 6.

[106] The Lord Chancellor's Report suggested that banks, building societies and so on could offer conveyancing services.

- superior court appearances;
- verification of documents and swearing of statements;
- tribunal appearances; and
- alternative dispute resolution.

Obviously the knowledge required to provide legal advice varies considerably among these areas and it is notable that lawyers already face competition in many of them from non-lawyers who specialise in dealing with the particular activity. Some advice will be of a routine kind. Other advice will be concerned with the interpretation of complex legislation not yet examined in court, while other advice again will be given in the context of actually settling the law through litigation. No one is likely to be able to provide expert advice in all areas of the law. In recognition of these realities, some jurisdictions (Britain and some Australian states) permit conveyancing by licensed landbrokers. This is one area that seems quite amenable to lower entry barriers.

4.1 Conveyancing

Conveyancing is by definition the operation of transferring property rights from one party to another, though in practice the service of conveyancing also includes advising parties about the implications of the transaction. Conveyancing normally involves a limited range of legal expertise such as land law and contract law, and does not usually require intimate knowledge of other areas of law. Para-legals who have undertaken well-focused training are sufficiently qualified to be competent conveyancers.

Discussion of conveyancing usually centres on real estate sales, and domestic ones at that. But in fact conveyancing is defined so as to include the transfer of various financial instruments (section 2 Land Transfer Act 1952). These transactions are almost invariably conducted on behalf of sophisticated and well-informed business clients. Furthermore, it would appear that accountants and others frequently handle such transactions, with no complaint from lawyers or anyone else.

In New Zealand conveyancing services are restricted to solicitors with current practising certificates, and people under their supervision.[107] The rules of conduct on conflicts of interest, and regulations concerning the maintenance of trust accounts, further discourage some lawyers from providing conveyancing services for a fee.[108] Although section 229 of the Land Transfer Act 1952 allows the registrar-general of land to license fit and proper persons as landbrokers to undertake conveyancing, the actual requirements for a landbroker have included the completion of a law degree. Only one landbroker's licence has been issued since 1939 (that person subsequently became a lawyer and does not practise as a landbroker, so there are currently none in practice). Five people, however, practise as landbrokers under the trans-Tasman mutual recognition

[107] Law Practitioners Act 1982, s 65.

[108] Law Practitioners Act 1982, s 89, and the rules, 1.01.

arrangements. Thus the legal profession no longer has a monopoly on conveyancing though entry into conveyancing remains highly restricted.

Two main justifications are commonly given for reserving conveyancing to licensed lawyers:

- buying a property is a very important investment: for many people it involves the investment of their lifetime savings. As a result, consumers are said to require high quality conveyancing services to obtain good titles for their properties. As many consumers are not familiar with conveyancing and related matters, it is argued that lawyers must have the exclusive right to undertake conveyancing to ensure that only high quality services are provided. This argument is essentially one of information asymmetry and, as discussed earlier, does not justify reserving conveyancing to licensed lawyers; and
- New Zealand uses a 'Torrens Title' system of land registration, in which the land title is guaranteed by the government once the documents are examined and registered by a district registrar. To enable this system to operate smoothly, it is important that documents are correctly registered. If not, third-party property rights may be adversely affected. But while the impact on third parties (or 'externality' in economic terms) might be thought to provide a case for examining whether conveyancers should be licensed, current rules already permit individuals to undertake conveyancing on their own behalf. This suggests that the rationale for the current licensing system is not third-party effects. Moreover, the preferred approach would be to provide third parties with the opportunity to seek redress for losses suffered from the party at fault. However, as the state guarantees compensation to those who lose property rights by negligence or fraud, the real reason for licensing conveyancing may be the state's desire to limit its exposure by ensuring that those registering property transfers are appropriately trained.

There are reasons for believing that the current system is likely to be inefficient. Non-lawyers cannot provide what is essentially a straightforward service for most home buyers, with the result that prices will generally be higher than otherwise. There is some evidence that competition from non-lawyers lowers the prices charged by law firms. Simon Domberger and Avrom Sherr found that the impending entry of licensed conveyers in England and Wales:

> ... was sufficient to set in motion strong competitive forces within the profession. Fees started to fall in 1984, following the policy announcement to liberalise conveyancing, and a full three years before licensed conveyancers entered the market. By 1986 the discriminatory element in the combined fees charged for sales and purchases of property had fallen by one third – from £6 to £4 per £1000 of property value ... the threat of competition has yielded significant welfare benefits. Price discrimination has been reduced, conveyancing costs have fallen in real terms, and there has been a measurable improvement in consumer satisfaction.[109]

[109] Domberger, S and Sherr, A (1989), 'The Impact of Competition on Pricing and Quality of Legal Services', *International Review of Law and Economics*, vol 9, p 55.

Consumers currently cannot 'bundle' all the various services required in buying or selling property, because lending institutions and real estate firms cannot effectively offer 'one-stop' shopping services. For example, while a bank could provide conveyancing services to its clients, it could not sign the land transfer documents unless this was done by a bank-employed licensed lawyer.[110] Moreover, this restriction provides lawyers with a competitive advantage as general commercial advisers since some commercial transactions – such as corporate reconstructions – usually require conveyancing. To avoid the cost of briefing another adviser, consumers may go to lawyers for commercial advice rather than, say, an accountant.

E-DEC suggests that the licensing of lawyers is not sufficient to assure quality services:

> We found that lawyers' knowledge of the law and ability to do legal analysis is generally good. However, some lawyers' knowledge of the practical aspects of the law, of legal transactions and procedures, is inadequate ... The quality problems with legal transactions appear to be worst in court transactions, particularly in the family law area, and in conveyancing. The Law Practitioners Act 1982 has granted lawyers a monopoly on conveyancing, presumably on the assumption that only lawyers are competent to carry out conveyancing work. But there is little in the existing system of education or licensing to ensure that lawyers have practical competence in conveyancing.[111]

On the other hand, Mr Ian Haynes, the president of the NZLS, argued that it is the regulatory regime that assures consumers of a reliable service and that non-lawyer conveyancers, if permitted, should be subject to the same provisions as lawyers.[112] His view overlooks the role of competition in setting standards of performance and, more importantly, it seeks to deny consumers the opportunity to decide whether the benefits of the lawyers' regulatory regime outweigh the costs. Rather than impose that regime on non-lawyer conveyancers, the government should allow conveyancers to operate free from licensing. If Mr Haynes is correct, lawyers would retain their regime because it benefits consumers while other conveyancers would voluntarily adopt similar restrictions in order to compete. On the other hand, if he is wrong, conveyancers (other than lawyers) would avoid the excessive costs of the lawyer regime and lawyers would quickly drop unjustified restrictions to compete. The issue should be put to the test of the market.

New South Wales has progressively deregulated the legal profession in the last few years. In 1993 licensed conveyancers were permitted. The Legal Profession Reform Act 1993 came into force in 1994. This introduced compulsory fee disclosure, did away with fee

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[110] Even if regulatory impediments to the provision of lawyer, conveyancing and real estate services were removed, potential conflicts of interest may limit the extent to which some services are bundled. Conveyancing and real estate services may commonly be bundled but the provision of those services and finance may be discouraged by the potential for such conflicts.

[111] E-DEC Limited (1997), *op cit* section 4.4.

[112] Haynes, Ian (1997), 'Refocussing the Conveyancing Debate', *LawTalk*, 4 August, p 6. Haynes reports that in dollar terms lawyers' conveyancing fees have not increased since the lawyers' scale was removed in 1984. In real terms they have halved. This illustrates how regulatory rules which inhibit competition, such as scale fees, can impose high costs on consumers.

scales and reduced the remaining restrictions on advertising. The Civil Justice Research Centre in Sydney found that mean professional fees charged by small firms for conveyancing decreased by 17 percent between 1994 and 1996, and that there was a move away from scale fees towards flat and negotiated fees.[113]

There is little justification for reserving conveyancing to lawyers, and the government should allow other professionals to work as conveyancers. Already the Public Trust Office in New Zealand provides full conveyancing services in connection with the administration of estates. A former assistant land registrar, Lester Dempster, applied three times to the registrar-general of land in New Zealand for a landbroker's licence, but was refused. He (now registered in the Northern Territory) and four other Australian registered landbrokers practise in New Zealand under the Trans-Tasman Mutual Recognition Act 1997. Problems still remain because the scale of fees for landbrokers is set by obsolete regulation and New Zealand's entry criteria for landbrokers are too restrictive.

There is a case for removing the licensing requirement for conveyancing work altogether, and allowing any individual or company to provide the service. It is already the case that a person can, for a flat fee, instruct someone else on how to carry out their own conveyancing. The risks in such a situation must be as great as if the instructor carried out the conveyancing personally.

If there is a concern that the normal protection of competition and the general law are insufficient, conveyancing could be subject to a certification system. The requirements for certification should reflect the minimum qualifications and experience needed to conduct conveyancing competently and should not be restricted to lawyers.

Once the land registry is computerised fully, it will be possible to include with the register all the currently non-registered potential difficulties for a purchaser, such as restrictions on further development of the land imposed by a local authority and orders made by the Environment Court. It will then become considerably easier for private individuals to see to their own registration of title and the case for a certification system will be weaker.

4.2 Other lawyer services

While opening up conveyancing to non-lawyers has proved successful outside New Zealand, what about other areas of practice? Arizona in the United States declined to re-enact its Unauthorized Practice of Law (UPL) statute in 1986 which had made it illegal for those who did not meet certain minimum requirements to practise law.[114] Since then

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[113] Barker, Joanne (1996), *Conveyancing Fees in a Competitive Market*, Justice Research Centre, Law Foundation of New South Wales, Sydney.

[114] Every other state in the United States has a UPL prohibition. However, the State Bar of California announced in 1985 that it would no longer initiate UPL actions. Because such prosecutions are almost always brought by bar organisations rather than aggrieved clients, the announcement meant a *de facto* freeing of entry into the market in that state. See Leef (1998), *op cit* pp 24 and 45.

many businesses providing non-lawyer legal assistance have opened. As George Leef points out:

> Repealing UPL statutes would be particularly beneficial for low-income Americans. A study commissioned by the American Bar Association found that in 1987, 40 percent of Americans near or below the poverty line experienced civil legal problems for which they had no legal assistance. With a free market in legal services, those individuals could patronise an affordable, unlicensed legal practitioner. The success of such businesses in Arizona indicates that many people regard that option as a good alternative to lawyers … Nonlawyers routinely refer cases that are outside their competence to lawyers, even though they are not bound by law to do so. In Arizona and California referrals from paralegals to lawyers are common. That indicates that nonlawyers tend not to take cases that they feel are beyond their competence.[115]

The Law Society of New South Wales set up a Professional Regulation Task Force which reported in May 1997. The Task Force noted that:

> … the legal profession is an anomaly when compared with other professions. Accountants are differentiated within their own profession by virtue of the professional association to which they belong. This is also the case with engineers and architects. In the case of architects it is also their title which distinguishes them from other planners and draftsmen. It is only where services are of a physical and personal nature, specifically in the health industry, that professionals must be licensed in order to practise lawfully. [116]

The Task Force went on to recommend that:

> In the first instance, the statutory monopoly on legal work should be removed in New South Wales by appropriate changes to the Legal Profession Act. The right of a person to appear in court for another party would, of course, continue to be governed by the courts themselves as at present. Once an amalgam of the law societies and bar associations from around Australia are able to form a single national licensing body, such relinquishment of statutory monopoly should be implemented on an Australia-wide basis … and as an essential concomitant of any relinquishment of the statutory monopoly, persons other than licensed lawyers should not in the course of or for the purpose of earning income from the provision of legal services, be permitted to use legal profession titles nor hold themselves out to be a lawyer or a member of a professional association of lawyers and should be subject to the sanction of the fair trading and trade practices laws in Australia for breaches of that prohibition.[117]

In essence the Task Force recommended a certification scheme for legal services other than appearance in court as counsel. Undoubtedly, this proposal if brought into force would satisfy many critics of the regulation of the legal profession. Those areas of practice amenable to lesser qualifications would be subject to much greater competition. As a result reputation would become more important to lawyers. A similar approach should be adopted in New Zealand.

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115 Leef, George C (1997), 'Lawyer Fees Too High?', *Regulation*, Winter, p 30.

116 Professional Regulation Task Force (1997), *Report of Professional Regulation Task Force*, Law Society of New South Wales, Sydney.

117 *ibid* p 31.

In 1999 the Law Council of Australia adopted a new policy on the reservation of legal work for lawyers.[118] It noted the special role that a lawyer performs as an officer of the court. The Law Council of Australia stated that the core areas of legal work that should be reserved for lawyers should include the following:

- appearances in court and matters incidental to that right;
- the "drawing, filling up or preparing" of an instrument or other document for fee or reward that is a will or other testamentary instrument, that creates, regulates or affects rights between parties (or purports to do so), or affects real or personal property on behalf of another person; and
- probate.

4.3 Court appearances as counsel

In the common law system, the court adopts a relatively passive role. Its only source of information is the parties and their counsel. The courts have no resources, legal or fiscal, to engage in their own inquiries. This upholds party autonomy and the principle that the courts are provided to decide disputes brought before them by parties, and not to act as an arm of the state implementing policy. The consequence, however, is that the courts must be able to rely absolutely on what they are told by counsel. Not only must everything that counsel tells the court be literally true and not misleading, but in some cases there is a duty of full disclosure. The alternative is that courts would have to be resourced to carry out their own inquiries. This would have major fiscal implications as well as altering the relationship between the individual and the state. The courts must therefore be able to regulate who appears before them, since the only way in which the courts can uphold these principles is by imposing severe penalties on those who breach them.

[118] Law Council of Australia (1999), 'Policy Statement on the Reservation of Legal Work for Lawyers', http://www.lawcouncil.asn.au/rlwpol.htm.

5

WHO SHOULD REGULATE?

5.1 Post-admission regulation in New Zealand

After a lawyer has been admitted as a barrister or solicitor of the High Court of New Zealand, regulation of their conduct is in the hands of the NZLS and the relevant district law society. The NZLS is a monopoly while district law societies are local monopolies.

It is argued that compulsory membership of a law society is necessary to protect consumers. A lawyer's membership allows the NZLS to demand adherence to the Rules. The Council of the NZLS has extensive powers to make rules under section 17 of the Law Practitioners Act 1982.

The Rules are not an exhaustive code relating to professional responsibility. Discipline within the legal profession is also addressed in Part VII of the Law Practitioners Act 1982, which deals with complaints and disciplinary processes at national and district levels. Some concepts in Part VII are not defined in the Act itself or in the Rules. These include 'misconduct' in a practitioner's 'professional capacity' and 'conduct unbecoming of a barrister or solicitor'. In some circumstances the Act deems a practitioner to be guilty of misconduct in a professional capacity. But in other circumstances it is up to a district society complaints committee, a district disciplinary tribunal, the New Zealand Law Practitioners Disciplinary Tribunal or a court to decide whether there has been a breach of conduct. Such a charge need not be tied to any specific rule of ethics contained in the Rules. Thus at least some aspects of the disciplinary system need not depend on membership of the NZLS.

Membership compels lawyers to join the fidelity fund to cover claims for fraud and a significant percentage of the membership levy is a contribution to the fidelity fund – an open-ended mutual insurance scheme with no risk rating of premiums. But there are no convincing reasons why contributions to the NZLS's fund or any other fund should be compulsory. Moreover, insurance against fraud can be purchased independently of the regulation of lawyer behaviour (although, of course, in a properly merit-rated scheme good conduct would be encouraged through lower premiums for practitioners who demonstrate high standards of care).

5.2 Self-regulation versus independent regulation

In common law countries, including New Zealand, there has been a tradition of conferring on legal professional bodies monopoly powers to determine the entry criteria of barristers and solicitors and to regulate professional conduct. There are some reasons for this approach. Self-regulators have specialist expertise and technical knowledge of professional practice, which means that the information costs in setting and enforcing

standards may be lower than otherwise. Self-regulators may be in a better position than law-making bodies to respond to changing market conditions. Moreover, the direct administrative costs of regulation are borne largely by those being regulated (although the costs are ultimately borne by the public).

Many of the concerns about professional rules, however, arise from a belief that the legal profession is concerned mainly with the interests of its own members (the representative role) rather than the wider interests of the public. This is an inevitable consequence of the same body performing regulatory and representative roles.

The costs of monopoly self-regulation may outweigh any benefits because it provides excessive scope for anti-competitive practices to develop and for consumers with valid complaints against members to be frustrated. Monopoly regulators tend to impede innovation ostensibly in the public interest but really because innovators threaten the incomes of established practitioners. Entry barriers may be used by self-regulators to increase monopoly profits. Excessive entrance qualifications would, for instance, create barriers to the practice of law and increase the profits of insiders. Certainly an increase in entry barriers will almost always increase the profits of incumbents in the affected market.

When the creation of the fifth law school in New Zealand was proposed, many in the legal profession objected that New Zealand did not 'need' more law graduates although only about half of law graduates go into the profession. They attempted to impose some rationing at the university entry level. The possibility that an increase in law graduates might benefit society by reducing the cost of legal services and by increasing their supply, and that some people might be denied the opportunity to pursue their preferred occupation, seemed to have been overlooked.

In Australia there has been a trend away from monopoly self-regulation of lawyers towards the establishment of independent regulatory agencies. In New South Wales the Legal Profession Act 1987 set up separate mechanisms for entry regulation (the Legal Practitioners Admission Board) and complaints (the Office of the Legal Services Commissioner). There is also a Legal Services Advisory Council, responsible for reviewing the structure and regulation of the legal profession. This Council has a particular responsibility to examine whether any rule imposes restrictive or anti-competitive practices.

In Victoria the Legal Practice Act 1996 came into force on 1 January 1997. Until then the profession in Victoria had been self-regulating. Two professional associations – the Victorian Bar and the Law Institute of Victoria – had statutory responsibility for licensing and post-admission regulation, including discipline. Now a statutory Legal Practice Board has been set up to regulate the profession and to administer three funds: a legal practice fund (the income of which comprises practising certificate fees); a fidelity fund; and a public purpose fund (the income of which includes trust account interest and fines). The public purpose fund pays non-regulatory expenses such as legal aid and tops up the fidelity fund.

Each lawyer pays a fee to a recognised professional association (RPA), which can issue practising certificates and handle complaints. RPAs report to, and are accredited by, the Legal Practice Board. The Law Institute of Victoria, which was a company incorporated under statute, was abolished at the end of 1996 and its assets transferred to a new company, Victoria Lawyers RPA Limited. The Law Institute of Victoria is now a business name owned by the new company. Victoria Lawyers RPA Limited is responsible for regulatory functions while the Law Institute of Victoria undertakes representative functions. These organisations will eventually be separated. Over time more than two RPAs may be set up.

5.3 Monopoly regulation versus voluntary arrangements

The assignment of regulatory functions to independent agencies presumes that occupation-specific regulation of the profession is justified. As argued above, it is not easy to see why lawyer conduct should require special regulation. So long as there are adequate avenues for clients to seek redress in the event of fraud, breach of contract or negligence, there is no compelling reason why a lawyer should be required to join the NZLS and agree to abide by the Rules.

One way of limiting regulatory capture is to remove the statutory powers of the NZLS and district law societies and make membership of them or any other professional body voluntary. This would allow competing professional bodies to emerge to serve members if there is a demand for them. The threat of competition is often sufficient to focus organisations on serving the best interests of their members. Competition also helps to align the interests of members with those of consumers. Lawyers may have insufficient common interest in many issues to ensure a unified professional body encompassing all practitioners. If unnecessary rules and restrictions were imposed on members a new professional body might be formed to represent those lawyers who do not wish to be bound by them. Some lawyers may elect not to join a representative body.

The market for legal services involves product, client and lawyer heterogeneity. Because of this complexity, no one knows, *a priori*, the optimal rules, or the best way of bringing them into force. Moreover, as argued above, there are no strong public policy grounds to license many legal services. The best strategy is to create institutional arrangements that encourage organisations to take decisions in their own interests that also help to maximise benefits to society. Competition (including potential competition) among organisations can provide an important means of ensuring that rules further the interests of members. Where there is competition, inefficient rules will not survive because those subject to such rules would be disadvantaged.

The trans-Tasman mutual recognition arrangements will provide the basis for some regulatory competition between Australian states and New Zealand. But why stop there? There is no compelling reason why lawyers should not manage their own affairs on a voluntary basis. What is being referred to here, then, is not regulation but the formation of voluntary associations which draw up and police their own rules in

accordance with the general law. New associations can then form whenever the existing ones fail to meet the needs of the profession.

The removal of monopoly regulatory powers from the NZLS can provide benefits to consumers of legal services by:

- fostering rules that enable members to be more responsive to changing consumer needs, and that more closely reflect the preferences of members;
- allowing rules that take into account differences in the costs of supplying legal services;
- providing incentives to search out ways to lower the costs of providing legal services for a given level of quality;
- encouraging standards of professional behaviour that better reflect community expectations;
- allowing more efficient transmission of information to consumers about the standards of service they can expect (monopoly regulators are likely to encourage the idea that consumers are being looked after by a third party and do not need to do their own monitoring of lawyers); and
- reducing the potential for 'capture' of the standards and regulatory processes by vested interest groups. Vested interest groups would capture a monopoly regulator, even at the national level. Voluntary bodies are subject to competition.

Opening up the supply of legal services to non-lawyers would put competitive pressure on lawyers to ensure that their rules are efficient. The government may be pressured to set minimum self-regulatory standards, including compulsory insurance. There would seem to be little point in opening the legal services market to competition if its benefits were dissipated by doubtful regulatory requirements. Consumers would soon learn the risks they were exposed to by dealing with lawyers and non-lawyers.

Some may argue that there is one potentially major problem with competition in the market for legal services: consumers may not be sufficiently able to distinguish between services provided by practitioners subject to different professional rules. However, professional bodies and their members have incentives to publicise the rules under which they are operating, allowing consumers to make their own trade-offs over price and quality. It might be claimed that some consumers could not make these trade-offs. However, in a competitive market, not all consumers need to be well informed: the well-informed marginal consumer ensures others are protected. Moreover, competition raises standards and prevents 'a race for the bottom' occurring, in which the lowest common denominator prevails. The normal legal impositions, enforced by the courts, such as fiduciary duties to clients, also ensure minimum standards. Moreover, competition leads to higher standards in areas where consumers demand those standards and are prepared to pay for them.

6

REGULATION OF BARRISTERS

In New Zealand, some lawyers choose to hold practising certificates as barristers sole. The decision to practise only as a barrister may be made for one or more of several reasons. Some lawyers may wish to specialise in litigation, to practise alone rather than in a large firm or to save the expense of operating solicitors' trust accounts. In addition, a lawyer may choose to practise as a barrister sole in order to acquire the status of queen's counsel. A barrister sole is subject to an additional chapter in the Rules, 'The Practice of Barristers'.

It should be noted at the outset that the criticisms of the detailed rules relating to barristers that are discussed below would not apply if they were the rules of a voluntary association. It is the regulation of the legal profession that creates the need to examine these rules in detail and not the existence of a group of lawyers who wish to maintain a separation from the rest of the profession.

It should also be noted that in New Zealand, unlike several Australian states, there is no requirement to engage a barrister to appear in court. Those in practice as solicitors can also exercise their rights of audience as barristers without (as in England and Wales[119]) first having to be licensed as advocates. Any criticisms of the practices of the bar must therefore be considered in the light of the fact that the bar does not enjoy a monopoly over litigation. The bar's practices may therefore be seen as a form of product definition and differentiation rather than monopolistic privileges. This does not imply, however, that regulation of the legal profession has no effect on the bar. Clearly, lawyers as a whole hold a monopoly over court appearances as counsel.

Barristers argue that they epitomise the professional independence which ought to characterise the legal profession as a whole. This independence is supported by three rules: that barristers cannot practise in partnership but must be self-employed; that barristers cannot be instructed except by a solicitor; and the so-called 'cab-rank rule' that a brief cannot be refused save on proper grounds.

6.1 Independence and self-employment

The concept of independence is valued for four main reasons:

- First, the client of a professional person is entitled to the exercise of that person's skill and judgment and not merely to their slavish obedience. Clients should be given an accurate view of the likelihood of success of litigation and of the best ways of

[119] *Modernising Justice* contained a proposal to extend the right of audience to solicitors; see Lord Chancellor's Department (1998b), *op cit*.

achieving a desired end. Since this is in the interests of clients, it might be expected that competitive pressures would be sufficient to maintain these standards.

- Secondly, the lawyer has duties to the court: to make full disclosure in certain circumstances, to conduct discovery procedures properly, not to pursue an action for ulterior motives and so forth. The fundamental rule is that litigation is in the hands of counsel and counsel makes decisions about the conduct and eventually the withdrawal of an action. This may require counsel occasionally to act contrary to the immediate interests of the client, and it is important for the functioning of the legal system that confidence is maintained in lawyers' adherence to these duties. The courts therefore have a choice either to regulate the rights of audience closely or to inflict severe penalties on those who do not comply with these requirements.
- Thirdly, the judiciary are appointed from the legal profession. It is important that judges do not have records of activism in support of particular causes or known leanings to one side or another in regularly occurring disputes, for example between employers and unions, between consumers and producers, or between insurance companies and policyholders.
- Fourthly, it is vital to the functioning of a free society that some people are at liberty to express views and pursue causes without being beholden to others. Since many of the issues on which the comments of such people are valued will relate to the rule of law and to basic rights issues, it is particularly valuable to have lawyers in this position. The bar could point to a dispute over the composition of the Court of Final Appeal of Hong Kong to demonstrate that the independent bar is better placed to maintain its independence than firms of solicitors with long-term relationships with business clients. The treaty between China and Britain relating to the handover of Hong Kong to China specified that overseas judges would be appointed to the Court of Final Appeal. Subsequently, Britain and China secretly agreed that while several overseas judges would be appointed to the Court of Final Appeal, only one would sit on each bench to decide a case. When this arrangement became known the legal profession in Hong Kong protested that it contravened the spirit of the treaty. Certain Chinese business clients of solicitors practising in Hong Kong pressured the Hong Kong Law Society to stop protesting for fear of offending the Chinese government, which it promptly did, and only the Bar Association in the jurisdiction continued to raise the matter.

There is a spectrum of independence ranging from the full-time employee owing duties of confidence to an employer, to the solicitor who has to consider the welfare of their partners and to the self-employed barrister with numerous clients on no one of whom the barrister relies for any substantial part of their income. In between come members of law firms who work largely or even exclusively for long periods for a major client, solicitors with numerous small clients and barristers who are regularly briefed by a business or government department that is a frequent litigator. In New Zealand not only may partners in law firms appear in court but so may employees of businesses and government departments who hold practising certificates.

In theory, the responsibilities of all lawyers to the courts and to each other are the same. All lawyers are subject to the same code of ethics. Nonetheless, it appears plausible that for the self-employed barrister with numerous one-off clients, the potential costs of adhering to these ethical duties are lower than for the solicitor with important long-term clients. There is no compelling reason, however, why this adherence to a code of ethics should not be a matter for individual practitioners to decide.

6.2 Referral rule

With certain exceptions, a barrister sole cannot accept instructions directly from a member of the public, but only via a solicitor. This is known as the referral rule or intervention rule. Outside New Zealand it is usually known by the latter title as the rule goes so far as to forbid contact between a barrister and their client and witness without the intervention of a representative of the solicitor.

This rule is not one created and enforced by the bar. If it were, there could be little objection as there is no requirement for someone acting as a barrister sole to join the Bar Association. The referral rule is created and enforced by the NZLS. Barristers do not have to contribute to the fidelity fund, or maintain a trust account. Effectively, therefore, the Rules create two different kinds of lawyer.

It is argued that the independent bar could not exist without the referral rule. The reason for this is that solicitors would not refer clients to barristers if they feared that the barrister would thereafter take over their client's general business. The rule is intended to ensure that solicitors do not refer clients to a direct competitor.

This in turn is important from the point of view of the public benefit if the public benefit arguments for an independent bar are accepted; and from the point of view of clients in making available to them a pool of advocates wider than merely the litigation department of the firm of solicitors.

On the other hand, there are undoubtedly cases where the intervention of a solicitor is not required and in these cases the rule appears merely to impose unnecessary cost. The rule is often treated as a mere formality. After a client has contacted a barrister, the barrister may ask a solicitor for a formal referral, or the briefing may go through a 'post box' solicitor. (Solicitors in New Zealand, as a rule, do much less preparation of cases they are to brief out than is the case in England.) The barrister thus avoids any charge of misconduct, the solicitor becomes liable for the barrister's fees as a matter of professional discipline (barristers cannot sue for their fees), and the client has to pay for the unwanted services. Although such arrangements appear to breach the spirit of the referral rule, they do not breach its rationale since the barrister is impeded from obtaining the client's whole legal business.

The referral rule does not apply to legally aided defendants in criminal cases; indeed the legal services boards will not fund both a solicitor and a barrister.[120] This exception can

[120] The exceptions permitted in New Zealand are more limited than in the United Kingdom where chartered accountants, surveyors, banks, insurance companies and local authorities are permitted to brief the independent bar directly.

be defended on the ground that to exempt a single kind of business cannot undermine the rationale for the rule. On the other hand, in other jurisdictions counsel presenting cases in court are not permitted contact with the accused and witnesses. This prevents the coaching of clients and witnesses. Since the coaching of witnesses is consensual between the barrister and the client, complaints will not be forthcoming and a prophylactic rule may be required to prevent it. The amount of coaching of clients and witnesses that goes on in New Zealand can only be speculated upon, but it is the common currency of anecdotes.

6.3 Cab-rank rule

This rule requires that a lawyer must not turn down any brief save on reasonable grounds (such as that it is outside the lawyer's area of expertise or a reasonable fee is not forthcoming). The cab-rank rule applies to all lawyers in New Zealand and therefore formally there is no distinction between barristers sole, and barristers and solicitors.

The cab-rank rule is commonly justified on the ground that it ensures that unpopular people and those promoting minority causes are able to obtain legal representation. A lawyer may not turn down a brief for fear of unfavourable publicity.

The rule also helps individual lawyers to appear from time to time on both sides of disputes, for example prosecuting and defending criminal cases, appearing for employers and unions, and developers as well as environmentalists, Maori claimants, local authorities and others resisting their claims. In this way it is emphasised that arguments made in court are those of the client and not of counsel and counsel provide a pool of independent persons who may be suitable for selection as judges.

Inevitably, despite the rule, solicitors accumulate regular clients and may acquire a reputation for taking one side of an argument. This is particularly so in employment matters and can be seen to lead directly to difficulties in appointing suitable judges to the Employment Court.

6.4 Reform of the Bar

The effect of the current rules relating to barristers is to create limited competition for a proportion of legal business between two different types of lawyer with different business structures and different assurances as to quality.

Since the demand for the services of barristers in New Zealand is growing, while their use is voluntary, a group adopting these practices may remain under a voluntary regime. The division of the profession into two groups, however, one with and one without a fidelity fund, one allowed to create partnerships, the other not, and so forth, is unlikely to reflect the subtlety and variety of arrangements that may arise under a voluntary regime. A key advantage of a voluntary regime is that regulators do not need to make judgments on such matters. Competition will generally determine which arrangements are appropriate. Those lawyers who wish to appear in court would, however, be required to comply with the rules set by the courts.

6.5 The appointment of queen's counsel

When queen's counsel (QC) were first appointed in the sixteenth century to help the Crown's law officers, the title QC was associated with a certain type of work and not necessarily with professional eminence. These days QCs are appointed on the basis of advocacy skills and experience but factors such as geographical and gender balance also feature.

New Zealand introduced the title in 1907. The current appointment of a QC is:

> ... made by the Governor-General on the recommendation of the Attorney-General and with the concurrence of the Chief Justice of New Zealand ... The normal requirement is that a barrister is expected to spend a reasonable period of time in practice as an independent barrister before applying for silk.[121]

In principle, the QC title is an award for prominent achievement in law, and is currently the only officially recognised title for eminent lawyers. At first members of law firms could be appointed QCs, but in 1913, at the initiative of the firms themselves, the rule was changed so that only a barrister sole could become a QC. This causes some resentment today among those practising as advocates in law firms.

The objection to allowing QCs – or barristers with any similar title – to practise in partnership with solicitors was that it led to a situation in which every firm had to have one (today the large firms would have to have several) and firms referred work to their in-house QC rather than the advocate best suited to a particular case. This inevitably happens to some degree, as work is given in-house to advocates who might be able to take silk outside the firm.

The disadvantages of the rule are that:

- it prevents QCs, as barristers, from adopting any business form other than self-employment;
- it discriminates against litigation lawyers who choose to remain in firms; and
- it effectively disqualifies transactional lawyers from attaining the rank.

Against these it can be said that the title 'QC' traditionally means a senior and experienced advocate and that members of firms could alternatively agitate for their own form of recognition comparable to the Writers to the Signet in Scotland.

It has been suggested that:

> The rank of Queen's Counsel is an integral part of the independent bar and it sets the standard for other barristers to follow and to aspire to. It provides leadership and also gives the bar additional standing that ensures that it is better able to take a stand (including one against the abuse of judicial power, if that were to occur) when a stand needs to be taken.[122]

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121 Eichelbam, Thomas and East, Paul (1991), 'Procedures for Appointment of Queen's Counsel', *LawTalk,* 2 September, p 9.

122 Farmer, Jim (1993), 'QCs: Integral Part of Independent Bar', *LawTalk,* 15 April, p 16.

Even if QCs were allowed to practise in law firms (practising either solely as barristers or as both barristers and solicitors), it seems likely that large numbers would stay on at the bar, ensuring client access to quality representation. However, this would depend on the number of QCs appointed, the extent to which they are appointed from law firms and the economics of legal practice. If the *raison d'être* of the QC title is simply to indicate quality advocacy – a system of certification – there are good reasons for awarding the title irrespective of how the advocate chooses to practise. If there are concerns with the administration of justice then those concerns should be addressed directly, not by imposing artificial restrictions on the mode of practice.

In sum, there seems little justification for QCs not being able to choose the organisational form best suited to their circumstances. The title QC (or a new title as in Australia) would then indicate quality advocacy skills irrespective of where the advocate practised.

Some argue that the QC title provides commercial advantages. For example, the South Australia Attorney-General, Chris Sumner, has commented that "being appointed a Queen's Counsel is like being given a licence to print money".[123] It seems unlikely, however, that the title confers immediate commercial rewards. A barrister's skill level does not immediately increase on being made a QC. The argument that new QCs are able to raise fees requires either that clients (through their solicitors) cannot correctly evaluate the level of advocacy skills (which seems implausible), or that there is a separate market for QCs, unrelated to actual skill levels. For example, the officers of a company may feel obliged to hire a QC both to signal to the other side that they are serious about proposed litigation and also to reduce the risk that shareholders may accuse them of failing to obtain the best legal advice possible. Retaining a QC may provide 'insurance', especially where the other party has retained a QC.

QC titles are no longer bestowed for outstanding services to the Crown. If the title serves as a signal of quality and attainment, as in a 'brand', then there is no clear reason why governments should be involved in this process at all. It is unlikely that the benefits of certifying certain barristers as QCs outweigh the costs involved because barristers are at present engaged on the advice of solicitors. Thus the information asymmetry argument for certification does not apply. If lawyers or advocates are licensed to appear in court, as suggested in this report, then such licensing indicates to the public that such lawyers or advocates are competent to represent the public. There are no compelling grounds for the government to establish further regulation to identify the more experienced and skilful advocates. Moreover, to confer such titles for life leads to the possibility that the title may mislead consumers if the holder's level of skill is not maintained. Outstanding service to the law and to other activities can be recognised by the conferment of queen's honours.

Professional bodies may, however, wish to recognise outstanding ability. In New South Wales, the title QC has been replaced by that of senior counsel (SC) and the appointment process is independent of government. Changes to the appointment of QCs including their possible abolition are being considered in the United Kingdom. There is no reason why solicitors and barristers should not be able to introduce their own recognition system.

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[123] Sumner, Chris (1991), 'The A-G and the Cost of Silk: Attorney-General Chris Sumner on Barristers', *Law Society Bulletin*, vol 13(8), September, p 30.

7

POST-ADMISSION REGULATION OF BARRISTERS AND SOLICITORS

7.1 Restrictions on forms of business organisation

Partnerships or sole practitioners presently provide lawyer services. Partnerships have the obvious advantage of being able to aggregate financial capital, provide 'one-stop' shopping, and train new lawyers in a number of areas. But partnerships are also formed where trust is important. Partnerships help to 'signal' to customers that the firm upholds high standards of ethics and of service quality. Because partners are personally liable for each other's performance, they have an incentive to monitor the performance of fellow partners to maintain appropriate standards and prevent fraudulent behaviour.

Put technically, lawyers in partnerships *bond* themselves (by making themselves liable for the performance of their partners) in order to protect their clients' interests when client-monitoring costs are high. Law firms specialise in order to reduce monitoring costs, since monitoring costs are lower for lawyers with similar qualifications. On the other hand, where team production is important and a variety of skills are required, legal firms may develop diverse skills. This diversity will increase monitoring costs. The advantages of team production must be weighed against increased monitoring costs, which must be paid for by consumers. It is worth noting that advocacy typically does not require team skills or team monitoring: other advocates supply monitoring.

Since the members of a partnership have a pecuniary interest in the partnership's financial success, there is a potential conflict of interest if one partner takes a brief in opposition to another partner. An effect of partnership may therefore be to reduce competition by reducing the number of lawyers available to a particular client. These considerations were recognised by the majority of the Court of Appeal in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation*.[124] On the other hand, if firms became so large that clients had few choices, some lawyers might be encouraged to establish new firms.

The sole practitioner may be an efficient business unit where assignments can be managed by a single practitioner, a relatively small amount of capital is required, joint facilities are unnecessary, and the maintenance of personal reputation provides incentives to supply the quality of service demanded by clients.

It is possible to view the bar as combining the benefits of partnerships – such as the ability to share resources in the form of accommodation, libraries and so on – with the

[124] [1998] 3 NZLR 641.

advantages of sole traders, such as the ability to compete against all other advocates and monitor other members openly.

The company is the most important form of business organisation for the provision of goods and services. The potential advantages of incorporation include continuity of existence, transferability of interests, lower costs of raising capital and limited liability.[125] The separation of ownership and control may also facilitate the effective management of large organisations. Presumably these advantages could be obtained if lawyers were permitted to incorporate. In New Zealand, however, they are prevented from doing so.[126]

Some commentators argue that incorporation of law firms is inconsistent with lawyers' obligations. It is claimed, for instance, that incorporation may impair the professional-client relationship, by allowing law professionals to come under pressure from their company to put its interests ahead of those of the consumer. But this argument does not seem convincing. Individual lawyers' responsibilities are largely unaltered by the choice of organisational form, whether they practise as employees of firms or of companies, or as principals. Some large law firms attempt to establish by contract similar incentive structures to those that would apply with a company structure. It is competition and not mandatory organisational structures which best safeguard the interests of consumers.

A second argument is that incorporation would allow lawyers to 'hide behind the corporate veil', and thus avoid disciplines against them. However, if lawyers were to incorporate, the same code of conduct and discipline could be applied both to lawyers in corporations and to the corporations themselves. It is hard to see how lawyer employees could 'hide behind the corporate veil'. Where there is misconduct, the company, the employee, or both could face disciplinary action or be sued. If a complaint were made against the company rather than the employee, this would happen because of a choice by the complainant, not because the employee was hidden behind the corporate veil.

For some, limited liability constitutes a third ground for concern about the incorporation of legal practices. Unlike the unlimited liability of a partnership, where all partners are jointly and severally liable for civil claims against the firm, limited liability in a corporation implies that only the corporation itself is liable for such claims. However, large law firms often arrange for companies to own their business assets, while spouses, children or family trusts often hold the personal assets of partners. Accordingly, the unlimited liability status of sole practitioners and partnerships is often more limited than appears at first sight.

In any market, limited liability does not change the total risk involved in a transaction, other things being equal, but shifts some risk from entrepreneurs to creditors and clients. In a competitive market this transfer of risks will be reflected in the terms of contracts among the various parties. In the legal services market, however, some clients may not be well informed and may not be fully compensated for the risks they bear. Some people

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125 Prichard, J and Robert, S (1982), 'Incorporation by Lawyers', in Evans and Trebilcock, *op cit*, pp 305–308.

126 The prohibition results from s 43, s 44, s 54 and s 55 of the Law Practitioners Act 1982.

consequently argue that limited liability arising from incorporation of law practices is a disadvantage to consumers.

The information problem, however, is not inherent in incorporation. Information about corporations, especially publicly listed companies, is often more fully disclosed and more easily accessible than information about other forms of organisation. In the case of partnerships, it is the net assets of the partners that are relevant to creditors. Such information is usually not readily available. In consequence, consumers are often best informed when dealing with corporations. If consumers were disadvantaged by incorporation some practitioners would, given a competitive market, exploit the opportunity by continuing to practise through a partnership. Moreover, the apparently unlimited liability of partnerships is in fact constrained, since it is limited to the assets of the partners. These may be small because partners of law firms are not necessarily wealthy.

Prohibiting lawyers from incorporating is unjustified. The restriction imposes considerable costs because the advantages of incorporation are forgone and other problems are created. The inability to incorporate may constrain a law firm from obtaining equity capital from non-lawyers, which may limit the ability of the firm to expand. While law firms may borrow funds secured over personal and real property, the existing assets of the firm and those of its partners limit borrowing. Allowing capital injections from outside a practice may help reduce impediments to the development of large law firms where it is economic to do so.

The Victorian Legal Practices Act 1996 allowed for the incorporation of legal practices with limited liability (Part 10). Shareholders and directors must be current practitioners.

The Professional Regulation Task Force set up by the Law Society of New South Wales reported that:

> ... as service providers, law firms are more than top heavy with lawyers ... law firms are locked into the 'partnership' mentality. This creates a culture which is club-like, exclusive and for some, impenetrable. This culture puts law firms at a disadvantage in that the successful service providers of the future will have flat and highly transparent structures. Non-partnership structures can more readily adapt to this model.[127]

The Task Force proposed that:

> Lawyers should be free to structure themselves in any way they see fit. This should include: partnership (unlimited); limited liability partnership; and incorporation with limited liability.[128]

The Task Force went on to propose that shareholders or directors need not be lawyers. Incorporated law firms would not be treated differently from other corporations.

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127 Professional Regulation Task Force (1997), *op cit* p 21.

128 *ibid* p 22.

The Attorney-General of New South Wales announced in late 1999 that legislation would be introduced to allow lawyers to provide legal services through corporations. While solicitors in New South Wales can already practise through companies under Part 10A of the Legal Profession Act 1987, the corporation must hold a practising certificate, solicitors and their families must control the corporation and the corporation must have unlimited liability. There are few advantages of incorporation with these conditions. Under the proposed legislation the corporation will not need to be licensed to practise law, only one board member will need to be a solicitor and the corporation will be able to engage in activities other than legal work. Solicitors will be required to contribute to the fidelity fund and will be subject to professional ethics and rules on an individual basis. The requirement for corporations to have unlimited liability is to be reviewed.[129]

In sum, there are no compelling reasons why lawyers in New Zealand should be prevented from incorporating if they so desire. Any problems arising from limited liability could be addressed directly. It should be remembered that limited liability refers only to the limited liability of the capital subscribers, not the liability of the firm for negligence and other failings.

Of course it is unlikely all lawyers would chose to incorporate, if given the option. They would make their own judgments, and only those who found incorporation to be the most efficient means of practising would act accordingly. But the ability to exercise this choice would clearly increase the efficiency of the legal services industry.

7.2 Multi-disciplinary practices

Multi-disciplinary legal practices could help to provide the services wanted by consumers at lowest cost, through better coordination among professionals. Legal services do not often exist in isolation from services provided by other professions. For example, often lawyers must cooperate with accountants in taxation and insolvency cases, merchant banks in corporate restructuring cases, economists in government regulation issues, and mortgage brokers in real estate transactions.

Just as they can hire para-legals for standard legal work, lawyers may also employ other professionals capable of providing substitute services at lower cost than a lawyer. For example, in relation to some issues accountants may be able to provide better tax advice to corporations at a lower cost than lawyers. As John Quinn points out:

> It seems likely that most substitution efficiencies will involve exploiting opportunities for greater specialisation of effort within the multi-disciplinary firm, essentially those refinements in task allocation that cannot now be achieved, or achieved as cheaply, through the employment of paralegals. This suggests that the prospects for substitution efficiencies from multi-disciplinary practice are probably limited.[130]

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[129] Shaw, Jeff (1999), 'Incorporation of Legal Practices Under the Corporations Law', *Law Society Journal*, vol 37(10), p 67.

[130] Quinn, J (1982), 'Multi-disciplinary Legal Services and Preventative Regulation', in Evans and Trebilcock *op cit*.

The advantage of multi-disciplinary practice arises from the saving that can be made from joint production of legal and other services (economies of scope) through the use of common inputs. Production economies can arise from lower costs in obtaining and using information (about the financial affairs of a company structure, for example, which is useful for financial planning and ensuring compliance with the law). Better quality service can arise from a greater ability to jointly recognise client needs. Clients also benefit from 'one-stop' shopping.

Lawyers in country areas and in metropolitan suburbs may also benefit from the potential of multi-disciplinary practice to afford economies of scale (where average costs decline as the size of a firm increases). This can occur through the use of shared fixed assets such as libraries and computers, and through increased specialisation (of lawyers, para-legals and administrative staff). The ability to reach a more optimal size may allow regional and suburban law firms to compete more effectively with larger city practices.

From the point of view of the consumer, the main advantage of multi-disciplinary services is that they save on the costs of information search and communication. Indeed, the major reason for the emergence of particular organisational forms is the savings in such transactions costs. But there are also other advantages for multi-disciplinary legal services:[131]

- lawyers and other professionals are under a unified management, with the result that their efforts are better coordinated, and duplicated work can be avoided;
- since lawyers and other professionals tend to have different perspectives, joint provision of services can improve the identification of consumer needs, reducing the probability of negligence and raising the quality of services;
- collaboration between legal and other professionals can result in a more efficient allocation of tasks. Human and other resources of the firm can be allocated according to individuals' comparative advantages. As a result, greater efficiency can be achieved, which in turn can lower the costs of service to clients; and
- joint provision of services can save costs through the use of common inputs such as offices, secretaries, and information.

The benefits of multi-disciplinary services are not currently obtainable because of several restrictions:

- solicitors and non-solicitors may not act as agents for each other;[132]
- a solicitor may not allow their name to be used upon the account of, or for the profit of, a non-solicitor, and may not refer work to a non-solicitor;[133] and
- a solicitor may not practise with non-lawyers.[134]

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131 For a more detailed account of the benefits of multi-disciplinary practices see Quinn (1982), *op cit*.

132 Law Practitioners Act 1982, s 66 and s 67.

133 Law Practitioners Act 1982, s 67.

134 The Rules, rule 2.03.

Although lawyers are allowed to employ other professionals, and law firms can provide multi-disciplinary services with other professional employees, this practice is discouraged for two reasons:

- lawyers are discouraged from employing other professionals because lawyer employers will remain solely responsible to clients for the conduct of their employees; and
- professionals other than lawyers are discouraged from joining law firms because no matter how important a role they play in the firm, they can never be awarded co-equal status as lawyers.

As a result, although multi-disciplinary services provided by law firms are not explicitly prohibited, they are effectively restricted in practice. Occupation-specific regulation may also prevent or restrict professionals from other disciplines practising with lawyers.

Two basic types of conflict of interest are perceived to be associated with multi-disciplinary firms.[135] One concerns a lawyer's ability to influence consumer demand. Since legal services involve both identifying consumer needs and satisfying those needs, lawyers may have a considerable influence on the decisions of consumers. A dishonest lawyer in a multi-disciplinary law firm may abuse this privilege by persuading the consumer to purchase unnecessary complementary services provided by the firm. This is only likely to be a significant problem where there are no separate markets for each of the services provided. In so far as it is a real problem, it already exists to some extent in relation to the choice of counsel after a transaction advised upon by a commercial partner is litigated.[136]

More serious problems arise where different loyalties are owed by different parts of a firm involved in one transaction. For example, in a combined lawyer and real estate firm, a conflict arises in a property sale if the firm acts as an estate agent for the vendor and as the lawyer for the purchaser. Quinn gives other examples.[137] He suggests:

> The design of an appropriate regulatory response requires a case by case review of the costs and benefits of specific types of multi-disciplinary practice which involve incompatible roles and functions. This would essentially involve weighing the efficiency gains which might be generated by a particular type of multi-disciplinary practice against such factors as the severity of potential client harm and its probability of occurrence. In some cases there may be protective measures (eg disclosure and consent requirements) which would reduce the likelihood of client injury to acceptable levels. In other cases, the probability of harm from conflicting interests may be low because of the nature of the services, or the sophistication of the firm's clientele.[138]

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135 See Quinn (1982), *op cit*, for a detailed discussion.

136 See, eg *Kooky Garments v Charlton* [1994] 1 NZLR 587; (1993) 7 PRNZ 253.

137 Quinn (1982), *op cit* pp 344–345.

138 *ibid* p 345.

There are, however, several reasons why this type of conflict of interest does not appear to be sufficient to justify regulatory impediments to the provision of multi-disciplinary services:

- it is essentially an extension of conflicts in legal practice generally: a lawyer in ordinary practice is also in a position to prescribe an excessive level of services. Ethical legal practices depend mainly on the ethics of individual legal practitioners rather than on organisational forms;
- consumers can choose to purchase complementary services separately, thus reducing the risk of being cheated by a dishonest lawyer; and
- a lawyer's ability to influence consumer demand does not inevitably lead to conflict of interest situations. Honest lawyers can often prescribe appropriate complementary services to save consumers' search costs.

A second type of conflict of interest can arise where the joint provision of certain services is inappropriate. Quinn[139] gives the example of a lawyer acting for a client purchasing property where the real estate agent is the lawyer's partner. In this case the lawyer has a pecuniary interest in seeing the transaction completed, which may tempt them to agree to a contract unfavourable to the client.

But the risk of this type of conflict of interest is also not substantial. Consumers can often discern any potential conflict of interest, and will refrain from purchasing incompatible services from one firm. They are assisted by the requirement that lawyers disclose a conflict of interest. In cases where the risk of conflict of interest is substantial, a better approach may be to make specific rules to avert such conflicts, rather than impose a sweeping restriction on multi-disciplinary services.

Another difficulty with multi-disciplinary services relates to the solicitors' fidelity fund. Currently, all solicitors in practice contribute to the fund, which compensates clients who have suffered pecuniary loss from the dishonesty of solicitors or their employees or agents. Since the fund applies only to solicitors and those under their supervision, the question arises as to how the fidelity fund should apply to multi-disciplinary firms.

There are at least four possible options:

- to increase the levy on solicitors in multi-disciplinary firms, and extend the coverage of the fund to the misconduct of non-legal professionals;
- to exempt solicitors in multi-disciplinary practice from the levy, thus making the fund inapplicable to multi-disciplinary firms;
- to continue levying solicitors and leave the non-legal professionals to make their own provisions for misconduct; or
- to abolish the fund with or without other compulsory insurance arrangements.

139 *ibid* p 345.

The problem with the first two options is that they create an unnecessary distinction between multi-disciplinary firms and ordinary law firms. The third option avoids this problem, but demands close scrutiny because it affects all law firms.

The fidelity fund purports to protect consumers from malpractice by legal practitioners, and to ensure professional accountability. But in practice it offers very limited consumer protection. For example, a client is entitled to claim against the fund only after they have "exhausted all relevant rights of action and other legal remedies available against the defaulting solicitor or any other person in respect of the loss suffered by him".[140] In addition, under the Law Practitioners Amendment Act 1993 practitioners are not liable for a claim of more than $5,000, and the fund cannot be used to reimburse any loss relating to money which a solicitor is instructed by a client to invest on behalf of the client.

Moreover, as many solicitors do not handle clients' money, it hardly seems fair that they should be obliged to contribute to the fund. Even in the case of lawyers who do handle large amounts of money, there is no reason why honest practitioners should pay levies to subsidise the dishonest. Ultimately the burden of the levies is shifted to consumers, with the effect that all consumers of legal services pay to compensate those who have successfully claimed against the fund.

Given the limited consumer protection and inequitable distribution of costs associated with the fidelity fund, the preferable option is to abolish the fund. There is already a precedent for this move in the accounting profession: the accountants' fidelity fund was abolished with effect from 1 May 1993. Future competition between lawyers and non-lawyers, whether incorporated or not, would mean market-determined insurance arrangements suited to different types of legal services.

7.3 Disciplinary procedures

The legal profession argues that consumers of legal services are protected by self-regulation and that any competing non-lawyers should be subject to similar disciplinary provisions to ensure a 'level playing field'. For example, the president of the NZLS, Mr Ian Haynes, in a speech to Auckland lawyers on 23 July 1997 said:

> The Fidelity Fund, the financial assurance scheme, professional indemnity insurance, ethical standards, and the disciplinary procedures which apply to all lawyers, work to insure that people who buy and sell houses can rest assured that their conveyancing will almost certainly proceed smoothly – and if something goes wrong, it will be fixed ... If consumers are to be adequately protected then non-lawyer conveyancers would have to be subject to the same requirements ... they would have to carry professional indemnity insurance. They would have to operate trust accounts with audit or other financial assurance procedures. And there would have to be some kind of fidelity fund and disciplinary proceedings to keep people in line.[141]

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[140] Law Practitioners Act 1982, s 171.

[141] Haynes, Ian (1997), *loc cit*. At the same time, as Mr Haynes points out, the real estate industry should also be deregulated so that consumers end up with lower prices and the possibility of 'one-stop shopping' for legal and real estate services.

Undoubtedly, the threat of disciplinary action by one's peers can help to deter fraud and other behaviour that reflects badly on the legal profession as a whole. As well, indemnity insurance helps to provide a safety net for consumers. However, the issue goes beyond whether there is sufficient enforcement of ethical rules (with which the law societies are mainly concerned) or providing compulsory insurance. Of major importance in providing legal services is whether bad, unconscionable or negligent service is penalised appropriately.

Competitive markets provide incentives for efficient and appropriate services. Reputation is important. Competitive markets provide strong incentives for law firms to ensure their reputation is not diminished by poor quality advice and service, and private sector insurance companies have incentives to monitor their clients effectively to reduce their exposure to claims for negligent behaviour by law firms. There seems to be little evidence that law societies go beyond the market in effectively promoting fair and efficient legal services. Rather, their main concern is not disciplining poor service but only punishing serious misbehaviour. At present only six to eight lawyers are struck off each year in New Zealand and most of those are first found guilty of crimes in the courts. The NZLS's Annual Report for 1998, for example, shows that seven practitioners were struck off, four because they had been convicted of offences in court.[142] The disciplinary rules provide some quality guarantees – a safety net – but are likely to be largely irrelevant in ensuring that consumers get the kinds of service they want and the rules impose significant costs on consumers as discussed above.

In any event, without competition we cannot determine whether the level of 'security' provided by law societies is the level consumers want and are prepared to pay for. Many consumers may prefer a lower price and less security (particularly where the legal advice does not involve the loss of a house or the prospect of major damages). Of course competitive markets also constrain non-lawyers from providing legal advice. Over time non-lawyer societies may develop their professional requirements based on giving consumers the level of protection they want and are prepared to fund.

Should all lawyers have the same disciplinary regulation? There is no compelling reason for uniform disciplinary rules. That would assume the same disciplinary rules are likely to be right not only for different areas of legal practice but also different types of practitioner. This is unlikely. It also assumes that consumers cannot tell the difference between lawyers' and non-lawyers' rules. This is not a question of all consumers knowing the difference but rather the development of professional rules that can be used by each group to signal to consumers that they will be protected from incompetent practitioners. Those bodies that fail to provide appropriate services will suffer penalties as their members face reduced demand for their services. It is not clear that consumers of legal services currently pay much attention to professional misconduct rules and their implementation – it does not arise in their minds because there is no alternative.

District law societies proud of their enforcement of lawyers' obligations should not fear others. Their reputation may serve as a competitive barrier to entry by other professional

142 New Zealand Law Society (1999), 'NZLS Annual Report 1998', *LawTalk*, April, p 22–24.

bodies. The societies only have something to fear if consumers of legal services currently do not have much faith in them or do not believe that the costs they impose are outweighed by related benefits.

7.4 Trust funds

Solicitors are required to nominate at least one trust account for the purposes of Part VIA of the Act. Every bank at which a nominated trust account is held is required to pay interest at the rate determined in accordance with the provisions contained in the Act.[143] The interest is paid into the NZLS special fund.[144] This fund is used to finance a range of private and public good activities.

These provisions are of doubtful merit from a regulatory perspective. A highly discriminatory tax is imposed on people whose money passes through a nominated trust account. Activities such as the maintenance of law libraries and the education of lawyers are essentially private activities that should be funded privately. Public good activities, such as the provision of legal aid in criminal cases, should be funded from broad-based taxes that are likely to be less distorting. There are no valid grounds to fix the basis on which interest should be determined or to fix bank fees at 50 percent of gross interest. Although the present legislation was passed in 1991, these provisions can be traced back to the inefficiencies of New Zealand's highly regulated past. They should be re-examined.

[143] Law Practitioners Act 1982, s 91L.

[144] Law Practitioners Act 1982, s 91M.

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CONCLUSIONS AND RECOMMENDATIONS

The provision of legal services is heavily regulated. Entry into the legal profession is restricted, competition among lawyers is constrained and only practitioners who hold practising certificates issued in New Zealand and who operate as sole traders or in partnership can lawfully offer most legal services to the public. These and other rules can be expected to raise the costs of such services, diminish the quality of some services, deny some people services of the quality and type they would prefer and prevent some people from engaging in their preferred occupation.

The licensing of the legal profession is likely to impede welfare-enhancing change. Innovation occurs at the margin, as entrepreneurs introduce and test new ideas. Markets foster innovation because innovators are rewarded if they give consumers more attractive choices or if they produce at a lower cost than their competitors. Licensing slows down innovation as 'average preferences' decide whether rules should be changed or not. Innovators must persuade others, including established practitioners who are likely to be adversely affected, to adopt new rules. Not only is this costly to entrepreneurs but the rewards from innovation are dissipated.

The legal profession is controlled by the NZLS and district law societies. They are statutory monopolies that can be expected to put the perceived interests of the profession ahead of those of the public and be unresponsive to consumer needs and impede firms that are willing to be more responsive. While the present regime requires certain minimum standards to be met on entry into the profession, there are no formal post-admission assessments of the knowledge or quality of legal services supplied by practitioners.

The NZLS and district societies may impose costs on practitioners through delays in granting approvals or in mistakenly declining applications or proposals. These societies face relatively weak incentives to service their members' interests and those of consumers because they are protected from competition. Such regulatory agencies are rarely subject to a thorough evaluation of their performance and individuals and small groups usually have limited recourse if an agency performs badly. The NZLS has blanket protection from legal action, including where its council, committees or employees act other than in good faith.

Significant benefits would be necessary to offset the costs of regulation that is specific to the legal profession. They are doubtful. Consumer protection grounds do not justify restricting the supply of most classes of legal services to licensed practitioners. Such restrictions are neither necessary nor sufficient to protect the public from incompetent

and dishonest practitioners. A competitive market for legal services, reinforced by standard remedies for fraud, breach of contract and negligence, offers consumers the best combination of price and quality.

In a time of increasing globalisation of services and rapid technological change, the nature of legal practice is changing worldwide. The legal profession is subject to emerging competition from other professions. The relaxation of rules to allow legal services to be provided by multi-disciplinary firms, for instance, is being examined in countries such as New Zealand, Australia, Britain and the United States in response to competitive pressures.

Differences in the way legal services are provided around the world will diminish as competition forces changes on law firms and regulatory authorities. The profession has examined increasing competitive pressures elsewhere, particularly in Australia. The Professional Regulation Task Force established by the Law Society of New South Wales noted:

> It will be extremely difficult for our profession, in the face of the lowering of barriers to competition in virtually all industries in Australia, to retain a statutory monopoly of certain work. Indeed, it may be that reliance on such protection has been a factor in the reluctance of most individual practices to change to meet the several recent challenges to the profession.[145]

Consumers will be worse off over the longer term if occupation-specific regulation does not adapt to their changing needs and results in inefficient modes of legal practice. Such regulation is unlikely to be able to keep up with rapid change.

The recognition of practising certificates issued in Australia or New Zealand in both countries will tend to create a trans-Tasman market for lawyer services. Thus lawyers admitted in one jurisdiction with its own professional rules can operate in another jurisdiction with, at least initially, different professional rules. In such an environment, inefficient rules will come under pressure. Lawyers who are subject to professional rules that raise costs without providing a commensurate benefit for clients will be disadvantaged. While mass lawyer migration from or to Australia is unlikely, in the practice areas where skills are easily transferable (competition law, securities law and so on) there will be pressure for change. The trans-Tasman arrangements are a step in the right direction but they are insufficient.

What is the solution? One way forward, suggested in this paper, is to encourage competition and hence innovation by reducing statutory controls over the provision of legal services. Anyone should be able to provide legal services other than those services that are explicitly reserved for recognised lawyers by statute; in other words the decision in *Dempster v Auckland District Law Society*[146] should be reversed by legislation. It is envisaged that a few activities, most notably court appearances as counsel, should be reserved. Regular reviews of work reserved to lawyers should be carried out. The

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145 Professional Regulation Task Force (1997), *op cit* p 29.

146 [1995] 1 NZLR 210.

legislation should confer on the courts the right to regulate court appearances and establish persons or classes of persons who can carry out other licensed work. This approach is similar to that taken in respect of the appointment of auditors of public companies.

The courts should maintain either a single roll of lawyers or a roll of advocates entitled to appear and a roll of solicitors entitled to file documents. Individuals should be allowed to enrol in both capacities if they wish. The criteria should focus on an applicant's capacity to fulfil their duty as an officer of the court and not be aimed at regulating the provision of legal services or the profession generally. An appearance committee could resolve that members of named professional associations automatically be entitled to enrol, whereas other persons would have to apply personally. This committee should also frame rules relating to representation in particular cases, dealing with conflicts of interest, employed lawyers and so forth.

The courts have played a role in recognising people who may appear as counsel since the 1840s. This proposal puts the responsibility solely on the courts. Theoretically, this is the position in New Zealand and the courts occasionally act on it, as in *Kooky Garments* (discussed above) and in the *Black v Taylor* series of cases, in which a barrister was disqualified because he had previously acted for the opposing party. In practice, however, the courts have effectively delegated the regulation of appearance to the NZLS. One example of this is that the courts have not reacted to the NZLS's relaxed attitude toward granting practising certificates to lawyers employed by corporates and government departments by preventing such lawyers from representing their employers in court. A key advantage of this proposal is that practitioners who do not wish to engage in court work would not be required to meet the requirements of the courts in order to offer other legal services to the public.

The licensing of conveyancing should be abolished and any person or firm should be permitted to engage in conveyancing. If there is a concern that the normal protection available to consumers through competition and the general law is insufficient, conveyancing could be subject to a certification system. The registrar-general of land could issue conveyancing competence certificates to suitably qualified and experienced conveyancers, leaving the public to choose between certified and uncertified conveyancers. Again, these could automatically be issued to members of named professional associations within a certain period of obtaining their legal qualifications. The need for certifying conveyancers should be reviewed once the registry's computer system records all matters that affect a property title.

The statutory monopoly conferred on the NZLS and district law societies should be removed. Membership of those bodies or other organisations representing lawyers and other providers of legal services should be voluntary. The Law Practitioners Act 1982 should be repealed save for certain transitional provisions. Lawyers would then have a greater interest in ensuring that the rules they operated under were efficient, that is, were appropriate to their needs, and permitted services to be provided to clients at least cost. Professional bodies that do not serve member needs and that impede the

competitiveness of members would face the risk of a diminishing membership. Increased reliance on voluntary arrangements would eliminate the scope for lawyers to devise self-interested rules at the expense of consumers.

Some lawyers, in particular those protected by the current system, will object to a reduction in restrictions on the provision of legal services and greater reliance on voluntary arrangements relating to the organisation of independent practice. Some will argue for comfortable uniformity. But any suggestion that there should be uniform antipodean regulation of lawyers should be resisted. The goal is to adopt a regulatory regime for the provision of legal services that enables the overall welfare of New Zealanders to be maximised rather than the harmonisation of inefficient trans-Tasman regulation.

A voluntary approach involves altering the regulatory landscape so that consumers can have more influence over the type and quality of legal services available. This would allow associations by areas (or combinations of areas) of law to develop if that would be beneficial to affected practitioners and their clients. Thus family lawyers, competition lawyers or sole practitioners could form their own associations and set admission, educational and disciplinary rules that are tailored to their particular types of practice. Over time, experimentation, new entry and monitoring by peers would ensure that professional rules better met practitioner and consumer needs. More affordable access to justice would result.

If the proposals discussed above were fully implemented, there would arguably be no requirement for further regulation of the profession. Professional associations would emerge and could apply to the courts and to the registrar-general of land for recognition. In this model, lawyers would rely on the ordinary law of passing-off to protect titles such as barrister and solicitor.

If there are concerns that this approach would leave consumers with too little information to judge the quality of practitioners, a certification scheme could be introduced. The use of titles such as lawyer, barrister and solicitor would be protected by statute. A designated regulatory agency, for instance a department or an independent statutory body, could be authorised to approve associations whose members may use those titles and prescribe rules by which individuals might also qualify to use them. The agency would need to be satisfied that persons entitled to use protected titles meet minimum standards of competency. There would be no prohibition on people who are not certified from providing legal services (other than court appearances and any other restricted work) provided that they do not use protected titles. The title 'chartered accountant' can only be used lawfully by members of the New Zealand Institute of Accountants.

If these proposals were implemented it would become unnecessary to consider matters such as:

- the incorporation of law firms;
- multi-disciplinary practices;

- discipline and complaints;
- opening services to non-lawyers;
- professional insurance and trust account requirements; and
- the intervention rule.

They would be matters for each professional association to determine.

8.1 Recommendations

The following recommendations are made:

1. Restrictions on the practice of law should apply only to work that is explicitly reserved for recognised lawyers by statute. It is envisaged that few activities would be reserved. Regular reviews of the work reserved to lawyers should be carried out. The legislation should confer on the courts the right to regulate court appearances as counsel and should establish persons or classes of persons who can carry out any other licensed work.
2. Restrictions on court appearance should be the responsibility of the courts, which should maintain either a single roll of lawyers or a roll of advocates entitled to appear and a roll of solicitors entitled to file documents.
3. The licensing of conveyancing should be abolished and any person or firm should be permitted to engage in conveyancing. The registrar-general of land should issue conveyancing competence certificates to suitably qualified and experienced applicants until the registry's computer system records all matters that affect a property title.
4. The statutory monopoly conferred on the New Zealand Law Society and district law societies should be abolished.
5. Consideration should be given to the introduction of a certification scheme protecting the use of titles such as lawyer, barrister and solicitor by statute. An independent regulatory agency should administer any such scheme.
6. Public good aspects of the legal system such as the provision of legal aid in criminal cases should be funded from general taxes rather than the present highly discriminatory tax on money held in solicitors' trust funds.

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